Palacký University Olomouc
Faculty of Law

Jan Palacký

Multi-Tier Dispute Resolution in International Commercial Arbitration

Thesis

Olomouc 2017

I hereby declare that the thesis *Multi-Tier Dispute Resolution in International Commercial Arbitration* is my own work and that I quoted all sources used in this thesis.

Olomouc, 6 November 2017

Jan Palacký

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List of Abbreviations

ADR	Alternative dispute resolution
Art./Arts.	Article/Article
Ibid.	Ibidem, in the same place
i.e.	Id est, that is
BayObLG	Bayerisches Oberstes Landesgericht (Supreme court of appeals for Bavaria), [GER]
BGer	Bundesgericht (Federal Supreme Court of Switzerland), [CHE]
BGH	Bundesgerichtshof (Federal Court of Justice), [GER]
Cass.	Cour de cassation (Court of Cassation), [FRA]
CCP	Code of Civil Procedure
CHE	Switzerland
CPR	Civil Procedural Rules
GER	Germany
FRA	France
MDR	Multi-tier dispute resolution
MediationsG	Mediationsgesetz (Mediation Act), [GER]
OGer	Obergericht (Appellate court), [CHE]
OLG	Oberlandesgericht (Regional court of appeals), [GER]
p./pp.	page/pages
para./paras.	paragraph/paragraphs
ZPO	Zivilprozessordnung (Code of Civil Procedure), [GER]

1 Introduction

The subject matter of this thesis is "multi-tier dispute resolution clauses," also known as "escalation clauses,"[1] "multi-step clauses,"[2] "ADR first clauses,"[3] or "pre-arbitral procedural requirements."[4] (For short, referenced to throughout the thesis as "MDR clauses.") The multi-tier dispute resolution is a legal phenomenon that is becoming more and more popular in the world of international business.[5]

Essentially, an MDR clause is a "clause in a contract which provides for distinct stages, involving separate procedures, for dealing with and seeking to resolve disputes".[6] Most commonly, these clauses will contain a provision that stipulates an obligation to engage in negotiations, to undergo a mediation procedure, or to participate in other ADR procedures.[7] Since the only limitation to the drafting of MDR clauses is the parties' autonomy, the exact content of such obligations can vary in different ways.[8]

Yet the purpose of MDR clauses is always the same, i.e. to reserve arbitration (or litigation) only to those cases where all the other options have failed. In other words, arbitration (or litigation) is intended to be a last resort and thus should only be initiated when preliminary stages set out in an MDR clause have been unsuccessful in resolving the dispute.[9]

The reasoning behind MDR clauses is simple and rather pragmatic, i.e. to preserve good business relationships between involved parties and to stay out of lengthy and expensive legal proceedings. This is achieved by emphasising ADR methods, which are based on a mutual co-operation, rather than classic adversial procedures. The ADR can be very useful especially in long-term contracts where the parties must preserve some degree of relationship in order to perform their contractual duties contract.[10]

Unfortunately, these noble objectives are seldom achieved in practice. Most of the time, MDR clauses end up being "pathological"—a clause that is not capable to function in practice.[11] In this regard, "the particular concern is the risk that, rather than coming closer to a resolution of their dispute, the parties will 'stumble' on the escalation ladder during the course of

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[1] BERGER, Peter Klaus. Law and Practice of Escalation Clauses. *Arbitration International*, 2006, Vol. 22, Issue 1, p. 1.
[2] Ibid. p. 1.
[3] Ibid. p. 1.
[4] BORN, Gary B., SCEKIC, Maria. Pre-Arbitration Procedural Requirements 'A Dismal Swamp'. In CARON, David D. (ed.) et al. *Practising Virtue: Inside International Arbitration*. Oxford: Oxford University Press, 2015, p. 227.
[5] BERGER: *Law and Practice…*, p. 1.
[6] PRYLES, Michael. Multi-Tiered Dispute Resolution Clauses. *Journal of International Arbitration,* 2001, Vol. 18, Issue 2, p. 159.
[7] BORN, Gary B. *International Commercial Arbitration*. 2nd edition. Kluwer Law International, 2014. pp. 916-917.
[8] KRAUSS, Oliver. The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith Under English Law. *McGill Journal of Dispute Resolution*, 2016, Volume 2, Issue 1, p. 144.
[9] BERGER: *Law and Practice…*, p. 1.
[10] Ibid. pp. 1-2
[11] Ibid. p. 2.

