FACULTY OF LAW AND CRIMINOLOGY

ADR Clauses in Commercial Contracts and the Need for a Comprehensive Legal Framework

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List of Abbreviations

AAA	American Arbitration Association
ADR	Alternative Dispute Resolution
ACDC	Australian Commercial Dispute Center
AI	Artificial Intelligence
BGB	*Bürgerliches Gesetzbuch* (German Civil Code)
BGH	*Bundesgerichtshof* (Federal Court of Justice)
BW	*Burgerlijk Wetboek* (Dutch Civil Code)
CEDR	Centre for Effective Dispute Resolution
CJEU	Court of Justice of the European Union
CPR	Civil Procedure Rules
ECA	English Court of Appeal
EHC	English High Court
EU	European Union
FAA	Federal Arbitration Act
HCS	High Court of Singapore
ICC	International Chamber of Commerce
ICTs	Information and Communication Technologies
IMI	International Mediation Institute
LG	*Landgericht* (District Court)
MDR	Multi-Tiered Dispute Resolution
NSW	New South Wales
PIL	Private International Law
ODR	Online Dispute Resolution
OLG	*Oberlandesgericht* (Superior State Court)
OGH	*Oberster Gerichtshof* (Austrian Supreme Court)
SCA	Systematic Content Analysis
SME	Small and Medium Sized Enterprise
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UCC	Uniform Commercial Code
UFMJRA	Uniform Foreign Money-Judgments Recognition Act
UN	United Nations
UNCITRAL	United Nationals Commission on International Trade Law
US	United States of America
WG	Working Group
ZPO	*Zivilprozessordnung* (Code of Civil Procedure)

Introduction to PhD

Contents

Introduction

1. In today's fast-paced world, commercial parties increasingly seek to prevent and resolve disputes in a cost and time efficient manner.[1] Their pursuit for a better way to resolve disputes led to the re-emergence of non-binding/consensual alternative dispute resolution ('ADR')[2] mechanisms in the 1990s.[3] Almost three decades later, the most prominent form of consensual ADR, mediation, enjoys global attention as dispute resolution providers,[4] policy makers, and judges attempt to promote its use.[5]

2. Commercial parties that see the benefits of ADR may conclude dispute resolution clauses that call for ADR prior to arbitration or litigation.[6] ADR agreements are often included in the parties' substantive contract, as agreeing to resort to ADR during the dispute is perceived to be risky. The risk is associated with the image of wanting to settle, a sign of a potentially weak case.[7] When properly utilized, ADR provides a flexible cost and time

[1] The term 'commercial' in this context includes various forms of business and economic activity, including commerce, trade, taxation, bankruptcy, IP, and takeovers, but excludes consumer disputes. See also L. BOULLE, *Mediation: Principles, Process, Practice*, Australia, Ligare Pty Ltd., 2011, 359.
[2] Additional explanation provided in Section 1.1.
[3] The use of the term "re-emergence" is deliberate. Resort to ADR to resolve conflicts can be traced back to ancient Phoenicians who use these mechanisms to resolve trade disputes. Moreover, in Southeast Asian cultures, such as Singapore, resort to mediation to resolve conflicts is a cultural norm. See J. BARRET en J. BARRETT, *A History of Alternative Dispute Resolution: The Story of a Political, Social and Cultural Movement*, San Francisco Jossey-Bass, 2004, 71. R. BIRKE en L.E. TEITZ, "US Mediation in the Twenty-first Century: The Path that brought America to Uniform Laws and Mediation in Cyberspace" in N. ALEXANDER (ed.), *Global Trends in Mediation*, Germany, Centrale Für Mediation, 2003, 365. G. DE PALO en R. CANESSA, "New Trends for ADR in the European Union" in P. CORTÉS (ed.), *The New Regulatory Framework for Consumer Dispute Resolution*, Oxford, Oxford University Press, 2016, 414. S.R. SMEREK, B.R. BRAUN en A.S. JICK, "USA" in M. MADDEN (ed.), *Global Legal Insights - Litigation & Dispute Resolution*, London, Global Legal Group, 2014, 289. P.K. BERGER, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*, 1, Alphen aan Den Rijn, Kluwer Law International, 2015, 44. K.C. LYE, "A persisting aberation: The movement to enforce agreements to mediate", *Singapore Academy of Law Journal* 2008, 1.
[4] Such as the ICC, ACDC, CEDR, NMI, IMI, etc.
[5] "Mediation is recognised now as the principal ADR process utilised for legal reform in many common law countries but many civil law countries have also witnessed an ADR and mediation movement in response to civil litigation problems" (P. BROOKER, *Mediation Law: Journey through Institutionalism to Juridification*, New York, Routledge, 2013, 2.). See C. WALLGREN, "ADR and Business" in J.C. GOLDSMITH, A. INGEN-HOUSZ en G.H. POINTON (eds.), *ADR in Business: Practice and Issues across Countries and Cultures*, New York, Kluwer Law International, 2006, 3-5.
[6] According to a 2011 survey of Fortune 1,000 companies conducted by Cornell University, 54.2% of mediations in corporate commercial disputes were triggered as a result of a contract (T.J. STIPANOWICH en J.R. LAMARE, "Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations", *Harvard Negotiation Law Review* 2014, 34.). Moreover, a questionnaire conducted by Strong regarding the use and perception of international commercial mediation, resort to mediation in international commercial disputes is mostly attributable to agreements to mediate (See S.I. STRONG, "Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation", *University of Missouri School of Law* 2014, 16.).
[7] C. WALLGREN, "ADR and Business" in J.C. GOLDSMITH et al. (eds.), *ADR in Business: Practice and Issues across Countries and Cultures*, New York, Kluwer Law International, 2006, 10.

efficient mechanism that can result in an amicable resolution of dispute(s).[8] However, agreements to pursue ADR ('ADR agreements')[9] can result in opposite effects. There are a growing number of disputes regarding the binding nature of these agreements, the rights and obligations therein, remedies for a breach, and the forum that may address enforceability questions.[10]

3. This should come as no surprise; research has showed that it is common for parties to disagree on the interpretation and enforceability of other types of dispute resolution clauses, such as their arbitration and forum selection clauses.[11] It is ironic for parties to dispute their agreement to pursue non-binding dispute resolution mechanisms since disputing the obligation to pursue ADR contradicts the nature thereof. In principle, ADR involves voluntary and amicable dispute resolution mechanisms.[12]

[8] L.F. KNUDSEN en S. BALIAN, "Alternative Dispute Resolution Systems Across the European Union, Iceland and Norway", *Procedia - Social and Behavioral Science* 2014, 945; D. JOSEPH, *Jurisdiction and Arbitration Agreements and Their Enforcement*, London, Sweet & Maxwell, 2005, 448. G. DE PALO en R. CANESSA, "New Trends for ADR in the European Union" in P. CORTÉS (ed.), *The New Regulatory Framework for Consumer Dispute Resolution*, Oxford, Oxford University Press, 2016, 412. J. EPSTEIN, *The Enforceability of ADR Clauses*, Melbourne, Australia, 2008, 1. H.S. FREEHILLS, "European Commission publishes report on use of ADR by business", *Herbert Smith Freehills ADR Notes* 2012. S.I. STRONG, "Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation", *University of Missouri School of Law* 2014, 28. T.J. STIPANOWICH en J.R. LAMARE, "Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations", *Harvard Negotiation Law Review* 2014, 34.

[9] Not to be confused with the "settlement agreement" nor the "agreement with the third-party neutral". Further explanations are provided in section 1.2.

[10] From 1999-2005, there was a 120% increase in the number of litigations regarding mediation issues (See J.R. COBEN en P.N. THOMPSON, "Mediation Litigation Trends: 1999-2007", *World Arbitration & Mediation Review* 2007, afl. 3, 398.). Moreover, between 19999 and 2003 there was a threefold increase in the number of disputes regarding the parties' obligations to participate in mediation (J.R. COBEN en P.N. THOMPSON, "Disputing Irony: A Systematic Look at Litigation About Mediation", *Harvard Negotiation Law Review* 2006, afl. 43, 105.). M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 271. W. ERLANK, "Enforcement of Multi-Tiered Dispute Resolution Clauses" 2002, 8. C. BÜHRING-UHLE, L. KIRCHHOFF en G. SCHERER, *Arbitration and Mediation in International Business*, Alphen aan den Rijn, Kluwer, 2006, 230. J.D. FIGUERES, "Multi-Tiered Dispute Resolution Clauses in ICC Arbitration", *ICC International Court of Arbitration Bulleting* 2003, afl. 1, 71. D. KAYALI, "Enforceability of Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration* 2010, afl. 6, 552. C. BÜHRING-UHLE *et al.*, *Arbitration and Mediation in International Business*, Alphen aan den Rijn, Kluwer, 2006, 229. A. JOLLIES, "Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement", *Arbitration* 2006, afl. 4, 329.

[11] G.B. BORN, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, Alphen aan den Rijn, Wolters Kluwer, 2013, 141. C. BELLSHAM-REVELL, "Complex Dispute Resolution Clauses: Has the desire to control the dispute process led to increased uncertainty?", *Olswang* 2008, 1.

[12] "Disputing Irony" J.R. COBEN en P.N. THOMPSON, "Disputing Irony: A Systematic Look at Litigation About Mediation", *Harvard Negotiation Law Review* 2006, afl. 43.

4. National courts employ varying approaches when faced with parties disputing their ADR agreements. Moreover, the approach of courts to dispute resolution clauses seems to contradict that of the arbitral tribunals. In particular, when courts rule against the tribunal's decision to accept jurisdiction, or to find the claim admissible, the question arises as to whether the courts must prioritize the ADR or the arbitration agreement. An unfulfilled ADR agreement can have a direct effect on arbitration. There have been several instances of courts annulling arbitral awards, withdrawing the tribunal's jurisdiction, and declining the admissibility of disputes for arbitration on the basis of an unfulfilled ADR agreement.[13]

5. The uncertainty regarding the binding nature of agreements to pursue ADR is problematic for the growth of ADR.[14] Today, there is no uniform international statute that addresses the legal consequences of ADR agreements, nor conditions for their binding nature.[15] The lack of a harmonised approach to ADR agreements results in the application of a variety of individual states' contractual, procedural, and private international law (PIL) rules.[16] As a remedy to this persisting uncertainty, this doctoral thesis suggests the creation of a comprehensive international framework for the ADR agreement.[17] The need for a framework is apparent when taking into consideration that the current law on the ADR agreement is scattered.

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[13] Chapter II further expands on the varying approaches to ADR agreements. *White v Kampner*, 641 A2d 1381 (Conn 1994), 1387: court invalidating arbitral award in light of a mandatory negotiation requirement.

[14] A. SCHMITZ, "Refreshing Contractual Analysis of ADR Agreements By Curing Bipolar Avoidance of Modern Common Law", *Harvard Negotiation Law Review* 2008, afl. 1, 74. See D. KAYALI, "Enforceability of Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration* 2010, afl. 6, 552. H. EIDENMÜELLER en H. GROSERICHTER, "Alternative Dispute Resolution and Private International Law" 2015, 8. C. TEVENDALE, H. AMBROSE en V. NAISH, "Multi-Tier Dispute Resolution Clauses and Arbitration", *Turkish Commercial Law Review* 2015, afl. 1, 31. S.R. GARIMELLA en N.A. SIDDIQUI, "The Enforceability Of Multi-tiered Dispute Resolution Clauses: Contemporary Judicial Opinion", *IIUM Law Journal* 2016, afl. 1, 160. G. BORN en M. ŠĆEKIĆ, "Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'" in D.D. CARON, S.W. SCHILL, A.C. SMUTNY en E.E. TRIANTAFILOU (eds.), *Practising Virtue: Inside International Arbitration*, Oxford Scholarship Online, 2015, 227. M. PRYLES, "Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration* 2001, afl. 2, 160. L. SNEDDON en A. LEES, "Frequently asked questions: is my tiered dispute resolution clause binding?", *Ashurst* 2013, 1.

[15] D. CAIRNS, "Mediating International Commercial Disputes: Differences in U.S. and European Approaches", *Dispute Resolution Journal* 2005, 67. M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 295. H. EIDENMÜELLER en H. GROSERICHTER, "Alternative Dispute Resolution and Private International Law" 2015, 8. L. BOULLE, *Mediation: Principles, Process, Practice*, Australia, Ligare Pty Ltd., 2011, 617. A. BIHANCOV, "What is an example of a good dispute resolution clause and why?", *Australian Centre for Justice Innovation* 2014, 2.

[16] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 278. H. EIDENMÜELLER en H. GROSERICHTER, "Alternative Dispute Resolution and Private International Law" 2015, 5.

[17] See Chapter III.

6. To assess the possibility for a comprehensive framework for the ADR agreement and to provide insights to policy makers, there is a need for a comparative doctrinal analysis of the applicable laws in selected jurisdictions.[18] In particular, there is a need to study the validity and enforceability of ADR agreements, as well as the parties' obligations under the ADR agreement. The structure of this doctoral thesis reflects on the above: Chapter I will address the validity and enforcement of the parties ADR agreement; Chapter II will discuss the findings of a comprehensive empirical study of the parties' rights and obligations under the ADR agreement; and Chapter III will propose the content of a framework for the ADR agreement.

7. Before going into the actual research questions, it is important to circumscribe the subject of my research and to situate this against the scientific and legal background. To that end, I will firstly clarify the various concepts under focus (Section 1) including "alternative dispute resolution" and "mediation" [Section 1.1], the "ADR agreement" (Section 1.2), and "multi-tiered dispute resolution" (Section 1.3). Subsequently, Section 2 will provide a brief overview of the context of this research topic. I will discuss the scientific state of the art (Section 2.1), set out the legal framework (Section 2.2), and discuss a number of empirical studies that illustrate the relevance of the issues discussed in this thesis (Section 2.3). Finally, I will set the scope of this research and the methodology used to reach scientifically sound conclusions (Section 3.3).

1. Explanatory Remarks

1.1. "Alternative Dispute Resolution" and "Mediation"

8. There is no consensus regarding what dispute resolution mechanism the term "alternative dispute resolution" encompasses and whether it should include negotiation and arbitration. The source of dispute is the interpretation of the term "alternative". There are four interpretations of this component (Chart 1).

[18] Section 1.2 further expands on the jurisdictional scope.

Chart 1 – *Varying Definitions of "Alternative Dispute Resolution"*

Camp 1: All mechanisms not involving a judge (*including* arbitration and negotiation)	**Camp 2:** Mechanisms involving a third-party neutral (*excluding* negotiation but *including* arbitration)
Camp 3: Exclude mechanisms involving binding determination (*excluding* arbitration but *including* negotiation)	**Camp 4:** Only mechanisms involving third-party neutral facilitation (*excluding* arbitration and negotiation)

9. In the first camp, there are those that define ADR to include all mechanisms that are alternative to court proceedings, and thus include negotiation and arbitration.[19] In the second camp, there are those who believe that the term ADR covers mechanisms where the parties have agreed that a third-party neutral, other than a judge, will contribute to resolving the dispute.[20] Thereby, excluding negotiation, but including arbitration. In the third camp, there are those that believe that the term ADR only includes those mechanisms that do not require third-party binding *determination*.[21] Thereby, excluding arbitration, but including negotiation. Lastly, in the fourth camp, there are those that believe that the term ADR should only be used to discuss mechanisms involving third-party *facilitation*. Thereby, excluding both negotiation and arbitration.

10. While I agree that due to the absence of an ADR neutral, negotiations are not a form ADR, I do not argue against the classification of arbitration as an ADR mechanism. Instead, I make a further distinction between non-binding and binding dispute resolution

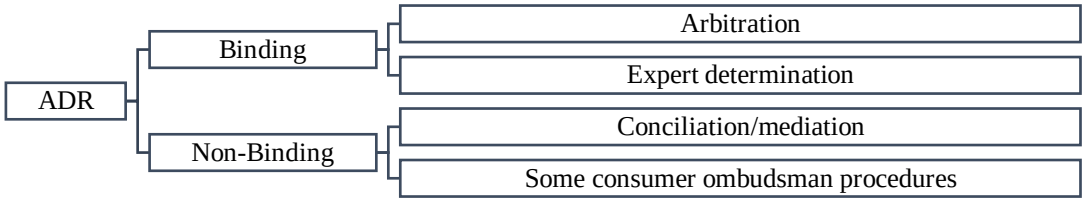
[19] L. NOTTAGE, "Is (international commercial) arbitration ADR?", *The Journal of The Institute of Arbitrators & Mediators* 2002, afl. 1, 84. T. SOURDIN, *Alternative Dispute Resolution*, Sydney, Thomson Lawbook co., 2005, 2-3. F.E.A. SANDER, "Future of ADR", *Journal of Dispute Resolution* 2000, 3.

[20] Evident from the Directive on Consumer ADR, the EU's definition of ADR includes arbitration. Commission Staff Working Paper Accompanying the proposal: ADR "covers non-judicial procedures, such as conciliation, mediation, arbitration, complaints boards." See also M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 271. C. HODGES, I. BENÖHR en N. CREUTZFELDT-BANDA (eds.), *Consumer ADR in Europe Civil Justice Systems*, Oxford, Hart Publishing Ltd, 2012, 247; N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 8-12. S. BALKET, *A Practical Approach To Alternative Dispute Resolution*, Oxford, Oxford University Press, 2011. R. HOGAN, "ADR: Adding Extra Value to Law", *Arbitration* 2012, 247. R. RANA, *Alternative Dispute Resolution: A Handbook for In-House Counsel in Asia*, Singapore, LexisNexis, 2014, 6. C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 491. W. ERLANK, "Enforcement of Multi-Tiered Dispute Resolution Clauses" 2002, 6.

[21] "Modern ADR is a voluntary system, according to which the parties enter a structure negotiation or refer their disputes to a third party for evaluation and/or facilitation of resolution. (L. MISTELIS en C. SCHMITTHOFF, "ADR in England and Wales: A Successful Case of Public Private Partnership" in N. ALEXANDER (ed.), *Global Trends in Mediation*, Germany, Centrale Für Mediation, 2003, 139; W. ERLANK, "Enforcement of Multi-Tiered Dispute Resolution Clauses" 2002, 6.).

mechanisms.[22] Non-binding (consensual) dispute resolution mechanisms are those in which the parties have control over the outcome of the process and are therefore not bound by the third-party neutral's decision-making (joint decision-making).[23] Binding (adjudicative) dispute resolution mechanisms, such as arbitration, expert determination, and litigation do not require the parties' agreement for the resolution of the dispute, as the third-party neutral renders a decision that is binding on the parties.[24]

Chart 2 – *Binding versus Non-Binding ADR*



11. Parties are free to combine binding/adjudicative and non-binding/consensual mechanisms to create hybrid forms of dispute resolution.[25] Consequently, the boundary between the various forms of dispute resolution is, at times, blurry.[26] According to Nottage, arbitration shares many aspects of mediation and is thus not "conceptually distinct".[27] He further argues that the current trend in arbitration seems to suggest that, "certain types of international commercial arbitration may become so informal as to merge with some mediation processes."[28] Nevertheless, it is clear that arbitration is not synonymous with consensual

[22] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 273.
[23] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 274. J.C. BETANCOURT en J.A. COOK, "ADR, Arbitration, and Mediation: A Collection of Essays: An Overview", *International Journal of Arbitration, Mediation and Dispute Management (Sweet & Maxwell)* 2014, xxii.
[24] L. MISTELIS en C. SCHMITTHOFF, "ADR in England and Wales: A Successful Case of Public Private Partnership" in N. ALEXANDER (ed.), *Global Trends in Mediation*, Germany, Centrale Für Mediation, 2003, 140. E. SILVESTRY, "Alternative Dispute Resolution in the European Union: an Overview", *Russian Law* 2013. J.C. BETANCOURT en J.A. COOK, "ADR, Arbitration, and Mediation: A Collection of Essays: An Overview", *International Journal of Arbitration, Mediation and Dispute Management (Sweet & Maxwell)* 2014, xxii.
[25] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 274.
[26] C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 506.
[27] L. NOTTAGE, "Is (international commercial) arbitration ADR?", *The Journal of The Institute of Arbitrators & Mediators* 2002, afl. 1, 86.
[28] L. NOTTAGE, "Is (international commercial) arbitration ADR?", *The Journal of The Institute of Arbitrators & Mediators* 2002, afl. 1, 86.

mechanisms.[29] Consensual dispute resolution mechanisms do not permanently hinder the parties' access to court. Conversely, when parties resort to adjudicative mechanisms they forfeit their access to court, which has a bearing on their right of access to justice. Therefore, adjudicative mechanisms are subject to stricter conditions than consensual ones.[30]

12. In focusing on non-binding ADR, it is essential to discuss mediation, the most prominent non-binding dispute resolution mechanism. Mediation is a non-binding mechanism involving a third-party neutral (without any decision making powers) who assists the parties in their attempt to settle their dispute.[31] The only disagreement here is regarding the role of the neutral in guiding the parties to reach a resolution of their dispute. To illustrate, some refer to "mediation" as "conciliation", and although the latter is a purely evaluative mechanism, mediation can be either facilitative or evaluative.[32] I, however, do not delve

[29] A. SCHMITZ, "Refreshing Contractual Analysis of ADR Agreements By Curing Bipolar Avoidance of Modern Common Law", *Harvard Negotiation Law Review* 2008, afl. 1, 16.
[30] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 274.
[31] S. SPECTER en J.L. PEARLMAN, "United States: Mediation" in C. ESPLUGUES en S. BARONA (eds.), *Global Perspectives on ADR*, Cambridge, Intersentia, 2014, 538. A. FIADJOE, *Alternative Dispute Resolution: A Developing World Perspective*, Great Britain, Cavendish Publishing Limited, 2013, 58. W. ERLANK, "Enforcement of Multi-Tiered Dispute Resolution Clauses" 2002, 6. See also UNCITRAL WG II: "'Mediation' is a widely used term for a process where parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of, or relating to, a contractual or other legal relationship. (A/CN.9/WG.II/WP.205, p. 3)." The Mediation Directive: "'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question. (Article 3(a))."
[32] In facilitative mediation, the neural third-party has no authority to impose a solution on the disputing parties and does not offer his/her advice on the outcome, while in evaluative methods, the neutral third-party makes forma land informal recommendations. H. GENN, S. RIAHI en K. PLEMING, "Regulation of Dispute Resolution in England and Wales: A Sceptical Analysis of Government and Judicial Promotion of Private Mediation" in F. STEFFEK en H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 137. N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 10. M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 274. K. HAN en N. POON, "The Enforceability of Alternative Dispute Resolution Agreements: Emerging Problems and Issues", *Singapore Academy of Law Journal* 2013, 468. C. ESPLUGUES, "General Report: New Developments in Civil and Commercial Mediation - Global Comparative Perspectives" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 11. K.J. HOPT en F. STEFFEK, "Mediation: Comparison of Laws. Regulatory Models, Fundamental Issues" in K.J. HOPT en F. STEFFEK (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 16. H. GENN *et al.*, "Regulation of Dispute Resolution in England and Wales: A Sceptical Analysis of Government and Judicial Promotion of Private Mediation" in F. STEFFEK en H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 137. N. ALEXANDER, "Mediation in Practice: Common Law and Civil Law Perspectives Compared", *International Trade and Business Law Review* 2001, 1; W. ERLANK, "Enforcement of Multi-Tiered Dispute Resolution Clauses" 2002, 6. D. KAYALI, "Enforceability of Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration* 2010, afl. 6, 553. S.

into discussing the nature of mediation versus conciliation. Instead, I opt to view these mechanisms as one category. Since my focus is on non-binding mechanisms, from here onwards, when I use the term "ADR" I am referring to non-binding mechanisms such as mediation and conciliation while excluding negotiation.

13. In discussing ADR, I must also briefly address the rise of online dispute resolution ('ODR'). With the rise of e-commerce, ADR has also expanded to the online sphere.[33] Again, there is disagreement regarding the definition of ODR.[34] There appears to be two main definitions.[35] The first defines "ODR" as the use of the Internet and/or information and communication technologies ('ICTs') to guide the parties in using ADR.[36] The second is to refer to online dispute resolution platforms where parties wholly resolve their dispute online (at times, using artificial intelligence - 'AI') as "ODR".[37] In my view, relying on technology such as video streaming or file exchange software does not change the process. Therefore,

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BARONA en C. ESPLUGUES, "ADR Mechanisms and Their Incorporation into Global Justice in the Twenty-First Century: Some Concepts and Trends" in C. ESPLUGUES en S. BARONA (eds.), *Global Perspectives on ADR*, Cambridge, Intersentia, 2014, 41. H. EIDENMÜELLER en H. GROSERICHTER, "Alternative Dispute Resolution and Private International Law" 2015, 3. C. JARROSSON, "Legal Issues Raised by ADR" in J.C. GOLDSMITH, A. INGEN-HOUSZ en G.H. POINTON (eds.), *ADR in Business: Practice and Issues across Countries and Cultures*, The Netherlands, Kluwer Law International, 2006, 112. E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 8. D. BAMFORD, "Australia" in C. ESPLUGUES en S. BARONA (eds.), *Global Perspectives on ADR*, Cambridge, Intersentia Publishing Ltd., 2014, 62. U. MAGNUS, "Mediation in Australia: Development and Problems" in K.J. HOPT, F. STEFFEK en H. UNBERATH (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 875.

[33] R. BIRKE en L.E. TEITZ, "US Mediation in the Twenty-first Century: The Path that brought America to Uniform Laws and Mediation in Cyberspace" in N. ALEXANDER (ed.), *Global Trends in Mediation*, Germany, Centrale Für Mediation, 2003, 388.

[34] "Formal definitions of 'online dispute resolution' have remained similar, even bland, over the years, defined in 2003 for example, as an omnibus term that describes any one of several classifications of dispute resolution systems or procedures, and four years later as a broad category that can encompass any mediation, arbitration or dispute resolution that takes place outside of court and at least partially online" (B.L. MANN, "Smoothing Some Wrinkles in Online Dispute Resolution", *International Journal of Law and IT* 2009, afl. 1.). See also G. KAUFMANN-KOHLER en T. SCHULTZ, *Online Dispute Resolution: Challenges for Contemporary Justice*, the Netherlands, Kluwer Law International, 2004. 7.

[35] J. HÖRNLE en P. CORTÉS, "Legal Issues in Online Dispute Resolution" 2014, 1. R. BIRKE en L.E. TEITZ, "US Mediation in the Twenty-first Century: The Path that brought America to Uniform Laws and Mediation in Cyberspace" in N. ALEXANDER (ed.), *Global Trends in Mediation*, Germany, Centrale Für Mediation, 2003, 388.

[36] M. GRAMATIKOV (ed.), *Costs and Quality of Online Dispute Resolution: A Handbook for Measuring the Costs and Quality of ODR*, Antwerp, Maklu, 2012, 23. C. FARAH, "Critical analysis of online dispute resolutions: the optimist, the realist and the bewildered", *Computer and Telecommunications Law Review* 2005, afl. 4, 123-128. X, "What is Online Dispute Resolution? A Guide for Consumers", *ABA Task Force on Electronic Commerce and Alternative Dispute Resolution Task Force Draft* 2002, 1.

[37] S. SCHIAVETTA, "Relationship Between e-ADR and Article 6 of the European Convention of Human Rights pursuant to the Case Law of the European Court of Human Rights", *Journal of Information, Law and Technology* 2004, 1. UNCITRAL Technical Notes on Online Dispute Resolution 2017, Section V (2): Online dispute resolution, or "ODR", is a "mechanism for resolving disputes through the use of electronic communications and other information and communication technology."

ODR should *only* cover instances where parties exclusively rely on online platforms or AI to resolve their disputes. This means that the parties never meet face-to-face during the ADR sessions.[38] Therefore, ODR is not of huge relevance to purely commercial disputes. This is further evident when taking into consideration the fact that the promotion of ODR focuses mostly on its utility thereof for the resolution of consumer disputes.[39] This work will discuss ODR where relevant to the discussion herein.

1.2. "ADR Agreements" and "Agreements to Mediate"

14. When parties make the choice to resort to ADR, they typically record this choice in writing. The resulting ADR agreements can be concluded before, or after, a dispute arises and can be part of the main commercial contract (a clause) or a stand-alone contract.[40] Unsurprisingly, there is disagreement regarding the appropriate title to describe the parties' agreement to pursue ADR.[41] I opted to use the term "ADR agreement" to refer to the parties' pre- and post-conflict agreement to pursue ADR mechanisms. However, as many authors utilize the term "agreement to mediate" or "mediation agreement" to refer to what I call the "ADR agreement", I use their wording when discussing their work.

15. In this work, the term "ADR agreement" does not refer to the agreement between the ADR neutral and the parties (the "appointment agreement"), the agreement that the parties sign at the beginning of their ADR (the "commencement agreement"), nor the agreement that records the parties' settlement (the "settlement agreement").[42] Due to a lack of specific

[38] X, "What is Online Dispute Resolution? A Guide for Consumers", *ABA Task Force on Electronic Commerce and Alternative Dispute Resolution Task Force Draft* 2002, 1. G. KAUFMANN-KOHLER en T. SCHULTZ, *Online Dispute Resolution: Challenges for Contemporary Justice*, the Netherlands, Kluwer Law International, 2004, 7.

[39] M.S. MARTIN, "Keep It Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-Commerce", *Boston University International Law* 2002, 150. Settlesmart.com, SquareTrade.com, iLevel.com, iCourthouse.com, OneAccord.com, WEBdispute.com, and onlineresolution.com P. CORTÉS en R. MAŃKO, "Developments in European Civil Procedure" in P. CORTÉS (ed.), *The New Regulatory Framework for Consumer Dispute Resolution*, Oxford, Oxford University Press, 2016, 57.

[40] P. TOCHTERMANN, "Mediation in Germany: The German Mediation Act -Alternative Dispute Resolution at the Crossroads" in K.J. HOPT, F. STEFFEK en H. UNBERATH (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 549.

[41] C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 588; C. ESPLUGUES, "General Report: New Developments in Civil and Commercial Mediation - Global Comparative Perspectives" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 28.

[42] Diedrich defines the mediation agreements as the "contract to mediate between the parties", while referring to the contract between the parties and the mediator as the "Mediator agreement" (F. DIEDRICH, "International/Cross-Border Mediation within the EU - Place of Mediation, Qualifications of the Mediator and

regulation on ADR agreements, there can be an overlapping of their content with that of the appointment agreement and the commencement agreement.[43]

16. Moreover, ADR agreements are not the same as "agreements to agree", which is an agreement requiring the parties to enter into a subsequent agreement,[44] nor "agreements to negotiate."[45] ADR mechanisms such as mediation are recognized processes with understood features, unlike negotiation.[46] To expand on the notion of ADR agreements, Figure 1 provides selected examples thereof.

Figure 1 - *Selected ADR Agreements*

The parties agree to attempt to resolve any dispute, claim or controversy arising out of or relating to this Agreement by mediation, which shall be conducted under the then current mediation procedures of The CPR Institute for Conflict Prevention & Resolution or any other procedure upon which the parties may agree. The parties further agree that their respective good faith participation in mediation is a condition precedent to pursuing any other available legal or equitable remedy, including litigation, arbitration or other dispute resolution procedures.

Either party may commence the mediation process by providing to the other party written notice, setting forth the subject of the dispute, claim or controversy and the relief requested. Within ten (10) days after the receipt of the foregoing notice, the other party shall deliver a written response to the initiating party's notice. [OPTIONAL PROVISION: The mediation shall be conducted by _____ with its principal offices located at _____]. The initial mediation session shall be held within thirty (30) days after the initial notice. The parties agree to share equally the costs and expenses of the mediation (which shall not include the expenses incurred by each party for its own legal representation in connection with the mediation).

The parties further acknowledge and agree that mediation proceedings are settlement negotiations, and that, to the extent allowed by applicable law, all offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by any of the parties or their agents shall be confidential and inadmissible in any arbitration or other legal proceeding involving the parties; provided, however, that evidence which is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation.

The provisions of this section may be enforced by any Court of competent jurisdiction, and the party seeking enforcement shall be entitled to an award of all costs, fees and expenses, including reasonable attorneys' fees, to be paid by the party against whom enforcement is ordered.

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the Applicable Law" in F. DIEDRICH (ed.), *The Status Quo of Mediation in Europe and Overseas: Options for Countries in Transition*, Hamburg, Verlga Dr. Kovač, 2014, 73-74.) P. BAKER, "Young Lawyers: selecting the right mediator", *Alternative Dispute Resolution* 2011, 23.

[43] C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 596; C. ESPLUGUES, "General Report: New Developments in Civil and Commercial Mediation - Global Comparative Perspectives" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 30.

[44] "Agreements to agree" are often identified by common law courts as unenforceable.

[45] L. BOULLE, *Mediation: Principles, Process, Practice*, Australia, Ligare Pty Ltd., 2011, 621.

[46] L. BOULLE, *Mediation: Principles, Process, Practice*, Australia, Ligare Pty Ltd., 2011, 621.

Before appointment, the mediator will assure the parties of his or her availability to conduct the proceeding expeditiously. It is strongly advised that the parties and the mediator enter into a retention agreement. A model agreement is attached hereto as a Form.[47]
The parties agree that they will endeavor to settle any dispute controversy or claim arising out of or relating to this contract, which they are unable to settle through direct negotiations, by mediation administered by the Chicago International Dispute Resolution Association ("CIDRA"), One South Wacker Drive, Suite 2800, Chicago, Illinois 60606, USA, under its Mediation Rules before resorting to arbitration, litigation, or other dispute resolution procedure. Any contractual requirement of filing a notice of claim with respect to the dispute submitted to mediation shall be suspended by mutual agreement until the conclusion of the CIDRA mediation proceedings.[48]

17. As will be discussed in Section 2.1, in jurisdictions familiar with ADR, it is common for contracts to refer to ADR as a prior step to arbitration in a multi-tiered dispute resolution clause ('MDR').[49] As Civil Law jurisdictions are less familiar with ADR, the above practice is less frequent.[50] The section below further explains the structure and terminology of dispute resolution clauses that contain multiple dispute resolution mechanisms.

1.3. "Multi-Tiered Dispute Resolution"

18. MDR clauses -also known as "(multi-) step", "ADR first", "waterfall" or "escalation" clauses- refer to dispute resolution agreements that contain multiple tiers of dispute resolution mechanisms.[51] There are many options to design these clauses, ranging from two to several tiers.[52] MDR clauses typically require the parties to first attempt non-binding processes such as negotiation followed by ADR, and envisages arbitral or court proceedings as the final stage.[53]

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[47] Accord Mediation and Dispute Resolution Services; Mediation. Retrieved via: http://accord-adr.com/Mediation_clauses.htm, last visited on 10-04-2017.
[48] CIDRA, "Sample Mediation Clause", Retrieved via: http://www.cidra.org/samplemediation, last visited on 06-04-2017.
[49] D. CAIRNS, "Mediating International Commercial Disputes: Differences in U.S. and European Approaches", *Dispute Resolution Journal* 2005, 64. J.D. FIGUERES, "Multi-Tiered Dispute Resolution Clauses in ICC Arbitration", *ICC International Court of Arbitration Bulleting* 2003, afl. 1, 71.
[50] D. CAIRNS, "Mediating International Commercial Disputes: Differences in U.S. and European Approaches", *Dispute Resolution Journal* 2005, 64.
[51] M. PRYLES, "Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration* 2001, afl. 2. 159; O. KRAUSS, "The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith Under English law", *McGill Journal of Dispute Resolution* 2016, 143. J.D. FILE, "United States: multi-step dispute resolution clauses", *IBA Legal Practice Division: Mediation Commitee Newsletter* 2007, 36. G.B. BORN, *International Commercial Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2014, 279. E. SUSSMAN en V.A. KUMMER, "Drafting The Arbitration Clause: A Primer On The Opportunities And The Pitfall", *Dispute Resolution Journal* 2012, afl. 1, 6.
[52] Chapter II provides selected examples of MDR clauses.
[53] O. KRAUSS, "The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith Under English law", *McGill Journal of Dispute Resolution* 2016, 144. A. JOLLIES, "Consequences of Multi-tier

19. MDR clauses are common in contracts where the issues are complex or when the contract is intended to endure over a longer period, such as joint venture, franchising, building and construction contracts, as well as finance and lease agreements.[54] The freedom to choose from a wide range of mechanisms enables the parties to control the way in which their dispute escalates and is resolved.[55] The parties can thus adapt their MDR clauses to suit their needs, thereby saving them both on time and costs.[56] Consequently, the parties may settle their dispute sooner and cheaper than when waiting for a binding decision.

20. In light of party autonomy, parties can draft their MDR clauses in diverse ways.[57] However, when such clauses include an ADR tier, the next tier tends to be arbitration.[58] Accordingly, the parties are to refrain from commencing arbitration prior to ADR and while ADR is ongoing.[59] Figure 2 provides selected samples of MDR clauses.

Figure 2 - *Sample MDR Clause Calling for ADR Prior to Arbitration*

6. Mediation followed by Arbitration
The parties shall endeavour to settle any dispute arising out of or relating to this agreement, including with regard to its existence, validity or termination, by mediation administered by the Australian Disputes Centre (ADC).
(a) The mediation shall be conducted in accordance with the ADC Guidelines for Commercial Mediation operating at the time the dispute is referred to ADC (the Guidelines).
(b) The terms of the Guidelines are hereby deemed incorporated into this agreement.
In the event that the dispute has not settled within twenty-eight (28) days following referral to ADC, or such other period as agreed to in writing between the parties, the parties shall submit the dispute to arbitration in [*insert seat/place of the arbitration*].
(c) The arbitration shall be administered by ADC and conducted in accordance with the ADC Rules for Domestic Arbitration operating at the time the dispute is referred to arbitration (the Rules).

Arbitration Clauses: Issues of Enforcement", *Arbitration* 2006, afl. 4, 329. J.D. LEW, L. MISTELIS en S. KROLL, *Comparative International Commercial Arbitration*, The Hague, Kluwer Law International, 2013, para. 8-62.

[54] L. BOULLE, *Mediation: Principles, Process, Practice*, Australia, Ligare Pty Ltd., 2011, 614.

[55] L.F. KNUDSEN en S. BALIAN, "Alternative Dispute Resolution Systems Across the European Union, Iceland and Norway", *Procedia - Social and Behavioral Science* 2014, 945; D. JOSEPH, *Jurisdiction and Arbitration Agreements and Their Enforcement*, London, Sweet & Maxwell, 2005, 448. G. DE PALO en R. CANESSA, "New Trends for ADR in the European Union" in P. CORTÉS (ed.), *The New Regulatory Framework for Consumer Dispute Resolution*, Oxford, Oxford University Press, 2016, 412.

[56] Y. ZHAO, "Revisiting the issue of enforceability of mediation agreements in Hong Kong", *China-EU Law Journal* 2013, 127.

[57] O. KRAUSS, "The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith Under English law", *McGill Journal of Dispute Resolution* 2016, 144. G.B. BORN, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, Alphen aan den Rijn, Wolters Kluwer, 2013, 103.

[58] Chapter II. L. BOULLE, *Mediation: Principles, Process, Practice*, Australia, Ligare Pty Ltd., 2011, 614. D. CAIRNS, "Mediating International Commercial Disputes: Differences in U.S. and European Approaches", *Dispute Resolution Journal* 2005, 64.

[59] MDR clauses may contain the following wording: “In the event that the dispute has not settled within thirty working (28) days following referral to mediation, or such other period as agreed to in writing between the parties, the parties shall submit the dispute to arbitration in [*insert seat of the arbitration*].”

(d) The terms of the Rules are hereby deemed incorporated into this agreement.
(e) The arbitrator shall not be the same person as the mediator unless the parties each consent in writing to the arbitrator so acting.
This clause shall survive termination of this agreement.[60]

Future Disputes: WIPO Mediation Followed, in the Absence of a Settlement, by [Expedited] Arbitration Clause
Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the WIPO Mediation Rules. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].
If, and to the extent that, any such dispute, controversy or claim has not been settled pursuant to the mediation within [60][90] days of the commencement of the mediation, it shall, upon the filing of a Request for Arbitration by either party, be referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules. Alternatively, if, before the expiration of the said period of [60][90] days, either party fails to participate or to continue to participate in the mediation, the dispute, controversy or claim shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules. [The arbitral tribunal shall consist of [a sole arbitrator] [three arbitrators].]
The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim referred to arbitration shall be decided in accordance with the law of [specify jurisdiction].[61]

21. Often, parties to a dispute do not only disagree about substantial contractual obligations relating to their commercial contract, but also about the MDR clause and its legal effect.[62] It is unsurprising when a party opts to ignore the ADR tiers and seeks the intervention of an arbitral tribunal or court.[63] The question, then, is whether courts or arbitral tribunals have the power to intervene at that point. A common question is *when* does one tier end and another begin.[64] It is also unclear what the effect is of one or more tiers on the admissibility of such a claim. In absence of a harmonised approach regarding the enforceability and validity of ADR agreements, courts and arbitral tribunals tend to apply differing approaches, which results in significant uncertainty. Chapter I of this thesis will address this uncertainty by tackling the question of when an ADR agreement is valid and enforceable.[65]

[60] DC, "ADC Dispute Resolution Sample Clauses", Retrieved via: https://disputescentre.com.au/wp-content/uploads/2015/02/ADC-Dispute-Resolution-Sample-Clauses-2015.pdf, last visited on 9-02-2017.
[61] WIPO, "Future Disputes: WIPO Mediation Followed, in the Absence of a Settlement, by [Expedited] Arbitration Clause". Retrieved via: http://www.wipo.int/amc/en/clauses/med_arb/, last visited on 07-04-2017.
[62] O. KRAUSS, "The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith Under English law", *McGill Journal of Dispute Resolution* 2016, 143.
[63] O. KRAUSS, "The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith Under English law", *McGill Journal of Dispute Resolution* 2016.
[64] W. ERLANK, "Enforcement of Multi-Tiered Dispute Resolution Clauses" 2002, 10.
[65] O. KRAUSS, "The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith Under English law", *McGill Journal of Dispute Resolution* 2016, 143.

2. Research Background and Context

22. To provide clarity regarding the relevance of this thesis, the following paragraphs will provide a condensed overview of the existing research on the ADR agreement. It will also describe the current legal framework (or lack thereof). Moreover, this section will situate the urgency of this research for legal practice by explaining the results of my empirical work.

2.1. Location and Contribution of this Thesis to the Academic Debate

23. This thesis is not the first to address the enforceability of ADR agreements. A number of commentators have attempted to decode the conditions for validity and enforceability of ADR agreements.[66] The majority of these works are in the form of articles or book chapters.

[66] See N. ANDREWS, *The Modern Civil Process: Judicial and Alternative Forms of Dispute Resolution in England* Rottenburg, Deutsche Nationalbibliothek, 2008; N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulator Reform" in K.J. HOPT, F. STEFFEK en H. UNBERATH (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013; R. BELLINGHAUSEN en J. GROTHAUS, "Escalation Clauses: No Longer a Tripping Hazard for Arbitrations with Seat in Germany?", *Kluwer Arbitration Blog* 2016, http://kluwerarbitrationblog.com/2016/12/01/escalation-clauses-no-longer-a-tripping-hazard-for-arbitrations-with-seat-in-germany/; C. BELLSHAM-REVELL, "Complex Dispute Resolution Clauses: Has the desire to control the dispute process led to increased uncertainty?", *Olswang* 2008; C. BOOG, "How to Deal With Multi-tiered Dispute Resolution Clauses", *ASA Bulletin* 2007; G. BORN en M. ŠĆEKIĆ, "Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'" in D.D. CARON et al. (eds.), *Practising Virtue: Inside International Arbitration*, Oxford Scholarship Online, 2015; J. EPSTEIN, *The Enforceability of ADR Clauses*, Melbourne, Australia, 2008; W. ERLANK, "Enforcement of Multi-Tiered Dispute Resolution Clauses" 2002; C. ESPLUGUES en S. BARONA (eds.), *Global Perspectives on ADR*, Cambridge, Intersentia Publishing Ltd., 2014; J.D. FIGUERES, "Multi-Tiered Dispute Resolution Clauses in ICC Arbitration", *ICC International Court of Arbitration Bulleting* 2003, afl. 1; J.D. FILE, "United States: multi-step dispute resolution clauses", *IBA Legal Practice Division: Mediation Commitee Newsletter* 2007; S.R. GARIMELLA en N.A. SIDDIQUI, "The Enforceability Of Multi-tiered Dispute Resolution Clauses: Contemporary Judicial Opinion", *IIUM Law Journal* 2016, afl. 1. T. GREGORY, "Multi-tiered dispute resolution clauses, a friendly Miranda warning", *Kluwer Arbitration Blog* 2014. K. HAN en N. POON, "The Enforceability of Alternative Dispute Resolution Agreements: Emerging Problems and Issues", *Singapore Academy of Law Journal* 2013; Z. ISLAM, "Legal Enforceability of ADR Agreement", *International Journal of Business and Management Invention* 2013, afl. 1; C. JARROSON, *Legal Issues Raised by ADR*, Kluwer Law International, 2010; A. JOLLIES, "Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement", *Arbitration* 2006, afl. 4; D. JONES, "Dealing with Multi-Tiered Dispute Resolution Process", *The International Journal of Arbitration, Mediation and Dispute Management* 2009, afl. 2; E. KAJKOWSKA, "Enforceability of Multi-Step Dispute Resolution Clauses An Overview of Selected European Jurisdictions" in L. CADIET, B. HESS en M.R. ISIDRO (eds.), *Procedural Science at the Crossroads of Different Generations*, 4, Luxembourg, Nomos Verlagsges, 2015; E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017. L.V. KATZ, "Getting to the Table Kicking and Screaming: Drafting an Enforceable Mediation Provision", *Alternatives to the High Cost of Litigation* 2008; D. KAYALI, "Enforceability of Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration* 2010, afl. 6; J. LEE, "Mediation Clauses at the Crossroads", *Singapore Journal of Legal Studies* 2001; S.O. LOONG en D. KOH, "Enforceability of Dispute Resolution Clauses in Singapore", *Asian JM* 2016; K.C. LYE, "A persisting aberation: The movement to enforce

Interestingly, many of works follow similar jurisdictional scopes, focusing mainly on Common Law jurisdictions.[67] The choice to focus on the approach of Common Law jurisdictions such as the United States of America ('US') and Australia is logical, as courts in these states have faced challenges to ADR agreements earlier and more frequently compared to their Civil Law counterparts.

24. While providing their personal insights on the same case law and legislation as authors before them, these scholars attempt to provide parties with clarity and guidance regarding their ADR agreement or situate ADR in the context of arbitration. In particular, there is a clear trend to emphasize the need for careful and detailed drafting to ensure the enforceability of the parties' ADR agreement. Many authors even prescribe the elements that ought to be included in a binding ADR agreement. There are, however, three notable gaps in the literature.

25. Firstly, according to my research and knowledge, there is one author with access to study arbitral tribunal's determination regarding a clause calling for ADR prior to arbitration.[68] Her research, however, dates from 2000 and is limited to International Chamber of Commerce ('ICC') tribunals. The lack of in-depth and up-to-date research into the approach of arbitral tribunals is problematic. As Section 2.3 further details, this is a major limitation, as parties often dispute their ADR agreement before arbitral tribunals. Secondly, there has been no attempt to study the content of ADR agreements in a systematic fashion in order to uncover the parties' rights and obligations. While numerous scholars discuss the obligations that ADR agreements and ADR as a mechanism imply, their work does not involve empirical research. In particular, no prior author has applied a specialized systematic

agreements to mediate", *Singapore Academy of Law Journal* 2008; D. NSHOKANO KASHIRONGE, "Escalation Clauses and Arbitration: The German Law Approach", *Association for International Arbitration Newsletter* 2017; M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2; M. PRYLES, "Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration* 2001, afl. 2; M.G. SANTOS, "The Role of Mediation in Arbitration: The Use and the Challenges of Multi-tiered Clauses in International Agreements", *Doutrina Nacional* 2013, afl. 38; F. STEFFEK, "The Relationship between Mediation and Other Forms of Alternative Dispute Resolution" in P.D.f.C.s.R.a.C. AFFAIRS (ed.), *The Implementation of the Mediation Directive*, Brussels, European Union, 2016; E. SUTER, "The Progress from Void to Valid for Agreements to Mediate", *Arbitration* 2009; C. TEVENDALE *et al.*, "Multi-Tier Dispute Resolution Clauses and Arbitration", *Turkish Commercial Law Review* 2015, afl. 1; N. VOSER, "Multi-tier dispute resolution clauses: consequence of non-compliance with pre-arbitral procedural requirements", *Thomas Reuters* 2011.

[67] At times, the focus also includes France, Germany and Switzerland.

[68] A. JOLLIES, "Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement", *Arbitration* 2006, afl. 4.

content analysis[69] ('SCA') to ADR agreements in commercial contracts.[70] Therefore, prior work does not rely on an analysis of the ADR agreement as the source of the parties' obligations. The absence of a systematic review of these agreements brings into question statements about the parties' obligations. Lastly, while some authors have called for the creation of a harmonised framework for the ADR agreement, there is sparse in-depth research into how and by whom such a framework is to be created.[71]

26. Exceptionally, Piers and Strong have attempted to tackle the format and nature of a transnational instrument on the ADR agreement. Strong's research draws from the result of her 2014 empirical survey addressed to private practitioners, in-house counsel, government officials, neutrals, and legal academics.[72] She found that the "[s]urvey participants were overwhelmingly (75%) in favour of a Convention that addressed both the beginning and the end of the mediation process. Of the other two options, respondents preferred an international instrument addressing settlement agreements arising out of an international commercial mediation (19%) to an international instrument addressing agreements to mediate international commercial disputes (6%)."[73] Evidently, there is support for a Convention that addresses both agreements to mediate international commercial disputes and settlement agreements arising out of mediation of international commercial disputes.

[69] SCA is a systematic and replicable technique applied to the analysis of a variety of texts, ranging from interview transcripts to legal texts such as case law and legislation.
[70] A. JOLLIES, "Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement", *Arbitration* 2006, afl. 4, 117. P. TOCHTERMANN, "Agreements to Negotiate in the Transnational Context - Issues of Contract Law and Effective Dispute Resolution", *Uniform Law Review* 2008. N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 225. I. BACH en U.P. GRUBER, "Germany" in C. ESPLUGUES, J.L. IGLESISAS en G. PALAO (eds.), *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, 2 dln., 1, Cambridge Intersentia Publishing Ltd., 2013, 165. K.J. HOPT en F. STEFFEK, "Mediation: Comparison of Laws. Regulatory Models, Fundamental Issues" in K.J. HOPT en F. STEFFEK (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 31. Also see M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 290-295. G. BORN en M. ŠĆEKIĆ, "Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'" in D.D. CARON et al. (eds.), *Practising Virtue: Inside International Arbitration*, Oxford Scholarship Online, 2015, 239. C. ESPLUGUES, "General Report: New Developments in Civil and Commercial Mediation - Global Comparative Perspectives" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 33. E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 137.
[71] A. SCHMITZ, "Refreshing Contractual Analysis of ADR Agreements By Curing Bipolar Avoidance of Modern Common Law", *Harvard Negotiation Law Review* 2008, afl. 1, 74.
[72] S.I. STRONG, "Realizing Rationality: An Empirical Assessment of International Commercial Mediation ", *Washington & Lee Law Review* 2016, 2002.
[73] S.I. STRONG, "Realizing Rationality: An Empirical Assessment of International Commercial Mediation ", *Washington & Lee Law Review* 2016, 2057.

27. Piers, the supervisor of this doctoral project, provides concrete proposals by outlining the potential wording of an instrument on the ADR agreement. Her proposal focuses on the creation of a European instrument in the context of European private law. Figure 3 provides a copy of Piers's proposal. She recommends that a potential instrument covers both commercial and consumer disputes, suggests dismissal as a remedy to a breach of the ADR agreement, and outlines the parties' obligations.

Figure 3 - *Piers's Proposal for an ADR Specific Law*[74]

Article 1: The ADR Agreement-Lex Generalis

A. An ADR agreement is an agreement by which parties consent that, before going to courts, a third person other than a judge shall contribute to finding a solution for all or certain disputes which have arisen or which may arise between them within a defined legal relationship, and which can be the object of a settlement.

B. An ADR agreement may be in the form of an ADR clause in a contract or in the form of a separate agreement.

C. An ADR agreement shall be valid and binding provided the chosen ADR mechanism is defined or determinable.

[…]

Article 3: ADR Agreement and Claims Before a Court or Arbitral Tribunal

A. A court or arbitral tribunal seated in an EU Member State, and before which an action is brought in a matter that is the subject of an ADR agreement, shall, if a party so requests at a point in time not later than when submitting the first statement on the substance of the dispute, declare the action inadmissible, unless it finds such an agreement null and void, inoperative or incapable of being performed.

B. It is not incompatible with an ADR agreement for a party to request, and for a court to order, interim measures of protection.

Article 4: Duties of the Parties Under an ADR Agreement

A. Unless the parties stipulate otherwise, parties to an ADR agreement shall refrain from initiating arbitral or judicial proceedings with respect to the dispute that is the subject of the ADR agreement, up until the moment they comply with the duties defined in section B of this article, or any other moment specified by the parties in the ADR agreement.

B. Parties to an ADR agreement are under an obligation to set up the ADR mechanism. To comply with this obligation, the parties must take the following steps:

1. The parties shall endeavor to reach agreement on one or more third parties, unless they have agreed upon a different appointment procedure.
2. The parties shall pay the advance on costs that are required to set up the ADR procedure.
3. The parties shall attend the first meeting that is convened at the request of the third party, where they shall discuss and endeavor to reach an agreement on the further steps to be taken.

C. Each party shall cooperate in good faith with the third party.

28. Building on the existing research regarding the ADR agreement, this work will address the second and the third gap by studying the parties' obligations under ADR agreements and the need for a framework regulating these agreements.[75] The second gap pertains to the lack

[74] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 305-306.

[75] Regarding the first gap: the lack of research into arbitral tribunal decision making when faced a dispute relating to an ADR agreement. This gap could not be addressed in this work due to practical barriers, namely

of systematic review of the parties' obligations under their ADR agreement, while the third gap relates to the lack of concrete suggestions on a potential framework. The next section further explains the legal framework that forms the basis of this research.

2.2. Legal Framework

29. ADR specific rules often fall into the following categories: laws regulating the ADR mechanism;[76] laws regulating the role and obligations of the ADR neutral;[77] rules on court-annexed ADR;[78] laws on industry specific ADR (e.g. construction or labour); and case law answering questions relating to ADR, the process, the ADR agreement, settlement agreements, ADR neutral qualifications, etc.[79] In particular, non-case law rules on ADR tend to take following form: market and private contractual arrangements (market); industry standards; codes of conduct and court practice directions (industry); framework instruments (framework);[80] models laws (model law); and state legislation from domestic law makers (legislation).[81]

30. There is a clear tendency to regulate ADR and the obligations of the third-party neutral. However, the law on the ADR agreement is in its "formative stages".[82] While there are several notable international efforts to regulate ADR, such as Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters[83] (the 'Mediation Directive') and the United Nations Commission on International Trade Law ('UNCITRAL') instrument on Mediated Settlement Agreements, these instruments do not address the ADR agreement. The exclusion in these instruments is surprising. The European Union ('EU'), despite its

despite numerous efforts, I could not gain access to awards from the biggest dispute resolution provider, the ICC. The denial is not surprising, as the confidentiality of arbitration is a highly protected matter.

[76] E.g. the Austrian *Zivilrechts-Mediations-Gesetz.*

[77] E.g. the German *Verordnung über die Aus- und Fortbildung von zertifizierten Mediatoren (Zertifizierte-Mediatore n-Ausbildungsverordnung – ZMediatAusbV).*

[78] E.g. the English Civil Procedure Rules.

[79] Also see N. ALEXANDER, W. GOTTWALD en T. TRENCZEK, "Mediation in Germany: The Long and Winding Road" in N. ALEXANDER (ed.), *Global Trends in Mediation*, Germany, Centrale Für Mediation, 2003, 193.

[80] Framework regulations provide states the framework to regulate specific aspects of ADR.

[81] N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulator Reform" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 147.

[82] N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 174.

[83] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L 136/3.

purported interest in promoting ADR, has limited rules on the ADR agreement that only have some general indications that often focus on consumer ADR agreements.[84] The UNCITRAL exclusion is, simply due to the complexity of regulating these agreements. Moreover, it is important to note that the framework for binding ADR mechanisms such as the Convention on the Recognition on Enforcement of Foreign Arbitration Awards (the 'New York Convention') cannot be used to assess the validity and enforceability of ADR agreements. Evidently, there is no international statute that addresses the consequence of the failure to comply with the ADR agreement on future arbitral or court proceedings.[85] Furthermore, there is no consensus on the applicability of existing regional private law instruments to ADR agreements.[86] Therefore, national laws must be consulted to study ADR agreements.

31. With the exception of Singapore, it is rare for the national legislators to address the ADR agreement. Therefore, general contractual, procedural and PIL may be of relevance. In addition, different laws may be applicable to varying aspects of the ADR agreement, such as validity, consent and capacity, substance, the parties' obligations, termination, and enforcement.[87] Despite the absence of legislation addressing the issue of validity and enforceability of the ADR agreement, there is a growing pool of case law. As abovementioned, the majority of case law is from the Common Law jurisdictions under analysis due to their lengthier experience with ADR. The case law often involves a party seeking to prevent the other from commencing court or arbitral proceedings on the basis of non-compliance with an ADR agreement.[88] The next section further expands the understanding of ADR agreements by reflecting on the findings of the framing empirical research.

[84] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 283. M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 282.
[85] D. CAIRNS, "Mediating International Commercial Disputes: Differences in U.S. and European Approaches", *Dispute Resolution Journal* 2005, 67. H. EIDENMÜELLER en H. GROSERICHTER, "Alternative Dispute Resolution and Private International Law" 2015, 6.
[86] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 278.
[87] U. FRAUENBERGER-PFEILER, "Austria 2014" in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 14.
[88] N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009.

2.3. Empirical Research

32. As abovementioned, the review of the existing research on the ADR agreement revealed the relevant gaps that I aim to fill. To better understand the complex nature of ADR agreements and thereby set the parameters of this work, I conducted a global survey and a SCA.

33. The survey had a twofold aim: (1) to gather ADR agreements for the content coding study and (2) to enquire about the perception and experience of ADR professionals and experts towards the conclusion of ADR agreements. The survey, which was open from the 9 February to 30 April 2017, targeted ADR professionals and experts – including lawyers, in-house counsel, academics, and third-party neutrals – with experience in drafting, inserting, or enforcing dispute resolution clauses that provide for ADR mechanisms such as mediation and conciliation.[89] At the closing of the survey, 622 individuals completed the survey. Responses came from around the globe.

34. In addition to the survey, I opted to employ SCA to study the content of 172 ADR agreements gathered via desk research and the survey. SCA is a systematic and replicable technique applied to the analysis of a variety of texts, ranging from interview transcripts to legal texts such as case law and legislation.[90] SCA is a research method used to objectively and systematically detect themes and trends in texts including legal instruments and contracts, as well as communications. The choice for SCA seemed fitting, as there are relatively few cases and rules that address the parties' obligations.[91] Furthermore, the parties' agreement to resort to ADR and the rules of procedure of the relevant ADR

[89] For a complete discussion of the findings, see M. SALEHIJAM, "ADR Clauses and International Perceptions: A Preliminary Report", *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement* 2017, afl. 3.
[90] S. STEMLER, "An Overview of Content Analysis", *Practical Assessment, Research & Evaluation* 2001, afl. 17, 1. G. VAN HARTEN, "Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration", *Osgood Comparative Research in Law and Political Economy Research report no. 41/2012* 2012. M.A. HALL, "Coding Case Law for Public Health Law Evaluation", *Public Health Law Research* 2011, 3.
[91] C. ESPLUGUES, "General Report: New Developments in Civil and Commercial Mediation - Global Comparative Perspectives" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 58. P.G. MAYR en N. KRISTIN, "Regulation of Dispute Resolution in Austria: A Traditional Litigation Culture Slowly Embraces ADR" in F. STEFFEK en H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 79. B. HESS en N. PELZER, "Regulation of Dispute Resolution in Germany: Cautious Steps towards the Construction of an ADR System" in F. STEFFEK en H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 227.

association is the basis for their rights and obligations under the contract.[92] By systematically analysing the content of ADR agreements, I further tested whether there are common reoccurring obligations that can indicate a trend or a common practice. The codes are descriptive and reflect the obligations contained in the agreements. Codes facilitate the counting of obligations in order to assess the frequency of reoccurrence thereof. The coding was conducted using the software Nvivo.

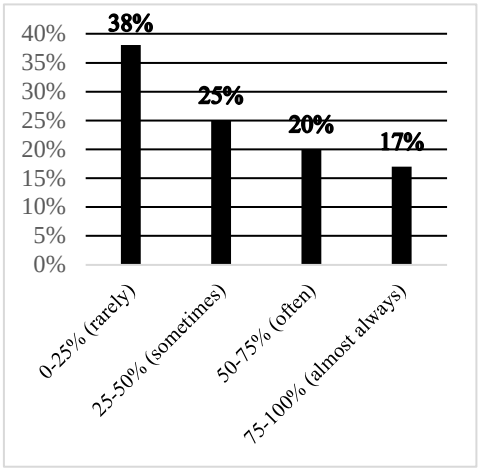
35. The empirical research preceding the completion of this work provided a realistic image of the ADR agreement in the context of commercial contracts. This section presents the conclusions relevant to establish the boundaries of my research.

36. The survey was distributed amongst ADR professionals and experts – including lawyers, in-house counsel, academics, and third-party neutrals – with experience in drafting, inserting, or enforcing dispute resolution clauses that provide for ADR mechanisms. The majority of the 354 respondents (223 or 63%) indicated that it is not common practice for dispute resolution clauses in commercial contracts to refer to ADR mechanisms such as mediation.[93] This response is surprising, as it was hypothesized that those who are familiar with ADR and have international experience are likely to come across or encourage parties to conclude ADR agreements.

[92] B. HESS en N. PELZER, "Mediation in Germany: Finding the Right Balance between Regulation and Self-Regulation" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 296. C. JARROSSON, "Legal Issues Raised by ADR" in A. INGEN-HOUSZ (ed.), *ADR in Business: Practice and Issues Across Countries and Cultures*, II, Aan den Rijn, Kluwer Law International, 2011, 163. J.M. SMITS, *Contract Law: A Comparative Introduction*, Cheshire, Edward Elgar Publishing, 2014, 18. Moreover, the content of the ADR agreement is settled by the parties (K.J. HOPT en F. STEFFEK, "Mediation: Comparison of Laws. Regulatory Models, Fundamental Issues" in K.J. HOPT en F. STEFFEK (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 31. B. HESS en N. PELZER, "Mediation in Germany: Finding the Right Balance between Regulation and Self-Regulation" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 296.

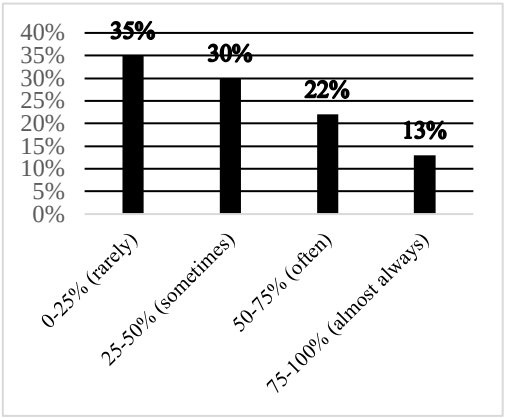
[93] Of the 354 respondents to the question, 38% indicated that such a reference is rare (0-25% of the instances), 25% designated that such a reference occurs sometimes (25-50% of the instances), 20% specified that such a reference occurs often (50-75% of the instances), and only 17% of the respondents designated that such a references takes place almost always (75-100% of the instances).

Figure 4 - *Answer from the respondents to the question "How often do you estimate that commercial dispute resolution clauses that you have drafted, inserted, applied and/or enforced make a reference to non-binding ADR (i.e. mediation/conciliation)?"*



37. The answer to the question "How often are the dispute resolution clauses with a non-binding ADR element part of an international/cross-border contract?" is similar to that of the previous question. Indicating that the parties' response to the question of how often such agreements make a reference to non-binding ADR is not affected by whether the agreements were included in an international contract.[94] This a startling response, as my hypothesis was that international contracts are more likely to contain ADR agreements than domestic contracts.[95]

Figure 5 - *Answer from the respondents to the question "How often are the dispute resolution clauses with a non-binding ADR element part of an international/cross-border contract?"*



38. The findings regarding the frequency of concluding ADR agreements beg the question of whether voluntary recourse to ADR mechanisms is as frequent as is purported.[96] Therefore,

[94] Of the 325 respondents, 35% indicated that they rarely find such clauses in international contracts, 30% specified sometimes, 22% designated often, 13% noted almost always.
[95] "Finally, although there has been a trend toward ADR provisions other than those involving only arbitration, historically, fewer contracts contain mediation provisions" (S.H. HOLLY en M. JULIANO, "Recent Developments Concerning Enforcement Of ADR Provisions", *Delaware Law Review* 2014, afl. 1, 55.).
[96] It is becoming more common to include mediation clauses in commercial contracts. See L. BOULLE, *Mediation: Principles, Process, Practice*, Australia, Ligare Pty Ltd., 2011, 614.

it seems that while commercial contracts tend to contain dispute resolution clauses, they are less inclined to refer to ADR. This is not to say that ADR agreements are not of importance to the growth of ADR. According to Strong's 2014 survey regarding the use and perception of international commercial mediation, resort to mediation in international commercial disputes is mostly attributable to mediation clauses.[97]

39. Subsequently, the survey inquired about how dispute resolution clauses are concluded by asking, "In your experience, are dispute resolution clauses drafted individually for each transaction or taken from a model/standard clause database (copy and pasting)?" This question was posted in a narrow manner purposefully in order to encourage the participants to use the comment section to further explain their drafting practices. Of the 340 respondents, 24% (or 82) used the comment section. Half of those commenting noted that, while their starting point is a model/standard contract, they often modify/adapt the terms in order to fit the parties' needs. This practice was confirmed, as 65% (226 respondents) indicated that they copied and pasted their clauses from a database. The practice of copy and pasting indicates the fruitlessness of the drafting guidelines written by academics and ADR providers for the parties and once more supports the proposal for a uniform framework. This is because, the parties are unlikely to consult these guides while in a rush to conclude their commercial agreements. In particular, checking drafting guidelines for individual states implies higher transactions costs.

40. The final question regarding the current practice in the conclusion of ADR agreements asked, "How often do you estimate that dispute resolution clauses are concluded online via electronic exchanges or click-wrap agreements?"[98] According to the respondents, commercial parties have not joined the cause of digitizing their contract formation.[99]

[97] Commercial mediation is most likely to arise pursuant to a contractual mandate, "either through a standalone pre-dispute mediation agreement or a pre-dispute multi-tier (step) dispute resolution clause" (S.I. STRONG, "Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation", *University of Missouri School of Law* 2014, 16.).

[98] Click-wrap agreements are those that are concluded once one parties clicks "I accept" or "I agree" on the other parties' website. The use of click-wrap is common practice on e-commerce websites utilized by both consumers and businesses.

[99] Of the 293 respondents to the question, 54% designated rarely, 24% indicated sometimes, 18% specified often, 4% designated almost always.

41. The SCA conducted in the context of this work focused on 172 ADR agreements. I coded separately for conciliation and decided not to treat "conciliation" and "mediation" as synonyms to demonstrate the rarity of dispute resolution clauses calling for conciliation. Of the 172 clauses, only 7 called for conciliation, while 90% (155 agreements) called for mediation.[100] Moreover, these findings confirm that mediation is the most common form of ADR in my sample. Lastly, I found that the majority (81% or 139 agreements) of ADR agreements were part of a MDR clause.

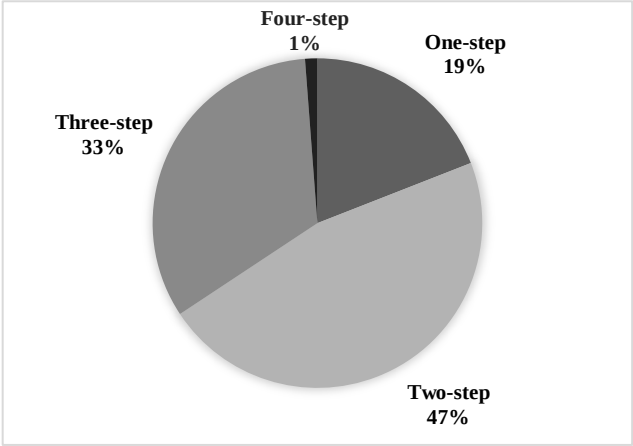


Figure 6 - *Composition of the ADR agreements under study. One-step indicates that the agreement only called for mediation/conciliation.*

42. Noteworthy is that the agreements and applicable institutional rules coded most commonly prescribed arbitration following ADR (60% or 84 agreements),[101] while 14% (20 agreements) prescribed litigation, 3% expert determination (4 agreements), and 0.7% neutral evaluation (1 agreement). The survey conducted in the context of this work provided further insights on the current perception of the respondents to ADR agreements.[102] A full

[100] The findings of this study reaffirm the shift in UNCITRAL WGII's choice of terminology in their discussion on an instrument on the enforcement of international commercial settlement agreements resulting from mediation. The shift from using the term "conciliation" to now "mediation" is explained in the advanced copy of the sixty-eight session "the instruments should refer to "mediation" instead of "conciliation", as it was a more widely used term." A/CN.9/WG.II/WP.205, p. 2

[101] 63% of the agreements that contained an obligation to refrain from acting specified arbitration.

[102] It is also of relevance to reflect on Strong's 2014 survey on the use and perception of international commercial mediation. Responses to her survey indicated the perceived difficulty of enforcing agreements to mediate in both the domestic and international contexts: 14% of respondents indicated that it was impossible or very difficult to enforce agreements to mediate domestic disputes, "26% said it was somewhat difficult, 39% said it was easy, 12% said that the issue was largely untested and 7% said that they did not know." When the same respondents where ask about their perception of the difficulty faced in enforcing agreements to mediate international commercial disputes in the respondents' home jurisdiction, the percentage of respondents finding it impossible or very difficult rose to 19%, "and the number of those indicating that enforcement was somewhat difficult went up to 30%." Moreover, the survey asked the respondents how difficult it would be to enforce agreements to mediate in the respondents' home jurisdiction when the mediation would take place abroad. "The perceived difficulty rose yet again, with 26% of the respondents indicating that enforcement would be impossible or very difficult and 30% indicating that enforcement would be somewhat difficult." Evidently, there is a perceived level of difficulty associated with enforcing ADR agreements in both the domestic and international context. Furthermore, such findings indicate that the international legal and business communities

report of the findings is available in my article "ADR Clauses and International Perceptions: A preliminary Report".[103] This work will refer to the survey responses when appropriate.

3. Research Scope and Methodology

43. Having established the research background, it is important to clarify the scope of this work. Accordingly, this section firstly explains the boundaries of this research, including the jurisdictional scope. Moreover, this section provides an overview of the various research methods applied to answer the following research questions: when is an ADR agreement valid and enforceable; what are the parties' obligations under an ADR agreement; and what are the essential elements of a comprehensive framework for the ADR agreement?

3.1. Research Scope: Private Commercial ADR in Selected States

44. In focusing on both domestic and international commercial ADR agreements, two additional boundaries are established. First, I limit the precise nature of the ADR mechanism under focus. Second, I limit my focus to selected states with varying ADR histories.

45. As mentioned in Section 1.1 in discussing ADR, I am often referring to mediation as it is the most prominent form of ADR. However, the concept of ADR includes both private and court-annexed/administered ADR. "Court-annexed ADR" refers to ADR conducted in the context of a court proceeding, which is triggered as a result of a court suggestion or a mandatory procedural condition. "Court administered ADR" refers to ADR that is directly administered by the courts and often involves a judge or a court-appointed third party acting as the neutral. Therefore, to narrow my scope further I exclude court-annexed/administered ADR from the scope of my research. This is a natural elimination, as court-annexed and court-administered ADR rarely involve a pre-existing ADR agreement. I, however, do refer to the laws on court-annexed/administered ADR when relevant.

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perceive agreements to mediate international commercial disputes as more difficult to enforce than agreements involving domestic disputes. This perception affects the parties' pre-dispute choice to agree to resolve their dispute by mediation. S.I. STRONG, "Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation", *University of Missouri School of Law* 2014, 39-40.

[103] M. SALEHIJAM, "ADR Clauses and International Perceptions: A Preliminary Report", *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement* 2017, afl. 3.

46. Moreover, regarding the first boundary, I focus on ADR in relation to disputes arising from commercial relationships. Commercial disputes often arise from a pre-existing commercial relationship. Although there is no consensus regarding the precise definition of the term "commercial relationship", the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation ('the Model Law on Mediation')[104] lists the following as creating a commercial relationship: trade transaction for the supply/exchange of goods/services, distribution agreements, commercial representation/agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement, joint venture, industrial cooperation, and the carriage of goods or passengers by air, sea, rail or road.[105] Thereby, I exclude consumer ADR. This exclusion is necessary for two reasons. Firstly, consumer ADR vastly differs from commercial ADR in both its form and framework. When parties attempt ADR in a consumer context, they often resort to ombudsmen or another sort of non-binding third party decision-making process. Secondly, at least, in the EU, there is already a growing framework for consumer ADR that exclusively focuses on protecting the weaker party.[106]

47. In addition to limiting my focus to a particular ADR mechanism, I opted to study selected states in order to provide transnational perspectives. The discussion of ADR requires transnational perspectives in light of the conviction that global disputes require global solutions. The choice of states further reflects my research-funding proposal, which was to make concrete suggestions for the EU legislator regarding the ADR agreement. Therefore, it was relevant to study the European private legal context from two perspectives: the perspective of EU Private Law and that of the EU Member States. Already in the project proposal, I chose to focus on four Member States, namely **Austria**, **England**,[107] **Germany**, and **the Netherlands**. The choice for the above states was intentional and motivated by their varying approach to the ADR agreement. Moreover, the states have differing methods for the regulation and promotion of ADR. To illustrate, in Austria, a pioneer in mediation law

[104] ex. the Model Law on Conciliation 2002.
[105] Further see UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002.
[106] See the ADR Directive and the ODR Regulation.
[107] This study focuses on the legal and practical situation regarding ADR in England and Wales; however, in order to facilitate discussion, the reference to 'England' is to be understood as a reference to 'England and Wales'.

and practice,[108] mediation and mediators are extensively regulated,[109] while in England, there is little state intervention of the mechanism asides from rules aimed at promoting recourse thereto. In addition, while in Germany and England, ADR is interlinked with the courts, in the Netherlands, mediation grew without compulsory rules using financial incentives.[110]

48. To better fulfil my research aim, it is important to develop a relevant frame of reference. I found this frame of reference in the laws of states where ADR plays a prominent role in dispute resolution, as well as in the (soft) laws and regulations developed by international organizations. The countries that I have chosen to serve as frames of reference against which I examine existing European Private Law on ADR, and that serve as a source of inspiration to propose an improved framework, are **Australia**, the **US**, and **Singapore**. The reason I selected these three states in Asia, Europe, and North America, where ADR plays a prominent role, is so that I uncover global trends, if any, regarding the issues pertaining to ADR agreements.[111] Furthermore, it is important not to restrict the analysis to EU Member States, as disputes do not stop at the boundaries of the EU. In today's globalized world, I needed to pay close attention to initiatives outside the EU boarders to regulate and harmonise ADR.[112] Therefore, Singapore, the US, and Australia provided models of how to efficiently promote ADR and should be used as benchmarks for legislatures and practitioners in Europe.[113]

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[108] See M. ROTH en D. GHERDANE, "Mediation in Austria: The European Pioneer in Mediation Law and Practice" in K.J. HOPT, F. STEFFEK en H. UNBERATH (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013.

[109] "Austria is one of the few European countries to have enacted progressive mediation legislation which not only recognises mediation as a profession but provides detailed criteria for training and qualifications of civil mediators" (C. MATTL, A. PROKOP-ZISCHKA en S. FERZ, "Mediation in Austria" in N. ALEXANDER (ed.), *Global Trends in Mediation*, 1, New York, Kluwer Law International, 2006, 80.).

[110] Compared to other continental European countries, the Netherlands has a well-developed mediation structure. See J.M. BOSNAK, "The European Mediation Directive: More Questions Than Answers" in J.C. GOLDSMITH, A. INGEN-HOUSZ en G.H. POINTON (eds.), *ADR in Business: Practice and Issues across Countries and Cultures*, New York, Kluwer Law International, 2010, 625.

[111] "The Modern Mediation Movement in the USA is said to have increased pace from the 1970s, the then transferred to England and Australia in the 1980's and to European civil countries and South Africa in the 1990s" (P. BROOKER, *Mediation Law: Journey through Institutionalism to Juridification*, New York, Routledge, 2013, 13.)

[112] A similar reasoning was followed by K.J. HOPT en F. STEFFEK, "Mediation: Comparison of Laws. Regulatory Models, Fundamental Issues" in K.J. HOPT en F. STEFFEK (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 8.

[113] K.J. HOPT en F. STEFFEK, "Mediation: Comparison of Laws. Regulatory Models, Fundamental Issues" in K.J. HOPT en F. STEFFEK (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 9.

49. It is moreover important to examine the framework of EU Private Law relevant for the ADR agreement. This framework includes the Mediation Direction, the ADR Directive,[114] and the ODR Regulation,[115] as well as regulatory and PIL norms. In addition, I study, where relevant, the efforts of international organizations such as UNCITRAL in regulating ADR. These instruments include the Model Law on Mediation and the recent UN Convention on International Settlement Agreements Resulting from Mediation (the 'Singapore Convention'). I also study numerous ADR rules from dispute resolution institutions such as the ICC, the American Arbitration Association ('AAA'), and the Centre for Effective Dispute Resolution ('CEDR') among others.

3.2. Methodology: Functional Comparative Law and Empirical Research

50. The introduction to this thesis stated my aim of assessing the potential for a comprehensive framework on the ADR agreement. It furthermore stipulated the need to answer the following questions: (1) when is the parties' ADR agreement enforced and (2) what are the parties' obligations under an ADR agreement. To fulfil this need and thereby reach my final aim, I opted to employ a mixed approach involving both traditional legal research and methods borrowed from empirical researchers. This section provides an overview of the methodology applied in each chapter in a chronological order.

51. Chapter I will be dedicated to providing a comprehensive overview of the current approaches to the validity and enforceability of ADR agreements to test for best practices. Here, the application of a comparative law analysis is appropriate, as my aim is to study the contractual, procedural, and PIL of multiple states simultaneously. In applying a comparative law analysis, I further add a functional component. Thus, I will not discuss every national approach to all of my questions, as in many instances, the issues under analysis have yet to arise and so the experience of other jurisdictions found through a comparative study provides guidance.

52. In addition, as discussed in Section 2.2, on "Legal Framework", despite the lack of a legislative framework for the ADR agreement at the national level of the majority of states,

[114] Directive 2013/11/EU of The European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004.
[115] Regulation (EU) No 524/2013 Of The European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L 165/1.

there are a growing number of judiciary decisions on the matter. However, the decisions on the matter are minimal compared to the case law on arbitration or choice of court agreements. Consequently, there are relatively few cases to study regarding the legality and enforceability of ADR agreements. Furthermore, due to the infancy of voluntary commercial ADR in the Civil Law jurisdiction under analyses, the majority of these cases originate from Common Law jurisdictions.

53. Moreover, the comparative law approach is complemented by an analysis of expert and political discourse on the issues at hand. Therefore, I take into consideration reports from the European Commission, UNCITRAL, as well as the published works addressing ADR agreements, discussed in Section 2.1. It should be noted that, due to the significant differences between domestic and international ADR, it is not self-evident to what extent the theoretical and empirical scholarship on domestic ADR is applicable to cross-border commercial disputes.[116] Nevertheless, conclusions drawn based on domestic experiences are a useful starting point for the discussion of ADR in an international commercial context.[117] Lastly, as abovementioned, Chapter I faced a practical limitation, as I could not access arbitral awards addressing ADR agreements with the exception of those publicly available.

54. Chapter II will address questions relating to the parties' rights and obligations under an ADR agreement by employing methods borrowed from empirical researchers. In particular, I opted to apply a survey and a SCA to achieve two goals (see Section 2.3). Firstly, to gather ADR agreements for analysis, and secondly, to better understand such agreements.

55. Focusing on the research goal of assessing a potential comprehensive framework for the ADR agreement, Chapter III will utilize traditional legal research methods. The analysis therein relies on regulatory theories proposed by proponents and opponents of regulation

[116] S.I. STRONG, "Realizing Rationality: An Empirical Assessment of International Commercial Mediation ", *Washington & Lee Law Review* 2016, 7; P.E. MASON, "What's Brewing in the international commercial mediation process: differences from domestic mediation and others parties, counsel and mediators should know", *Dispute Resolution Journal* 2011, 66. For example, international commercial disputes are not only more complicated than domestic matters they also feature larger number of parties and a variety of cross-cultural concerns. See H.I. ABRAMSON, "Time to try mediation of international commercial disputes", *ILSA Journal of International Law and Comparative Law* 1998, 323. J. BARAKAI, "What's a cross-cultural mediator to do? A low-context solution for a high-context problem", *Cardozo Journal of Conflict Resolution* 2008.

[117] S.I. STRONG, "Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation", *University of Missouri School of Law* 2014, 12.

and harmonisation. It is my hypothesis that the harmonisation of laws applicable to the validity and enforceability of ADR agreements greatly reduces the current uncertainty, but does not remove all disparities. Therefore, there is a need for a strategic approach to the regulation of ADR agreements. Accordingly, Chapter III will explore the potential content of a framework for the ADR agreement by detailing its various counterparts.

56. Moreover, the work carried out in the context of this doctoral thesis had the ultimate aim of providing concrete suggestions to the EU legislator regarding the regulation of ADR agreements.[118] To fulfil this aim, Chapter III will focus on how to create such a framework with the EU's regulatory role in mind. In addition, Chapter III will consider the supporting role that UNCITRAL can play in the creation of a framework for the ADR agreement. The choice to focus on the supplementary role of UNCITRAL reflects its historical involvement in the creation of harmonising instruments in the field of international dispute resolution. The work of the EU and the UNCITRAL can correlate and fulfil a supporting function as they both aim to promote ADR. The UNCITRAL has gone as far as granting the EU an observatory seat in its sessions, while EU Member States with membership to UNCITRAL are eligible to participate in the creation of UNCITRAL instruments.[119]

[118] Chapter I, Section 3.1.

[119] "UNCITRAL texts are initiated, drafted, and adopted by the United Nations Commission on International Trade Law, a body made up of 60 elected member States representing different geographic regions. Participants in the drafting process include the member States of the Commission and other States (referred to as "observer States"), as well as interested international inter-governmental organizations ("IGO's") and non-governmental organizations ("NGO's")" (UNCITRAL, *FAQ- Origin, Mandate and Composition of UNCITRAL*, http://www.uncitral.org/uncitral/en/about/origin_faq.html#drafting).)

Chapter I: Validity and Enforceability of ADR Agreements

Contents

Introduction

1. A private ADR mechanism –as opposed to court-annexed– can only begin and continue on the basis of the parties' voluntary participation. Therefore, it is important to have clarity regarding the parties' desire to submit their dispute to ADR.[120] The consent of the parties to pursue ADR can be contained in an individually negotiated contract or in an ADR clause within a commercial contract.[121] Often, these agreements require the parties to submit their dispute to ADR, and at the same time, prohibit the parties from starting arbitration or litigation while ADR is pending.[122] This chapter is dedicated to providing a comprehensive overview of the current approaches to the validity and enforceability of ADR agreements in order to test for best practices. Here, the application of a comparative law analysis is appropriate, as my aim is to study the contract, procedural, and PIL of multiple states. In applying a comparative law analysis, I further add a functional component. Thus, I do not discuss every national approach to all of my questions, as in many instances, the issues under analysis have yet to arise and thus the experience of other jurisdiction found through a comparative study provides guidance.

2. In addition, as discussed in the Introduction Chapter (Section 2.2 on "Legal Framework"), despite the lack of a legislative framework for the ADR agreement at the national level of the majority of states, there are a growing number of judiciary decisions on the matter. However, the decisions on the matter are minimal compare to the case law on arbitration or choice of court agreements. Consequently, there are few cases to study regarding the legality and enforceability of ADR agreements. Furthermore, due to the infancy of voluntary commercial ADR in the Civil Law jurisdiction under analyses (Austria and Germany), the majority of these cases originate from Common Law jurisdictions (Australia, England and the US).

[120] C. ESPLUGUES, "General Report: New Developments in Civil and Commercial Mediation - Global Comparative Perspectives" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 28.
[121] The validity of such consent is contingent upon the parties willingly and knowingly opting out of their right of access to court (even if temporarily opting out). See also M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 283.
[122] C. ESPLUGUES, "General Report: New Developments in Civil and Commercial Mediation - Global Comparative Perspectives" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 33.

3. Moreover, an analysis of expert and political discourse on the issues at hand will compliment this works' comparative law approach. Therefore, I take into consideration reports form the European Commission, the UNCITRAL, as well as the published works addressing ADR agreements. It should be noted that, due to the significant differences between domestic and international ADR, it is not self-evident to what extent the theoretical and empirical scholarship on domestic ADR is applicable to cross-border commercial disputes. Nevertheless, conclusions drawn based on domestic experiences are a useful starting point for the discussion of ADR in an international commercial context. Lastly, to reiterate, this chapter faces a practical limitation, as I could not access arbitral awards addressing ADR agreements.

4. To provide an in-depth analysis of the issues that arise when parties dispute the validity and effect of their ADR agreement, it is important to understand the nature of the issues at hand.[123] ADR agreements give rise to three clear points of discussion: when are these agreements binding on the parties (Section 1); should these agreements be enforced (Section 2); and how should breaches of these agreements be remedied (Section 3)? On the basis of the identified issues, this chapter will further provide best practices for the legislator, judiciary, and arbitral tribunals when faced with disputed ADR agreements. The aim in providing this analysis and advice is to aid the creation of an environment that is conductive to the growth of commercial ADR.[124]

5. For an agreement to be binding on the parties, it must firstly be both formally and substantively valid. As the conditions for validity differ amongst states, today, in absence of ADR specific rules, to be valid and enforceable, these agreements need to follow the applicable law.[125] Therefore, to answer the question of when are ADR agreements binding,

[123] There are a growing number of disputes relating to the parties' ADR agreement. According to a study by Cole, "In the seven-year period from 1999 to 2005, the number of reported opinions on Westlaw that addressed mediation issues increased from 172 in 1999 to 521 in 2005, a 303% increase" (S.R. COLE, C.A. MCEWEN, N.H. ROGERS, J.R. COBEN en P.N. THOMPSON, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 203.). Moreover, Coben and Thompson found that, "Disputes about parties' obligations to participate in mediation are detailed in 279 cases in the database, including 122 opinions coded as condition precedent cases, where mediation could be considered a mandatory pre-condition to litigation or arbitration…These types of disputes more than tripled in frequency between 1999 and 2003, from twenty-one to seventy-three" (J.R. COBEN en P.N. THOMPSON, "Disputing Irony: A Systematic Look at Litigation About Mediation", *Harvard Negotiation Law Review* 2006, afl. 43, 105.).

[124] This is unlike other authors who commence their work from a pro-arbitration stance.

[125] In discussing the validity and enforceability of ADR agreements, this chapter does not provide an overview of the basic contract law principles concerning consent, capacity fraud, and duress as these questions are not specific to the ADR agreement. Instead, specific aspects of such laws are highlighted when relevant. Thus, the

Section 1 will provide a comparative analysis of the varying approaches in the states under analysis.[126] In line with the principle of separability, Section 1 will discuss the validity and enforceability of ADR agreements independently of the main contract.[127] The analysis in Section 1 will be formulated in a critical manner in order to enable the uncovering of best practices.

6. Returning to the second question of the legal effect of ADR agreements, Section 2 of this chapter will argue for the necessity to enforce these agreements. Currently, there is a lack of consensus as to whether the obligations contained in ADR agreements are enforceable on the parties. To provide support for the pro-enforcement stance, Section 2 will disprove the arguments against enforcement. In providing an analysis of the arguments for and against enforcement, Section 2 will lastly highlight the importance of acknowledging the legitimate grounds of a refusal to enforce.

7. Subsequently, Section 3 using a comparative law approach will assess how courts and arbitral tribunals remedy the breaches of such agreements. The remedies under study include financial remedies, specific performance, stays and dismissals, injunctive relief, and refusal to enforce arbitral awards and judgements, as well as refusals to compel arbitration. Section 3 will further explore the remedy best suited to the needs of commercial parties by assessing the appropriateness of each remedy in terms of the time at which the relief is sough, as well as the effect of the remedy (i.e. restorative, deterrent, or compelling).

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content herein should be read in correlation with standard law books on consent, capacity and traditional procedural law books.

[126] Austria, Australia, England, Germany, Singapore, the Netherlands, and the US. The "Introduction" (Section 3.1) to this PhD work explains the jurisdictional choices.

[127] In addressing the question of how courts apply the requirements of certainty and completeness to the ADR agreement, this PhD work draws on a substantial body of case law from Common Law jurisdictions due to a lack thereof from Civil Law countries. Neither the German Mediation Law nor the ZPO regulate consequences of non-compliance. Therefore, we must look to jurisprudence, which is also limited. The disparity in the number of cases between the Common and Civil Law jurisdictions is perhaps due to newness of commercial ADR in Germany and Austria. In Austria, the predominant form of dispute resolution is litigation in front of national courts (P.G. MAYR en N. KRISTIN, "Regulation of Dispute Resolution in Austria: A Traditional Litigation Culture Slowly Embraces ADR" in F. STEFFEK en H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 65.). Likewise, litigation is the most common form of dispute resolution in Germany. Recourse to court is a deeply rooted tradition in German legal culture, as Germany has a traditionally strong court system (B. HESS en N. PELZER, "Regulation of Dispute Resolution in Germany: Cautious Steps towards the Construction of an ADR System" in F. STEFFEK en H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 212; A. TROSSEN, "Practical issues and Shortcomings of the New 2012 German Mediation Act" in F. DIEDRICH (ed.), *The Status Quo of Mediation in Europe and Overseas: Options for Countries in Transition*, Hamburg, Verlga Dr. Kovač, 2014, 118. C. HODGES *et al.* (eds.), *Consumer ADR in Europe Civil Justice Systems*, Oxford, Hart Publishing Ltd, 2012, 73.).

1. Binding ADR Agreements: Validity and Enforceability

8. Without ADR specific rules, general contract law rules governs the validity of ADR agreements. A binding contract must be both formally and substantively valid in order to be binding.[128] Typically, ADR agreements have not given rise to legal issues relating to the *formal* validity. This is because, unlike agreements to arbitrate, for an ADR agreement to be formally valid, there are no special requirements outside of the applicable contract law requirements in the states under analysis.[129] Regarding substantive validity, the contract law defences apply. Therefore, aspects relating the overall validity of a contract are of importance, such as fraud, duress, and incapacity.[130]

9. ADR clauses in the context of MDR clauses give rise to disagreements regarding whether the ADR step is futile or unnecessarily delaying the proceeding tiers as a delay tactic.[131] Thus, it is important to know whether and when ADR agreements are enforceable against an unwilling party.[132] To grasp these issues, it is significant to note the boundary between ADR agreements and the main contract, and in the context of MDR clauses, between ADR agreements and preceding and proceeding tiers.

10. In line with the principle of separability, ADR agreements ought to be viewed as an agreement that is separate from the main commercial contract.[133] This was specifically

[128] Formal validity relates to the external expression of agreements. This includes considerations such as whether the agreement has to be writing, signed, in a special font or colour, stapled or digital. Substantive (or material) validity concerns the legality of the content of the parties' agreement, their capacity and consent to enter the agreement, public policy, and sufficient certainty.
[129] Such agreements do not have to be in writing or signed (P. TOCHTERMANN, "Mediation in Germany: The German Mediation Act -Alternative Dispute Resolution at the Crossroads" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 549.). See also B. HESS en N. PELZER, "Mediation in Germany: Finding the Right Balance between Regulation and Self-Regulation" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015.
[130] S.R. COLE *et al.*, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 188.
[131] J.D. FILE, "United States: multi-step dispute resolution clauses", *IBA Legal Practice Division: Mediation Commitee Newsletter* 2007, 33.
[132] J.D. FILE, "United States: multi-step dispute resolution clauses", *IBA Legal Practice Division: Mediation Commitee Newsletter* 2007, 33.
[133] The doctrine of separability is supported on the basis of party autonomy, legal certainty, international comity, and the policy to give effect to dispute resolution clauses (Z.S. TANG, *Jurisdiction and Arbitration Agreements in International Commercial Law*, New York, Routledge, 2014, 74.). *Mutais mutandis*, the same rule regarding the autonomy (separabiltiy) of the arbitration clause should apply to ADR clauses. The validity of each tier of a MDR clause is autonomous from the others (E. VAN BEUKERING-ROSMULLER en P. VAN LEYNSEELE,

confirmed in Germany, where the doctrine of separability (*Selbstständigkeit*) is applied by analogy to ADR agreements.[134] Accordingly, an ADR agreement is separable from the main contract. Thus, it is not necessarily impeached or rendered void if the main contract is avoided, discharged, rescinded, frustrated, repudiated, or found to be void for illegality.[135] The SCA also illustrates this point, where amongst the agreements that addressed separability,[136] all stipulated that the ADR agreement is separable from the main contract. Therefore, the discussion of the validity of the parties' agreement to submit their current or future disputes to ADR should be isolated from the discussion of the validity of the main contract.

11. Moreover, it is legally correct to treat ADR agreements contained in MDR clauses as separable from the preceding and proceeding tiers, including the arbitration tier.[137] In the SCA, one agreement specifically pointed out this separation.[138] The Australian case of *Elizabeth Bay Developments*[139] demonstrated the risk of treating tiers in MDR clauses

"Enforceability of Mediation Clauses in Belgium and the Netherlands", *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 2017, afl. 3, (36) 46.). See also R. FEEHILY, "The Contractual Certainty of Commercial Agreements to Mediate in Ireland", *Irish Journal of Legal Studies* 2016, 64. For Germany, see BGH, XII ZR 165/06, Judgement of 29 October 2008, para. 27-28 (mediation clauses prevent court action). For the US see case severing the agreement to mediate from the rest of MDR clause to save the MDR: *Templeton Dev. Corp. v. Superior Court*, 144 Cal. App. 4th 1073, 1084, 51 Cal. Rptr. 3d 19, 27 (2006). See also R. DENDORFER en P. WILHEM, "Mediation in a global village: Legal complexity of cross-border mediation in Europe", *Yearbook on International Arbitration* 2017, 238.

[134] *Bundesgerichthof* of 4 July 1977 BGH NJW 1977, 2263, where the Court said that the clause was separable from the main contract and thus the termination of the partnership did not end the conciliation obligations. See also OLG Rostock 2006 3 U 37/06 18.09.2006; E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 189.

[135] The same principle also applies to choice of court agreements in England under Civil Procedure Rules (CPR) r 6.20 and r 11. See also M. AHMED, *The Nature and Enforcement of Choice of Court Agreements: A Comparative Study*, Oxford, Hart Publishing, 2017, 38. D. JOSEPH, *Jurisdiction and Arbitration Agreements and Their Enforcement*, London, Sweet & Maxwell, 2005, 123-128.

[136] 6 out of the 172 agreements coded.

[137] Nevertheless, "under English law in cases of the plea of *non est factum*, fraud or duress it may be that both the substantive contract and the jurisdiction agreement are simultaneously impeached. As with arbitration agreements, where illegality is alleged, the nature of the illegality needs to be considered and whether it directly impeaches the jurisdiction agreement" (M. AHMED, *The Nature and Enforcement of Choice of Court Agreements: A Comparative Study*, Oxford, Hart Publishing, 2017, 39.). See also NSW Court of Appeals, *United Group Rail Service Ltd v Rail Corporation New South Wales*, Judgement of 3 July 2009, para. 89.

[138] "If any provision hereof is held to be invalid or unenforceable in whole or part, the validity and enforceability of the remainder of such provision and other provisions of this Agreement shall not be affected" (Survey respondent clause – emailed 14-03-2017)

[139] *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Lt*d, unreported, 28 March 1995, Supreme Court of NSW, Commercial Division, Construction List, Giles J - "In this case the court analysed a tiered dispute resolution clause contained in a joint venture contract concluded between two parties. The contract contained a mediation clause requiring administration of the dispute through the ACDC, followed by arbitration in accordance with the Arbitration Rules of the ACDC. The clause referred to a mediation appointment agreement which contained a stipulation committing the parties to 'attempt in good faith to negotiate towards achieving settlement of the dispute'. The relationship between the parties feel apart when Boral withdrew its participation in the project. In view of Boral's infringement of its contractual duties Elisabeth Bay terminated the contract and

agreement as an integrated unit. In the case, the defendant treated the MDR clause as one agreement, assuming that it was sufficient to request a stay of proceedings to commence mediation in order to enforce the entire dispute resolution clauses, which also included an arbitration tier. As the party never requested the enforcement of the arbitration tier, Giles J only addressed the request to enforce the mediation tier. He found that the mediation tier was too uncertain to have a binding force and thus asserted jurisdiction, which left the arbitration tier contained in the contract unenforced.[140]

12. Here, it is imperative to point to a Singaporean case that at first sight seems to go against the above view. In *Ling Kong Henry v Tanglin Club* ("*Tanglin Club*"),[141] the Singapore High Court found that MDR clauses constitute an agreement to arbitrate. However, the case involved the seizing of the court to enforce an arbitration obligation and not a dispute relating to an ADR tier. Therefore, the findings of the court are not necessarily contradicting the above statement that the validity and effect of ADR agreements are separable.[142] Rather, what the High Court was pointing is that a MDR clause does not transform the arbitration tier to an agreement that falls outside the framework for arbitration.

13. In circumstances where ADR agreements give rise to legal disputes, parties generally are in disagreement regarding either the *substantive* validity of their agreement or regarding whether the obligations therein are fulfilled. Nevertheless, there is consensus that ADR agreements in the commercial context (business-to-business) are substantively valid and enforceable as long as they are sufficiently certain and in line with public policy and mandatory rules.[143]

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filed its claim for damages directly in court. Although the claimant's action stood in contravention of both the mediation and arbitration clause, the defendant confined his defence to claiming a breach of the first step of the dispute resolution process, namely the mediation procedure."

[140] E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 190-191.

[141] *Ling Kong Henry v Tanglin Club* [2018] SGHC 153 para 26. See also *Heartronics Corporation v EPI Life Pte Ltd and Others* (Sing. High Ct. 2017) SGHCR 17. The Singapore High Court found that in the context of Med-Arb, the mediation tier is not severable from the arbitration one and thus the repudiatory breach of the procedure meant a stay would not be granted to support arbitration. However, this case related to a Med-Arb, a hybrid dispute resolution mechanism intertwining mediation and arbitration, and not a clause requiring distinct stages of dispute resolution.

[142] For support, see also *International Research Corp PLC v Lufthansa Systems* [2014] 1 SLR 13 and Section 3.2.5, para. 63.

[143] Certainty is essential to enforcement, as without it, it is not clear what obligations the parties have entered into. Public policy and mandatory rules relate to the laws, measures, actions, and priorities of a governmental entity that cannot be deviated from even if both parties mutually agree. It is important to note that the content of the public policy and mandatory rules differ amongst states.

14. Courts and arbitral tribunals approach enforceability on a case-by-case basis and apply different *certainty* thresholds.[144] This is highly counterproductive for transnational parties and small and medium sized enterprises ('SMEs'), as they are required to draft various clauses for each jurisdiction in which they have business. To illustrate the uncertain landscape of ADR agreements, this section focuses on the persisting issues that arise from the varying certainty thresholds applied to assess ADR agreements. This section moreover will provide a brief analysis of the public policy considerations that are of relevance to the validity of the ADR. This section concludes by determining the feasibility of formulating a sufficiently certain ADR agreement in light of modern contracting practices.

1.1. Public Policy

15. As abovementioned, an ADR agreement must not violate the public policy at the place where enforcement is sought. In general, ADR poses a lower threat to public policy concerns than arbitration, as a party can always refuse to settle and take the issue to court.[145] Moreover, a party can apply for the annulment of the contract if there is a public policy issue. Highly relevant in this context is the parties inalienable right of access to justice. An ADR agreement cannot be valid if the parties contract out of this right of access to justice. Nevertheless, it is now clear that an ADR agreement does not generally breach this right.[146] ADR agreements are only a temporary waiver of the right to a fair hearing before a court or tribunal and not a permanent waiver of the right to access binding solutions.[147]

16. In some instances, however, ADR agreements breach the right of access to court. This is the case, for instance, when a contract unfairly prevents or delays a party from accessing a binding resolution of their dispute. In that case, the ADR agreement can be invalidated on the basis of interfering with a parties' access to justice. The 1977 *Bundesgerichthof*[148] case illustrates such a situation, where the court refused to enforce an ADR clause in a

[144] G. BORN en M. ŠĆEKIĆ, "Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'" in D.D. CARON et al. (eds.), *Practising Virtue: Inside International Arbitration*, Oxford Scholarship Online, 2015, 239.
[145] S.R. COLE *et al.*, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 187.
[146] *Bundesgrichtshof* 23 November 1983 NJW 1984, 669 – conciliation clauses are in accordance with public policy (*guten Sitten*) under §138(1) BGB. N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 204. See also Articles 19(4) and 20 of the Basic Law of the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*), 23 May 1949 regarding *unverzichtbare Rechte.*
[147] See *Bundesgerichthof*, VIII ZR 344/97, Judgement of 18 November 1998; *OLG Rostock*, 3 U 37/06, Judgement of 19 September 2006 at II.
[148] *Bundesgerichthof* of 4 July 1977 BGH NJW 1977, 2263

partnership agreement, as it was a too far-reaching obstacle to court access. The conciliation procedure was conditional on the payment of a deposit towards the cost of the conciliation, but the clause did not have a basis on which the fee was to be calculated, which unduly restricted the claimant's access to court.[149] However, as Chapter II will demonstrate, there are now ways to determine how to calculate fees in absence of a choice by parties. Thus, such a missing piece should no longer be seen as a barrier to access to justice.

17. A similar but more limited approach is seen in American courts under the doctrine of unconscionability. Procedural and substantive unconscionability are relied upon to deny enforcement of an ADR agreement on the basis of legal invalidity.[150] Procedural unconscionability relates to the pre-contractual negotiations and concerns duress, duty to disclose, and fraud.[151] Substantive unconscionability relates to aspects of the contract that are unconscionable (unacceptable).[152] In relation to ADR agreements, this includes unfair terms related to costs, location, or other expenses beyond reasonable expectations.[153] The best example to demonstrate this exception does not derive from a commercial contract: in *Garrett v Hooters-Toledo,*[154] the dispute involved a mediation clause that required the employee to request mediation within ten days of a claim arising.[155] If the employee failed to bring the claim within this period, the clause indicated that this was a forfeiture of the claim.[156] Moreover, the mediation would have to take place in a city other than the employee's work place. The court held that the clause was unconscionable, as the terms of the clause imposed "burdens and barriers that would routinely defer former employees from vindicating their rights."[157]

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[149] In *OLG Frankfurt* NJW-RR 1998, 778 and *Bundesgerichthof* NJW 1999, 674, it was clarified that the duty to pay a deposit can still be enforceable if the ground for the fees are mutually agreed.
[150] UCC, Section 2-302:"if the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse the contract." See also L.V. KATZ, "Getting to the Table Kicking and Screaming: Drafting an Enforceable Mediation Provision", *Alternatives to the High Cost of Litigation* 2008, 185. S.R. COLE *et al.*, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 189. A.A. LEFF, "Unconscionability and the Code – The Emperor's New Clause", *Penn Law Review* 1967, afl. 4, 485.
[151] J.D. CALAMARI en J.M. PERILLO, *The Law of Contracts*, West Group, 1998. 406. See also A.A. LEFF, "Unconscionability and the Code – The Emperor's New Clause", *Penn Law Review* 1967, afl. 4, 499-500.
[152] J.D. CALAMARI en J.M. PERILLO, *The Law of Contracts*, West Group, 1998, 407.
[153] S.R. COLE *et al.*, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 190.
[154] *Garrett v Hooters-Toledo* 295 F Supp 2s 774 (ND Ohio 2003).
[155] On location, see *Miliner v. Bock Evans Financial Counsel, Ltd.*, 114 F. Supp. 3d 871, 871 (N.D. Cal. 2015).
[156] J. RALPH, "Unconscionable Mediation Clauses: Garret v Hooters-Toledo", *Harvard Negotiation Law Review* 2005, 1.
[157] *Garrett v Hooters-Toledo* 295 F Supp 2s 774 (ND Ohio 2003), 783. See also N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 204. Other cases on unconscientionability: i.e. a clause that required the party to give notice of any claim within one year after the claim is known or lose the right to pursue it entirely through mediation and then arbitration (Ninth Circuit Court

18. Another instance where an ADR agreement is contrary to mandatory rules is, when the agreement is contrary to legislation. There have been several cases of American courts refusing to enforce an ADR agreement calling for mediation contrary to legislation.[158] This approach is correct, since it is self-evident that ADR agreements as contracts ought not to violate rules.

1.2. Certainty

19. The contract law requirements of certainty and completion exist in many jurisdictions.[159] Contract law governs the making and enforcing of agreements. Certainty in this context relates to the clarity of the obligations that the agreement imposes on the parties. Certainty is essential to the enforcement of the ADR agreement, as it requires the participation of the parties and is not self-executing. In other words, courts need a sufficiently objective criterion to assess the parties' compliance. Although some general trends are evident, courts and tribunals continue to have differing certainty thresholds. In the most general terms, a sufficiently *certain* ADR agreement must indicate the parties' intention to be bound to ADR by using mandatory language, describing the scope of the agreement,[160] and the mechanism to be followed.[161] However, as this section will demonstrate, there are problematic

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of Appeals *Davis v. O'Melveny & Myers,* 485 F.3d 1066 (9th Ci. 2007). 10 day notice requirement unconsciensceable (*Garret v Hotters-Toledo*, 295 F. Supp. 2d 774 (N.D. Ohio 2003).

[158] Two cases demonstrate this point clearly. First, in *Templeton Dev.,* a Californian court refused to enforce a construction contract that required mediation in Nevada contrary to the California Code of Civil Procedure 210.42(a) (*Templeton Dev. Corp. v. Superior Court*, 144 Cal. App. 4th 1073, 1084, 51 Cal. Rptr. 3d 19, 27 (2006)). Second, in *Ford Motor Co.¸* the court found that the clause was in conflict with the state Motor Vehicle Franchise Act (*Ford Motor Co. v. Motro Veh. Review Board*, 338 III.App.3d 880, 788 N.E.2d 187 (III.App. 5 Dist. 2003)).

[159] In Civil Law jurisdictions: *essentialia negotii.* General principles of contract formation under the common law require the parties to a contract to demonstrate a clear intent to enter into a relation that is sufficiently certain in its terms (A. BIHANCOV, "What is an example of a good dispute resolution clause and why?", *Australian Centre for Justice Innovation* 2014, 2. K. HAN en N. POON, "The Enforceability of Alternative Dispute Resolution Agreements: Emerging Problems and Issues", *Singapore Academy of Law Journal* 2013, 457.).

[160] In addition to expressing the will of the parties, an enforceable ADR agreement must define the types of dispute the parties intend to submit to mediation. See BGB §145 et seq. It should be noted that, the conditions of defining the dispute subject to ADR is known as the *bestimmtheitserfordernis* and is highly relevant in ADR agreements where parties agree to resolve a future dispute via ADR. See also M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 287.

[161] The use of the word "shall" and "must" in dispute resolution clause indicates that the parties must first to seek ADR before arbitration (compulsory). An exception might be Germany *LG Münster* of 21 December 2000 DstRe 2001, 604. Moreover, the 1975 ICC Case No. 4230 concerned pre-arbitral conciliation where the claimant failed to initiate conciliation and the defendant had raised a jurisdictional objection. The tribunal decided that the clause had no binding force and that it had jurisdiction. The tribunal found that it had jurisdiction in accordance with the non-obligatory wording of the clause: "all disputes related to the present contract *may* be settled amicably." Furthermore, ICC Case No. 10256 (see also no 5872) involved a pre-arbitral requirement that was not binding, as the clause stipulated that the parties "may" initiate mediation. The tribunal found that the wording of

differences in the way courts assess whether an ADR agreement has fulfilled the above conditions.

1.2.1. Differing Approaches to What Constitutes Mandatory Language

20. In the Common Law jurisdictions under analysis, an ADR agreement is only viewed as mandatory if it, in addition to using non permissive language, clarifies the binding nature of the agreement as a condition precedent to other binding mechanisms.[162] Requiring that the ADR agreement be a precondition means that parties wishing to draft an enforceable ADR agreement must enter into MDR clauses. This is not entirely problematic, as in practice, parties mostly conclude ADR agreements in a MDR context.[163] Nevertheless, it is preferred that as long as there is a clear intention to conduct ADR, that obligation should be imposed regardless of whether the parties have formulated their agreement as a condition precedent to binding mechanisms.

21. In the Civil Law jurisdictions under analysis,[164] there is no need to formulate the obligation to pursue ADR as an obligation precedent to a binding mechanism. In Germany, ADR agreements do not constitute a condition precedent to arbitration or court litigation; they instead constitute a *pactum de non petendo.*[165] This means that the parties have agreed (temporarily) not to sue each other. An ADR agreement has such an effect irrespective of whether the parties have expressly mentioned this intention or not.[166] This is quite different to the Common Law approach in focus, which requires that the agreement be explicit about ADR being a precondition. As will be further discussed in Chapter III, it is advisable to

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the clause indicated that mediation was not mandatory: "either party […] *may* [emphasis added] refer the dispute to an expert for consideration of the dispute."

[162] B. MARSH, A. ODDY en J. O'NEILL, "England and Wales" in N. ALEXANDER en S. WALSH (eds.), *EU Mediation Law Handbook, Global Trends in Dispute Resolution* 7, Alphen aan den Rijn, Kluwer Law Internatioanl, 2017, 220. K. SIEBEL en R. HOUGH, "Uncertainty in Dispute Resolution Clauses", *DLA Piper Asia Pacific Updates* 2013. See also ICC Case No. 9984: the wording of the clause indicated that the ADR is an obligation, and the tribunal found the clause binding upon the parties.

[163] See also Chapter II, Section 2.2.

[164] Austria, Germany and the Netherlands.

[165] The mutual agreement not to sue ('*dilatorischer Klageverzicht*') is a procedural law agreement that is understood as a temporary waiver of the parties' inherent rich to go to court. Such an agreement does not affect the merits of the dispute (P.K. BERGER, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*, 1, Alphen aan Den Rijn, Kluwer Law International, 2015, 128.). Also established by §9(3) of the DIS Mediation Rules: "The parties undertake not to bring an (arbitration) action for such claims that are still subject to pending mediation proceedings."

[166] "A contractual interpretation of these types of 'mandatory' clauses [is] based on the objective intention of the parties pursuant to §§133, 157 German Civil Code" (K. OSSWALD en G. FLECKE-GIAMMARCO, "Germany" in N. ALEXANDER en S. WALSH (eds.), *EU Mediation Law Handbook, Global Trends in Dispute Resolution* 7, Alphen aan den Rijn, Kluwer Law International, 2017, 360.). See also A. HACKE, ""New York Convention II" to come?" n/a, 115, para. 70.

enforce ADR agreements as long as they are formulated in mandatory terms regardless of forming a condition precedent to binding mechanisms such as litigation or arbitration.

1.2.2. The Challenge of Sufficient Certainty

22. Analysing the current approaches to the enforcement of ADR agreements results in a disconcerting conclusion regarding how courts and tribunals assess these agreements. Research into ICC arbitral tribunals' awards indicates that arbitrators tend to follow a different approach from the courts. Applying a two-pronged approach, some tribunals firstly tend to consider whether the parties had an obligation to attempt mediation prior to arbitration.[167] Parties' must use mandatory wording to demonstrate the obligatory nature of their ADR agreement.[168] If so, the ICC arbitral tribunals, applying a factual analysis, check if this obligation was fulfilled.[169] As Section 3.1 will demonstrate, tribunals do not always follow the above path and have shown anti-ADR positions. It should, however, be noted that, there is no up-to-date research on how arbitral tribunals outside of the ICC approach these agreements. Nevertheless, the ICC is one of the most prominent institutions providing dispute resolution services.[170] Therefore, conclusions drawn from studying ICC arbitral tribunals are of significance.

23. Turning to how courts approach ADR agreements, they require that the agreements be sufficiently certain in order to be enforceable. Today, the standard of sufficient certainty is higher for ADR agreements than for arbitration agreements. This is surprising, as their effect on the right of access to justice is not as significant as that of an arbitration agreement. The standard of sufficient certainty is a clear hurdle to the enforcement of these agreements. In addition, the different standards of sufficient certainty result in a confused setting for cross-border ADR agreements. As there is no uniform test to determine whether an ADR

[167] W. ERLANK, "Enforcement of Multi-Tiered Dispute Resolution Clauses" 2002, 42.
[168] ICC Case No. 4230: The tribunal found that it had jurisdiction in accordance with the non-obligatory wording of the clause: "all disputes related to the present contract *may* be settled amicably." ICC Case No. 10256: The tribunal found that the wording of the clause indicated that mediation was not mandatory: "either party […] *may* [emphasis added] refer the dispute to an expert for consideration of the dispute." ICC Case No. 10256, Interim Award of August 12, 2000: three-tiered clauses providing for mediation before arbitration – tribunal rejected the argument that mediation was a pre-condition to arbitration as the wording suggested that mediation was optional. Also regarding mandatory language, see ICC case no. 9977 – as cited by J.D. FIGUERES, "Multi-Tiered Dispute Resolution Clauses in ICC Arbitration", *ICC International Court of Arbitration Bulleting* 2003, afl. 1. and ICC case no 8462 – Final Award of June 1999.
[169] See W. ERLANK, "Enforcement of Multi-Tiered Dispute Resolution Clauses" 2002, 42.
[170] ICC, *Dispute Resolution Services*, https://iccwbo.org/dispute-resolution-services/).

agreement is binding on the parties,[171] courts and tribunals approach enforceability on a case-by-case basis.

24. Here, there is a clear difference between the Common Law and the Civil Law under study as to certainty. In the Germanic systems under analysis, the courts follow the notion that the will of the parties should be adhered to in order to ensure reliance and only the absence of will to enter the contract should be a basis for avoidance.[172] Thus, to assess certainty, these courts focus on the entire context of the agreement, not the precise language of the particular agreement.[173] In the German Supreme Court Case XII ZR 165/06,[174] the court found the clause to be sufficiently certain although the parties did not specify how the conciliation board is to be composed and the conciliation body was wrongly referred to as an "Arbitral Tribunal" in the clause.[175] The court noted that, the mistake in the name was only a harmless misnomer that should be ignored in light of the parties' clear intention.

25. Moreover, there is a division among the Common Law jurisdictions in focus. It appears at this stage that courts in Australia and Singapore take a more liberal approach than English courts.[176] To illustrate the above division, the paragraphs below provide illustrations of when the conditions for sufficient certainty in the jurisdictions under analysis differ.

    The first difference relates to the extent to which the parties must described the selected ADR procedure in order for the court to find the agreement to be sufficiently certain. Amongst the states under analysis, the English courts take the strictest approach to sufficient

[171] See also K. HAN en N. POON, "The Enforceability of Alternative Dispute Resolution Agreements: Emerging Problems and Issues", *Singapore Academy of Law Journal* 2013, 460.
[172] As long as the clauses bind both parties, they are valid. The function of clauses are to keep disputes out of court. See H. BEALE, "Characteristics of Contract Laws and the European Optional Instrument" in H. EIDENMÜELLER (ed.), *Regulator Competition in Contract Law and Dispute Resolution*, Oxford, Hart Publishing, 2013, 320.
[173] E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 83. Binding terms *Mußbestimmung* despite apparently permissive wording (*Bundesgrichtshof* 23 November 1983, BGH NJW 1984, 669). Also in *LG Münster* of 21 December 2000 DStRE 2001, 614 – where the clause stipulated that the parties should attempt conciliation before court proceedings, but clause was found to have an imperative nature pointing to the purpose of the clause.
[174] German Supreme Court, XII ZR 165/06, Judgment of 29 October 2008, NJW-RR 2009, 637. See https://lexetius.com/2008,3422 §10 des Vertrages lautet.
[175] Para. 18 & 23: Schlichtungsstelle als "Schiedsgericht".
[176] L. SNEDDON en A. LEES, "Frequently asked questions: is my tiered dispute resolution clause binding?", *Ashurst* 2013, 2. J. LEE, "Mediation Clauses at the Crossroads", *Singapore Journal of Legal Studies* 2001, 87. K. HAN en N. POON, "The Enforceability of Alternative Dispute Resolution Agreements: Emerging Problems and Issues", *Singapore Academy of Law Journal* 2013, 474.

certainty.[177] For instance, in the 2012 *Sulamerica*[178] case, Moore-Bick LJ found the clause unenforceable while acknowledging that the parties clearly intended to be bound.[179] Likewise, Hildyard J in *Wah*,[180] found the clause unenforceable despite it establishing a detailed procedure, as the process was not clear regarding who was to be involved, whether the neutral was to reach a conclusion or take a particular step, and as the clause contained vague terms such as 'attempt to resolve the dispute'.[181]

26. The approach in *Sulamerica* and *Wah* seems to act against the 2002 celebrated judgement in *Cable & Wireless*[182] where Colman J found a clause enforceable despite the parties' lack

[177] The clause in *Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd.* [2008] EWHC 2019 (TCC) was considered unenforceable. "If any dispute or difference arises under or in connection with this Contract, where the parties have agreed to do so, the dispute or difference may be submitted to mediation in accordance with the provision of clause 39B." Clause 39 B: "The objective under clause 39 shall be to reach a binding agreement in resolution of the dispute or difference." According to Coulson J, this stipulation is too uncertain to have binding force. See also N. ANDREWS, *Andrews on Civil Processes: Arbitration and Mediation*, II, Cambridge, Intersentia, 2013, para. 1.52.

[178] ECA (Civil Division), *Sulamerica CIA Nacionla De Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, Judgement of 16 May 2012.

[179] *Sulamerica Cia Nacional De Seguros SA and others v Enesa Engenharia Sa and others* [20120] EWCA Civ 638 (CA) – Court of Appeal found the mediation clause void for uncertainty. The clause in question required that the parties "will seek to have the dispute amicable resolved by mediation" and that the parties were free to terminate the mediation by notice after the first mediation meeting. In including a time-frame for mediation the clause further provided for 90 days from the commencement of the mediation following which the parties are to initiate arbitration. The clause further addressed confidentiality and costs of the mediation. Despite the clause having addressed important aspects, it failed for certainty as it not address the appointment of the mediator and did not have a detailed description of the mediation process (para 36). Moore-Bick LJ "The most that might be said is that it imposes on any party who is contemplating referring a dispute to arbitration an obligation to invite the other to join in an ad hoc mediation, but the content of even such a limited obligation is so uncertain as to render it impossible of enforcement in the absence of some defined mediation process" (para. 35-36).

[180] EHC (Chancery Division), *Wah (Aka Alan Tang) & Anor v Grant Thornton International Ltd. and others*, [2012] EWHC 3198 (Ch), [2012] CN 63, Judgement of 14 November 2012.

[181] "(a) Any dispute or difference as described in Section 14.2 shall in the first instance be referred to the Chief Executive in an attempt to settle such dispute or difference by amicable conciliation of an informal nature. The conciliation provided for in this Section 14.3 shall be applicable notwithstanding that GTIL may be a party to the dispute or difference in question. (b) The Chief Executive shall attempt to resolve the dispute or difference in an amicable fashion. Any party may submit a request for such conciliation regarding any such dispute or difference, and the Chief Executive shall have up to one (1) month after receipt of such request to attempt to resolve it. (c) If the dispute or difference shall not have been resolved within one (1) month following submissions to the Chief Executive, it shall be referred to a Panel of three (3) members of the Board to be selected by the Board, none of whom shall be associated with or in any other way related to the Member Firm or Member Firms who are parties to the dispute or difference. The Panel shall have up to one (1) month to attempt to resolve the dispute or difference. (d) Until the earlier of (i) such date as the Panel shall determine that it cannot resolve the dispute or difference, or (ii) the date one (1) month after the request for conciliation of the dispute or difference has been referred to it, no party may commence any arbitration procedures in accordance with this Agreement" (para. 27). The claimant initiated arbitration and skipped the conciliation step. The tribunal rejected the defendant's jurisdictional objections and gave an award which was challenged under Section 67 of the Arbitration Act 1996. The court on the basis of its supervisory power over the tribunal's jurisdiction found that the clause, although very detailed, did not create an enforceable precedent. SA, Hildyard J found that the cause was not sufficiently certain regarding the commitments to peruse the ADR process.

[182] EHC (Commercial Court) Division, *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm Ct), [2002] CLC 1319, Judgement of 11 October 2002.

of choosing a particular method of dispute resolution.[183] This strict approach remains despite the *Emirate* case,[184] where a MDR clause requiring "friendly discussions" was enforceable. In the case, Teare J purposefully distinguished *Sulamerica* and *Wah* on the basis that these cases required mediation/conciliation, while the latter required the resolution of the dispute through friendly discussion in good faith.[185] However, it is possible that the reasoning of Teare J will indirectly affect the courts' policy towards enforcing ADR agreements.[186] This is because, English courts' main argument for their aversion to enforcement of ADR agreements has been their similarity to agreements to agree, which prior to *Emirates* were found to be unenforceable.[187] Thus, it can be said that the position of English courts towards the enforceability of such agreements is evolving.[188]

27. The approach to ADR agreements in Australia and Singapore is enforcement friendly. Although the approach of Australia and Singapore correlates, with the passing of the 2017 Mediation Act, Singapore appears to be a step ahead of Australia in its approach to ADR agreements. Article 8 of the Mediation Act grants courts in Singapore the statutory power to order a stay of proceedings pending mediation as long as the parties have expressed their intention to be bound to their ADR agreement in writing. Accordingly, the Mediation Act does not appear to require the agreement to address further details about the mediation or the ADR provider.

28. The pro-enforcement policy of Singapore is also evident in case law. In *International Research Corp,*[189] Sundaresh Menon CJ on appeal agreed with the High Court of Singapore ('HCS') that the precondition to arbitration was enforceable although the title of the clause

[183] EHC (Commercial Court) Division, *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm Ct), [2002] CLC 1319, Judgement of 11 October 2002, para. 25.
[184] EHC (Queen's Bench Division), *Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd* [2014] EWHC 014 (Comm), Judgement of 1 July 2014.
[185] In *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm), the Australian decision in *United Group* was of relevance. Tear J relied on the analysis of English authorities by Alssop J of New South Wales Court of Appeal while distinguishing *Walford v Miles* and *Sulamerica Cia Nacionel SA and others v Enesa Enger.*
[186] See also M. SALEHIJAM, "Enforceability of ADR Agreements: An Analysis of Selected EU Member States", *International Trade and Business Law Review* 2018.
[187] See M. SALEHIJAM, "A Call for a Harmonized Approach to Agreements to Mediate", *Yearbook on International Arbitration and ADR* 2018.
[188] O. KRAUSS, "The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith Under English law", *McGill Journal of Dispute Resolution* 2016, 147.
[189] Singapore Court of Appeals, *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55, Judgement of 18 October 2013.

called for mediation, but described the process of negotiations.[190] Chan Seng Onn J of the HCS in relying on the mandatory character of the dispute resolution clause referred to the reasoning of Colman J in the English case of *Cable & Wireless* and did not cite the English cases of *Sulamerica* or *Wah.*[191]

29. Likewise, the Australian courts' approach to dispute resolution clauses is to hold the parties to the terms of their agreement.[192] These courts interpret such clauses in a liberal way and thus in the same manner as other clauses in a commercial contract.[193] According to Vickery J in the Australian case of *WTE*,[194] "as a minimum, what is necessary for a valid and enforceable dispute resolution clause, is to set out the process or model to be employed, and in a manner which does not leave this to further argument."[195] Thus, the requirement of certainty does not imply the dispute resolution clause must be overly structured.[196] To illustrate, Warren J of the Supreme Court of Victoria in *Computershare Ltd v Perpetual Registrars*[197] found that, "where parties have made a special arrangement requiring them to address a path to a potential solution there is every reason for a court to say such parties should be required to endeavour in good faith to achieve it. In these circumstances the court does not need to see a set of rules laid out in advance by which the agreement, if any, between the parties may in fact be achieved."[198]

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[190] Singapore Court of Appeals, *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55, Judgement of 18 October 2013, para. 54

[191] HCS, *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2012] SGHC 226, Judgement of 12 November 2012, para. 95.

[192] A. MURRAY, *Enforcing the modern suite of dispute resolution clauses*, 2015, 3.

[193] In interpreting clauses in commercial clauses, the courts apply the following rules of interpretation: "Give the contract a business-like interpretation paying attention to the language used by the parties, the commercial circumstance which the document addresses, and the object which it is intended to secure" (*Mccann v Switzerland Insurance Australia Limited* [2000] HCA 65); "Only hold a clause void for uncertainty as a last resort, where it is not possible to give it a reasonable meaning" (*Lord Denning MR in Greater London Council v Connolly* [1970] 2 QB 100).

[194] Victorian Supreme Court, *WTE Co-Generation v RCR Energy Pty Ltd* [2013] VSC 314, Judgement of 21 June 2013.

[195] Victorian Supreme Court, *WTE Co-Generation v RCR Energy Pty Ltd* [2013] VSC 314, Judgement of 21 June 2013, para. 46.

[196] In *Aiton*, Einstein J noted that, "if specificity beyond essential certainty were required, the dispute resolution procedure may be counter-productive as it may begin to look much like litigation itself." However, the clause in this case fail, as it did not address the repayment of the mediator (Supreme Court of NSW, *Aiton Australia Pty Ltd v Transfield Pty Ltd*, [1999] NSWSC 996, Judgement of 1 October 1999, para. 46 &174). See also M. HALES, "Australia" in I.L. COMMITTEE (ed.), *Multi-Tiered Dispute Resolution Clauses*, 2015, 11.

[197] *Computershare Limited v Prepetual Registars Ltd and Ors* N2 [2000] VSC 233.

[198] *Computershare Limited v Prepetual Registars Ltd and Ors* N2 [2000] VSC 233, para 7.

30. There have also been marked differences regarding the need to address the selection and remuneration of the ADR neutral in the parties' ADR agreement. It is clear that in the Common Law jurisdictions under analysis, an enforceable ADR agreement must provide a clear methodology for the appointment of the third-party neutral.[199] However, it is not clear whether similar to Common Law jurisdictions, a specification of a procedure for the appointment of the neutral suffices in Germany or if the agreement must specify the mediator by name.[200] In Austria, according to Frauenberger-Pfeiler, the certainty requirement implies that the agreement must contain details regarding the selection of the neutral(s).[201] Nevertheless, in both jurisdictions there is no explicit decision on the question of whether an ADR agreement is enforceable.[202]

31. In theory, the lack of a procedure to select the neutral should not act as the barrier to the enforceability of the ADR agreement. Courts have the power to designate a neutral, as a similar practice for the selection of the arbitrator upon the failure by the parties to set out the procedure exits.[203] Moreover, as Chapter II will outline, the empirical study conducted in the context of this research demonstrated that there are numerous institutional rules that outline how the neutral is to be selected in absence of choice by the parties.

32. Lastly, differences exist regarding whether a reference to a good faith obligation in the ADR agreement warrants its unenforceability.[204] It seems that here the lack of consensus bypasses

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[199] In relation to England, see for example *Halifax Financial Services v. Intuitive Systems Limited* [1999] 1 All ER 303; *Cable & Wireless v. IBM* [2002] EWHC 2059; *Holloway v. Chancery Mead Limited* [2007] EWHC 2495; and *Sulamerica CIA Nacional de Seguros v. Enesa* [2012] EWCA Civ 638. See also B. MARSH *et al.*, "England and Wales" in N. ALEXANDER en S. WALSH (eds.), *EU Mediation Law Handbook, Global Trends in Dispute Resolution* 7, Alphen aan den Rijn, Kluwer Law Internatioanl, 2017, 220. K. SIEBEL en R. HOUGH, "Uncertainty in Dispute Resolution Clauses", *DLA Piper Asia Pacific Updates* 2013.

[200] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 288.

[201] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 288.

[202] The BGH has held conciliation clauses that clearly demonstrate the intention of the parties to make litigation a last resort as enforceable.

[203] *Annapolis Professional Firefighters Loc*al *1929, IAFF, AFL-CIO v. City of Annapolis,* 100 Md. App. 714, 642 A.2d 889, 895 (1994). "Another strategic issue is whether the mediation clause should provide for the selection of a mediator in the event that the parties cannot agree once a dispute arises. In a Maryland case, the parties designated a public agency to select the mediator. At the time of the dispute, the designated public agency was defunct. The court of appeals indicated that a court had equitable power to designate a mediator if requested by a party. The court referenced a similar practice for selection of an arbitrator upon failure of method set out in the arbitration clause" (S.R. COLE *et al.*, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 197.).

[204] "A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of

the Common and Civil Law divide. English courts have been hostile to the doctrine of good faith.[205] In the English of *Wah*, Hildyard J ruled that the term good faith was "too open-ended" and therefore does not point to a sufficiently certain procedure that is to be followed by the parties during their negotiations.[206] Again, the English approach is stricter than other states analysed herein.

33. In other states, there appears to be a trend towards recognizing the good faith obligation in dispute resolution clauses.[207] In the US, the duty of good faith is as a general principle of contract law that is implied in all commercial contracts.[208] According to §205 of the American Restatement (Second) of Contracts, "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[209] Moreover, in the Australian courts the obligation of good faith negotiations is valid and enforceable.[210] In the Australian case of *Aiton*, Einstein J reflected on a commercial contract requiring the parties to negotiate in good faith and found that:

> "It is clear that a tension may exist between negotiation from a position of self-interest and the maintenance of good faith in attempting to settle disputes. However, maintenance of good faith in a negotiating process is not inconsistent with having regard to self-interest."[211]

In other words, good faith does not imply the obligation to act for or in the interests of the other party. Furthermore, Raja JA of the SCA clarified in *HSBC v Toshin*[212] that it will enforce good faith negotiation clauses in cases where it is clear to the court that the parties

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intent to defraud or to seek unconscionable advantage" (Bryan A. Garner (ed.), Black's Law Dictionary, 7th ed., St. Paul 1999, 701).

[205] C. PARKER, G. ROWAN en N. PANTLIN, "How Far Can You Act in Your Own Self-Interest?", *Herbert Smith Freehills* 2016, 3. O. KRAUSS, "The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith Under English law", *McGill Journal of Dispute Resolution* 2016, 148.

[206] EHC (Chancery Division), *Wah (Aka Alan Tang) & Anor v Grant Thornton International Ltd. and others*, [2012] EWHC 3198 (Ch), [2012] CN 63, Judgement of 14 November 2012, para 57.

[207] N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 204.

[208] See S.J. BURTON, "Breach of Contract and the Common Law Duty to Perform in Good Faith", *Harvard Law Review* 1980, 371.

[209] Restatement (Second) of the Law of Contracts §205 (1981) [Restatement].

[210] See *United Group Rail Services Limited v. Rail Corporation New South Wales* [2009] NSWCA 177

[211] Supreme Court of NSW, *Aiton Australia Pty Ltd v Transfield Pty Ltd*, [1999] NSWSC 996, Judgement of 1 October 1999, para 83. See also NSW Court of Appeals, *United Group Rail Service Ltd v Rail Corporation New South Wales*, Judgement of 3 July 2009, para. 81.

[212] SCA, *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v. Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738, Judgement of 27 August 2012.

have not fulfilled or performed this obligation.[213] Lastly, courts in pro-good faith Civil Law jurisdictions, such as Germany,[214] imply the good faith obligation into contractual arrangements.[215]

34. In absence of a uniform framework regulating the conditions for validity and enforceability of ADR agreements, it is important that the parties carefully draft their agreement in order to ensure its effectiveness. Drawing from my comparative law analysis of the varying approaches to ADR agreements, I conclude that for an ADR agreement to be transnationally binding, it must be sufficiently certain and clear on the parties' intention to be bound by the obligation to attempt ADR.[216] To ensure that an ADR agreement meets the certainty threshold in the jurisdictions under study, it must address the following matters:[217]

    (i) The scope of the agreement (disputes covered);[218]

    (ii) Description of the procedure (i.e. How to initiate the procedure, minimum attendance requirement, how to terminate the procedure);

    (iii) Procedure to select the neutral(s) and his/her payment;

    (iv) Time-frame for the ADR or a timetable for compliance;[219] and

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[213] SCA, *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v. Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738, Judgement of 27 August 2012, para. 40.
[214] §242 BGB: "An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration."
[215] N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 204. See also K. HAN en N. POON, "The Enforceability of Alternative Dispute Resolution Agreements: Emerging Problems and Issues", *Singapore Academy of Law Journal* 2013, 475.
[216] The use of the word "shall" and "must" in dispute resolution clause indicates that the parties must first to seek mediation before arbitration (compulsory) (An exception might be Germany *LG Münster* of 21 December 2000 DstRe 2001, 604.). Moreover, the 1975 ICC Case No. 4230 concerned pre-arbitral conciliation where the claimant failed to initiate conciliation and the defendant had raised a jurisdictional objection. The tribunal decided that the clause had no binding force and that it had jurisdiction. The tribunal found that it had jurisdiction in accordance with the non-obligatory wording of the clause: "all disputes related to the present contract *may* be settled amicably." Likewise, the ICC Case No. 10256 (see also no 5872) involved a pre-arbitral requirement that was not binding, as the clause stipulated that the parties "may" initiate mediation. The tribunal found that the wording of the clause indicated that mediation was not mandatory: "either party […] *may* [emphasis added] refer the dispute to an expert for consideration of the dispute."
[217] See also *Elizabeth Bay Development Pty Ltd v Boral Building Services ty Ltd* (1995) 36 NSWLR 709; *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194; *Chinadotcom Corporation v Hugh Morrow* [2001] NSWSC 209. Accordingly, for ADR clause to be enforceable, all steps should be set out clearly and relevant rules and guidelines incorporated. See also Y. ZHAO, "Revisiting the issue of enforceability of mediation agreements in Hong Kong", *China-EU Law Journal* 2013, 125.
[218] Scope is of importance, as the ADR agreement can only be enforced in relation to the disputes that fall under its scope.
[219] Prescribing a time-period for the completion of the ADR improves clarity of the obligation by expressing that the parties may only proceed to other mechanisms/adjudication following the expiry of the specified time frame. The duration of mediation is of importance to the parties, the mediator, as well as courts and tribunals especially in relation to limitation and prescription periods. It is thus necessary to ascertain when the ADR proceedings start and end. In some countries, the dateline is fixed, this is also the case in some institutional rules. Moreover, according to Zhao, "[i]t is not enough to state that the parties will move to arbitration if they cannot settle their

(v) Clarifications regarding obligation to refrain from acting (that is initiating arbitration).

35. Moreover, the research conducted in the context of this study has shown that although not obligatory, to increase certainty, it is advisable that an ADR agreement addresses the following elements:

    (i) The parties' behavioural obligations (i.e. cooperate, meaningful discussions, etc.); and

    (ii) The place of the mechanism or method for selection thereof.

36. Lastly, if the parties wish to eliminate additional potential points of disagreement, it is advisable that the agreements address the following elements:

    (i) Applicable procedural and substantive law;

    (ii) Governing court for matters relating to the ADR agreement;

    (iii) Applicable institutional rules (attention must be made to the version agreed to);

    (iv) Consequence for a failure to comply (stay, dismissal, damages, sanctions, etc.);

    (v) The effect on limitation periods; and

    (vi) The language of ADR or method for selection thereof.

37. Typically, when parties opt for institutionalised ADR, the applicable ADR rules tend to cover many aspects of the mechanism (ranging from selecting the neutral to time-frames and location). However, it is not always clear that these rules fulfil the varying certainty thresholds. Thus, as Chapter III will discuss, there is a need for ADR providers to collaborate to ensure the enforceability of their model ADR clauses and procedural rules.

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disputes by mediation. Rather, the clause should clarify what constitutes and complete a tier or step, that is, it should specify the point of failure and set out the criteria for determining if a tier or step has failed" (Y. ZHAO, "Revisiting the issue of enforceability of mediation agreements in Hong Kong", *China-EU Law Journal* 2013, 128.). Furthermore, according to the *Budesgerichtshof* decision of 4 July 1977, the precise wording of the clause is essential to enforceability of the obligations therein (BGH NJW 1977, 2263). Essential is the time-frame within which the conciliation is to occur to ensure that access to justice is not indefinitely restricted. This was reinforced in BGH decision of 23 November 1983: the exclusion of actionability should be clearly defined and thus time-frames are important. Parties must also prescribe conditions to fulfil to start litigation. Otherwise, ambiguity causes excessive difficulties in enforcing duties under ADR clauses (BGH, NJW 1984, 669). See also C. ESPLUGUES, "General Report: New Developments in Civil and Commercial Mediation - Global Comparative Perspectives" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 62. E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 82.

1.3. Drafting Enforceable ADR Agreements

38. Undoubtedly, the more detailed an ADR agreement, the less chances for a court finding the agreement uncertain. When parties insert tailor-made ADR agreements, there is a higher risk of interpretive difficulties that arise from diverging standards of certainty.[220] This was especially evident in the English case of *Wah*, where Hildyard J found the detailed tailor-made and detailed clause unenforceable.[221] Therefore, by opting for institutionalised ADR agreements, parties, in theory, increase the chances of enforceability. However, there is no guarantee that ADR agreements referring to institutional rules are enforceable. The Australian case of *Elizabeth Bay*[222] demonstrates this point. In the case, the clause in question required mediation administered by the Australian Commercial Dispute Center ('ACDC'). Giles J found that the clause was not sufficiently certain, as the ACDC guidelines did not match the mediation agreement.[223]

39. In reality, dispute resolution clauses tend to be drafted with little care. Practitioners and scholars frequently refer to dispute resolution clauses as "midnight clauses" since they are often concluded or copied and pasted so late in the day.[224] In my 2017 survey regarding the perception of dispute resolution professionals and experts to ADR agreements, 65% indicated that such agreements are often copied and pasted.[225] This is problematic, as it raises the potential for uncertainty. Especially if adjustments are made without sufficient research and if the copied clause is not suitable for enforcement in the relevant jurisdiction. The risk is even higher if two or more legal systems or adjudicative bodies are to scrutinize the clause.[226] Therefore, there is a probability that an ADR agreement concluded hastily might not fulfil the certainty criteria.[227]

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[220] E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 143.
[221] EHC (Chancery Division), *Wah (Aka Alan Tang) & Anor v Grant Thornton International Ltd. and others*, [2012] EWHC 3198 (Ch), [2012] CN 63, Judgement of 14 November 2012.
[222] *Elizabeth Bay Development Pty Ltd v Boral Building Services ty Ltd* (1995) 36 NSWLR 709.
[223] According to the ACDC guidelines,, the parties need to sign a mediation appointment agreement which sets out the terms of mediation. Thus, there was a need "to sign an unknown agreement as an important step in the process of mediation", which is too uncertain.
[224] E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 223.
[225] M. SALEHIJAM, "ADR Clauses and International Perceptions: A Preliminary Report", *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement* 2017, afl. 3.
[226] E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 223.
[227] M. PRYLES, "Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration* 2001, afl. 2, 160.

40. A recent case (2018) from the Supreme Court of South Australia demonstrated that the lack of careful drafting remains. In *Hurdsman & Ors v Ekactrm Solutions Pty Ltd*,[228] the dispute resolution clause was found to be neither an arbitration nor a mediation agreement due to its poor drafting. The clause in question stipulated, "If the parties have been unable to resolve the Dispute within the Initial Period, then the parties must submit the Dispute to a mediator for determination in accordance with the Rules of the Singapore International Arbitration Centre (Rules), applying South Australian law, which Rules are taken to be incorporated into this agreement." The wording of the clause resulted in the parties disagreeing regarding the nature thereof, it being a mediation or arbitration clause. In light of the uncertainty, Kelly K refused to stay the proceedings and took jurisdiction.

41. It seems that English courts are the most strict regarding contractual certainty principles.[229] While it is true that Australian and Singaporean courts are more open to enforcing the parties' intentions to mediate their dispute as long as the parties' intentions are sufficiently certain, such a supportive stance remains to be seen in England. This is problematic, as the English approach requires a far too detailed and legalistic specification of the ADR process. To remedy this, Chapters II and III will discuss a comprehensive framework for the ADR agreement.

42. Furthermore, there remains the reality that Common Law courts in focus are likely to find an agreement to be unenforceable if it is missing minor details such as the selection and remuneration of the neutral. For instance, in the Australian case of *Aiton*, the court did not enforce the mediation clause as it failed to address the remuneration of the mediator.[230] The court's refusal to order a stay because of a missing mention of the mediator's fees. This finding, however, is not conductive to the promotion of ADR.[231]

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[228] *Hurdsman & Ors v Ekactrm Solutions Pty Ltd* [2018] SASC 112.
[229] See ECA (Civil Division), *Sulamerica CIA Nacionla De Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, Judgement of 16 May 2012. See also K. HAN en N. POON, "The Enforceability of Alternative Dispute Resolution Agreements: Emerging Problems and Issues", *Singapore Academy of Law Journal* 2013, 469. T. HEINTZMAN, "When Is A Mediation Agreement Enforceable?", *Heintzman ADR* 2012, http://www.heintzmanadr.com/international-commercial-arbitration/when-is-a-mediation-agreement-enforceable/.
[230] Supreme Court of NSW, *Aiton Australia Pty Ltd v Transfield Pty Ltd*, [1999] NSWSC 996, Judgement of 1 October 1999, para. 67.
[231] W. ERLANK, "Enforcement of Multi-Tiered Dispute Resolution Clauses" 2002, 29.

43. There are a number of ways in which the fees to be paid could be determined, such as those used in cases involving arbitration.[232] Furthermore, there are court sponsored ADR programs that may guide the courts in assessing the remuneration of the parties. In applying such a high threshold of certainty to ADR agreements, the courts appear to act against the intention of the parties in concluding these agreements, which is to follow a smooth and amicable dispute resolution process, not to create additional disputes.[233]

44. It is unlikely that there will be a change to the traditional drafting practices, so the certainty of ADR agreements will continue to be a challenge. Enforcing vague requirements for a process that does not require parties to settle, but merely to attempt to do so should not be as problematic as it is today.[234] There is a need for a new approach to these agreements from the legislator and the courts (Chapter III will provide suggestions as to this new approach). Furthermore, while it is possible that ADR agreements can be drafted following contractual principles so as to be held to be enforceable, the courts have the ultimate power to remedy.[235] Therefore, it is important to pay regard to the current remedies available to enforce these agreements. The next section will discuss the need for enforcement and will provide an analysis of the varying remedies.

2. Desirability of Enforcing ADR Agreements

45. This section will consider the dynamic relationship of commercial parties to argue for the enforcement of ADR agreements. To support this argument, the factors that affect the question of enforcement will be analysed herein. Typically, the points against and for the enforcement of ADR agreements rely on the doctrine of access to justice, on the voluntary nature of these agreements, futility, public interest, and the objectives of commercial ADR. Following the discussion of the reasons for an enforcement friendly approach to ADR

[232] W. ERLANK, "Enforcement of Multi-Tiered Dispute Resolution Clauses" 2002, 29.
[233] C. DEBATISTIA, "Drafting Enforceable Arbitration Clauses", *Arbitration International* 2005, 240.
[234] See also S.R. COLE *et al.*, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 192. Moreover, in *Oglebay Norton Vo. V. Armco, Inc.*, the Ohio Supreme Court affirmed a trial judge's decision to order mediation. This was despite the parties having agreed to only "mutually agree upon a rate" (52 Ohio ST. 3d 232, 556 N.E.2d 515, 521 (1990)).
[235] D. KAYALI, "Enforceability of Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration* 2010, afl. 6, 570.

agreements, this section concludes by outlining a number of grounds to refuse enforcement despite there being a binding ADR agreement.

2.1. Access to Justice

46. The principle of access to justice is enshrined in various constitutions, as well as in international instruments, such as in Article 8 Universal Declaration of Human Rights[236] and Article 6 European Convention on Human Rights.[237] Today, access to justice is not as available and efficient as is desirable. Courts in developed countries and developing countries alike are increasingly criticized for their inefficiency, high costs, and complicated procedures.[238] When the system of justice is inefficient, citizens themselves often attempt to resolve these shortcomings in both passive and active ways.[239] Passively, disputes are left unresolved, as in certain cases, it seems more inexpensive and sounder to do so. In fact, the most recent studies found that 25% of commercial disputes in the EU are left unresolved,[240] while 45% of small businesses have indicated that they will not pursue a claim in a foreign court if the value of the claim was less than €50,000.[241]

47. Actively, the parties have looked to non-judicial (or alternative) means of dispute resolution. This explains why parties have increasingly enter into ADR agreements.[242] ADR provides

[236] Right to Effective Judiciary: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."
[237] Right to a Fair Trial: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."
[238] See P. CORTÉS, *Online Dispute Resolution for Consumers in the European Union*, Oxon, Routledge, 2011, 9.
[239] C. ESPLUGUES en S. BARONA (eds.), *Global Perspectives on ADR*, Cambridge, Intersentia Publishing Ltd., 2014, v. See also M. SALEHIJAM, "Increasing Citizen's Recourse to ADR" in A. NIELS en C. ULRIKE (eds.), *Participation Du Citoyen À L'ordre Juridique*, Bruge, die Keure, 2017.
[240] V. TILMAN, *Lessons Learnt From The Implementation Of The EU Mediation Directive: The Business Perspective* Note, 2011, 8; C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 492; C. ESPLUGUES, "General Report: New Developments in Civil and Commercial Mediation - Global Comparative Perspectives" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 4.
[241] N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulatory Reform" in F. STEFFEK en K. HOPT (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 179.
[242] According to numerous scholars, ADR institutions, and governments, the use of ADR to resolve disputes is on the rise. Regarding the rise of ADR see M.H. S.C., L.S. ONN en C.T. TAT, "ADR in East Asia" in J.C. GOLDSMITH, A. INGEN-HOUSZ en G.H. POINTON (eds.), *ADR in business : practice and issues across countries and cultures*, Alphen aan den Rijn, Kluwer Law International, 2006, 147; A. DE ROO en R. JAGTENBERG, "The Netherlands Encouraging Mediation " in N. ALEXANDER (ed.), *Global Trends in Mediation*, Germany, Centrale Für Mediation, 2003, 237; A. FIADJOE, *Alternative Dispute Resolution: A Developing World Perspective*, Great Britain, Cavendish Publishing Limited, 2013, 1; M. FRIES, "Common Patterns of Consensual Conflict Resolution", *KritV* 2012, 122; C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 492.

an avenue to remedy the current shortcomings in the system of justice of many states.[243] ADR enhances access to justice for three reasons.[244] Firstly, even if ADR means that parties temporarily give up their fundamental right of access to a court,[245] by enforcing ADR agreements, courts are also indirectly addressing the current inefficiencies in the system of justice. It is thus clear that the enforcement of an ADR agreement does not create a barrier to justice for the parties and might even be a way to achieve a swifter resolution of the dispute.[246] Secondly, the enforcing of an ADR agreement does not ouster the court's jurisdiction permanently, as the parties maintain the right to terminate the process.[247] Thirdly, parties may apply for interim measures, proving that the enforcing of the ADR agreement does not endanger the parties' immediate interests.[248] Through interim measures, parties can ensure that the dispute resolution process does not jeopardize their rights or property.[249] Such measures include injunctive relief and protective measures.[250]

[243] E. COMMISSION, "The 2016 EU Justice Scoreboard" 2016, 3. In 2011, Italy faced a backlog of five million cases (M.H. MARTUSCELLO, "The State of the ADR Movement in Italy: The Advancement of Mediation in the Shadows of the Stagnation of Arbitration", *New York International Law Review* 2011, 49.) See also J. NOLAN-HALEY, "Is Europe Headed Down the Primrose Path with Mandatory Mediation?", *Fordham University School of Law* 2012, 982. Regarding issues relating to access to justice in Eastern and Central Europe see E.F.o.A.t. JUSTICE, "Access to Justice in Central and Eastern Europe: Forum Report " 2002. *Green Paper On Alternative Dispute Resolution In Civil And Commercial Law*, 'ADR is a political priority, repeatedly declared by the European Union institutions' (19 April 2002, COM(2002) 196 final). The Mediation Directive; *Directive 2009/22/EC (Directive on Consumer ADR)* [2013] OJ L 165/63; *Regulation (EU) No 524/2013 Of The European Parliament And Of The Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR)* [2013] OJ L 165/1. See also M. SALEHIJAM, "Increasing Citizen's Recourse to ADR" in A. NIELS en C. ULRIKE (eds.), *Participation Du Citoyen À L'ordre Juridique*, Bruge, die Keure, 2017.

[244] S. BARONA en C. ESPLUGUES, "ADR Mechanisms and Their Incorporation into Global Justice in the Twenty-First Century: Some Concepts and Trends" in C. ESPLUGUES en S. BARONA (eds.), *Global Perspectives on ADR*, Cambridge, Intersentia, 2014, 6.

[245] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 279.

[246] See also M. SALEHIJAM, "Increasing Citizen's Recourse to ADR" in A. NIELS en C. ULRIKE (eds.), *Participation Du Citoyen À L'ordre Juridique*, Bruge, die Keure, 2017.

[247] E. SUTER, "The Progress from Void to Valid for Agreements to Mediate", *Arbitration* 2009, 33; J.M. SCHERPE en B. MARTEN, "Mediation in England and Wales: Regulation and Practice" in K.J. HOPT, F. STEFFEK en H. UNBERATH (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 379.

[248] The power to order interim measures is often concurrent between both courts and arbitral tribunals. In Germany, this follows from an analogous application of §1033 ZPO, which permits such measures in case of arbitration (see H. UNBERATH, "Unberath, Mediationsklauseln in der Vertragsgestaltung: Prozessuale Wirkungen und Wirksamkeit", *NJW* 2011, 1321.).

[249]See A.W. ROVINE (ed.), *Contemporary Issues in International Arbitration and Mediation*, Leiden, Martinus Nijhoff Publishers, 2008, 53. A.f.I. ARBITRATION (ed.), *Interim Measures in International Commercial Arbitration*, Antwerpt, Maklu Publishers, 2007, 76.

[250] Chapter II will further discuss these rights.

2.2. Voluntary Nature of ADR

48. This work does not support the minority view that the voluntary nature of ADR suggests that the parties should not be compelled to comply with their agreement.[251] This view is apparent in the Netherlands, where despite support from some lower courts for the enforcement of ADR agreements,[252] case law from the Dutch Supreme Court (*Hoge Raad der Nederlanden*) finds such agreements to be unenforceable due to the voluntary nature of mediation.[253] The Dutch approach stands against the majority view that enforcing an ADR agreement does not force the parties to cooperate and consent, but only to participate in a process that might result in co-operation and consent.[254] Indeed, coercion *into* the ADR process must be distinguished from coercion *in* the ADR process.[255] Unlike the case for mandatory ADR where doubts remain, when parties agree to attempt ADR by concluding an ADR agreement, there is no coercion by merely enforcement of a contract.[256] Furthermore, there are increasingly more jurisdictions requiring the parties to *attempt* ADR through their court programs.[257]

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[251] i.e. This view is followed by the Dutch Supreme Court. See also K.J. HOPT en F. STEFFEK, "Mediation: Comparison of Laws. Regulatory Models, Fundamental Issues" in K.J. HOPT en F. STEFFEK (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 30; S.F. ALI, *Court Mediation Reform: Efficiency, Confidence and Perceptions of Justice*, Cheltehnham, Edward Elgar Publishing Limited, 2018, para. 3.4.2; G. JONES en P. PEXTON, *ADR and Trusts: an international guide to arbitration and mediation of trust disputes*, London, Spiramus Press Ltd, 2015, 35.

[252] Enforcement through a dismissal of the case until the parties have at least commenced the mediation. In a decision in 2000, the *Kantongerecht* of Amsterdam found that mediation was equal to binding advice procedures and thus the claim brought in contravention of the agreement could not be litigated (Amsterdam District Court (*Knatongerecht Amsterdam*), *NJkort* 2001, 13, Judgement of 21 December 2000). However, the court was overruled by the Lower Regional Court of Amsterdam (Lower Regional Court of Amsterdam (*Rechtbank Amsterdam*), *NJ* 2003, no. 87, Judgement of 16 October 2002).

[253] In the family law context see HR, *NJ* 2006, 75, Judgement of 20 January 2006. This approach was reconfirmed in 2008 and 2009 (HR, *RvdW 688*, Judgement of 27 June 2008*;* HR, *BH7132*, Judgement of 8 May 2009). In other continental jurisdictions, such as Germany, the voluntary nature of mediation is not an obstacle to the enforceability of ADR clauses (see BGH of 23 November 1983 BGH, NJW 1984, 669).

[254] Supreme Court of NSW, *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR, 194, Judgement of 24 February 2002, p. 206 per Giles J.

[255] P. TOCHTERMANN, "Agreements to Negotiate in the Transnational Context - Issues of Contract Law and Effective Dispute Resolution", *Uniform Law Review* 2008, 712. Moreover, according to Alexander, mediation can only become a true alternative to court proceedings "when it is subject to some degree of mandating" (N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulator Reform" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 175.).

[256] P. TOCHTERMANN, "Agreements to Negotiate in the Transnational Context - Issues of Contract Law and Effective Dispute Resolution", *Uniform Law Review* 2008, 712. See also E. SUTER, "The Progress from Void to Valid for Agreements to Mediate", *Arbitration* 2009, 28. J. LEE, "Mediation Clauses at the Crossroads", *Singapore Journal of Legal Studies* 2001, 92.

[257] In the US and Australia, mandatory reference to ADR is viewed as an improvement to access to justice, not an impediment to the right of access to courts (See e.g. Australia Federal Court of Australia Act 1976 (Cth) s53A and ss 53A(a), 1(A) as amended by Law and Justice Legislation Amendment Act 1997, USA Civil Justice Reform Act 1990 and ADR Act 1998). Moreover, the experiences of the US, Canada, and Australia with mandatory ADR has shown that the level satisfaction with such mechanisms remains equal to ADR mechanism that have been commences as a result of a voluntary agreement (A. MARRIOTT, "Mandatory ADR and Access

2.3. Futility of Enforcement

49. A persisting argument against the enforcement of ADR agreements relates to futility.[258] Accordingly, it is useless to force an unwilling party to engage in a process that requires their participation to succeed. Indeed, the parties' willingness to participate is one of the most essential elements for the success thereof.[259] Although the futility argument is absent in Civil Law jurisdictions,[260] Common Law courts are traditionally reluctant to grant relief when the disputants refuse to participate in ADR, viewing the enforcement as futile.[261] If a party to an ADR procedure does not want to cooperate, the procedure is said to be fruitless, emphasizing the need to obtain relief from a court or tribunal.[262] This attitude was prevalent until the mid-1980s in the US, the birthplace of modern ADR.[263]

50. Today, a larger majority of scholars and judges oppose the use of the futility argument against enforcement, as ADR often achieves results even in cases where the parties have been unwilling to settle.[264] There is certainly proof that skilled neutrals have the ability to

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to Justice" in J.C. BETANCOURT en J.A. CROOK (eds.), *ADR, Arbitration, and Mediation: A Collection of Essays*, Bloomington, AuthorHouse, 2014, 270-271.).

[258] "[I]n practice, any obligation to mediate cannot be realistically enforced. Usually there will be no difference between not participating in a proceeding at all and only attending a proceeding without the willingness to cooperate" (A.R. KLETT, M. SONNTAG en S. WILSKE, "Intellectual Property Law in Germany", *Beck Online* 2008, 104.). See also C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 589.