proceedings."[12] This fact is usually attributed to the complexity of multi-tier dispute resolution clauses: "it is a well-known fact that the potential for error increases with the complexity of the dispute resolution clause."[13]

That being said, one should consider the role of national courts regarding the enforceability of MDR clauses. It is undisputed that national courts hold an important position in international commercial arbitration. As a matter of fact, arbitration, as a private dispute resolution, is only allowed, provided that national courts retain some form of control over arbitral proceedings and its outcome.[14] While the exact extent of court's powers to exercise control over arbitration can vary depending on the applicable laws, in principle, national courts are vested with a power: (1) to enforce arbitration agreements (by precluding any party to an arbitration agreement to initiate court proceedings and by helping to establish the arbitral tribunal when a party is in default), (2) to support the conduct of arbitral proceeding (for instance, by ordering interim measures) and (3) to review the outcome of such arbitral proceedings, i.e. to decide on challenges to arbitral awards or challenges to enforcements of arbitral awards.[15]

In international commercial arbitration, courts (or other judicial bodies) from various jurisdictions are called upon to exercise the above-noted powers. Needless to say, any form of differences in exercising these powers—especially when combined with the complexity of MDR clauses—creates undesirable uncertainty in the field of international commerce.

In this regard, the uncertainty might lead to severe consequences regarding the enforceability of MDR clauses. To illustrate, it has already been said that MDR clauses typically provide for several stages. Thus, let us consider an MDR clause which is divided into two stages—mediation and arbitration. In addition, the first step—the mediation—is considered to be a condition precedent to the arbitration, which is considered to be the second and final step. Accordingly, the legal effects of arbitration agreement depend upon the completion of the mediation procedure. In simpler terms, the arbitration agreement does not activate as long as the parties do not comply with the requirement of mediation. In this case, the difficulties may arise with respect to annulment and enforcement of the award. One of the grounds for both the annulment of an award and refusing to enforce an award is the non-existence of an arbitration agreement between the parties. As a result, a party that does not comply (whatever its reasons are) with the requirements set out in the concerned MDR clause, risks the annulment or non-recognition of its award.

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[12] BERGER: *Law and Practice*…, p. 2.
[13] Ibid., p. 3.
[14] BLACKABY, Nigel et al. *Redfern and Hunter on International Arbitration.* 6th edition. Oxford University Press, 2015, pp. 415-416.
[15] Ibid., pp. 418-419.

On the other hand, where an MDR clause does not involve an arbitration, the above noted does not apply at all; the uncertainty (although still undesirable) does not give rise to risks of those associated with arbitration. It has been long held that parties—in contrast to arbitration—cannot oust the court's jurisdiction. As it will be discussed below, in such cases the courts may (at most) order a stay of proceedings pending the completion of ADR process.

In the light of the above, the main objective of this paper is to furnish answers to the following question: Is there any consensus, as far as national courts are concerned, about the requirements of the enforceability of MDR clauses, and the remedies in case of the breach in relation to arbitration? In order to achieve this goal, the thesis is based on the following main hypothesis:

> As far as international commercial arbitration is concerned, there is a common practice among national courts with respect to the enforceability of multi-tier dispute resolution clauses.

The hypothesis is then divided into three sub-hypothesises: In the context of international commercial arbitration:

> (1) a multi-tier dispute resolution clause per se is enforceable;
> (2) there is a consensus as to the requirements that a multi-tier dispute resolution clause must poses in order to be enforceable; and
> (3) there is a consensus as to remedies in case of the breach of multi-tier dispute resolution clause.

The thesis explores the position regarding the enforceability of MDR clauses in various jurisdictions; both common and civil legal systems are examined. Regarding the common law tradition, the thesis examines two jurisdictions: (1) English and Wales and (2) Australia. As for the civil law systems, the thesis deals with three of them: (1) France, (2) Germany and (3) Switzerland. Each of these jurisdictions are examined in turn.

To achieve its goal, the thesis uses analysis and synthesis. First, this thesis, in its third chapter (the second chapter is dedicated to introductory remark to certain legal terms and concepts), analyses each jurisdiction with its case law and seeks to determine its position on the enforceability of MDR clauses. Second, in its fourth and last chapter, the thesis analyses the findings of the examined jurisdictions and strives to synthesise a common practice with respect

to the enforceability of MDR clauses in the context of international commercial arbitration. As a result, the thesis will either confirm or rebut the above-mentioned hypothesises.