[259] D. KAYALI, "Enforceability of Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration* 2010, afl. 6, 569. See also S.R. GARIMELLA en N.A. SIDDIQUI, "The Enforceability Of Multi-tiered Dispute Resolution Clauses: Contemporary Judicial Opinion", *IIUM Law Journal* 2016, afl. 1, 166.

[260] German courts have never support the futility argument against the enforcement of ADR clauses (see BGH NJW 1984, 669; OLG Celle NJW 1971, 288p).

[261] L.V. KATZ, "Getting to the Table Kicking and Screaming: Drafting an Enforceable Mediation Provision", *Alternatives to the High Cost of Litigation* 2008, 183.

[262] L. SCHMIEDEL, "Mediation in the Netherlands: Between State Promotion and Private Regulation" in K.J. HOPT en F. STEFFEK (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 711.

[263] *Estate of Ferdinand Marcos Human Rights Litigation*, 94 F.3d 539 (9th Cir. 1996), citing *Virginian Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515, 550, 601 (1937).

[264] A. SCHMITZ, "Refreshing Contractual Analysis of ADR Agreements By Curing Bipolar Avoidance of Modern Common Law", *Harvard Negotiation Law Review* 2008, afl. 1, 64. E. SUTER, "The Progress from Void to Valid for Agreements to Mediate", *Arbitration* 2009, 36. *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55, Judgement of 18 October 2013; Supreme Court of Queensland, *Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd* [2012] QSC 290, Judgement of 26 September 2012. "Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve [...] it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide" (ECA, *Susan Dunnett v Railtrack Plc* [2002] EWCA Civ 303, Judgement of 22 February 2002, para. 14). Moreover, in *R&F, LLC v. Brooke Corp.*, 2008 WL 294517 (D. Kan. 2008), the court enforced the contractual obligation to mediate rather than exercising its inherent power to compel mediation. Furthermore, in *Hyperion VOF v. Amino Development Corp.*, 2008 wL 163624 (W.D. Wash. 2008), the court

sway unwilling parties to consider the opportunities of amicable dispute resolution.[265] Even in disputes where settlement is not possible, ADR can assist the parties in narrowing down their disputes and/or provide an opportunity to assess the strengths and weaknesses of their claim.[266]

51. Coleman J eloquently noted in *Cable & Wireless*, "there may be cases where a reference to ADR would be obviously futile and where the likelihood of a productive mediation taking place would be so slight as not to justify enforcement of the agreement."[267] This does not mean the parties can simply argue futility to avoid their obligations.[268] ADR would have to be useless exercise.[269] Therefore, although ADR is most successful when parties are willing to attempt to settle,[270] the unwillingness of one party should not be a basis for a refusal for

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enforced the obligation mediate against a challenge that absence of parties from a companion lawsuit would make mediation futile). See also S.R. COLE *et al.*, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 163.

[265] As Dyson LJ pointed out in *Halsey*, "mediation often succeeds where previous attempts to settle have failed" (ECA, *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, Judgement of 11 May 2004, para. 22). The futility arguments fails to take into account the intrinsic value of mediation in assisting the parties to minimize their differences and improve their mutual understanding. See also N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 173; Y. ZHAO, "Revisiting the issue of enforceability of mediation agreements in Hong Kong", *China-EU Law Journal* 2013.

[266] "Although some have described the whole notion of forcing the parties to attend the first mediation session as 'futile', we believe practice shows that mediation successes can be achieved – and in a significant number cases are achieved – even with *a priori* unwilling parties. That is the experience in countries and states where court ordered mediation exists or when mediation is mandatory prior to initiating a lawsuit. In other words: withdrawing from the mediation is a right but, as any right, it must be exercised with due care and without abuse. In my view, it would be abusive to withdraw from the process before it has been given a chance to develop as intended in the reasonable interpretation of any mediation clause" (E. VAN BEUKERING-ROSMULLER en P. VAN LEYNSEELE, "Enforceability of Mediation Clauses in Belgium and the Netherlands", *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 2017, afl. 3, (36) 52.). Accordingly, the futility argument fails to take into account the intrinsic value of mediation. Mediation can assist parties to minimize their differences and improve their mutual understanding even if not settlement is reached. Even when parties have not voluntarily entered into the mediation, a skilled mediator, can bring about changes in their attitude, reduce animosity, narrow difference, and bring parties closer to reaching a settlement. In addition, support for mandatory mediation can be found in *Idoport Pty Ltd v. National Australia Bank*: "Even if dispute is not resolved, often mediation may narrow issues, saving time and costs in any on-going litigation" ([2001] NSWSC 427; M. MCINTOSH, "A Step Forward - Mandatory Mediations", *Australasian Dispute Resolution Journal* 2003, 280.). See also M. KALLIPETIS, *Mediation Privilege and Confidentiality and the EU Directive*, Kluwer Law International, 2010, 123. D. BAMFORD, "Australia" in C. ESPLUGUES en S. BARONA (eds.), *Global Perspectives on ADR*, Cambridge, Intersentia Publishing Ltd., 2014, 69.

[267] EHC (Commercial Court) Division, *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm Ct), [2002] CLC 1319, Judgement of 11 October 2002, para. 1328.

[268] See *A. Raymond Tinnerman Manufacturing, Inc. v. Tecstar Mfg. Company*, Case No. 11-C-0987. United States District Court, E.D. Wisconsin: "mediation is not futile simply because one party has taken the position that it is not liable. At the outset of almost any legal dispute, the parties will have very different views of the case. The purpose of mediation is to attempt to reach a compromise."

[269] EHC (Commercial Court) Division, *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm Ct), [2002] CLC 1319, Judgement of 11 October 2002, at para. 1328.

[270] C. BÜHRING-UHLE *et al.*, *Arbitration and Mediation in International Business*, Alphen aan den Rijn, Kluwer, 2006, 228.

enforcement. This is because, an ADR agreement reflects the parties' intentions and should be enforced regardless of the consensual feature of ADR.[271]

2.4. Public Interest

52. There are several arguments that prove that public interest supports the enforcement of the ADR agreement. Nevertheless, as Section 2.6 will further discuss, there is also one public interest against enforcement, namely the need for precedent. Turning to the public interest argument supporting enforcement, it is important to note that the contractual approach does not accept the breaking of a contractual obligation simply because the obligation is to participate in an ADR procedure.[272]

53. Furthermore, it is in the wider public interest to promote consensual resolution of disputes by supporting the enforceability of ADR agreements, as social peace is better served by consensual solutions.[273] In support, §253(3) of the German Code of Civil Procedure (*Zivilprozessordnung*)('ZPO)' requires the parties to submit a statement of claim that indicates whether the parties have previously attempted to mediate or engage in any form of ADR, and whether there are obstacles that are preventing such a procedure from taking place.[274] §15a of the Introductory Law to the German Code of Civil Procedure ('EGZPO')

[271] D. KAYALI, "Enforceability of Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration* 2010, afl. 6, 569. S.R. COLE *et al.*, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 193.

[272] C. JARROSSON, "Legal Issues Raised by ADR" in A. INGEN-HOUSZ (ed.), *ADR in Business: Practice and Issues Across Countries and Cultures*, II, Aan den Rijn, Kluwer Law International, 2011, 119. See also Llongmore LJ in ECA, *Petromec Inc v Petroleo Brasileiro SA Petrobras*: it is "a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered" ([2006] 1 Lloyd's Rep 121, Judgement of 15 July 2005, at para.121); L. BOULLE, *Mediation: Principles, Process, Practice*, Australia, Ligare Pty Ltd., 2011, 637. In addition, according to the principle of *pacta sunt servanda*, an agreement must be performed, otherwise the other party ought to have a remedy for the breach (D. KAYALI, "Enforceability of Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration* 2010, afl. 6, 551; E. VAN BEUKERING-ROSMULLER en P. VAN LEYNSEELE, "Enforceability of Mediation Clauses in Belgium and the Netherlands", *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 2017, afl. 3, (36) 36.).

[273] S.O. LOONG en D. KOH, "Enforceability of Dispute Resolution Clauses in Singapore", *Asian JM* 2016, 17. See also SCA, *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v. Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738, Judgement of 27 August 2012, para. 40, per VK Rajah JA: "we think that such "negotiate in good faith" clause are in the public interested as they promote the consensual disposition of any potential disputes." Decision followed in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2013] 1 SLR 973; [2012] SGHC 226 – High Court decided that a MDR clauses was enforceable. See Also E. VAN BEUKERING-ROSMULLER en P. VAN LEYNSEELE, "Enforceability of Mediation Clauses in Belgium and the Netherlands", *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 2017, afl. 3, (36) 36. L.S. ONN, "Mediation", *SinfaporeLaw.org* 2015.

[274] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 291.

also requires the parties to a dispute to attempt ADR (*obligatorische Streitschlightung*)[275] prior to proceeding to litigation.[276] Likewise, the English CPR and CPR Practice Directions,[277] as well as case law and court guides requires parties to a dispute to attempt, regardless of an ADR agreement, to resolve their conflict through ADR rather than proceeding to courts directly.[278] Less strict, is the Dutch approach, which provides courts with a referral system for ADR.[279]

54. The successful inclusion of mandatory ADR in the system of justice takes the above point further. Moreover, 48% to the 2013 International Mediation Institute ('IMI') International Corporate User Survey indicated that they are in favour of mediation as a mandatory step.[280] Lastly, there is empirical evidence that even when parties are required to attempt ADR, the rate of settlement is still impressively high.[281]

2.5. Aim of Commercial ADR

55. In addition to the above arguments, requiring parties to comply with their valid ADR agreement is in line with the aim of commercial ADR, which is to resolve or narrow commercial disputes in order to avoid costly litigation and arbitration, and to preserve the

[275] German phrase for compulsory arbitration or a mandatory attempt to settle a dispute.
[276] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, pp. 291-292.
[277] These are rules that supplement the CPR and that regulate minor issues or explain how the CPR should be understand.
[278] S. SIME, S. BLAKE en J. BROWNE, *A Practical Approach To Alternative Dispute Resolution*, Oxford, Oxford University Press, 2011, 76-79. J.M. SCHERPE en B. MARTEN, "Mediation in England and Wales: Regulation and Practice" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 376-377; M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 291.
[279] S. SIME *et al.*, *A Practical Approach To Alternative Dispute Resolution*, Oxford, Oxford University Press, 2011, 76-79. J.M. SCHERPE en B. MARTEN, "Mediation in England and Wales: Regulation and Practice" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 376-377; M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 291.
[280] 37% against and 15% ambivalent (IMI, *IMI ADR User Survey Results*, https://www.imimediation.org/2013/04/06/imi-adr-users-survey-results/).).
[281] G. DE PALO, "Mandatory Mediation Is Back In Italy With New Parliamentary Rules", *Mondo ADR* 2013, http://www.mondoadr.it/articoli/mandatory-mediation-italy-parliamentary-rules.html. K. MACK, "Courts Referral to ADR: Criteria and Research", *National Alternative Dispute Resolution Advisory Council*, 4 & 42. According to De Palo and Trevor, settlement rates in commercial mediations are close to 90% in th UK (G. DE PALO en M.B. TREVOR, "Is Mediation Moving Out of Shadows and Into the U.K. Practice Mainstream?", *Alternatives to the High Cost of Litigation* 2012, 9.). On average, EU lawyers affirmed that meeting with their clients to evaluate the merits of a mandatory mediation clause in all contracts to be between 'considerably' and 'much' value. The raw rating score for EU lawyers was 3.5 out of 5." A. CENTER, "The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation" 2010, 33.

parties' relationship.[282] Furthermore, enforcing an ADR agreement ensures that the choice of the parties and the needs of international business community are fulfilled.[283] Hence, the choice of one party to ignore its ADR obligation once a dispute arises without an actual attempt at ADR should not sabotage the agreement.[284] This is a sound argument when considering the existing pro-arbitration frameworks in the jurisdictions under analysis (another private dispute resolution mechanism).[285] This point is strengthened when taking into account that ADR is less invasive than arbitration.[286]

2.6. Legitimate Grounds for Refusing Enforcement of a Valid ADR Agreement

56. It would run contrary to common sense to require parties to attempt ADR in all circumstances. Even with a binding ADR agreement, there may be grounds that justify a refusal to enforce the parties' obligations. There are two potential grounds that justify a refusal to enforce an ADR agreement. These grounds relate to abuse of process and the need for a court ruling (precedent).[287]

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[282] Mediation clauses are designed to avoid litigation. ADR is a means of avoiding lengthy, complex, and costly litigation/arbitration (D. KAYALI, "Enforceability of Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration* 2010, afl. 6, 569.). Thereby, through enforcing an mediation clause, the parties are provided with the opportunity to engage in a mechanism that may provide a durable and mutually acceptable resolution (T.J. STIPANOWICH, "Contract and Conflict Mangement", *Wisconsin Law Review* 2001, 856-857. A. SCHMITZ, "Refreshing Contractual Analysis of ADR Agreements By Curing Bipolar Avoidance of Modern Common Law", *Harvard Negotiation Law Review* 2008, afl. 1, 44.). Moreover according to Schultz, "[t]he three representations of the roles of dispute resolution are, first, a pursuit of the satisfaction of the parties to the instant case; second a pursuit of the rule of law; and, third, a pursuit of the incarnated values of 'official law', as one of the founders of legal sociology put it, meaning state law" (T. SCHULTZ, *The Roles of Dispute Settlement and ODR*, Kluwer Law International, 2010.). See also *Dave Gretak Enters, Inc v Mazda Motors of American, Inc*, 622 A.2d 14, 23-24 (Del Ch 1992); EHC (Queen's Bench Division), *Emirate Trading Agency Llc v Prime Mineral Exports Private Ltd* [2014] EWHC 014 (Comm), Judgement of 1 July 2014. J.D. FILE, "United States: multi-step dispute resolution clauses", *IBA Legal Practice Division: Mediation Commitee Newsletter* 2007; S.R. COLE *et al.*, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 162. C.H. CROWN, "Are Mandatory Mediation Clauses Enforceable?", *Litigation Journal* 2010, afl. 2, 4.

[283] A. JOLLIES, "Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement", *Arbitration* 2006, afl. 4, 336. D. KAYALI, "Enforceability of Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration* 2010, afl. 6, 569.

[284] C. JARROSSON, "Legal Issues Raised by ADR" in A. INGEN-HOUSZ (ed.), *ADR in Business: Practice and Issues Across Countries and Cultures*, II, Aan den Rijn, Kluwer Law International, 2011, 119.

[285] Courts in the jurisdictions under analysis must resolve disputes regarding arbitration agreements in favour of arbitration even in instances where the agreement was the result of bribery. See G.B. BORN, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* London, Kluwer Law International, 2016, chapter 5, para 17. S. BARONA en C. ESPLUGUES, "ADR Mechanisms and Their Incorporation into Global Justice in the Twenty-First Century: Some Concepts and Trends" in C. ESPLUGUES en S. BARONA (eds.), *Global Perspectives on ADR*, Cambridge, Intersentia, 2014, 25. *Westacre Investments Inc. v. Jugoimport-SDRP Holding Co. Ltd* [19999] APP.L.R. 05/12 AND ICSID award of 04.10.2006 in *World Duty Free Co. Ltd v. Republic of Kensa ARB/00/7*.

[286] S.9(2) of the Arbitration Act 1996 (England). In *Cable & Wireless*, Coleman J held that a court may refuse a stay when an ADR procedure would be "a completely hopeless exercise." *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm Ct), [2002] CLC 1319.

[287] Black's Law Dictionary defines precedent as "[a] decided case that furnishes a basis for determining later cases involving similar facts or issues; [s]ec stare decisis" (7th edn, 1999), 1195). The World Trade Organisation

57. Abuse of process includes instances when the party seeking enforcement knowingly contributed to the non-compliance with the ADR agreement or made substantive arguments before raising the plea of non-compliance.[288] In such instances, there is a waiver of the right to seek enforcement of the ADR agreement.[289] To illustrate, in the 1998 German Federal Court of Justice (*Bundesgerichtshof*) ('BGH') decision[290] and the 1997 Superior State Court (Oberlandesgericht) ('OLG') of Frankfurt decision,[291] the defendants had refused to pay the conciliation fee and once the claimants brought a claim, the defendants raised the plea of non-compliance. The courts refused to accept the plea as it would be an impermissible exercise of rights (*unzulässige Rechtsausübung*) and thus rejected the plea.[292] In line, courts should not enforce ADR agreements, if the party seeking enforcement is doing so as a delay tactic.[293]

58. Finally, the desirability to develop case law is a policy argument against enforcement of ADR agreements. It is of special importance in the Common Law jurisdictions in focus, where the law evolves through court rulings.[294] Here, the dilemma refers to the clash between the court's role to encourage settlement and its role in creating precedent.[295] It is submitted herein that the courts should in general place the public interest in enforcing

(WTF)) and International Court of Justice also follow previous rulings to some extent (See G. KAUFMANN-KOHLER, "Arbitral Precedent: Dream, Necessity or Excuse?", *Freshfields Lecture* 2006.).

[288] Lack of a plea implies that the party has waived their right to enforce their ADR agreement as is the case with arbitration agreements under §1031(1) ZPO.

[289] S.R. COLE *et al.*, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 180. *Harting v. Barton*, 6 P3d 91, 94-96 (Wash App 2000); 1930-34 Associates, *L.P. v. BVF Const. Co., Inc.*, 2005 No. 0908, 2006 WL 1462932; E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 85.

[290] 18 November 1998, BGH, NJW 1999, 647.

[291] *OLG Frankfurt am Main*, 7 November 1997, NJW-RR 1998, 778.

[292] Contrary to principle of loyalty and trust (*Treuwidrigkeitseinwand*) as contained in §242 BGB. Conversely in *OLG Frankfurt am Main* of 7 November 1997 (NJW-RR 1998, 778), "the court clarified that the duty to support a dispute resolution process is confined to cooperative participation in the process. Such duty should not be extended to include financial contributions towards meeting the cost of conciliation. In the court's view, the party against whom the claim is brought should not be expected to financially support the proceedings brought against it. In reaching this conclusion the court showed sympathy with the 'natural reflects' of the 'attacked party' to ignore the financial consequences of such an attack. The court held that the contradictory behaviour of a defendant who first boycotted the ADR by not paying the requisite deposit and then invoked an ADR clause as a defence in court proceedings is of no relevance to blocking the enforceability of a disputed clause." See E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 86.

[293] S.R. COLE *et al.*, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 180. *Cumberland and York Distributors v Coors Brewing Co* No 01-244-P-H, 2002 WL 193323, at *4 (D Mc 7 February 2002).

[294] R. SILTALA, *A Theory of Precedent: From Analytical Positivism to a Post-Analytical Philosophy of Law*, Oregan, Hart Publishing, 2000, 121. See also J.M. WALKER, "The Role of Precedent in the United States: How do Precedents Lose Their Binding Effect?" 2016.

[295] See S. GOLDBERG, F.E.A. SANDER, N.H. ROGERS en S.R. COLE, *Dispute Resolution: Negotiation, Mediation and Other Processes*, USA, Wolters Kluwer Law & Business, 2012.

contractual agreements and in promoting ADR above the need for precedent. There are a few instances, however, where the court relying on its discretionary power may refuse enforcement of an ADR agreement on the basis of the need for precedent. Such an instance may arise if a company wishes to establish precedent through a court ruling when it is facing many similar claims against one of its services or products.[296]

59. When the exceptions to the enforcement of a binding ADR agreement are not applicable and there is an agreement that ought to be enforced and protected from infringements, the next question is how should breaches of these agreements be remedied? Section 3 will answer this question by firstly addressing how the legal nature of ADR agreements affects the range of remedies available. Subsequently, the range of remedies available in order to build the basis to conclude regarding the preferred remedy will be examined.

3. Remedies to a Breach of the ADR Agreement

60. There are three potential ways for a party to breach its ADR agreement:
    (i) By staying inactive once the other party has requested or initiated ADR, thereby frustrating the mechanism;
    (ii) By not participating in ADR once the process has commenced or by intentionally harming settlement efforts; or
    (iii) By initiating litigation/arbitration contrary to the agreement.[297]

61. When a party breaches the ADR agreement, the aggrieved party may want to seek assistance from courts or tribunals to enforce the obligations under the agreement. There are various approaches to remedying breaches of ADR agreements.[298] Primarily, the forum with jurisdiction over the dispute relating to the ADR agreement has the power to remedy breaches of the agreement.[299] However, parties typically do not pre-select this forum; thus,

[296] B. MARSH *et al.*, "England and Wales" in N. ALEXANDER en S. WALSH (eds.), *EU Mediation Law Handbook, Global Trends in Dispute Resolution* 7, Alphen aan den Rijn, Kluwer Law Internatioanl, 2017, 214. See also S. GOLDBERG *et al.*, *Dispute Resolution: Negotiation, Mediation and Other Processes*, USA, Wolters Kluwer Law & Business, 2012.
[297] A.R. KLETT *et al.*, "Intellectual Property Law in Germany", *Beck Online* 2008.
[298] L.V. KATZ, "Getting to the Table Kicking and Screaming: Drafting an Enforceable Mediation Provision", *Alternatives to the High Cost of Litigation* 2008, 183.
[299] N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 184.

there may again be uncertainty regarding who has power to assess and enforce these agreements.[300] The lack of certainty is especially problematic when the ADR agreement is a tier in a MDR clause calling for arbitration as the final step. The lack of certainty is especially problematic when the mediation agreement is a tier in a MDR clause calling for arbitration as the final step. The differing legal natures of the ADR agreement on the one hand, and the arbitration agreement on the other can lead to confusion about who has the power to enforce ADR tiers in a MDR clause.[301]

62. As abovementioned, the legal nature of the ADR agreement affects its enforcement; thus, it is essential to discuss the legal nature of these agreements in order to understand the available remedies.[302] Section 3.1 will commence this sub-chapter by assessing the reasoning behind the different legal nature denoted to ADR agreements by the jurisdictions analysed herein. Section 3.2 will further explains how the legal nature affects the method used to remedy breaches of the ADR agreement. Subsequently, Sections 3.3 will critically analyse the adverse effect of having differing remedies and will argue for a preferred and harmonized approach.

3.1. Legal Nature of ADR Agreements

63. The discussion of the above issues requires an understanding of the legal nature of ADR agreements.[303] There are mainly two camps when it comes to defining the legal nature of ADR agreements. On the one hand those that categorize ADR agreements as a hybrid substantive/procedural element of the contract, and on the other, those that find such agreements to be a condition precedent to a binding mechanism and thus of a procedural nature.[304] Many scholars as well as national courts have tackled the question of whether an

[300] The SCA found that only 8% of the agreements coded stipulated the jurisdiction with power to settle disputes arising from or relating to the ADR agreement. 4 of these agreements gave the courts of where the ADR is to take place, the authority to determine disputes relating to the agreement.
[301] C. BÜHRING-UHLE *et al.*, *Arbitration and Mediation in International Business*, Alphen aan den Rijn, Kluwer, 2006, 228.
[302] See A.L. DE ARGUMEDO PINEIRO, "Multi-Step Dispute Resolution Clauses", *Uria Menedez*, 3.
[303] See also Section 3.1.
[304] For the US see *HIM Portland, LLC v Devito Builders, Inc.*, 317 F.3d 41, (1st Cir 2003), para. 44; *MB America, Inc. v. Alaska Pac. Leasing*, 132 Nev. Adv. Op. 8 (Feb. 4, 2016) (where the Nevada Supreme Court enforced a contract's mediation provision as a condition precedent to litigation). For Singapore see HCS, *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2012] SGHC 226**,** Judgement of 12 November 2012, para. 191. See also ICC Case No. 12379; ICC Case No. 9812. For Germany see the decision of the BGH, November 18, 1998 (VIII ZR 344/97), cons 3b. The decision is reproduced in Neue Juristische Wochenzeitschrift 1999, 647, Zeitschrift für Wirtschafts – und Bankrecht 1999, 651and Der Betrieb 1999, 215. The decision confirmed the decision of the Bundesgerichof dated 23 November 1983 (VIIII ZR 197/82) which is reproduced in Neue Juristische Wochenzeitschrift 1984 at 669. Voser welcomes this

ADR agreement is of a substantive or procedural in nature.[305] However, this has led to no consensus.[306] The question is highly relevant, since the legal nature of an ADR agreement determines the available remedies for a breach thereof. Section 3.2 will further discuss the remedies to a breach of an ADR agreement.

64. In states where ADR agreements are viewed as having a procedural nature, such as Singapore, Australia, England and the US, courts have shown a tendency to enforce these agreements as a condition precedent to the jurisdiction of binding dispute resolution forums such as courts and arbitral tribunals.[307] The legal nature of ADR agreements is less clear in the Civil Law jurisdictions under focus.[308] In Germany, the Federal Court decided that conciliation clauses have a hybrid nature, meaning that they have both a substantive and procedural law nature.[309] Likewise, in relation to Austria, it is appropriate to classify the

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classification of mediation clauses by German Federal Courts (N. VOSER, "Multi-tier dispute resolution clauses: consequence of non-compliance with pre-arbitral procedural requirements", *Thomas Reuters* 2011, 9.). Jurisdictional theory: an arbitral tribunal can assess if the parties have complied with their pre-arbitral ADR obligations. The determination of the tribunal is reviewable by the supervisory court of the seat of arbitration and the national court(s) where the parties wish to enforce the award.

[305] See Introductory Chapter, Section Literature Review.

[306] Question posed by P.K. BERGER, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*, 1, Alphen aan Den Rijn, Kluwer Law International, 2015, 128.

[307] USA condition precedent to litigation *MB America, Inc. v. Alaska Pac. Leasing*, 132 Nev. Adv. Op. 8 (Feb. 4, 2016), the Nevada Supreme Court enforced a contract's mediation provision as a condition precedent to litigation. *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 336 (7th Cir. 1987) 335-36 ("The mediation clause here states that it is a condition precedent to any litigation. . . . Because the mediation clause demands strict compliance with its requirement... before the parties can litigate, plaintiffs' substantial performance arguments must fail."); and *Tattoo Art, Inc. v. TAT International, LLC*, 711 F.Supp.2d 645, 651 (E.D.Va. 2010)

[308] In the Netherlands, the agreement to mediate is classified as contractual in nature (A.a.K. VAN HOEK, Joris, "The Netherlands 2014" in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 452.). For jurisdictional qualification see EEHC (Queen's Bench Division), *Emirate Trading Agency Llc v Prime Mineral Exports Private Ltd* [2014] EWHC 014 (Comm), Judgement of 1 July 2014; Swiss Supreme Court, *case no. 4A-124/2014*, Judgement of 7 July 2014; France Cour de Cassation, 2e Ch. Civ, (*Société Polyclinique des Fleurs v. Peyrin*), Judgement of 6 July 2000; SCA, *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55, Judgement of 18 October 2013.Qualification as a matter of admissibility: BGH, no. I ZB 1/15, Judgement of 9 August 2016 & no. I ZB 50/15, Judgements of 14 January 2016; Swiss Federal Supreme Court, *X. GmbH (précédemment V. GmbH) v. Y. Sàrl, lère Cour de droit civil*, 4A_46/2011, 29 ASA Bull. 643, 651 et seq. (2011), Judgement of 16 May 2011.

[309] See the decision of the BGH, November 18, 1998 (VIII ZR 344/97), cons 3b. The decision is reproduced in Neue Juristische Wochenzeitschrift 1999, 647, Zeitschrift für Wirtschafts – und Bankrecht 1999, 651and Der Betrieb 1999, 215. The decision confirmed the decision of the Bundesgerichof dated 23 November 1983 (VIIII ZR 197/82) which is reproduced in Neue Juristische Wochenzeitschrift 1984 at 669. Voser welcomes this classification of mediation clauses by German Federal Courts (N. VOSER, "Multi-tier dispute resolution clauses: consequence of non-compliance with pre-arbitral procedural requirements", *Thomas Reuters* 2011, 9.). Nevertheless, some say they are exclusively procedural in nature. The most widely accepted classification of ADR clauses places them in the fora of contract law "as contracts *sui generis* for the performance for a continuing obligation with an atypical subject-matter" (N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 179.) See also §311(1) German Civil Code.

ADR agreement as having a hybrid nature.[310] However, Dutch courts struggle with the legal status of ADR agreements.[311] Currently, the Netherlands does not enforce such agreements. However, there is opposition to this approach, since well-drafted agreements to submit a dispute to ADR in a business case should be enforced.[312]

65. The classification of ADR agreements is particularly relevant in the context of MDR clauses, as it is quite common for ADR agreements to be a condition precedent to arbitration.[313] The question of the effect of ADR in the context of arbitration has given rise to an ongoing debate regarding the appropriate classification. There is a divide between the herein analysed Common Law and Civil Law countries regarding the effect of a valid ADR tier on arbitration. The BGH held on two occasions that arbitral tribunals seated in Germany are entitled to assume jurisdiction regardless of whether the parties' have complied with the

[310] Although Austrian courts have not clarified the nature and effects of an ADR agreement. Ulrike Frauenberger-Pfeiler argues, "mediation clauses may constitute a temporary waiver of the right to file a claim before court. The action should be rejected as temporarily inadmissible or the court should stay the proceedings until the parties prove that mediation has been attempted" (U. FRAUENBERGER-PFEILER, "Austria 2014" in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 13-14.). However, the nature of the clause/contract is not defined by the ACMC and there is a lack of clear judicial guidance's, therefore the approach of Austria remains unclear. U. FRAUENBERGER-PFEILER, "Austria 2014" in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 12. W.H. RECHBERGER, "Mediation in Austria", *Ritsumeikan Law Review* 2014, 68.

[311] E. VAN BEUKERING-ROSMULLER en P. VAN LEYNSEELE, "Enforceability of Mediation Clauses in Belgium and the Netherlands", *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 2017, afl. 3, (36) 41. Dutch courts do not enforce mediation clauses – *NJ 2003, 87* (Rb. Amsterdam 16 Oct. 2002); *NJ Kort 2003, 17* (Hof Den Haag 12 Dec. 2002); *LJN AO3003* (Rb. Arnhem 14 Jan. 2004); *Prg. 2005/214* 9Rb. Maastricht 9 Nov. 2005); *NJ 2006, 75* (HR 20 Jan. 2006). *NJ kort 2003/17* (Court of Appeals the Hague 2003); *NJ 2006, 75* (Supreme Court 2006).

[312] M. PEL, "The Netherlands" in N. ALEXANDER en S. WALSH (eds.), *EU Mediation Law Handbook, Global Trends in Dispute Resolution 7*, Alphen aan den Rijn, Kluwer Law Internatioanl, 2017, 573. E. VAN BEUKERING-ROSMULLER en P. VAN LEYNSEELE, "Enforceability of Mediation Clauses in Belgium and the Netherlands", *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 2017, afl. 3, (36) 42. September 2013 MP Van der Steur bill that stipulated that mediation clauses are in principle legally enforceable. The bill was withdrawn after the MP left the parliament June 2015 (Kamerstukken II 2012/13, 33723, 3 (MvT), 11 & 20-21; Kamerstukken II 2013/14, 33723, 6 (Gew, MvT) p. 16, 28-28; new draft bill "Wet bevordering mediation" proposed on 13 July 2016, requires courts to examine whether mediation could have an added value even if a party refuses to satisfy the commitment to mediate. Art 22a.

[313] See Chapter II.

preconditions in a MDR clause.[314] When faced with an unfulfilled ADR agreement, courts and tribunals should dismiss the claim as 'currently unfounded' (*zur Zeit unbegründet*).[315]

66. Therefore, ADR agreements exclude actionability (*Klagbarketi*) of the claim not the jurisdiction of the court or tribunal.[316] Similarly, an ADR agreement in Austria in principle does not influence court proceedings at any stage.[317] Adherence to an ADR agreement is voluntary and thus not a precondition to litigation.[318] Common Law jurisdictions on the contrary find that a valid ADR agreement forms a jurisdictional barrier. In other words, a court or tribunal must refuse jurisdiction when faced with a party wishing to enforce a valid ADR agreement. Thus, if the court finds the tribunal lacks jurisdiction, it can order a stay or injunction of the arbitration.[319] Moreover, the courts may annul an arbitral award if the

[314] BGH, no. I ZB 1/15, Judgement of 9 August 2016 & no. I ZB 50/15, Judgements of 14 January 2016: on the 9th of August 2016, the BGH confirmed its previous ruling that compliance with a tier in a MDR clause is not a question of jurisdiction, but of admissibility. Leading judgement in Germany is the BGH decision of 23 November 1982 BGH NJW 1984, 669 – contract about takeover of veterinary practice that required conciliation in front of a veterinary chamber. But the claimant filed in court without conciliating. The defendant claimed inadmissibility of the dispute. On appeal, the BGH overturned the decision of the lower court and enforced the clause. Court found that clause was imperative (*Mußbestimmung*). Mandatory character of clause was supported by its purpose, which was to keep disputes out of court and to give members an opportunity to resolve disputes cheaply and confidentially. Therefore, there court clarified the binding nature of ADR clauses.

[315] R. BELLINGHAUSEN en J. GROTHAUS, "Escalation Clauses: No Longer a Tripping Hazard for Arbitrations with Seat in Germany?", *Kluwer Arbitration Blog* 2016, http://kluwerarbitrationblog.com/2016/12/01/escalation-clauses-no-longer-a-tripping-hazard-for-arbitrations-with-seat-in-germany/. According to the admissibility theory, only the tribunal can sanction the breach of the ADR tier. The "admissibility theory is based on the premise that ADR clauses are not conditions of arbitral jurisdiction; instead, their fulfilment affects properties of the claim. As such, the decision in this matter is not a part of the *Kompetenz-Kompetenz* determination but relates to the claim itself. The court's supervisory powers do not extend into this sphere, conceding instead to the principle of arbitral autonomy" (E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 187.). According to §1032(2) German ZPO, prior to the constitution of the arbitral tribunal, an application can be made to have the courts determine the admissibility of the proceedings. Therefore, even the decision of the tribunal is always reviewable and ought to be reviewable. See also M. WITTINGHOFER, "Application to Have Arbitration Declared (In)Admissible – A German Torpedo to Arbitral Proceedings?", *Kluwer Arbitration Blog* 2015, http://kluwerarbitrationblog.com/2015/11/05/application-to-have-arbitration-declared-inadmissible-a-german-torpedo-to-arbitral-proceedings/.

[316] E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 36.

[317] U. FRAUENBERGER-PFEILER, "Austria 2014" in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 12.

[318] If an ADR agreement blocked access to court, it would be contrary to the principle of voluntariness (U. FRAUENBERGER-PFEILER, "Austria 2014" in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 12-13.).

[319] In England, according to §31 and 32 of the Arbitration Act of 1996, the court can review the tribunal's jurisdiction once the latter has determined it positively and upon the application of the party who has not taken steps in the arbitral proceedings. In EHC, *Excalibur Ventures v Texas Keystone* 2011 EWHC 1624 (Comm), Judgement of 28 June 2011, para. 64, Globster J held that §30 of the Arbitration Act in permitting arbitral tribunals to determine their own jurisdiction, does not oblige such a determination to be made by the tribunal. Furthermore, although the US Federal Arbitration Act does not address the principle of *kompetenz-kompetenz*, the traditional view is that it is up to the courts to determine the tribunal's jurisdiction (Federal Arbitration Act of 1925 (last amendment 15 November 1990), U.S.C. Title 9, sec 3. See e.g., *Howsam v Dean Witter* 537, US 79

tribunal took jurisdiction despite a valid and unfulfilled ADR agreement. These potential consequences are further discussed in the sections below.

67. In light of the different legal natures denoted to ADR agreements, the question arises if there is a preferred approach. There seems to be support for treating the ADR agreement as an admissibility barrier from some pro-arbitration scholars.[320] According to Born and Šćekić, the ADR agreement may only be treated as posing a barrier to the arbitrator's jurisdiction if the parties make it unequivocally clear that they do not want the arbitrators to assess the compliance with pre-arbitration procedural requirements.[321] This stance follows the notion that the arbitrators not judges may determine if a condition precedent to arbitration is satisfied.[322] However, the opposing view states that, if the conditions precedent to arbitration are not fulfilled, it is futile to talk about the enforcement of the arbitration itself.[323] In other words, only when the conditions precedent to arbitration are fulfilled should arbitration commence.[324]

68. In addition, supporters of the view that ADR agreements form a barrier to the admissibility of the claim rely on the presumption that the parties desire a centralized forum for the resolution of disputes that excludes courts.[325] I do not support this argument for two reasons.

(2002); *PacifiCare Healthy Systems Inc v Book* 538 US 401, (2003) 285 F 3d 971, 123 Ct 1531 (2003); *Green Tree Financial Corp v Bazzle* 123 S Ct 2402 (2003)).

[320] See also E. KAJKOWSKA, "Enforceability of Multi-Step Dispute Resolution Clauses An Overview of Selected European Jurisdictions" in L. CADIET et al. (eds.), *Procedural Science at the Crossroads of Different Generations*, 4, Luxembourg, Nomos Verlagsges, 2015.

[321] G. BORN en M. ŠĆEKIĆ, "Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'" in D.D. CARON et al. (eds.), *Practising Virtue: Inside International Arbitration*, Oxford Scholarship Online, 2015, 259. See also E. KAJKOWSKA, "Enforceability of Multi-Step Dispute Resolution Clauses An Overview of Selected European Jurisdictions" in L. CADIET et al. (eds.), *Procedural Science at the Crossroads of Different Generations*, 4, Luxembourg, Nomos Verlagsges, 2015, 172. J. PAULSSON, "Jurisdiction and Admissibility", *Global Reflections on International Law, Commerce and Dispute Resolution* 2005, 602.

[322] S.R. COLE *et al.*, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 174. In *U.S. ex rel. Gillette Air Conditioning Co., In. v. Satterfiel and Pontikes Const., Inc.*, 2010 WL 5067683 (W.D. tex 2010): the arbitrator decides whether procedural prerequisites to arbitration have been satisfied unless no rational mind could question that the parties intended for a procedural provision to preclude arbitration and that it had not been complied with; *Knowles v. Community Loans of America, Inc.*, 2012 WL 5868622 (S.D. Ala. 20120): procedural questions growing out of a dispute and bearing on tis final disposition, such as whether the first two steps of a grievance procedure were completed, are for the arbitrator not the court; *Universal Forum of Cultures Barcelona 2004 S.L., in liquidating v. Council for a parliament of the World's Religions*, 2013 WL 1196607 (N.D. III. 2013): arbitrator decides whether mediation is a precondition to arbitration.

[323] Y. ZHAO, "Revisiting the issue of enforceability of mediation agreements in Hong Kong", *China-EU Law Journal* 2013, 128.

[324] Y. ZHAO, "Revisiting the issue of enforceability of mediation agreements in Hong Kong", *China-EU Law Journal* 2013, 128.

[325] G. BORN en M. ŠĆEKIĆ, "Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'" in D.D. CARON et al. (eds.), *Practising Virtue: Inside International Arbitration*, Oxford Scholarship Online, 2015, 259. E. KAJKOWSKA, "Enforceability of Multi-Step Dispute Resolution Clauses An Overview of Selected European

Firstly, the above reasoning does not take into account that parties tend to formulate ADR as a condition precedent to arbitration. Therefore, there is no evidence that the parties want a centralized forum for the resolution of all of their disputes including those relating to their dispute resolution clause. In fact, parties often tend to take disputes relating to the dispute resolution clause to courts as the ultimate source of justice. If the parties intend for the tribunal to make a final determination regarding whether their obligations under an ADR agreement, they may do so in their clause by inserting the following provision: "any dispute regarding the parties' obligations under the ADR agreement/tier must be determined by arbitration."

Secondly, arbitral tribunals have shown an inclination to treat pre-conditions to arbitration as non-mandatory or have wrongly assessed the parties' compliance with the binding nature of these agreements.[326] This violates the principle of *pacta sunt servanda*.[327] Parties who conclude an ADR agreement as a precondition to arbitration do so precisely because they want to have an obligation to attempt amicable settlement and thereby a binding mechanism as a last resort.[328] It is, therefore, essential that courts can review the determination of arbitrators regarding ADR agreements to safeguard the parties' agreement.[329] In these cases, the party wishing to enforce a valid agreement faced delay and additional expenses, as they

Jurisdictions" in L. CADIET et al. (eds.), *Procedural Science at the Crossroads of Different Generations*, 4, Luxembourg, Nomos Verlagsges, 2015, 173.

[326] *Empresa Nacional de Telecommunicaciones (Telecon en Liquidacion) (Colombia) v. IBM de Solombia S.A. (Colombia)* – Decision of ICC Tribunal 17 November 2004: the tribunal found that a conciliation tier block access to administrative justice as established in Article 229 of the Colombian Constitution. However, this is a narrow and formalist view, as conciliation provides an additional avenue for access to justice. See e.g. ICC Case No. 1140 Final Award 2010 XXXVII YB Commm Arb 32: where an agreement to pursue ADR (other than arbitration) is a 'primary expression of intention' and' should not be applied to oblige the parties to engage in fruitless negotiations or to delay an orderly resolution of the disputes'. *Emirate*, where the party who sought to enforce the agreement faced delay and expenses as it had to argue for enforceability in front of the court in light of the tribunal finding that it had jurisdiction (EHC (Queen's Bench Division), *Emirate Trading Agency Llc v Prime Mineral Exports Private Ltd* [2014] EWHC 014 (Comm), Judgement of 1 July 2014).

[327] An agreement must be kept (J. LEE, "Mediation Clauses at the Crossroads", *Singapore Journal of Legal Studies* 2001, 93. Further see Section IV (B)).

[328] "By the 20th century, the problems of arbitration were manifold: Arbitrators were accused of being frightened of appeals if they departed from court-like procedures; lawyers were blamed for 'hijacking' the process and 'seeking to bind [non-legal advisors] with legal science" (P. BROOKER, *Mediation Law: Journey through Institutionalism to Juridification*, New York, Routledge, 2013, 19. See Also P.K. BERGER, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*, 2, Alphen aan Den Rijn, Kluwer Law International, 2015, 47.

[329] This argument stands contrary to E. KAJKOWSKA, "Enforceability of Multi-Step Dispute Resolution Clauses An Overview of Selected European Jurisdictions" in L. CADIET et al. (eds.), *Procedural Science at the Crossroads of Different Generations*, 4, Luxembourg, Nomos Verlagsges, 2015, 173. See also M. PRYLES, "Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration* 2001, afl. 2, 159.

had to seek the assistance of national courts.[330] It is moreover important to note that arbitration can be a costly and time-consuming process that increasingly mimics court litigation in terms of evidence, submissions, disclose, witness statements, and expert opinions.[331]

69. To treat an ADR agreement as a simple pre-arbitral requirement would minimize ADR as a dispute resolution mechanism of the parties' choice. In most states, statute binds courts to decline jurisdiction and to give effect to the parties' agreement.[332] As will be further discussed in Chapter III, the same approach should also be followed towards ADR agreements.[333] Therefore, this work proposes that ADR agreements are contracts of a special nature with procedural consequences similar to that of arbitration and choice of court and arbitral agreements. Moreover, as Section 3.2 and 3.3 will demonstrate, categorizing ADR agreements has having a procedural effect is appropriate in light of the remedies available.

3.2. The Toolbox of Remedies

70. Section 2 discussed how there is growing support from the courts, the business community, the legislator, dispute resolution providers, and intergovernmental organizations for the recognition and enforcement of ADR agreements.[334] Typically, courts and tribunals review

[330] In case of pre-arbitral procedural requirements, various US courts have held that the arbitrator(s) have the final say regarding whether there requirements are fulfilled (See *Dialysis Access Ctr, LLC v RMS Lifeline, Inc,* 638 F3d 367, 383 (1st Cir 2011); *Howsam v Dean Witter* 537, US 79 (2002)).
[331] Despite litigation's downward trend, discontent with arbitration has never been more widespread" (B.A. PAPPAS, "Med-Arb and the Legalization of Alternative Dispute Resolution", *Harvard Negotiation Law Review* 2015, 161.). See also R.N. DOBBINGS, "The Layered Dispute Resolution Clause: from Boilerplate to Business Opportunity", *Hasting Business Law Journal* 2005, afl. 1, 174.
[332] C. BÜHRING-UHLE *et al.*, *Arbitration and Mediation in International Business*, Alphen aan den Rijn, Kluwer, 2006, 230.
[333] U. FRAUENBERGER-PFEILER, "Austria 2014" in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 12.
[334] N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 186. See also P. TOCHTERMANN, "Agreements to Negotiate in the Transnational Context - Issues of Contract Law and Effective Dispute Resolution", *Uniform Law Review* 2008, 710. Also reflected in Article 13 of the UNCITRAL Model Law on International Commercial Conciliation and Article 10(2) of the ICC Mediation Rules. If the parties have "expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future disputes", this agreement to conciliation (read mediation) shall be given effect to by the arbitral tribunal or court seized (UN Doc. A/58/17, Annex 1, 54, 58). ICC Mediation Rules 2014, available at https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/, (16 October 2017). The Netherlands is the only jurisdiction under analysis, where parties cannot be forced to comply with their mediation clause (M. PEL, "The Netherlands" in N. ALEXANDER en S. WALSH (eds.), *EU Mediation Law Handbook, Global Trends in Dispute Resolution* 7, Alphen aan den Rijn, Kluwer Law Internatioanl, 2017, 573.). However, some academics believe a well-drafted agreement to submit a dispute to mediation in a business case may result in a different decision in the future. See *NJ 2003, 87* (Rb. Amsterdam 16 Oct. 2002); *NJ Kort 2003, 17* (Hof Den Haag 12

compliance with an ADR agreement following a plea by the defendant before substantive arguments.[335] This is because, ADR involves a private choice by private parties and thus in accordance with party autonomy, the parties are free to walk away from their agreement if they mutually agree. Today, in absence of a harmonized approach, the national applicable law determines the type of remedy available in disputes involving a violation of an ADR agreement.[336] Hence, parties who have a preferred remedy in mind should pay significant attention to the law applicable to the enforcement of their agreement.

71. Sophisticated parties may provide their own contractual or procedural consequences for a breach or include a provision for an agreed amount by way of liquidated damages.[337] In the SCA study conducted in the context of this research, only 4% of the agreements contained a remedy clause. The most common remedies were the right to recover all costs and expenses and the inability to recover costs.[338] As Section 3.2.1 will demonstrate, there is support for clauses barring the recovery of attorney's fees if a party refuses to conduct ADR or acts unreasonably during the process.[339] However, the enforceability of such a clause will depend on the *lex fori*. This is an important matter to note, as in certain jurisdictions, such

Dec. 2002); *LJN. AO3003* (Rb. Arnhem 14 Jan. 2004); *Prg. 2005/214* (Rb. Maastricht 9 Nov. 2005); *NJ 2006, 75* (HR 20 Jan. 2006). Furthermore, in Austria, it is unclear to what extent the courts will support the enforcement of mediation clauses (M. RISAK en C. LENZ, "Austria" in N. ALEXANDER en S. WALSH (eds.), *EU Mediation Law Handbook, Global Trends in Dispute Resolution* 7, Alphen aan den Rijn, Kluwer Law International, 2017, 41.). Some argue that the adherence to mediation clauses cannot be seen as a pre-condition to a court procedure (Gerhard Hopf, *Erfahrungen mit dem österreichischen Mediationsgesetz*, in *Konfliktlösung im Konsens*, 84 (eds Willibald Posch, Wolfgang Schleifer & Sascha Ferz, Leykam 2010)). Conversely, others hold that mediation clauses constitute a valid temporary waiver of the right to file a claim and the action should be rejected as temporarily inadmissible or the court should stay the proceedings. The latter option is preferable as mediation clauses thereby at least have some legal effect (U. FRAUENBERGER-PFEILER, "Austria 2014" in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 14.).

[335] Final award in case no. 7211, 24 September 2013 published in the ICCA yearbook on Commercial Arbitration XXXIX (2014).

[336] C. JARROSSON, "Legal Issues Raised by ADR" in A. INGEN-HOUSZ (ed.), *ADR in Business: Practice and Issues Across Countries and Cultures*, II, Aan den Rijn, Kluwer Law International, 2011, 120.

[337] E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 49. *Thackwray v Winter* (1880) 6 VLR (L) 128 (liquidated damages of 50 pounds were provided for breach of the arbitration agreement). A. JOLLIES, "Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement", *Arbitration* 2006, afl. 4, 337. Contractual penalties appear to be available in Austria (U. FRAUENBERGER-PFEILER, "Austria 2014" in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 13.). Also possible in the US (S.R. COLE *et al.*, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 180.). Liquidated damages possible in the US if they are in accordance with a reasonable assessment of the probability of lose, such as attorney's fees to obtain enforcement.

[338] 5 provided for the recovery of costs and 2 stipulated that the violating party cannot recover costs.

[339] L.V. KATZ, "Getting to the Table Kicking and Screaming: Drafting an Enforceable Mediation Provision", *Alternatives to the High Cost of Litigation* 2008, 185.

as England, a clause prescribing a remedy for breach may be found to be unenforceable on the basis of the penalty doctrine.

72. However, under the penalty doctrine, clauses prescribing a remedy may not call for punitive, non-compensatory damages for contractual breaches.[340] Today, an enforceable liquidated damages clause must reflect a quantified cost based on a pre-estimate of loss. Procedural consequences include the requirement that tribunals and courts stay proceedings or dismiss cases when faced with an unfulfilled ADR agreement.[341]

73. National courts and tribunals remedy breaches of ADR agreements differently. In most jurisdictions under analysis, there are no specific rules on how courts ought to give effect to the parties' agreement. There is no consensus regarding the appropriate remedy for a failure to comply with an ADR agreement. Singapore is an exception in this regard.

74. In theory, there are four categories of remedies to breaches of ADR agreements: financial remedies including damages and adverse costs orders, specific performance, stay orders and dismissals, as well as injunctions.[342] Furthermore, as Section 3.2.5 will discuss, there have been instances of courts annulling arbitral awards or refusing to compel arbitration not as a remedy to a breach of an ADR agreement, but rather as a consequence.

75. Through analysing the above listed remedies, this section establishes the basis for Section 3.3, which will discuss the most appropriate method to give effect to the parties' ADR agreement. The choice of remedy reflects the consequence of the various remedies at hand.

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[340] Clauses that call for extravagant an unconscionable sums when compared with the greatest loss are likely to be considered a penalty. *Cavendish Square Holding BV v El makdessi and Parking Eye Ltd v Beavis* [2015] ULSC 67. E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses,* Oxford, Hart Publishing, 2017, 152. *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd.* [1914] UKHL. 1. According Lord Watson in *Lord Elphinestone v Monkland Iron and Coal Co* (1886), "there is a presumption that a provision is a penalty when a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but rifling damage." However, see the supreme court in *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Limited v Beavis,* a clause is penal if it is out of proportion to the innocent party' legitimate interest in enforcing the counter party's contractual obligations. Therefore, the new test is no longer focused on whether the clause in question had a deterrent or compensatory nature or not ([2015] UKSC 67).

[341] Regarding the benefits and disadvantages of contracting for procedure see K.E. DAVIS en H. HERSHKOFF, "Contracting for Procedure", *William & Mary Law Review* 2011, afl. 2.

[342] See also R. FEEHILY, "The Contractual Certainty of Commercial Agreements to Mediate in Ireland", *Irish Journal of Legal Studies* 2016, 98. Other potential remedies are not discussed in light of their rarity. Moreover, consequences such as vacating of arbitral awards are not discussed as they do not relate to remedies to a failure to comply with an agreement to mediate.

Here, this thesis makes a distinction between restorative, deterring and compelling remedies:

(a) *Restorative* remedies (such as damages) put the party back in the position it was in in relation to its rights, privileges and property before the breach.[343]

(b) *Deterring* remedies (such as stays) that aim to discourage parties from breaching their agreements.[344]

(c) *Compelling r*emedies (such as specific performance) that directly enforce the obligations contained in the agreement.

76. The following subsections will provide an overview of the various remedies and their categorization as restorative, deterring, or compelling. As will be further discussed in Section 3.3, the preferred remedy/remedies should have a compliance and deterrent effect. This is because, restorative remedies cannot replace the opportunity offered by ADR.

3.2.1. Financial Remedies (Deterrent and Restorative)

77. The contractual remedy of compensatory damages is available to the party who seeks the enforcement of its ADR agreement. Damages might arise if the other party hired a neutral, rented a venue for the mediation, disclosed trade secrets, or faced a loss of reputation from having to defend the claim in court. Contractual damages tend to be compensatory in nature and aim to put the plaintiff back in the position it would have been in if the parties had complied with their agreement.[345] Therefore, they are a restorative remedy. In theory, a party could claim damages on the basis of a violation of a contractual duty to participate in a process.[346] However, such a claim will likely fail, as it is difficult to find quantifiable

[343] X, *What is Restorative Remedies?*, https://thelawdictionary.org/restorative-remedies/).
[344] They are, in other words, a scare tactic. See K. BARNETT, *Accounting for Profit for Breach of Contract: Theory and Practice*, Oxford, Hart Publishing, 2012, 27.
[345] N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 204 & 208.
[346] For instance in Austria, the breach of a mediation clause or an agreement to mediate is a breach of a contract and is thus governed by general contract law, which can, at times, entail compensation (U. FRAUENBERGER-PFEILER, "Austria 2014" in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 14. C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 605.). Moreover a breach of the agreement to mediate can theoretically lead to a claim for compensation in accordance with the German contract law. In Germany this category of damages is referred to as frustrated expenditure (*frustrierte Aufwendungen*) (§280 & 241(2) BGB). For the Netherlands see L. SCHMIEDEL, "Mediation in the Netherlands: Between State Promotion and Private Regulation" in K.J. HOPT en F. STEFFEK (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 731. See also the ECA in *Sunrock Aircraft Corp Ltd. v. Scandinavian Airlines System Denmark-Norway-Sweden*, [2007] EWCA (Civ) 882, 2 Lloyd's Rep. 612 (Eng.), Judgement of 24 August 2007: a party could be entitled to damages calculated on the basis of the amount that would have resulted from the ADR process if the parties had complies with the dispute resolution clause.

loss.[347] Damages might arise if the other party hired a neutral and rented a venue for the ADR or disclosed trade secrets and faced a loss of reputation from having to defend the claim in court.[348] In all other cases, damages are an impractical remedy to the breach of the ADR agreement, as it is difficult to quantify loss.[349] Thus, damages do not result in the enforcement of the ADR obligation.

78. Aside from contractual damages,[350] courts in the Common Law jurisdictions under analysis have, at times, contemplated the awarding of nominal damages.[351] Nominal damages are minimal monetary damages awarded to the party who was right but has not suffered any substantial injury or loss.[352] They are resorted to by parties who can prove breach of contract but cannot prove damages.[353] Although relating to a binding ADR mechanism, in 2007, Thomas J of the English Court of Appeals in a case involving a breach of an expert determination clause in a commercial contract considered nominal damages.[354] In Common

[347] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 299. C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 606. I. BACH en U.P. GRUBER, "Germany" in C. ESPLUGUES et al. (eds.), *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, 2 dln., 1, Cambridge Intersentia Publishing Ltd., 2013, 166. R. FEEHILY, "The Contractual Certainty of Commercial Agreements to Mediate in Ireland", *Irish Journal of Legal Studies* 2016, 101. K.C. LYE, "A persisting aberation: The movement to enforce agreements to mediate", *Singapore Academy of Law Journal* 2008, 209. L.V. KATZ, "Getting to the Table Kicking and Screaming: Drafting an Enforceable Mediation Provision", *Alternatives to the High Cost of Litigation* 2008, 183. E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 72. See also F. FABIAN, "The Enforceability of Mediation Clauses - the Approach of English and German Courts and ICC Arbitral Tribunals", *SchiedsVZ* 2005, 253. C. BÜHRING-UHLE *et al.*, *Arbitration and Mediation in International Business*, Alphen aan den Rijn, Kluwer, 2006, 231. U. FRAUENBERGER-PFEILER, "Austria 2014" in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 13. To illustrate, there have been several instances of failed damages claims in the Netherlands (Lower Regional Court of Haarlem (*Rechtbank Haarlem*), *LJN* AQ2615, Judgement of 4 June 2002; HR, *NJ* 2006, no. 5, Judgement of 20 January 2006. See also Lower Regional Court of Zutphen (*Rechtbank zutphen*), *LJN* BH5413, Judgement of 24 February 2009).

[348] B. HESS en N. PELZER, "Mediation in Germany: Finding the Right Balance between Regulation and Self-Regulation" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 296. D. JOSEPH, *Jurisdiction and Arbitration Agreements and Their Enforcement*, London, Sweet & Maxwell, 2005, para. 14.16.

[349] Y. ZHAO, "Revisiting the issue of enforceability of mediation agreements in Hong Kong", *China-EU Law Journal* 2013, 126.

[350] That is damages awarded for breach of contract.

[351] Kirby P in NSW court of appeal, *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1, Judgement of 1991, para. 32, where he discussed the possibility of nominal damages. See also N. VOSER, "Multi-tier dispute resolution clauses: consequence of non-compliance with pre-arbitral procedural requirements", *Thomas Reuters* 2011, 410.

[352] Nominal damages can be as low as $1. See J. BEATTY en S. SAMUELSON, *Business Law and the Legal Environment*, Boston, Cengage Learning, 2006, 410.

[353] NSW court of appeal, *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1, Judgement of 1991, para. 32.

[354] *Sunrock Aircraft Corp Ltd. v. Scandinavian Airlines System Denmark-Norway-Sweden*, [2007] EWCA (Civ) 882, 2 Lloyd's Rep. 612 (Eng.), Judgement of 24 August 2007, para. 42.

Law jurisdictions, nominal damages could be an interesting remedy to combine with other remedies.[355] However, the imposing of nominal damages also does not equate the enforcing of the ADR agreement.

79. In addition, some Common Law courts may resort to cost sanctions if a party unreasonably refuses to attempt ADR prior to litigation.[356] It is conceivable, however, that cost sanctions may effectively be used to prompt compliance with an ADR agreement. Cost sanctions involve the court's refusal to grant the winning party their legal costs. English courts have discretion to impose adverse costs orders on a party unreasonably refusing to mediate regardless of who wins the legal dispute at trial.[357] Likewise, in the American case of *Frei*,[358] the court barred lawyer's fees in line with the parties' dispute resolution agreement as the defendant had refused to conduct ADR.[359] The case involved a mediation clause in the contract for the sale of a house. Furthermore, the apportionment of litigation expenses is possible in the Netherlands under Article 237 of the Dutch Code of Civil Procedure. Accordingly, the losing party has to pay the fees unless the costs request were needless. However, it is improbable that the above exception applies to an unreasonable refusal to

[355] As will be discussed in Section 3.3.

[356] ECA, *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, Judgement of 11 May 2004, para. 16: the ECA reversed the "loser pays" rules in light of the wining party's refusal to comply with a court order to engage in ADR; ECA, *PGF II SA v. OMFS Company Limited. 1 Ltd*., [2013] EWCA (Civ) 1288, Judgement of 23 October 2013; ECA, *Thakkar v Patel* [2017] EWCA Civ 117, Judgement of 25 January 2017. For Singapore see Rules of Court Order 59 Rule 5(c). See also J. LEE, "Singapore" in C. ESPLUGUES en S. BARONA (eds.), *Global Perspectives on ADR*, Cambridge, Intersentia Publishing Ltd., 2014, 415. Potential possibility in Australia also (Civil Dispute Resolution Act 2011). Court cannot decline jurisdiction, but may impose sanctions and procedural remedies. U. MAGNUS, "Mediation in Australia: Development and Problems" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 876. Section 11 & 12 Civil Dispute Resolution Act.

[357] CPR pt 36. B. MARSH *et al.*, "England and Wales" in N. ALEXANDER en S. WALSH (eds.), *EU Mediation Law Handbook, Global Trends in Dispute Resolution* 7, Alphen aan den Rijn, Kluwer Law Internatioanl, 2017, 216. Cost sanction awarded in *Yorkshire Bank plc and Clydesdale Bank Asset Finance Ltd v RDM Asset Finance Ltd* and J.B. Coach Sales (UK) (30 June 2004) (unreported); *Gill v RSPCA* (2009) EWHC 2990; *Laporte v Commissioner of Police of the Metropolis* [2015] EWHC 371 (QB). Cost sanctions not awarded: *ADS Aerospace Ltd v EMS Global Tracking Ltd* [2012] EWHC 2904 (TCC).

[358] *Frei v. Davey* (2004) 124 Cal. App. 4th 1506. Court of Appeal, Fourth District, Division 3, California. The case involved the California Residential Purchase Agreement and Joint Escrow Instructions, Section 17.

[359] The court denied a request for $157,885 by rejecting the argument that settlement efforts fulfilled the same function. "Communications between the parties or their counsel regarding settlement are not the same as mediation. In mediation, a neutral third party analyses the strengths and weaknesses of each party's case, works through the economics of litigation with the parties, and otherwise assists in attempting to reach a compromise resolution of the dispute" (*Frei v. Davey* (2004) 124 Cal. App. 4th 1506, para. 1508). See also L.V. KATZ, "Getting to the Table Kicking and Screaming: Drafting an Enforceable Mediation Provision", *Alternatives to the High Cost of Litigation* 2008, 185; S.R. COLE *et al.*, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 180. For cost sanctions see *Lee v GEICO Indemnity Co* 2009 WI App 168; 321 Wis 2d 698; 776 N W 2d (Ct App, 2009) (court has statutory and inherent authority to order sanctions against a party who failed to appear in person at mediation).

conduct ADR.[360] Courts may furthermore impose cost sanctions if one party acted unreasonably during the ADR or withdrew from it prematurely.[361]

80. Similarly, ICC arbitral tribunals may use costs to sanction a party that unreasonably rejected the proposal to conduct ADR. [362] In Case no. 13085, the ICC tribunal found that the "Assignee subcontractor has to bear the costs of the arbitration and the legal costs of the Assignee Ban."[363] In theory, the appointment of costs should reflect the *lex arbitri*. However, arbitral tribunals routinely issue cost awards without much discussion of the applicable law.[364] Moreover, several rules and guidelines address the potential for adverse

[360] Deviation from rules can happen if court leaves costs that were needlessly applied for or causes at the expense of the party by the party by whom these costs were applied or caused. However, there is consensus that the provision does not play a role in cases of an unreasonable refusal to mediate. See E. VAN BEUKERING-ROSMULLER en P. VAN LEYNSEELE, "Enforceability of Mediation Clauses in Belgium and the Netherlands", *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 2017, afl. 3, (36) 45.
[361] For England, see *Laporte & Anor v Commissioner of Police of the Metropolis* [2015] EWHC 371 (QB) on when refusal to mediate my attract cost sanctions where the court warned litigants against dismissing mediation as futile. *Earl of Malmesbury v Strutt & Parker* [2007] EWCH 999 (QB) (court stipulated that the duty to mediate extends to the mediation process as well and considered the application of cost sanctions as a party having agreed to mediate, acted unreasonably during the process, thereby falling short of good faith. Court award a financial quantum less than both claims and final offer at mediation); *Leicester Circuits Ltd v Coates Brothers plc* [2003] EWCA Civ 333 (the parties agreed to go to mediation and appointed a mediator, arranged the date of the mediation meeting; however, the defendant withdrew a day before the mediation. The defendant lost at first instance but won on appeal. The court of appeal did not allow the recovery of costs incurred as there was a chance that mediation would succeed. According to Longmore LJ: "The whole point of having mediation, and once you have agreed to it, proceeding with it, is that the most difficult of problems can sometimes, indeed often are, resolved …Having agreed to mediation, it hardly lies in the mouths of those who agreed to it to assert that there was no realistic prospect of success."); *McMillan Williams v Range* [2004] EWCA Civ 294 (Ward LJ refused to award the costs of the appeal to the appellant); *Roundstone Nurseries Ltd v Stephenson Holdings Ltd* [2002] EWHC 1431 (TCC) (the defendant withdrew from mediation meeting days before, thus the court ordered that the defendant pays the claimant's costs thrown away by the late cancellation of the mediation process). See also N. ALEXANDER en F. STEFFEK, *Making Mediation Law*, Washington, International Finance Corporation, 2016, 34; S. SIME *et al.*, *A Practical Approach To Alternative Dispute Resolution*, Oxford, Oxford University Press, 2011, 94. For the US, see J.R. COBEN en P.N. THOMPSON, "Disputing Irony: A Systematic Look at Litigation About Mediation", *Harvard Negotiation Law Review* 2006, afl. 43, 115-120. Regarding the refusal to award attorney's fees as a sanction to the failure to attend mediation in the US see: *People's Mortage Corp. v. Kan. Bankers Surety Co.*, 62 F. App'x 232 (10th Cir. 2003) (court awarded attorney's fees against insurer's in part for unreasonable refusal to participate in mediation); *Segui v. Margrill*, 844 So. 2d 820, 821 (Fla. Dist. Ct. App. 2003) (court awarded $1,484 in attorney's fees and mediator fees as a sanction since the party did not attend the mediation sessions). Regarding fees in cases where a prevailing party failed to mediate as a condition precedent in the US see *Leamon v. Krajkiewcz*, 107 Cal. App. 4th 424 (Cal. Ct. App. 2003)(affirming the denial of fees to prevailing party as it failed to first request mediation as required by the California Standard From Residential Purchase Agreement); *Brinn v. Tidewater Transp. Dist. Comm'n*, 242 F.3d 227 (4th Cir. 2001). Regarding sanctions for bad faith in the US, see *Ferrero v. Henderson*, No. C-3-00-462, 2003 WL 21796381, at 5-6 (S.G. Ohio) (the court granted the plaintiff's unopposed sanction motion as defendant acted in bad faith at mediation by refusing to make any settlement offer).
[362] C. BÜHRING-UHLE *et al.*, *Arbitration and Mediation in International Business*, Alphen aan den Rijn, Kluwer, 2006, 240.
[363] Published in the ICC yearbook on Commercial Arbitration XXXIV (2009), para. 44.
[364] M. SAVOLA, "Awarding Costs in International Commercial Arbitration", *Scandinavian Studies in Law* 2017, 291. J.Y. GOTANDA, "Awarding Costs and Attorney's Fees in International Commercial Arbitration", *Michigan Journal of International Law* 1999, 17-18.

cost orders.[365] The issue of costs is important especially in small and medium sized disputes, as they represent a large portion of the total amount in dispute.[366] Evidently, the allocation of costs matters to the parties and the threat thereof can be an effective deterrent. Nonetheless, like damages, cost sanctions alone are not an adequate remedy to a breach of an ADR agreement, as they do not restore the lost opportunity to discuss the dispute with a trained neutral.[367]

3.2.2. Specific Performance (Compelling)

81. Specific performance is a substantive remedy that requires/compels the party violating its dispute resolution clause to comply with its agreement.[368] Specific performance is an ideal remedy to the breach of an ADR agreement when a party is unwilling to attempt ADR, as it directly enforces the parties' obligations.[369] Common Law courts grant specific

[365] According to the IBA Guideline 26 on Party Representation, the arbitral tribunal has the power to take into account a party representative's misconduct when apportioning costs. Guideline 27 further provides anon-exhaustive list of factors that the arbitral tribunal can consider when determining cost (Party representatives must be notified of allegations of misconduct). Moreover, LCIA Rule 28.4 provides that, "the arbitral tribunal shall makes its orders on legal and arbitration costs on the basis of the general principle that, "costs should reflect the parties' relative success and failure […] except where it appears […] that in the particular circumstances this general approach is inappropriate." Likewise Article 6 of the CEDR Rules for the Facilitation of Settlement in International Arbitration stipulate that, "[w]hen considering the allocation between the Parties of the costs of the arbitration, (including the Parties' own legal and other costs) the Arbitral Tribunal may take into account: 1.1. any offer to settle that has been made by a Party where the Party to whom such an offer has been made has not done better in the award of the Arbitral Tribunal than the terms of the offer to settle; 1.2. any unreasonable refusal by a Party to make use of a Mediation Window; or 1.3. any failure by a Party to comply with a requirement to mediate or negotiate in the contract between the Parties which is the subject of the arbitration." See Also Rule 44 of the Stockholm Chamber of Commerce; Article 35(2) DIS Rules; Article 47.4 FAI Rules; Article 40(1) Swiss Rules; Article 42(1) UNCITRAL Arbitration Rules (2010); Article 37(5) ICC Rules; Article 33.2 HKIAC Rules; Article 34 ICDR Rules; Rules 35(1) and 37 SIAC Rules.

[366] P. BUTLER en C. HERBERT, "Access to Justice vs Access to Justice for Small and Medium-Sized Enterprises: The Case for a Bilateral Arbitration Treaty", *Victoria* 2014, 197. FSB, "TIED UP: UNRAVELLING THE DISPUTE RESOLUTION PROCESS FOR SMALL FIRMS" 2016, 6. R.M. JACKSON, *Review of Civil Litigation Costs*, 1, United Kingdom, The Stationary Office, 2009, 129. D. CAMPBELL (ed.), *E-Commerce: Lawand Jurisdiction*, Fredrick, Aspen Publishers, 2003, 150. A. CENTER, "The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation" 2010, 18 & 22. C. GONZALES-BUENO, *Arbitral Tribunal's Decisions on Costs Sanctioning the Parties for Counsel Behaviour: A Phenomenon Expected to Increase?*, 2014.

[367] A. SCHMITZ, "Refreshing Contractual Analysis of ADR Agreements By Curing Bipolar Avoidance of Modern Common Law", *Harvard Negotiation Law Review* 2008, afl. 1, 55.

[368] R. FEEHILY, "The Contractual Certainty of Commercial Agreements to Mediate in Ireland", *Irish Journal of Legal Studies* 2016, 100. See also K.F. DUNHAM, "Binding Arbitration and Specific Performance Under the FAA: Will This Marriage of Convenience Survive?", *Journal of American Arbitration* 2004, afl. 2.

[369] A. SCHMITZ, "Refreshing Contractual Analysis of ADR Agreements By Curing Bipolar Avoidance of Modern Common Law", *Harvard Negotiation Law Review* 2008, afl. 1, 92. K.C. LYE, "A persisting aberation: The movement to enforce agreements to mediate", *Singapore Academy of Law Journal* 2008, 210. Lee argues that, "there is nothing objectionable in decreeing specific performance of an ADR clause" (J. LEE, "Mediation Clauses at the Crossroads", *Singapore Journal of Legal Studies* 2001, 92.). Likewise, Alexander cannot comprehend why Common Law courts would refuse in principle to make orders for specific performance when "they are increasingly prepared to refer cases to mediation, even against the wishes of both parties" (N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 202.). See also *Cable & Wireless* where Colman J also noted that, "clause 41.2 includes a

performance if damages are inadequate.[370] As Section 3.2.1 demonstrated, damages are inadequate to remedy breaches of ADR agreements. However, with the exception of US courts, national courts under analysis are reluctant to grant specific performance.[371]

82. Likewise, in Austria, there is a strong emphasis on the principle of voluntariness in ADR.[372] Therefore, a party cannot *prima facie* enforce its agreement by having a court order the other party to attend an ADR session.[373] However, when a contract is drafted with sufficient certainty, it should be possible to enforce the ADR agreement and supervise it.[374] Despite the clear utility of specific performance, resort to this remedy remains rare. In the Australian case of *Banabelle*, Einstein J in refusing specific performance stayed the proceedings on the basis that:

> The court may, however, effectively achieve enforcement of the clause by default, by ordering that proceedings commenced in

sufficiently define mutual obligation upon the parties both to go through the process of initiating a mediation, selecting a mediator and at least presenting that mediatory with its case and its documents and attending upon him. There can be no serious difficulty in determining whether a party has complied with such requirements" (EHC (Commercial Court) Division, *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm Ct), [2002] CLC 1319, Judgement of 11 October 200, para. 8.).

[370] T. EISENBER en G.P. MILLER, "Damages versus Specific Performance: Lessons from Commercial Contracts", *Journal of Empirical Legal Studies* 2015, 30. See also K.F. DUNHAM, "Binding Arbitration and Specific Performance Under the FAA: Will This Marriage of Convenience Survive?", *Journal of American Arbitration* 2004, afl. 2.

[371] Specific performance is a remedy that is left to the Common Law judiciaries' discretion and is traditionally only available when damages are inappropriate or inadequate. For instance, the general rule in Australia is that equity will not order specific performance of a dispute resolution clause, as supervision of the performance is untenable (Supreme Court of NSW, *Aiton Australia Pty Ltd v Transfield Pty Ltd*, [1999] NSWSC 996, Judgement of 1 October 1999, para. 26: no order specific performance of the clause in question due to the difficulty of supervision.). However in the US, specific performance may be ordered whenever it is equitable (See the UCC, 2012, §2-716 "Buyer's Right to Specific Performance or Replevin). See also P. TOCHTERMANN, "Agreements to Negotiate in the Transnational Context - Issues of Contract Law and Effective Dispute Resolution", *Uniform Law Review* 2008, 711. L.S. ONN, "Mediation", *SinfaporeLaw.org* 2015.

[372] M. ROTH en D. GHERDANE, "Mediation in Austria: The European Pioneer in Mediation Law and Practice" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 249.

[373] N. ALEXANDER, A. HOWARD en D. QUEK, *UNCITRAL and the Enforceability of iMSAs: the debate heats up*, 2016. C. LEON en I. ROHRACHER, "Austria" in G. DE PALO en M.B. TREVOR (eds.), *EU Mediation Law and Practice*, Oxford, Oxford University Press, 2012, 14.

[374] E. SUTER, "The Progress from Void to Valid for Agreements to Mediate", *Arbitration* 2009, 35. These possibility seems to exist in Germany according to Eidenmüller and Koenig who argue that a party to an mediation clause can request specific performance thereof and thereby oblige the non-compliant party to fulfil its obligations (S. KOENIG, "Germany" in G. DE PALO en M.B. TREVOR (eds.), *EU Mediation Law and Practice* Oxford, Oxford University Press, 2012, 141.). See also M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 299.

respect of a dispute subject to the clause be stayed or adjourned until such time as the process referred to in the clause is completed.[375]

83. Thus far, due to a lack of statutory foundation, resort to specific performance remains an exceptional remedy to breaches of ADR agreements. There have only been few instances of US courts relying on the Federal Arbitration Act ('FAA') to order specific performance. Such cases demonstrate that the order of specific performance may be a viable option if courts have a legislative basis to rely on. This is evident when remembering that the remedy of specific performance in the field of arbitration only became available following the enactment of the FAA.[376] There is support for the need to resort to specific performance from the academic community. Kulm argues that if there is a legislative policy decision to foster ADR, there is also a need to soften the common law rules on specific performance.[377] Otherwise, attempts to sanction a breach of the ADR agreement would be frustrated.[378] Specific performance unlike damages and cost sanctions may offer a true enforcement mechanism.

3.2.3. Stays and Dismissals (Deterrent and Compelling)

84. When a party breaches its ADR agreement by commencing litigation or arbitration contrary to the agreement, there are two prominent remedies that apply depending on the jurisdiction seized, namely stays and dismissals.[379] Both stays and dismissals are procedural remedies

[375] NSW Supreme Court, *New South Wales v Banabelle Electrical Pty Ltd* [2002] NSWSC 178, Judgement of 22 March 2002, para. 29. Moreover, in the leading case of *Cable & Wireless*, Colman J relied on its discretionary power to grant a stay upon the court proceedings that could only be lifted when one of the parties could demonstrate the failure of mediation in front of the court (EHC (Commercial Court) Division, *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm Ct), [2002] CLC 1319, Judgement of 11 October 2002). In England, the main remedy is a stay; under the 1996 Arbitration Act, a stay of proceedings is obligatory, while in case of ADR, a stay of proceedings is discretionary (Section 49(2), Senior Courts Act 1981; Rule 26.4 of the Civil Procedure Rules (CPR) 1998). See also C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 607. Likewise, in the US under the case *Philadelphia Housing Authority v. Dore & Assocs. Contracting, Inc.*, the court granted summary judgment and stayed proceedings as the housing agency had failed to fulfil its contractual obligations enabling the defendant contractor to exercise its right to mediate or arbitrate (11 F. Supp.2d 633 (E.D. Pa. 2000)).

[376] K.F. DUNHAM, "Binding Arbitration and Specific Performance Under the FAA: Will This Marriage of Convenience Survive?", *Journal of American Arbitration* 2004, afl. 2, 6.

[377] R. KULMS, "Mediation in the USA: Alternative Dispute Resolution between Legalism and Self-Determination" in K.J. HOPT, F. STEFFEK en H. UNBERATH (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 1269. *Lynn v General Electric Company*, 2005 WL 701270 (D. Kan., 2005); *Annapolis Professional Firefighters Local 1926, IAFF, AFL-CIO v City of Annapolis*, 642, A.2d 889, 894 et seq. (Md. App., 1994).

[378] R. KULMS, "Mediation in the USA: Alternative Dispute Resolution between Legalism and Self-Determination" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 1269.

[379] E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 155.

that indirectly enforce an ADR agreement and deter parties from breaching their agreements.[380] Thus, they are deterring remedies. A stay order pauses the proceedings until the parties comply with their agreement, while through a dismissal the claim will have to be refiled if the ADR is unsuccessful. The sections below further describe the difference between these procedural remedies. On the basis of this comparison and the sections above, Section 3.2.5 will discuss the preferred legal remedy.

85. The Common Law courts in focus and ICC arbitral tribunals often grant a stay of proceedings[381] as a remedy for breach of an ADR agreement.[382] Stay orders are based on the court's inherent power and on the tribunal's contractual power.[383] Singapore has enacted legislation reaffirming that courts have the statutory power to stay their own proceedings in light of a valid and written ADR agreement.[384] If a party does not honour its ADR agreement, the other party can request that the binding forum seized (courts or arbitral

[380] Regarding stays an an indirect remedy, see D. SPENCER en M. BROGAN, *Mediation Law And Practice* Cambridge, Cambridge University Press, 2006, 410.
[381] A stay means that the proceedings are halted until the parties have complied with their obligations.
[382] See also *Santos* where Douglas J of the Supreme Court of Queensland stayed the proceedings pending the performance of the parties' obligations (Supreme Court of Queensland, *Santos Ltd v Flour Australia Pty Ltd* [2016] QSC 129, Judgement of 30 May 2016, para. 28). In the US, courts regularly stay proceedings in order to indirectly enforce parties' mediation clauses. "If trial proceedings are commenced in spite of an obligation to mediate, a stay of trial is appropriate until mediation is completed" (R. KULMS, "Mediation in the USA: Alternative Dispute Resolution between Legalism and Self-Determination" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 1269.). See also *Philadelphia Housing Authority v. Dore & Associates Contracting, Inc.*, 111 F. Supp. 2d 633 (E.D. Pa. 2000) (federal district court stayed court proceedings); *Mobility Transit Services, LLLC v. Augusta, Ga.*, 2013 WL 3225475 (S.D Ga. 2013) (stay); *Mark v Neundorf*, 147 Conn App. 485, 83 A.3d 685 (2014) (failure to participate in mediation as required by contract did not deprive court of subject matter jurisdiction); *US v Bankers Insurance Co.*, 245 F. 3d 315, 321 et seq. (4th Cir., 2001); *Lynn v General Electric Company*, 2005 WL 701270 (D. Kan., 2005). *CV Richard Ellis, Inc v American Environmental Waste Management*, No. 98-CV-4183(JG), 1998 WL 903495 (E.D.N.Y. Dec 4, 1998) (District court of NY stayed legal proceedings to enforce a mediation agreement. Followed in *Fisher v GE Medial Systems*, 276 F.Supp.2d 891 (M.D. Tenn. 2003).); J.R. COBEN en P.N. THOMPSON, "Mediation Litigation Trends: 1999-2007", *World Arbitration & Mediation Review* 2007, afl. 3, 397. S.R. COLE *et al.*, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 163. J.R. COBEN en P.N. THOMPSON, "Disputing Irony: A Systematic Look at Litigation About Mediation", *Harvard Negotiation Law Review* 2006, afl. 43, 105. For tribunals see M. MEAR, "Enforceability of Mediation in Multi-tiered Clauses: the Croatian Perspective", *Kluwer Arbitration Blog* 2015. ICC Case No. 6276. However, see Bill Call Ford, Inc. v. Ford Motor Co., 48 F3d 201, 207-08 (6th Cir 1995) (upholding grant of summary judgment to defendant on warranty claim because participation in dispute resolution process provided in contract was condition precedent to filing suit).
[383] Inherent power of US courts to grant stays (*United States v. Bankers Ins.* Co., 245 F.3d 315, 322 (4th Cir. 2001); *AMF, Inc. v. Brunswick Corp.*, 621 F.Supp. 456 (S.D.N.Y. 1985).
[384] Article 8 (1)&(2) of the Singapore Mediation Act 2017.

tribunals) orders a stay of its own proceedings until the defaulting party has complied with its agreement.[385] Time-bars are stayed alongside arbitral proceedings.[386]

86. Switching to dismissals, as also discussed in Section 3.2, recourse thereto to enforce ADR agreements is prevalent in jurisdictions where the ADR agreement has a hybrid substantive nature.[387] Through a dismissal, a legal claim is dismissed instead of suspended; hence, the parties have to file the claim again if the ADR process does not lead to a settlement.[388] German courts relying on the above logic have rejected actions on the basis that they are 'temporarily/currently inadmissible' in light of an agreement to conciliate.[389]

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[385] Stays are always on plea of defendant (*not ex officio*). For Australia see Supreme Court of NSW, *Aiton Australia Pty Ltd v Transfield Pty Ltd*, [1999] NSWSC 996, Judgement of 1 October 1999, para. 166. M. HALES, "Australia" in I.L. COMMITTEE (ed.), *Multi-Tiered Dispute Resolution Clauses*, 2015, 13. C. LOVEDAY, R. ABRAHAM en D. BRITH, "Australia" in M. MADDEN (ed.), *Global Legal Insights - Litigation & Dispute Resolution*, London, Global Legal Group, 2014, 9. For England see N. ANDREWS, "Mediation in England: Organic Growth and Stately Progress", *Revista Eletrônica de Direito Processual* 2012, afl. 9, 581. Powers to promote ADR see CPR 26.4 and 1.4 (1)(2) (A party may request in writing a stay and court on its own initiative can authorise a stay). For the US see J.R. COBEN en P.N. THOMPSON, "Disputing Irony: A Systematic Look at Litigation About Mediation", *Harvard Negotiation Law Review* 2006, afl. 43, 108.

[386] K. LENAERTS, I. MASELIS en K. GUTMAN, *EU Procedural Law*, Oxford, Oxford University Press, 2014, 759. N. FOSTER (ed.), *Blackstone's EU Treaties & Legislation 2015-2016*, Oxford, Oxford University Press, 2015, 199.

[387] As in Germany, in Austria, in accordance with the voluntary nature of mediation, mediation clauses and agreement to mediate do not generally oust the justification of the courts (C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 613. R. BELLINGHAUSEN en J. GROTHAUS, "Escalation Clauses: No Longer a Tripping Hazard for Arbitrations with Seat in Germany?", *Kluwer Arbitration Blog* 2016, http://kluwerarbitrationblog.com/2016/12/01/escalation-clauses-no-longer-a-tripping-hazard-for-arbitrations-with-seat-in-germany/, 249.). Despite the Common Law tendency to use stays as a ways of indirectly enforcing ADR agreements, the District of South Carolina in *Allied World Surplus Lines Insurance Company v. Blue Cross and Blue Shield of South Carolina* dismissed a claim brought in violation of a mediation clause. The court found that ripeness is a question of subject matter jurisdiction and thus where mediation is a condition precedent to the commencement of litigation and it has not been fulfilled, the underlying controversy remains dependent on such uncertainty as whether the required mediation will occur and whether it will resolve all or party of the underlying claims (3 August 2017) US District Court for the District of South Carolina). More examples of dismissals in the US include: *Dominion Transmission, Inc. v. Precision Pipeline*, where the United States District Court for the Eastern District of Virginia dismissed a complaint where the two corporations had agreed to submit any disputes to mediation before commencing litigation and failed to do that. The basis for the dismissal, however, relied on the court's inherent authority to control its docket, not on any lack of subject matter jurisdiction (No. 3:2016cv00180 - Document 56 (E.D. Va. 2017)).

[388] N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 204.

[389] Within the period of time set by the court (§282 (3) ZPO). Although German courts have yet to determine the remedy for breach of an agreement to mediate, they have held in case of agreements to conciliation that when such agreements clearly reflect the intention of the parties to refer the dispute to litigation as a last resort, they will result in the court dismissing a claim as temporarily inadmissible (*unzulässig*) implied temporary waiver of action (*dilatorischer Klageverzicht*) (BGH, VIII ZR 344/97, Judgement of 18 November 1998; BGH, *XII ZR 165/06*, Judgement of 29 October 2008; para. 22; P.K. BERGER, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*, 1, Alphen aan Den Rijn, Kluwer Law International, 2015, 128. A. RONNIE, M. SCULLY, K. SMITH en A. CHANDARIA, *International Mediation Guide*, London, Clifford Chance, 2016, 41. A.R. KLETT *et al.*, "Intellectual Property Law in Germany", *Beck Online* 2008, 123; S. RÜTZEL en A. LEUFGEN, "Germany" in M. MADDEN (ed.), *Global Legal Insights - Litigation & Dispute Resolution*, London, Global Legal Group, 2014. B. HESS en N. PELZER, "Regulation of Dispute Resolution in

87. The 1998 BGH decision[390] confirmed the inadmissibility of claims if there is a failure to comply with the conciliation clause.[391] The court came to its conclusion by finding that a conciliation clause has a comparable effect to an arbitration clause.[392] Likewise in the 2000 Münster District Court (*Landgericht*)('LG') decision,[393] the Court stipulated that the clause in question had the effect of a *pactum de non petendo*[394] and thus the proceedings were found to be initiated prematurely making the claim temporarily inadmissible (*derzeit nicht zulässig*).[395]

Germany: Cautious Steps towards the Construction of an ADR System" in F. STEFFEK en H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 224.). Also established by §9(3) of the DIS Mediation Rules: "The parties undertake not to bring an (arbitration) action for such claims that are still subject to pending mediation proceedings." The procedural order of inadmissibility– *Prozeßurteil* not *Sachurteil* relates to the merits (See P Hartmann in A Baumback W Lauterback K Abers P Hartmann (eds) *zicilproessordnung mit FamFG, GVG und anderen Nebengesetzen*, 74th edn (CH Beck 2010) 1024). The BGH in the decision of 23 November 1982 stated that the parties can contractually agree that the right to bring a legal claim is conditional or temporarily excluded (BGH NJW 1984). It should, be noted that, German courts have yet to address the enforceability of agreements to mediate. Moreover, there is a difference in the way German courts treat ADR agreements and expert determination clauses. In Germany, a breach of ADR clause results in the claim being rejected as inadmissible via a *procedural* order (key) while breach of the expert determination clause requires the court to render the claim unfounded and issue a judgment on the merits (E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 198.).

[390] 18 November 1998BGH NJW 1999, 647.

[391] The case involved a clause requiring conciliation before a relevant tax advisors' chamber. Similar reasoning should by followed by arbitral tribunals as confirmed in the decision of *OLG Frankfurt am Main* 1998, where the court stipulated that the conciliation step should precede arbitration in the same manner as it does for litigation. Thus, mediation clauses block the commencement of arbitration. See also NJW-RR 1998, 778; XII ZR 165/06, NJW 637 (2009), BGH, 29 October 2008; and VIII ZR 344/97, NJW 647 (1999), BGH, 18 November 1998 with respect to conciliation clauses; K. OSSWALD en G. FLECKE-GIAMMARCO, "Germany" in N. ALEXANDER en S. WALSH (eds.), *EU Mediation Law Handbook, Global Trends in Dispute Resolution* 7, Alphen aan den Rijn, Kluwer Law International, 2017, 260.

[392] *LG Münster.* Lower courts have followed similar reasoning (see *Brandenburgisches OLG* decision of 18 September 1996 which involved a MDR clause calling for negotiation followed by conciliation in a partnership agreement between solicitor and tax advisors. The court found the claim temporarily inadmissible (*einsteweilen unzulässig*)). Again in of *OLG Frankfurt am* Main, the case involved a conciliation clause in an agreement for the sale of a tax advisory practice (NJW-RR 1998, 778 of 7 November 1997). Under §1032(1) ZPO, courts must dismiss cases brought in violation of arbitration agreements.

[393] 21 December 2000, DStRE 2001, 614.

[394] According to Berger, such an inadmissibility is based on the *pactum de non petendo* that is implied by the parties' inclusion of an mediation clause in their contract (P.K. BERGER, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*, 1, Alphen aan Den Rijn, Kluwer Law International, 2015, 128. See also BGB §133 & 157). Premature claims are considered temporarily inadmissible in Germany (*einstweilen unzulässig*) and not unfounded (*unbergümdet*). Therefore, the parties can contract a condition for actionability as long as it does not unduly restrict the right to access courts. The agreement to limit actionability is a procedural contract that is labelled as *pactum de non petendo* (*Stillhalteabkommen*). The parties agree in their contract not to initiate proceedings until they have exhausted the prescribed private dispute resolution mechanism (§1029 ZPO; E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 69.).

[395] The clause in question was contained in the rules regulating the conduct of the tax advisors and required conciliation before a tax advisor's chamber. The actionability of the claim is a condition of admissibility of the proceedings (*Prozeßvoraussetzung*)(*Verfahrensvoraussetzung* see BayObLG NJW-RR 1996, 910 and LG Stralsund NZM 2003, 327).

88. Although the question has yet to go in front of courts in Austria, the potential for a dismissal is based on the prediction that an ADR agreement constitutes a temporary waiver to the right to start litigation and thus a claim brought in violation thereof is not yet actionable (*mangelnde Klagbarkeit*).[396] However, it is unclear if Austrian courts are open to enforcing ADR agreements in commercial contracts in light of Austria's adherence to the principle of voluntariness.[397]

89. When courts and tribunals order a stay of proceedings or dismiss a case in light of an unfulfilled ADR agreement, they are staying their own proceedings or dismissing the claims brought in front of them. As evident by the case law on ADR agreements, courts in their supervisory role also have the power to order stays of arbitration proceedings and can declare cases inadmissible to arbitration.[398] If a party objects the tribunal's jurisdiction or the admissibility of the dispute, the case will eventually end up in front of courts. Thus, it is efficient in terms of costs and time to review the determination of the tribunal regarding jurisdiction or admissibility at the "front end".[399] If a party seeks to stop an arbitration or litigation abroad, stay and dismissals are not appropriate, as the court no longer plays a supervisory role. In these cases, as will be discussed in the next Section (3.2.5), courts may potentially rely on injunctions.

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[396] See OGH, 8 ObA 2128/96s, Judgement of 17 April 1997; OGH, 1 Ob 300/00z, Judgement of 17 August 2001; OGH, 4 Ob 203/12z, Judgement of 15 January 2013.

[397] According to the OGH, mediation cannot be initiated and conducted if it is contrary to the will of one of the parties (OGH, Ob 161/97a, Judgement of 15 July 1997 and the Austrian Mediation Act especially Article 1(1), 16(2) and 17(1) (*Zivilrechts-Mediations-Gesetz*, BGBl I 2003/29)).

[398] R. KULMS, "Mediation in the USA: Alternative Dispute Resolution between Legalism and Self-Determination" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 1269. A. LIMBURY, *ADR in Australia*, Kluwer Law International, 2010. If ADR is a condition precedent to arbitration, party in breach may be enjoined from commencing arbitration prior to the mediation. – enjoined means to be prohibited. See *Semco, L.L.C. v Ellicott Machine Corporation International*, 1999 WL 493278 (E.D. La., 1999); *Hooper Bailie Associated Ltd v. Natcon Group Pty Ltd* (1992) 28 NSWLR 194 at 206 (per Giles J, enforcement of the conciliation clause, stay of arbitration ordered).

[399] R. WEERAMANTRY, "Anti-Arbitration Injunctions: The Core Concepts", *Clifford Chance*, 2. N. POON, "The Use and Abuse of Anti-Arbitration Injunctions", *Singapore Academy of Law Journal* 2013, 252. Indeed, there is no rule of jurisdiction that a party who wishes to raise an issue of the effectiveness of an arbitration clause has to go through with the arbitration and the relevant procedures for challenging the jurisdiction of the arbitral tribunal. See also *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2012] 1 WLR 920, para. 99; *Excalibur Ventures LLC v Texas Keystone Inc* [2011] 2 Lloyd's Rep 289, para. 99.

3.2.4. Injunctive Relief (Deterrent and Compelling)

90. In case a party prematurely initiates binding proceedings such as arbitration or court proceedings contrary to an ADR agreement, an injunction offers an extraordinary remedy to restrain the continuation of such proceedings abroad.[400] Likewise, a party may request an injunction to prevent the other party from commencing binding proceedings. An anti-suit injunction seeks to prevent the initiation or continuation of court proceedings while an anti-arbitration injunctions seeks to prevent the initiation or continuation of arbitral proceedings. Anti-arbitration injunctions can be issued against a party and the tribunal while anti-suit injunctions can only be issued against a party.[401]

91. Courts in Common Law jurisdictions have a wide discretion to grant an injunction,[402] while such relief is not available in continental Europe.[403] Moreover, in the EU, anti-suit injunctions cannot be used to halt court proceedings commenced contrary to a dispute resolution agreement in another EU Member States.[404] The same policy could apply to ADR agreements.[405] There are, however, no barriers against the issuing of anti-arbitration

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[400] N. POON, "The Use and Abuse of Anti-Arbitration Injunctions", *Singapore Academy of Law Journal* 2013, 250.

[401] R. WEERAMANTRY, "Anti-Arbitration Injunctions: The Core Concepts", *Clifford Chance* 1. See also M. GUSY en M. WELDON, "Anti-suit Injunctions and Antiarbitration Injunctions in the US Enjoining Foreign Proceedings", *Practical Law* 2014; N. POON, "The Use and Abuse of Anti-Arbitration Injunctions", *Singapore Academy of Law Journal* 2013, 247.

[402] §39 of the Senior Court Act 1981; *Société Nationale Industrielle Aerospatiale v Lee Kui JAK* [1987] AC 871 (PC); *Airbus Industrie FIE v Patel* [1000] 1 AC 119 (HL); *Donohue v Armco* [2002] 1 Lloyd's Rep 425 (HL); *Turner v Grovit* [2002] 1 WLR 107 (HL); *Turner v Grovit* [2004] ECR I-3565 (ECJ); *OT Africa Line Ltd v Magic Sportswear Corp* [2005] 2 Lloyd's Rep 170 (CA). Anti-suit/anti-arbitration injunction is an equitable remedy mentioned by the English judge Coleman J in *Cable & Wireless* Court's power to secure compliance with the contractual bargain: "The reference to ADR is analogous to an agreement to arbitrate. As such, it represents a free-standing agreement ancillary to the main contract and capable of being enforced by a stay of the proceedings or by injunction absent any pending proceedings" ([2002] CLC 1319 at 1327).

[403] However, see §1004 of the German Civil Code regarding prohibitory injunction; OLG Düsseldorf Jan. 10 1996. Against anti-foreign arbitration injunction see J.J. BARCELÓ III, "Anti-Foreign Suit Injunctions to Enforce Arbitration Agreements", *Fordham Conference* 2007. Regarding the enforcement of an English anti-suit injunction see *West Tankers, Inc. v. Ras Riunione Adriatica de Sicurta SpA*, (2005) 2 Lloyd's Rep 257; (2005) 2 All E. R. (Comm) 240; 2005 WL 699582 (QBD (Comm Ct)). See also M. STACHER, "You Don't Want to Go There - Antisuit Injunctions in International Commercial Arbitration", *ASA Bulletin* 2005, 645. E. GAILLARD, *Anti-suit Injunctions in International Arbitration*, NEw York, Juris Publishing, Inc., 2005.

[404] In *Allianz*, the European Court of Justice ruled that it is incompatible with the Brussels Regulation for a Member State court to grant an anti-suit injunction again proceedings in the courts of another Member States in relation to a breach of arbitration clauses (Case C-185/07 *Allianz SpA v West Tankers Inc* [2009] ECR I-663; *Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Recast Brussels Regulation) predecessor Regulation (EU) No 44/2001 the European Court of Justice*; *Nori Holdings Ltd & Ors v Public Joint-Stock Company 'Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm)).

[405] This is because, the ECJ judgement only relates to court proceedings protected by the Brussels I recast Regulation. Also see E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 45.

injunctions in cases where a party commences arbitral proceedings before complying with the ADR agreement.[406]

92. In England and the US, jurisdictions with experience with anti-suit inunctions, for an anti-arbitration injunction, it is necessary to show that the legal or equitable rights are infringed or threatened by the continuation of the arbitration or that the continuation is vexatious, oppressive, or unconscionable.[407] Anti-arbitration injunctions have given rise to discussions regarding the need to protect arbitration. There are claims that such injunctions violate customary public international law, block access to a pre-agreed forum, interfere with contractual rights, and are a violation of a state's supervisory right to review.[408] Despite the above concern, injunctions are essential to prevent abuse of process, re-litigation of disputes, and multiple proceedings.[409] Therefore, to avoid abuse of process and to protect arbitration, an anti-arbitration injunction should only be granted if the tribunal refuses to enforce the parties' valid ADR agreement and before the party seeking enforcement has made substantive claims regarding the commercial dispute.

93. The jurisdiction to grant injunctions against commencing or continuing proceedings falls under the general supervisory function of the courts.[410] In case of arbitration, typically the

[406] N. ANDREWS, *Andrews on Civil Processes: Arbitration and Mediation*, II, Cambridge, Intersentia, 2013, 204.
[407] E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 47. *Elektrim SA v Vivendi Universal SA (No 2)* [2007] EWHC 571 (Comm); *Internet FZCO v Ansol Ltd* [2—7] EWCA Civ 1124 (CA). In *Claxton Engineering Services Ltd v Tam Olaj-Es Gazkuto KTF*, Humblen J held that it was appropriate to grant an anti-arbitration injunction restraining arbitration in Hungary as the parties had entered into a binding agreement giving English courts exclusive jurisdiction and there was no arbitration agreement ([2011] EWHC 345. See also *Weissfisch v Julius* [2006] EWHC Civ 2018; *A v B* [2007] 1 Lloyd's Rep 237; *C v D* [2007] EWHC 1541 (Comm); *AmTrust Europe Ltd v Trust Risk Group SpA* [20155] EWHC 1927 (Comm)). For the US see *Citigroup Global Mkts., Inc.*, 598 F.3d at 34 US. Regarding anti-suit injunction see *Paramedics Electromedicina Commercial, Ltda. v. GE Medical Systems Information Technologies, Inc.*, 369 F.3d 645 (2d Cir. 2004) (the court applied the four factors enumerated in *China Trade* case to a request for anti-suit injunction: two threshold requirements that (1) the parties are the same in both matters and (2) resolution of the case before the enjoining court is dispositive of the action to be enjoined, and two other factors: (3) public policy considerations and (4) protection of the jurisdiction of the rendering court).
[408] See J. JOY, "Anti-Arbitration Injunctions: A Comparison of Approaches and the Problem of National Court Interference", *European International Arbitration Review* 2015, afl. 2.
[409] See J. JOY, "Anti-Arbitration Injunctions: A Comparison of Approaches and the Problem of National Court Interference", *European International Arbitration Review* 2015, afl. 2.
[410] N. ANDREWS, *Andrews on Civil Processes: Arbitration and Mediation*, II, Cambridge, Intersentia, 2013, 69. English courts may issue anti-arb injunctions to block foreign arbitrations commenced in violation of a valid mediation clause. See also for the US, *US China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d. J.L. GORSKIE, "US Courts and the Anti-Arbitration Injunction", *The Journal of the London Court of International Arbitration* 2012, afl. 2, 299. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626 (5th Cir. 1996).

court at the seat of jurisdiction holds this supervisory power.[411] An injunction against an arbitration seated abroad may be possible in exceptional circumstances.[412] Here, it is essential that the interests of the applicant and the respect for arbitral tribunals and arbitration as an autonomous process be balanced in granting anti-arbitration injunctions. Therefore, it is generally ill advised to issue anti-arbitration injunctions unless the court has sufficient jurisdictional overview.[413]

3.2.5. Refusal to Enforce and Compel (Deterrent)

94. The sections above discussed the various ways used to (directly or indirectly) remedy breaches of ADR agreements. Breaches of ADR agreements do not only result in one party having the right to seek a remedy, they also have an effect on the enforceability of arbitration, as well as arbitral awards and court judgements (see Table 1 below). American courts have vacated arbitral awards in light of a failure to conduct ADR as a condition precedent.[414] Moreover, American courts have refused to compel arbitration in light of an unfulfilled ADR tier and have thereby retained jurisdiction over the disputes.[415] The refusal

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[411] Queen's Bench Division, Commercial Court, *AmTrust Europe Limited and Trust Risk Group SpA* ([2015] EWHC 1927 (Comm). For discussion on the US approach, see J.L. GORSKIE, "US Courts and the Anti-Arbitration Injunction", *The Journal of the London Court of International Arbitration* 2012, afl. 2.

[412] E.g. if litigation has been commenced and there is no agreement to arbitrate. Courts at the seat have primary jurisdiction over the tribunal. Therefore, local remedies should be exhausted. Professor Rau suggests that, in such circumstances, the court might frame its decision not as a ruling that it has no 'authority' to enjoin, but instead as a presumption in favour of the exhaustion of local remedies or even a prudential *forum non conveniens* decision (S.A. RAU, "Understanding (and Misunderstanding) 'Primary Jurisdiction'", *American Review of International Arbitration* 2010.). In *Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm), Gloster J granted an anti-arbitration injunction. The claimant had commenced both judicial and arbitration proceedings; however, there was a dispute as to who was a party to the agreement to arbitration. In *Sabbagh v Khoury & Ors [2018] EWHC 1330 (Comm)*, Knowles J issued an anti-arbitration injunction against proceedings in Lebanon as the tribunal did not have jurisdiction to hear the case. See also *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi TBK Ltd and Another* (The "Barito") [2013] EWHC 1240 (Comm). In the US, see *Conservative/Restrictive Approach* (2nd, 3rd, 6th, DC) (E.g., 2004 *Paramedics v. GEMS-IT*). Regarding Singapore, see N. POON, "The Use and Abuse of Anti-Arbitration Injunctions", *Singapore Academy of Law Journal* 2013, 246.

[413] N. POON, "The Use and Abuse of Anti-Arbitration Injunctions", *Singapore Academy of Law Journal* 2013, 290.

[414] J.D. FILE, "United States: multi-step dispute resolution clauses", *IBA Legal Practice Division: Mediation Commitee Newsletter* 2007, 34. *DeValk Lincoln Mercury Inc v Ford Motor Co*, 811 F 2d 326, 336 (7th Circ 1987).

[415] In the First Circuit Court of Appeals case of *HIM Portland*, the parties had not attempted mediation and when the other party filed suit and moved to compel arbitration, the defendant resisted. The court held that, "[u]nder the plain language of the contract, the arbitration provision is not triggered until one of the parties requests mediation' since neither party attempted mediation – neither can compel to submit to arbitration" (*HIM Portland LLC v DeVito Builders Inc*, 317 F 3d 41, 42 (1st Cir 2003), para. 13). Moreover in the Eleventh Circuit Court of Appeals case of *Kemiron*, the case involved the following dispute resolution clause "[i]in the event that a dispute cannot be settled between parties, the matter shall be mediated within fifteen (15) days after receipt of notice by either party that the other party request the mediation of a dispute pursuant to this paragraph." "In the event that the dispute cannot be settled through mediation, the parties shall submit the matter to arbitration within ten (10) days after receipt of notice by either party." When the dispute arose, the defendant attempted to stay the action

is based on the argument that when the condition precedent to arbitration is not fulfilled, the arbitration tier is not triggered.[416] Courts of appeal have emphasized the protection of the FAA does not operate without regard to the wishes of the parties.[417] Thereby, emphasizing the ineffectiveness of arbitration provisions when the conditions precedent are not fulfilled.[418]

95. §67 of the English Arbitration Act 1966 addresses the right to set aside domestic awards because of a lack of substantive jurisdiction. According to the Act, a party to the arbitral proceedings may apply to the court to challenge an award of an arbitral tribunal regarding its substantive jurisdiction.[419] Moreover, a party can ask for an order declaring the award on its merits to be of no effect due to a lack of substantive jurisdiction.[420] Likewise the Singapore Arbitration Act §21(9) and §21A(4) stipulate that a court may review the arbitral tribunal's award on jurisdiction.[421]

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pending arbitration. Since neither party had met the notice requirements for mediation, the court said "the arbitration provision has not been activated" and thus the suit should not be stayed (*Kemiron Atlantic, Inc v Aguakem Int'l Inc,* 290 F 3d 1287, 1289 (11th Cir 2002) at para.1291). See also J.D. FILE, "United States: multi-step dispute resolution clauses", *IBA Legal Practice Division: Mediation Commitee Newsletter* 2007, 33; S.R. COLE *et al.*, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 180.

[416] S.R. COLE *et al.*, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 163. Regarding a condition precedent to arbitration see *Morgan v. Parra*, 2013 WL 1500467 (N.J. Super. Ct. App. Div. 2013) (the court refused to compel arbitration when parties fail to participate in the required mediation); *Amir v. International Bank of Commerce*, 419 S.W.3d 687 (Tex. App. Houston 1st Dist. 20 13) (court will not compel arbitration if the parties do not satisfy procedural provisions of contract requiring mediation); *Perdue Farms, Inc. v. Design Build Contracting Corp.*, 263 Fed. Appx. 380, 383 (4th Cir. 2008) (the court held that the unfulfilled condition precedent to arbitration rendered arbitration requirement enforceable); *R&F, LLC v Brooker Corp.*, 2008 WL 294517 (D.Kan. 2008) (the court refused to compel arbitration when party failed to mediate as contract required).

[417] *HIM Porland, LLC v. Devito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003) (the court affirmed the denial to compel arbitration where parties' contract required a request for mediation as a condition precedent to arbitration); *Kemiron Atl., Inc. v. Aquakem Int'l, Inc.,* 209 F.3d 1287 (11th Cir. 2002) (the court ruled that the parties' failure to request mediation, a condition precedent to arbitration under the contract, precluded enforcement of the arbitration clause.) See also S.R. COLE *et al.*, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 174; J.R. COBEN en P.N. THOMPSON, "Disputing Irony: A Systematic Look at Litigation About Mediation", *Harvard Negotiation Law Review* 2006, afl. 43, 109.

[418] *Kemiron Atl., Inc. v. Aquakem Int'l, Inc.,* 209 F.3d 1287 (11th Cir. 2002), para 1291; *Safaer v. Nelson Fiancial Group, Inc.*, 422 F. 3d 289 (5th Cri. 2005) (reversing the trial court's denial to compel arbitration - 'weak' mediation clause in the parties' agreement is merely a request to mediate prior to arbitration, rather than a condition precedent. "If we …are not able to resolve your concerns, we ask that we first seek to resolve any conflicts in mediation before resorting to any other forum").

[419] §67(1)(a) Arbitration Act 1966. See also §73. The English High Court upheld a challenge under §67 in *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm).

[420] §67(1)(b) Arbitration Act 1966. See also §73.

[421] 47(1)(b)(ii) stipulates that domestic awards "may be set aside by the Court if the Court finds that […] the award is contrary to public policy."

96. Here the question becomes: can courts refuse to enforce arbitral clauses and awards that fall under the protection of the New York Convention? Article II(1) of the New York Convention requires contracting states to recognize a written agreement to arbitrate. In addition, according Article III, contracting states shall recognize and enforce valid arbitral awards. However, both Article II and III contain exceptions to the obligation to enforce.

97. The valid grounds for refusal in case of Article II include if the arbitration agreement is null and void, inoperative, or incapable of being performed.[422] Furthermore, Article V lists the valid grounds to refuse enforcement of an arbitral award. Of relevance is the exception of lack of jurisdiction and public policy.[423] Setting aside an arbitral award on the basis of a lack of jurisdiction of the tribunal is found in most normative models based on the UNCITRAL Model Law and the New York Convention.[424] Moreover, according to Article V(2)(a)(iv) of the New York Convention, if the constitution of the tribunal was contrary to agreement, the award may be set aside.[425]

98. In theory, an arbitral award that ignores a valid ADR agreement can be contrary to both the dispute resolution clause and to procedural public policy.[426] Therefore, if a party ignores an ADR tiers, the arbitration agreement is not activated.[427] Furthermore, as Chapter III will expand, future amendments of the New York Convention could clearly stipulate this exception as a triggering related issue. Nevertheless, a party cannot rely on non-compliance to avoid arbitration as long as that other party acted in good faith to preserve its right to arbitration.[428]

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[422] Article II(3) of the New York Convention.
[423] Article V(2)(b) of the New York Convention.
[424] Article 34(2)(a)(i)&(iii)&(iv) and Article 36(1)(a)(i)&(iii) of the UNCITRAL Model Law; Article IX of the European Convention On International Commercial Arbitration. E. KAJKOWSKA, "Enforceability of Multi-Step Dispute Resolution Clauses An Overview of Selected European Jurisdictions" in L. CADIET et al. (eds.), *Procedural Science at the Crossroads of Different Generations*, 4, Luxembourg, Nomos Verlagsges, 2015, 164.
[425] See also J.M. GRAVES en J.F. MORRISSEY, "Arbitration as a Final Award: Challenges and Enforcement", *Touro Law Scholarly Works* 2008, 467.
[426] Article V(2)(b) refers to public policy without distinguishing between substantive and procedural public policy. Substantive public policy involves matters such as the merits of a decision (abuse of rights, discrimination, expropriate, abuse of principles such as *pacta sunt servanda* and good faith), while procedural public policy involves matters such as the procedure in which the award was rendered (such as particle neutrals, fraud, and breach of natural justice). Article V(1) must be invoked by a party seeking refusal to enforce. See also M. INGLOT, "Separability Of Or Overlap Between Public Policy And Procedural Grounds For Refusal Of Enforcement Of Foreign Arbitral Awards Under The New York Convention", *Polish Review of International and European Law* 2015, afl. 1, 844.
[427] See M. SALEHIJAM, "Chapter 3: The Role of the New York Convention in Remedying the Pitfalls of Multi-Tiered Dispute Resolution Clauses" in K.F. GÓMEZ en A.M.L. RODRÍGUEZ (eds.), *60 Years of the New York Convntion: Key Issues and Future Challenges*, Spain, Wolter Kluwer, 2019.
[428] *Welborn Clinic v Medquist Inc* 301 3d 634, 638 (7th Cir. 2002).

99. Next, the question arises whether a court can refuse to enforce a foreign judgement issued despite a valid ADR agreement. In this regard, three instruments that protect foreign judgments must be mentioned, namely the Brussels I recast Regulation, the Hague draft Convention on the Recognition and Enforcement of Foreign Judgments ('Draft Hague Convention'), and the Uniform Foreign Money-Judgments Recognition Act ('UFMJRA').

100. According to the Brussels I recast Regulation, EU Member States must recognise and enforce judgements issued in another Member State.[429] The recognition of a judgment shall be refused where, on the application of the person against whom enforcement is sought, one of the grounds referred to in Article 45 is found to exist. Of interest here, is that recognition may be refused if it would be contrary to public policy.[430] However, the Brussels I recast Regulation makes it clear that the courts cannot refuse enforcement on the basis of a lack of jurisdiction.[431] The US approach provides an interesting contrast to the above, according to the UFMJRA, courts have discretion to refuse to enforce a judgement if the rendering court lacked subject-matter jurisdiction.[432]

101. The Draft Hague Convention differs from the Brussels I recast Regulation as it lists valid jurisdiction of the rendering courts as a requirement for eligibility for recognition and enforcement.[433] Furthermore, Article 7(1)(d) of the Draft Hague Convention provides that enforcement may be refused if the proceedings were contrary to the parties' agreement regarding in which court the dispute is to be resolved. This clause does not specifically address dispute resolution clauses and is limited to choice of court agreements.[434]

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[429] Article 36 of the Brussels I recast Regulation.
[430] Article 45(1)(a) of the Brussels I recast Regulation.
[431] Article 45(3): "Without prejudice to point (e) of paragraph 1, the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction." Case C-7/98 *Krombach v Bambersk*; Judgment of the Court of 28 March 2000; Joined Cases 9 & 10/77, *Bavaria Fluggesellschaft Schwabe & Co. KG v. Eurocontrol*, 1977 E.C.R. 1517, [1977-1978 Transfer Binder] Common Mkt. Rep. (CCH) J 8428 (Jul. 14, 1977) 1977 E.C.R. at 1525-26. See also T. KERESTES, "Public Policy in Brussels Regulation I: Yesterday, Today and Tomomrrow", *Lexonomica* 2016, afl. 2, 83. M. INGLOT, "Separability Of Or Overlap Between Public Policy And Procedural Grounds For Refusal Of Enforcement Of Foreign Arbitral Awards Under The New York Convention", *Polish Review of International and European Law* 2015, afl. 1, 44. There is no international understanding of public policy (J. OELMANN, "The Barriers to the Enforcement of Foreign Judgements as Opposed to Those of Foreign Arbitral Awards", *Bond Law Review* 2006, afl. 2, 81-82.).
[432] Article 4(a)(3) of the UFMJRA.
[433] Article 5(1) of the Draft Hague Convention.
[434] "The proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court other than the court of origin."

Nevertheless, it is clear that this exception points to the importance of party autonomy.[435] Therefore, Article 7(1)(d) should be redrafted to stipulate that an exception to enforcement includes instances where the judgement is contrary to a valid "dispute resolution clause". This stipulation would further reflect the goal of Article 24 of the Draft Hague Convention: "This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention."

102. When parties become aware of the above consequences, they are potentially deterred from breaching their ADR agreements. Therefore, the refusal to enforce arbitral awards and court judgements and to compel arbitration is not in itself a way of indirectly encouraging compliance with an ADR agreement.

Table 1 - *Overview of the Relationship between ADR Agreements and Enforcement Instruments*

	Brussels I recast Regulation	**The Draft Hague Convention**	**UFMJRA**	**The New York Convention**
Dispute Resolution Clause	n/a	n/a	n/a	Article II – arbitration clauses must be enforced unless exceptions are present
Foreign Judgement or Arbitral Award	Must be enforced– lack of jurisdiction is not a defence	Must enforce if foreign court (1) had jurisdiction (i.e. not contrary to choice of court agreement); and (2) enforcement must respects other Conventions	Foreign judgment must be enforced unless contrary to (1) dispute resolution agreement; and/ or (2) court lacked subject-matter jurisdiction	Awards must be enforced if they are (1) in line with the arbitral clause; and (2) obey public policy

3.3. A Preferred Remedy

103. Section 3.2 provided an overview of the remedies used when a party breaches its ADR agreement. The discussion covered financial remedies, specific performance, injunctive relief, stays and dismissals, as well as refusal to compel and enforce. The aim of the overview was to demonstrate the oftentimes-confusing panoply of means available to deal with ADR agreements and their enforcement.[436] To address this inconsistency, this section

[435] A. GOVERNMENT, *Recognition and enforcement of foreign judgments Public Consultation Paper*, 2018, 20.

[436] The difficulty created by these varying approaches was confirmed by a study carried out by S.I. Strong where 14% of respondents to the 2014 Strong survey on the use and perception of international commercial mediation indicated that it was impossible or very difficult to enforce agreements to mediate domestic disputes, "26% said

will suggest guidelines for selecting the appropriate remedy (Table 2). In discussing the preferred approach, this section distinguishes between remedies in instances where a party (i) refuses to attend ADR, but has not initiated court or arbitral proceedings; (ii) has entered into the ADR process, but is not actively participating or is intentionally harming settlement efforts (i.e. refusing to respond to settlement offers); and (iii) has taken the substantive dispute directly to a court or tribunal. Furthermore, this section reflects on the distinction drawn in Section 3.2 between restorative remedies (Code "Restore"), those that deter parties from violating their obligations (Code "Deter"), and those that force parties to comply with their actual agreement (Code "Comply").

Table 2 - *Potential Remedies Relating to the Moment of Breach*[437]

Moment of Breach	**Potential Remedies**
(i) A party refuses to attend ADR, but has not initiated court or arbitral proceedings.	Specific performance plus the threat of damages and adverse cost orders (Comply, Restore, Repair)
(ii) A party has entered into the ADR process, but is not actively participating or is intentionally harming settlement efforts (that is refusing to respond to settlement offers).	Specific performance plus damages and adverse cost orders (Comply, Restore, Repair)
(iii) A party has ignored the ADR agreement and taken the substantive dispute to a court or tribunal.	Stays or injunctions depending on the jurisdiction seized, as well as adverse cost orders (Comply, Deter)

104. As stipulated in Section 3.2.2, recourse to specific performance is an ideal remedy to the breach of an ADR agreement when a party is refusing to attempt ADR (breach type i) or is staying inactive despite invitations to commence ADR (breach type ii).[438] This is because, through specific performance, parties are compelled to fulfil the obligations under their ADR agreement. However, with the exception of the US courts wrongly relying on the FAA, this remedy has not been utilized due to legal barriers and difficulties in supervision.

it was somewhat difficult, 39% said it was easy, 12% said that the issue was largely untested and 7% said that they did not know." When the same respondents where ask about their perception of the difficulty faced in enforcing agreements to mediate international commercial disputes in the respondents' home jurisdiction, the percentage of respondents finding it impossible or very difficult rose to 19%, "and the number of those indicating that enforcement was somewhat difficult went up to 30%" (S.I. STRONG, "Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation", *University of Missouri School of Law* 2014, 39-40.).

[437] Although not discussed in this section, the instances of courts refusing to enforce arbitral award and compel arbitration when the parties have failed with their agreement reflect yet another avenue to deter breaches of ADR agreements.

[438] A. SCHMITZ, "Refreshing Contractual Analysis of ADR Agreements By Curing Bipolar Avoidance of Modern Common Law", *Harvard Negotiation Law Review* 2008, afl. 1, 92. See also K.C. LYE, "A persisting aberation: The movement to enforce agreements to mediate", *Singapore Academy of Law Journal* 2008, 203.

Therefore, in discussing a preferred remedy, one must remain cautious of the factual limits. Courts are unlikely to resort to this remedy unless a legislative framework similar to that for arbitration requires otherwise. The possibility for such a framework will be discussed in Chapter III.

105. When a party has initiated court or arbitral proceedings despite a valid ADR agreement (breach type iii), injunctions against arbitrations and court proceedings seated abroad, as well as stay orders for local proceedings are appropriate. The preference for stays over dismissals is justified from an efficiency viewpoint (see Section 3.1). It is clear that dismissals are impractical for commercial parties. A dismissal would mean that the aggrieved party must pay a registration and administration fee anew in order to reconstitute the proceedings or tribunal.[439] Conversely, when a court orders a stay of court or arbitral proceedings, the same court or tribunal can hear the case without the need to appoint a new tribunal.[440] Moreover, a dismissal does not protect the claim from time-bars and limitation periods, while a stay pauses time-bars and limitation periods. Therefore, stays are more time and cost efficient than a dismissal.[441]

106. Instead of finding the claim to be inadmissible, the courts and tribunals relying on dismissals, such as German and Austrian courts, should follow the approach of Common Law courts and ICC tribunals. Stays are possible in Germany through the application of §251 and §278a(4)&(5) ZPO.[442] In Austria, in accordance with §168 ZPO, the parties may agree to suspend proceedings. Such a procedural agreement can be concluded at the same time as the ADR agreement. Thus, the parties' must opt for this. The possibility to stay proceedings to enforce an ADR agreement was also envisaged in the Netherlands in the

[439] S.R. GARIMELLA en N.A. SIDDIQUI, "The Enforceability Of Multi-tiered Dispute Resolution Clauses: Contemporary Judicial Opinion", *IIUM Law Journal* 2016, afl. 1, 190.
[440] See M. MEAR, "Enforceability of Mediation in Multi-tiered Clauses: the Croatian Perspective", *Kluwer Arbitration Blog* 2015. E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 93.
[441] See also *Halim v. Great Gatsby's Auction Gallery, Inc.,* 516 F.3d 557, 561 (7th Cir. 2008); M. MEAR, "Enforceability of Mediation in Multi-tiered Clauses: the Croatian Perspective", *Kluwer Arbitration Blog* 2015; R. BELLINGHAUSEN en J. GROTHAUS, "Escalation Clauses: No Longer a Tripping Hazard for Arbitrations with Seat in Germany?", *Kluwer Arbitration Blog* 2016, http://kluwerarbitrationblog.com/2016/12/01/escalation-clauses-no-longer-a-tripping-hazard-for-arbitrations-with-seat-in-germany/.
[442] ZPO §278(5): courts may refer parties to mediation, conciliation and alternative dispute resolution generally. If the parties agree, then ZPO §251 grants the courts the power to rest proceedings upon the application of the parties in circumstances where the outcome of mediation or similar processes would make this appropriate.

unsuccessful Bill (*Wetsvoorstel*) 33723 of 21 November 2012.[443] However, to repeat, as a stay is a suspension of the proceedings, it does not mean that the parties are forced to engage in ADR.[444] Rather through a stay, the parties are simply given an opportunity to explore settlement options.[445]

107. Turning to the utility of financial remedies, regardless of the type of breach, it is important to the note the differing effect of cost sanctions and damages. Section 3.2.1 demonstrated, through the imposing of damages, the obligations in ADR agreements are not enforced; they simply are a restorative remedy if there are quantifiable costs. Likewise, cost sanctions, in themselves, are not a remedy, but merely provide for an adverse consequence. Therefore, these financial consequences do not restore the lost opportunity of settlement through ADR and should be relied on in conjunction with a compliance type remedy.

108. The above paragraphs aimed to demonstrate that a preferred remedy to the breach of an ADR agreement is one that compels the parties to participate in the ADR process. This is because, other remedies do not return the opportunity for settlement that ADR offers. Building on this logic, breaches of ADR agreements should face several consequences depending on the stage at which the breach occurred. Sanctions to breaches of ADR agreements are essential, as a lack thereof sets disincentives for participation in ADR.[446] Lastly, in light of the reluctance to conduct extensive scrutiny of the parties' actions, breaches of ADR agreements should be assessed on the basis of a formal procedural criterion. Chapter II will discuss the research that aims to form the basis for the above criteria.

Concluding Remarks

[443] Proposed Article III, Tweede Kamer, vergaderjaar 2012–2013, 33 723, nr. 3, at p. 19. Available https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?id=2013Z16937&dossier=33723 (16 October 2017).
[444] E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017. N. ANDREWS, *The Modern Civil Process: Judicial and Alternative Forms of Dispute Resolution in England* Rottenburg, Deutsche Nationalbibliothek, 2008, para. 11.39.
[445] E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 44.
[446] R. KULMS, "Mediation in the USA: Alternative Dispute Resolution between Legalism and Self-Determination" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 1278-1279.

109. This chapter provided a comprehensive overview of the current approaches to the validity and enforceability of ADR agreements in order to conclude on best practices. To effectively provide an in-depth analysis, three clear points were discussed: when are these agreements binding on the parties (Section 1); should these agreements be enforced (Section 2); and how should breaches of these agreements be remedied (Section 3).

110. Issues relating to the enforceability of ADR agreements tend to revolve around contractual certainty. Although some general trends are evident, courts and tribunals have differing certainty thresholds. Today, the standard of sufficient certainty is higher for ADR agreements than for arbitration agreements. However, parties tend to conclude their dispute resolution agreements hastily and without much thought. This is problematic, as it raises the chance of the agreement being unenforceable if adjustments are made without sufficient research, and if the copied clause is not suitable for enforcement in the jurisdiction seized. The risk is even higher if two or more legal systems or adjudicative bodies scrutinize the clause.

111. It is unlikely that there will be a change to the traditional drafting practices, so the certainty of ADR agreements will continue to be a challenge. Thus, the high standard of sufficient certainty is a hurdle to the enforcement of these agreements. A solution here is to give the preciseness of the wording of the ADR agreements less importance, as the parties are only bound to the results if they agree to settle. Enforcing vague requirements for a process that is not binding in nature or burdensome should not be as problematic as it is today.

112. Moreover, there is no consensus regarding the appropriate remedy for a failure to comply with an ADR agreement. To enhance certainty, this chapter provided an in-depth analysis of the legal nature of ADR agreements and the appropriate remedy depending on the timing of the breach. However, to properly support the enforcement of ADR agreements more information is needed regarding the obligations implied therein. Therefore, Chapter II will report on the findings on an empirical study into the rights and obligations implied by an ADR agreement.

Chapter II: Parties' Rights and Obligations under an ADR Agreement

Contents

Introduction

1. Dispute resolution clauses in commercial contracts can prescribe one mechanism or multiple mechanisms, and they can be simple or complex. These clauses may be individually drafted or copied and pasted (sometimes with minor adjustments).[447] However, with the exception of arbitration clauses, little is known about the content of ADR agreements, as well as the rights and obligations implied therein.[448] To better understand these agreements, this chapter will provide an overview of my SCA of 172 ADR agreements.[449]

2. SCA is a systematic and replicable technique applied to the analysis of a variety of texts, ranging from interview transcripts to legal texts such as case law and legislation.[450] It is a research tool borrowed from empirical researchers.[451] In legal research, SCA is defined as a research method used to objectively and systematically detect themes and trends in texts including legal instruments and contracts, as well as communications.[452] In practical terms, SCA involves the application of codes to the data, which are ADR agreements in my study.

3. Some of the questions asked are as follows: are the parties to an ADR agreement obligated to set up the selected ADR mechanism; attend a minimum number of sessions; attend the sessions personally; cooperate; act in good faith; attempt to settle; refrain from seizing courts or arbitral tribunals; refrain from seeking interim measures; and/or comply with the obligation of confidentiality?

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[447] Countless dispute resolution providers advertise the incorporation of their standard clauses by parties in order to attract parties to their services.

[448] "[T]he central issue to approaching the mediation clause and the agreement to mediate […][is] what this binding condition granted to them actually means for the parties who agreed to submit the dispute to mediation and how their fulfilment may be requested by one party in case of breach of the agreement or inactivity" (C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 604.). C. ESPLUGUES, "General Report: New Developments in Civil and Commercial Mediation - Global Comparative Perspectives" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 33.

[449] Section 1 will provide an in-depth explanation of SCA.

[450] S. STEMLER, "An Overview of Content Analysis", *Practical Assessment, Research & Evaluation* 2001, afl. 17, 1. G. VAN HARTEN, "Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration", *Osgood Comparative Research in Law and Political Economy Research report no. 41/2012* 2012, 15. M.A. HALL, "Coding Case Law for Public Health Law Evaluation", *Public Health Law Research* 2011, 3.

[451] "Empirical simply means based on facts, rather than on theory or untested belief (e.g. political opinion or ideology." D.R. HENSLER, "Designing Empirical Legal Research: A Primer for Lawyers" 2013, 7.

[452] According to the widely accepted 1952 definition by Berelson, content analysis is "a research technique for the objective, systematic and quantitative description of the manifest content of communication" (B. BERELSON, *Content Analysis in Communication Research*, Michigan, Free Press, 1952, 18.).

4. As abovementioned, this work utilized a SCA to study the data, which in this case are ADR agreements. The application of SCA is fitting since essential aspects of the selected mechanism and the rights and duties of the parties are primarily regulated by their agreement to resort to ADR and the rules of procedure of the relevant ADR provider.[453] Furthermore, by employing a method not commonly used in legal science, this study gains new insights regarding the rights and obligations implied by these agreements. Moreover, since there are relatively few cases and rules that address the parties ADR agreement,[454] this study was the first to address these questions in a systematic manner. The value of this study is the identification of issues in practice that arise from ADR agreements. Thereby, I will map the reality of ADR agreements by identifying the legal issues that arise in practice. Chapter III will take into consideration the findings as discussed in this chapter and their implications for a future framework for the ADR agreement.

5. To better understand the context of this study, a detailed overview of the research design including data collection, content coding, and literature review will be provided in Section 1. Subsequently, Section 2 will explore the findings of the SCA in the following order: the codes applied to categorize the ADR agreement, its content and composition (Sections 2.1–2.3); the codes relating to preconditions to the ADR, commencement procedures, and applicable rules (Sections 2.4 –2.6); the codes applied to practical matters, such as the procedure to appoint the neutral, his/her payment and logistics (Sections 2.7–2.8); the codes

[453] B. HESS en N. PELZER, "Mediation in Germany: Finding the Right Balance between Regulation and Self-Regulation" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 296. C. JARROSSON, "Legal Issues Raised by ADR" in A. INGEN-HOUSZ (ed.), *ADR in Business: Practice and Issues Across Countries and Cultures*, II, Aan den Rijn, Kluwer Law International, 2011, 163. J.M. SMITS, *Contract Law: A Comparative Introduction*, Cheshire, Edward Elgar Publishing, 2014, 18. Moreover, the content of the ADR agreement is settled by the parties (K.J. HOPT en F. STEFFEK, "Mediation: Comparison of Laws. Regulatory Models, Fundamental Issues" in K.J. HOPT en F. STEFFEK (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 31.). Also see B. HESS en N. PELZER, "Mediation in Germany: Finding the Right Balance between Regulation and Self-Regulation" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 296.

[454] Cite cases C. ESPLUGUES, "General Report: New Developments in Civil and Commercial Mediation - Global Comparative Perspectives" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 58. P.G. MAYR en N. KRISTIN, "Regulation of Dispute Resolution in Austria: A Traditional Litigation Culture Slowly Embraces ADR" in F. STEFFEK en H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 79. Germany: B. HESS en N. PELZER, "Regulation of Dispute Resolution in Germany: Cautious Steps towards the Construction of an ADR System" in F. STEFFEK en H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 227.

for the various legal issues relating to the effect of the ADR agreement on subsequent proceedings, such as interim relief, limitation periods, and the obligation to refrain from acting (Sections 2.9–2.11); the codes relating to the behavioural, temporal, attendance, and confidentiality obligations prescribed by the ADR agreements and applicable institutional rules (Sections 2.12–2.15); as well as the codes focused on the ways the parties may terminate their mechanism and remedies/penalties for non-compliance (Sections 2.16–2.17). This chapter will conclude by providing a summary of the findings and by suggesting new regulatory approaches to ADR agreements.

1. Research Design and Literature Review

6. The discussion of the research design will contain two components, namely data collection and content coding, while the section on literature review will be discussed in a chronological order.

1.1.Data Collection

7. To gather ADR agreements for the analysis, the research scope of the SCA was limited to selected states reflecting the jurisdictional scope of this doctoral thesis.[455] Moreover, since it was impossible to estimate the population of ADR agreements, the decision was made to employ random sampling.[456] In addition, while numerous ADR agreements are freely available on the websites of dispute resolution providers and in practitioner guidebooks, such a sample does not include the agreements drafted by in-house counsel or law firms. Thus, as well as collecting freely available agreements, this study also set out to collect agreements directly from ADR professionals and experts. A test call requesting such clauses on various platforms with ADR professionals as audience proved only slightly effective, since many professionals indicated their inability to participate due to confidentiality or firm policy.[457] In light of this response, the decision was made to change the approach to gathering these agreements. Research into potential avenues resulted in the selection of a

[455] Austria, Australia, England, Germany, Singapore, the Netherlands, and the US. Also see Introduction Chapter
[456] For more discussion of sample and population see F.L. LEEUW en H. SCHMEETS, *Empirical Legal Research: A Guidance Book for Lawyers, Legislators and Regulators*, Northhampton, Elgar, 2016, 158-159.
[457] Sample response "We have in house precedents which we use with guidance notes for contract drafters but we don't share those outside the firm. The basic approach in terms of mandatory/non-mandatory/tiered clauses is similar to the approach taken by many organisations."

questionnaire instead of a general call. Through the questionnaire, ADR professionals and experts could indicate why they may not be willing or able to provide such clauses (i.e. confidentiality, too much effort, or other).

8. The online, self-administered questionnaire,[458] which was open from 9 February to 30 April 2017, targeted ADR professionals and experts –including lawyers, in-house counsel, academics, and third-party neutrals– with experience in drafting, inserting, or enforcing dispute resolution clauses that provide for ADR mechanisms. To ensure that only the targeted audience responded to the questionnaire, two additional safeguards were implemented. Firstly, the call for participation emphasized that the questionnaire targeted legal professionals with experience in drafting, inserting, or enforcing dispute resolution agreements that provided for ADR. Secondly, the questionnaire was manipulated to contain conditional questions that filtered-out participants.[459] The data collection yielded 172 agreements for analysis. The section below will provide an overview of the method of analysis, which in this case was content coding.

1.2.Content Coding

9. The coding employed in this study followed the four stages outlined by Hall and Wright:[460]

> (1) […] create a tentative set of coding categories a priori. Refine these categories after thorough evaluation, including feedback from colleagues, study team members, or expert consultants.
>
> (2) Write a coding sheet and set of coding instructions (called a "codebook"), and train coders to apply these to a sample of the material to be coded. Pilot test the reliability (consistency) among coders by having multiple people code some of the material.
>
> (3) Add, delete, or revise coding categories based on this pilot experience, and repeat reliability testing and coder training as required.
>
> (4) When the codebook is finalized, apply it to all of the materials.[461]

[458] A questionnaire that the respondent completes on his/her own without intervention or involvement of the administrator.
[459] See M. SALEHIJAM, "ADR Clauses and International Perceptions: A Preliminary Report", *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement* 2017, afl. 3. A copy of the questionnaire and its responses can be requested via maryamsalehijam@ugent.be.
[460] M. SALEHIJAM, "The Value of Systematic Content Analysis in Legal Research", *Tilburg Law Review* 2018.
[461] M.A. HALL en R.F. WRIGHT, "Systematic Content Analysis of Judicial Opinions", *California Law Review* 2008, afl. 1, 107.See also M.A. HALL, "Coding Case Law for Public Health Law Evaluation", *Public Health Law Research* 2011, 19.

10. The initial list of codes was created on the basis of scholarly works and case law that address the rights and obligations implied by ADR agreements.[462] Section 1.3 will explain the terminology employed in the literature on the topic. The codes are descriptive, reflecting the obligations and essential aspects contained in the agreements. They are used to facilitate the counting of obligations in order to assess the frequency of reoccurrence.[463] The data was analysed twice to ensure the objectivity and reliability of the codes assigned.[464]

1.3.Literature Review

11. To set the parameters for this study and to establish a coding list, relevant works addressing the content of ADR agreements, and more specifically, the obligations of the parties therein, were analysed. The paragraphs below will provide an overview of the study. A more in-depth analysis of what obligations are contained in an ADR agreement will be provided under Section 2. The overview will be presented in a chronological order to demonstrate the persisting gap that this study addresses.

12. Early on, in 2005, David argued that mediation agreements result in privacy and confidentiality obligations.[465] Soon after, in 2006, Jarrosson addressed the question "what is the extent of the parties' obligations when they agree to resort to ADR?"[466] He argued that in principle the effect of an ADR agreement depends on the terms the parties have agreed on.[467] On this basis, he created four labels for various types of ADR agreements:

[462] The final code book is in Annex I. Also see J. SALDAÑA, "An Introduction to Codes and Coding" in J. SALDAÑA (ed.), *THE CODING MANUAL FOR QUALITATIVE RESEARCHERS*, Chennai, SAGE publishing, 2015, 144.
[463] Moreover, the choice was made to apply split coding instead of lumper coding in order to generate a more nuanced analysis. Also see J. SALDAÑA, "An Introduction to Codes and Coding" in J. SALDAÑA (ed.), *THE CODING MANUAL FOR QUALITATIVE RESEARCHERS*, Chennai, SAGE publishing, 2015, 23.
[464] M. COMINETTI en P. SEELE, "Hard soft law or soft hard law? A content analysis of CSR guidelines typologized along hybrid legal status", *Schwerpunkthema* 2016, 134.
[465] "Most institutional provisions make express provision in this regard, see e.g. art 7 of the ICC ADR rules. Likewise, see art 9 of the UNCITRLA Model Law on international commercial conciliation, and art 6 of preliminary draft EU Directive" (D. JOSEPH, *Jurisdiction and Arbitration Agreements and Their Enforcement*, London, Sweet & Maxwell, 2005, 450.).
[466] Jarrosson revisited the issue in 2010 in the second volume of his article; however, there is no difference between his 2006 article in relation to the issue of obligations.
[467] C. JARROSSON, "Legal Issues Raised by ADR" in J.C. GOLDSMITH et al. (eds.), *ADR in Business: Practice and Issues across Countries and Cultures*, The Netherlands, Kluwer Law International, 2006, 116. His work was updated in 2011 but with minor changes to the section on the obligations created by the ADR agreement.

(1) Provisions that create no obligation, such as those that make a mere declaration of intention to consider the possibility of ADR once a dispute arises (code 'zero obligations');[468]

(2) Provisions that create limited obligations, such as those that only require the parties to discuss/consider ADR (code 'limited obligations');[469]

(3) Provisions that create an obligation for a short period, such as those containing a time limit to institute ADR as a condition precedent to arbitration/litigation while also indicating that if a party does not reply to a request to initiate, participate, or continue the process, the parties are free from the obligation to mediate (code 'short term obligations');[470] and

(4) Provisions that create real obligations such as those requiring ADR as a precondition to arbitration or litigation (code 'real obligations').[471]

13. Zero and Limited Obligations

Regarding the first and second type of agreements, there are numerous rulings from the Common Law jurisdictions in focus[472] that confirm when parties merely agree to consider ADR, they are not legally bound to pursue such mechanism.[473] Thus, if a party refuses to discuss the matter, the ADR mechanism is not set in motion and there are no adverse consequences for the refusing party.[474] This article does not code agreements that are not

[468] C. JARROSSON, "Legal Issues Raised by ADR" in J.C. GOLDSMITH et al. (eds.), *ADR in Business: Practice and Issues across Countries and Cultures*, The Netherlands, Kluwer Law International, 2006, 117. For example see ICC Model Clause A: Option to Use the ICC Mediation Rules-*The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC Mediation Rules.*

[469] For example see ICC Model Clause B: Obligation to Consider the ICC Mediation Rules-*In the event of any dispute arising out of or in connection with the present contract, the parties agree in the first instance to discuss and consider referring the dispute to the ICC Mediation Rules.*

[470] If the agreement provides for a time limit to institute ADR, the expiration of this limit ends the parties' obligation to commence ADR.

[471] C. JARROSSON, "Legal Issues Raised by ADR" in J.C. GOLDSMITH et al. (eds.), *ADR in Business: Practice and Issues across Countries and Cultures*, The Netherlands, Kluwer Law International, 2006, 119. For example see ICC Model D: Obligation to Refer Dispute to the ICC Mediation Rules, Followed by Arbitration if Required-*In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.*

[472] Australia, England, Singapore, and the US.

[473] M. SALEHIJAM, "A Call for a Harmonized Approach to Agreements to Mediate", *Yearbook on International Arbitration and ADR* 2018, 11.

[474] C. JARROSSON, "Legal Issues Raised by ADR" in J.C. GOLDSMITH et al. (eds.), *ADR in Business: Practice and Issues across Countries and Cultures*, The Netherlands, Kluwer Law International, 2006, 117.

binding on the parties due to their voluntary nature (i.e. "the parties may consider mediation").

14. Short Time and Real Obligations

Regarding the third type of provisions, Jarrosson argues that if a party unreasonably refused to participate in setting up the ADR proceedings, liability may arise depending on the wording of the ADR agreement.[475] He lastly claims that the fourth type of provisions is fulfilled if the parties appoint a neutral and attend at least one mediation session.[476] In addition to his division of ADR agreements, Jarrosson noted that, certain obligations are incumbent upon the parties, such as the obligation for the proceedings to be kept confidential.[477]

15. Two years later, in 2008, Tochtermann in relation to the German approach, opined that, "[a]t the very least, the parties will be required to initiate the mediation by appointing a mediator and furnishing him with statements of fact. Moreover, they must attend a first mediation session. Since the parties concluded the mediation agreement to overcome the barriers which they would face in direct negotiations, they will also be required to participate in a caucus session, where the mediator may point out the chances of the mediation structures and inform the parties of its basic principles, so that the mediation has a chance to start off even where emotions are high."[478]

16. Subsequently, in 2009, Alexander addressed the parties' duties in mediation in general and not specifically under a mediation agreement.[479] According to her, once a mediation has

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According to Article 4(2) of the UNCITRAL Model Conciliation Law, if a party does not receive an acceptance to an invitation to conciliation within a specific period, it can treat such silence as a rejection of the invitation.

[475] C. JARROSSON, "Legal Issues Raised by ADR" in J.C. GOLDSMITH et al. (eds.), *ADR in Business: Practice and Issues across Countries and Cultures*, The Netherlands, Kluwer Law International, 2006, 118. Article 10(1)(a) of the UNCITRAL Model Conciliation Law stipulates that, there is no liability for the refusal to participate in ADR proceedings.

[476] C. JARROSSON, "Legal Issues Raised by ADR" in A. INGEN-HOUSZ (ed.), *ADR in Business: Practice and Issues Across Countries and Cultures*, II, Aan den Rijn, Kluwer Law International, 2011, 166.

[477] C. JARROSSON, "Legal Issues Raised by ADR" in J.C. GOLDSMITH et al. (eds.), *ADR in Business: Practice and Issues across Countries and Cultures*, The Netherlands, Kluwer Law International, 2006, 116.

[478] P. TOCHTERMANN, "Agreements to Negotiate in the Transnational Context - Issues of Contract Law and Effective Dispute Resolution", *Uniform Law Review* 2008, 712. He again reiterated this view in 2013. He again reiterated this view in 2013 (P. TOCHTERMANN, "Mediation in Germany: The German Mediation Act - Alternative Dispute Resolution at the Crossroads" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013.).

[479] N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 225.

commenced, the parties may be obliged to act reasonably in relation to the mediation and to participate in good faith. Since she does not directly address the obligations arising from the parties' mediation agreement, her findings were only considered during the creation of the codes applicable to the parties' behavioural obligations in their ADR sessions.

17. In 2013, Andrews discussed the expectations that arise from an agreement to mediate. However, he did not address the obligations therein. The expectations are as follows:
    (1) The third-party neutral will be impartial, independent, and competent (trained);
    (2) The process will be confidential;
    (3) The aim of the mediation is to arrive at a settlement of all or part of the dispute; and
    (4) The subsequent settlement will be concluded or at least evidenced in writing.[480]

    Here, there is consensus amongst Andrews and Jarrosson that ADR in principle implies confidentiality.

18. Seven years following Jarrosson's initial attempt to make sense of the various obligations that arise from ADR agreements, Bach and Gruber tackled the same question in the context of German law. According to them, such agreements often contain both positive and negative obligations.[481] They positively oblige the parties to mediate in order to resolve all or some part of their dispute, while they negatively oblige the parties to refrain from initiating court or arbitration proceedings prior to the termination of the mediation.[482] If a more detailed approach is applied to the division of Bach and Gruber, it appears that the three obligations are implied: (1) the parties must set up the mediation; (2) attempt to resolve the dispute; and (3) refrain from pursuing binding mechanisms.

19. In the same year, Hess and Pelzer also reflected on the parties' obligations in Germany. They similarly found that, in accordance with the principle of voluntariness and §2(5) of the German Mediation Act, the parties may leave the mediation at any time once the

[480] N. ANDREWS, *Andrews on Civil Processes: Arbitration and Mediation*, II, Cambridge, Intersentia, 2013, 28.
[481] I. BACH en U.P. GRUBER, "Germany" in C. ESPLUGUES et al. (eds.), *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, 2 dln., 1, Cambridge Intersentia Publishing Ltd., 2013, 165.
[482] *Pactum de non petendo.*

mediation has commenced.[483] According to Hess and Pelzer, Piers, as well as Tochtermann, in Germany, the principle of *pacta sunt servanda* requires that the parties appoint a mediator, at a minimum attend a first meeting, and comment on the substance of the dispute.[484] Moreover, they find that there is a general duty to cooperate in the mediation and to negotiate in good faith.[485]

20. Hopt and Steffek also address the consequences of mediation clauses. Accordingly, these agreements "can contain substantive as well as procedural elements. Possible substantive elements are the duties to: prepare the mediation; to participate in the mediation; to negotiate in good faith; and to only initiate litigation if mediation fails." [486] They also argue that the parties do not have to agree to a settlement.[487] Hopt and Steffek appear to be distinguishing the same obligations as Bach and Gruber while adding the obligation to negotiate in good faith similar to Hess, Pelzer, and Alexander.

21. Regarding another Germanic system, Austria, Frauenberger-Pfeiler notes that a mediation clause obliges the parties to jointly seek mutually satisfactory results and in doing so, refrain from actions that endanger the goal of a mutual settlement.[488] She also argues that basic

[483] B. HESS en N. PELZER, "Regulation of Dispute Resolution in Germany: Cautious Steps towards the Construction of an ADR System" in F. STEFFEK en H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 227.
[484] B. HESS en N. PELZER, "Mediation in Germany: Finding the Right Balance between Regulation and Self-Regulation" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015. NJW 2011, 1320, 1322.; P. TOCHTERMANN, "Mediation in Germany: The German Mediation Act -Alternative Dispute Resolution at the Crossroads" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 549. B. HESS en N. PELZER, "Regulation of Dispute Resolution in Germany: Cautious Steps towards the Construction of an ADR System" in F. STEFFEK en H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 227. M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 292. C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 606.
[485] B. HESS en N. PELZER, "Regulation of Dispute Resolution in Germany: Cautious Steps towards the Construction of an ADR System" in F. STEFFEK en H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 227. See §242 BGB.
[486] K.J. HOPT en F. STEFFEK, "Mediation: Comparison of Laws. Regulatory Models, Fundamental Issues" in K.J. HOPT en F. STEFFEK (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 31. Also see K.J. HOPT en F. STEFFEK, "Mediation: Comparison of Laws. Regulatory Models, Fundamental Issues" in K.J. HOPT en F. STEFFEK (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 63.
[487] K.J. HOPT en F. STEFFEK, "Mediation: Comparison of Laws. Regulatory Models, Fundamental Issues" in K.J. HOPT en F. STEFFEK (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 63.
[488] U. FRAUENBERGER-PFEILER, "Austria 2013" in C. ESPLUGUES, J.L. IGLESISAS en G. PALAO (eds.), *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, 2 dln., 1, Cambridge, Intersentia Publishing Ltd., 2013, 11.

principles of mediation encourage the parties to disclose the information necessary to reach a settlement, to take no court action during the mediation, and to treat information from the other party with confidentiality.[489] In addition, the parties should, in principle, attend all mediation sessions.[490] However, there are no written rules on these principles and thus these duties cannot be enforced in Austria, as doing so would contravene the principle of voluntariness.[491] Therefore, in Austria, the parties are free to withdraw from the mediation at any time despite an ADR agreement.[492]

22. Discussing the obligations implied by ADR agreements in a transnational context, in 2014, Piers divided the various obligations into three categories:
    (1) The obligation to set up the ADR proceeding;
    (2) The obligation to find a solution; and
    (3) The obligation to refrain from acting.[493]

    She points to the same obligations as Bach and Gruber, as well as Hopt and Steffek while explicitly distinguishes the obligation of working towards a solution. The obligation to find a solution is in line with the settlement expectation discussed by Andrews. However, this obligation does not mean that the parties can be forced to agree to a proposed solution as also noted by Frauenberger-Pfeiler.[494] According to Piers, the above contractual duties of the parties do not address the concrete actions that the parties must take in the pursuit of a settlement.[495] This leads to conflicting opinions in the legal doctrine.[496]

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[489] U. FRAUENBERGER-PFEILER, "Austria 2013" in C. ESPLUGUES et al. (eds.), *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, 2 dln., 1, Cambridge, Intersentia Publishing Ltd., 2013, 11.
[490] U. FRAUENBERGER-PFEILER, "Austria 2013" in C. ESPLUGUES et al. (eds.), *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, 2 dln., 1, Cambridge, Intersentia Publishing Ltd., 2013, 11.
[491] U. FRAUENBERGER-PFEILER, "Austria 2013" in C. ESPLUGUES et al. (eds.), *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, 2 dln., 1, Cambridge, Intersentia Publishing Ltd., 2013, 12.
[492] P.G. MAYR en N. KRISTIN, "Regulation of Dispute Resolution in Austria: A Traditional Litigation Culture Slowly Embraces ADR" in F. STEFFEK en H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 79.
[493] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 290-295.
[494] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 294.
[495] P. TOCHTERMANN, "Mediation in Germany: The German Mediation Act -Alternative Dispute Resolution at the Crossroads" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 549.
[496] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 294.

23. While some are of the opinion that the parties are free to negotiate in the manner that best fits their individual interests,[497] others argue that the parties must further the mediation according to their abilities.[498] For instance, an obligation arising from the "ADR order" that may be issued in accordance with Article G1.8 of the Admiralty and Commercial Courts of England is the duty to agree on a neutral in good faith. Therefore, Piers finds that while the parties cannot be forced by the court to find a solution through ADR, they are obliged to, at the minimum, attempt to resolve their dispute through ADR.[499] In addition, although there is no duty to give particular information during the mediation procedure, the parties are expected not to misrepresent the facts.[500] Lastly, Piers finds that there is a general duty to pay the neutral. [501]

24. Subsequently, in 2015, Berger found that, "the agreement to mediate is a contract that obliges the parties to settle their dispute through mediation and not before the domestic courts or an international arbitral tribunal."[502] Here, he implies that the parties have an obligation to refrain from acting as suggested by several authors above. Accordingly, a "party is merely required to make an honest, reasonable and conscientious effort to resolve the dispute through mediation."[503] Thus, he points to behavioural obligations.

25. Contrary to Piers, Born and Šćekić claim that obligations under an agreement to mediate are usually limited.[504] They base their argument on the claim that such agreements imply that the parties are to discuss an issue, not to reach a specific outcome. Hence, the authors seem to argue against an implied obligation to find a solution. The claim of Born and Šćekić is supported by Esplugues who argues that an agreement to mediate does not mean the

[497] P. TOCHTERMANN, "Mediation in Germany: The German Mediation Act -Alternative Dispute Resolution at the Crossroads" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 549.
[498] K. Trams, Die Mediationsvereinbarung –Eine Vertragsrechtlichte Analyse 138 [The Mediation Agreement – A Contract Legally Possible Analysis] (Tectum Verlag Marburg 2008). M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 294.
[499] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 291.
[500] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 294.
[501] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 292.
[502] P.K. BERGER, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*, 1, Alphen aan Den Rijn, Kluwer Law International, 2015, 128.
[503] P.K. BERGER, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*, 1, Alphen aan Den Rijn, Kluwer Law International, 2015, 132.
[504] G. BORN en M. ŠĆEKIĆ, "Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'" in D.D. CARON et al. (eds.), *Practising Virtue: Inside International Arbitration*, Oxford Scholarship Online, 2015, 239.

parties are obliged to settle.[505] In agreement, Magnus finds that in mediation, a party must cooperate and further the process, but it does not have to accept a compromise.[506]

26. In line with the Born and Šćekić, in 2017, Kajkowska restated the lack of a minimum standard of compliance and further noted that, in states where mediation agreements are enforced, what is required of the parties is at a minimum the instituting of the mechanism by appointing the mediator.[507] Her view is repeated by van Beukering-Rosmuller and Van Leynseele, who find that a mediation clause creates a duty for the parties to reach an agreement on the appointment of the neutral or the process for appointment.[508] Thus, the duty to attempt mediation is breached if a party torpedoes the appointment.[509] However, they add that the parties must also agree to meet with the mediator at least once.[510]

27. This study opted to include all of above distinguished obligations/expectations with the exception of those relating to the neutral's characteristics or behaviour, as many legislative acts already address the duties of the neutral.[511] Moreover, the obligations of the neutral do not arise from the parties' ADR agreement, but from the agreement the parties conclude with the neutral once the dispute materializes. This study further divided the various obligations to numerous sub-codes. The next section will provide a detailed discussion of the coding results. In addition, a comprehensive list of the codes applied (the codebook) is contained in Annex I.

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[505] C. ESPLUGUES, "General Report: New Developments in Civil and Commercial Mediation - Global Comparative Perspectives" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 33.
[506] U. MAGNUS, "Mediation in Australia: Development and Problems" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 893. *RabelsZ* 74 (2010) 732, 747
[507] E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 137.
[508] E. VAN BEUKERING-ROSMULLER en P. VAN LEYNSEELE, "Enforceability of Mediation Clauses in Belgium and the Netherlands", *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 2017, afl. 3, (36) 50.
[509] E. VAN BEUKERING-ROSMULLER en P. VAN LEYNSEELE, "Enforceability of Mediation Clauses in Belgium and the Netherlands", *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 2017, afl. 3, (36) 50.
[510] E. VAN BEUKERING-ROSMULLER en P. VAN LEYNSEELE, "Enforceability of Mediation Clauses in Belgium and the Netherlands", *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 2017, afl. 3, (36) 51.
[511] "Parties' duties in mediation are less developed and discussed than mediator's duties" (K.J. HOPT en F. STEFFEK, "Mediation: Comparison of Laws. Regulatory Models, Fundamental Issues" in K.J. HOPT en F. STEFFEK (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 63.).

2. Findings of the Systematic Content Analysis

28. In total, 172 ADR agreements were formatted for coding.[512] At the end of the second round of coding, there were 38 codes and 199 sub-codes.[513] The subsections below will provide an overview of the findings, the potential issues, the relevant legal framework, and considerations to the *lex ferenda.*[514] The discussion of my findings will follow the typical structure of an ADR agreement. By taking the above approach, this work is the first to study ADR agreements in a systematic manner. Therefore, the conclusions thereon reflect data and not my opinions or perception. In addition, rather than having the starting point be the study of the law, this work starts from what is learned in practice (through the SCA) regarding the issues at hand. Subsequently, in this section, I will look to the law applicable and evaluate the effectiveness of current laws. On the basis of the SCA and the analysis of current rules, this section will discuss areas where a framework for the ADR agreement would create certainty and resolve issues. These suggestions are expanded on and analysed in Chapter III.

2.1.Composition of the Clauses under Analysis

29. The SCA revealed that 81%[515] of the clauses coded stipulated ADR in the context of a multi-tiered dispute resolution (MDR) clause.[516] This is not surprising as many authors argue that the promotion of ADR as the preferred alternative to litigation and arbitration has resulted in dispute resolution providers and commercial parties to increasingly drafting agreements containing MDR clauses that call for ADR prior to other binding procedures.[517] It should,

[512] It is again emphasized that this study does not provide a detailed content coding of the parties' agreement to negotiate nor arbitrate even they are contained in a MDR clause alongside an ADR agreement.
[513] The codebook is published in Annex I.
[514] *De lege ferenda* (with a view to the future law).
[515] The percentages in this article are rounded up.
[516] An overview of the definition of MDR clauses is provided in Chapter I.
[517] See O. KRAUSS, "The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith Under English law", *McGill Journal of Dispute Resolution* 2016, 144. D. CAIRNS, "Mediating International Commercial Disputes: Differences in U.S. and European Approaches", *Dispute Resolution Journal* 2005, 64. Q. ANDERSON, "A Coming Of Age For Mediation In Singapore", *Singapore Academy of Law Journal* 2017, 292. X, "Drafting Step Clauses: An Empirical Look At Their Practicality And Legality", *Pace Law School* http://www.cisg.law.pace.edu/cisg/IICL-NE.html. S.R. GARIMELLA en N.A. SIDDIQUI, "The Enforceability Of Multi-tiered Dispute Resolution Clauses: Contemporary Judicial Opinion", *IIUM Law Journal* 2016, afl. 1, 166. C. TEVENDALE *et al.*, "Multi-Tier Dispute Resolution Clauses and Arbitration", *Turkish Commercial Law Review* 2015, afl. 1, 31. M. MEAR, "Enforceability of Mediation in Multi-tiered Clauses: the Croatian Perspective", *Kluwer Arbitration Blog* 2015, 1. P.K. BERGER, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*, 1, Alphen aan Den Rijn, Kluwer Law International, 2015, 47.

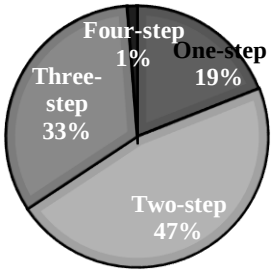
however, be noted that, the trend to conclude MDR agreements does not mean that they are common or widespread. The questionnaire conducted in the context of this research asked "How often do you estimate that commercial dispute resolution clauses that you have drafted, inserted, applied and/or enforced make a reference to non-binding ADR (i.e. mediation/conciliation)?" Of the 354 respondents to the question, the majority (63%) indicated that it is *not* common practice for dispute resolution clauses in commercial contracts to make a reference to non-binding ADR mechanisms such as mediation or conciliation.[518] The study further sought to assess the structure of the 139 MDR clauses. Figure 1 provides a sample of a typical MDR clause.