2 ADR and Good Faith

Before venturing any further, a short overview of two legal concepts used in the thesis should be made: (1) ADR and (2) good faith.

As for the first notion, the ADR stands for Alternative Dispute Resolution. In general, ADR comprises dispute resolution techniques that constitute an alternative to court or arbitral proceedings.[16] It consists of a variety of methods such as: negotiation, mediation, expert determination, mini-trials etc.[17]

In terms of ADR obligations arising under MDR clauses, the thesis focuses on two above noted techniques: negotiation and mediation. Though there are no universal definitions for mediation, the commonly held view is that mediation is a structured process within which a third neutral party is presented, whose objective is to facilitate a dialogue between the parties in dispute in order to seek a resolution of the said dispute.[18]

It should be noted, that sometimes confusions arise between terms mediation and conciliation. Without going into specific details, the essentials remain the same: both provide for assisted negotiations and both require the parties' consent in order to conclude a settlement.[19] Accordingly, for the purposes of this thesis, the terms mediation and conciliation are used synonymously.

On the other hand, one must differentiate between a mediation and the second method of interest—negotiation. Concerning the latter, there is no independent third person present, and usually it does not set out a detailed procedure for the parties to follow.[20]

Second, there is the notion of good faith. It should be said, right at the outset, that a proper analysis of the notion, is beyond the scope of the thesis. Nonetheless, since there are parts in this thesis which are concerned with the issue of good faith, it is appropriate to include a short overview of this notion.

To give a short introduction to the principle of good faith, it is suggested that the notion of good faith imposes a certain standard of behaviour on the parties to follow during their contractual relationship. This standard applies to all phases of contractual relationship, ranging

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[16] ALEXANDER, Nadja. *International and Comparative Mediation*. Kluwer Law International, 2009, pp. 8-9; BÜHRING-UHLE, Christian. *Arbitration and Mediation in International Business*. 2nd edition. Kluwer Law International, 2006, p. 169; RUBINO-SAMMARTANO, Mauro. *International Arbitration Law*. 2nd edition. Kluwer Law International, 2001, p. 13.

[17] RUBINO-SAMMARTANO: *International Arbitration Law*, pp. 7-21.

[18] ALEXANDER: *International and Comparative Mediation*, p. 14; BÜHRING-UHLE: *Arbitration and Mediation…*, p. 176.

[19] ALEXANDER: *International and Comparative Mediation*, pp. 15-16; BÜHRING-UHLE: *Arbitration and Mediation…*, p. 176.

[20] ALEXANDER: *International and Comparative Mediation*, p. 25.

from a pre-contractual phase to enforcement of a contract. It is said, that the main role of such a principle is to employ moral or ethical judgment to concrete cases.

The above-mentioned need for a value judgement, however, has become a subject of discussions and controversies among authorities from various jurisdictions. While the notion of Good Faith (whatever the exact domestic terminology), as an overarching principle of law, has been recognized for some time in Civilian jurisdiction, it is a relative new concept for common law countries. In this regard, some common law jurisdiction, such as US or Australia, were quick to adjust, while, for instance, English law has continued to show reluctance when it comes to adopting this broad principle of good faith.

Nonetheless, at the same time, it is suggested that, while there may exist differences at theoretical levels, in practice, both civil and common law jurisdiction usually arrives (though through different means) to same results.[21]

[21] VOGENAUER, Stefan. In VOGENAUER, Stefan (ed.). *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC).* 2nd edition. Oxford, Oxford University Press, 2015, pp. 205-225.

3 Enforceability of Multi-Tier Dispute Resolution Clauses

The third chapter explores the position regarding the enforceability of MDR clauses in different jurisdictions. The jurisdictions will be examined in the following order: (1) English and Wales, (2) Australia, (3) France, (4) Germany and (5) Switzerland.

3.1 England and Wales

When it comes to the enforceability of MDR clauses, English law is perhaps the most resourceful of all the legal systems covered by this thesis. Accordingly, English law deserves a great deal of scrutiny. If one decides to explore the issue of MDR clauses in England, he or she will find that English law draws a clear distinction between obligations to negotiate disputes and obligations to undergo other kinds of ADR procedure such as, for example, mediation. Consequently, English law has developed two relatively distinct (although not isolated) branches of case law that deal with the obligations arising out of MDR clauses.