Figure 1 - *Sample of a Three-Step Clause*

Three-Stage Process: Negotiation, Mediation, Arbitration a. Negotiation Between Executives The parties shall attempt in good faith to resolve any dispute arising out of or relating to this [Agreement] [Contract] promptly by negotiation […]. b. Mediation If the dispute has not been resolved by negotiation as provided herein within [45] days after delivery of the initial notice of negotiation, [or if the parties failed to meet within [20] days,] the parties shall endeavor to settle the dispute by mediation […]. c. Arbitration Any dispute arising out of or relating to this [Agreement] [Contract], including the breach, termination or validity thereof, which has not been resolved by mediation as provided herein [within [45] days after initiation of the mediation procedure] within [30] days after appointment of a mediator], shall be finally resolved by arbitration […].[519]

30. The coding revealed that 80 agreements were two-step clauses, 57 were three-step clauses, while 2 called for a four-step dispute resolution process. Figure 2 provides an illustration of the prevalence of each type of dispute resolution agreements.

Figure 2- *Composition of Dispute Resolution Agreements*



K.C. LYE, "A persisting aberation: The movement to enforce agreements to mediate", *Singapore Academy of Law Journal* 2008, 1.

[518] M. SALEHIJAM, "ADR Clauses and International Perceptions: A Preliminary Report", *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement* 2017, afl. 3, 31.

[519] Questionnaire Respondent #567.

Noteworthy is that the majority (84%) of the two-step clauses called for mediation/conciliation prior to a binding mechanism and rarely negotiations.[520] In the three-step clauses, almost all called for negotiation,[521] mediation, and finally arbitration/litigation.

31. Assuming that ADR agreements are often the preceding tier to arbitration or litigation, it is surprising that the framework for these binding mechanisms does not address ADR as a condition precedent. The fact that, in my sample, the majority of the ADR agreements were contained in a MDR clause suggests that the framework for the agreement should take into consideration the effect thereof on arbitration and litigation. Chapter III will discuss how the framework for the ADR agreement should interact with that of arbitration and litigation.

2.2.Type of ADR

32. The choice was made to code separately for conciliation and to not treat conciliation and mediation as synonyms during the coding in order to demonstrate the rarity of dispute resolution clauses calling for conciliation. Of the 172 clauses, only 7 called for conciliation. The findings of this study reaffirm the shift in UNCITRAL Working Group II's terminology. Both the Model Law on Conciliation and the Proposed Convention on Conciliation have been renamed using the term "mediation". The shift from using the term "conciliation" to now "mediation" is explained in the advanced copy of the 68th Session: "the instruments should refer to "mediation" instead of "conciliation", as it was a more widely used term."[522]

33. Furthermore, although the clauses and institutional rules under analysis address the process of mediation, it was rare to *explicitly* define mediation. Of the rules under analysis, only five institutional rules address the definition of mediation, namely the CEDR Model Mediation Procedure,[523] the Netherlands Arbitration Institute ('NAI') Mediation Rules,[524]

[520] Thus, not common to require negotiation prior to mediation in a two-step clause.
[521] The coder opted to code clauses requiring meeting between the senior representatives as "negotiation" although the clause did not explicitly state negotiation. Notion of multi-stage negotiation.
[522] A/CN.9/WG.II/WP.205, p. 2.
[523] "1. What is mediation? Mediation is a flexible process conducted confidentially in which a neutral person actively assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution." See "Model Mediation Procedure" (2018) at 2, online (pdf): *Center for Effective Dispute Resolution* <https://www.cedr.com/about_us/modeldocs/?id=21>.
[524] "Article 2 – Mediation. 1. 'Mediation' is taken to mean a procedure in which two or more parties to a dispute endeavour to resolve their dispute with the aid of a mediator on a voluntary basis." See "Mediation Rules" (2017) at 6, online (pdf): *Netherlands Arbitration Institute* <https://www.nai-

the Mediation Rules of the Institute of Mediations and Arbitrators Australia,[525] and the Mediation Rules of USA&M.[526]

34. In addition, despite the active promotion of ODR especially by the EU through its legislative initiatives,[527] only 3 clauses called for ODR. The lack of reference to ODR could relate to the fact that commercial disputes are resolved outside of the official ODR platforms albeit with some technological assistances. This is not to understate the benefit of ODR, which is resolving disputes wholly online in small disputes (low monetary value), disputes arising from an online transaction including consumer disputes, and when parties cannot meet each other face-to-face due to emotional or logistical reasons.[528]

35. Moreover, it was surprising to see 7 clauses calling for binding ADR (i.e. where the neutral makes a final decision if the parties fail to reach a settlement). This is despite ADR being almost unanimously defined as a non-binding process (Figure 3 provides sample of such agreements). Calling for binding ADR contradicts its nature and thus brings into question the validity of the clause.[529] Chapter I provided an extensive discussion of the conditions for validity and enforceability of ADR agreements. In particular, calling for binding ADR is in fact not calling for a true ADR process, but rather a dispute resolution process that is closer to arbitration.

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nl.org/downloads/NAI%20Mediation%20Rules%201%20January%202017.pdf> [https://perma.cc/ZD3D-NQFG].

[525] "RULE 1 Definitions 'mediation' is a process in which parties to a dispute with the assistance of a neutral third party ('the Mediator') identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or other determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted." See "Mediation and Conciliation Rules" (2001) at 1, online (pdf): *The Institute of Arbitrators and Mediators Australia* <https://www.iama.org.au/sites/default/files/resources/rules-guidelines/mediation-and-conciliation/mcrules.pdf> [https://perma.cc/N2ZE-LLU4].

[526] "Mediation is a voluntary process where the parties to a dispute, with the help of an impartial third-party (the mediator), attempt to work toward a mutually satisfactory solution. By agreeing to mediate, parties agree to negotiate to settle their differences. Neither USA&M nor any mediator has the power or authority to render a binding decision or to force the parties to accept a settlement." See "Mediation Procedures" (2018) online: *United States Arbitration and Mediation* https://usam.com/mediation-procedures/ >.

[527] ODR Directive.

[528] K.J. HOPT en F. STEFFEK, "Mediation: Comparison of Laws. Regulatory Models, Fundamental Issues" in K.J. HOPT en F. STEFFEK (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 66.

[529] *Lindsay v. Lewandowski* Cal.App.4th at p. 1623, Justice Sills eloquently characterizes binding mediation as "a half-baked arbitration" or "not 'mediation' but simply a low-quality arbitration." (Id. at p. 1627-1628.) *Moreover, in Bowers v. Raymond J. Lucia Companies, Inc.*, (2012) 206 Cal. App. 4th 724, a $5 Million binding mediation award was held enforceable under California Code of Civil Procedure Section 664.6 because the parties mutually agreed to proceed to a full-day mediation as part of a settlement agreement and authorized the mediator to render an award if the case did not settle.

Figure 3 – *Sample of a Binding ADR Clause*

Any dispute less than $_____ in value shall be subject to binding mediation […].[530]

36. Lastly, 2 agreements did not preselect a particular ADR mechanism. Instead, one called for the ADR provider to choose for the parties and one called for the establishment of a dispute board. These agreements should in principle cause no legal issues as they are clear regarding the procedure to be carried out in the selection of the dispute resolution procedure and the selection of the dispute board.

37. To reiterate, the above findings reaffirm that mediation is the most prominent form of ADR. This is in line with scholarly works on ADR.[531] Therefore, the majority of the results of this study relate to the rights and obligations contained in mediation agreements. In line with this finding, the suggestions made in Chapter III regarding the content of a legislative framework for the ADR agreement will reflect mostly on the rights and obligations of parties to a mediation agreement.

2.3.Scope and Separability

38. The disputes that fall within a particular dispute resolution clause are determined according to the wording of the agreement.[532] In line with the widespread requirement for dispute resolution clauses to have a clear scope, 95% of the agreements under analysis specified the scope of disputes covered by the agreement. The preciseness of scope is essential to enforceability, as dispute resolution clauses can only be enforceable in relation to disputes that fall under their scope. Parties can formulate the scope of their clause in broad or narrow terms. Interestingly, 2 of the agreements contained a financial scope, which prevented the mediation and arbitration of small disputes.[533]

39. Although there is no recorded dispute regarding the scope of ADR agreements, in relation to arbitration clauses, when the scope thereof is formulated in broad terms, i.e. "all disputes arising out of, or relating to this agreement", there is a possibility that disputes not arising

[530] Construction Dispute Resolution Services; Binding Mediation – Arbitration (graduated processes). Retrieved via: http://www.constructiondisputes-cdrs.com/suggested_contract_language_for.htm; last visited on 10-04-2017.
[531] See Introductory Chapter.
[532] N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 190.
[533] Questionnaire Respondent #33 "In the event the total amount in dispute is higher than USD 50,000, the parties agree to submit the Dispute to settlement proceedings under the [insert from approved institutions] mediation rules."

directly from the contract must still be arbitrated. Moreover, if the scope is too narrow, parties may disagree as to whether a specific dispute falls within the scope thereof.[534] In case of arbitration, there is a preference for broad interpretation of scope.[535] A well formulated ADR agreement should have a broad scope, as ADR is a useful technique to settle or narrow disputes.[536] Furthermore, a framework for the ADR agreement should require courts and tribunals to enforce these broadly formulated agreements. This approach is in line with the widespread policy of the states under analysis to promote ADR and to encourage recourse thereto in many types of disputes.[537]

40. In addition, 6 clauses addressed separability, with 1 specifying that the ADR tier is separable from the rest of the dispute resolution clause (Figure 4).

Figure 4 – *Sample of Separability*

If any provision hereof is held to be invalid or unenforceable in whole or part, the validity and enforceability of the remainder of such provision and other provisions of this Agreement shall not be affected.[538]

Although a limited number of clauses specifically address separability, the ADR agreement should be viewed separately from the commercial contract as well as the agreement to negotiatie and the agreement to arbitrate/litigate. The appropriateness for separability was discussed in Chapter I, Section 1. The separability of ADR agreements must also be clarified in the proposed framework, as there have been few instances of the parties and courts viewing the various tiers of a MDR agreement as one agreement.[539] The doctrine of separability is supported on the basis of party autonomy, legal certainty, international comity, and the policy to give effect to dispute resolution clauses.[540]

[534] I. WELSER en S. MOLITORI, "The Scope of Arbitration Clauses – Or "All Disputes Arising out of or in Connection with this Contract"" 2012. P.D. FRIEDLAND, *Arbitration Clauses for International Contracts*, New York, JurisNet, 2007. A. REDFERN en M. HUNTER, *Law and Practice of International Commercial Arbitration*, London, Sweet & Maxwell, 2004.
[535] I. WELSER en S. MOLITORI, "The Scope of Arbitration Clauses – Or "All Disputes Arising out of or in Connection with this Contract"" 2012, 19.
[536] J. LEE en M. LIM, *Contemporary Issues in Mediation*, I, London, World Scientific Publishing Co. Pte. Ltd, 2016, 101.
[537] See Introductory Chapter.
[538] Survey respondent clause – emailed 14-03-2017.
[539] Chapter I, Section 1.
[540] Z.S. TANG, *Jurisdiction and Arbitration Agreements in International Commercial Law*, New York, Routledge, 2014, 74.

2.4.Preconditions to the ADR Tier

41. Section 2.1 discussed the composition of the dispute resolution clauses under analysis and noted that, there is a tendency for three-step and several two-step dispute resolution clauses to require some form of negotiation or meeting in the first tier. This section will discuss the agreements under analysis that set a precondition to the ADR. 40% of the agreements analysed required the parties to negotiate or have a meeting between specified persons prior to the ADR. 11 of these agreements contained a multi-staged negotiation/meeting phase; with 73% of the 11 requiring a structured form of correspondence prior to the negotiation/meeting.

42. Of the agreements establishing a precondition to ADR, the majority (74%) specifically called for negotiation prior to ADR. Again, it should be noted that, clauses requiring meetings between the parties were coded as "negotiation", even if the parties did not explicitly state "negotiation". 20% of the clauses calling for negotiation further specified who must participate in the negotiations, namely "executives with the power to settle". Of the clauses calling for negotiation, 60% specified a time-frame. Both the time-frame and the counting of days varied, ranging from 10 to 60 days "from the notice of dispute", "from the invitation to negotiate", "from the date commencement of negotiation", or "from initial notice of negotiation".

43. The remaining clauses with a precondition to the envisaged ADR mechanism called for either a meeting between the managers, directors, senior representatives, or meetings between designated dispute representatives. Here the majority (90%) of the clauses specified a time-frame. Again, the time-frame to comply and the rules on counting the days differed amongst the clauses. Ranging from 1 meeting to 45 days from "the dispute notice", "request notice", or "the meeting of the executives".

44. Moreover, 14 of the clauses waived the precondition to negotiate if the parties failed to meet within a specified time; ranging from 10 to 30 days. 64% of the agreements requiring negotiation stipulated 30 days, 29% stipulated 20 days, and 7% stipulated 10 days. However, the starting times differed, ranging from "[…] days after the delivery of the notice of dispute" to "[…] days after the delivery of notice of negotiation".

Interestingly, one agreement clearly stipulated that the failure to negotiate cannot be relied upon to refuse ADR (Figure 5).

Figure 5 - *Sample of a Failure to Negotiate*

During the course of the mediation, no party can assert the failure to fully comply with paragraph A, as a reason not to proceed or to delay the mediation.[541]

45. When an agreement sets a precondition for ADR, there is potential for complexities. Although I did not find a legal dispute were a party refused to conduct ADR on the basis of an unfulfilled negotiation tier, there have been several cases where a party refused to arbitrate/litigate on the basis of an unfulfilled negotiation tier.[542] In these cases, the courts and arbitral tribunals under analysis were split regarding the enforceability of negotiation obligations on the parties. Until the *Emirates* case,[543] English judges have stipulated that agreements to negotiate are too uncertain to be enforceable, while Australian judges support the enforceability of agreements to negotiate.[544] This uncertainty carries over to ADR agreements. It is unclear if an unfulfilled negotiation tier will prevent a party from enforcing the ADR tier. Here, two questions arise: (1) does the principle of *pactum de non petendo* apply to preconditions to an ADR mechanism; and (2) is the enforcement of negotiation tiers in line with the need and expectations of commercial parties?

46. To answer the first question, one must look to the emerging case on negotiation tiers. Accordingly, if parties have stipulated in *mandatory* terms the requirement to negotiate as a condition precedent to ADR, then, the principle of *pactum de non petendo* requires the enforcement of such an agreement. However, if the requirement to negotiate/meet is not stipulated in a specific time-frame and without referral as to who is to attend, there is uncertainty regarding what is required of the parties and thus the negotiation agreement is not enforceable. In the words of Sheety, "[t]he period of time for negotiation or mediation (which should not be too long) should be triggered by a defined and indisputable event,

[541] Alternative Dispute Resolution Committee of the New York City Bar Association; Compilation of Sample Mediation Clauses – Commercial Law Sample; 2016. Retrieved via: http://www2.nycbar.org/pdf/report/uploads/20073042-CompilationofSampleMediationClausesALTDIS442016.pdf, last visited on 10-04-2017.
[542] EHC (Queen's Bench Division), *Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd* [2014] EWHC 014 (Comm), Judgement of 1 July 2014.
[543] EHC (Queen's Bench Division), *Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd* [2014] EWHC 014 (Comm), Judgement of 1 July 2014.
[544] NSW court of appeal, *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1, Judgement of 1991.

such as a written request to negotiate or mediate under the clause or the appointment of a mediator."[545]

47. Concluding from the above, it is evident that negotiation tiers should only be enforced if they specify exact time-frames and refer to the individuals to be involved. Without such stipulations, such agreements are too uncertain and not conductive to the process of dispute resolution. This is particularly true when the negotiation tier is a precondition to an ADR tier, since ADR provides the parties with a forum for *assisted* negotiations. Therefore, the answer to the second question is that, the enforcement of negotiation tiers does not benefit commercial parties when there is a subsequent ADR tier. However, as the national approaches to negotiation tiers continue to vary, a framework for the ADR agreement should stipulate that it is up to national courts and tribunals whether they will enforce preconditions to the ADR tier as this is an unsettled matter.

2.5. Procedure to Commence / Trigger ADR

48. When parties agree to pursue ADR to resolve their disputes, it is important to know how they ought to start the prescribed mechanism. As stipulated above, in this study, both the ADR agreement and the applicable institutional rules were coded. 60% of the agreements and the applicable institutional rules studied described the procedure to commence the ADR. The majority of the procedures were contained in the applicable institutional rules categorized under the headings "Initiation of Mediation", "Request for Mediation", or "Commencement of Proceedings/Mediation". The most common methods to commence mediation were, the filing of a request or application followed by the sending of an invitation to the other party to participate (Figure 6).

Figure 6 – *Procedure to Commence ADR*

49. Interestingly, 15 agreements contained a time component stipulating that the parties must commence ADR in a specified period, ranging from 10 to 90 days. The average number of

[545] N. SHETTY, "The Arbitration Agreement" in S. MENON (ed.), *Arbitration in Singapore: A Practical Guide*, Singapore, Sweet & Maxwell, 2014, 154.

days was 29.5, while the most common number of days were 15 and 28.[546] The markers for the start of the time-frame within which the parties must commence their mediation ranged from "from the file being sent to neutral", "from notification of mediation", "after request for mediation", "after referral to mediation", "after referral by the contractor", "from date of mediation notice", "from event giving rise to the dispute", to "from expiry of time to challenge neutral".

50. Although the majority of agreements addressed the procedure to commence the ADR agreement, when the parties' agreement does not address this factor, confusion can arise regarding whether the mechanism is deemed to have commenced. While it is rare to regulate the ADR proceedings, in Austria, a proponent of regulating mediation, the beginning and end of the mediation are addressed in instances where the parties use a registered mediator: "the beginning of the mediation is the agreement of the parties that the dispute shall be resolved by mediation. Mediation ends, when a party or the mediator refuses to continue the mediation, or when there is a final outcome of the mediation procedure."[547]

51. As Chapter III will discuss, the framework for the ADR agreement should reflect on these findings and list "invitation to mediate", "notice of mediation", and "request/application for mediation" as potential ways to commence ADR. Furthermore, it is advisable for the framework to suggest a time limit within which a party must react to the initiation of ADR in order to avoid a state of limbo (i.e. where ADR is deemed to have commenced unilaterally, but is not terminated). In addition, a time limit would allow the party to effectively prove that the other party has failed to engage in ADR within the given period. The exact number of days for this can be set by each jurisdiction and can reflect the above findings. However, to better be able to set the time limits for a reaction to an invitation to conduct ADR further research is necessary. In particular, research is needed regarding the true progression of ADR proceedings.

[546] 1 – within 10 days; 4 –within 15 days; 4 – within 28 days; 3- 30 days; 2 – 45 days; 1 – within 3 months (90 days from event giving rise to dispute).
[547] § 17 Abs. 1 ACMC. Other national mediation rules, such as the German Mediations Law, the English and Dutch mediation framework tend to be silent on how mediation is to be initiated.

2.6.Applicable Law and Jurisdiction

52. When parties conclude an ADR agreement, they often do not consider the jurisdictions in which the procedure is to take place or the governing law.[548] In this study, only 9% of the agreements addressed the governing law of the ADR agreement. 6% of the agreements coded specified the governing law of the ADR. Moreover, a mere 14 agreements (8%) stipulated the jurisdiction with power to settle disputes arising from or relating to the ADR agreement. 4 of these agreements gave the courts where the ADR session takes place the authority to determine disputes relating to the agreement. Evidently, parties largely tend to omit provisions relating to applicable laws and jurisdiction when concluding their dispute resolution clause. Here the delocalisation theory deserves mention. Accordingly, ADR ought to be dissociated from the laws of the geographical location where it takes place.[549] However, the parties do not indicate the law applicable law or the forum with the power to rule in a transnational context, disputes can arise regarding these matters.[550] Thus, as Chapter III will explore, a future framework for the ADR agreement ought to provide connecting factors for the determination of applicable law and jurisdiction in order to provide certainty to the parties when disputes arise.

53. Although relatively few clauses designated a governing law for the agreement and mechanism, close to 71% of the clauses pre-selected the applicable institutional rules. Furthermore, 5 of the institutional rules indicated that the applicable rules were superior, while 9 indicated that the content of the agreement was superior. Thus, the use of dispute resolution providers is prevalent. In my study, only 27% of the agreements coded specifically designated that the named institution ought to administer the mechanism. Nevertheless, it is probable that if parties select applicable institutional rules, they also aim to have the institution administer these rules and vice versa.[551] Moreover, as Chapter I demonstrated, parties increase the likelihood for the enforceability of their ADR agreement if they refer to valid institutional rules.[552]

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[548] N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 70.
[549] P. READ, "Delocalization Of International Commercial Arbitration: Its Relevance In The New Millennium ", *Aria* 1999, afl. 2. S. YU CHONG en N. ALEXANDER, *Singapore Convention Series: Why is there no 'seat' of mediation?*, 2019.
[550] H. EIDENMÜELLER en H. GROSERICHTER, "Alternative Dispute Resolution and Private International Law" 2015, 4.
[551] In *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd.* (1995) 36 NSWLR 709, by selecting the ACDC to administer their mediation, the parties had incorporated the guidelines by reference.
[552] See Chapter I, Section 1.2 on certainty.

2.7.Third-Party Neutral and Payment

54. Reiterating the Section 1.3 on Literature Review, the statutory and contractual obligations of the neutral are outside the scope of the SCA, as such obligations are not relevant to the discussion of the obligation of the parties' to an ADR agreement. Nevertheless, for an ADR agreement to be enforceable, it must address the selection of the neutral and in the Common Law jurisdictions in focus, his/her remuneration.[553] Thus, this study anticipated that the majority of the agreements and applicable institutional rules would address the selection of the neutral. Confirming this hypothesis, 84% of the agreements and/or the applicable institutional rules contained a procedure to appoint/select the neutral. The need to be clear regarding how the neutral is to be selected was discussed in Chapter I. If the parties fail to select a process for the selection of the neutral, the framework for the ADR agreement should provide the courts or tribunals with authority to appoint a neutral. Thereby, agreements that miss a minor detail remain enforceable.

55. Regarding the remuneration of the neutral, the majority of the agreements/institutional rules (63%) addressed this aspect. The most common division (95%) was to equally divide the costs. Evidently, there is a clear trend regarding the division of costs in the data set. This is key, as it neutralizes the argument in the Australian case of *Aiton*[554] that, it is not obvious how the third-party is to be remunerated.[555] Furthermore, as discussed in Section 1.3, according to Tochterman, in Germany, when parties do not pre-agree on the payment of the neutral, the fees will be determined with reliance on customary hourly rates.[556] As there is a clear trend in my sample regarding the remuneration of the neutral, the framework for the ADR agreement should also address this matter (i.e. if the parties have failed to indicated how the neutral is to be remunerated, the costs should be evenly split). The content of the proposed framework will be further discussed in Chapter III, Section 3.3 under "Default Rules".

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[553] See M. SALEHIJAM, "A Call for a Harmonized Approach to Agreements to Mediate", *Yearbook on International Arbitration and ADR* 2018.
[554] *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996 [67].
[555] *Aiton* – "To my mind, the suggested implied term does not satisfy the third of these conditions." The third condition being "it must be so obvious that 'it goes without saying" [66].
[556] P. TOCHTERMANN, "Mediation in Germany: The German Mediation Act -Alternative Dispute Resolution at the Crossroads" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 523. Jörg Risse, Wirtschaftsmediation, para. 9 (C.H. Beck 2003), 542. Also see §612(2) BGB.

2.8.Logistics: Venue, Language, etc.

56. According to Tümpel and Sudborough, whose work was also discussed in Section 1.3, "ADR clauses often do not contain provisions regarding the place and the language of the ADR proceedings, although such provisions are often contained in arbitration clauses."[557] In testing their claim, the SCA found that 63% of the agreements studied addressed the venue/location of the dispute, with 1 agreement designating the "seat" of mechanism. It can be said that ADR agreements tend to address the place of mechanism. Of the agreements and ADR rules that prescribed a procedure to select the location of the mechanism, one approach stood out: the neutral/provider has power to set the location for the ADR.[558]

57. Coding was also carried out to check the parties' language choices. 27% of the agreements and the applicable rules addressed how the language is to be determined, with 1 requiring it to be the same language as the agreement. There were multiple approaches to selecting the language of the mechanism in absence of choice by the parties, ranging from the neutral and dispute resolution provider having the power to decide in consultation with the

[557] H. TÜMPEL en C. SUDBOROUGH, *ICC's ADR Rules 2001-2010: Current Practices, Case Examples and Lessons Learned*, Kluwer Law International, 2010, 261-262.

[558] AAA, "Drafting Dispute Resolution Clauses –American arbitration association", Retrieved via: https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540, last visited on 06-04-2017, p. 18; ADC, "ADC Dispute Resolution Sample Clauses", Retrieved via https://disputescentre.com.au/wp-content/uploads/2015/02/ADC-Dispute-Resolution-Sample-Clauses-2015.pdf, last visited on 9-02-2017; K.M. SCANLON, *Drafting Dispute Resolution Clauses: Better Solutions For Business*, New York, International Institute for Conflict Prevention & Resolution, 2006, 155-156. Article 20.4 Nederland ICT Terms and Conditions 2014; CIDRA, "Sample Mediation Clause", Retrieved via: http://www.cidra.org/samplemediation, last visited on 06-04-2017; Construction Dispute Resolution Services; Binding Mediation. Retrieved via: http://www.constructiondisputes-cdrs.com/suggested_contract_language_for.htm; last visited on 10-04-2017; EUCON, "Mediationklausel (Variant emit Schiedsverfahren)", Retrieved via http://www.eucon-institut.de/mediation/mediationsklauseln/, last visited on 06-04-2017; ICC, "Model Mediation Clauses – Clause C". Retrieved via: https://iccwbo.org/dispute-resolution-services/mediation/mediation-clauses/, last visited on 07-04-2017; IntegretieMediation, "Mediationskaluseln", Retrieved via http://www.in-mediation.eu/mediationsklauseln, last visited 06-04-2017; J AMS, "Clause Providing for Mediation in Advance of Arbitration". Retrieved via: https://www.jamsadr.com/international-clause-workbook/, last visited on 07-04-2017; German Hellenic Chamber of Commerce, "Mediation Clause of the German-Hellenic Chamber of Industry and Commerce", retrieved via http://www.oddee.gr/en/ipodeigmata-ritron-3/2-uncategorised-gr/154-mediation-clause-of-the-german-hellenic-chamber-of-industry-and-commerce.html, last visited on 13-09-2017; SIMC, "SIMC Model Mediation Clause", retrieved via http://simc.com.sg/simc-mediation-clause/, last visited on 28-02-2017.

parties,[559] to the language of the agreement containing the mediation agreement,[560] to calling for a specific language (i.e. English, German) unless otherwise agreed.[561] Interestingly, the rules of the Mediation Center of Europe, of the Mediterranean and of the Middle East of the European Centre of Arbitration and Mediation were very detailed, stipulating: "Unless a single common language was utilised in the relationships between the parties to the contract, the Mediator may permit a party to use one of the languages used by the parties to communicate between themselves for the purposes of the contract. 9.3. If the applicant undertakes to pay and advances the costs of the translation, the use of a language different from those permitted above may be allowed by the Mediator provided that simultaneous translation occurs."[562]

58. When ADR agreements and the relevant institutional rules address the logistics of the mechanism such as the venue, date, and language, the parties save considerable time, as they do not have to agree on these aspects once a dispute arises. Selecting the venue and language, however, is not essential to the certainty of the ADR agreement. This is a clear difference to the field of arbitration, where selecting a "seat"[563] for the arbitration seems to be a key factor in the parties' dispute resolution choices. The seat of the arbitration determines which court has jurisdiction to enforce the arbitration clause and award as well

[559] ICC, "Model Mediation Clauses – Clause C". Retrieved via: https://iccwbo.org/dispute-resolution-services/mediation/mediation-clauses/, last visited on 07-04-2017; EUCON, "Mediationklausel (Variant emit Schiedsverfahren)", Retrieved via http://www.eucon-institut.de/mediation/mediationsklauseln/, last visited on 06-04-2017; IntegretieMediation, "Mediationskaluseln", Retrieved via http://www.in-mediation.eu/mediationsklauseln, last visited 06-04-2017; Survey respondent clause 10 – emailed 14-03-2017; SIMC, "SIMC Model Mediation Clause", retrieved via http://simc.com.sg/simc-mediation-clause/, last visited on 28-02-2017; Survey respondent clause 12 – emailed 14-03-2017; Survey respondent clause 14 – emailed 14-03-2017; Survey respondent clause 15 – emailed 14-03-2017; Survey respondent clause 18– emailed 14-03-2017; Survey respondent clause 27 – uploaded in questionnaire #10; Survey respondent clause 4 – emailed 14-03-2017; Survey respondent clause 27 – uploaded in questionnaire #365; VIAC, "Recommended Mediation Clause", Retrieved via http://www.viac.eu/en/mediation-en/mediation-clauses-en, last visited on 7-02-2017; Survey respondent clause 8 – emailed 14-03-2017.

[560] AAA, "Drafting Dispute Resolution Clauses –American arbitration association", Retrieved via: https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540, last visited on 06-04-2017, p. 16; ICDR; "pre-dispute mediation clause". Retrieved via https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestreleased, last visited on 17-04-2017; Survey respondent clause 22– emailed 14-03-2017; Survey respondent clause 39 – uploaded in questionnaire #279.

[561] Libralex; Sample Mediation Clause. Retrieved via: http://www.libralex.com/publications/sample-multi-tier-dispute-resolution, last visited on 10-04-2017; Live Mediation; Beispiel einer Mediationklausel. Retrieved via: http://www.live-mediation.com/2013/03/mediationsklausel/, last visited on 11-04-2017; Timothy M. Kaufmann, "Sample Dispute Resolution Clause". Retrieved via: Electronic copy available at: http://ssrn.com/abstract=2671799, last visited on 07-04-2017, p. 1-6.

[562] Article 9 on the Language of Proceedings.

[563] The "seat" implies the legal jurisdiction where the ADR is carried out and therefore the supervisory forum and applicable *lex fori*.

as the applicable rules. Therefore, as Chapter III will further discuss, in cases where the parties have not selected the location and language of their mechanism, it would be advisable for the framework to address this issue.

2.9.Interim Relief and Provisional Measures

59. 37% of the agreement studies specifically allow the parties to seek interim relief/provisional measures during ADR proceedings. However, there were 2 agreements that were confusing as they addressed the parties' right to seek interim relief/provisional remedies only during arbitration.[564] Therefore, it was unclear if the parties may rely on such remedies while the ADR is ongoing. Although this is not a core issue in this thesis, the sections below will provide a short analysis of the right to interim relief in the context of ADR agreements.

60. There is judicial support for the right to seek interim relief. For instance, in 2008, the Dutch Court of Breda held that safeguarding measures, such as freezing orders, are possible despite an ongoing mediation procedure.[565] Singapore has taken a step further by regulating this right in Article 8(3) of the 2017 Mediation Act: "(3) The court may, in making an order under subsection (2), make such interim or supplementary orders as the court thinks fit for the purpose of preserving the rights of the parties." In Germany, amongst other jurisdictions, this right also exists in the framework of arbitration: "It is not incompatible with an arbitration agreement for a court to grant, before or during arbitral proceedings, an interim measure of protection relating to the subject-matter of the arbitration upon request of a party."[566]

61. In principle, ADR agreements should not prevent the application for interim measures, as there are certain disputes that may require the filing of suit in order to prevent further harm (i.e. IP disputes).[567] In such instances, the envisaged dispute resolution mechanism may not always be helpful to the parties.[568] Therefore, a framework for the ADR agreement should

[564] These agreements were excluded from the count of the total agreements addressing interim relied/ provisional remedies.
[565] Voorzieningsrechter Rechtbank Breda 10 October 2008, *LJN* BF7611. Also check Rechtbank Arnhem 18 November 2003, *LJN* AQ2547 – family case regarding a change of the husband's assets.
[566] §1033 ZPO.
[567] D. PIPER, "Drafting an effective alternative dispute resolution clause under Texas law: News and Insights from Austin", *DLA Piper Publications* 2012.
[568] Alexander also argues that the temporary waiver of the right to file a claim does not affect the application for certain interim relief, unless there is a contractual agreement to the contrary (N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 205.).

ensure that the parties' choice to conduct ADR does not endanger the right to seek interim relief.

2.10. Limitation and Prescription Periods

62. A prescription period refers to the period set by statute within which the parties must bring legal action. Prescription periods are also referred to as limitation periods. 19% of the agreements addressed such periods, with more than half requiring limitation periods to be extended while the other half required their suspension (Figure 7). Although the length of the suspension/extension varied, they never exceeded 30 days. The most frequent suspension/extension period was 20 days.

Figure 7 – *Sample of Limitation/Suspension Periods*

RULE 10 Extension of Limitation Period 1. If, during the mediation, a limitation period for bringing any proceedings in relation to the Dispute expires, the parties agree that: a. the limitation period will be extended by the number of days from the date of reference of the Dispute to mediation to the date of termination in accordance with these Rules; b. they will not rely, in any arbitral or judicial proceedings, on expiry of the limitation period /other than as calculated in accordance with this Rule.[569]
All applicable statutes of limitation and defences based upon the passage of time shall be tolled until 15 days after the Earliest Initiation Date.

63. Not all legal systems provide for the suspension/extension of limitation periods when the parties engage in ADR. Consequently, the parties' substantive claim may be time-barred.[570] A question that arises in these instances, is whether the parties can agree via contract to extend limitation periods. The answer to this question is not clear. For instance, in Delaware, contracts cannot be used to extend the statute of limitation.[571] Conversely, in the state of

[569] Resolution Institute; Mediation followed by arbitration. Retrieved via: https://www.resolution.institute/dispute-resolution/standard-dr-clauses-for-use-in-contracts, last visited on 20-04-2017.

[570] When the other party mediated until the limitation period passed, the first party was left without a remedy. That is what happened in *Federated Insurance Co of Canada v. Markel Insurance Co. of Canada*, 2012 ONCA 218, 2012 CarswellOnt 4051 (Ont. C.A.).

[571] L.G. HEIRNG en M.A. DIVINCENZO, "Considerations for Contractual Provisions Extending Statutes of Limitations", *Morris Nichols* 2013, 1. *GRT, Inc. v. Marathon GTF Technology, LTD*, 2011 WL 2682898 at *15 n.80 (Del. Ch. July 11, 2011) (stating that a "freely made contractual decision among private parties to shorten, rather than lengthen, the permitted time to file a lawsuit does not violate the unambiguous negative command of 10 Del. C. § 8106 [the statute of limitations for breach of contract], but a decision to lengthen it does and allows access to the state's courts for suits the legislature has declared moribund"); *Shaw v. Aetna Life Insurance Co.*, 395 A2d 384, 386-387 (Del. Super. 1978). A recent New York decision has answered this question in the affirmative. Parties can, by contract, shorten the time period found in a statute of limitations for filing suit (*Polar Bear Mechanical, Inc. v. Walison Corp.*, 2017 N.Y Slip Op. 50848(U) (June 22, 2017)).

New York, and in Germany, the parties may alter the statute of limitation to extend or suspend.[572] Germany provides this possibility albeit with two restrictions: (a) liability for deliberate acts may not be shortened; and (b) extensions cannot exceed 30 years.[573] Likewise, in the Netherlands, limitation periods can be extended and not suspended.[574]

64. In addition to parties agreeing to pause or extend limitation periods, it is common for statutes to require that limitation periods are to be paused/extended while parties attempt to settle their disputes. For instance, in Austria, "[t]he commencement and subsequent continuation of mediation with a registered mediator shall suspend the commencement and continuation of the limitation period as well as other notice period regarding pursuit of the rights and claims which are subject to mediation."[575] The parties may also agree in writing that other obligations and rights between them that are not subject to the mediation should also be affected.[576] In Germany, §203 of the German Civil Code ('BGB')[577] specifically allows for the suspension of limitation periods in case of negotiations; and in this case, ADR is considered a form of negotiation. Likewise, the California International Arbitration and Conciliation Act provides for a stay of judicial and arbitral proceedings in case of voluntary ADR. This stay includes that the limitation periods including periods of prescription be paused.[578]

[572] NY "promise to waive, to extend, or not to plead the statute of limitation applicable to an action arising out of a contract." (New York Gen. Oblig. Law § 17-103.1.) New York Gen. Oblig. Law § 17-103. This law is subject to certain exceptions that the mediator and the parties should be aware of. For instance, the mediator and the parties should be aware that agreements to extend the statute of limitations indefinitely have been held to be unenforceable under New York law. See Bayridge Air Rights, Inc. v. Blitman Constr. Corp., 80 N.Y.2d 777 (1992). Moreover, the parties and the mediator should be aware that Section 17-103 only applies to disputes "arising out of a contract" and requires that any agreement extending the limitations period be in writing. See, e.g., Eberhard v. Elmira City Sch. Dist., 6 A.D.3d 971 (3d Dep't 2004). R.R. ROSSI en K.B. TORRES, "Mediation Q&A: US (New York)", *Practical Law* 2017, 2.

[573] §202 BGB

[574] Conditions for extension are listed under Article 3:320 and 3:321 of the Dutch Civil Code (Burgerlijk Wetboek) ('BW'). Also possible to interrupt Under Dutch law it is possible to interrupt a statute of limitation by performing a certain legal action (Article 3:316, 3:317 and 3:318 BW). By interrupting a statute of limitation, a new limitation period will commence from the day following to that interruption (Article 3:319 BW).

[575] Article 22(1) of the Civil Law Mediation Act.

[576] Article 22(2) of the Civil Law Mediation Act. U. FRAUENBERGER-PFEILER, "Austria 2014" in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 22.

[577] *Bürgerliches Gezetsbuch* - German Civil Code Book (BGB).

[578] 32 USA CCP, ss 1297.381 and 1297.382. Locator of law tolled until the tenth day following the termination of the ADR. E. VAN GINKEL, "Mediation under National Law: United States of America", *Mediation Committe Newsletter* 2005, 45.

65. In addition, Article 8 of the Mediation Directive requires Member States to "ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process." However, the Directive does not require Member States to implement it in relation to domestic mediations. Consequently, in Austria, the Netherlands, and England, the Directive does not apply to domestic mediations.[579] The difference between the rights and obligations implied by domestic versus cross-border ADR is especially evident in Austria. As above noted, in Austria mediations involving a registered mediator *suspend* limitation periods, while cross-border mediations that fall under Section 4 of the EU-Mediation Act 2011 *extend* the limitation period until the end of the mediation procedure. Here the difference between a *suspension* and *extension* is of note. A suspension carries a different legal consequence than an extension.

66. It is important that while the parties attempt ADR they feel at ease that their right to file a claim in courts or otherwise is not affected by the termination of limitation periods.[580] If parties fear the running of limitation periods while they attempt to come to a settlement, they will be more hesitant to the choice. Thus, it is important to provide for the suspension or extension of limitation/prescription periods if the parties opt to engage in private ADR.[581]

67. A potential issue that remains in relation to disputes pertaining to ADR agreements is that when the parties dispute the enforceability of their ADR agreement, limitation periods relating to the main commercial dispute are not paused. This is because, the current laws on ADR solely address the effect of an ongoing ADR session on limitation periods. Here, there is a clear gap in the law. The framework for the ADR agreement should address this issue by stipulating that disputes relating to the ADR agreement should not have an adverse consequence on the limitation periods relating to the commercial dispute. Thereby, parties will be discouraged from abusing the process in order to have the limitation periods run out.

[579] Scope of the Directive: Article 1; Definition of Cross Border: Article 2.
[580] This is supported by K.J. HOPT en F. STEFFEK, "Mediation: Comparison of Laws. Regulatory Models, Fundamental Issues" in K.J. HOPT en F. STEFFEK (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 34.
[581] K.J. HOPT en F. STEFFEK, *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 36.

This is key, as some parties might be discouraged from agreeing to ADR in a pre-dispute setting if they fear abuse of process by the other.

2.11. Obligation to Refrain from Acting (Pactum De Non Petendo)

68. As discussed above, there were 125 MDR agreements in this study. I further coded agreements and institutional rules that precluded a binding mechanism if the parties have not initiated ADR or while ADR is ongoing. When institutional rules are included in the study of preconditions, there were, in total, 133 agreements and institutional rules that required the parties to refrain from litigating or arbitrating before initiating ADR and while ADR is ongoing. This number constitutes 77% of the agreements (Figure 8). When an ADR agreement contains not only an obligation to submit the dispute to ADR, but also a prohibition to commence court proceedings or arbitration, the agreement contains two obligations.[582] The latter obligation is easier to enforce.[583] The obligation to use ADR as a precondition to litigation and arbitration exists in many jurisdictions[584] With the exception of the Netherlands, in the jurisdictions under analysis, the obligation to refrain from commencing other proceedings is enforceable.[585]

Figure 8 – *Institutional Rules Prohibiting Resort to a Binding Mechanism while ADR is Ongoing*

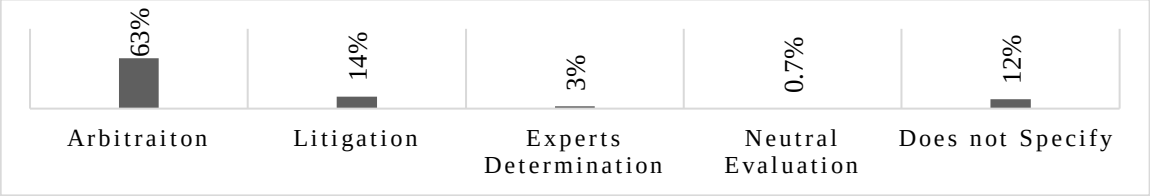
Resort to Arbitral or Judicial Proceedings 16. The parties undertake not to initiate, during the mediation, any arbitral or judicial proceedings in respect of a dispute that is the subject of the mediation […].[586]

[582] C. ESPLUGUES, "General Report: New Developments in Civil and Commercial Mediation - Global Comparative Perspectives" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 33.
[583] C. ESPLUGUES, "General Report: New Developments in Civil and Commercial Mediation - Global Comparative Perspectives" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 33.
[584] E.g. in the UK, Italy, the US, and Australia. M. SALEHIJAM, "A Call for a Harmonized Approach to Agreements to Mediate", *Yearbook on International Arbitration and ADR* 2018. See also T. SOURDIN, *Alternative Dispute Resolution*, London, Thomson Reuters, 2012, 356.
[585] See Chapter I and M. SALEHIJAM, "A Call for a Harmonized Approach to Agreements to Mediate", *Yearbook on International Arbitration and ADR* 2018, 22. Despite being a leader in mediation, in 2006, the Dutch High Court rejected the enforceability of agreements to mediate by relying on the voluntary nature of ADR. In the family law context see HR, *NJ* 2006, 75, Judgement of 20 January 2006. This approach was reconfirmed in 2008 and 2009 (HR, *RvdW 688,* Judgement of 27 June 2008*;* HR, *BH7132,* Judgement of 8 May 2009). Also in a 2002 case, the Regional Court of Haarlem rules that an obligation to negotiate is contrary to voluntary proceedings such as mediation. Rechtbank Haarlem 4 June 2002, *LJN* AQ2615; Also see Article 4 of the NMI Rules However, Schmiedel claims that in recent years, Dutch courts seem to have recognized the obligation of the parties to engage in mediation with an open mind (L. SCHMIEDEL, "Mediation in the Netherlands: Between State Promotion and Private Regulation" in K.J. HOPT en F. STEFFEK (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 732.).
[586] JAMS, "Standard JAMS International Mediation Clause". Retrieved via: https://www.jamsadr.com/international-clause-workbook/, last visited on 07-04-2017.

§ 8 DUTIES OF THE PARTIES
(1) […] mediation proceeding must be conducted before the commencement of a court proceeding or an arbitration related to the subject matter of the mediation proceeding.[587]

69. The agreements coded most commonly prescribed for arbitration following mediation,[588] 14% prescribed litigation, 3% expert determination, and less than 1% called for neutral evaluation. Furthermore, 12% of the clauses did not specify a binding mechanism and instead provided for options that parties can choose from while finalizing their agreement (Figure 9).

Figure 9 – *Obligation to Refrain From Acting*



70. ADR agreements often address the possibility of competing and/or subsequent litigation and arbitration.[589] The study further found 2 clauses that specifically allowed parallel arbitration. Thereby, imposing an obligation to conduct ADR exists, but not as a precondition. Participating in ADR while arbitration is ongoing can have both a positive and a negative effect. Positively, the parties are assured that the tribunal is there to assist them in their ADR attempt through providing the following services: interim relief, injunctions, and international enforceability of settlements as arbitral awards.[590] Negatively, the parties might not be willing to fully dive into the ADR, as they fear their statements and claims will be used against them in the arbitration.[591] In light of the rarity of clauses permitting parallel arbitration/litigation, the framework for the ADR agreement ought to emphasize the obligation of the parties' to refrain from acting before initiation ADR and while ADR is ongoing. This is of course unless any of the defences to enforcement as discussed in Chapter I are available. However, the framework ought to leave parties the freedom to agree to parallel arbitration or other combinations if they wish.

[587] EUCON, "Mediationsklausel (Variante für Stazung)", Retrieved via http://www.eucon-institut.de/mediation/mediationsklauseln/, last visited on 06-04-2017.
[588] 63% of the agreements that contained an obligation to refrain from acting specified arbitration.
[589] H. EIDENMÜELLER en H. GROSERICHTER, "Alternative Dispute Resolution and Private International Law" 2015, 8.
[590] For an extensive discussion see E. CHUA, "A contribution to the conversation on mixing the modes of mediation and arbitration: Of definitional consistency and process structure", *Transnational Dispute Management* 2018. M.B. BARIL en D. DICKEY, "MED-ARB: The Best of Both Worlds or Just A Limited ADR Option?", *Mediate.com* 2014.
[591] J. ALLISON, *Alternative Dispute Resolution Research*, 2018.

71. Of the agreements that required parties to refrain from acting, some clearly made ADR mandatory before the parties may resort to an adjudicative process while others require that the parties refrain from participating in binding mechanisms while ADR is ongoing. Therefore, the obligation to refrain from acting seems to have different starting points.

72. Regarding the first starting point, the agreements in the sample often stipulate that the parties "shall" or "must" mediate, failing which they "shall" resort to a binding mechanism (Figure 10 provides an example of a clause that does not explicitly mention the word "condition precedent"). As discussed in Chapter I, an ADR agreement will not be enforced if it fails to formulate the obligation in mandatory terms. It is reasonable to require parties to formulate the obligation to mediate in mandatory terms, as the courts need to be sufficiently certain that the parties intended to be bound by this obligation even if upon a dispute one party changes its mind.

Figure 10 – *Obligation to Refrain from Acting*

In the event that the dispute has not settled within twenty-eight (28) days following referral to ADC, or such other period as agreed to in writing between the parties, the parties shall submit the dispute to arbitration in [*insert seat/place of the arbitration*].[592]

73. These formulations, however, can be problematic. Again, as Chapter I demonstrated, in England, for an ADR agreement to be enforceable, it must be formulated as a condition precedent to binding mechanism. Here, the German approach is far better suited, as German courts will enforce the parties' agreement as long as the intention to be bound is clear.[593]

74. To ensure that the parties' agreement is found to be enforceable on the basis of a simple formulation, it is important that a future framework for the ADR agreement stipulates that, such agreements ought to be enforced as long as the parties' desire to be bound is clear. In my opinion, such a formulation can look as follows: "ADR agreements in writing under which the parties undertake to submit to ADR all or any differences that have arisen or that may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter falling under their agreement, shall be recognized and

[592] ADC, "ADC Dispute Resolution Sample Clauses", Retrieved via https://disputescentre.com.au/wp-content/uploads/2015/02/ADC-Dispute-Resolution-Sample-Clauses-2015.pdf, last visited on 9-02-2017.
[593] Chapter I, Section 3.2.

enforced."[594] In addition, reflecting on the history of the framework for arbitration, the proposed framework should address the defences and exceptions to enforcement, such as invalidity. Through this formulation, the parties' intentions will be adhered to and the unreasonably high threshold for certainty will be lowered. This potential effect of the framework will be further discussed in Chapter III.

75. Regarding the latter starting point, reflecting on the letter of the agreement, it seems that the parties will only be in breach of their ADR agreement if they commence ADR and binding procedures simultaneously. Here, it is unclear if the parties are in breach of their agreement if they never commence ADR and simply pursue a binding mechanism. Parties can clarify this matter by using mandatory language. Moreover, the framework for the ADR agreement should clarify that commencing binding proceedings without having first attempted ADR in accordance to an agreement would constitutes a breach thereof even if the clause is not explicitly worded so.

76. In addition, several agreements under study provided a time-frame for compliance with the various tiers of a MDR clause. Time-frames provide certainty regarding when that tier can be considered exhausted.[595] 58% of the clauses that obliged the parties to refrain from acting further specified a time-frame ranging from 10 to 90 days with an average of 53 days. This is in line with the study of Tümpel and Sudborough, who found that the average duration of 2001-2010 ICC ADR proceedings from transfer to the neutral until the termination of the proceedings was around three months.[596]

77. When there is a time-frame, there is a need to clearly identify the starting point of such a period. If there is ambiguity, the court or tribunal might reach different conclusions regarding when the ADR tier can be considered as exhausted.[597] The agreements studied had differing starting points ranging from "referral to mediation", "appointment of neutral", "date of acceptance of mediation", "invitation to participate", "notice of mediation", "mediation demand", "initiation of mediation", "from filing of the request to engage in

[594] This passage was written by me.
[595] E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 220.
[596] H. TÜMPEL en C. SUDBOROUGH, *ICC's ADR Rules 2001-2010: Current Practices, Case Examples and Lessons Learned*, Kluwer Law International, 2010, 259.
[597] E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 220.

mediation", to "notice of dispute" (Figure 11).[598] The most common starting points were, "initiation of mediation" and "notice of dispute".

Figure 11 – *Sample of Agreements with Time Frame for the ADR*

If mediation would not resolve the subject matter of the dispute within 30 days after the commencement of the mediation procedure, then either party may commence legal proceedings in an appropriate court to resolve the matter.[599]
"If at the conclusion of 90 days after service of the Notice of Dispute […] the parties are unable to agree to a mediator, within 45 days after Notice of […] then the dispute shall be resolved by binding arbitration.[600]

78. If the parties fail to set time-frames to initiate ADR and starting points, the framework should provide default options. It is appropriate to set the time-frame at the notice of the dispute as the parties who dispute their ADR agreement often never initiate the procedure. Thereby, the obligation to conduct ADR becomes even clearer. A more concrete suggestion regarding a time-frame can be made through additional research into varying limitation periods and opinions of ADR users and experts.

79. In addition, 20% of the agreements that contained an obligation to refrain from acting further specified that the parties are exempt from this obligation if the other party fails to participate in the ADR. This approach should also be reflected in the framework as it is in line with the jurisprudence.[601] Courts in multiple jurisdictions have consistently ruled that a party cannot request the enforcement of an ADR agreement if it were in breach thereof.[602]

[598] Days from referral to ADR 7, After appoint of third party neutral 10, After date of acceptance 1, After invitation 2, After notice of ADR 3, after written demand 2, after initiation 20, from filling of request to commence ADR 9, from notice of dispute 13.
[599] Survey respondent clause 31 #68– emailed 14-03-2017.
[600] Survey Respondent Clause 56 – emailed 15-05-2017.
[601] See also Chapter I, Section 2.6.
[602] S.R. COLE *et al.*, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 180. *Harting v. Barton*, 6 P3d 91, 94-96 (Wash App 2000); 1930-34 Associates, *L.P. v. BVF Const. Co., Inc.*, 2005 No. 0908, 2006 WL 1462932; Contrary to principle of loyalty and trust (*Treuwidrigkeitseinwand*) as contained in § 242 BGB. Conversely in *OLG Frankfurt am Main* of 7 November 1997 (NJW-RR 1998, 778), "the court clarified that the duty to support a dispute resolution process is confined to cooperative participation in the process. Such duty should not be extended to include financial contributions towards meeting the cost of conciliation. In the court's view, the party against whom the claim is brought should not be expected to financially support the proceedings brought against it. In reaching this conclusion the court showed sympathy with the 'natural reflects' of the 'attacked party' to ignore the financial consequences of such an attack. The court held that the contradictory behaviour of a defendant who first boycotted the ADR by not paying the requisite deposit and then invoked an ADR clause as a defence in court proceedings is of no relevance to blocking the enforceability of a disputed clause." See E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 86. *Cumberland and York Distributors v Coors Brewing Co* No 01-244-P-H, 2002 WL 193323, at *4 (D Mc 7 February 2002).

It would follow this logic, that the other party is not bound to the obligation if the counterparty is in breach. This logic was discussed extensively in Chapter I.[603]

80. Lastly, 7 clauses in the dataset required the staying/suspending of litigation and arbitration while ADR is ongoing. 5 of these agreements explicitly required that the parties apply for the staying of proceedings. This is also in line with the jurisprudence, as courts do not enforce ADR agreements unless one party requests so.[604] Likewise, the Singapore Mediation Act 2017 stipulates that, the court may stay the proceedings constituted in breach of an ADR agreement *upon* the application of one of the parties.[605] To only enforce ADR agreements upon the requests of one of the parties flows from the principle of party autonomy. Thus, this approach should also be reflected in a future framework for the ADR agreement. A formulation thereof could look as follows: "Court and tribunals ought to give effect to the parties ADR agreement if one of the parties applies for such enforcement." This formulation and its proposed location will be discussed in Chapter III.

2.12. Obligation about Time and Time-frames

81. In this study, the code "time" signifies the minimum time the parties must participate in the ADR. 38% of the ADR agreements were assigned the code "obligation time/duration". The majority (85%) of the agreements that addressed the obligation about time/duration stipulated a minimum amount of time that the parties must participate in the ADR. The minimum time ranged from a specific number of hours, days, or sessions. The most common requirement (93%) was for the parties to attend a specified minimum number of sessions/meetings (see Figure 12).[606]

Figure 12 – *Obligations Regarding Minimum Number of Sessions*

[603] Chapter I, Section 2.6.
[604] Chapter I, Section 1.
[605] Article 8(1) of the Singapore Mediation Act.
[606] 1 agreement required one full day of ADR; 2 agreements addressed minimum number of hours (4 and 7 hours respectively).

82. The findings of this study correlate with a study of court-annexed mediations in Germany, which established that, mediations last an average of 2.7 months (81 days) and only one session.[607] Likewise, according to a Dutch study of mediations from 1998 to 2004, the average timeframe for mediation, from request to settlement is 2.5 months (75 days).[608]

83. The minimum duration of the ADR is relevant not only to the parties, but also to the neutral and the courts/arbitrators.[609] By having a minimum, there is clarity regarding when the parties can be found to have met their ADR obligation. As discussed under Section 1.3, the majority of scholars support the idea that an ADR agreement binds the parties to at least attend one ADR session/meeting before they can unilaterally terminate the ADR. Furthermore, Bach and Gruber rely on §2(5) of the German Mediation Act, which states that the parties may "end the mediation at any time", to argue that the wording suggests that the parties cannot refuse ADR, they can only terminate an ADR mechanism once it has commenced and thus refuse to settle.[610] This approach was also supported in the English cases *Leicester Circuits*[611] and *Roundstone Nurseries.*[612] In these cases, the withdrawal from the mediation before the first ADR session was sanctioned with a refusal to grant recovery of costs.[613] More narrowly, in the American case of *Fluor Enterprises*,[614] the court held that the plaintiff had fulfilled a pre-litigation mediation requirement by simply selecting a mediator. Therefore, the filing of an action after the selection of a mediator, but before the actual mediation, was deemed appropriate.

84. Reflecting on the above, it is apparent that a framework for the ADR agreement should clearly stipulate when the parties can be considered to have met their ADR obligation in terms of time: i.e. the obligation to conduct ADR is met when the parties attend at least one ADR session/meeting. This formulation is addressed in Chapter III while Section 2.13 will

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[607] R. GREGOR, "Abschlussbericht zur Evaluation des Modellversuchs Güterichter ", *Friedrich-Alexander-Universität Erlangen-Nürnberg Juristische Fakultät* 2007, 12.
[608] ACB & M.A. Schonewille, Winst maken bij het oplossen van geschillen: conflictmanagement en mediation in Nederlandse ondernemingen, Stichting ACB Mediation (ADR Centrum voor het Bedrijfsleven), 2004.
[609] C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 700.
[610] I. BACH en U.P. GRUBER, "Germany" in C. ESPLUGUES et al. (eds.), *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, 2 dln., 1, Cambridge Intersentia Publishing Ltd., 2013, 166.
[611] *Leicester Circuits Ltd v Coates Brothers Plc* [2003] EWCA Civ 333 Longmore LJ.
[612] *Roundstone Nurseries Ltd v Stephenson Holdings Ltd* [2002] EWHC 1431 (TCC).
[613] S. SIME *et al.*, *A Practical Approach To Alternative Dispute Resolution*, Oxford, Oxford University Press, 2011, 94.
[614] *Fluor Enterprises, Inc. v. Solutia Inc.* 147 F. Supp. 2d 650 (S.D. Tex. 2001).

further discuss the exact behavioural obligations of the parties during their ADR session/meeting.

2.12.1. Rules on Counting Days/Time

85. Only 38% of the agreements analysed designated the date and time of the mechanism or a procedure to determine them. Moreover, 34% of the agreements contained rules on when the mechanism is deemed to have commenced. The most common starting points were, "the receipt of request by the mediation provider" and "notice of dispute".

86. It is important to have clear guidelines on when the ADR is deemed to have commenced to avoid disputes on the matter. For example, a dispute relating to this issue arose in the *Fluor Enterprises* case.[615] The parties had agreed to mediate for a 30-day period, but disagreed on which actions commenced the procedure that set this period in motion.[616] In this study, only 4% of the agreements contained rules on counting days. It is surprising to see a lack of attention paid to the rules on counting the days, as 38% of the agreements analysed contained a time period for the ADR. To reiterate, when there is a time-frame there is a need to clearly identify the starting point of the period. If there is ambiguity, the court or tribunal might reach different conclusions regarding when the mediation tier can be considered as exhausted.[617] Therefore, as Chapter III will discuss there is a role for the future framework on the ADR agreement (namely the default rules) to address the appropriate prescription of indicators of ADR commencing.

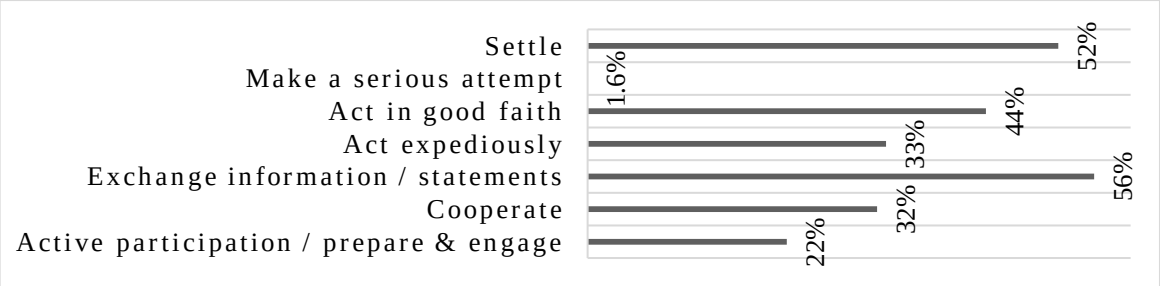
2.13. Behavioural Obligations

87. One of the main challenges of addressing the parties' obligations under an ADR agreement is to know the extent of participation that is required of them. In this study, 73% of the clauses and institutional rules addressed the parties' behavioural obligations. The code "behaviour" relates to the way in which the parties are to behave/conduct themselves prior to and during the ADR. The obligations regarding behaviour were further divided to "active participation (prepare and engage)", "cooperation", "exchanging of information", "expeditious behaviour", "good-faith", "serious attempt", and "settle". The most

[615] *Fluor Enterprises Inc. v Solution Inc.*,147 F Supp (2nd) 648 (SD Tex 2001).
[616] *Fluor Enterprises, Inc. v. Solutia Inc.*, 147 F. Supp. 2d 648 (S.D. Tex. 2001).
[617] E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 220.

reoccurring obligations as to behaviour were, “to exchange information” and “to settle” (Figure 13).

Figure 13 –Parties’ Behavioural Obligations



2.13.1. Exchange of Information

88. The obligation to exchange information often relates to the need to exchange written statements regarding the dispute, as well as the details such as names and addresses of those to be involved in the mechanism. Of the clauses requiring the parties to exchange information, 1 specified the requirement to make oral statements (Figure 14).

Figure 14 –*Sample of making oral statement*

At the mediation conference, each party should be prepared to make a brief oral statement explaining his or her perspective.[618]

89. The duty to provide the third party neutral with information is not regulated nor mandated by courts. Nevertheless, the parties are expected not to misrepresent the facts.[619] The requirement to exchange information is also found in civil procedure rules of many states. For instance, although the law in England does not explicitly address how a party must behave during an ADR procedure,[620] there are clear instructions regarding how the parties should exchange information prior to litigation in the Practice Direction on Pre-Action

[618] Johnson & Johnson Model International ADR Clause Pacific Basin Option 1. K.M. SCANLON, *Drafting Dispute Resolution Clauses: Better Solutions For Business*, New York, International Institute for Conflict Prevention & Resolution, 2006, 129-130.
[619] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 294.
[620] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 292. J.M. SCHERPE en B. MARTEN, "Mediation in England and Wales: Regulation and Practice" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 406.

Conduct.[621] Moreover, scholars agree that the unwilling party should be compelled to hear the other party's offer and/or the neutral to fulfil their obligation in the ADR agreement.[622]

90. It is undeniable that a successful ADR session requires that the parties at the very least attempt to exchange a minimum number of statements. Therefore, the future framework for the ADR agreement should clarify that a behavioural obligation is to exchange relevant information and statements regarding the dispute and the desired settlement outcome. In outlining such an obligation, however, a balancing act is necessary. As the obligation to make a serious attempt at ADR should not infringe upon the voluntariness of ADR. Indeed, coercion *into* the ADR process must be distinguished from coercion *in* the ADR process.[623]

2.13.2. Settle

91. As discussed in the Section 1.3, there is consensus amongst scholars, legislatures, and judges that an ADR agreement does not require the parties to come to a settlement but merely that they make a real effort to come to a resolution.[624] To further study the potential obligation to settle, this study coded the agreements under analysis for the obligation to attempt to or to "settle". 38% of the agreements addressed the issue of settlement. Of these 65 agreements, the majority (88%) required the parties to "endeavour" or "attempt" to settle their dispute via ADR. Furthermore, 2 clauses required that the parties make suggestions for settlement. Interestingly, 8 agreements required the parties to settle their dispute via ADR using the mandatory language (Figure 15).

Figure 15 – *Sample of an agreement containing an obligation to settle*

[621] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 292. Practice Direction on Pre-Action Conduct (2014), Annex A, Rule 6.1
[622] I. BACH en U.P. GRUBER, "Germany" in C. ESPLUGUES et al. (eds.), *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, 2 dln., 1, Cambridge Intersentia Publishing Ltd., 2013, 165-166.
[623] P. TOCHTERMANN, "Agreements to Negotiate in the Transnational Context - Issues of Contract Law and Effective Dispute Resolution", *Uniform Law Review* 2008, 712. Moreover, according to Alexander, mediation can only become a true alternative to court proceedings "when it is subject to some degree of mandating" (N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulator Reform" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 175.).
[624] There is no obligation under statute or other law to accept a proposed settlement during ADR. Also see O. KRAUSS, "The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith Under English law", *McGill Journal of Dispute Resolution* 2016, 1278.

> Any controversy or claim arising out of or relating to this contract or breach thereof, **shall be settled by mediation under the Construction Industry Mediation Procedures of the American Arbitration Association** [emphasis added].[625]

92. The obligation to settle a dispute via ADR is unlikely to be enforced, since a core feature of ADR is its non-binding nature.[626] Parties cannot be forced to accept a settlement proposed by the other party or the neutral whose task it is to facilitate the dispute resolution process.[627] This is in line with the principle of voluntariness in ADR, which is in highly valued. Moreover, in Germany, §2(5) of the Mediation Law emphasizes the right of the parties to end the mediation at any time.[628] Likewise, in the US and the other Common Law jurisdictions under study, there is no obligation to agree to a settlement during an ADR session.[629] With this consideration in mind, it is important that the framework for the ADR agreement only requires that the parties endeavour/attempt to settle their dispute via ADR in order to preserve the voluntary nature of an ongoing ADR process.[630]

2.13.3. Act in Good Faith

93. The third most common obligation relating to the code "behaviour" was the requirement to act in good faith.[631] However, when parties agree to conduct ADR in good faith, there is potential for disagreement regarding what good faith entails.[632] While it is easy to assess whether a party has attended an ADR session, it is more difficult to test the good faith of

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[625] AAA, "Drafting Dispute Resolution Clauses –American arbitration association", Retrieved via: https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540, last visited on 06-04-2017, p. 18.
[626] C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 603. C. ESPLUGUES, "General Report: New Developments in Civil and Commercial Mediation - Global Comparative Perspectives" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 33. P.G. MAYR en N. KRISTIN, "Regulation of Dispute Resolution in Austria: A Traditional Litigation Culture Slowly Embraces ADR" in F. STEFFEK en H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 79. See also Article 3.3 of the European Code of Conduct for Mediators at http://europa.eu.int/comm/justice_home/ejn/adr/adr_ec_code_conduct_en.pdf *("The parties may withdraw from the mediation at any time without giving any justification.").*
[627] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 289.
[628] *Gesetz zur Förderung der Mediation und anderer Verfahren de außergerichtlichen Konfliktbeilegung* [German Mediation Law], July 21, 2012, Bundesgesetzblatt [BGB1.] at 1577, § 2(5) (Gers.).
[629] R. KULMS, "Mediation in the USA: Alternative Dispute Resolution between Legalism and Self-Determination" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 1279.
[630] Chapter I, Section 2.2 discusses the voluntary nature of ADR.
[631] 33% of all agreements.
[632] P. STOTHARD, S. BRUCE, S. CURRAN en C. SWARTZ-ZERN, "Investment Protection and International Dispute Resolution in Singapore" in S. MENON (ed.), *Arbitration in Singapore: A Practical Guide*, Singapore, Sweet & Maxwell, 2014, 570. P. STOTHARD *et al.*, "Investment Protection and International Dispute Resolution in Singapore" in S. MENON (ed.), *Arbitration in Singapore: A Practical Guide*, Singapore, Sweet & Maxwell, 2014, 570.

parties towards the negotiations.[633] Black's Law Dictionary defines "good faith" as "a state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage."[634]

94. It is even more difficult to assess what good faith is in relation to the obligation to conduct ADR. Courts seems to approach the enforceability of the good faith obligation differently. To illustrate, English courts have been traditionally hostile to the doctrine of good faith.[635] There is no general obligation of good faith in English law and the parties have no statutory obligation to tell the truth or observe other norms of behaviour.[636] Nevertheless, in *Carleton*,[637] the English Justice Jack found that a party who took an unreasonable stance in mediation is in the same position as a party who refused to mediate and therefore can be sanctioned.

95. Conversely, in the US, the duty of good faith is recognized as a general principle of contract law that is implied in all commercial contracts.[638] According to §205 of the American Restatement (Second) of Contracts, "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[639] Furthermore, good faith is an "overriding and eminent principle" in the US Uniform Commercial Code ('UCC').[640]

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[633] C. TEVENDALE *et al.*, "Multi-Tier Dispute Resolution Clauses and Arbitration", *Turkish Commercial Law Review* 2015, afl. 1, 38. R. KULMS, "Mediation in the USA: Alternative Dispute Resolution between Legalism and Self-Determination" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 1279.

[634] "A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage" (Bryan A. Garner (ed.), Black's Law Dictionary, 7th ed., St. Paul 1999, 701).

[635] O. KRAUSS, "The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith Under English law", *McGill Journal of Dispute Resolution* 2016, 148; C. PARKER *et al.*, "How Far Can You Act in Your Own Self-Interest?", *Herbert Smith Freehills* 2016, 3.

[636] J.M. SCHERPE en B. MARTEN, "Mediation in England and Wales: Regulation and Practice" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 406. J.M. SCHERPE en B. MARTEN, "Mediation in England and Wales: Regulation and Practice" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 406.

[637] *Carleton (Earl Malmesbury) v Strutt and Parker* [2008] EWHC 424 (QB).

[638] See S.J. BURTON, "Breach of Contract and the Common Law Duty to Perform in Good Faith", *Harvard Law Review* 1980, 371.

[639] Restatement (Second) of the Law of Contracts § 205 (1981) [Restatement].

[640] §1-201 and 203 of UCC. See also R. RANA, *Alternative Dispute Resolution: A Handbook for In-House Counsel in Asia*, Singapore, LexisNexis, 2014, 61.

Likewise, in Australia, the obligation of good faith is sufficiently certain and enforceable.[641] In the 1999 Australian case of *Aiton*, Einstein J reflected on a commercial contract requiring the parties to negotiate in good faith and found that:

> It is clear that a tension may exist between negotiation from a position of self-interest and the maintenance of good faith in attempting to settle disputes. However, maintenance of good faith in a negotiating process is not inconsistent with having regard to self-interest.[642]

96. Lastly, courts in pro-good faith Civil Law jurisdictions, such as Germany, imply a good faith obligation into contractual arrangements.[643] According to §242 BGB, the parties are under a general duty to cooperate in the ADR process and to negotiate in good faith. [644] In addition to the above duties in the BGB, the parties are bound by the general the contract law requirement against undue influence and the use of threats during the ADR procedure.[645] In particular, §203 of the BGB on limitation periods[646] and the principle of good faith protects the parties from the loss of rights during the ADR.[647]

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[641] A. LIMBURY, *ADR in Australia*, Kluwer Law International, 2010, 7.

[642] *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996, para 83. Also see NSW Court of Appeals, *United Group Rail Service Ltd v Rail Corporation New South Wales*, Judgement of 3 July 2009, para. 81; *Coal Cliff* where Kirby P found that the contractual promise to negotiate in good faith is intended to stand as a legal obligation that is binding on the parties (NSW court of appeal, *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1, Judgement of 1991, para. 26-27).

[643] N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 196; K. HAN en N. POON, "The Enforceability of Alternative Dispute Resolution Agreements: Emerging Problems and Issues", *Singapore Academy of Law Journal* 2013, 475. In relation to Germany, also see NJW 647 (1999), BGH, 18 November 1998. In the Netherlands, when parties conclude a mediation agreement, they are obligated to negotiate in good faith (L. SCHMIEDEL, "Mediation in the Netherlands: Between State Promotion and Private Regulation" in K.J. HOPT en F. STEFFEK (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 731.).

[644] According to §242 BGB, "An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration."

[645] P. TOCHTERMANN, "Mediation in Germany: The German Mediation Act -Alternative Dispute Resolution at the Crossroads" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 549. M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 294.

[646] On the expiry of exclusion periods during the mediation proceedings, if the party has expressly conveyed the impression that I is waiving the right to assert expiry of such periods see Eidenmuller, Vertrags- und Verfahrensecht de Wirshaftsmediation, 123, Wagner, NJQ (2001), 182, 186. P.K. BERGER, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*, 1, Alphen aan Den Rijn, Kluwer Law International, 2015, 128.

[647] P.K. BERGER, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*, 1, Alphen aan Den Rijn, Kluwer Law International, 2015, 128.

97. However, as Section 2.15 will outline, ADR negotiations are covered by confidentiality, which begs the question of how the parties' behaviour can be assessed.[648] It is submitted that the parties' pre-negotiation steps (preliminary) leading to the ADR are not covered by confidentiality, which mitigates the issue of proof. Therefore, good faith of the parties can be assessed concerning the following steps: answering the request to conduct ADR, discussions regarding the choice of neutral, discussions regarding the practical aspects of the mechanism, and the need to attend the first session.[649]

98. Reflecting on the above for the proposed framework on the ADR agreement, it is evident that the matter of good faith ought to be approached with caution. A contractual good faith obligation should not be relied upon as the sole reason for the refusal to enforce an ADR agreement. Moreover, the parties should avoid using such formulations due to the lack of uniformity regarding the content of a good faith obligation in relation to ADR. In light of differing approaches to good faith that reflect a long legal history in each of the states under analysis, the choice was made not to discuss good faith in the proposed framework for the ADR agreement.

2.13.4. Cooperate, Active Participation, and a Serious Attempt

99. Referring further to various obligations imposed on the parties by their ADR agreement, this study further coded for the obligations "cooperate", "active participation or prepare and engage", and "serious attempt." 40 agreements required that parties cooperate (Figure 16), 28 required active participation or to prepare and engage (Figure 17), and 2 require the parties to make a serious attempt (Figure 18).

Figure 16 – *Sample cooperate*

The parties must cooperate fully with the mediator, including by providing all information that he or she reasonably requests.[650]

Figure 17 – *Sample active participation or prepare/engage*

[648] E. VAN BEUKERING-ROSMULLER en P. VAN LEYNSEELE, "Enforceability of Mediation Clauses in Belgium and the Netherlands", *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 2017, afl. 3, (36) 52.
[649] E. VAN BEUKERING-ROSMULLER en P. VAN LEYNSEELE, "Enforceability of Mediation Clauses in Belgium and the Netherlands", *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 2017, afl. 3, (36) 54.
[650] Survey respondent clause 3 – emailed 14-03-2017.

M-9. Responsibilities of the Parties […] the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.[651]

Figure 18 – *Sample make a serious attempt*

By consenting to mediate or conciliate under these Rules, the parties agree to engage in the mediation or conciliation in good faith and in a forthright manner and make a serious attempt to resolve the dispute.[652]

The above obligations are likely to be enforced on the parties and increase the certainty of the parties' contractual agreement. Moreover, the above obligations are in line with other scholarly findings.

100. In the Austrian context, Frauenberger-Pfeiler comments that, although the parties are free to negotiate in a way that protects their interests, they may not misrepresent facts, make threats, or exert undue influence.[653] Likewise in Germany, in addition to the duty to negotiate in good faith, there is a general duty to cooperate in the ADR process.[654] In relation to Australia, Magnus notes that, "[w]here the parties have agreed on mediation […], there is also a general duty on each party to further the mediation procedure in a reasonable way."[655] Thus, a party must cooperate and not impede the ADR procedure. The need to cooperate is also stipulated by the Law Society of England and Wales in the Civil and Commercial Mediation Accreditation Scheme: "Each party must use its best endeavours to comply with reasonable requests made by the mediator to prompt the efficient and expeditious resolution of the disputes. If either party does not do so, the mediator may terminate the mediation."[656]

[651] AAA, "Drafting Dispute Resolution Clauses –American arbitration association", Retrieved via: https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540, last visited on 06-04-2017, p. 18.
[652] CIDRA, "Sample Mediation Clause", Retrieved via: http://www.cidra.org/samplemediation, last visited on 06-04-2017.
[653] P. TOCHTERMANN, "Mediation in Germany: The German Mediation Act -Alternative Dispute Resolution at the Crossroads" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 549.
[654] B. HESS en N. PELZER, "Regulation of Dispute Resolution in Germany: Cautious Steps towards the Construction of an ADR System" in F. STEFFEK en H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 227. §242 BGB.
[655] U. MAGNUS, "Mediation in Australia: Development and Problems" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 893. See at the Federal level: s. 31(1)(b) Native Title Act 1993; at the State level: s. 27 Civil Procedure Act 2005 (NSW); s. 11 Fram Debt Mediation Act 1994 (NSW); r. 1180 Court Procedure Rules (ACT); s. 325 Uniform Civil Procedure Rules (Qld).
656 Annex C, c. 10 of the Civil and Commercial Mediation Accreditation Scheme.

101. Moreover, in *Halsey v. Milton Keynes General NHS Trust*,[657] the English Court of Appeal set out a test to determine whether the refusal to mediate was reasonable.[658] Unreasonable behaviour includes a refusal to mediate, a last minute withdrawal from a planned mediation, making an offer in an aggressive manner without a real intention to resolve the dispute, and not giving the other part enough time to prepare.[659] Bach and Gruber take this a step further and argue that the unwilling party should be compelled to hear the other party's offer, and/or that the mediator must fulfil their obligation under the mediation agreement.[660]

102. For an ADR mechanism to be fruitful, the parties must at the very least cooperate, participate, and make a serious attempt. Therefore, it would be advisable for a framework for the enforcement of the ADR agreement to not only list these behavioural obligations, but to further provide for sanctions when the parties fail to fulfil their behavioural obligations. Chapter I discussed the preferred remedy for breaches of ADR agreements. The need for a framework that contains a detailed ADR procedure only arises when the parties fail to draft enforceable ADR agreements. Again, as Chapter III will discuss, here such rules would only be binding if one of the parties seeks the enforceable of the ADR agreement.

2.13.5. Act Expeditiously

103. The fourth most common behavioural obligation was the obligation for the parties to conduct the process expeditiously.[661] In other words, the parties ought not to delay the process unreasonably. The need to act expeditiously relates to the obligation of cooperation. There is no legal test regarding whether the parties can be deemed to have acted as such. Therefore, the framework for the ADR agreement should not address this matter.

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[657] *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] 1 W.L.R. 3002.
[658] *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] 1 W.L.R. 3002, paragraph 16; In particular, in the determination of the repartition costs, the courts have, at times, deviated from the "loser pays" rule on the basis of the winning party's behaviour (S. SHIPMAN, "Alternative Dispute Resolution, the Threat of Adverse Costs, and the Right of Access to Court" in D. DWYER (ed.), *The Civil Procedure Rules Ten Years On*, Oxford, Oxford University Press, 2009, 341.).
[659] *Leicester Circuits Ltd. v. Coates Bros. Plc.*, [2003] EWCA (Civ) 333 (Eng.); *Societe International de Telecommunications Aeronautiques S.C. v. The Wyatt Co.* (UK), [2002] EWHC 2401; *Earl of Malmesbury v Strutt & Parker* [2008] EWHC (QB) 424- High Court "a party who agrees to mediation but then causes the mediation to fail by reason of his unreasonable position in the mediation is in reality in the same position as party who unreasonably refuses to mediate."
[660] I. BACH en U.P. GRUBER, "Germany" in C. ESPLUGUES et al. (eds.), *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, 2 dln., 1, Cambridge Intersentia Publishing Ltd., 2013, 165-166.
[661] 24% of all agreements.

2.14. Obligation to Attend in Person and Third Parties

104. The code "attendance" was applied to agreements that require the parties or their representatives to personally attend the ADR sessions. 47% of the agreements analysed require personal attendance by the parties, or by someone with authority to agree to a settlement. Fruitful ADR can only take place if individuals with the power to settle (decision making authority) attend the ADR sessions. If the parties fail to attend the ADR sessions, they can be found in breach of their obligation.

105. In *International Research Corp*,[662] the Singapore Court of Appeal found that the conditions precedent to arbitration were not satisfied as the respondent failed to send its "Director Customer Relations" and "Managing Director" to the meetings. The requirement to personally attend an ADR session is also found in some legislations. In Florida, Rule 1.720(b) of the Civil Procedure stipulates that, "[i]f a party fails to appear at a duly noticed conference with good cause, the court upon motion shall impose sanctions, including an award of mediator and attorney's fees and other costs, against the party failing to appear." Moreover, in Australia and Germany, personal attendance is required unless the parties have agreed otherwise (e.g. via online mediation).[663] Likewise, in England, ADR must be attended in person or via another means of communication (e.g. video conferences/ODR).[664] As to why personal attendance is *sine qua non*, the American court in *Nick v. Morgan's Food*[665] noted that, "[m]eaningful negotiations cannot occur if the only person with authority to actually change their mind and negotiate is not present. Availability by telephone is insufficient because the absent decision maker does not have the full benefit of the ADR proceedings, the opposing party's arguments, and the neutral's input."[666]

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[662] *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55.
[663] U. MAGNUS, "Mediation in Australia: Development and Problems" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 894. P. TOCHTERMANN, "Mediation in Germany: The German Mediation Act -Alternative Dispute Resolution at the Crossroads" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 555.
[664] J.M. SCHERPE en B. MARTEN, "Mediation in England and Wales: Regulation and Practice" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 407.
[665] *Nick v. Morgan's Food of Missouri, Inc.* 270 F. 3d 590 (8th Cir. 2001)
[666] Also see J. FOLBERG, D. GOLANN, T.J. STIPANOWICH en L.A. KLOPPENBERG, *Resolving Disputes: Theory, Practice, and Law*, New York, Wolters Kluwer, 2016. *Nick v. Morgan's Foods, Inc*. 270 F.3d 590 (8th Cir. 2001).

106. Although less than half of the ADR agreements explicitly required personal attendance of the parties in the ADR mechanism, such requirement should nevertheless be mandated. The future framework for the ADR agreement ought to emphasise the importance of having individuals with decision making power in attendance. Decision making power in this context relates to the power to agree to a settlement agreement. Furthermore, it would be advisable for the framework to promote the incorporation of ICTs when the relevant persons cannot physically attend.

2.14.1. Presence of Lawyers

107. The study further coded for whether there were stipulations relating to the parties' lawyers. The code "representation" focuses on whether the agreements require the parties to be accompanied by legal counsel. 53% of the agreements specified that the parties must have representatives consulting them. This requirement is perhaps meant to prevent parties from potential duress or fraud during the ADR proceedings. Although there are no rules against having representatives in the ADR proceedings, some argue that as counsel is often focused on protecting the legal position of the parties, he/she might be too focused on legal rights and duties instead of long term interest.[667] There is, however, generally no prohibition of having legal representatives join the process as long as the parties to the ADR agree.[668]

2.15. Obligation of Privacy and Confidentiality

108. The SCA revealed that 70% of the agreements addressed confidentiality (Figure 19) while 15% of agreements contained provisions regarding privacy (Figure 20). Most ADR related rules and clauses focused on confidentiality; although it should be noted that, the concept of confidentiality is an extension of the right to privacy.[669]

Figure 19 – *Sample confidentiality*

CONFIDENTIALITY Article 16 1. The mediator shall not disclose any information provided to him or her by a party or witness without the consent, as appropriate, of that party and witness. 2. The mediator shall not be compelled to divulge such information, or to testify in regard to the mediation in any proceedings unless required to do so by law. 3. The parties shall maintain the confidentiality of the mediation and shall not – except where its disclosure is required by law or is necessary for purposes of implementation and enforcement – rely on, or introduce

[667] *Also see* A.B. ASSOCIATION, "ROLE OF ATTORNEYS IN MEDIATION PROCESS", 1.
[668] This is specifically allowed under §2(4) of the German Mediation Act.
[669] S. OBERMAN, "Confidentiality in Mediation: An Application of the Right to Privacy", *Ohio State Journal on Dispute Resolution* 2012, afl. 3, 542.

as evidence in any arbitral, judicial, or other proceeding, any observations, statements or propositions made before or by the mediator or any documents produced in relation to the mediation proceedings.[670]

Figure 20 – *Sample privacy*

"9. Privacy
Mediation conferences and related mediation communications are private proceedings. The parties and their representatives may attend mediation conferences. Other persons may attend only with the permission of the parties and with the consent of the mediator.[671]

109. The confidentiality of ADR is one of its purported benefits. Confidentially is of importance at two levels: between the parties and the neutral (inside) and between the process and the outside world (outside).[672] In the agreements studied, the obligation to maintain confidentiality was often imposed on the parties and the neutral. The need to protect confidentiality of the ADR is further reiterated in various legislative acts, including the Mediation Directive.[673] As the paragraphs below demonstrate, the approach to confidentiality differs amongst the various systems under analysis.[674]

110. According to §1(1) of the German Mediation Act, mediation is defined as "a confidential and structured procedure, in which the parties voluntarily and on their own responsibility try to achieve an amicable resolution of their conflict with the support of one or more mediators." However, the Mediation Law is not clear regarding the application of the confidentiality obligation to the parties. Therefore, it is for the ADR agreement to require the parties to comply with the obligation of confidentiality.[675] This is confirmed in the Netherlands, where Article 5 of the Cross-Border Mediation Law stipulates that, confidentiality of the process must be expressly agreed upon by the parties and the mediator in their commencement agreement. Consequently, the parties and the neutral are free from the obligation to testify regarding the information exchanged during the ADR.[676]

[670] PRIME Finance, "Option 1". Retrieved via: http://primefinancedisputes.org/files/2017-01/prime-arbitration-and-mediation-rules-v1801171c.pdf, last visited on 07-04-2017.
[671] Survey respondent clause 22 – emailed 14-03-2017.
[672] See L.S. ONN, "Mediation", *SinfaporeLaw.org* 2015.
[673] Article 7 of the Mediation Directive on confidentiality of mediation; Australia s. 131 (1) Evidence Act 1995. See also M. KALLIPETIS, *Mediation Privilege and Confidentiality and the EU Directive*, Kluwer Law International, 2010, 183.
[674] J.M. BOSNAK, "The European Mediation Directive: More Questions Than Answers" in J.C. GOLDSMITH et al. (eds.), *ADR in Business: Practice and Issues across Countries and Cultures*, New York, Kluwer Law International, 2010, 649.
[675] For instance see §10.1 of the DIS Mediation Rules.
[676] In addition, the NMI Mediation Rules contain three principles, one of which is confidentiality: confidentially and secrecy are to be observed during and after the mediation, by all parties concerned. These three basic principles are also found in the UNCITRAL Model Rules on Conciliation (A. DE ROO en R. JAGTENBERG, "The Netherlands Encouraging Mediation " in N. ALEXANDER (ed.), *Global Trends in Mediation*, Germany, Centrale Für Mediation, 2003, 243.

111. Likewise, in Austria, confidentiality is the cornerstone of mediation.[677] However, outside the duty of confidentiality imposed on the mediator, the courts do no deem evidence inadmissible if the information became knowledge for the parties during the mediation.[678] Confidentiality is also protected in Singapore through Article 9 of the Singapore Mediation Act 2017, which prohibits disclosure of mediation communication. Furthermore, Article 10 of the Act requires permission for the admission of mediation communication as evidence in litigation. Likewise in Australia, the confidentially of the communication in ADR is protected.[679] Lastly, in England, the confidentiality may be regulated by the parties in the neutral/commencement agreement.[680]

112. Confidentiality, however, can be problematic when a party is attempting to prove breach of the ADR agreement as a result of the other party's actions during the procedure.[681] For example, if a party acted in bad faith during the ADR, the overriding protection of confidentiality supersedes the possibility to prove the irregular behaviour.[682] In light of the

[677] See M. ROTH en M. STEGNER, "Mediation in Austria", *Yearbook on International Arbitration* 2013. EU only mediators, § 3 of the EU-MA 2011: "mediators and any other participants in the mediation proceedings are obliged not to testify in court or in an arbitration in civil or commercial matters about information they obtained during the mediation". "This means that § 3 of the EU-MA 2011 establishes the obligation to refuse to testify for the mediator and any other person involved in the mediation proceedings; yet it is only a right to refuse to answer similar to § 321 of the ZPO, but no legal prohibition of questioning as laid down in § 320 (4) of the Act on Civil Procedure for Austrian registered mediators" M. RISAK en C. LENZ, "Austria" in N. ALEXANDER en S. WALSH (eds.), *EU Mediation Law Handbook, Global Trends in Dispute Resolution* 7, Alphen aan den Rijn, Kluwer Law International, 2017, 55.

[678] Thus, a breach of liability only results in damages. To ensure compliance with a confidentiality clause, parties to an Austrian mediation often also include a financial clause calling for a heavy fine in case of a breach. See M. RISAK en C. LENZ, "Austria" in N. ALEXANDER en S. WALSH (eds.), *EU Mediation Law Handbook, Global Trends in Dispute Resolution* 7, Alphen aan den Rijn, Kluwer Law International, 2017, 55.

[679] Privilege of confidentiality" (U. MAGNUS, "Mediation in Australia: Development and Problems" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 888.).

[680] English courts will not consider 'without prejudice' material, unless privilege is waived. See B. MARSH *et al.*, "England and Wales" in N. ALEXANDER en S. WALSH (eds.), *EU Mediation Law Handbook, Global Trends in Dispute Resolution* 7, Alphen aan den Rijn, Kluwer Law Internatioanl, 2017, 228.

[681] In the US, privilege affects the parties' ability to prove breaches of obligations in mediation (S.R. COLE *et al.*, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 197.).

[682] "The overriding need to preserve the confidentiality of the mediation process supersedes the parties' possible wish to blame the other side for the failure of the attempted mediation. If one party is unhappy with the attitude, position or stance of the other side, the only remedy is to interrupt the mediation and to resort to other dispute resolution mechanisms. We believe the social need for mediation, for which preserving confidentiality is an essential tool, trumps a party's right, as respectful as it may be, to bring evidence about the behavior of the other side during the mediation process" (E. VAN BEUKERING-ROSMULLER en P. VAN LEYNSEELE, "Enforceability of Mediation Clauses in Belgium and the Netherlands", *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 2017, afl. 3, (36) 56.). Nevertheless, case law originating from the US indicates that the courts have attempted to clarify good faith mediations. The court in *A.R. Reynolds & Sons* sanctioned a party for not participating in good faith on the basis of the following arguments: "Availability by telephone is insufficient because the absent decision-maker does not have the full benefit of the ADR proceedings, the opposing party's arguments, and the neutral's input"; "Mediation is a process in which the

importance of confidentiality to the ADR process, it is advisable that a future framework for the ADR agreement reiterates the significance thereof while providing guidelines regarding how confidentiality can best be protected.

2.16. Procedure to Terminate the ADR Mechanism

113. In this study, 65% of agreements contained a procedure to terminate the selected ADR mechanism. There were often several options to bring the ADR sessions to an end, ranging from the execution of the settlement agreement; written or verbal declaration of the neutral, by a declaration or "notice of declaration" by one or all of the parties, no communication between the parties and the neutral for X number of days, by the lapsing of the time set for the ADR, failure to appoint or pay the neutral, by declaration of the dispute resolution provider, and conclusion of a written record of the final proposals of the parties and the neutral.[683] In addition to stipulating a procedure to end the ADR mechanism, 14% of the

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parties must work together, with the assistance of a trained facilitator, to devise a solution to their dispute"; "Passive attendance at mediation cannot be found to satisfy the meaning of participation in mediation …"; "Adherence to a predetermined resolution, without further discussion or other participation, is irreconcilable with risk analysis, a fundamental practice in mediation"; "The court finds that the counsel to Wells Fargo sought to control the procedural aspects of the mediation by resisting filing a mediation statement and demanding to know the identities of the other party representatives"; "The party representative who was sent into the mediation does not appear to have had the authority to enter into creative solutions that might have been brokered by the mediator." S. SIME *et al.*, *A Practical Approach To Alternative Dispute Resolution*, Oxford, Oxford University Press, 2011, 107. US Bankruptcy Ct, S.D. New York.

[683] See AAA, "Drafting Dispute Resolution Clauses –American arbitration association", Retrieved via: https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540, last visited on 06-04-2017, p. 18; M-13. Termination of Mediation; ACICA, Mediation Clause. Retrieved via: https://acica.org.au/acica-mediation-clause/, last visited on 21-04-2017, 16 Termination of Mediation Proceedings; Accord Mediation and Dispute Resolution Services; Mediation. Retrieved via: http://accord-adr.com/Mediation_clauses.htm, last visited on 10-04-2017; ADC, "ADC Dispute Resolution Sample Clauses", Retrieved via https://disputescentre.com.au/wp-content/uploads/2015/02/ADC-Dispute-Resolution-Sample-Clauses-2015.pdf, last visited on 9-02-2017, 10. Termination of the Conciliation; Alternative Dispute Resolution Committee of the New York City Bar Association; Compilation of Sample Mediation Clauses – Commercial Law Sample 2016. Retrieved via: http://www2.nycbar.org/pdf/report/uploads/20073042-CompilationofSampleMediationClausesALTDIS442016.pdf, last visited on 10-04-2017; CEDR, "Model Documents", Retrieved via https://www.cedr.com/about_us/modeldocs/, last visited on 8-02-2017, 9. Conclusion of the mediation; CIDRA, "Sample Mediation Clause", Retrieved via: http://www.cidra.org/samplemediation, last visited on 06-04-2017, Article 24 - termination or reopening of mediation proceedings; WKO, Mediationklausel. Retrieved via: https://www.wko.at/branchen/information-consulting/unternehmensberatung-buchhaltung-informationstechnologie/wirtschaftsmediation/Mediationsklausel.html, last visited on 10-04-2017; VIAC, "Recommended Mediation Clause", Retrieved via http://www.viac.eu/en/mediation-en/mediation-clauses-en, last visited on 7-02-2017, TERMINATION OF THE PROCEEDINGS Article 11; UNCITRAL, "model conciliation clause", Retrieved via: https://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf, last visited on 06-07-2017, TERMINATION OF CONCILIATION PROCEEDINGS Article 15; USA&M, "Sample Mediation Clause", Retrieved via http://usam.com/sample-mediation-clause/, last visited on 06-04-2017; Questionnaire Respondent 41 #306 , Art. 14. POSSIBLE DISAGREEMENT BETWEEN THE PARTIES; Questionnaire Respondent 32 #76 , SECTION 5 - GENERAL PROVISIONS; Survey respondent clause 25– emailed 04-03-2017, TERMINATION OF CONCILIATION PROCEEDINGS Article 15; WIPO Mediation Rules, Termination of the Mediation Article 19; SMC, "Mediation Clause", retrieved via http://www.mediation.com.sg/about-us/#mediation-clauses, last visited on 28-02-2017, 9 Termination; SIMC, "SIMC Model Mediation Clause", retrieved via http://simc.com.sg/simc-mediation-clause/, last visited on 28-02-

agreements contained a maximum time limit for the ADR. The maximum number of days ranged from 15 to 90 days, with the average number of days standing at 47.5 days. Additionally, 3 agreements called for three-hour long sessions. The time limits, however, had differing starting marks ranging from "the date of commencement of the mechanism", "from the dispute notice", "from the mediator receiving instructions", "from the date of submission", "from the signing of the mediator agreement", "from the referral to mediation", to "from the request for mediation".

114. Uniquely, 2 German dispute resolution providers explicitly stipulate that *only* after the first mediation session, can the procedure be terminated.[684] §2(5) of the German Mediation Act also sets out several causes of termination: "The parties can terminate mediation at any time. The mediator can terminate the mediation, especially when he is of the opinion that autonomous communication or settlement between the parties is not to be anticipated." Likewise, the wording of the institutional rules is reflected in Austria. According to §17(1)

2017, 7 Termination of Mediation; Resolution Institute; Consumer Contracts. Retrieved via: https://www.resolution.institute/dispute-resolution/standard-dr-clauses-for-use-in-contracts, last visited on 20-04-2017, RULE 8 Termination of the Mediation; PRIME Finance, "Model arbitration clause for contracts". Retrieved via: http://primefinancedisputes.org/page/model-clauses , last visited on 07-04-2017, TERMINATION OF MEDIATION PROCEEDINGS Article 19; Office of Procurement, "Public Works Contract For Minor Works". Retrieved via: http://constructionprocurement.gov.ie/wp-content/uploads/PW-CF1_Contract.pdf, last visited on 07-04-2017, p. 47-48; NAI, "mediation clause – English" http://www.nai-nl.org/en/info.asp?id=907, last visited on 06-04-2017, Article 7 - The end of the mediation; German Hellenic Chamber of Commerce, "Mediation Clause of the German-Hellenic Chamber of Industry and Commerce", retrieved via http://www.oddee.gr/en/ipodeigmata-ritron-3/2-uncategorised-gr/154-mediation-clause-of-the-german-hellenic-chamber-of-industry-and-commerce.html, last visited on 13-09-2017, Article 14 [Termination of the mediation proceedings]; Libralex; Sample Mediation Clause. Retrieved via: http://www.libralex.com/publications/sample-multi-tier-dispute-resolution, last visited on 10-04-2017; JAMS, "Clause Providing for Mediation in Advance of Arbitration". Retrieved via: https://www.jamsadr.com/international-clause-workbook/, last visited on 07-04-2017, Termination of the Mediation 18; IntegretieMediation, "Vorschlag für eine mediationsgerechte Klausel", Retrieved via http://www.in-mediation.eu/mediationsklauseln, last visited 06-04-2017, 5; ICDR, "pre-dispute mediation clause". Retrieved via https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestreleased, last visited on 17-04-2017, 12. Termination of Mediation; ICC, "Model Mediation Clauses – Clause C". Retrieved via: https://iccwbo.org/dispute-resolution-services/mediation/mediation-clauses/, last visited on 07-04-2017, Article 8 Termination of the Proceedings; EUCON, "Mediationklausel (Variant emit Schiedsverfahren)", Retrieved via http://www.eucon-institut.de/mediation/mediationsklauseln/, last visited on 06-04-2017, § 13 END OF MEDIATION; DIS, "DIS-Mediation/Conciliation Clause 02", retrieved via http://www.disarb.org/EN/17/clause/dis-mediation-conciliation-clause-02-id6, last visited on 28-02-2017, Section 12 Termination of the proceedings.

[684] Article 5. Closure of the procedure "5.1. After the first mediation session, mediation can be terminated at any time by one of the participants as well as by the mediator himself. A demolition of mediation is to be justified, but there is no claim to that effect" (Live Mediation; Beispiel einer Mediationklausel. Retrieved via: http://www.live-mediation.com/2013/03/mediationsklausel/, last visited on 11-04-2017). Article 13 "(4) Each party is entitled to terminate the mediation proceeding at any time after the first mediation meeting in writing vis-à-vis EUCON and the mediator. The mediation proceeding ends two weeks after the receipt of such declaration, unless the mediation proceeding continues prior to this deadline amicably" (EUCON, "Mediationklausel (Variant emit Schiedsverfahren)", Retrieved via http://www.eucon-institut.de/mediation/mediationsklauseln/, last visited on 06-04-2017, § 13 END OF MEDIATION).

of the Austrian Civil Mediation Act, the mediation terminates upon the declaration of any party.

115. As abovementioned, the parties can include an ADR tier in their MDR clause as a condition precedent to binding processes. Hence, it is important for the parties to know how they can effectively mark the end of their ADR proceedings before moving on to arbitration/litigation.[685] There have been several instances where disagreements regarding whether the ADR tier had been met have resulted in additional costs. In the American case of *Allied World Surplus,*[686] the parties had started mediation but the neutral did not declare the mediation to be at an impasse and therefore there was uncertainty regarding whether the mediation had ended. The court found that any ambiguity regarding communication with the parties should be resolved in favour of the mediation not ending.[687]

116. If the parties fail to stipulate maximum time limits for their ADR mechanism and a procedure for the termination thereof, the framework for the ADR agreement should similarly to the German and Austrian mediation rules provide for such a procedure. The following should be listed in the future framework as markers of the end of the ADR: the execution of the settlement agreement, written or verbal declaration of the neutral or dispute resolution provider that the mechanism has ended, a declaration or "notice of declaration" by one or all of the parties, the lapsing of the time set for the ADR, and the conclusion of a written record of the final proposals of the parties and the neutral. Again, Chapter III will further discuss the appropriate location of the above markers in the framework for the ADR agreement.

2.17. Remedy for Non-Compliance

117. In this study, only 4% of the agreements contained a remedy for a breach of the ADR agreement. The most common remedy was the right to recover all costs and expenses followed by the inability to recover costs.[688] As Chapter I, Section 3 revealed, potential

[685] "[I]t would be useful to consider what constitutes rejection or termination of mediation, since there is a considerable amount of debate about that particular issue, especially in the context of multi-tiered (step) dispute resolution clauses" (S.I. STRONG, "Beyond International Commercial Arbitration? The Promise of International Commercial Mediation", *Washington University Journal of Law & Policy* 2014, 32-33.).
[686] *Allied World Surplus Lines Insurance Company v. Blue Cross and Blue Shield of South Carolina* (August 3 2017) US District Court for the District of South Carolina.
[687] Dispute is not ripe and thus dismissal is appropriate under Rule 12 (b)(1).
[688] 5 provided for the recovery of costs and 2 stipulated that the violating party cannot recover costs.

remedies for a failure to comply with an ADR tier include financial sanctions, stays and dismissals, specific performance, and injunctions.[689] There is, however, no consensus regarding the appropriate remedy for a failure to comply with an ADR agreement. Moreover, Chapter I provided an in-depth discussion of the ideal remedies depending on the time of the breach. Accordingly, as the parties tend not to address the remedy for non-compliance with their ADR agreement, the future framework for the ADR agreement ought to discuss the preferred remedy for breaches. Chapter III will further build on these findings in making concrete suggestions regarding the regulation of the remedies for non-compliance with ADR agreements.

Concluding Remarks

118. Through an in-depth content analysis of 172 ADR agreements, this chapter uncovered common practices regarding the rights and obligations implied by the dataset. In light of the tendency of the parties to draft their dispute resolution clauses without much attention, it is suggested that the trends should be relied upon in the creation of a comprehensive framework for the ADR agreement. As Chapter III will further discuss, default rules can counteract potential gaps in ADR agreements. In absence of default rules, a simple omission might result in the invalidity of an ADR agreement. For instance, if an agreement fails to address the remuneration of a neutral, the courts in certain jurisdictions, such as in England and Wales, will find the clause to be void for uncertainty. Default rules can provide standard solutions for problems typical to these agreements. The positive effect of default provisions for the promotion of ADR can be based on the success story of arbitration; arbitration frameworks of many jurisdictions contain default rules. There have been instances of national courts upholding pathological arbitration clauses that simply state "English law – arbitration, if any, London according to ICC Rules"[690] or "arbitration – Hamburg, Germany."[691]

[689] Chapter I, Section 3.
[690] Upheld – *Arab-African Energy Corp Ltd v Olieprodukten Nederland BV* [1983] 2 Lloyd's Rep 419
[691] In *HKL v Rizq*, the Singapore High Court held that a pathological arbitration clause "may or may not be upheld depend[ing] on the nature and extent of its pathology" (see paragraph [12]). However, the Singapore courts will generally seek to "give effect to that clause, preferring an interpretation which does so over one which does not" (see paragraph [13]). It was clear in that case that the parties had indeed evinced an intention to arbitrate, but had somehow referred to a non-existent entity in Singapore ("Arbitration Committee"). In contrast, the Swiss Supreme Court in *X Holding AG and ors v Y Investments NV* (25 October 2010) ("X v Y") rejected a pathological arbitration clause as not evincing the parties' intention to arbitrate. The clause had called for

119. As Chapter III will outline, any potential default rules should consider addressing the following factors: how to initiate procedure, the scope of the agreement (disputes covered), applicable procedural and substantive laws, procedure to select the neutral(s) and the payment of the neutral, place of the mechanism or method for selection thereof, the language of mechanism or method for selection thereof, the parties' obligations including, the obligation to refrain from acting, consequence for a failure to comply (stay, dismissal, damages, sanctions, etc.), as well as the procedure to terminate the mechanism and time-frames.

disputes between the parties to be settled through AAA arbitration "or to any other US court". Also see G.B. BORN, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* London, Kluwer Law International, 2016, 29.

Chapter III - Essential Elements of a Comprehensive Legal Framework

Contents

Introduction

1. Many agree on the need for a framework regulating the ADR agreement and its enforcement.[692] Some even suggest that ADR is in need of its own New York Convention.[693] However, the regulation of dispute resolution is complex, as it takes place at every level, in both formal and informal ways. This complexity increases at the multi-national level, since issues become more complicated once various systems with differing approaches are involved.[694] Today, there are numerous ways to formulate and implement international rules.[695] This chapter will explore the potential content of a framework for the ADR agreement on the basis of a principled approach to regulation[696] in order to demonstrate that there is a need for harmonisation.

2. The content of the debate herein originates from the work of Steffek and Hopt, as well as Alexander.[697] Accordingly, this work focuses on industry-based instruments, framework

[692] "In light of the multiple legal systems and their lack of coordination […], effective dispute resolution in international disputes needs a legal framework ensuring that: the ADR procedure is being conducted and that, parallel, competing procedures (no matter where) are excluded; a result is reached within a reasonable time, with an adequate standard of procedural fairness, ensuring confidentiality and the neutrality of any third-party decision-maker; the result is final (i.e. it excludes any subsequent procedure not matter where) and enforceable worldwide" (227-228). "The weaknesses of the legal framework of international ADR constitute serious disadvantages" (236-237). "[A]s long as the treatment of ADR procedures will not be coordinated between different jurisdiction, international ADR procedures entail legal risks, at least to the extent they are conducted outside of the established framework of international commercial arbitration" (C. BÜHRING-UHLE *et al.*, *Arbitration and Mediation in International Business*, Alphen aan den Rijn, Kluwer, 2006, 236-237.).
[693] N. ALEXANDER, "Nudging Users Towards Cross-Border Mediation: Is It Really About Harmonised Enforcement Regulation?", *Contemporary Asia Arbitration Journal* 2014, afl. 2, 409. C. BÜHRING-UHLE *et al.*, *Arbitration and Mediation in International Business*, Alphen aan den Rijn, Kluwer, 2006, 108-109.
[694] J.A.E. FARIA, "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?", *Uniform Law Review* 2009, 5.
[695] J.A.E. FARIA, "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?", *Uniform Law Review* 2009, 5.
[696] "A coherent, ineligible, systematic and reasoned approach to law-making and standard setting")F. STEFFEK, "Principled Regulation of Dispute Resolution: Taxonomy, Policy, Topics" in F. STEFFEK en H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 34.).
[697] According to Alexander, there are five primary regulation forms related to mediation: (i) regulation by the market and private contractual arrangements (Market); (ii) industry-based regulation, including standards, codes of conduct and court practice directions and internal policies (Industry); (iii) framework legal instruments, such as the EU Directive on Mediation, which establish parameters within which states are required to regulate certain aspects of mediation (Framework[697]); (iv) model Laws, such as the MLICC, which invites states to adopt the terms of the Model Law within their own jurisdiction, ideally with no or minimal variation (Model Law); (v) legislation passed by domestic lawmakers such as parliament. The terms include delegated legislation such as regulations (Legislation) (N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulator Reform" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 147.). Furthermore, Alexander finds that mediation laws tend to service the following functions: (i) facilitate access to, and trigger the mediation process (triggering laws); (ii) regulate the conduct of the process (procedural laws); (iii) support the recognition and accreditation of mediators by establishing standards (standard-setting provisions); (iv) protect mediators and

instruments, model laws, and legislations that regulate the triggering of ADR and the process thereof. Any laws proposed herein are specific to the needs of commercial parties.[698] This study also considers the interests and opinions of other stakeholders, including the legislator, judiciary, ADR providers and professionals, and legal professionals.

3. Moreover, as the work carried out in the context of this doctoral thesis had the ultimate aim of providing concrete suggestions to the EU legislator regarding the ADR agreement,[699] this chapter will focus on how to create such a framework with the EU's regulatory role in mind. In addition, this chapter will consider the supporting role that UNCITRAL can play in the creation of a framework for the ADR agreement. The choice to focus on the supplementary role of UNCITRAL was based on its historical involvement in the creation of harmonising instruments in the field of international dispute resolution. UNCITRAL instruments include the New York Convention, the Model Law on Mediation (*ex.* the Model Law on Conciliation 2002), and the Singapore Convention.[700]

4. The work of the EU and the UNCITRAL can correlate and fulfil a supporting function as they both aim to promote ADR. The UNCITRAL has gone as far as granting the EU an observatory seat in its sessions, while EU Member States with membership to UNCITRAL are eligible to participate in the creation of UNCITRAL instruments.[701]

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users of mediation processes by clarity their respective rights and obligations (beneficial mediation laws) (N. ALEXANDER, "Mediation and the art of regulation", *QUT Law Review* 2008, afl. 1, 14.). K.J. HOPT en F. STEFFEK, "Mediation: Comparison of Laws. Regulatory Models, Fundamental Issues" in K.J. HOPT en F. STEFFEK (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013. N. ALEXANDER en F. STEFFEK, *Making Mediation Law*, Washington, International Finance Corporation, 2016.

[698] So the questions that need to be answered is who is the target audience, at which sector is the regulation directed, what is the function of the regulation, does the provision regulate the interface between the mediation process and the legal system, should the provision adopt a default or mandatory form, how should the regulation be reviewed? See N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 106.

[699] Chapter I, Section 3.1.

[700] Also see UNCITRAL Model Laws on Arbitral and Mediation.

[701] "UNCITRAL texts are initiated, drafted, and adopted by the United Nations Commission on International Trade Law, a body made up of 60 elected member States representing different geographic regions. Participants in the drafting process include the member States of the Commission and other States (referred to as "observer States"), as well as interested international inter-governmental organizations ("IGO's") and non-governmental organizations ("NGO's")" (UNCITRAL, *FAQ- Origin, Mandate and Composition of UNCITRAL*, http://www.uncitral.org/uncitral/en/about/origin_faq.html#drafting).)

5. To better understand the role of the harmonising bodies in focus, namely the EU and UNCITRAL, Section 1 will provide an in-depth overview of the various ways in which the two bodies have attempted to shape ADR. Subsequently, Section 2 will further argue for the need of harmonisation by delving into the harmonisation versus diversity dilemma, a dilemma that persists in any legal harmonisation discussion. Subsequently, Section 3 will explore the content of a framework for the ADR agreement by detailing its various counterparts. Expanding on the need for a framework, Section 4 will address supplementary elements of a framework for the ADR agreement. Complementing Sections 3 and 4, Section 5 will discuss the practical details of such a framework in terms of the type of instrument, the legal basis and the potential drafters. A conclusion will summarize this chapter.

1. International Harmonisation: the Role of the EU and UNCITRAL

6. To better understand the potential role of the main body under consideration, the EU, and the supplementary body, the UNCITRAL, the sections below will provide an analysis of their source of power, their existing instruments on ADR, and the reason for their interest in regulating and promoting ADR.[702]

1.1. Regulatory Powers of the EU and its Legislative Instruments

7. The EU is a unique economic and political union between 28 Member States (soon to be 27 following the expected exist of the United Kingdom).[703] EU Member States form an internal single market created through a standardized system of laws.[704] Today, the EU is an organization involved in the regulation of various policy areas including climate, health, security, migration, agriculture, fisheries, trade, and the area of freedom, security and justice, amongst others.[705] These policy areas relate to the *four freedoms* of people, goods,

[702] Here, there is a need to consider the appropriateness of a "hard" law versus a "soft" law instrument to achieve desired results. Soft law instruments often address parties or the legislator. When addressed to the latter, they can result in hard law at the domestic level. M. GEBAUER, "Unification and Harmonization of Laws", *Oxford Public International Law* 2009, 7. J.A.E. FARIA, "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?", *Uniform Law Review* 2009, 11. H. KRONKE, "Methodical Freedom And Organization Constraints In The Development Of Transnational Law", *Loyola Law Review* 2005, 295. M. GEBAUER, "Unification and Harmonization of Laws", *Oxford Public International Law* 2009, 7.
[703] EUROPA, *The 28 member countries of the EU*, https://europa.eu/european-union/about-eu/countries_en).
[704] EUR-LEX, *Internal Market*, https://eur-lex.europa.eu/summary/chapter/internal_market.html?root_default=SUM_1_CODED%3D24).
[705] EUROPA, *Goals and values of the EU*, https://europa.eu/european-union/about-eu/eu-in-brief_en).

services, and capital.[706] The EU derives its legislative powers from the Treaty on the European Union ('TEU') and Treaty on the Functioning of the European Union ('TFEU'). Accordingly, the EU can make laws if the treaties confer to it a legislative basis.[707] In line with the principle of subsidiarity, if the EU does not have exclusive competence, it can only regulate those areas where the Member States cannot sufficiently regulate themselves.[708] Moreover, in accordance with the principle of proportionality, it should only take actions to the extent that is necessary to achieve the objectives of the treaties.[709]

8. ADR is a topical issue in contemporary European (procedural) private law.[710] Today, EU Member States are growingly focused on promoting ADR in an attempt to enhance access to justice.[711] In the European continent, there is a trend of applying a formal legislative approach to ADR.[712] Other regulatory forms, such as self-regulation and market-contracting can fill the gaps left by the formal legislative approach.[713] Sections 3 and 4 will discuss these additions to formal regulation. The EU itself has also attempted to encourage the use of ADR in civil, commercial, and consumer disputes.[714] The EU has turned its focus to ADR due to persistent concerns regarding court congestion and costs, as well as obstacles to cross-border dispute resolution.[715] Thus far, the EU has enacted three legislative instruments

[706] Article 26 TFEU: "area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties." Also see C. BARNARD, *The Substantive Law of the EU: The Four Freedoms*, Oxford, Oxford University Press, 2016.
[707] Article 2 TEU on competence. Further see Principle of conferral (Article 5(2) TEU) and the Principle of proportionality (Article 5(4) TEU).
[708] Principle of subsidiary (Article 5(3) TEU and Protocol (No 2). EUROPARL, *The Principle of Subsidiarity*, http://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity).
[709] Article 5 TEU and Protocol (No 2).
[710] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 269.
[711] In October 1999, the European Council of Tampere "called for alternative, extrajudicial procedures to be created by the Member States." This called resulted in Directive 2008/52/EC after nearly a decade. Also see *Green Paper On Alternative Dispute Resolution In Civil And Commercial Law*, 'ADR is a political priority, repeatedly declared by the European Union institutions' (19 April 2002, COM(2002) 196 final). In October 1999, the European Council of Tampere "called for alternative, extrajudicial procedures to be created by the Member States." This called resulted in Directive 2008/52/EC after nearly a decade (Directive 2008/52/EC Recital 2). M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 269.
[712] This is with the exception of the Netherlands, which opts to allow the organic growth of ADR with state provided incentives.
[713] N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 91.
[714] Recommendations 98/257 and 2001/30; Green paper of November 16, 1993, COM (1993) 576 (discussing the access of consumers to justice and the settlement of consumer disputes in the single market); Action Plan of February 14, 1996 COM (1996) 13 (discussing consumer access to justice and the settlement of consumer disputes in the internal market).
[715] G. DE PALO en M.B. TREVOR (eds.), *EU Mediation Law and Practice*, Oxford, Oxford University Press, 2012, 1. The initial focus of the EU was on consumer disputes with a cross border nature. Throughout the years, however, there has been a shift in the EU's focus from ADR in consumer disputes to facilitative ADR also in

that address certain aspects of ADR: the Mediation Directive, the ADR Directive, and the ODR Regulation.

9. There are, however, problems with regional harmonisation. The expansion of the EU in combination with its growing competences has resulted in an increasingly complex administration and decision-making process.[716] Moreover, as regional solutions often focus on facilitating trade within a region, they run the risk of disregarding potential for a global solution.[717] Furthermore, despite the benefits of EU harmonisation, the relationship of the Mediation Directive and the two other instruments is not clear. The Mediation Directive and the latter two instruments were created at different times and separately from one another. The ADR Directive and ODR Regulation aim to enhance consumer redress and the functioning of the internal market, while the aim of the Mediation Directive is to facilitate access to ADR in civil and commercial disputes, to increase the amicable settlement of disputes, and to enhance the legal framework of mediation.[718]

10. Focusing on the only legislative instrument relevant to commercial (business-to-business) ADR, namely the Mediation Directive, it should be noted that, the Directive does not provide a uniform mediation law. Instead, it promotes mediation through harmonising specific aspects of mediation.[719] Thus, the Directive permits a considerable amount of

civil and commercial disputes. E. SILVESTRY, "Alternative Dispute Resolution in the European Union: an Overview", *Russian Law* 2013. See 2002 Green Paper on Alternative Dispute Resolution in civil and commercial matters. “In 2002, the European Commission issued a Green Paper on ADR [“Green Paper”] in civil and commercial law that specifically identified cross-border commercial disputes as an area in need of regulation. The purpose of the paper was to encourage the use of out-of-court dispute resolution as more appropriate in many cases than dispute resolution by judges or arbitrators. The Green Paper described ADR as a “political priority” for all EU institutions and launched a broad consultation process on how this goal could be achieved, although, it acknowledged that many member states had already passed legislation encouraging the use of ADR. As part of its consultation process, the Green Paper raised twenty-one questions about critical ADR issues including: confidentiality, consent, enforcement, mediator training, mediator accreditation and liability and the problem of prescription periods.” J.M. NOLAN-HALEY, "Evolving Paths to Justice: Assessing the EU Directive on Mediation", *Fordham Law Legal Studies Research Paper No. 1942391* 2011, 1-7.

[716] J.A.E. FARIA, "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?", *Uniform Law Review* 2009, 24.

[717] Nevertheless, the EU has authority to negotiate international uniform law instruments with States outside the EU, which affects the rule making process. J.A.E. FARIA, "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?", *Uniform Law Review* 2009, 25. M. GEBAUER, "Unification and Harmonization of Laws", *Oxford Public International Law* 2009, 7.

[718] E. COMMISSION, *Report From The Commission To The European Parliament, The Council And The European Economic And Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters*, 2016, 11.

[719] Issues covered include the quality of the mediation (Article 4), recourse to mediation (Article 5), enforceability of agreement resulting from mediation (Article 6), and confidentiality (Article 7), limitation periods (Article 8). The Directive only applies to cross-border disputes. However, “nothing should prevent Member States from applying [the Directives’] provisions also to internal mediation processes.” N.

diversity. For instance, the Mediation Directive does not address the triggers that lead to mediation, such as the agreement to mediate and court-ordered mediation. It simply provides that the courts may invite the parties to commence mediation.[720] In addition, the Directive contains a weak provision on the enforcement of settlement agreements, as it requires that the courts make a settlement agreement enforceable only if both parties have consented thereto.[721] To require both parties to consent to the enforcement of their agreement is a requirement that is surprising, as parties often resort to enforcement only when a party to the agreement fails to fulfil its obligations.[722]

11. Although drafters were aware of the need for a common and uniform regulation framework that facilitates a sufficient/high level of predictability for the parties, there is still an absence of a clear legal framework on mediation in the EU.[723] This is problematic as such an absence creates an effective barrier to the rise of mediation in the EU.[724] The regulatory environment in the EU contributes to the mediation paradox: despite being universally promoted, ADR is used in less than 1% of civil and commercial cases in the EU.[725] The Mediation Directive has thus failed in reaching its aim of increasing the number of mediations.[726] Despite this,

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ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulator Reform" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 143. C. ESPLUGUES, J.L. IGLESISAS en G. PALAO (eds.), *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, 2 dln., 1, Cambridge Intersentia Publishing Ltd., 2013, vi.

[720] Article 5 of the Mediation Directive.

[721] Article 6(1) of the Mediation Directive.

[722] C.T.K. DESMOND, "The SIAC-SIMC Arb-Med-Arb Protocol: Enforcing International Commercial Mediated Settlement Agreements (MSAs) through the New York Convention" in J. LEE en M. LIM (eds.), *Contemporary Issues in Mediation*, I, London, World Scientific Publishing Co. Pte. Ltd, 2016, 85; M. ROBERTSON, "Compliance Success with Mediated Settlements in Small Claims", *Mediate.com* 2015, http://www.mediate.com/articles/RobertsonM1.cfm.

[723] C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 505. Recital 7 of the Mediation Directive.

[724] C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 504.

[725] G. DE PALO en R. CANESSA, "New Trends for ADR in the European Union" in P. CORTÉS (ed.), *The New Regulatory Framework for Consumer Dispute Resolution*, Oxford, Oxford University Press, 2016, 410. G. DE PALAO, "A Ten-Year-Long "EU Mediation Paradox" When an EU Directive Needs To Be More …Directive", *Europarl* 2018, 1.

[726] "Despites its proven and multiple benefits, mediation in civil and commercial matters is still used in less than 1% of the cases in the EU" (*GREEN PAPER On Alternative Dispute Resolution In Civil And Commercial Law*, 'ADR is a political priority, repeatedly declared by the European Union institutions' (19 April 2002, COM(2002) 196 final). G. DE PALO en R. CANESSA, "New Trends for ADR in the European Union" in P. CORTÉS (ed.), *The New Regulatory Framework for Consumer Dispute Resolution*, Oxford, Oxford University Press, 2016, 415. "Regrettably, this European intervention has consumed countless hours of official time, both at the European hub and among the Member States. On any sensible cost-benefit analysis this exercise in law-marking has hardly been worthwhile." N. ANDREWS, "European Influences Upon English Civil Justice: Tempests Or Gentle Breezes?" in A. NYLUND en B. KRANS (eds.), *The European Union and National Civil Procedure*, Cambridge, Intersentia, 2016, 35.

the EU Commission report on the Mediation Directive has surprisingly stipulated that for now, there is no need to revise the Directive.[727]

12. Notwithstanding the lack of success of the EU instruments on ADR, there are several benefits to the harmonisation of private law by EU instruments. Firstly, these instruments are more easily amendable and repealable than international Conventions. Secondly, the ECJ provides harmonised interpretation of the supranational law, thereby providing the parties with certainty.[728] Thirdly, by addressing ADR at the community level, inconsistencies among Member States can be reduced.[729] Harmonised rules function more efficiently if their interpretation is trusted to international or supranational courts. Thus, regional harmonisation at the EU level provides the benefit of the Court of Justice of the EU ('CJEU') having the final say regarding the interpretation of an EU law instrument.[730]

13. To reiterate, the European law framework on ADR does not address the questions of binding effect and enforceability of non-binding ADR agreements in the commercial context.[731] If the EU opts to regulate the ADR agreement, depending on the legal basis thereof, it may do so through numerous instruments ranging from regulations, Directives, decisions, and recommendations.[732]

14. Regulations apply directly and thus do not require implementation. They are *prima facie* applicable across the EU. EU Regulations unify the civil procedure and PIL of Member States by replacing the pre-existing approaches.[733] Various EU PIL instruments, such as the Brussels and Rome Regulations[734] have provided Member States with harmonised conflict of law rules. However, Regulations are infrequently used to harmonise substantive contract

[727] EPGENCMS, "Mediation Directive 2008/52/EC", *Europarl* 2018.
[728] M. GEBAUER, "Unification and Harmonization of Laws", *Oxford Public International Law* 2009, 6.
[729] E. SILVESTRY, "Alternative Dispute Resolution in the European Union: an Overview", *Russian Law* 2013.
[730] M. GEBAUER, "Unification and Harmonization of Laws", *Oxford Public International Law* 2009, 6.
[731] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 278.
[732] Article 288 TFEU (The Legal Acts of the Union): "To exercise the Union's competences, the institutions shall adopt regulations, Directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force."
[733] M. GEBAUER, "Unification and Harmonization of Laws", *Oxford Public International Law* 2009, 2.
[734] For more info see EUROPARL, *Fact Sheet on the European Union*, http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.12.5.html).

law. Section 5 will further elaborate on the utility of regulations in the proposed framework for the ADR agreement.

15. Directives harmonise national laws, but require implementation from Member States to have effect.[735] Directives are more flexible, as they do not tend to dictate the way in which they ought to be enforced. Member States may transpose a Directive through adopting a special act, revising existing laws or amending their civil codes.[736] In line with the principle of proportionality,[737] Negatively, there have been instances where the domestic implementation did not comply with the objectives of a Directive.[738] In particular, late or partial implementation is problematic. These issues were evident in the implementation of the Mediation Directive where several Member States only implemented it after delays.[739] When Member States do not (properly) implement Directives, the EU Commission may bring an action claiming breach of EU rules.[740] Neverthless, directives are preferred to Regulations.

16. Regarding the last possibility, namely Recommendations, the EU has in the past relied thereon to address issues pertaining to ADR. The Council of Europe Recommendation No. (2002)10 on mediation in civil matters invited Member States to consider the extent to which an agreement to submit a dispute to mediation may restrict the party's rights.[741] Recommendations make the views of the EU institutions known, but have no binding force and thus impose no legal duty on the addressee.[742] Nevertheless, Recommendations can influence interpretation of national laws by courts (persuasive authority).[743] To illustrate, in the context of the Unfair Terms Directive,[744] national judges in France and other Member States often refer to the EU Recommendations to assess if a term is unfair or not.[745]

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[735] Thus, they are not directly applicable. Regarding indirect effect and horizontal effect see P. CRAIG en G. DE BURCA (eds.), *The Evolution of EU Law*, Oxford, Oxford University Press, 2011, 335.
[736] J. KIRALY, "Kiraly The Limits of Harmonizing Contract Law in the European Union", 14.
[737] Article 296(1) TFEU and Article 5(4) TEU.
[738] Nevertheless, national courts are obliged to interpret domestic law in line with EU law.
[739] C. BESSO, *Implementation of the EU Directive N. 52/ 2008: A Comparative Survey*, 2-3.
[740] Article 258 TFEU.
[741] Council of Europe Recommendation No. (2002)10 on mediation in civil matters, para. 37.
[742] Article 288 TFEU; E. COMMISSION, *Types of EU law*).
[743] P. CRAIG en G. DE BURCA, *EU Law: Text, Cases, and Materials*, Oxford, Oxford University Press, 2011, 109, 351, 493. Case C-322/88 *Salvatore Grimaldi v Fonds des maladies profe*ssionnelles 4406; J. STEINER, L. WOODS en P. WATSON, *Steiner & Woods EU Law*, Oxford, Oxford University Press, 2011, 118.
[744] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.
[745] P. NEBBIA, *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, Oxford, Hart Publishing, 2007, 27.

17. Turning to the legal basis available to the EU legislator for the regulation of ADR agreements, it is important to note that, these agreements have both substantive and procedural consequences. They are contracts requiring parties to carry out the designated procedure. The mixed nature means that the legal basis relied upon must not only enable the EU to harmonise substantive rules (contract law), but also procedural rules (such as those relating to limitation periods).[746] EU competence in the field of transnational civil procedure is derived from Article 81 TFEU: "[the EU] shall develop cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases" i.e. "the adoption of measures for the approximation of laws and regulations of Member States."[747] As the procedural rules of Member States are divergent, the EU intervenes to ensure that EU law is effectively enforced in an equal manner throughout the EU.[748] The support for the EU involvement bases itself on the internal market, economic benefits, and the need to limit forum shopping.[749]

18. Related, Article 67(4) TFEU empowers the EU to facilitate access to justice within the area of freedom, security, and justice. Article 114 TFEU provides an additional legal basis to regulate civil procedure in addition to Article 81 TFEU.[750] The EU law on cross-border civil and commercial mediation is in form of a Directive. The legal basis of the Mediation Directive is Article 81 TFEU. Likewise, the law on consumer ADR is in form of a Directive, with its legal basis being Article 114 TFEU.

19. The EU Commission can rely on both Articles 81 and 114 TFEU to regulate the ADR agreement. However, attention must be paid to Article 352 TFEU, which requires that the

[746] However, there is no specific legal basis for the EU to harmonise procedural law. See E. STORSKRUBB, "Alternative Dispute Resolution in the EU: Regulation Challenges", *European Review of Private Law* 2016, 9.
[747] Article 81(2) TFEU - ordinary legislative procedure. Measures shall be adopted "particularly when necessary for the proper functioning of the Internal Market. "elimination of obstacles to the proper functioning of civil proceedings, if necessary by promotion the compatibility of the rules on civil procedure applicable in Member States."
[748] Z. VERNADAKI, "Civil Procedure Harmonisation in the EU: Unraveling the Policy Considerations", *Journal of Contemporary European Research* 2013, afl. 2, 299.
[749] Z. VERNADAKI, "Civil Procedure Harmonisation in the EU: Unraveling the Policy Considerations", *Journal of Contemporary European Research* 2013, afl. 2, 299.
[750] R. MANKO, "Europeanisation of civil procedure. towards common minimum standards?", *European Parliamentary Research Service* 2015, 20.

legal basis of a legislative act must reflect its main purpose (not a secondary purpose).[751] Nevertheless, if an act has several main purposes, it can rest upon multiple legal basis.[752] To reiterate, Article 81 TFEU, titled "Judicial Cooperation in Civil Matters", provides that the EU must develop judicial cooperation in civil matters that have cross-border implications. Measures adopted under this Article may be aimed at "(g) the development of alternative methods of dispute settlement" among other goals. Article 114 TFEU, titled "Approximation of Laws", provides that the EU must adopt measures of harmonisation with the objective of establishing and maintaining the functioning of the international market.[753] Article 114 TFEU cannot apply simply because there are disparities in the Member States.[754] Section 5 will further discuss the correct legal basis for each aspect of the proposed framework.

20. Here, it is important to demonstrate why EU action is in line with the principles of subsidiarity and proportionality. As discussed in the previous chapters, there has been no effort to align the approaches to the ADR agreement.[755] The uncertainty regarding the binding nature of agreements to pursue ADR is problematic for the growth of ADR.[756] The

[751] Case C-155/91 *Commission v Council,* paras 19, 21; Case C-36/98 *Spain v Council*, para. 59; Case C-211/01 *Commission v Council*, para. 39.
[752] Case C-336/00, *Huber*, para. 31; Case C-281/01 *Commission v Council,* para. 35, Opinion 2/00, para. 23; Case C-211/01 *Commission v Council*, para 40. The EU legislator has, however, been accused of legislating with incorrect legal basis in order to widen the application of a legal basis in the past. See P. CRAIG, "The CJEU and Ultra Vires Action: A Conceptual Analysis", *Common Market Law Review* 2011, 408.
[753] Article 114(1) TFEU.
[754] "Tobacco Advertising I"; Case C-376/98 Germany v European parliament and Council ECLI:EU:C:2000:544, "where a Directive was successfully challenged since it in parts was considered not to facilitate trade."
[755] D. CAIRNS, "Mediating International Commercial Disputes: Differences in U.S. and European Approaches", *Dispute Resolution Journal* 2005, 67. M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 295. H. EIDENMÜELLER en H. GROSERICHTER, "Alternative Dispute Resolution and Private International Law" 2015, 8. C. BARNARD, *The Substantive Law of the EU: The Four Freedoms*, Oxford, Oxford University Press, 2016, 617. A. BIHANCOV, "What is an example of a good dispute resolution clause and why?", *Australian Centre for Justice Innovation* 2014, 2.
[756] A. SCHMITZ, "Refreshing Contractual Analysis of ADR Agreements By Curing Bipolar Avoidance of Modern Common Law", *Harvard Negotiation Law Review* 2008, afl. 1, 74. See D. KAYALI, "Enforceability of Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration* 2010, afl. 6, 552. H. EIDENMÜELLER en H. GROSERICHTER, "Alternative Dispute Resolution and Private International Law" 2015, 8. D.Q. ANDERSON, E. CHUA en N.T. MY, "How Should the Courts Know Whether a Dispute is Ready and Suitable for Mediation? An Empricial Analysis of the Singapore Courts' Referral of Civil Disputes to Mediation", *Harvard Negotiation Law Review* 2018, 292. C. TEVENDALE *et al.*, "Multi-Tier Dispute Resolution Clauses and Arbitration", *Turkish Commercial Law Review* 2015, afl. 1, 31. S.R. GARIMELLA en N.A. SIDDIQUI, "The Enforceability Of Multi-tiered Dispute Resolution Clauses: Contemporary Judicial Opinion", *IIUM Law Journal* 2016, afl. 1, 160. G. BORN en M. ŠĆEKIĆ, "Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'" in D.D. CARON et al. (eds.), *Practising Virtue: Inside International Arbitration*, Oxford Scholarship Online, 2015, 227. M. PRYLES, "Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration* 2001, afl. 2, 160. L. SNEDDON en A. LEES, "Frequently asked questions: is my tiered dispute resolution clause binding?", *Ashurst* 2013, 1.

lack of a harmonised approach to ADR agreements results in the application of a variety of individual states' contract, procedural, and PIL rules.[757] This in turn has an adverse effect on the parties' transaction costs. The decreasing of transaction costs can prove that the principle of subsidiary is respected.[758] The need for a framework is moreover apparent taking into consideration that the current law on the ADR agreement is scattered. Section 2 will further demonstrate that there is a clear need to harmonise the varying approaches to the ADR agreement.

1.2.The Supplementary Role for UNCITRAL

21. UNCITRAL is a core legal body of the UN and functions to promote international trade law. The UN General Assembly gave UNCITRAL its mandate to further the progressive harmonisation and unification of the law of international trade.[759] The body has been active in the harmonisation and unification of laws since 1966. UNCITRAL divides its work among six working groups that perform the substantive preparatory work on topics within its work program.[760] Of relevance here, is Working Group II, whose efforts have resulted in the New York Convention, the Model Law on Arbitration, the Singapore Convention, the Model Law on Mediation, and the UNCITRAL Conciliation Rules.

[757] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 278. H. EIDENMÜELLER en H. GROSERICHTER, "Alternative Dispute Resolution and Private International Law" 2015, 5.
[758] J. KIRALY, "Kiraly The Limits of Harmonizing Contract Law in the European Union".
[759] UNCITRAL, *About UNCITRAL*, http://www.uncitral.org/uncitral/en/about_us.html). UNCITRAL, *Origin, Mandate and Composition of UNCITRAL*, http://www.uncitral.org/uncitral/en/about/origin.html). UNCITRAL gives effect to its mandate by: "(a) Coordinating the work of organizations active in this field and encouraging cooperation among them; (b) Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws; (c) Preparing or promoting the adoption of new international conventions, Model Laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field; (d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade; (e) Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade; (f) Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development; (g) Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade; and (h) Taking any other action it may deem useful to fulfil its functions" (General Assembly resolution 2205 (XXI), sect. II, para. 8. See UNCITRAL, "A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law" 2013.).
[760] UNCITRAL, "Working Groups".

22. UNCITRAL produces legislative texts, such as Conventions,[761] Model Laws,[762] legislative guides,[763] recommendations, model provisions, and non-legislative texts, such as the UNCITRAL Arbitration Rules, the UNCITRAL Conciliation Rules, and the UNCITRAL Notes on Organizing Arbitral Proceedings. The body, however, is not a legislator, it simply drafts laws for national governments to adopt, either as a treaty or as domestic legislation.[764] Consequently, UNCITRAL creates instruments that provide for generalized norms capable of varied interpretation and application.[765] Thus, in implementing these texts, states face increased transaction costs in applying and interpreting the resulting rules.[766]

23. Turning to the types of instruments produced by UNCITRAL, Conventions are the primary vehicle for the harmonisation of private law.[767] They unify law by establishing binding obligations.[768] Conventions are only binding on states that choose to sign and ratify them. Conventions may only be departed from if their provisions allow for reservations. International Conventions face several limitations. Firstly, the procedure to ratify them can take several years, which results in gaps between the adoption of the Convention and its entry into force.[769] Secondly, it is difficult to amend international Conventions.[770] If a

[761] i.e. United Nations Convention on Contracts for the International Sale of Goods; the Convention on the Limitation Period in the International Sale of Goods; United Nations Convention on Independent Guarantees and Stand-by Letters of Credit; United Nations Convention on International Bills of Exchange and International Promissory Notes; United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg); United Nations Convention on the Liability of Operators of Transport Terminals in International Trade.
[762] UNCITRAL Model Law on International Commercial Arbitration; UNCITRAL Model Law on Procurement of Goods, Construction and Services; UNCITRAL Model Law on International Credit Transfers; UNCITRAL Model Law on Electronic Commerce; UNCITRAL Model Law on Electronic Signatures; UNCITRAL Model Law on International Commercial Conciliation; United Nations Convention on the Assignment of Receivables in International Trade.
[763] UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects; UNCITRAL Legislative Guide on Insolvency Law and the United Nations Convention on the Use of Electronic Communications in International Contracts.
[764] P.B. STEPHAN, "The Futility of Unification and Harmonization in International Commercial Law", *University of Virginia School of Law: Legal Studies Working Paper Series* 1999, 8.
[765] N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulator Reform" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 141.
[766] N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulator Reform" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 141.
[767] J.A.E. FARIA, "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?", *Uniform Law Review* 2009, 8.
[768] UNCITRAL, "A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law" 2013, 13 & 18.
[769] J.A.E. FARIA, "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?", *Uniform Law Review* 2009, 8.
[770] J.A.E. FARIA, "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?", *Uniform Law Review* 2009, 8. A. ROSETT, "Unification Harmonisation Restatement Codification and Reform in International Commercial Law", *The American Journal of Comparative Law* 1992, 688. J.

Convention is amended, the changes result in Protocols and there is no guarantee that all contracting parties will ratify the text of the Protocol.[771] Moreover, it is typically difficult and lengthy to persuade states to accede to Conventions.[772] If deep harmonisation is not achievable or greater flexibility is desired, other legislative techniques are appropriate, such as a Model Law or a legislative guide.[773]

24. Model laws on the other hand provide a pattern for national lawmakers to adopt in their domestic legislation. Model laws are flexible templates for domestic legislators.[774] They can also be incorporated by reference and require no signature.[775] Model laws offer a higher degree of quality as they are not impeded by the political creation that surrounds Conventions.[776] When implementing a Model Law, states are free to adjust the text in order to accommodate local needs.[777] Thus, Model Laws result in a lower degree of uniformity than Conventions.[778] When uniformity is undesirable, Model Laws are a preferred alternative to Conventions.[779]

25. Aside from Conventions and Model Laws, UNCITRAL can create legislative guides and recommendations. Guides and recommendations come into play when consensus is missing on key issues of a particular subject.[780] Legislative guides and recommendations advance the objective of harmonisation by providing *potential* legislative solutions to certain issues.[781] Model provisions are useful in future Conventions and when existing instruments

CLIFT, "UNCITRAL and the Goal of Harmonisation of Law", *Internet Law and Policy Forum* 1999, http://www.ilpf.org/events/jurisdiction/presentations/cliftpr.htm.
[771] J.A.E. FARIA, "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?", *Uniform Law Review* 2009, 8.
[772] A.D. ROSE, "The challenges for uniform law in the twenty-first century", *Uniform Law Review* 1996, 13.
[773] Model Laws and legislative guides, however, can be finalized by UNCITRAL alone. UNCITRAL, "A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law" 2013, 13 & 18.
[774] R. WOLFF, "Model Laws as Instruments for Harmonisation and Modernization", *UNCITRAL Congress 2017* 2017.
[775] Article 16(1) of the Australian International Arbitration Act.
[776] M. GEBAUER, "Unification and Harmonization of Laws", *Oxford Public International Law* 2009, 7.
[777] UNCITRAL, "A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law" 2013, 14.
[778] M. GEBAUER, "Unification and Harmonization of Laws", *Oxford Public International Law* 2009, 4.
[779] J.A.E. FARIA, "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?", *Uniform Law Review* 2009, 12.
[780] UNCITRAL, "A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law" 2013, 16.
[781] UNCITRAL, "A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law" 2013, 16.

are amended.[782] Parties to international trade contracts can use non-legislative texts such as the UNCITRAL Arbitration Rules and the Conciliation Rules.

26. To date, there are three UNCITRAL instruments on Commercial ADR: the Singapore Convention,[783] the Model Law on Mediation, and the Conciliation Rules. The Conciliation Rules and the Model Law[784] were created in the 1980s while the Singapore Convention is a recent project that will be open to signatories on 7 August 2019.[785] Evidently, there are 30 years between the early and modern instruments. To grasp the role of UNCITRAL in the regulation of ADR, the paragraphs below will provide a short overview of these instruments plus the provisions relevant to the ADR agreements.

27. The Model Law provides for an international legal framework that seeks to harmonise laws applicable to cross-border ADR. The Model Law on Mediation is available when the parties have not agreed on a set of mediation rules or failed to include them in their contract.[786] A limited number of jurisdictions have adopted the Model Law.[787] The Model Law is criticized for accommodating too many compromises.[788] It fails to set mandatory requirements in most of its provisions resulting in a small step towards harmonisation.[789] In relation to ADR agreements, Article 14 recognizes the *prima facie* enforceability of these agreements.[790] However, it allows for an exception: "to the extent necessary for a party, in

[782] "In 1982, for example, UNCITRAL formulated a model provision establishing a universal unit of account of constant value that could be used, in particular, in international transport and liability conventions, for expressing amounts in monetary terms" (UNCITRAL, "A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law" 2013, 17.).
[783] UNCITRAL's work on an instrument addressing the enforcement of settlement agreements arising out of mediation was inspired by a 2014 proposal from the US governmental (Document A/CN.9/822, paras. 123-125 and para. 129).
[784] The Model Law was updated in 2002.
[785] Article 11 of the Singapore Convention.
[786] P. BINDER, *International Commercial Arbitration & Conciliation in UNCITRAL Model Law Jurisdictions*, London, Sweet & Maxwell, 2010, 453.
[787] UNCITRAL, *Status of the UNCITRAL Model Law on International Commercial Conciliation*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html). Legislation based on or influenced by the Model Law has been adopted in 33 States in a total of 45 jurisdictions; however, there are no official list of signatories.
[788] E. VAN GINKEL, "The UNCITRAL Model Law on International Commercial Conciliation: A Critical Appraisal", *Journal of International Arbitration* 2004, 1. P. SANDERS, *The Work of UNCITRAL on Arbitration and Conciliation*, the Netherlands, Springer, 2001. P. BINDER, *International Commercial Arbitration & Conciliation in UNCITRAL Model Law Jurisdictions*, London, Sweet & Maxwell, 2010. N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009.
[789] N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulator Reform" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 142.
[790] "Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing

its opinion, to preserve its rights."[791] Agreeing with Alexander, this exception is too broad and subjective, which opens the door for the parties to ignore their contractual obligations.[792] For example, a party may commence arbitration, because "in its opinion" (a subjective judgement), it needs to protect its legal rights. Therefore, it is my view that the Model Law does not properly address the ADR agreement by not providing for a strict enforcement regime.

28. The UNCITRAL Conciliation Rules are a contractual instrument and provide a comprehensive set of procedural rules that the parties can agree on in order to conduct their conciliation proceedings. The Rules include a model conciliation clause, rules on when conciliation is deemed to have commenced and terminated, general conduct of proceedings, and rules on procedural aspects relating to the appointment and role of the neutral. Additional aspects covered include the admissibility of evidence in other proceedings, and limits to the right of parties to undertake judicial or arbitral proceedings while the conciliation is ongoing. In particular, Article 16 addresses resort to arbitral or judicial proceedings: "The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation

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or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings."

[791] Article 14 does not change the content of Article 13 of the old Model Law on Conciliation. The Guide to the Enactment and Use of the 2002 UNCITRAL Model Law on International Commercial Conciliation provides an explanation to this wording: "83. In the preparation of the Model Law, it was noted that, the initiation of arbitral or judicial proceedings by the parties while conciliation was pending was likely to have a negative impact on the chances of reaching a settlement. However, no consensus was found on the formulation of a general rule that would prohibit the parties from initiating such arbitral or judicial proceedings or restrict such an action to taking the steps necessary to prevent expiry of a limitation period. It was found that limiting the parties' right to initiate arbitral or court proceedings might, in certain situations, discourage parties from entering into conciliation agreements. Moreover, preventing access to courts might raise constitutional law issues in that access to courts is in some jurisdictions regarded as an inalienable right." "85. Even in the case where the parties would have agreed to waive their right to initiate arbitral or judicial proceedings while conciliation is pending, Article 13 creates the possibility for a party to disregard that agreement where, in the opinion of that party, the initiation of arbitral or court proceedings is necessary to preserve its rights. That provision is based on the assumption that parties will effectively limit themselves in good faith to initiating arbitral or court proceedings in circumstances where such proceedings are truly necessary to preserve their rights. Possible circumstances that may require such proceedings may include the necessity to seek interim measures of protection or to avoid the expiration of a limitation period (A/CN.9/514, para. 76). A party might initiate court or arbitral proceedings also where one of the parties remained passive and thus hindered implementation of the conciliation agreement." (emphasis added) "86. Article 13 makes it clear that the parties' right to resort to arbitral or judicial proceedings is an exception to the duty of arbitral or judicial tribunals to stay any proceeding in the case of a waiver by the parties of the right to initiate arbitral or judicial proceedings."

[792] N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulator Reform" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 142.

proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights." This wording is similar to the Model Law. It is, however, unclear how often the parties resort to these rules. Moreover, it is not clear how courts and tribunals give effect to Article 16. Therefore, again, the effectiveness of the Rules is questionable.

29. The Singapore Convention took three years of debate and involved the participation of 85 states and 35 international governmental and non-governmental organizations.[793] The Convention contains sixteen Articles.[794] The scope of the Convention is limited to commercial disputes in a cross-border context. The Convention stipulates that, the settlement agreements reached through mediation must be enforced.[795] The Convention aims to facilitate the enforcement of mediated settlement agreements by enabling the enforcing party to go directly to a court in a state where enforcement is sought instead of first obtaining a court judgment for breach of contract. It moreover provides defences that the parties and courts can rely on to argue against enforcement of a settlement agreement.[796]

30. The need for a Convention on mediated settlement agreements was proposed by the US in 2014.[797] The aim of the proposal was to promote the use of conciliation. However, the effectiveness of this instrument is questionable, as it does not address the beginning of the ADR process. This is despite Strong's survey finding that 75% of the respondents favour a Convention that addressed not only the end of mediation, but also its beginning.[798]

[793] N. ALEXANDER, *Singapore Convention on Mediation*, 2018.
[794] Article 1. Scope of application; Article 2. Definitions; Article 3. General principles; Article 4. Requirements for reliance on settlement agreements; Article 5. Grounds for refusing grant relief; Article 6. Parallel applications or claims; Article 7. Other laws or treaties; Article 8. Reservations; Article 9. Effect on settlement agreements; Article 10. Depositary; Article 11. Signature, ratification, acceptance, approval, accession; Article 12. Participation by regional economic integration organizations; Article 13. Non-unified Legal Systems; Article 14. Entry into force; Article 15. Amendment; Article 16. Denunciations.
[795] Article 2(1) of the Convention: "The Convention does not apply to settlement agreements that: (i) have been approved by a court or have been concluded in the course of court proceedings; (ii) are enforceable as a judgment in the state of that court; or (iii) have been recorded and are enforceable as an arbitral award. The rationale of this carve-out is that there are other international instruments (e.g., the New York Convention and the Hague Convention on the Choice of Court Agreements) that specifically govern these types of settlement agreements."
[796] Article 5 of the Singapore Convention.
[797] A/CN.9/822.
[798] 19% of the respondents favoured a convention that only addressed the enforcement of settlement agreements, while 6% favoured a convention that focuses on the enforceability of agreements to mediate. S.I. STRONG, "Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation", *University of Missouri School of Law* 2014, 46. S.I. STRONG, "Realizing Rationality: An Empirical Assessment of International Commercial Mediation ", *Washington & Lee Law Review* 2016, 45.

Moreover, as Chapter I demonstrated, the inconsistency of the various approaches to the enforcement of ADR agreements has created barriers to the use of ADR especially in the cross border context. Therefore, as Section 5 will discuss, it is highly advisable that the UNCITRAL rethinks its strategy of only regulating the settlement agreement. Without addressing the agreement to mediate, the aim of promoting mediation will not be efficiently met. The next section will further demonstrate that there is a clear need to harmonise the approach to ADR agreements.

2. The Harmonisation versus Diversity Dilemma

31. The legal harmonisation process dates back to the second half of the 19th century.[799] Most regulatory reforms at the international level can be associated with harmonisation initiatives.[800] In general, harmonisation attempts to reduce the legal risks associated with differing laws.[801] Through harmonisation of regulatory requirements or government policies of states, rules become identical or similar.[802] There is moreover a clear trend to harmonise various aspects of business law in order to provide parties with legal certainty in their cross-border transactions. Examples exist in a number of areas of international trade law including contract law,[803] international sale of goods,[804] finance,[805] transport,[806] intellectual property,[807] and dispute resolution (i.e. arbitration).[808] However, harmonisation

[799] J.A.E. FARIA, "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?", *Uniform Law Review* 2009, 6. M. GEBAUER, "Unification and Harmonization of Laws", *Oxford Public International Law* 2009, 2.
[800] N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulator Reform" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 132.
[801] P.B. STEPHAN, "The Futility of Unification and Harmonization in International Commercial Law", *University of Virginia School of Law: Legal Studies Working Paper Series* 1999, 2. Here the difference between "harmonisation" and "unification" is of note. Unification implies that domestic laws are made the same with a single text. While harmonisation implies that laws are made similar or nearly the same.
[802] R. GARNETT, "International Arbitration Law: Progress Towards Harmonisation", *Melbourne Journal of International Law* 2002, 1. D. LEEBBRON, "Claims for Harmonisation: A Theoretical Framework ", *Canadian Business Law Journal* 1996, 82.
[803] UNIDROIT Principles of International Commercial Contract (1994).
[804] United Nationals Convention on Contracts for the International Sale of Goods, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988).
[805] International Chamber of Commerce Uniform Customs and Practice for Documentary Credits (1993).
[806] International Convention for the Unification of Certain Rules Relating to Bills of Lading, opened for signature 25 August 1924, 120 LNTS 155 (entered into force 2 June 1931).
[807] Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, opened for signature 9 September 1886 [1901] ATS 126 (entered into force 5 December 1887).
[808] New York Convention.

is not always effective in achieving its aim. To better illustrate the reality of harmonisation, the next subsection will provide an in-depth analysis of the true nature of harmonisation. Subsequently, subsection 2.2 will drive this point further by discussing the potential effect of harmonisation in relation to the ADR agreement.

2.1.The Reality of Harmonisation

32. Today, there is a more pragmatic view about the added benefits and costs of legal harmonisation.[809] Harmonisation of laws through binding instruments may result in sub-optimal and vaguely drafted rules in the pursuit of political compromise.[810] Furthermore, the claim that legal unification removes the legal obstacles to trade and thereby stimulates economic growth is empirically unsubstantiated.[811] Harmonisation begs the question of whether the effort is justified, necessary, and whether or not it hinders or promotes international business.[812] In fact, harmonisation is difficult and somewhat undesirable in areas of law where there are differing interests (e.g. IP law).[813]

33. There are many reasons to support the diversity of laws. Having diversity generally means that the parties can choose from a wide range of applicable laws.[814] Furthermore, harmonisation, unlike diversity, may be insensitive to cultural and economic diversity.[815] The search for consensus between differing legal systems runs the risk of resulting in the

[809] M. GEBAUER, "Unification and Harmonization of Laws", *Oxford Public International Law* 2009, 2. J. SMITS, "Plurality of Sources in European Private Law, or: How to Live With Legal Diversity?", *Maastricht European Private Law Institute* 2011.
[810] S. WALT, "Novelty and the risk of uniform sales law", *Virginia Journal of International Law Association* 1999.
[811] J.A.E. FARIA, "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?", *Uniform Law Review* 2009, 10. A.S. HARTKAMP, "Moderations and harmonization of contract law: objectives, methods, and scope, act of the congress to celebrate the 75th anniversary of the founding of the international institute for the unification of private law", *Uniform Law Review* 2003, 82.
[812] P.B. STEPHAN, "The Futility of Unification and Harmonization in International Commercial Law", *University of Virginia School of Law: Legal Studies Working Paper Series* 1999, 2. J. SMITS, "Plurality of Sources in European Private Law, or: How to Live With Legal Diversity?", *Maastricht European Private Law Institute* 2011, 2.
[813] i.e. states with economic dependence on pharmaceutical companies will prefer IP with higher protection, while states with increasing healthcare costs will prefer less industry-friendly IP laws to make health care affordable.
[814] N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulator Reform" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 140.
[815] J. BHAGWAIT en R. HUDEX (eds.), *Fair Trade and Harmonisation: Prerequisites for Free Trade?*, 2, Cambridge, Mit Press, 1996.

mitigating or abandoning of approaches in other legal systems.[816] However, when the legal infrastructure is inconsistent, the business environment suffers.[817] Differing legal systems undoubtedly increase transaction costs. In particular, inconsistencies lead to increased costs of legal disputes, incentives for collecting information, making a claim, and securing compliance with an agreement.[818] Increased transaction costs in turn lead to lower investments, lower consumptions, and lower national income.[819]

34. Although not the main factor to an increase in cross-border trade, certainty provides an economic benefit, as the transaction cost of informing oneself regarding divergent rules, at times, outweighs the benefits of cross-border trade.[820] Individual litigants, foreign investors, and SMEs tend to lack the resources in terms of money, time and legal foundations to select the appropriate procedural rules in order to profit from the diversity/multiplicity of legal

[816] J.A.E. FARIA, "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?", *Uniform Law Review* 2009, 9. J. HOBHOUSE, "International Conventions and Commercial Law The Pursuit of Uniformity", *The Law Quarterly Review* 1990, 533.

[817] Subjective and objective legal certainty "Legal uncertainty always occurs when individual actors are uncertain of the effects of the provisions of the dominant legal system on the results of their actions. In the wider sense, the term covers both "subjective" and "objective" legal uncertainty" (P. TEREZKIEWICKZ, "The Europeanisation of insurance contract law: the insurer's duty to advise and its regulation in German and European Law" in J. DEVENNEY en M. KENNY (eds.), *The Transformation of European Private Law*, Cambridge, Cambridge University Press, 2013, 245.).

[818] The OHADA common commercial codes have resulted in clarify and uniformity in domestic legal systems and regional legal infrastructures. Consequently, there were greater foreign investment and cross border trade. P. TEREZKIEWICKZ, "The Europeanisation of insurance contract law: the insurer's duty to advise and its regulation in German and European Law" in J. DEVENNEY en M. KENNY (eds.), *The Transformation of European Private Law*, Cambridge, Cambridge University Press, 2013, 245. H. WAGNER, "Legal Uncertainty - Is Harmonization of Law the Right Answer? A Short Overview", *FernUniversitat in Hagen* 2009, 4. "[P]arties to a transnational contract are likely to need appropriate legal advice on the features of an unfamiliar legal system. This will create additional costs which will make the transaction as a whole more expensive" (C. TWIGG-FLESNER, "Some Thoughts on the Harmonisation of Commercial Law and the Impact on Cross-Border Transactions" in C. TWIGG-FLESNER en G.V. PUIG (eds.), *Boundaries of Commercial and Trade Law*, Europe, Sellier European Law Publishers, 2011, 104.).

[819] P. TEREZKIEWICKZ, "The Europeanisation of insurance contract law: the insurer's duty to advise and its regulation in German and European Law" in J. DEVENNEY en M. KENNY (eds.), *The Transformation of European Private Law*, Cambridge, Cambridge University Press, 2013, 245.