3.1.1 Obligation to Negotiate

English courts were initially reluctant to enforce obligations arising out of MDR clauses.[22] In particular, obligations to simply negotiate a dispute were perceived as non-legally binding. The unwillingness to enforce these obligations was based on the very reason already indicated—the requirement of sufficient certainty with respect to legal relationship. In terms of contract formation, the certainty is the main principle in Common law.[23] In principle, "[a] party is required to demonstrate a clear intention to enter into a legal relationship with regard to stipulations which are certain in nature".[24]

That being said, probably the first time an English court was tasked with deciding on the enforceability of an obligation to negotiate as a part of dispute resolution clause was in *Itex Shipping Pte Ltd v China Ocean Shipping Co (The Jing Hong Hai)*.[25]

The case concerned a dispute that arose under a charter party. Since the dispute was subject of a dispute resolution mechanism that provided for a final resolution through arbitration, one of the parties resorted to the arbitration and obtained an award in its favour. The other party, however, not being satisfied with the state of affairs, challenged the award and argued for non-compliance with an obligation to settle (negotiate) the dispute in an amicable manner. The dispute resolution clause that sparked the controversies read:

[22] KRAUSS: *The Enforceability of Escalation…*, p. 148.
[23] Ibid., p. 148.
[24] Ibid., p. 148.
[25] *Itex Shipping Pte Ltd v China Ocean Shipping Co (The "Jing Hong Hai")*, [1989] 2 Lloyd's Rep 522.

> "Any dispute on this agreement will be settled amicably. Should both parties be unable [to] reach amicable settlement, the dispute will be referred to arbitrators already appointed by both parties under the charterparty […]"[26]

The underlying question was whether or not the clause constituted a valid source of enforceable obligations and amounted to a condition precedent to the agreement to arbitrate. In that respect, the court held the clause as unenforceable. The court stated that a provision imposing an obligation to negotiate does not give rise to any legally binding obligation. The court reasoned that the clause in question "simply records what is probably no more than a pious hope that there would be amicable discussions".[27]

One particular decision on which the judgment in *Itex Shipping* heavily relied on was *Courtney and Faibarn v Tolaini Brothers*.[28] The *Courtney* is a part of a strain of decisions that have greatly impacted the issue of the enforceability of MDR clauses under English law.[29] Moreover, these decisions are often referenced to when inefficiencies or dangers associated with complex dispute resolution clauses are discussed.[30]

Keeping that in mind, the facts in *Courtney* were as follows. Mr Tolaini wanted to develop a hotel site. To that end, he contacted Mr Courtney, a property developer. The basis of their cooperation was that Mr Courtney would obtain finance for the project by introducing a third party to Mr Tolaini; in return, Mr Tolaini would negotiate the price of the project with Mr Courtney and employ him as the constructor.

Even though the financing was taken care of as planned, Mr Tolaini and Mr Courtney did not come to terms with respect to the price. As a result, Mr Tolaini ended up with choosing another party to construct his hotel site. In light of this, Mr Courtney decided to take action and proceeded to litigation, demanding damages for a loss of profits on the grounds that Mr Tolaini had not lived up to his end of the bargain as he had not employed Mr Courtney for the works.

Having been presented with the facts (the supposed contract comprised of two short, not very detailed letters[31]), the court limited itself to one simple question: whether or not the parties

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[26] FLANNERY, Lois, MERKIN, Robert. Emirates Trading, good faith, and pre-arbitral ADR clauses: a jurisdictional precondition? *Arbitration International*, 2015, Volume 31, Issue 1, p. 79.

[27] Ibid., p. 79.

[28] *Courtney & Fairbarn Ltd. v Tolaini Brothers (Hotels) Ltd.* (1974), [1975] 1 WLR 297, [1975] 1 All ER 716.

[29] KRAUSS: *The Enforceability of Escalation…*, p. 148.

[30] BORN: *International Commercial Arbitration*, pp. 916-923.