[820] Important facots include institutional quality, tax, etc. R. ISLAMM en A. RESHEF, "Trade and Harmonization: If your institutions are good, does it matter if they are different?", *World Bank Policy Research Working Paper 3907* 2006, 2. Z. VERNADAKI, "Civil Procedure Harmonisation in the EU: Unraveling the Policy Considerations", *Journal of Contemporary European Research* 2013, afl. 2, 300. J. SMITS, "Plurality of Sources in European Private Law, or: How to Live With Legal Diversity?", *Maastricht European Private Law Institute* 2011, 2. For opponents to the argument that harmonisation reduces all transaction costs see R. HALSON en D. CAMPBELL, "Harmonization and its discontents: a transaction costs critique of a European contract law" in J. DEVENNEY en M. KENNY (eds.), *The Transformation of European Private Law*, Cambridge, Cambridge University Press, 2013, 110. "All these initiatives are designed to replace the divergent national rules with a harmonised, or even uniform, set of rules. To what extent this core assumption (different laws are bad for cross-border trade, and harmonising at least some aspects of commercial law will boost the volume of crossborder transactions) stands up to scrutiny remains uncertain" (C. TWIGG-FLESNER, "Some Thoughts on the Harmonisation of Commercial Law and the Impact on Cross-Border Transactions" in C. TWIGG-FLESNER en G.V. PUIG (eds.), *Boundaries of Commercial and Trade Law*, Europe, Sellier European Law Publishers, 2011, 104.).

systems.[821] They cannot easily access information regarding different legal systems and enforce their rights in foreign legal systems.[822] Moreover, the criticism of harmonisation fails to consider the deficiencies of domestic legislative processes and laws.[823] The consequence here is an inequality of arms and a denial of access to justice for the above listed parties.[824]

35. International harmonisation can help to reduce the challenges associated with diversity by aligning national approaches. Thereby, harmonisation tends to reduce the potential for transnational legal problems while providing increased predictability regarding the applicable rules.[825] In addition, if a problem is transnational, in the sense that it is a

[821] Z. VERNADAKI, "Civil Procedure Harmonisation in the EU: Unraveling the Policy Considerations", *Journal of Contemporary European Research* 2013, afl. 2, 307. Z. VERNADAKI, "Civil Procedure Harmonisation in the EU: Unraveling the Policy Considerations", *Journal of Contemporary European Research* 2013, afl. 2, 301.
[822] In relation to the EU, if citizens avoid cross-border litigation, they leave their rights unenforced, which means that cross-border commercial activity, investment, and consumption will be adversely affect, hindering the smooth functioning of the internal market. Z. VERNADAKI, "Civil Procedure Harmonisation in the EU: Unraveling the Policy Considerations", *Journal of Contemporary European Research* 2013, afl. 2, 301.
[823] J.A.E. FARIA, "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?", *Uniform Law Review* 2009, 9. R. GOODE, "Reflections on the Harmonisations of Commercial Law", *Uniform Law Review* 1991, 73. Unharmonised national laws could be characterized as restrictions and may act as impediments. Harmonisation is a process that promises, if not guarantees, to successfully fulfill certain conditions. The achievement of uniformity is patently obvious, because a single set of rules is the first goal irrespectively of the content and the philosophy of these rules. To put it differently, a common level field for all players is created, following the approximation of all local provisions. In reality, harmonisation underscores the autonomy of national legal systems, limits competition and gives priority to a process of evolutionary adaptation of values of the state level (S. ANDREADAKIS, "Regulatory Competition or Harmonization: The dilemma, the alternatives and the prospect of Reflexive Harmonization" in M. ANDENAS en C.B. ANDERSEN (eds.), *Theory and Practice of Harmonisation*, Chelenham, Edward Elgar, 2012, 8.).
[824] Z. VERNADAKI, "Civil Procedure Harmonisation in the EU: Unraveling the Policy Considerations", *Journal of Contemporary European Research* 2013, afl. 2, 307.
[825] N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulator Reform" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 138. J. CLIFT, "UNCITRAL and the Goal of Harmonisation of Law", *Internet Law and Policy Forum* 1999, http://www.ilpf.org/events/jurisdiction/presentations/cliftpr.htm. P.B. STEPHAN, "The Futility of Unification and Harmonization in International Commercial Law", *University of Virginia School of Law: Legal Studies Working Paper Series* 1999, 4. M. GEBAUER, "Unification and Harmonization of Laws", *Oxford Public International Law* 2009, 5. R. GARNETT, "International Arbitration Law: Progress Towards Harmonisation", *Melbourne Journal of International Law* 2002, 2. N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulator Reform" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 138. J.A.E. FARIA, "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?", *Uniform Law Review* 2009, 5. J. CLIFT, "UNCITRAL and the Goal of Harmonisation of Law", *Internet Law and Policy Forum* 1999, http://www.ilpf.org/events/jurisdiction/presentations/cliftpr.htm. Transaction costs such as the costs associated with collecting information about the applicable law; with the formal processing for legal disputes such as court costs; with lawyers' fees; etc. According to Lord Justice Kennedy, unification of private law would result in "enormous gain to civilised mankind." "Conceive the security and the peace of mind of the ship owner, the banker, or the merchant who knows that in regard to his transactions in a foreign country the law of contract, of moveable proper, and of civil wrongs is practically identical with that of his own country" (Lord Justice Kennedy, The unification of law, Journal of Society of Comparative Legislation, vol 10 (1901), 212 et seq (214-15) Thus, laws not based on a harmonised standard may

reoccurring legal issue in various jurisdictions (i.e. enforceability of ADR agreements), transnational solutions are more in line with the needs of commercial parties.[826] Effective harmonisation must pay regard to the idiosyncrasies of national legal systems. It is desirable as far as it reduces transactional costs of cross-border commercial matters.[827]

36. Harmonisation is only necessary if it reflects the "best" level of regulation for a specific topic.[828] To know what is the ideal level of regulation, Smits proposes the taking of a functional view of the regulation of the relationship between the private parties by asking can the functions of private law be achieved better at another level (i.e. regional level).[829] Here, the principle of subsidiarity in the EU and the concept of ideal coordination of actors are of relevance.[830] The next subsection will further demonstrate why the need for certainty outweighs the benefits of diversity in relation to ADR agreements. The emphasis in this context is on the fact that this thesis does not propose the harmonisation of all of contract, procedural, or commercial law.

2.2.Harmonisation in the Field of Dispute Resolution

37. Like the harmonisation of contract, procedural and business law, the legal harmonisation of various dispute resolution mechanisms had varying levels of success in supporting transnational business.[831] Dispute resolution processes in national courts are deeply rooted in the respective legal traditions and cannot be easily displaced.[832] Nevertheless, the harmonisation of the framework for arbitration and choice of court agreements has benefited

act as an obstacle to sustainable development and economic growth. J.A.E. FARIA, "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?", *Uniform Law Review* 2009, 16.
[826] J. GORDLEY, "Comparative Legal Research: Its Function in the Development of Harmonized Law", *The American Journal of Comparative Law* 1995, 564.
[827] P. TEREZKIEWICKZ, "The Europeanisation of insurance contract law: the insurer's duty to advise and its regulation in German and European Law" in J. DEVENNEY en M. KENNY (eds.), *The Transformation of European Private Law*, Cambridge, Cambridge University Press, 2013, 247.
[828] J. SMITS, "Plurality of Sources in European Private Law, or: How to Live With Legal Diversity?", *Maastricht European Private Law Institute* 2011, 2.
[829] "What are actually the functions that private law at the 'natural' national level serves and could these functions not be achieved in a better way at another level?" (J. SMITS, "Plurality of Sources in European Private Law, or: How to Live With Legal Diversity?", *Maastricht European Private Law Institute* 2011, 2.).
[830] J. SMITS, "Plurality of Sources in European Private Law, or: How to Live With Legal Diversity?", *Maastricht European Private Law Institute* 2011, 12.
[831] R. HALSON en D. CAMPBELL, "Harmonization and its discontents: a transaction costs critique of a European contract law" in J. DEVENNEY en M. KENNY (eds.), *The Transformation of European Private Law*, Cambridge, Cambridge University Press, 2013, 100.
[832] P. TEREZKIEWICKZ, "The Europeanisation of insurance contract law: the insurer's duty to advise and its regulation in German and European Law" in J. DEVENNEY en M. KENNY (eds.), *The Transformation of European Private Law*, Cambridge, Cambridge University Press, 2013, 249.

businesses engaged in cross-border transactions.[833] In the field of arbitration, most states have realized the substantial benefits of having a harmonised legal regime that facilitates and encourages arbitration by respecting the parties' arbitration agreement. This is apparent from the wide adoption of the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration (the UNCITRAL Model Law on Arbitration).[834]

38. Current policy debates focus on whether regulating ADR will come at the cost of over-legalizing the process and thus damaging its flexibility.[835] In the field of dispute resolution, maintaining diversity can be beneficial, as it enables experimentation and innovation of ADR rules. Full harmonisation can potentially inhibit experimentation and learning in addition to preventing the shifting of transaction costs.[836] Appropriately, Alexander stipulates that, the diversity-consistency dilemma requires us to consider *what* aspects of ADR are best fit for regulation and *how*.[837] The "what" question pertains to the subject to the regulation, while the "how" question regards the question of method.[838] A proposal to harmonise the approach to the enforcement of ADR agreements must find the balance between the need for diversity and consistency. The paragraphs below will argue why harmonisation is more conductive to the promotion of ADR and the parties' needs. By focusing on the parties' needs, the analysis reflects on normative individualism, implying

[833] R. HALSON en D. CAMPBELL, "Harmonization and its discontents: a transaction costs critique of a European contract law" in J. DEVENNEY en M. KENNY (eds.), *The Transformation of European Private Law*, Cambridge, Cambridge University Press, 2013, 100. See also R. GARNETT, "International Arbitration Law: Progress Towards Harmonisation", *Melbourne Journal of International Law* 2002, 2.
[834] R. GARNETT, "International Arbitration Law: Progress Towards Harmonisation", *Melbourne Journal of International Law* 2002, 3. J.J. BARCELÓ III, "Who decides the Arbitratos' Jurisdiction? Separability and Competence-Competence in transnational Perspective", *Vanderbilt Journal of Transnational Law* 2003, 1116.
[835] N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulator Reform" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 146. See also the report of the Working Group on mediation from the Department of Justice Hong Kong doj at 7.8 and 7.18. see also the debate with the Japanese ADR study committee on whether regulation by legislation was consistent with the essence of ADR: A yamada, session III: Conference proceedings of the international arbitration conference mediation arbitration and recent developments, 2-16 (2008). See also the debates of the UNCITRAL working group on conciliation, report of the working group on arbitration on the work of its thirty-fifth session document No. A/CN.9/506, p. 6.
[836] N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulator Reform" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 141.
[837] N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 92.
[838] N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 92.

that dispute resolution should be regulated in accordance with the needs of the individuals involved,[839] which in this case includes large corporations and SMEs.

39. Although there are valid arguments for diversity and the true effect of harmonisation, it is undeniable that the inconsistencies threaten the development of transnational ADR. Today, there is a "regulatory jungle" for ADR, since laws are developing in an unmanaged and piecemeal manner.[840] Despite the regulation of many aspects of ADR through laws, codes and standards,[841] these efforts do not address the ADR agreement.[842] Even at the EU regional level, an area with increasingly harmonised rules, there is no uniformity on the status of ADR agreements.[843] The same cannot be said for arbitration, where the pro-arbitration framework created by international Conventions and national laws means that arbitration agreements are more readily enforceable than forum selection clauses and ADR agreements.[844] The attempts to harmonise national laws on ADR, for instance through the UNCITRAL Model Law and Singapore Convention and the Mediation Directive, have not changed the legal basis for the treatment of cross-border ADR agreements. Thus, issues regarding the ADR agreement remain subject to national rules,[845] which risks that when

[839] F. STEFFEK, "Principled Regulation of Dispute Resolution: Taxonomy, Policy, Topics" in F. STEFFEK en H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 57. Also see F.R. TESON, *A Philosophy of International Law*, New York, Routledge, 2018. H. MICKLITZ, *Constitutionalization of European Private Law: XXII/2*, Oxford, Oxford University Press, 2014.

[840] N. ALEXANDER *et al.*, *UNCITRAL and the Enforceability of iMSAs: the debate heats up*, 2016. Legal framework for mediation in Australia has divergent sources: state regulation, court rules, case law, and private regulation (piecemeal approach) (U. MAGNUS, "Mediation in Australia: Development and Problems" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013.).

[841] Australia Mediation Act 1997; US Uniform Arbitration Act and Uniform Mediation Act reject proposal to provide for the enforcement of ADR agreements, as drafters believed that courts should rely on contract law principles (23-30 July 1999 Annual Meeting Draft, section 5(i)). CPR, Austria Mediation Law etc.

[842] Despite the acceptance of mediation in legislation and the civil litigation framework in common law countries, none of these legislative initiatives provide for the statutory enforcement of ADR agreements. See Y. ZHAO, "Revisiting the issue of enforceability of mediation agreements in Hong Kong", *China-EU Law Journal* 2013, 129. "The Austrian experience provides a useful example of what happens when triggering mechanisms are not considered in the regulator plan. Initially, mediation initiatives focused on the training and regulation of mediators and on the aspects of the mediation process. With little effort to incentivize demand. Consequently, despite extensive quality legislation relating to mediators, very few mediations took place" (N. ALEXANDER en F. STEFFEK, *Making Mediation Law*, Washington, International Finance Corporation, 2016, 28.).

[843] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 278.

[844] G.B. BORN, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, Alphen aan den Rijn, Wolters Kluwer, 2013, 141.

[845] H. EIDENMÜELLER en H. GROSERICHTER, "Alternative Dispute Resolution and Private International Law" 2015, 5. Laws governing conciliation clauses Cal. Civ. Pro. § 1297.381 (West 1998) (international 11 commercial); Fla. Stat. chs. 684.03 (1998) (international commercial), 684.10 12 (1998) (international commercial). X, *Uniform Mediation Act*, 1999, 37.

disputes arise, ADR agreements turn into instruments of delay and barriers to access to justice.[846]

40. Higher transactions cost arise when parties resort to litigation to settle legal disputes relating to their ADR agreement.[847] Moreover, uncertainty about the applicable law and enforcement discourages the use of ADR in cross-border disputes.[848] This is evident by the low level of ADR use in cross-border disputes in the EU and by the findings of several surveys.[849] The uncertainty further restricts the participation of SMEs in international trade, as they do not have the resources to seek legal advice regarding foreign legal systems. In fact, the most recent studies found that 25% of commercial disputes in the EU are left unresolved,[850] while 45% of small businesses have indicated that they will not pursue a claim in a foreign court if the value of the claim was less than €50,000.[851] This is significant, since SMEs make up a considerable portion of the market. To illustrate, in the EU, they make up 99% of an estimated 19.3 million enterprises.[852]

41. In the absence of a mature and comprehensive legal framework for the ADR agreement, ADR remains a wild land full of unknowns, which may deter parties from considering resort

[846] G. BORN en M. ŠĆEKIĆ, "Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'" in D.D. CARON et al. (eds.), *Practising Virtue: Inside International Arbitration*, Oxford Scholarship Online, 2015, 228. This lack of legal certainty results in inefficiency, as the laws become a source of conflict. See J.A.E. FARIA, "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?", *Uniform Law Review* 2009, 16. L. VEREECK en M. MUHL, "An Economic Theory of Court Delay", *European Journal of Law and Economics* 2000, afl. 3, 663.
[847] Dispute resolution clauses that are poorly drafted or inserted in a contract as a last minute consideration remain a source of conflict. P. FRIEDLAND en L. MISTELIS, "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration", *White & Case* 2015, 32.
[848] N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulator Reform" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 139. G. DE PALO en M.B. TREVOR (eds.), *EU Mediation Law and Practice*, Oxford, Oxford University Press, 2012, 1.
[849] N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulator Reform" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 139.
[850] V. TILMAN, *Lessons Learnt From The Implementation Of The EU Mediation Directive: The Business Perspective* Note, 2011, 8; C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 492; C. ESPLUGUES, "General Report: New Developments in Civil and Commercial Mediation - Global Comparative Perspectives" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 4.
[851] N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulatory Reform" in F. STEFFEK en K. HOPT (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 179.
[852] WORLDBANK, "SME Statistics".

thereto.[853] The law governing ADR agreements is underdeveloped and behind the pace of ADR's growth.[854] Today, the various issues that arise in relation to ADR agreements are in a state of transformation due to the growing number of disputes.[855] The time is ripe to address the uncertainty arising from a lack of a framework for the ADR agreement.

42. Harmonisation of procedural rules in ADR is advantageous for institutions and parties engaged in private commercial dispute resolution.[856] Through a framework, a secondary goal is also met, as legislation on ADR will address the underlying reasons that prevent parties from concluding ADR agreements.[857] The comprehensive regulation of the ADR agreement grants ADR with a legal status while the increased clarity removes certain pressures from the civil justice system that it would normally face when enforcing these agreements.[858] Furthermore, creating a framework for the ADR agreement levels the playing field between arbitration and ADR. This is because, parties are empowered to freely choose the mechanism that fits their needs without fearing issues at the enforcement stage.[859] Harmonisation of the approaches to the ADR agreement gives parties legal certainty regarding the effect of agreement to conduct ADR, since it reduces disputes regarding applicable laws while it increases certainty regarding the parties' rights and obligations.[860]

43. Although a harmonised framework might not always be applicable to purely domestic matters, a framework for cross-border agreements also tends to set best practices for

[853] N. ALEXANDER, "Nudging Users Towards Cross-Border Mediation: Is It Really About Harmonised Enforcement Regulation?", *Contemporary Asia Arbitration Journal* 2014, afl. 2, 408.
[854] K. HAN en N. POON, "The Enforceability of Alternative Dispute Resolution Agreements: Emerging Problems and Issues", *Singapore Academy of Law Journal* 2013, 456.
[855] Y. ZHAO, "Revisiting the issue of enforceability of mediation agreements in Hong Kong", *China-EU Law Journal* 2013, 131.
[856] E. SHACKELFORD, "Party Autonomy And Regional Harmonization Of Rules In International Commercial Arbitration", *University Of Pittsburgh Law Review* 2006, afl. 4, 912.
[857] B. HESS en N. PELZER, "Regulation of Dispute Resolution in Germany: Cautious Steps towards the Construction of an ADR System" in F. STEFFEK en H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 215. S.I. STRONG, "Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation", *University of Missouri School of Law* 2014, 36.
[858] P. BROOKER, *Mediation Law: Journey through Institutionalism to Juridification*, New York, Routledge, 2013, 239.
[859] S.I. STRONG, "Beyond International Commercial Arbitration? The Promise of International Commercial Mediation", *Washington University Journal of Law & Policy* 2014, 28.
[860] N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulator Reform" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 140.

national agreements as evident from the implementation of the New York Convention, the Uniform Mediation Act, and the Mediation Directive.[861] When national and international rules are consistent, the system works better.[862]

44. Regarding the potential effect of an EU law on domestic ADR practice, the implementation of the Mediation Directive is of note. According to a European Commission report on the Mediation Directive, there is a general desire amongst Member States to "treat internal and cross-border cases alike."[863] In implementing the Mediation Directive, three Member Sates chose to transpose the Directive solely in relation to cross-border cases.[864]

45. There is, however, a lack of clarity regarding the extent of harmonisation and method of harmonisation needed to provide certainty. Harmonisation is desirable to the extent that it reduces legal risk.[865] Practice shows that minimum standards enable states to maintain their legal differences to a certain extent while further permitting for more protective and effective national rules.[866] These minimum standards, however, must be made in a way that takes into account the "interconnection and interdependence between various areas of civil procedure."[867] With full harmonisation, also referred to as "unification", all relevant laws are made the same across states.[868] The next section will explore the specific content of the

[861] In the EU there PIL has transitioned from national to regional level through the Rome I and II Regulations. Developments in the domestic law on ADR effect the approach to ADR at the international level and vice versa (S.I. STRONG, "Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation", *University of Missouri School of Law* 2014, 12.).
[862] S.I. STRONG, "Beyond International Commercial Arbitration? The Promise of International Commercial Mediation", *Washington University Journal of Law & Policy* 2014, 33 & 101. Increased consistency leads to increased predictability. W.W. PARK, "The Specificity of International Arbitration: The Case for FAA Reform", *Vanderbilt Journal of Transnational Law* 2003, 1243. J.R. COBEN, "My change of Mind on the Uniform Mediation Act", *Dispute Resolution Magazine* 2017, 7.
[863] E. COMMISSION, *Report From The Commission To The European Parliament, The Council And The European Economic And Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters*, 2016, 5.
[864] E. COMMISSION, *Report From The Commission To The European Parliament, The Council And The European Economic And Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters*, 2016, 5.
[865] P.B. STEPHAN, "The Futility of Unification and Harmonization in International Commercial Law", *University of Virginia School of Law: Legal Studies Working Paper Series* 1999, 5.
[866] Z. VERNADAKI, "Civil Procedure Harmonisation in the EU: Unraveling the Policy Considerations", *Journal of Contemporary European Research* 2013, afl. 2, 309.
[867] Z. VERNADAKI, "Civil Procedure Harmonisation in the EU: Unraveling the Policy Considerations", *Journal of Contemporary European Research* 2013, afl. 2, 309.
[868] Near uniformity of approaches M. ANDENA en C.B. ANDERSEN (eds.), *Theory and Practice of Harmonisation*, Cheltenham, Edward Elgar, 2011, 326. "Unification aims to substitute several legal systems by one single system, whereas harmonisation only seeks to approximate legal systems or sets of norms by eliminating major differences and creating minimum requirements" (M. ANDENA en C.B. ANDERSEN (eds.), *Theory and Practice of Harmonisation*, Cheltenham, Edward Elgar, 2011, 428.). "The major promulgators of

proposed harmonisation by also considering the type and extent of harmonisation needed, as well as the potential for the coordination of actors.[869]

3. The Contents of the Framework for the ADR Agreement

46. The section above argued that the varying approaches to the ADR agreement ought to be harmonised. It is important to further discuss the content of such harmonisation in order to understand the complexity thereof. To reiterate, a harmonised framework on the ADR agreement should mitigate the existing uncertainty. Today, uncertainty exists regarding the binding nature of the ADR agreement, the obligations therein, the law applicable to various parts of the agreement and mechanism, as well as the forum and method of enforcement. The uncertainty that arises from a lack of a framework inhibits the growth of ADR.[870] To address the issues arising from the uncertain approach to ADR agreements, the next subsections will discuss the content of a comprehensive framework. The proposed framework aims to provide certainty without adversely affecting the flexibility and voluntariness of ADR.

47. The suggestions herein reflect on the findings of the SCA as discussed in Chapter II and the comparative law analysis in Chapter I. Here, two findings are of relevance.

48. Firstly, in relation to the structure of ADR agreements, it was rare for them to be standalone agreements in the sense that they were part of a larger dispute resolution clause.[871] Thus,

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legal uniformity strongly suggest that the concept of unification of law rests on the bringing together of legal systems, so the result in question is the establishing of similar rules across divides of legal cultures" (M. ANDENA en C.B. ANDERSEN (eds.), *Theory and Practice of Harmonisation*, Cheltenham, Edward Elgar, 2011, 31 & 35-61.).

[869] Actors include commercial parties, dispute resolution providers, national regulators, the EU, and UNCITRAL.

[870] "Failure of international commercial mediation could also be attributed to the absence of any multilateral or bilateral treaties supporting the enforcement of mediation and settlement agreements." There is a need "to create an international legal regime that supports the enforcement of commercial mediation as effective as the web of international treaties that currently support commercial arbitration" (S.I. STRONG, "Beyond International Commercial Arbitration? The Promise of International Commercial Mediation", *Washington University Journal of Law & Policy* 2014, 28 & 31.). Although international commercial arbitration relies primarily on a few highly effective multilateral treaties, the world of international investment arbitration suggests that a highly integrated system of bilateral treaties could also be effective (See C. MCLACHLAN, L. SHORE en M. WEINIGER, *International Investment Arbitration: Substantive Principles*, Oxford, Oxford University Press, 2007, 1.08. J.E. ALVAREZ, "A BIT on Custom", *Journal of International Law and Policy* 2012, 17.).

[871] Chapter II, Section 2.1.

any discussion of a potential law on the ADR agreement should take into account the relationship of the ADR tier with other tiers. It was also clear that MDR clauses calling for ADR tend to require such mechanisms prior to arbitration,[872] implying that future regulatory instruments should reflect on the special relationship between ADR and arbitration.[873]

49. Secondly, despite the calls for the pre-selection of the governing jurisdiction and applicable law in order to have legal certainty when a dispute arises, only a minority of the agreements addressed these aspects.[874] This again relates to the tendency for the parties to finalize their dispute resolution clause as a last minute thought.[875] Illuminating on the exact content of the framework for the ADR agreement, the sections below will discuss the need for harmonised rules on the enforcement of the ADR agreement, ADR specific PIL[876] rules,[877] and gap filling default rules.

3.1.Harmonised Rules on the Enforcement of the ADR Agreement

50. The current formal regulatory framework for ADR, which includes Conventions, Directives, Regulations, national legislations, and Model Laws, does not address the ADR agreement.[878] A study of case law in the US indicated that the second most common dispute regarding mediation related to the parties' duty to mediate.[879] This makes the limited effect of the recent UNCITRAL Singapore Convention even more questionable.[880]

[872] Chapter II, Section 2.1.
[873] Nevertheless, as discussed in Chapter I the ADR agreement in terms of its validity and enforceability should continue to be separable from the negotiation and arbitration tiers.
[874] "One of the main concerns with regard to the legal framework for alternative dispute resolution procedures is the need to *avoid parallel, competing procedures*, which in the context of international disputes can occur in several countries at the same time and which can result in conflicting outcomes" (C. BÜHRING-UHLE *et al.*, *Arbitration and Mediation in International Business*, Alphen aan den Rijn, Kluwer, 2006, 230.)
[875] "Mid-night" clauses.
[876] The term "private international law" refers to the laws applicable when there is a foreign element to the transaction, fact or event.
[877] ADR specific PIL rules can address three issues in absence of choice by the parties: applicable law, jurisdiction, and enforcement.
[878] Exception of Singapore. A/CN.9/WG.II/WP.202, Sixty-seventh session, Vienna, 2-6 October 2017, draft provision 1, 2.
[879] The first being the enforceability of the settlement agreement (J.R. COBEN en P.N. THOMPSON, "Disputing Irony: A Systematic Look at Litigation About Mediation", *Harvard Negotiation Law Review* 2006, afl. 43, 57.).
[880] In theory, an instrument on ADR should address the enforceability of the ADR agreement. "First, any convention on international commercial mediation should address the enforceability of an agreement to mediate" (S.I. STRONG, "Beyond International Commercial Arbitration? The Promise of International Commercial Mediation", *Washington University Journal of Law & Policy* 2014, 32.).

51. A framework that clearly stipulates that valid ADR agreements must be enforced signals that these agreements are binding and thereby provides certainty for the stakeholders.[881] To ensure that the parties' agreement is not found to be unenforceable because of a simple gap in the agreement, it is important that a future framework for the ADR agreement stipulates that such agreements ought to be enforced as long as the parties' desire to be bound is clear. Such a formulation can look as follows: "ADR agreements in writing under which the parties undertake to submit to ADR all or any differences that have arisen or that may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter falling under their agreement, shall be recognized and enforced."

52. In particular, it is advisable that a harmonised legal instrument for the ADR agreement addresses the following issues:
    i. The minimum requirements for a valid and enforceable ADR agreement;
    ii. The basic obligations of the parties to an ADR agreement;[882]
    iii. The time when courts/arbitral tribunals are required to enforce the parties' ADR agreement;
    iv. Preferred remedies;
    v. Defences against enforcement;[883]
    vi. The effect of the ADR procedure on limitation periods;
    vii. Interim relief;
    viii. Confidentiality; and
    ix. Markers of the mechanism ending.
53. In light of the need to reduce the differences in the domestic approaches to the main legal issue of ADR, namely enforceability, a future framework on ADR should *not* harmonise the basis of a minimum common denominator. This is because, such an approach would not

[881] N. ALEXANDER, "Nudging Users Towards Cross-Border Mediation: Is It Really About Harmonised Enforcement Regulation?", *Contemporary Asia Arbitration Journal* 2014, afl. 2. C.-F. LO, "Desirability of A New International Legal Framework For Cross-Border Enforcement of Certain Mediated Settlement Agreements", *Contemporary Asia Arbitration Journal* 2014, afl. 1, 121. B. WOLSKI, "Enforcing Mediated Settlement Agreements (MSAs): Critical Questions And Directions For Future Research", *Contemporary Asia Arbitration Journal* 2014, afl. 1, 89. E. SUSSMAN, "The New York Convention through a Mediation Prism", *Dispute Resolution Magazine* 2009, afl. 4, 11.).
[882] See Chapter II.
[883] There are three categories of exceptions to the enforcement of such agreements: (1) the party seeking enforcement has undermined the ADR; (2) the party opposing the arbitration or litigation makes post factual objections regarding the other party's failure to comply with the agreement; and (3) the mediation is moot. Also see Chapter I.

be appropriate in the context of commercial ADR. Instead, the content of the framework should be based on *best* practices[884] amongst states where ADR is common practice.[885] Chapter I discussed these best practices regarding enforcement.

54. Regarding point (i),[886] it is evident that at a very minimum an ADR agreement must clearly demonstrate the parties' intentions to be bound to the obligation to conduct ADR. Such intent can be demonstrated through the following contractual phrases: (a) "Any controversy or claim arising out of relating to this contract or breach thereof shall first be submitted to ADR"; and (b) "In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to ADR". However, ADR agreements should only be enforced upon the request of one of the parties in accordance with the principles of party autonomy and relativity of contracts.[887] A formulation thereof could look as follows: "Courts and tribunals ought to give effect to the parties ADR agreement if a party to the agreement applies for such enforcement."

55. Turning to the need for the parties' agreement to be detailed and sufficiently certain in order to be enforceable, the proposed instrument should define the parties' basic obligations (point ii) in order to avoid a court finding the agreement unenforceable due to uncertainty. Reflecting on the findings in Chapter II, it is advisable that at the very minimum, the parties be required to *actively attend* at least one ADR session/meeting in an attempt to settle the dispute. Here, the content of Section 3.3 regarding default rules are of importance. It is important to note here that it is easier to harmonise formal validity than substantive validity.[888] Domestic laws vary greatly regarding the substantive validity, since they govern questions of public policy and the concepts of justice and fairness. Even at a regional level, it is difficult to harmonise the requirements for the material validity of a contract.[889] That is why the proposal for default rules is of essence to the functioning of a comprehensive

[884] The approaches that result in high party satisfaction and that facilitate the enforcement of agreements.
[885] As further discussed in the Introduction Chapter.
[886] "The minimum requirements for a valid and enforceable ADR agreement."
[887] Contracts are only binding on those who have directly or indirectly consented to the contract. See M. VAN PUTTEN, "Chapter 4 - Labour Law and the Limits of Dogmatic Legal Thinking" in E. CLAES, W. DEVROE en B. KEIRSBLICK (eds.), *Facing the Limits of the Law*, Heidelberg, Springer, 2009, 61.
[888] Z.S. TANG, *Jurisdiction and Arbitration Agreements in International Commercial Law*, New York, Routledge, 2014, 65.
[889] Z.S. TANG, *Jurisdiction and Arbitration Agreements in International Commercial Law*, New York, Routledge, 2014, 65.

framework. As Section 3.3 will discuss, the proposed default rules would provide guidance to states without being legally binding thereon.

56. Regarding point (iii),[890] the framework ought to emphasise the importance to courts and tribunals that the parties' ADR agreement must be enforced. Wording similar to the following would be advisable: "Member States shall ensure that it is possible for a party to an ADR agreement to request that the content of a written agreement be made enforceable." However, as Chapter I demonstrated, depending on the legal nature noted to these agreements, the remedies differ.[891] Regarding best practices as to the remedies (point iv), the appropriate remedy differs depending on the time of the breach.[892] Therefore, the harmonised rules proposed herein cannot stipulate one particular way to enforce the parties' agreement. Moreover, harmonising the various contractual and procedural remedies available would likely be contrary to the principle of proportionality.[893] Nevertheless, an annex to the rules can provide Member States with guidelines as to the preferred remedies. Here, the findings in Chapter I, Section 3.3 are of relevance.

57. Turning to points (v) to (vii),[894] if the parties' obligation to pursue ADR is enforceable, mechanisms should also be constructed to protect parties against an abuse of a process. Here, the defences against enforcement, interim measures, and the effect on limitation periods are of importance. In particular, the harmonised rules should contain an open-ended list of potential defences that can be relied upon to argue against enforcement and to refuse enforcement, such as public policy, the need for court ruling, and abuse of process.[895] Regarding interim measures and limitation periods, the harmonised rules should reiterate the importance of providing the parties with such protections. The following wording can demonstrate this point: "Member States shall ensure that parties who choose ADR in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or

[890] "The time when courts/arbitral tribunals are required to enforce the parties' ADR agreement."
[891] Chapter I, Section 3.
[892] Chapter I, Section 3.3.
[893] Under this rule, the action of the EU must be limited to what is necessary to achieve the objectives of the Treaties. In other words, the content and form of the action must be in keeping with the aim pursued. The principle of proportionality is laid down in Article 5 of the Treaty on European Union. The criteria for applying it are set out in the Protocol (No 2) on the application of the principles of subsidiarity and proportionality annexed to the Treaties. See EUR-LEX, *Glossary of Sumamries: Proportionality Principle*, https://eur-lex.europa.eu/summary/glossary/proportionality.html).
[894] "The effect of the ADR procedure on limitation periods." "Interim relief."
[895] Chapter I, Section 2.6.

prescription periods during the ADR process."[896] Moreover, the rules should stipulate that disputes relating to an ADR obligation should not have an adverse bearing on the limitation periods relating to the commercial disputes.

58. Likewise, regarding confidentiality (point viii), the proposed rules should reemphasise the importance thereof when a party aim to establish a breach of an ADR agreement. In particular, if a party aims to establish a breach of an ADR obligation once ADR has commenced, it is essential that such objective does not violate the importance of confidentiality. Therefore, apart from reinforcing the importance of confidentiality, the framework should indicate that the parties should not be violating the obligation of confidentiality in their attempt to prove a breach of an agreement.

59. Turing to point (ix) regarding the markers of the mechanism's ending, an open ended list would be beneficial, as it would enable enforcing authorities to better assess whether a party is in breach of its obligations. Chapter II, Section 2.16 provided an analysis of potential markers of the mechanism ending. Potential markers include the execution of the settlement agreement, written or verbal declaration of the neutral or dispute resolution provider that the mechanism has ended, a declaration or "notice of declaration" by one or all of the parties, the lapsing of the time set for the ADR, and the conclusion of a written record of the final proposals of the parties and the neutral.

60. Lastly, it is important that the drafters take into account the interplay of the proposed rules and existing works, such as the Mediation Directive, the New York Convention, the Singapore Convention, and UNCITRAL Model Laws. In particular, it should be ensured that the harmonised rules do not clash with the well-established framework for arbitration. Here, a balancing act needs to take place. Chapter I, Section 3.3 provided an in-depth analysis of the need to give effect to an ADR agreement in a MDR clause. Section 4.1 of Chapter III will discuss how the framework for arbitration can be incorporated into the framework for the ADR agreement.

[896] Article 8(1) of the Mediation Directive.

3.2.Applicable Law and Jurisdiction

61. While the harmonisation of the approaches to the enforceability of ADR agreements greatly reduces uncertainty, it does not remove all disparities.[897] This is because, again, harmonising the laws applicable to the validity and enforceability of the ADR agreement still leaves certain aspects of contract and procedural law subject to national laws. The reason for this is that, the proposal for harmonisation respects the boundaries of subsidiarity and proportionality and thus does not call for *full* harmonisation. For example, those aspects relate to substantive validity of contracts, public policy, mandatory rules, and a number of procedural issues where national courts must intervene. This complexity has the potential for undermining ADR as a dispute resolution process. When parties do not indicate the law applicable to their ADR agreement, process, and the forum to address disputes relating to their ADR agreement, ADR specific PIL rules will aid the stakeholders in better determining the law applicable to the agreement and process, as well as to determine the appropriate forum.

62. PIL rules would come into play when the parties dispute the applicable law or the forum with the power to rule in a transnational context.[898] The necessity of conflict of law rules for ADR is also supported by the SCA discussed in Chapter II, which indicated that only 8.7% of the agreements addressed the governing law of the agreement and 5.8% indicated the law applicable to the ADR process. Moreover, only 7.5% of the agreements stipulated a jurisdictional choice. Evidently, parties largely tend to omit provisions relating to applicable laws and jurisdiction when concluding their ADR agreement.

63. In the context of the ADR agreement, a PIL instrument should clarify the law applicable to the ADR agreement, process, and the parties' rights and obligations. It should also clarify which forum has jurisdiction to enforce ADR agreements and resolve disputes between

[897] G. BAYRAKTAROGLU, "Harmonization of Private International Law at Different Levels: Communitarization v. International Harmonization", *European Journal of Law Reform* 2003, afl. 1/2, 170. "EU national legal systems on mediation are habitually silent as regards the law applicable to the mediation clause or the agreement to mediate in cross-border mediate. In fact, it is said to be a topic that has not been studied very much in many Member Sates so far" (C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 743. C. ESPLUGUES, "General Report: New Developments in Civil and Commercial Mediation - Global Comparative Perspectives" in C. ESPLUGUES en L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 76.).

[898] H. EIDENMÜELLER en H. GROSERICHTER, "Alternative Dispute Resolution and Private International Law" 2015, 4.

parties involved in the ADR. Specific PIL for the ADR agreement rules will help to address the following questions:

i. What law is applicable to assess the validity and enforceability of the ADR agreement;
ii. What law governs the ADR procedure and its effect;[899] and
iii. Which forum has the power to rule on disputes regarding the ADR agreement/process?

64. Turning to point (i) regarding the law applicable to the validity of the ADR agreement, it should be noted that, in the cross-border context in the EU, the Rome I Regulation is the framework used to determine the law applicable to the contracts.[900] This thesis does not support the application of the Rome I Regulation to ADR agreements in light of the special nature of such agreements.[901] The Rome I Regulation is not suitable since it addresses traditional contracts. Furthermore, ADR agreements are in the same family as arbitral agreements, which are explicitly excluded from the scope of the Rome I Regulation.[902] This is key, as the enactment of the Rome I Regulation came at a time when ADR agreements were not a "hot" topic nor commonly concluded.[903] It seems that the drafters of the Rome I Regulation did not discuss the inclusion nor exclusion of ADR agreements.

65. Returning to the question of applicable law, when an ADR agreement is part of the main contract, it is likely that the law applicable to the main contract is applicable thereto by default.[904] It is, however, questionable whether the above connecting factors should apply in cases where the ADR agreement forms part of a larger MDR clause. When an ADR agreement is a tier preceding arbitration/litigation, it is appropriate to apply the same law to

[899] Which law governs the effect of the ADR procedure, and the ADR agreement such as limitation periods on simultaneous or subsequent juridical and arbitral proceedings?
[900] H. EIDENMÜELLER en H. GROSERICHTER, "Alternative Dispute Resolution and Private International Law" 2015, 6.
[901] Counter to H. EIDENMÜELLER en H. GROSERICHTER, "Alternative Dispute Resolution and Private International Law" 2015, 6.
[902] Article 1(2)(e) of the Rome I Regulation.
[903] "On 30 November 2000 the Council adopted a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters (3). The programme identifies measures relating to the harmonisation of conflict-of-law rules as those facilitating the mutual recognition of judgments" (Rome I Regulation, Preamble (4). The Rome I Regulation was promulgated in 2008).
[904] This is the case in arbitration. See *BCY v BCZ* [2016] SGHC 249 Singapore; *Sulamerica Cia Nacional* 2013; D.D. CELIK, "Interpretation And Enforcement Of Arbitration Agreements Under English And U.S. Law", *Journal of Arbitration and Mediation* 2014, afl. 1, 27.

assess the validity and compliance with the ADR and arbitration/litigation agreement.[905] This is because applying the same law to the entire dispute resolution clause would provide parties with increased certainty and predictability. Thus, a PIL on the ADR agreement should also address the law applicable to the arbitration/litigation agreements, as they are often joined in a dispute resolution clause.[906]

66. Regarding the law applicable to freestanding ADR agreements and the parties' obligations, in absence of a choice, the chosen place of ADR will likely be seen as the strongest connecting factor.[907] Parties, however, do not always indicate the place of ADR.[908] Here, the law applicable to the substance of the dispute has the potential of applying to the ADR agreement.[909]

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[905] D. JOSEPH, *Jurisdiction and Arbitration Agreements and Their Enforcement*, London, Sweet & Maxwell, 2005, 450. However, in England, in *Sulamerica* Brazilian law was the proper law of the agreement and the mediation clause, while English law applied to the arbitration clause. This shows that different law apply to the MDR clause. Lord Justice Moore-Bick: "The fact that the mediation agreement in condition 11, and any mediation pursuant thereto, are governed by Brazilian law does not necessarily mean that any subsequent arbitration must be similarly so governed" (*Sulamerica CIA Nacional De Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, para 60).

[906] Regarding the growing use of MDR clauses see O. KRAUSS, "The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith Under English law", *McGill Journal of Dispute Resolution* 2016, 144. D. CAIRNS, "Mediating International Commercial Disputes: Differences in U.S. and European Approaches", *Dispute Resolution Journal* 2005, 64. Q. ANDERSON, "A Coming Of Age For Mediation In Singapore", *Singapore Academy of Law Journal* 2017, 292. X, "Drafting Step Clauses: An Empirical Look At Their Practicality And Legality", *Pace Law School* http://www.cisg.law.pace.edu/cisg/IICL-NE.html. S.R. GARIMELLA en N.A. SIDDIQUI, "The Enforceability Of Multi-tiered Dispute Resolution Clauses: Contemporary Judicial Opinion", *IIUM Law Journal* 2016, afl. 1, 166. C. TEVENDALE *et al.*, "Multi-Tier Dispute Resolution Clauses and Arbitration", *Turkish Commercial Law Review* 2015, afl. 1, 31. M. MEAR, "Enforceability of Mediation in Multi-tiered Clauses: the Croatian Perspective", *Kluwer Arbitration Blog* 2015, 1.

[907] According to Common Law rules, the *lex loci solutionis* is most appropriate to determine the proper law of the agreement to go to mediation. See E.B. CRAWFORD, and Carruthers, Janeen M., "United Kingdom 2013" in C. ESPLUGUES, J.L. IGLESISAS en G. PALAO (eds.), *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, 2 dln., 1, Cambridge, Inersentia Publishing Ltd. , 2013. If the parties' have not made an explicit choice of applicable law, the implicit choice of law should be construed in favour of the law of the location of the ADR proceedings. See H. EIDENMÜELLER en H. GROSERICHTER, "Alternative Dispute Resolution and Private International Law" 2015, 7. Article 4 of the Rome I Regulation, 'Closest connection' test. House of Lords in *Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation*: the arbitral forum gives rise to the "strong inference" that they want the law of the seat to govern their dispute.

[908] In this study, 63% of the agreements studied addressed the venue/location of the dispute, with 1 agreement designating the seat of mechanism.

[909] H. EIDENMÜELLER en H. GROSERICHTER, "Alternative Dispute Resolution and Private International Law" 2015, 9. However, see the *delocalisation theory*. P. READ, "Delocalization Of International Commercial Arbitration: Its Relevance In The New Millennium ", *Aria* 1999, afl. 2. S. YU CHONG en N. ALEXANDER, *Singapore Convention Series: Why is there no 'seat' of mediation?*, 2019.

67. Turning to point (ii),[910] the applicable procedural rules determine how the procedure is to be carried out. It is clear that the civil procedure rules of state courts are not fit to act as default rules for ADR.[911] This is because, ADR does not involve a third party with decision-making power.[912] Moreover, while several institutions have produced model rules for ADR, the parties do not always incorporate these rules. In the cases where the parties fail to indicate the relevant institutional rules or where these rules do not address the matter in dispute, it would be wise for the PIL to refer to the rules where ADR is located as the closest connecting factor. These rules would be applicable alongside the mandatory rules of that forum.[913] However, national rules do not always address the ADR process. Thus, the best way to tackle the unclear nature of the rules applicable to the ADR process is to have ADR specific rules in the form of default rules (Section 3.3 will explore this possibility).

68. Having discussed the applicable law, it is appropriate to turn to the last point of discussion, the jurisdiction to address disputes arising from or relating to ADR agreements (point iii). A PIL regime should also address which forum has the competence to address disputes relating to ADR agreements and to supervise the procedure. To select the appropriate forum, it is important to reflect on the moment at which a party to the agreement is seeking judicial assistance. Potential scenarios include: (a) a party is refusing to attend ADR, but has not initiated court or arbitral proceedings; (b) a party has entered into the ADR process, but is not actively participating or is intentionally harming settlement efforts (i.e. refusing to respond to settlement offers); or (c) a party has taken the substantive dispute to a court or tribunal.[914]

69. Regarding scenarios (a) and (b),[915] without an agreement to the contrary, a company may be sued where it has its statutory seat, central administration, or principal place of

[910] What law governs the ADR procedure and its effect.
[911] F. DIEDRICH, "International/Cross-Border Mediation within the EU - Place of Mediation, Qualifications of the Mediator and the Applicable Law" in F. DIEDRICH (ed.), *The Status Quo of Mediation in Europe and Overseas: Options for Countries in Transition*, Hamburg, Verlga Dr. Kovač, 2014, 66.
[912] See Introductory Chapter.
[913] Regarding the applicable law to arbitration proceedings, the first is choice of the parties and then the overriding mandatory rules of the forum. Parties can also choose to subscribe to institutional rules. See H. EIDENMÜELLER, "Regulatory Competition in Contract Law and Dispute Resolution" in H. EIDENMÜELLER (ed.), *Regulator Competition in Contract Law and Dispute Resolution*, Oxford, Hart Publishing, 2013, 4.
[914] Regarding provisional measures, the court where the ADR is located should have the power to grant such relief.
[915] (a) A party is refusing to attend ADR, but has not initiated court or arbitral proceedings. (b) A party has entered into the ADR process, but is not actively participating or is intentionally harming settlement efforts (i.e. refusing to respond to settlement offers).

business.[916] Furthermore, a company may be sued in the place of the fulfilment of the contractual obligation.[917] This approach would follow the well-established practice in PIL, which is constructive to the suggestions made herein.

70. In a scenario (c),[918] typically, when party A sues party B in the courts of jurisdiction X, party B requests that the court stays or dismisses the claim in light of an unfulfilled ADR obligation. In these cases, the importance of jurisdictional rules on the ADR agreement diminishes, as a court has already claimed jurisdiction in relation to an interlinked dispute. In addition, in the EU, the Brussels I recast Regulation addresses court jurisdiction and judgement recognition. The Brussels I recast Regulation can be relevant in cases where the courts make a decision about the recognition and enforcement of ADR clauses, as this decision is enforceable in other Member States. Moreover, ADR specific PIL rules should clarify the enforceability of an ADR agreement found to be valid and enforceable in one jurisdiction in another state.[919]

71. More complicated is how potential PIL should address issues when the ADR agreement forms part of a MDR clause. As Chapter I discussed, it is necessary for courts to have supervisory power over a tribunal's determination in a dispute relating to an ADR agreement. This is because, arbitral tribunals have shown discrepancies in their ability to properly assess the mandatory nature of these agreements as well as compliance therewith. Therefore, an ADR specific PIL should also stipulate that courts of the forum have supervisory power over a tribunal's determination regarding the ADR agreement.[920] In particular, tribunals should not be able to dismiss the binding nature of an ADR agreement worded in mandatory language without properly assessing if the parties have complied with their ADR agreement. Unless the agreement is more detailed or differs, parties can be set to meet their obligations under a binding ADR agreement by attending at least one ADR session while making a true attempt at settlement.

[916] Article 4(1) of the Brussels I recast Regulation.
[917] Article 7(1)(a) of the Brussels I recast Regulation.
[918] (c) A party has taken the substantive dispute to a court or tribunal.
[919] Recognition of court judgements Article 33 of the Brussels I recast Regulation.
[920] To further strengthen this point see Chapter I, Section 3.

3.3.Default Rules

72. As has been continuously discussed in this PhD, parties are responsible to ensure that their ADR agreement is sufficiently certain and enforceable. Yet, parties often fail to ensure the certainty of their dispute resolution clause.[921] Parties tend to only discuss the elements of the agreement that they find to be essential, such as the type of mechanism they wish to resort to when disputes arise.[922] Moreover, written contracts may fail to fully specify the parties' intentions.[923] In general, contracts do not always cover every conceivable contingency; almost all contract have some level of incompleteness.[924] When parties opt to include an ADR tier in their dispute resolution clause, they have a tendency to copy and paste the agreement to save on transaction costs. In my 2017 questionnaire regarding the perception of dispute resolution professionals and experts to ADR agreements, 65% indicated that such agreements are often copied and pasted.[925] This is problematic, as it raises the chance of the agreement being unenforceable if adjustments are made without sufficient research and if the copied clause is not suitable for enforcement in the jurisdiction seized.

73. The courts under analysis have a tendency to refuse to enforce ADR agreements that are uncertain due to missing details.[926] Therefore, it is not sufficient to have a harmonised instrument calling for the enforcement of ADR agreements. For the matters not covered by the general conditions of the parties' agreement, the law should provide the default or facilitative rules that apply in light of the parties' lack of arrangement to the contrary in order to fill in the gaps in the parties' agreement.[927] The need for gap fillers and default

[921] J.M. SMITS, *Contract Law: A Comparative Introduction*, Cheshire, Edward Elgar Publishing, 2014, 18.
[922] J.M. SMITS, *Contract Law: A Comparative Introduction*, Cheshire, Edward Elgar Publishing, 2014, 18.
[923] T. BAKER en K.D. LOGUE, "Mandatory Rules and Default Rules in Insurance Contracts", *School Penn Law: Legal Scholarship Respository* 2015, 3.
[924] T. BAKER en K.D. LOGUE, "Mandatory Rules and Default Rules in Insurance Contracts", *School Penn Law: Legal Scholarship Respository* 2015, 3.
[925] M. SALEHIJAM, "ADR Clauses and International Perceptions: A Preliminary Report", *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement* 2017, afl. 3.
[926] See Chapter I.
[927] *Centrum est quod certum redid potest* –agreements lacking complete certainty can be rendered certain. In case of arb: "The parties will expect the arbitrator to decide the case according to the letter of the contract, and where necessary to supplement it to fill in gaps or remove ambiguities to follow the spirit of the transaction. The arbitrator must decide the case according to the commercial purpose of the transaction, not be reference to abstract general rules of law provided in civil and commercial codes" (H. COLLINS, "Regulatory Competition in International Trade: Transnational Regulation through Standard Form Contracts" in H. EIDENMÜELLER (ed.), *Regulator Competition in Contract Law and Dispute Resolution*, Oxford, Hart Publishing, 2013, 136.). See I. AYRES en R. GERTNER, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules", *Yale Law School Legal Scholarship Repository* 1989, 87. When terms are implied on the basis of statute, there is less controversy regarding the gap-filling exercise. Examples of gap-filling statues include the English sale of Goods Act. See also A.P. BOON LEONG, "The Challenge of Principled Gap-Filling: A Study of Implied Terms

rules is addressed in the realm of arbitration. To illustrate, the FAA has "gap-filling" provisions that address the identity of the arbitrator when the chosen one is unavailable.[928]

74. ADR specific default rules ought to be contrasted with mandatory rules that cannot be contracted out of.[929] Default rules enable parties to tailor their business relationship without worrying about certainty. Thereby, gap fillers reduce the cost of contracting.[930] This suggestion is in line with the modern approach to interpreting commercial contracts, which is to give meaning to the terms in order to preserve validity, as long as the parties' agreement is in mandatory terms.[931] This is not to say the courts are to rewrite the contract for the parties.[932] By applying default rules to fill in gaps, the current practice of punishing uncertain agreements by refusing enforcement shifts to one where agreements are enforced.[933]

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in Comparative Context", *Queensland Legal Yearbook* 2013, 354. T. BAKER en K.D. LOGUE, "Mandatory Rules and Default Rules in Insurance Contracts", *School Penn Law: Legal Scholarship Respository* 2015, 3.

[928] Federal Arbitration Act, 9 U.S.C. § 5: "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator."

[929] Contrast UCC's duty to act in good faith (mandatory) and the warranty of merchantability.

[930] S. BAKER en K.D. KRAWIEC, "The Penalty Default Canon", *The George Washington Law Review* 2004, afl. 4, 666.

[931] *Verba ita sunt intelligenda ut res magis valeat quam pereat* - the contract should be interpreted so that it is valid rather than effective. See also per Lord Wright in House of Lords, *Hillas & Co v Arcos Ltd* (1932) 147 LT 503, Judgement of 1932, para. 541: "business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding" defect; Llongmore LJ in ECA, *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2006] 1 Lloyd's Rep 121, Judgement of 15 July 2005, para. 121: "[I]t would be a strong thing to declare unenforceable a clause into which the parties have deliberately to defeat the reasonable expectations of honest men." K. HAN en N. POON, "The Enforceability of Alternative Dispute Resolution Agreements: Emerging Problems and Issues", *Singapore Academy of Law Journal* 2013, 460. K.C. LYE, "A persisting aberation: The movement to enforce agreements to mediate", *Singapore Academy of Law Journal* 2008, 2. Andrews on Civil Process vol II para 1.35 and 1.46 supports implying terms into the clause. Support for filling the gaps in contracts is also found in the Draft European Common Frame of Reference. See also B. FAUVARQUE-COSSON en D. MAZEAUD, "GUIDING PRINCIPLES OF EUROPEAN CONTRACT LAW" in O. SCHMIDT (ed.), *European Contract Law: Materials for a Common Framew of Reference*, Munich, European Law Publishers, 2009, 44.

[932] SCA and *Master Marine AS v Labroy Offshore Ltd* [2012] 3 SLR 125, Judgement of 18 April 2012, para. 41-42, per Rajah JA.

[933] Similar to what is argued in I. AYRES en R. GERTNER, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules", *Yale Law School Legal Scholarship Repository* 1989, 106.

75. Looking at the current cause for gaps in the parties' ADR agreement further supports the need for gap-filling provisions. As Chapter I discussed, dispute resolution clauses tend to be drafted with little care. Practitioners and scholars frequently refer to dispute resolution clauses as "midnight clauses" since they are often concluded or copied and pasted so late in the day.[934] The main reason for this behaviour is the high transaction cost associated with individually drafting highly detailed dispute resolution clauses at a time when the parties have reached agreement on the essential part of their relationship, namely the commercial transaction.[935]

76. Default rules tend to reflect what is rational for the parties to a contract (the norm).[936] Here, the foundations of the default rules are efficacy (make the agreement workable) and purpose (prevent the agreement's purpose from being defeated).[937] These "market-mimicking" or "majoritarian" default rules minimize the need for parties to incur the costs associated with contracting around the default rules. This is because, these rules reflect what the majority of contracting parties would agree to.[938] However, there are also default rules with a different purpose than minimizing transactions costs. They, instead, are designed to induce the parties to take action. These rules are also referred to as "information-forcing" or "penalty" defaults.[939] Their purpose is to induce the party with superior information to negotiation for a more efficient deal. These types of default rules, however, are not proposed herein.

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[934] E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 223.
[935] "In the common view, parties leave a gap in their contract when the costs of solving the relevant problem exceed the gains or when a term would condition on unobservable information." See A. SCHWARTZ en R.E. SCOTT, "The Common Law Of Contract And The Default Rule Project", *Virginia Law Review Association* 2016, 1578.
[936] C.A. RILEY, "Designing Default Rules in Contract Law: Consent, Conventionalism, and Efficiency", *Oxford Journal of Legal Studies* 2000, afl. 3, 370.
[937] A. ROBERTSON, "The Foundations of Implied Terms: Logic, Efficacy and Purpose" in S. DEGELING, J. EDELMAN en J. GOUDKAMP (eds.), *Contract in Commercial Law*, Sydney, LawBook Co, 2016, 1. See also rational bargaining theory M. HEVIA, "Coleman on Gap-Filling and Default Rules", *Diritto e questioni pubbliche* 2012, 166. T. BAKER en K.D. LOGUE, "Mandatory Rules and Default Rules in Insurance Contracts", *School Penn Law: Legal Scholarship Respository* 2015, 4.
[938] T. BAKER en K.D. LOGUE, "Mandatory Rules and Default Rules in Insurance Contracts", *School Penn Law: Legal Scholarship Respository* 2015, 4.
[939] T. BAKER en K.D. LOGUE, "Mandatory Rules and Default Rules in Insurance Contracts", *School Penn Law: Legal Scholarship Respository* 2015, 4.

77. With the goal of reducing transactions costs and reflecting on bounded rationality, potential default rules should reflect the bargain that most parties would reach on their own.[940] The content of the default rules here is inspired by the findings of my SCA, as well as case law and arbitral awards. Chapter I and II demonstrated that most ADR agreements and institutional rules tend to share certain commonalities. Evidently, there are clear trends in relation to the content of ADR agreements and processes.

78. The proposed default rules should only be detailed in so far as to make the parties' agreements sufficiently certain when there are gaps. Overly complicated default rules can, at times, be counterproductive, as they would potentially complicate the drafting process for parties who wish to exclude the applicability of the default rules.[941] In suggesting the creation of default rules to fill in the gaps in the parties' agreement, it is necessary to discuss the form thereof. It is advisable that the default rules suggested herein be formulated as a soft law[942] that states can adopt to complete their framework for the ADR agreement.

79. As discussed in Chapter I, in cases where the parties' agreement was found to lack sufficient certainty, the issues related to the appointment and remuneration of the neutral,[943] length of the ADR sessions,[944] the obligation to negotiate in good faith,[945] markers of the mechanism

[940] I. AYRES en R. GERTNER, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules", *Yale Law School Legal Scholarship Repository* 1989, 93. S. BAKER en K.D. KRAWIEC, "The Penalty Default Canon", *The George Washington Law Review* 2004, afl. 4, 663.
[941] F.G. POMAR, "The Harmonization of Contract Law through European Rules: a Law and Economics Perspective", *Revista Para El Analisis Del Derecho* 2008, 17.
[942] Recommendation, opinion or best practices or Model Laws (no binding force, advisory role).
[943] In relation to England, see for example *Halifax Financial Services v. Intuitive Systems Limited* [1999] 1 All ER 303; *Cable & Wireless v. IBM* [2002] EWHC 2059, *Holloway v. Chancery Mead Limited* [2007] EWHC 2495, and *Sulamerica CIA Nacional de Seguros v. Enesa* [2012] EWCA Civ 638. See B. MARSH *et al.*, "England and Wales" in N. ALEXANDER en S. WALSH (eds.), *EU Mediation Law Handbook, Global Trends in Dispute Resolution* 7, Alphen aan den Rijn, Kluwer Law Internatioanl, 2017, 220. For Australia see K. SIEBEL en R. HOUGH, "Uncertainty in Dispute Resolution Clauses", *DLA Piper Asia Pacific Updates* 2013. *Annapolis Professioanl Firefighters Loc*al *1929, IAFF, AFL-CIO v. City of Annapolis*, 100 Md. App. 714, 642 A.2d 889, 895 (1994). "Another strategic issue is whether the mediation clause should provide for the selection of a mediator in the event that the parties cannot agree once a dispute arises. In a Maryland case, the parties designated a public agency to select the mediator. At the time of the dispute, the designated public agency was defunct. The court of appeals indicated that a court had equitable power to designate a mediator if requested by a party. The court referenced a similar practice for selection of an arbitrator upon failure of method set out in the arbitration clause" (S.R. COLE *et al.*, *Mediation: Law, Policy & Practice*, US, Thomson Reuters, 2017, 197.).
[944] *Leicester Circuits Ltd v Coates Brothers Plc* [2003] EWCA Civ 333 Longmore LJ; *Roundstone Nurseries Ltd v Stephenson Holdings Ltd.* [2002] EWHC 1431 (TCC).
[945] EHC (Chancery Division), *Wah (Aka Alan Tang) & Anor v Grant Thornton International Ltd. and others*, [2012] EWHC 3198 (Ch), [2012] CN 63, Judgement of 14 November 2012, para. 57.

ending,[946] the obligation to attend the mechanism,[947] and the obligation to refrain from initiation and participating in binding mechanisms.[948] Reflecting on the FAA and the findings of the SCA, the content of the proposed rules can be crystalized. In addition to repeating the need for enforcement of the parties' ADR agreement, default rules should clarify how the following aspects ought to be addressed:[949]

i. Behavioural obligations;
ii. Selection and payment of the neutral;
iii. Length of mechanism;
iv. Attendance obligations;
v. Disclosure and confidentiality/privilege;
vi. Limitation periods (paused or extended);
vii. The availability and type of interim relief;

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[946] *Allied World Surplus Lines Insurance Company v. Blue Cross and Blue Shield of South Carolina* (August 3 2017) US District Court for the District of South Carolina.
[947] *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55
[948] For the US see *HIM Portland, LLC v Devito Builders, Inc.*, 317 F.3d 41, (1st Cir 2003), para. 44; *MB America, Inc. v. Alaska Pac. Leasing*, 132 Nev. Adv. Op. 8 (Feb. 4, 2016) (where the Nevada Supreme Court enforced a contract's mediation provision as a condition precedent to litigation). For Singapore see HCS, *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2012] SGHC 226**,** Judgement of 12 November 2012, para. 191. See also ICC Case No. 12379; ICC Case No. 9812. In the Netherlands, the agreement to mediate is classified as contractual in nature (A.a.K. VAN HOEK, Joris, "The Netherlands 2014" in C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 452.). For jurisdictional qualification see EEHC (Queen's Bench Division), *Emirate Trading Agency Llc v Prime Mineral Exports Private Ltd* [2014] EWHC 014 (Comm), Judgement of 1 July 2014. Swiss Supreme Court, *case no. 4A-124/2014*, Judgement of 7 July 2014; France Cour de Cassation, 2e Ch. Civ, (*Société Polyclinique des Fleurs v. Peyrin*), Judgement of 6 July 2000; SCA, *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55, Judgement of 18 October 2013.Qualification as a matter of admissibility: BGH, no. I ZB 1/15, Judgement of 9 August 2016 & no. I ZB 50/15, Judgements of 14 January 2016; Swiss Federal Supreme Court, *X. GmbH (précédemment V. GmbH) v. Y. Sàrl, lère Cour de droit civil*, 4A_46/2011, 29 ASA Bull. 6443, 651 et seq. (2011), Judgement of 16 May 2011. USA condition precedent to litigation (*MB America, Inc. v. Alaska Pac. Leasing*, 132 Nev. Adv. Op. 8 (Feb. 4, 2016)), the Nevada Supreme Court enforced a contract's mediation provision as a condition precedent to litigation. *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 336 (7th Cir. 1987) 335-36 ("The mediation clause here states that it is a condition precedent to any litigation. . . . Because the mediation clause demands strict compliance with its requirement... before the parties can litigate, plaintiffs' substantial performance arguments must fail.") and *Tattoo Art, Inc. v. TAT International, LLC*, 711 F.Supp.2d 645, 651 (E.D.Va. 2010). See the decision of the BGH dated November 18, 1998 (VIII ZR 344/97), cons 3b. The decision is reproduced in Neue Juristische Wochenzeitschrift 1999, 647, Zeitschrift für Wirtschafts – und Bankrecht 1999, 651and Der Betrieb 1999, 215. The decision confirmed the decision of the Bundesgerichof dated 23 November 1983 (VIIII ZR 197/82) which is reproduced in Neue Juristische Wochenzeitschrift 1984 at 669. Voser welcomes this classification of mediation clauses by German Federal Courts (N. VOSER, "Multi-tier dispute resolution clauses: consequence of non-compliance with pre-arbitral procedural requirements", *Thomas Reuters* 2011, 9.). Nevertheless, some say they are exclusively procedural in nature (B Hess Rechtsgrundlagen Mediation in F Haft K von Schlieffen (eds) *Handbuch Mediation, Verhandlungstechnik, Strategien, Einsatzgebiete*, 2nd edn (CH Beck, 2010) 1062ff). The most widely accepted classification of ADR clauses places them in the fora of contract law "as contracts *sui generis* for the performance for a continuing obligation with an atypical subject-matter") N. ALEXANDER, *International and Comparative Mediation: Legal Perspectives*, New York, Kluwer Law International, 2009, 179. See § 311(1) German Civil Code and Eidenmüller, Vertrags- und Verfahrensrecht in der Wirstschaftsmediation (Köln: Dr Otto Schmidt 2001) 23.
[949] Also see Chapter II.

viii. Procedure to commence and terminate the proceedings;

ix. Language and location of the proceedings; and

x. Remedies for the failure to conduct ADR.

80. Regarding behavioural obligations (point i), the SCA (discussed in Chapter II) showed that the most reoccurring ones were, to "actively participate", "cooperate", "exchange information", "act expeditiously", "make a serious attempt", and "to attempt to settle". Reflecting on the SCA and factors that make an ADR attempt successful,[950] it is advisable that default rules stipulate that the parties must genuinely attempt to settle their dispute, exchange the information required for a productive ADR session, and refrain from actions that impeded the ADR process. Here, we can learn from the experience in England and America, where the parties' counterproductive behaviour is sanctionable.

81. In England, the CPA does not explicitly address how a party must behave during an ADR procedure.[951] There are, however, clear instructions regarding how the parties should exchange information prior to litigation in the Practice Direction on Pre-Action Conduct.[952] Moreover, scholars agree that the unwilling party should be compelled to hear the other party's offer and/or the neutral to fulfil their obligation in the ADR agreement.[953] The Law Society of England and Wales in the Civil and Commercial Mediation Accreditation Scheme stipulates, "Each party must use its best endeavours to comply with reasonable requests made by the mediator to prompt the efficient and expeditious resolution of the disputes. If either party does not do so, the mediator may terminate the mediation."[954]

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[950] J. BERCOVITCH, *Theory and Practice of International Mediation: Selected Essays*, New York, Routledge, 2011, 43. R. FISHER en W. URY, *Getting to Yes: Negotiating Agreement Without Giving In*, New York, Houghton Mifflin Company, 1991. J. BERCOVITCH, *Resolving International Conflicts: The Theory and Practice of Mediation*, London, Lynne Rienner Publishers, 1996, 25. G. MILLER, *Building and Sustaining a Successful ADR Practice*, 2011.

[951] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 292. J.M. SCHERPE en B. MARTEN, "Mediation in England and Wales: Regulation and Practice" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 406.

[952] M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 292. Practice Direction on Pre-Action Conduct (2014), Annex A, Rule 6.1

[953] I. BACH en U.P. GRUBER, "Germany" in C. ESPLUGUES et al. (eds.), *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, 2 dln., 1, Cambridge Intersentia Publishing Ltd., 2013, 165-166.

[954] Annex C, c. 10.

82. In *Halsey v. Milton*, the English Court of Appeal set out a test to determine whether the refusal to mediate was reasonable.[955] Unreasonable behaviour includes a refusal to mediate, a last minute withdrawal from a planned mediation, making an offer in an aggressive manner without a real intention to resolve the dispute, and not giving the other part enough time to prepare.[956] Bach and Gruber take a further step in relation to behaviour and argue that the unwilling party should be compelled to hear the other party's offer and/or the neutral to fulfil their obligation under the ADR agreement.[957]

83. Turning to the selection and payment of the neutral (point ii), the SCA found a common trend amongst the agreements analysed. The most common agreement was to have an ADR institution appoint the neutral if the parties fail to agree. Here, the default rules should give courts the power to appoint a neutral in absence of choice. This is already common practice in the field of court-annexed ADR. Moreover, the most common and fair approach to the payment of the neutral in a commercial ADR setting was to evenly split costs. The division is fair in a commercial context and reflects common practice in the other private dispute resolution mechanisms such as arbitration.[958]

84. Regarding the length of the mechanism (point iii), the SCA showed that the most common requirement was to attend at least one ADR session/meeting. In line with scholarly writing and jurisprudence, it is sensible to set "one ADR session" as the minimum ADR length.[959]

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[955] *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] 1 W.L.R. 3002, para. 16; S. SHIPMAN, "Alternative Dispute Resolution, the Threat of Adverse Costs, and the Right of Access to Court" in D. DWYER (ed.), *The Civil Procedure Rules Ten Years On*, Oxford, Oxford University Press, 2009, 342. In particular, in the determination of the repartition costs, the courts have, at times, deviated from the "loser pays" rule on the basis of the winning party's behaviour.

[956] *Leicester Circuits Ltd. v. Coates Bros. Plc.*, [2003] EWCA (Civ) 333 (Eng.) *Societe International de Telecommunications Aeronautiques S.C. v. The Wyatt Co.* (UK), [2002] EWHC 2401; *Earl of Malmesbury v Strutt & Parker* [2008] EWHC (QB) 424- High Court "a party who agrees to mediation but then causes the mediation to fail by reason of his unreasonable position in the mediation is in reality in the same position as party who unreasonably refuses to mediate."

[957] I. BACH en U.P. GRUBER, "Germany" in C. ESPLUGUES et al. (eds.), *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, 2 dln., 1, Cambridge Intersentia Publishing Ltd., 2013, 165-166.

[958] X, *How much does arbitration cost, and who pays?*, 2019. However, also see national approaches on "loser pays" rules. R. MILLER en F. CROSS, *The Legal Environment of Business*, Mason, Cross Miller, 2009, 73. M.G. LAMM, "Who Pays Arbitration Fees? The Unaswered Question in Circuit City Stores, Inc. v. Adamas", *Campell Law Review* 2001, 93.

[959] I. BACH en U.P. GRUBER, "Germany" in C. ESPLUGUES et al. (eds.), *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, 2 dln., 1, Cambridge Intersentia Publishing Ltd., 2013, 166. *Leicester Circuits Ltd v Coates Brothers Plc* [2003] EWCA Civ 333 Longmore LJ; *Roundstone Nurseries Ltd v Stephenson Holdings Ltd.* [2002] EWHC 1431 (TCC). S. SIME *et al.*, *A Practical Approach To Alternative Dispute Resolution*, Oxford, Oxford University Press, 2011, 94.

By having a minimum, there is clarity regarding when the parties have met their ADR obligation. Furthermore, the proposed rules should set a time-frame for the completion of the one ADR session/meeting. It would be wrong for the framework to set a strict time-frame, as such a matter should reflect each state's varying statute of limitations. Nevertheless, a model time frame reflecting the 53 days average (i.e. 60 days) discussed in Chapter II, Section 2.11 would be advisable.

85. In requiring the parties to attend a minimum number of ADR sessions, the proposed default rules should moreover stipulate as mandatory the attendance of an individual with decision-making powers (point iv). Fruitful ADR can only take place if individuals with the power to settle (decision making authority) attend the ADR sessions.[960] The need to *personally* attend ADR sessions to satisfy an ADR obligation was confirmed in several cases and mediation related statutes.[961]

86. Turning to the obligations of confidentiality/privilege (point v), the default rules ought to ensure that these matters are respected during the ADR sessions.[962] Confidentiality is of importance at two levels: between the parties and neutral (inside) and between the process and the outside world (outside).[963] Various legislative acts, including the Mediation Directive, address the need to protect confidentiality of the ADR.[964]

87. Future default rules should also address limitation periods (point vi), requiring them to be paused or extended in order to protect the parties' rights. As Chapter II, Section 2.10 discussed, it is common for statutes to require that limitation periods to be paused/extended while parties attempt to settle their disputes.[965] Article 8 of the European Mediation

[960] G. FOLBERG, *Mediation: The Roles of Advocate and Neutral*, New York, Wolters Kluwer, 2016. X, *Mediation: Use Extreme Caution When Waiving Any Participant's Personal Appearance*, 2012.
[961] *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55; Florida, Rule 1.720(b) of the Civil Procedure; *Nick v. Morgan's Food of Missouri, Inc.* 70 F. 3d 590 (8th Cir. 2001)
[962] See Chapter II, Section 2.15 for more information on confidentiality
[963] See L.S. ONN, "Mediation", *SinfaporeLaw.org* 2015.
[964] Article 7 of the Mediation Directive; Australia s. 131 (1) Evidence Act 1995. See also M. KALLIPETIS, *Mediation Privilege and Confidentiality and the EU Directive*, Kluwer Law International, 2010, 183.
[965] Article 22(1) of the Civil Law Mediation Act; §203 of the German BGB specifically allows for the suspension of limitation periods in case of negotiations; and in this case, ADR is considered a form of negotiation. Likewise, the California International Arbitration and Conciliation Act provides for a stay of judicial and arbitral proceedings in case of voluntary ADR. This stay includes that the limitation periods including periods of prescription be paused (32 USA CCP, ss 1297.381 and 1297.382. Locator of law tolled until the tenth day following the termination of the ADR. E. VAN GINKEL, "Mediation under National Law: United States of America", *Mediation Committe Newsletter* 2005, 45.)

Directive already requires Member States to "ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process."

88. It is important that while the parties attempt ADR they feel at ease that their right to file a claim in courts or otherwise is not affected by the termination of limitation periods.[966] If parties fear the running of limitation periods while they attempt to come to a settlement, they will be more hesitant to the choice. Thus, it is important to provide for the suspension or extension of limitation/prescription periods if the parties opt to engage in private ADR (as opposed to court ordered ADR).[967] An issue that remains is that when the parties dispute the enforceability of their ADR agreement, limitation periods relating to the main commercial dispute are not suspended. Here, the default rules need to address the effect of disputes relating to the ADR agreement on limitation periods. Thereby, the parties cannot force limitation periods to end (run out) by disputing the enforceability of ADR agreements.

89. Related is another of the parties' rights that needs to be addressed in the default rules, namely the right to access interim measures while ADR is ongoing (point vii). The parties should remain free to seek interim relief to preserve their rights and the status quo or to prevent the other party from continuing the breach pending a resolution of the dispute.

90. Mimicking the proposed harmonised rules, the default rules should also list a number of ways to commence and terminate the ADR mechanism (point viii). The framework for the ADR agreement should reflect on the findings in Chapter II, Section 2.5 listing "invitation to conduct ADR", "notice of ADR", and "request/application for ADR" as potential ways to commence ADR. Furthermore, it would be advisable for the framework to suggest a time limit within which a party must react to the initiation of ADR. This time limit would allow the party to prove that the other party has failed to engage in ADR within the given period. The exact number of days for this can be set by each jurisdiction and can reflect the SCA finding of 30 days. While it is rare to regulate the ADR proceedings, Austria, a proponent

[966] This is supported by K.J. HOPT en F. STEFFEK, "Mediation: Comparison of Laws. Regulatory Models, Fundamental Issues" in K.J. HOPT en F. STEFFEK (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 34.
[967] K.J. HOPT en F. STEFFEK, *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 36.

of regulating ADR, regulates the beginning and end of the mediation in instances where the parties use a registered mediator: "the beginning of the mediation is the agreement of the parties that the dispute shall be resolved by mediation. Mediation ends, when a party or the mediator refuses to continue the mediation, or when there is a final outcome of the mediation procedure."[968]

91. Turning to the termination of ADR, ideally all of the following should be listed in the future framework as markers of the end of the ADR: the execution of the settlement agreement; written or verbal declaration of the neutral or dispute resolution provider that the mechanism has ended; a declaration or "notice of declaration" by one or all of the parties; the lapsing of the time set for the ADR; and the conclusion of a written record of the final proposals of the parties and the neutral. As Chapter II, Section 2.16 discussed, there have been several instances where disagreements regarding whether the ADR tier had been fulfilled resulted in additional costs.[969]

92. Regarding the language of the ADR proceedings (point ix), it is important for the default rules to provide guidelines on the matter in absence of choice by the parties. In the international dispute resolution context, it is commonplace for the parties to speak difference languages. In addition, the neutral may also speak a different language. As Chapter II, Section 2.8 discussed, several ADR rules addressed the language of the proceedings. There were multiple approaches to selecting the language of the mechanism in absence of choice by the parties ranging from the neutral and dispute resolution provider having the power to decide in consultation with the parties,[970] to the language of the

[968] § 17 Abs. 1 ACMC. Other national mediation rules, such as the German Mediations Law, the English and Dutch mediation frameworks tend to be silent on how mediation is to be initiated.
[969] *Allied World Surplus Lines Insurance Company v. Blue Cross and Blue Shield of South Carolina*, (August 3 2017) US District Court for the District of South Carolina. Dispute is not ripe and thus dismissal is appropriate under Rule 12 (b)(1).
[970] ICC, "Model Mediation Clauses – Clause C". Retrieved via: https://iccwbo.org/dispute-resolution-services/mediation/mediation-clauses/, last visited on 07-04-2017; EUCON, "Mediationklausel (Variant emit Schiedsverfahren)", Retrieved via http://www.eucon-institut.de/mediation/mediationsklauseln/, last visited on 06-04-2017; IntegretieMediation, "Mediationskaluseln", Retrieved via http://www.in-mediation.eu/mediationsklauseln, last visited 06-04-2017; Survey respondent clause 10 – emailed 14-03-2017; SIMC, "SIMC Model Mediation Clause", retrieved via http://simc.com.sg/simc-mediation-clause/, last visited on 28-02-2017; Survey respondent clause 12 – emailed 14-03-2017; Survey respondent clause 14 – emailed 14-03-2017; Survey respondent clause 15 – emailed 14-03-2017; Survey respondent clause 18– emailed 14-03-2017; Survey respondent clause 27 – uploaded in questionnaire #10; Survey respondent clause 4 – emailed 14-03-2017; Survey respondent clause 27 – uploaded in questionnaire #365; VIAC, "Recommended Mediation Clause", Retrieved via http://www.viac.eu/en/mediation-en/mediation-clauses-en, last visited on 7-02-2017; Survey respondent clause 8 – emailed 14-03-2017.

agreement containing the mediation agreement,[971] to calling for a specific language (i.e. English, German) unless otherwise agreed.[972] Interestingly, the rules of the Mediation Center of Europe, of the Mediterranean and of the Middle East of the European Centre of Arbitration and Mediation were very detailed:

> Unless a single common language was utilized in the relationships between the parties to the contract, the Mediator may permit a party to use one of the languages used by the parties to communicate between themselves for the purposes of the contract. 9.3. If the applicant undertakes to pay and advances the costs of the translation, the use of a language different from those permitted above may be allowed by the Mediator provided that simultaneous translation occurs.[973]

93. Reflecting on the above, the fairest approach here is to look to the following connecting factors: the parties' common language (as in the language spoken by all of the parties), the language of the parties' ADR agreement, the language of the parties' correspondence, and the language of the venue of the ADR.[974] If one of the parties does not speak the language, there is a need for a professional interpreter, as successful ADR requires the parties to be able to communicate with one another and the neutral.

94. Moreover, it is important for the default rules to provide guidelines on the location of ADR proceedings (point ix) in absence of choice by the parties. Again, we can learn from the findings of the SCA. As Chapter II, Section 2.8 discussed, 63% ADR clauses and rules addressed the location of the proceedings. Of the agreements and ADR rules that prescribed a procedure to select the location of the mechanism, one approach stood out: the neutral/provider has power to set the location for the ADR.[975] It would be reasonable for

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[971] AAA, "Drafting Dispute Resolution Clauses –American arbitration association", Retrieved via: https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540, last visited on 06-04-2017, p. 16; ICDR; "pre-dispute mediation clause". Retrieved via https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestreleased, last visited on 17-04-2017; Survey respondent clause 22– emailed 14-03-2017; Survey respondent clause 39 – uploaded in questionnaire #279.

[972] Libralex; Sample Mediation Clause. Retrieved via: http://www.libralex.com/publications/sample-multi-tier-dispute-resolution, last visited on 10-04-2017; Live Mediation; Beispiel einer Mediationklausel. Retrieved via: http://www.live-mediation.com/2013/03/mediationsklausel/, last visited on 11-04-2017; Timothy M. Kaufmann, "Sample Dispute Resolution Clause". Retrieved via: Electronic copy available at: http://ssrn.com/abstract=2671799, last visited on 07-04-2017, p. 1-6.

[973] Article 9 on the Language of Proceedings.

[974] This is in line with the trend in arbitration. See R. CARROW en A. ALIBEKOVA (eds.), *International Arbitration and Mediation - From the Rofessional's Perspective*, USA, Yorkhill Law Publishing, 2007, 105.

[975] AAA, "Drafting Dispute Resolution Clauses –American arbitration association", Retrieved via: https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540, last visited on 06-04-2017, p. 18; ADC, "ADC

courts to also have power to set location of the proceedings by taking into account the parties' place of business and the selected location of the subsequent proceedings (i.e. the seat of arbitration) prior to the selection of the neutral.

95. Turning to the last heading of the default rules, namely remedies (point x), it is advisable that the rules prescribe the most appropriate remedies in absence of choice by the parties and with the limits of diverse national laws in mind. This is because, courts and tribunals continue to apply differing remedies, which creates uncertainty regarding the legal effect of a breach. It is important to remedy this uncertainty by having clear guidelines on the appropriate remedy to a breach. The Singapore Mediation Act is the only law amongst the jurisdictions analysed that is clear on remedies by prescribing for a stay of proceedings pending fulfilment of a mediation agreement.[976] The discussion in Chapter I, Section 3 is of extreme relevance in the formulating of a section on remedies in the proposed rules (see Chart 3).

Chart 3 – *Potential Remedies According to the Moment of Breach*

Moment of Breach	Potential Remedies
(i) A party is refusing to attend ADR, but has not initiated court or arbitral proceedings.	Specific performance plus the threat of damages and adverse cost orders (Codes Comply, Restore, Repair)
(ii) A party has entered into the ADR process, but is not actively participating, or is intentionally harming settlement efforts (i.e. refusing to respond to settlement offers).	Specific performance plus damages and adverse cost orders (Codes Comply, Restore, Repair)
(iii) A party has ignored the ADR agreement and taken the substantive dispute to a court or a tribunal.	Stays or injunctions depending on the jurisdiction seized and adverse cost orders (Codes Comply, Deter)

Dispute Resolution Sample Clauses", Retrieved via https://disputescentre.com.au/wp-content/uploads/2015/02/ADC-Dispute-Resolution-Sample-Clauses-2015.pdf, last visited on 9-02-2017; Scanlon, Kathleen M., *Drafting Dispute Resolution Clauses: Better Solutions for Business.* New York, International Institute for Conflict Prevention & Resolution, 2006, p. 155-156; Article 20.4 Nederland ICT Terms and Conditions 2014; CIDRA, "Sample Mediation Clause", Retrieved via: http://www.cidra.org/samplemediation, last visited on 06-04-2017; Construction Dispute Resolution Services; Binding Mediation. Retrieved via: http://www.constructiondisputes-cdrs.com/suggested_contract_language_for.htm; last visited on 10-04-2017; EUCON, "Mediationklausel (Variant emit Schiedsverfahren)", Retrieved via http://www.eucon-institut.de/mediation/mediationsklauseln/, last visited on 06-04-2017; ICC, "Model Mediation Clauses – Clause C". Retrieved via: https://iccwbo.org/dispute-resolution-services/mediation/mediation-clauses/, last visited on 07-04-2017; IntegretieMediation, "Mediationskaluseln", Retrieved via http://www.in-mediation.eu/mediationsklauseln, last visited 06-04-2017; J AMS, "Clause Providing for Mediation in Advance of Arbitration". Retrieved via: https://www.jamsadr.com/international-clause-workbook/, last visited on 07-04-2017; erman Hellenic Chamber of Commerce, "Mediation Clause of the German-Hellenic Chamber of Industry and Commerce", retrieved via http://www.oddee.gr/en/ipodeigmata-ritron-3/2-uncategorised-gr/154-mediation-clause-of-the-german-hellenic-chamber-of-industry-and-commerce.html, last visited on 13-09-2017; SIMC, "SIMC Model Mediation Clause", retrieved via http://simc.com.sg/simc-mediation-clause/, last visited on 28-02-2017

[976] Article 8 of the Singapore Mediation Act.

96. The proposed default rules should be resorted to when the parties' fail to draft sufficiently certain agreements – a likely event when considering modern contracting practices. In addition to providing the benefit of gap fillers, default rules maintain the flexibility of the ADR process. This is because, the parties remain free to modify these rules to fit their needs. Since potential issues attached to over-legalization are mitigated, the flexibility of ADR is protected.[977]

4. Supplements to the Framework: Amendments and Standard Form Contracts

97. In the context of commercial disputes, a framework regarding the validity and enforcement of the ADR agreement improves certainty. This section proposes two supplements to the proposed framework in order to aid in the creation of certainty for the status of the ADR agreement. In particular, two measures are suggested. The first suggestion is to adjust the framework for arbitration to include rules addressing the ADR agreement (Section 4.1). This suggestion reflects the findings of the SCA that ADR agreements are typically a tier in a MDR clause ending with arbitration (see Chapter II).[978] Secondly, I recommend that ADR providers in selected states with similar ADR models join forces to create an ADR agreement and procedure (Section 4.2).

4.1.Amending the Arbitration Framework

98. When it comes to resolving commercial disputes, the trend to conclude MDR clauses has resulted in unwanted disputes regarding the mandatory nature of the ADR tier. As Chapter I demonstrated, there is inconsistency amongst national courts and arbitral tribunals resulting in increased costs and inefficiency for the parties. The approach of national courts to MDR clauses calling for ADR prior to arbitration, at times, seems to contradict that of arbitral tribunals.[979] There have been several cases in which, the parties have challenged a tribunal's decision to accept jurisdiction or the claim despite a disputed obligation to

[977] Flexibility is one of the key features of ADR. See P. BROOKER, *Mediation Law: Journey through Institutionalism to Juridification*, New York, Routledge, 2013, 247. A. ROBERTSON, "The Limits of Interpretation in the Law of Contract", *Victoria University of Wellington Law Review* 2016, 201.
[978] Chapter II, Section 2.2.
[979] Chapter I, Section 3.1.

conduct ADR.[980] Thus far, disputes relating to ADR tiers have resulted in courts annulling arbitral awards,[981] refusing to compel arbitration,[982] withdrawing the tribunal's jurisdiction, and declining the admissibility of disputes for arbitration.[983] Here the question becomes: can courts refuse to enforce arbitral clauses and awards that fall under the protection of the New York Convention?

99. Article II(1) of the New York Convention requires contracting states to recognize a written agreement to arbitrate. In addition, according to Article III of the New York Convention, contracting states shall recognize and enforce valid arbitral awards. However, both Article II and III contain exceptions to the obligation to enforce arbitration agreements. The valid grounds for a refusal to enforce an arbitration agreement are when the agreement is null and void, inoperative, or incapable of being performed.[984] Article V of the New York Convention lists the valid grounds to refuse enforcement of an arbitral award. Of relevance is the exception of lack of jurisdiction and public policy.[985] Most normative models reflecting the UNCITRAL Model Law on Arbitration and the New York Convention enable the setting aside of an arbitral award on the basis of a lack of jurisdiction of the tribunal.[986] Moreover, according to Article V of the New York Convention, if the constitution of the

[980] For an overview of cases, see M. SALEHIJAM, "A Call for a Harmonized Approach to Agreements to Mediate", *Yearbook on International Arbitration and ADR* 2018.
[981] J.D. FILE, "United States: multi-step dispute resolution clauses", *IBA Legal Practice Division: Mediation Commitee Newsletter* 2007, 34. *DeValk Lincoln Mercury Inc v Ford Motor Co,* 811 F 2d 326, 336 (7th Circ 1987). §67 of the English Arbitration Act 1966; Singapore Arbitration Act §21(9) and 21A(4) stipulate that a court may review the arbitral tribunal's award on jurisdiction.
[982] In the First Circuit Court of Appeals case of *HIM Portland* , the parties had not attempted mediation and when the other party filed suit and moved to compel arbitration, the defendant resisted. The court held that, "[u]nder the plain language of the contract, the arbitration provision is not triggered until one of the parties requests mediation' since neither party attempted mediation – neither can compel to submit to arbitration (*HIM Portland LLC v DeVito Builders Inc,* 317 F 3d 41, 42 (1st Cir 2003), para. 13). Moreover in the Eleventh Circuit Court of Appeals case of *Kemiron*, the case involved the following dispute resolution clause "[i]n the event that a dispute cannot be settled between parties, the matter shall be mediated within fifteen (15) days after receipt of notice by either party that the other party request the mediation of a dispute pursuant to this paragraph." "In the event that the dispute cannot be settled through mediation, the parties shall submit the matter to arbitration within ten (10) days after receipt of notice by either party." When the dispute arose, the defendant attempted to stay the action pending arbitration. Since neither party had met the notice requirements for mediation, the court said "the arbitration provision has not been activated" and thus the suit should not be stayed (*Kemiron Atlantic, Inc v Aguakem Int'l Inc,* 290 F 3d 1287, 1289 (11th Cir 2002) at para.1291). See also J.D. FILE, "United States: multi-step dispute resolution clauses", *IBA Legal Practice Division: Mediation Commitee Newsletter* 2007, 33; S.R. COLE *et al.*, *Mediation: Law, Policy & Practice,* US, Thomson Reuters, 2017, 180.
[983] See Chapter II.
[984] Article II (3) of the New York Convention.
[985] Article V(2)(b) of the New York Convention.
[986] UNCITRAL Model Law Article 34(2)(a)(i)&(iii)&(iv) and Article 36(1)(a)(i)&(iii); European Convention On International Commercial Arbitration, Article IX; E. KAJKOWSKA, "Enforceability of Multi-Step Dispute Resolution Clauses An Overview of Selected European Jurisdictions" in L. CADIET et al. (eds.), *Procedural Science at the Crossroads of Different Generations,* 4, Luxembourg, Nomos Verlagsges, 2015, 164.

tribunal was contrary to the arbitration agreement, the award may be set aside.[987] In theory, an arbitral award that ignores a valid ADR agreement can be contrary to both the dispute resolution clause and to procedural public policy.[988] Therefore, if an ADR tier is ignored, the arbitration agreement is not activated.[989] However, this exception is not clearly stipulated in the framework for arbitration.

100. Furthermore, arbitral tribunals have shown a tendency to treat pre-conditions to arbitration as non-mandatory or have wrongly assessed the parties' compliance with the binding nature of these agreements.[990] This violates the principle of *pacta sunt servanda*.[991] Parties who conclude an ADR agreement as a precondition to arbitration do so precisely because they want to have an obligation to attempt amicable settlement and thereby making a binding mechanism a last resort.[992] It is, therefore, essential that courts can review the determination of arbitrators regarding ADR agreements to safeguard the parties' agreement.[993] In these

[987] Article V(2)(a)(iv). See also J.M. GRAVES en J.F. MORRISSEY, "Arbitration as a Final Award: Challenges and Enforcement", *Touro Law Scholarly Works* 2008, 467.
[988] Article V(2)(b) refers to public policy without distinguishing between substantive and procedural public policy. Substantive public policy involves matters such as the merits of a decision (abuse of rights, discrimination, expropriate, abuse of principles such as *pacta sunt servanda* and good faith), while procedural public policy involves matters such as the procedure in which the award was rendered (such as particle neutrals, fraud, and breach of natural justice). Article V(1) must be invoked by a party seeking refusal to enforce. See also M. INGLOT, "Separability Of Or Overlap Between Public Policy And Procedural Grounds For Refusal Of Enforcement Of Foreign Arbitral Awards Under The New York Convention", *Polish Review of International and European Law* 2015, afl. 1, 809.
[989] M. SALEHIJAM, "Chapter 3: The Role of the New York Convention in Remedying the Pitfalls of Multi-Tiered Dispute Resolution Clauses" in K.F. GÓMEZ en A.M.L. RODRÍGUEZ (eds.), *60 Years of the New York Convntion: Key Issues and Future Challenges*, Spain, Wolter Kluwer, 2019.
[990] *Empresa Nacional de Telecommunicaciones (Telecon en Liquidacion) (Colombia) v. IBM de Solombia S.A. (Colombia)* – Decision of ICC Tribunal 17 November 2004 (the tribunal found that a conciliation tier block access to administrative justice as established in Article 229 of the Colombian Constitution. However, this is a narrow and formalist view, as conciliation provides an additional avenue for access to justice). See e.g. ICC Case No. 1140 Final Award 2010 XXXVII YB Commm Arb 32 (an agreement to pursue ADR (other than arbitration) is a 'primary expression of intention' and' should not be applied to oblige the parties to engage in fruitless negotiations or to delay an orderly resolution of the disputes'). *Emirate*, where the party who sought to enforce the agreement faced delay and expenses as it had to argue for enforceability in front of the court in light of the tribunal finding that it had jurisdiction (EHC (Queen's Bench Division), *Emirate Trading Agency Llc v Prime Mineral Exports Private Ltd* [2014] EWHC 014 (Comm), Judgement of 1 July 2014).
[991] An agreement must be kept (J. LEE, "Mediation Clauses at the Crossroads", *Singapore Journal of Legal Studies* 2001, 93. Further see Section IV(B)).
[992] "By the 20th century, the problems of arbitration were manifold: Arbitrators were accused of being frightened of appeals if they departed from court-like procedures; lawyers were blamed for 'hijacking' the process and 'seeking to bind [non-legal advisors] with legal science" (P. BROOKER, *Mediation Law: Journey through Institutionalism to Juridification*, New York, Routledge, 2013, 19.). See Also P.K. BERGER, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*, 2, Alphen aan Den Rijn, Kluwer Law International, 2015, 47.
[993] This argument stands contrary to E. KAJKOWSKA, "Enforceability of Multi-Step Dispute Resolution Clauses An Overview of Selected European Jurisdictions" in L. CADIET et al. (eds.), *Procedural Science at the Crossroads of Different Generations*, 4, Luxembourg, Nomos Verlagsges, 2015, 173. See also M. PRYLES, "Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration* 2001, afl. 2, 159.

cases, the party wishing to enforce a valid agreement faced delay and additional expenses, as they had to seek the assistance of national courts.[994] The potential for discrepancy amongst courts and arbitral tribunals not only endangers the arbitration process (as awards might be annulled and jurisdiction retracted), but also the image of ADR as an efficient and consensual way to resolve disputes. It is moreover important to note that most of the perceived benefits attached to arbitration do not have a factual basis. Arbitration is a costly and time-consuming process that increasingly mimics court litigation in terms of evidence, submissions, disclose, witness statements, and expert opinions.[995]

101. Despite the clear interplay of arbitration and ADR, the laws on arbitration and ADR do not address the relationship between the two.[996] In particular, within the context of MDR clauses, answers to the question of whether Article II(1) of the New York Convention applies to the whole clause are inconsistent.[997] In my opinion, it is legally correct to treat ADR agreements contained in MDR clauses as separable from the preceding and proceeding tiers, including the arbitration tier.[998]

102. The Australian case of *Elizabeth Bay Developments*[999] demonstrated the risk of treating tiers in MDR clauses as an integrated unit. In the case, the defendant treated the MDR clause as

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[994] In case of pre-arbitral procedural requirements, various US courts have held that the arbitrator(s) have the final say regarding whether there requirements are fulfilled (See *Dialysis Access Ctr, LLC v RMS Lifeline, Inc,* 638 F3d 367, 383 (1st Cir 2011); *Howsam v Dean Witter* 537, US 79 (2002)).

[995] Despite litigation's downward trend, discontent with arbitration has never been more widespread" (B.A. PAPPAS, "Med-Arb and the Legalization of Alternative Dispute Resolution", *Harvard Negotiation Law Review* 2015, 161.). See also R.N. DOBBINGS, "The Layered Dispute Resolution Clause: from Boilerplate to Business Opportunity", *Hasting Business Law Journal* 2005, afl. 1, 174.

[996] J.M. SCHERPE en B. MARTEN, "Mediation in England and Wales: Regulation and Practice" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 375.

[997] "[…] that multi-tier dispute resolution clause is not an agreement in writing under which the parties have undertaken to submit to arbitration all or any differences which have arisen between them, but rather an agreement providing for the resolution of disputes by a procedure other than arbitration, with the possibility of arbitration if the dispute is not resolved through the earlier procedures' (M. PRYLES, "Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration* 2001, afl. 2, 161.). See also *Heartronics Corporation v EPI Life Pte Ltd and Others* (Sing. High Ct. 2017) SGHCR 17.

[998] Nevertheless, "under English law in cases of the plea of *non est factum*, fraud or duress it may be that both the substantive contract and the jurisdiction agreement are simultaneously impeached. As with arbitration agreements, where illegality is alleged, the nature of the illegality needs to be considered and whether it directly impeaches the jurisdiction agreement" (M. AHMED, *The Nature and Enforcement of Choice of Court Agreements: A Comparative Study*, Oxford, Hart Publishing, 2017, 39.). See also NSW Court of Appeals, *United Group Rail Service Ltd v Rail Corporation New South Wales*, Judgement of 3 July 2009, para. 89.

[999] *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*, unreported, 28 March 1995, Supreme Court of NSW, Commercial Division, Construction List, Giles J - "In this case the court analysed a tiered dispute resolution clause contained in a joint venture contract concluded between two parties. The contract contained a mediation clause requiring administration of the dispute through the ACDC, followed by arbitration in accordance with the Arbitration Rules of the ACDC. The clause referred to a mediation appointment agreement

one agreement, assuming that it was sufficient to request a stay of proceedings to commence mediation in order to enforce the entire dispute resolution clauses that also included an arbitration tier. As the party never requested the enforcement of the arbitration tier, Giles J only addressed the request to enforce the mediation tier. He found that the mediation tier was too uncertain to have a binding force and thus asserted jurisdiction, which left the arbitration clause in the contract unenforced.[1000] This is in line with my findings in the SCA, where one agreement specifically pointed out this separation.[1001]

103. In order to signal to arbitral tribunals that not enforcing ADR agreements would have adverse effects on the arbitration and the future award, the framework for arbitration should address the effect of ADR tiers on arbitration. This new approach would have a twofold positive effect. Primarily, it would ensure that the inclusion of an ADR tier in a MDR clause does not endanger the parties' selected dispute resolution process. Secondly, it would provide clarity regarding how arbitral tribunals and courts must respond when faced with a party wishing to enforce a mediation tier. Accordingly, this section assesses whether the main components of a framework for arbitration, namely the New York Convention and the Model Law on Arbitration, can address the effect of ADR tiers on subsequent arbitration. To better comprehend the nature of this incorporation, it is important to understand the relevant history and provisions of the Convention and the Model Law.

104. Since the Second World War, arbitration has benefitted from an extensive system of international treaties that promote its use.[1002] Today, the legal framework for arbitration is fundamentally different from the one for ADR, as the former has the protection of international law, namely through the New York Convention.[1003] The Convention with its

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which contained a stipulation committing the parties to 'attempt in good faith to negotiate towards achieving settlement of the dispute'. The relationship between the parties feel apart when Boral withdrew its participation in the project. In view of Boral's infringement of its contractual duties Elisabeth Bay terminated the contract and filed its claim for damages directly in court. Although the claimant's action stood in contravention of both the mediation and arbitration clause, the defendant confined his defence to claiming a breach of the first step of the dispute resolution process, namely the mediation procedure."

[1000] E. KAJKOWSKA, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, Oxford, Hart Publishing, 2017, 190-191.

[1001] "If any provision hereof is held to be invalid or unenforceable in whole or part, the validity and enforceability of the remainder of such provision and other provisions of this Agreement shall not be affected" (Survey respondent clause – emailed 14-03-2017).

[1002] NEWYORKCONVENTION.ORG, *Contracting States*, http://www.newyorkconvention.org/countries). S.I. STRONG, "Beyond International Commercial Arbitration? The Promise of International Commercial Mediation", *Washington University Journal of Law & Policy* 2014, 12.

[1003] H. EIDENMÜELLER en H. GROSERICHTER, "Alternative Dispute Resolution and Private International Law" 2015, 5.

159 signatories is arguably the most successful instrument of harmonisation in the field of private dispute resolution.[1004] Its scope is limited to foreign (non-domestic) arbitral agreements and awards. Article II(1) of the New York Convention requires contracting states to recognize a written agreement to arbitrate. Thereby, the Convention protects arbitration form competing national litigations.[1005]

105. As a result of the presumption in favour of the validity of the arbitral clause under the New York Convention, national courts must resolve issues in favour of arbitration. The inclusion of protection for the agreement to arbitrate, however, was not the primary aim of the drafters. They, instead, wanted to ensure easy recognition and enforcement of the arbitral award. The need to address the former "was only considered necessary as a means of fostering a legal environment that could and would generate enforceable arbitral awards."[1006] Interestingly, without the protection for the arbitration agreement, many arbitrations would not occur, as parties increasingly attempt to avoid or delay arbitration as part of their dispute resolution tactics.

106. The success of the Convention in promoting recourse to arbitration has not stopped calls for a 'new' New York Convention. Even Albert Jan van den Berg –one of the foremost authorities on the Convention– has acknowledged the shortcomings thereof.[1007] This work does not discuss the amendment debate; it does not argue for or against the overhauling of the Convention. Instead, it asks, *if* the New York Convention is to be amended, should one of its changes be that it addresses the effect of MDR clauses calling for ADR as a condition precedent to arbitration?

107. According to Article II(3) of the New York Convention, national courts may only invalidate arbitration agreements if they are null and void, inoperative, or incapable of being performed. Such stipulation has resulted in pro-enforcement policies in the national courts of the majority of signatory states. Today, arbitration agreements with the most elementary

[1004] S.I. STRONG, "Realizing Rationality: An Empirical Assessment of International Commercial Mediation ", *Washington & Lee Law Review* 2016, 4.
[1005] H. EIDENMÜELLER en H. GROSERICHTER, "Alternative Dispute Resolution and Private International Law" 2015, 5.
[1006] S.I. STRONG, "Beyond International Commercial Arbitration? The Promise of International Commercial Mediation", *Washington University Journal of Law & Policy* 2014, 39.
[1007] A.J. VAN DEN BERG, "Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards", *UNCITRAL* 2008.

wording are still enforced. This combined with the concept of *kompetenz-kompetenz* has, at times, resulted in arbitral tribunals accepting jurisdiction despite requests from the respondent to the contrary and without regard to judicial approaches to unfulfilled conditions precedent to arbitration. The failure of tribunals to correctly assess the parties' obligation to comply with the ADR agreement endangers the validity of the arbitration procedure and the subsequent award.[1008]

108. To protect arbitration and ADR, an amended New York Convention can consider non-compliance with an ADR tier as a barrier to the triggering of arbitration. The wording of Article II(3) of the New York Convention could be changed to the wording contained in Figure 1.

Figure 1 – *Amendment to the New York Convention*

Article II(3)
The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is: (a) null and void; (b) inoperative[;] (c) incapable of being performed **[; or (d) not yet entered into force due to an unfulfilled ADR tier that is a condition precedent**].

109. In accordance with the proposed wording, the Convention would establish a basis under which the tribunal would lack the right to hear the dispute as the arbitration agreement is not yet triggered. Therefore, tribunals would be discouraged from taking jurisdiction or admitting the dispute when the parties have failed to fulfil the mediation tier. In support of the enforcement of the ADR tiers, Prylers argues that, a MDR clause "is not an agreement in writing under which the parties have undertaken to submit to arbitration all or any differences which have arisen between them, but rather an agreement providing for the resolution of disputes by a procedure other than arbitration, with the possibility of arbitration if the dispute is not resolved through the earlier procedures."[1009]

110. Furthermore, Article V(1)(a) of the New York Convention should be amended to clearly stipulate that a lack of fulfilment of the ADR agreement can be grounds for the setting aside

[1008] See also *G. BORN en M. ŠĆEKIĆ, "Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'" in D.D. CARON et al. (eds.), Practising Virtue: Inside International Arbitration, Oxford Scholarship Online, 2015, 228.* American case of *White v Kampner*, 641 A2d 1381, 1382 (Conn. 1994); and Swiss case of 4A_628/2015 1 (1st Civ. L. Ct. 2016).

[1009] M. PRYLES, "Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration* 2001, afl. 2, 161.

of the award (Figure 2). This is as long as the party pleading for the annulment did not made substantive arguments on the commercial dispute in front of the tribunal. Thereby, the ADR agreement is protected at two stages: the start of the arbitration and the enforcement of the arbitral award.

Figure 2 – *Amendment to the New York Convention*

Article V(1)(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; **[or the said agreement was not yet entered into force due to an unfulfilled ADR tier that is a condition precedent;]** or […].

111. While it is unclear if there ever will be an amendment of the New York Convention, it is plausible to adjust the UNCITRAL Model Law on Arbitration. The 1985 Model law was amended in 2006. Therefore, there is proof that amendments are possible and practical. Article 8 of the Model Law requires courts to refer the parties to arbitration if a party requests so prior to providing arguments on the merit unless the agreement is 'null and void, inoperative or incapable of being performed.' Thereby, the Model Law repeats the presumption for the validity and enforcement of the arbitration agreement. Here, I suggest a similar wording for the amendment (Figure 2). Moreover, it would be sensible to amend Article 34(2)(b)(i) on "Application for setting aside as exclusive recourse against arbitral award" and Article 36(1)(a)(i) on "Grounds for refusing recognition or enforcement" to clearly stipulate that a lack of fulfilment of the ADR agreement can be grounds for the setting aside of the award (Figure 3).

Figure 3 – *Amendment to the Model Law on International Arbitration*

Article 8(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative [,] incapable of being performed **[, or not yet entered into force due to an unfulfilled ADR tier that is a condition precedent**].
Article 34(2)(b)(i) […] a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; **[or the said agreement was not yet entered into force due to an unfulfilled ADR tier that is a condition precedent;]** or
Article 36(1)(a)(i) […] a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; **[or the said**

agreement was not yet entered into force due to an unfulfilled ADR tier that is a condition precedent;] or

112. The above stipulation emphasizes the need to enforce a valid ADR tier; however, it does not provide clear guidelines to courts or tribunals to assess the validity of such agreements. Here, the default rules of the above-discussed framework would provide guidelines that tribunals and courts can rely on to assess the validity of ADR tiers (see Section 2). The main conclusion drawn from the above discussion is that while in theory the *new* York Convention should address the effect of ADR tiers, the amendment thereof seems unlikely in the near future. After all, there has been no amendment to the Convention since its entry into force in 1959. Therefore, a change of the existing approach through amending of the Model Law might be a more suitable avenue. Section 5 will further discuss the amending of the framework for arbitration to address the ADR agreement.

4.2.Recognition of Standard Contracts

113. The introduction to this chapter mentioned the utility of standard contracts in the creation of certainty. Standard form contracts and rules employ standardized provisions, otherwise known as "boilerplate contracts", "contracts of adhesion", and "take it or leave it contracts". Standard form contracts are "economy's self-made law."[1010] Through standard form contracts and rules, private parties and dispute resolution providers can push for harmonisation. These contracts influence the activity of contracting and reduce transaction costs.[1011]

114. The process of standardization provides advantages, as it reduces the need to negotiate a new contract for every transaction, thereby it can ensure that the parties' agreement is effective and not pathological. Moreover, standardization can provide internationally recognized solutions to the parties' specific issues.[1012] Adversely, standardized contracts limit choice and may reduce freedom of contract. [1013] Furthermore, such contracts may

[1010] In 1933, Hans Grossmann-Doerth referred to standard contracts as "economy's self-made law" "*Das selbstgeschaffene Recht der Wirtschaft*" (See G.-P. CALLIESS, "Law, Transnational", *Osgood Hall Law School of York University* 2010, 4.)
[1011] M.R. PATTERSON, "Standardization of Standard-From Contracts: Competition and Contract Implications", *William and Mary Law Review* 2010, afl. 2, 327.
[1012] UNCITRAL, "A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law" 2013, 18.
[1013] F. CAFAGGI, "Self-Regulation in European Contract Law" in H. COLLINS (ed.), *Standard Contract Terms in Europe: A Basis for an a Challenge to European A Basis for and a Challenge to European Contract Law*, The Netherlands, Alpehn aan den Rijn, 2008, 96.

decrease competition in the pursuit of innovative contractual clauses.[1014] However, my proposal is to provide for a standard clause and rules that the parties *may* opt to include in their commercial contracts.

115. States increasingly recognize the influence of standard form contracts. In England, for standard contracts to become known as recognized usage, they must be publicly known in the relevant market, be certain, reasonable, and in line with the law.[1015] Interestingly, Germany addresses the recognition of trade usage in §346 of the German Commercial Code: judges must consider usages known to a sector when they are normatively binding.[1016] Likewise, the UCC stipulates that, courts should look to usages of trade and other commercial standards and practices to interpret contracts and fill in potential gaps.[1017] In the international realm, the UN Convention on Contracts for the International Sale of Goods ('CISG')[1018] and the withdrawn Common European Sales Law also endorse the incorporation approach. In particular, the EU Commission and Parliament have identified standard terms and conditions as a means to further harmonise European Contract Law.[1019]

116. There is evidence that harmonisation through standard form contracts is a possibility. Today, rules of self-made laws are an important part of transnational law (*lex mercatoria*).[1020] To illustrate, International Federation of Consulting Engineers ('FIDIC') provides a range of standard conditions of contract for construction, plant, and design

[1014] F. CAFAGGI, "Self-Regulation in European Contract Law" in H. COLLINS (ed.), *Standard Contract Terms in Europe: A Basis for an a Challenge to European A Basis for and a Challenge to European Contract Law*, The Netherlands, Alpehn aan den Rijn, 2008, 96.
[1015] D. WIELSCH, "Global Law's Toolbox: How Standars Form Contracts" in H. EIDENMÜELLER (ed.), *Regulator Competition in Contract Law and Dispute Resolution*, Oxford, Hart Publishing, 2013, 77. *Cunliff Owen v. Teather & Greenwood* [1967], 3 ALL E.R. 561, 572-573: "For the practice to amount to a recognized usage, it must be certain, in the sense that the practice is clearly established; it must be notorious, in the sense that it is so well known in the market in which it is alleged to exist that those who conduct business in that market contract with the usage as an implied term, and it be reasonable."
[1016] *Handelsgesetzbuch.*
[1017] "Incorporation approach" see L. BERNSTEIN, "Trade Usage In The Courts: The Flawed Conceptual And Evidentiary Basis Of Article 2's Incorporation Strategy", *University of Chicago Law School Chicago Unbound* 2014, 1.
[1018] Article 9(2) of the CISG.
[1019] F. CAFAGGI, "Self-Regulation in European Contract Law" in H. COLLINS (ed.), *Standard Contract Terms in Europe: A Basis for an a Challenge to European A Basis for and a Challenge to European Contract Law*, The Netherlands, Alpehn aan den Rijn, 2008, 98. See also E. COMMISSION, "European Contract Law and the Revision of the Acquis: The Way Forward" 2004, 6-8.
[1020] Transnational law is the "institutional framework for cross-border interaction beyond the nation-states […] structured as a plurality of functionally specialized transnational law regimes, which in a pragmatic approach combine difference governance mechanisms of private […] and public […] origin" (F. MOSLEIN, "Regulatory Competition between Public and Private Rules" in H. EIDENMÜELLER (ed.), *Regulator Competition in Contract Law and Dispute Resolution*, Oxford, Hart Publishing, 2013, 147.).

industries. FIDIC standard contracts are widely used by many including the World Bank.[1021] These contracts also include standard dispute resolution systems.[1022] In the field of dispute resolution, standard rules include the UNCITRAL Arbitration Rules, which have been influential in several jurisdictions and are widely used.[1023]

117. Here, it is important to discuss the relevance of the UNCITRAL Conciliation Rules to the above proposal. While these Rules attempt to do something similar to the above, the UNCITRAL Rules are outdated and usage thereof is sparse. The rules date back to 1980 and have not been update or amended.[1024] Almost 40 years later, these rules can no longer fully serve the interests of modern parties and a newer version of such rules is currently under debate at UNCITRAL. The lack of resort to these rules reflects their origins. An international body, not dispute resolution providers, created these rules. The dispute resolution providers ultimately have no power in the final product as sovereign states deliberated the content thereof. Moreover, even if parties opts for these rules, UNCITRAL cannot administer the proceedings for them. Therefore, ADR providers should further forward their final clause and rules to UNCITRAL to act as inspiration to update the current Conciliation Rules.

118. As the introduction to this section proposed, it is advisable that ADR providers interested in producing transnationally enforceable ADR agreements collaborate across jurisdictions to create a standard form clause and basic ADR rules. This bottom-up approach avoids the complexities of rulemaking at regional and international organizations. Through a private collaboration to set standards, ADR providers can offer commercial parties with clauses and rules that are enforceable even outside of the territory of the dispute resolution provider. This can be of importance in the following scenario: Party A and Party B sign a commercial contract with a MDR clause calling for mediation in New York conducted by dispute resolution provider Z, failing which, for arbitration in London conducted by dispute resolution provider X. When a dispute arises, Party A initiates arbitration in London without first attempting mediation. Party B subsequently asks the courts of London to stay the

[1021] X, *Stadard From Contracts: FIDIC*, 2011.
[1022] Clause 20 and 21of FIDIC contracts.
[1023] The UNCITRAL Arbitration Rules have been widely used in both general commercial transactions and arbitrations between States and individuals (they were used as the basis for the Iran-US Claims Tribunal Rules and for a number of Bilateral Investment Treaties). The UNCITRAL Arbitration Rules have also influenced other rule systems (See X, *Guide to International Arbitration*, Latham & Watkins, 2017, 18.).
[1024] Although there are talks to update the Conciliation Rules.

arbitration pending mediation. However, the motion is denied on the basis that the mediation clause lacks sufficiently certainty. Here, if dispute resolution providers Z and X had collaborated on the content of the mediation clause and rules, there would be certainty regarding the enforceability of the clause in either jurisdiction.

119. Another reason supporting the need for dispute resolution providers to collaborate in the creation of standard ADR clauses is that efficiency increases when multiple providers agree thereon.[1025] Here, the consolidating method is relevant. Accordingly, a common core of case law/applicable standards are ascertained and expressed in a new rule.[1026] Following lessons learned from traditional cross-border rule making, this proposal has several action points for dispute resolution providers.

120. Firstly, the providers interested in establishing standard terms should identify other dispute resolution providers interested in ensuring that their model ADR agreements are enforceable in foreign jurisdictions. It is likely that the majority of dispute resolution providers situated in Europe with a focus on providing commercial dispute resolution services would be interested in ensuring the enforceability of their model clauses. Therefore, a simple call for collaboration will yield a diverse pool of providers.

121. Secondly, several locations should be predetermined as forums for discussion and collaboration. To ensure the enforceability of the model clause and rules reached, researchers and professionals from the relevant jurisdictions with knowledge of the validity and enforceability requirements of their state should also be invited to join the forum.[1027]

[1025] "Trade associations and similar entities often effect standardization of this kind through collective agreement on a standard contract, sometimes under the aegis of state actors. Multifirm contract standardization can provide not only the usual transaction-cost advantages of standard-form contracts, but also increased competition among firms, because a standard contract makes comparison among firms' offerings easier" (M.R. PATTERSON, "Standardization of Standard-From Contracts: Competition and Contract Implications", *William and Mary Law Review* 2010, afl. 2, 327.)

[1026] I. MCLEOD, *Legal Method*, London, Palgrave Macmillian, 2013, 297. C.M. SCHMITTHOFF, *Clive M. Schmitthoff's Selected Essays on International Trade Law*, London, Graham & Trotman, 1988, 200. R.F. HENSCHEL, "Methodological challenges of codifying or consolidating national and international sales law based on CISG Article 25" in M. ANDENA en C.B. ANDERSEN (eds.), *Theory and Practice of Harmonization*, Cheltenham, Edward Elgar, 2011, 199. i.e. ICC Incoterms and EGE standard contracts.

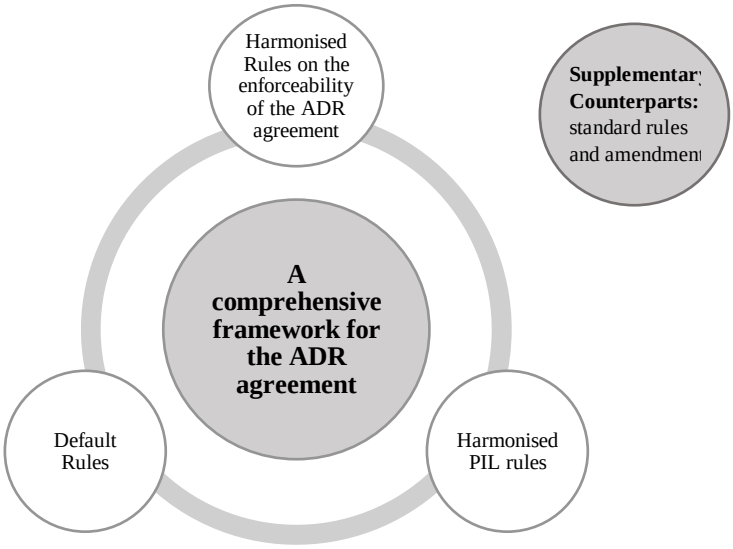
[1027] The SCA already provides a good database of numerous model clauses and procedural rules to have a minimum basis.

122. Lastly, before publishing the clause and rules for adoption, the forum should take the resulting product to the relevant judiciary to ask their opinion on enforceability.[1028] If the judiciary finds gaps in the propose rules or clause, there are needs for revisions. Once there is certainty regarding the enforceability of the clause and rules, the final step is to publish the *product* for wide usage. Here, there is a strong need for publicity.[1029]

5. The Way Forward: Drafting the Framework for the ADR Agreement

123. The sections above discussed the content of a comprehensive framework for the ADR agreement. Building on the above, this section will present a road map to the creation of a framework by discussing the potential path for the drafting of each aspect of the framework. To reiterate, a comprehensive framework for the ADR agreement is comprised of three essential components (harmonised rules on the enforcement of the ADR agreement, PIL rules, and default rules) and two supplementary counterparts (amendments to the arbitration framework and standard contracts) (see Figure 4).

Figure 4 - *Elements of a Comprehensive Framework*

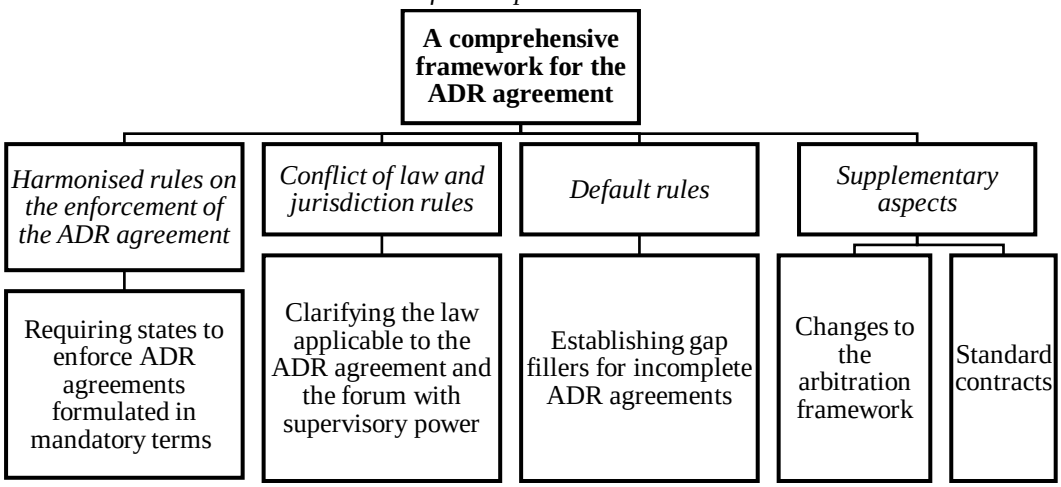


[1028] "The conventional way in which private standards become binding is for them to be recognized by the judiciary. When courts hear commercial disputes and are under a duty to fill in the meaning of general clauses they refer to informal customs or formally set standards defined by codes or guidelines. In both instances, any given contract is formed by private standardized practices that are not explicitly consented to by the concrete parties" (D. WIELSCH, "Global Law's Toolbox: How Standars Form Contracts" in H. EIDENMÜELLER (ed.), *Regulator Competition in Contract Law and Dispute Resolution*, Oxford, Hart Publishing, 2013, 77.).
[1029] However, there is a pitfall, when parties do not incorporate standard terms as they are and opt to make changes, the conditions for validity may no longer be met.

124. Chart 1 (below) provides a detailed overview of the proposed framework. To elaborate on the roadmap, this section will discuss the role of the EU, as well as the supplementary roles of UNCITRAL and dispute resolution providers. Moreover, this section will discuss the appropriate instrument for each aspect of the framework.

The starting point of this discussion is the argument that not every aspect of the framework needs to be presented in the same legal format (i.e. Convention, Regulation, Directive, etc.). This is because, each aspect of the framework contains unique content and therefore requires an individualistic approach. Through strategically selecting a legislative instrument, the needs of the commercial parties can be more rapidly satisfied.[1030] Potential regulators in the creation of the framework include the EU, UNCITRAL, and dispute resolution providers.

Chart 1 - *Elements of a Comprehensive Framework*



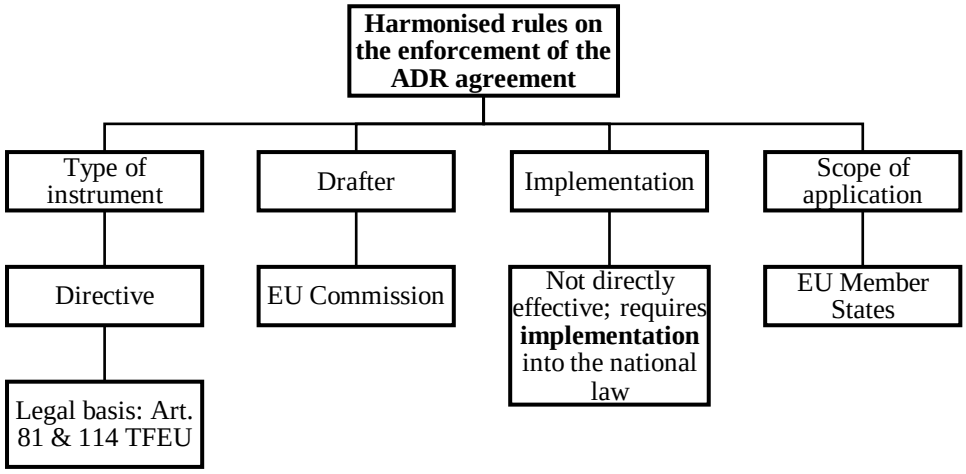
125. Turning to the first aspect of the framework –harmonised rules on the enforcement of the ADR agreement– I propose the aligning of the approach of EU Member States to that of ADR leaders, namely the US, Singapore and Australia. As abovementioned in Section 1.1, the EU has no general power to legislate, it must always base its proposals on a legal basis found in the TFEU. The EU has two potential legal basis of the proposed action, namely Articles 81 and 114 TFEU, both providing for the possibility of harmonisation. The EU has the power to create rules that are binding on its Member States in the area of judicial

[1030] Commercial parties including SMEs are the main stake holders of the proposed framework. This is often the case with legislative efforts in the commercial field. See N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulator Reform" in K.J. HOPT et al. (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 132.

cooperation in civil matters.[1031] This is essential, as it would create a harmonised approach to the ADR agreement in a relatively defined time-frame.[1032]

126. Here, the concrete suggestion to the EU is for it to consider amending the existing Mediation Directive to have it address the ADR agreement (Chart 2). This would enhance the current framework for ADR. However, it should be re-emphasized that in amending the Mediation Directive, the EU should not follow minimum harmonisation regarding the ADR agreement. Instead, it must establish a delicate balance between harmonisation based on best practices and the principles of subsidiarity and proportionality. Therefore, exceedingly detailed rules and loosely formulated ones that allow for too many differences must be avoided in order to ensure the meeting of the objectives set.[1033]

Chart 2 – *Creation of Harmonised Rules on Enforcement*



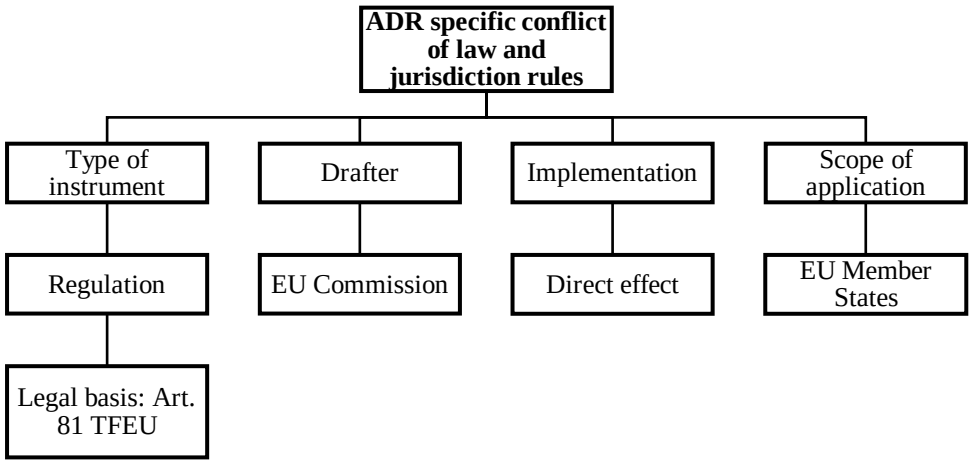
127. In addition to the EU taking the lead on the creation of harmonised rules on the ADR agreement, UNCITRAL ought to rethink the content of the Singapore Convention. As has been discussed throughout this work, there is a clear need that a Convention on mediation not only addresses settlement agreements, but also the ADR agreement. It seems that for now, the only avenue to amend the Convention are trough a formal amendment procedure as outlined in Article 15 or through the creation of a new Convention. Moreover, it is advisable that UNCITRAL considers amending its Model Law on Mediation to properly address the enforceability of ADR agreements.

[1031] Article 81 TFEU.
[1032] Given that the Member States would implement proposed Directive in a timely manner.
[1033] J. KIRALY, "Kiraly The Limits of Harmonizing Contract Law in the European Union" 12.

128. Section 2.2 further proposed the creation of ADR specific conflict of law and jurisdiction rules. Here again, the EU Commission can rely on Article 81 TFEU (Chart 3). Here, these rules should be contained in a Regulation similar to that of the Rome and Brussels Regulations.[1034] This provides the parties with clear rules on the law applicable to the ADR agreement and procedure including obligations, as well as rules on forum.

129. Harmonising the applicable rules and jurisdictions across the EU provides a leading example for non-EU countries. As Regulations are directly applicable, the parties and courts are immediately provided with certainty regarding the law applicable to ADR agreements. This is beneficial in light of the lengthy and, at times, difficult implementation process associated with Directives. In addition, the creation of PIL rules for the ADR agreement would be non-controversial, as it would reflect existing approaches in the Brussels and Rome Regulations.

Chart 3 – *Creation of Conflict of Law and Jurisdiction Rules*

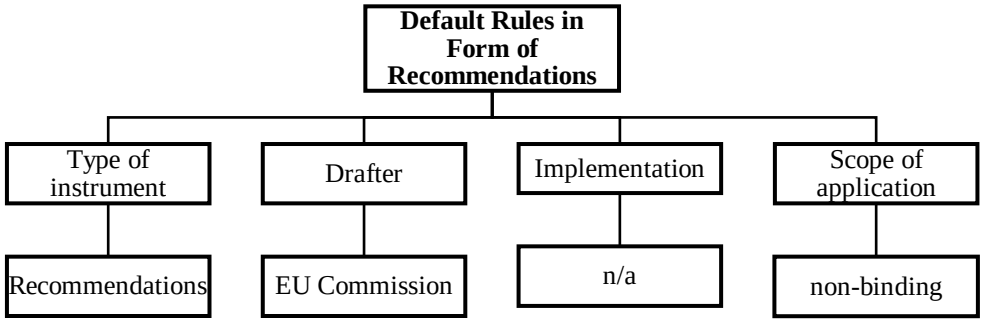


130. Turning to the last part of the proposed framework – default rules – the EU Commission should not rely on Directives or Regulations as the aim is not to harmonise the various national approaches to the internal workings of ADR. Instead, the Commission can provide Member States with Recommendations[1035] regarding best practices (Chart 4).

[1034] The legal basis of the Rome I Regulation: Article 61, 67, and 251 TFEU. The legal basis of the Brussels I recast Regulation: 67 and 81 TFEU.

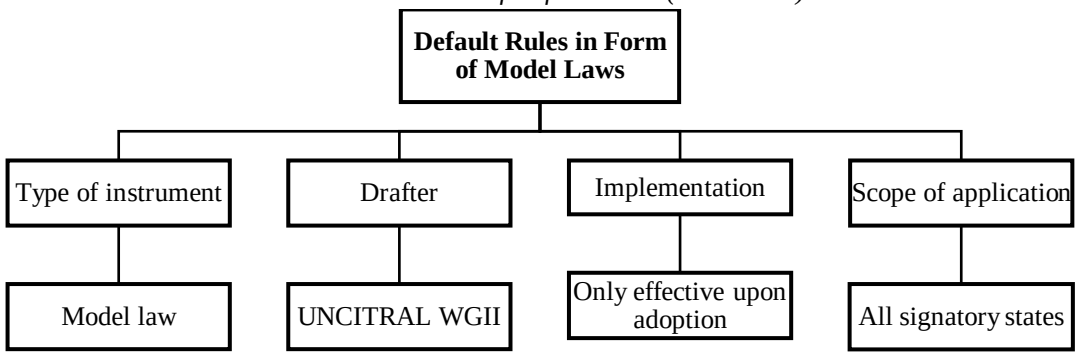
[1035] Article 288 TFEU; i.e. The Commission has adopted two recommendations establishing the principles applicable to out-of-court procedures for the resolution of consumer disputes. Commission Recommendation 98/257/EC of 30 March 1998 concerning the principles applicable to the bodies responsible for the extrajudicial resolution of consumer disputes, OJ L 115, 17.4.1998; Commission Recommendation 2001/310/EC of 4 April 2001 on the principles applicable to the extrajudicial bodies charged with the consensual resolution of consumer disputes, OJ L 109, 19.4.2001

Chart 4 – *Creation of Default Rules (Recommendations)*



131. Moreover, UNCITRAL is well position to play a significant role, since it can draft default rules in the form of Model Laws (Chart 5). There is already an UNCITRAL Model Law on Mediation that could be amended to better address the ADR process. Model laws allow states to have more flexibility in implementation, which allows enforcement in a manner that is compatible with national laws. To aid the Commission and UNCITRAL, the findings presented in Chapter II are of importance as they are indicative of trends in the agreements studied.[1036]

Chart 5 – *Creation of Default Rules (Model Law)*



132. Lastly, it is important to address the supplementary aspects of the framework, namely amendments to the arbitration framework and the creation of standard ADR agreements and rules (Chart 6).

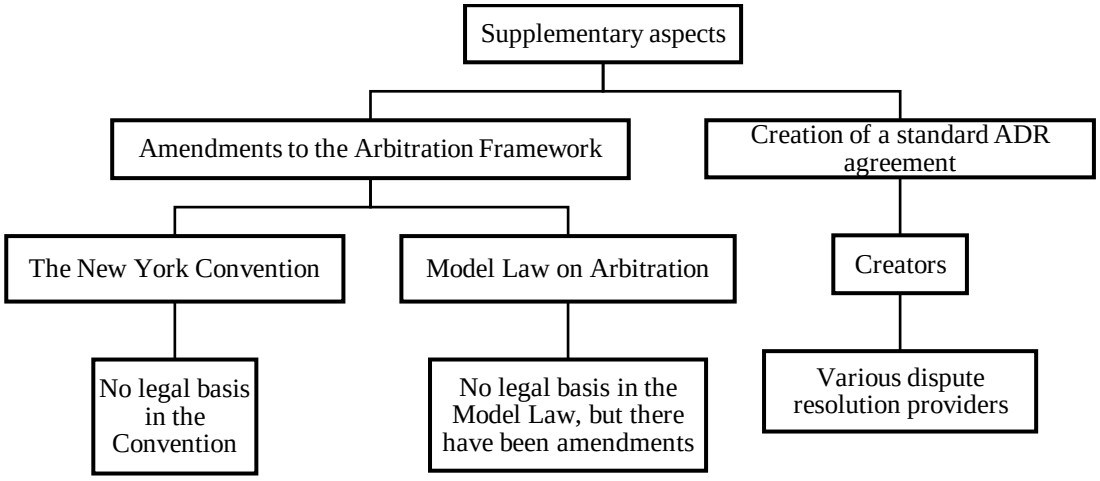
133. As Section 3.1 discussed, it would be ideal if the international framework for arbitration is amended to specifically address the legal effect of ADR agreements on subsequent arbitration. However, the amending of international Conventions is no easy feat. Therefore, it would be advisable for UNCITRAL to firstly amend its Model Law on Arbitration.

[1036] Other aspects of conciliation addressed in the Model Law: Commencement of conciliation (4); Number and appointment of conciliators (5); Conduct of conciliation (6); Communication between conciliator and parties (7); Disclosure of information (8); and Confidentiality (9).

Subsequently, signatories to the Model Law ought to do the same. The amending of national arbitration rules follows clear paths and is a common occurrence.[1037]

134. Regarding the creation of standard ADR agreements and rules, as discussed in Section 3.1, it is important to note that such a recommendation relies on the determination of dispute resolution providers. Only if there is consensus amongst providers in jurisdictions that currently have differing approaches, can there be an effective standard agreement and base rules. Therefore, it would be advisable for dispute resolution providers in both Civil and Common Law jurisdictions to collaborate on this endeavour. Lastly, dispute resolution providers that offer both ADR and arbitration should ensure that tribunals constituted under their supervision enforce the parties' ADR agreement.

Chart 6 – *Supplementary Aspects*



135. Regardless of aspect of the framework in focus, any harmonisation effort must include dialogue amongst the stakeholders in both the regional and the international sphere.[1038] Thereby, the proposed rules or models laws will be aligned with the needs of the main stakeholder, namely commercial parties.

[1037] J.M. MCCABE, "Uniformity in ADR: Thoughts on The Uniform Arbitration Act and Uniform Mediation Act", *Pepperdine Dispute Resolution Law Journal* 2003, 318. In the US, the NCCUSL revised the Uniform Arbitration Act in 2000. In Germany, the Civil Procedure Reform Act of 27 July 2001 and the Law of Contracts Reform Act of 26 Nov. 2001 amended the German Arbitration Act. In the Netherlands, the 2015 Dutch Arbitration Act amended the 1986 Act.
[1038] S. MENON, "Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence", *Singapore Journal of Legal Studies* 2013, 251.

Concluding Remarks

136. The aim of this chapter was to assess a EU framework for the ADR agreement. In addition, the chapter considered the supporting role that UNCITRAL can play in the creation of a framework for the ADR agreement. To better understand the role of the harmonising bodies in focus, namely the EU and UNCITRAL, this chapter provided an in depth overview of the various ways in which the two bodies have attempted to shape ADR. It moreover argued for harmonisation by delving into the harmonisation versus diversity dilemma. Furthermore, this chapter explored the content of a framework for the ADR agreement by detailing its various counterpart and supplementary elements. Lastly, this chapter discussed the practical details of such a framework in terms of type of instrument, legal basis and drafters.

137. A harmonised framework on the ADR agreement should mitigate the existing uncertainty. Today, there is uncertainty regarding the binding nature of the ADR agreement, the obligations therein, the law applicable to various parts of the agreement and mechanism, as well as the forum and method of enforcement. The proposed framework aims to provide certainty without adversely affecting the flexibility and voluntariness of ADR. The proposals in Chapter III reflect the findings of the SCA as discussed in Chapter II and the comparative law analysis in Chapter I.

138. Illuminating on the exact content of the framework for the ADR agreement, this chapter proposed the need for harmonised rules on the enforcement of the ADR agreement, ADR specific PIL rules, and default rules. In addition, the chapter proposed two supplements to the framework in order to aid in the creation of certainty for the status of the ADR agreement. The first suggestion is to adjust the framework for arbitration to include rules addressing the ADR agreement. The second suggestion is to have ADR providers in selected states with similar ADR models join forces to create an enforceable ADR agreement and procedure.

139. Furthermore, Chapter III discussed the roadmap to the creation of the above-proposed framework. In particular, the EU Commission should draft a Directive on the enforceability of the ADR agreement while UNCITRAL ought to rethink the content of the Singapore Convention and the Model Law on Mediation to stipulate the enforceability of ADR

agreements. Secondly, ADR specific conflict of law and jurisdiction rules should be created through a regulation similar to that of the Rome and Brussels Regulations. Turning to the last part of the proposed framework – default rules – it was proposed that the EU Commission should provide Member States with Recommendations regarding best practices. Here, UNCITRAL can play a significant role as it is well positioned to draft default rules in the form of Model Laws. Regarding the supplementary aspects of the framework, namely amendments to the arbitration framework and the creation of standard ADR agreements and rules, two concrete suggestions were made. Firstly, it would be ideal if the international framework for arbitration is amended to address the legal effect of ADR agreements on subsequent arbitration. Secondly, ADR providers interested in creating standard rules should collaborate on this endeavour.

Conclusion to PhD

Contents

1. Contribution to the Field of ADR

1. The research carried out in the context of my PhD revolved around the subject of ADR agreements in commercial contracts. The term "ADR agreements" refers to a group of agreements concluded either pre or post conflict that require the parties to pursue an ADR mechanism in an attempt to resolve their legal dispute(s). The term "ADR" was further defined as all dispute resolution mechanisms where a third-party neutral aids the parties in their attempt to settle their disputes without having decision making power.

2. Today, there is an urgent need to better understand the legal issues pertaining to ADR in general and ADR agreements in particular. This is because despite the promotion of ADR by dispute resolution providers, policy makers, and judges, use of ADR remains low. In particular, problems arise when parties lack certainty regarding the legal effect of an ADR agreement. The uncertainty regarding the binding nature of agreements to pursue ADR is problematic for the growth of ADR. As a remedy to this persisting uncertainty, this doctoral thesis explored the creation of a comprehensive EU framework for the ADR agreement.

3. To assess the possibility of a comprehensive framework for the ADR agreement and to provide insights to policy makers, I conducted a comparative doctrinal analysis of the applicable laws in selected jurisdictions and an innovative empirical research into the content of 172 ADR agreements. The states under analysis included four EU Member States (Austria, England, Germany, and the Netherlands) and three ADR leaders (Australia, Singapore, and the US). The territorial scope of this work reflected the goal of the research, which was to discuss the creation of a comprehensive EU framework for the ADR agreement.

4. To better understand the issues revolving around ADR agreements, this work answered three main questions: (1) when is an ADR agreement enforced; and (2) what are the parties' obligations under an ADR agreement; and (3) what are the essential elements of a comprehensive framework for the ADR agreement? In answering the above questions, this doctoral thesis came to conclusions on the following issues: (a) when an ADR agreement is valid; (b) whether it is necessary to enforce ADR agreements; (c) what the legal nature is of ADR agreements; (d) what the remedies are to breaches of ADR agreements' (e) what is the preferred remedy to the breaches of ADR agreements; (f) what are the common trends

regarding the parties' rights and obligations under ADR agreements; and (g) what are the essential elements of a comprehensive framework.

2. Findings

Finding 1: ADR agreements are valid and enforceable when they are sufficiently certain and formulated in mandatory terms.

5. For an agreement to be binding on the parties, it must be both formally and substantively valid. The validity and enforceability of ADR agreements must be assessed independently of the main contract and other dispute resolution tiers. Issues relating to the enforceability of ADR agreements tend to revolve around contractual certainty. Certainty is essential to the enforcement of the ADR agreement, as it requires the participation of the parties and is not self-executing. Although some general trends are evident, courts and arbitral tribunals have differing certainty thresholds. Today, the standard of sufficient certainty is higher for ADR agreements than for arbitration agreements. Undoubtedly, the more detailed an ADR agreement, the less chances for a court/arbitral tribunal finding the agreement uncertain.

6. However, parties tend to conclude their dispute resolution agreements hastily due to temporal limitations. This is problematic, as it raises the chance of the agreement being unenforceable. The risk is even higher if two or more legal systems or adjudicative bodies are to scrutinize the agreement.

7. For now, it is unlikely that there will be a change to the traditional drafting practices, so the certainty of ADR agreements will continue to be a challenge. Thus, the high standard of sufficient certainty is a hurdle to the enforcement of these agreements. A solution here is to give the preciseness of the wording of the ADR agreements less importance, as the parties are only bound if they agree to settle. Enforcing vague requirements for a process that is not binding in nature or burdensome should not be as problematic as it is today.

Finding 2: Courts and arbitral tribunals must enforce ADR agreements to ensure efficacy of ADR, to protect public interest, and to ensure access to justice.

8. Returning to the second question of the legal effect of ADR agreements, enforcement is essential for three reasons.

9. Firstly, even in disputes where settlement is not possible, ADR can assist the parties in narrowing down their disputes and/or provide an opportunity to assess the strengths and weaknesses of their claim. This is because, skilled neutrals have the ability to sway unwilling parties to consider the opportunities of amicable dispute resolution. Requiring parties to comply with their valid ADR agreement is in line with the aim of commercial ADR, which is to resolve or narrow commercial disputes in order to avoid costly litigation and arbitration, and to preserve the parties' relationship.

10. Secondly, according to the contractual approach, and in light of public interest, it is unacceptable to break a contract simply because the obligation is to participate in an ADR procedure. Furthermore, it is in the wider public interest to promote consensual resolution of disputes by supporting the enforceability of ADR agreements, as consensual solutions serve social peace.

11. Lastly, by enforcing ADR agreements, courts are also indirectly enforcing the remedy to the current inefficiencies in the system of justice. Today, in light of the pro-ADR policy of the majority of states in developing countries, it is clear that ADR does not hinder parties' access to justice to an extent that would run contrary to the right of access to justice. It is submitted herein that, ADR fosters access to justice.

Finding 3: ADR agreements are of a special legal nature, having both substantive and procedural consequences.

12. I found that there are three main camps when it comes to defining the legal nature of ADR agreements. ADR agreements are, depending on the jurisdiction, considered to be of a substantive, procedural, or a mixed nature. The legal classification of ADR agreements is particularly relevant in the context of MDR clauses, as it is quite common for ADR agreements to be a condition precedent to arbitration. There are, of course, pros and cons of the various approaches to ADR agreements; however, I find that these agreements should be viewed as contracts of a special nature with procedural consequences similar to that of arbitration and choice of court agreements.

Finding 4: Remedies to breaches of ADR agreements are varied and problematic.

13. As the field of ADR grows, commercial contracts have also begun to embrace dispute resolution clauses that require the parties to attempt ADR. Similar to other contracts, ADR agreements are, at times, also breached. There are three potential ways for a party to breach its ADR agreement: (i) by staying inactive once the other party has requested or initiated ADR, thereby frustrating the mechanism; (ii) by not participating in ADR once the process has commenced or by intentionally harming settlement efforts; and/or (iii) by initiating litigation/arbitration contrary to the agreement.

14. The remedies analysed included financial remedies, specific performance, stays and dismissals, injunctive relief, as well as refusals to enforce arbitral awards/judgements and to compel arbitration. The forum with jurisdiction over the dispute has decision-making power regarding the appropriate remedy. However, there is additional uncertainty regarding the forum with jurisdiction over the dispute.

15. There is no consensus regarding the appropriate remedy for a failure to comply with an ADR agreement. The choice of a preferred remedy should reflect the consequence of the various remedies at hand. Here, we must distinguish between restorative remedies such as damages, those that deter parties from violating their obligations such as stays, and those that force parties to comply with their actual agreement, such as specific performance. Restorative remedies put the party back in the position it was in in relation to its rights, privileges, and property, before the breach. Purely deterrent remedies aim to discourage parties from breaching their agreements. Lastly, there are remedies that directly enforce the obligations contained in the agreement onto the parties.

Finding 5: Breaches of ADR agreements are best remedied through specific performance and stays.

16. In discussing the preferred approach, I distinguished between remedies in instances where (i) a party is refusing to attend ADR, but has not initiated court or arbitral proceedings; (ii) a party has entered into the ADR process, but is not actively participating or is intentionally harming settlement efforts (i.e. refusing to respond to settlement offers); and (iii) a party has taken the substantive dispute to a court or tribunal.

17. Recourse to specific performance is an ideal remedy to the breach of an ADR agreement when a party is refusing to attempt ADR or is staying inactive despite invitations to

commence ADR. This is because, through specific performance, parties are compelled to fulfil the obligations under their ADR agreement. When a party has initiated court or arbitral proceedings, despite a valid ADR agreement, injunctions against arbitrations and court proceedings seated abroad, as well as stay orders for local proceedings, are appropriate.

18. The preference for stays over dismissals is justified from an efficiency viewpoint. Turning to the utility of financial remedies, regardless of the type of breach, it is important to the note the differing effect of cost sanctions and damages. Through the imposing of damages, the obligations in ADR agreements are not enforced. Damages are a restorative remedy if there is quantifiable cost. Likewise, cost sanctions, in themselves, are not a remedy, but merely provide for an adverse consequence. Therefore, these financial consequences do not restore the lost opportunity of settlement through ADR. Thus, financial remedies should be used in conjunction with other remedies. Breaches of ADR agreements should face several consequences depending on the stage at which the breach occurred. Sanctions to breaches of ADR agreements are essential, as a lack thereof sets disincentives for participation in ADR.

Finding 6: An ADR agreement obliges the parties to (a) commence the ADR mechanism and attend at least one ADR session; (b) refrain from engaging in binding mechanism, unless for interim measures; (c) jointly pay the costs of ADR; (d) personally attend the session(s); and (e) actively engage and collaborate in the mechanism in an attempt to settle the dispute.

19. By conducting a SCA of 172 ADR agreements, I gained new insights regarding the rights and obligations implied by these agreements. Moreover, since there are relatively few cases and rules that address the parties ADR agreement, I was the first to address these questions in a systematic manner. Some of the questions analysed were as follows: are the parties to an ADR agreement obligated to set up the selected ADR mechanism; attend a minimum number of sessions; attend the sessions personally; cooperate; act in good faith; attempt to settle; refrain from seizing courts or arbitral tribunals; refrain from seeking interim measures; and/or comply with the obligation of confidentiality?

20. The SCA revealed that 81% of the clauses coded stipulated ADR in the context of a MDR clause. Noteworthy is that the majority (84%) of the two-step clauses called for mediation/conciliation prior to a binding mechanism. I decided to code separately for

conciliation and to treat conciliation and mediation as separate mechanisms during the coding in order to demonstrate the rarity of dispute resolution clauses calling for conciliation. Of the 172 clauses, only 7 called for conciliation. The findings of this study reaffirmed the shift in UNCITRAL Working Group II's terminology. Today, both the Model Law on Conciliation and the Proposed Convention on Conciliation are renamed using the term "mediation".

21. I further coded for agreements and institutional rules that precluded a binding mechanism if the parties have not initiated ADR or while ADR is ongoing. When institutional rules were included in the study of preconditions, there were, in total 133, agreements and institutional rules that required the parties to refrain from litigating or arbitrating before initiating ADR, and while ADR is ongoing. This number constituted 77% of the agreements coded. Of the agreements that required parties to refrain from acting, some clearly made ADR mandatory before the parties may resort to an adjudicative process, while others required that the parties refrain from participating in binding mechanisms while ADR is ongoing. Therefore, the obligation to refrain from acting seems to have different starting points. In addition, 20% of the agreements that contained an obligation to refrain from acting further specified that the parties are exempt from this obligation if the other party fails to participate in the ADR.

22. Regarding the behavioural obligations of the parties, my study uncovered several trends. In this study, 73% of the clauses and institutional rules addressed the parties' behavioural obligations. The most reoccurring obligations as to behaviour were, "to exchange information" and "to settle". Moreover, 47% of the agreements analysed required personal attendance by the parties, or by someone with authority to agree to a settlement. Lastly, the study revealed that 70% of the agreements addressed confidentiality while 15% of agreements contained provisions regarding privacy.

23. Relying on the above empirical study and the comparative law analysis, I found that an ADR agreement implies the following obligations: (a) commence the ADR mechanism and attend *at least* one ADR session; (b) refrain from engaging in binding mechanism unless when applying for interim measures; (c) jointly pay the costs of ADR; (d) personally attend the session(s); and (e) actively engage and collaborate in the mechanism in an attempt to settle the dispute.

Finding 7: A comprehensive framework for the ADR agreement must be composed of harmonised rules, private international law rules, and default rules.

24. ADR is a topical issue in contemporary European (procedural) private law. However, current efforts to promote ADR have failed to increase resort to ADR. Policy debates focus on whether regulating ADR will come at the cost of over-legalizing the process and thus damaging its flexibility. In the field of dispute resolution, maintaining diversity can be beneficial, as it enables experimentation and innovation of ADR rules. However, today, there is a "regulatory jungle" for ADR, since laws are developing in an unmanaged and piecemeal manner. Although many aspects of ADR are regulated, these efforts do not address the ADR agreement. This regulatory environment contributes to the mediation paradox.

25. In the absence of a mature and comprehensive legal framework for the ADR agreement, the parties remain cautious of ADR's effectiveness. Therefore, the time is ripe to address the uncertainty arising from a lack of a framework for the ADR agreement. Through comprehensive regulation of the ADR agreement, ADR gains a legal status and the increased clarity removes certain pressures from the civil justice system that it would normally face while enforcing these agreements.

26. This doctoral project had the underlying goal of providing the EU with suggestions regarding the regulation of ADR agreements in order to fill the existing gap in European private law. The following suggestions regarding the regulation of ADR are directed to the EU. Moreover, I provide advice to UNCITRAL, as the body has been actively involved in the regulation of dispute resolution and its work intertwines with that of the EU.

27. To properly protect ADR agreements and promote ADR in general, the EU should consider regulation. If the EU opts to regulate the ADR agreement, it may do so through numerous instruments ranging from Regulations, Directives, Decisions, and Recommendations. However, the mixed nature of ADR agreements means that the legal basis relied upon must not only enable the EU to harmonise substantive rules (contract law), but also procedural rules (such as those relating to limitation periods). EU derives its competence in the field of transnational civil procedure from Article 81 TFEU, while Article 114 TFEU provides an

additional legal basis to regulate civil procedure. The EU Commission can, thus, rely on both Articles 81 and 114 TFEU to regulate the ADR agreement.

28. In particular, the EU Commission should draft a Directive on the enforceability of the ADR agreement while UNCITRAL ought to rethink the content of the Singapore Convention and the Model Law on Mediation to clearly stipulate the enforceability of ADR agreements.

29. There is also a need for ADR specific conflict of law and jurisdiction rules through a Regulation similar to the Rome and Brussels Regulations.

30. Turning to the last part of my proposed framework –default rules– I suggest that the EU Commission should provide Member States with best practices through a Recommendation. Here, the UNCITRAL can play a significant role as it is well positioned to also draft default rules in the form of Model Laws.

31. In addition to the above elements, I found that two supplementary actions can aid in the creation of certainty for the ADR agreement, namely amendments to the arbitration framework and the creation of standard ADR agreements and rules. In particular, I proposed two concrete steps. Firstly, it would be ideal if the international framework for arbitration is amended to specifically address the legal effect of ADR agreements on subsequent arbitration. Secondly, ADR providers interested in creating standard rules should collaborate on this endeavour.

3. Suggestions for Future Research

32. By focusing on the creation of a framework for the ADR agreement using both comparative law research and a SCA, this work filled several gaps in literature. It was the first work to study the content of ADR agreements in a systematic fashion in order to uncover the parties' obligations. In addition, this work delved into the procedural steps and legislative instruments that are relevant to the creation of a framework. While some authors have called for the creation of a harmonised framework for the ADR agreement, there is no in-depth research that describe how and by whom such a framework is to come into existence.

33. Nonetheless, no comparative law study carried out in the context of a doctoral thesis is without its limitations. This is because, the number of jurisdictions for analysis is limited to a feasible sum. Although this work discusses seven diverse national approaches to ADR agreements, there are other jurisdictions with experience in handling disputes relating to ADR agreements. Future research on ADR agreements should have an extended jurisdictional scope. The initial additions to the scope can include Switzerland, France and Canada, as they have several decisive rulings on the matter. Moreover, as this study could not access unpublished arbitral awards, it would be interesting to research the approach of diverse arbitral tribunals. Furthermore, as discussed in Chapter II, the SCA conducted included 172 ADR agreements gathered via desk research and an online questionnaire. Here, again, an increase in the number of agreements under analysis would ensure that the study is continued and reflective of wider trends.

34. Lastly, to improve the quality of the recommendations made in Chapter III, it is advisable that future research tests the efficacy of the proposed framework. This is possible in two steps. Firstly, a questionnaire should be constructed to assess the reception of the proposed framework by the relevant stakeholders, which includes commercial parties, the legislator, judiciary, ADR providers/professionals, and legal professionals. Surveying the stakeholders on their experience and perception of the framework is essential for evaluating the top down effect of the framework. Moreover, it gives the drafters an opportunity to assess what expectations remain from the stakeholders. Secondly, if the EU, UNCITRAL, and dispute resolution providers opt to implement my suggestions, a study should be conducted to see if there is an increase in the total number of ADR sessions in the short, medium, and long term.

Annex I - Codebook

1. Binding mediation
    a. Optional
2. Conciliation
3. Confidentiality
4. Confusing portions
5. Consider mediation
6. Dispute board
7. Expenses or costs of the neutral
    a. Equal share
    b. Own costs
    c. Trader pays
8. Governing law
    a. Of the agreement
    b. Of the mediation
        i. Place of mediation
9. Institution administers
10. Institutional rules or procedure
    a. Applicable law is superior
    b. Clause provisions are superior
11. Interim measures or protective measures or interlocutory relief
    a. Unclear
12. Jurisdiction
    a. Courts where mechanism takes place
13. Language
    a. Language of the agreement
14. Limitation periods
    a. Extended
        i. 20 days
    b. Suspended
        i. 15 days
        ii. 20 days
            From conclusion of mediation
        iii. 30 days
15. Maximum time limit
    a. 15 days from date of commencement
    b. 2 days
    c. 3 hour sessions
    d. 30 days
        i. From dispute notice
        ii. From mediator receiving instructions
        iii. From the date submitted to mediation
        iv. From the signing of the mediation agreement
    e. 40 days
        i. From referral
    f. 45 days
        i. From date of reference
        ii. From filing the request for mediation
    g. 60 days
        i. From commencement of mechanism
        ii. From notice of dispute
        iii. From request for mechanism
    h. 8 weeks (44 days)
        i. From commencement of mechanism
    i. 90 days from date of commencement
16. Mechanism not binding
17. Mechanism determined by institution
18. Mechanism is a precondition or precludes
19. Arbitration
    a. 10 days
    b. 28 days
        i. After referral
    c. 30 days
        i. After appointment of the mediator
        ii. After date of acceptance of mediation
        iii. After invitation to mediate
        iv. After notice of mediation
        v. After referral to mediation
        vi. After service of a written demand for mediation
    d. 40 days
        i. From the mediator's appointment
    e. 45 days
        i. From initiation

ii. From notice
iii. From reference
iv. From request for mediation

f. 60 days
i. After invitation to mediate
ii. After the start of mediation
iii. From notification of dispute
iv. From request for mediation
v. From the mediator's appointment

g. 90 days
i. From initiation of procedure
ii. From request for mediation
iii. Written demand for mediation

20. Clause does not specify
21. Exception - failure to participate or resolve the dispute
22. Expert determination
    a. 28 days
        i. After referral to institution
    b. 60 days
        i. From the start of mediation
23. Litigation
    a. 21 days
        i. From dispute being referred to mediation
    b. 30 days
        i. From selection of neutral
        ii. From the start of mediation
    c. 45 days
        i. From mediator's selection
    d. 60 days
        i. From request for mediation
        ii. From the start of the mechanism
    e. 90 days
        i. From initiation
    f. Several options
24. Neutral evaluation
    a. 30 days
        i. After referral to mediation
25. Mediation
26. Online
27. Parallel arbitration allowed
28. Participation obligation
29. Behaviour
    a. Active participation or prepare & engage
    b. Cooperate
    c. Exchange of information or statements
        i. Make oral statement
    d. Expeditiously
    e. Good faith
    f. Serious attempt
    g. Settle
        i. Attempt or endeavour to settle
        ii. Make suggestions for settlement
        iii. Shall settle or agree to settle
30. Personal attendance or representative with power to settle
31. Representation
32. Time
    a. Commence within a certain time period
        i. 10 days
        ii. 15 days
        iii. 28 days
        iv. 3 months
        v. From event giving rise to dispute
        vi. 30 days
        vii. 45 days
    b. Days
        i. 1 full mediation day
    c. Hours
        i. 4 hours
    d. Number of sessions or meetings
        i. 10 days
        ii. First meeting with mediator
        iii. First session
        iv. 7 hours
        v. Information session
33. Penalty clause

    a. Cannot recover costs
    b. Recover all costs and expenses
    c. Stay
34. Pre-condition for mechanism
35. Failure to meet
    a. 10 days
    b. 20 days
    c. 30 days
36. Meeting of dispute representatives
    a. 21 days
        i. From dispute notice
    b. 30 days
37. Meeting of Mangers, Directors or Senior Representatives
    a. 1 meeting
    b. 14 days
    c. 20 days
    d. 21 days
    e. 30 days
        i. From meeting of the executives
    f. 37 days
        i. From dispute notice
    g. 45 days
    h. Unclear
38. Negotiation
    a. 10 days
        i. From the notice of dispute
    b. 30 days
        i. From invitation to negotiate
    c. 45 days
        i. From initial notice of negotiation
        ii. From notice of dispute
    d. 5 days
    e. 60 days
        i. From notification of dispute
    f. Non-binding obligation
39. Privacy
40. Procedure for third-party neutral appointment
41. Designated mediator
42. Procedure to commence mechanism
43. Invitation
44. Notice
45. Request or application
    a. Joint request
46. Time component
    a. 15 day days from expiry of the 7 working days deadline to challenge mediator
    b. 30 days from notice
47. Procedure to terminate mechanism
48. Requires agreement to start mechanism
49. Rules on counting days
50. Scope
    a. Financial
51. Separability
    a. From the rest of the dispute resolution clause
52. Time and date
53. Unenforceable
54. Venue
    a. Seat of mechanism

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