[31] *Courtney & Fairbairn Ltd V Tolaini Brothers (Hotels) Ltd*, [1975] 1 WLR 297, [1975] 1 All ER 716. ("… if my discussions and arrangements with interested parties lead to an introductory meeting, which in turn leads to a financial arrangement acceptable to both parties you will be prepared to instruct your Quantity Surveyor to negotiate fair and reasonable contract sums in respect of each of the three projects as they arise. (These would, incidentally be based upon agreed estimates of the net cost of work and general overheads with a margin for profit of 5%) which, I am sure you will agree, is indeed reasonable.")

in fact concluded an enforceable agreement in law. Ultimately, the court held that there had not been any contract between the parties on the basis that essential contractual terms, such as determination of a price, were missing. In the court's words:

> "There is no machinery for ascertaining the price except by negotiation. … Seeing that there is no agreement on so fundamental a matter as the price, there is no contract."[32]

In this regard, the court decided by following what has been a long-established principle of English contract law[33] (some of the decisions go all the way back to the beginning of the 19th century), i.e. the principle that "when there is a fundamental matter left undecided and to be subjection of negotiation, there is no contract.[34]

In addition, the court decided to tackle another issue and asked itself the following question: "Even if there was not a contract actually to build, was not there a contract to negotiate?"[35] The answer to the question was *no*. The court reasoned that:

> "If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through; or if successful, what the result would be. It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law."[36]

This reasoning then became the cornerstone supporting the view that obligations to undergo negotiation (or other ADR procedures) are not legally binding and spawned a number of decisions (one of them being the already mentioned *Itex Shipping* case) where such obligations were more or less treated as bare "agreements to agree", which are, due to the lack of sufficient certainty, unenforceable under English law.[37] In this regard, another frequently cited decision that shaped the viewpoint on the enforceability of obligations to negotiate is *Walford v Miles*.[38]

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32 Ibid.

33 *May & Butcher Ltd v King,* [1929] UKHL 2, [1929] All ER Rep 679, [1934] 2 KB 17.; *WN Hillas & Co Ltd v Arcos Ltd*, [1932] UKHL 2, [1932] 147 LT 503.; *Foley v Classique Coaches Ltd*, [1934] 2 KB 1.

34 *Courtney & Fairbairn Ltd V Tolaini Brothers (Hotels) Ltd*, [1975] 1 WLR 297, [1975] 1 All ER 716.

35 Ibid.

36 Ibid.

37 *Itex Shipping Pte Ltd v China Ocean Shipping Co (The "Jing Hong Hai")*, [1989] 2 Lloyd's Rep 522.*; Paul Smith Ltd v H & S International Holding Co Inc.*, [1991] 2 Lloyd's L. Rep. 127 ("The plaintiffs rightly conceded that the provisions that

In that case, Mr Martin Walford and Mr Charles Walford sought to buy a company owned by Mr and Mrs Miles. During the course of negotiation, Mr Walford and Mr Miles agreed that Mr Miles "would terminate negotiations with any third party or consideration of any alternative with a view to concluding agreements with [Walfords]." Latter, however, Mr Miles (for various reasons) decided to sell the company to a third party instead. Accordingly, Walfords treated the Mr Miles' decision as repudiation of the agreement and issued court proceedings. In their statement of claim, Walfords argued that in order to give "business efficacy" to the agreement, Mr Miles had been obliged to "continue to negotiate in good faith"[39] with them in respect to the sale of the company.

English courts were therefore (again) tasked with answering the question whether an agreement whereby the parties undertake to negotiate with each other with a view to conclude a contract constitute an enforceable agreement. (It should be noted that the agreement in question provided no specification as to the duration of the negotiation.)

In short, the answer was a negative one. The court decided to follow the approach laid down in *Courtney*, i.e. a mere obligation to negotiate, albeit with good faith, is not enforceable due to its inherent lack of certainty. As a result, the court dismissed Walfords' claim.

In its reasoning, the court once more accentuated the requirement of certainty under English contract law. According to the court, an agreement to negotiate "lacks [this] necessary certainty".[40] It is therefore impossible to ascertain the legal contents of this agreement. The lack of certainty raises some practical issues when it comes to enforcing obligations to negotiate—how can a court determine if a party complied with the obligation? In other words, there are no objective criteria for determining the breach of an obligation to negotiate. In this regard, the court added that:

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the parties shall strive to settle the matter amicably, and that a dispute shall, in the first place, be submitted for conciliation, do not create enforceable legal obligations."); *Walford v Miles*, [1992] 2 A.C. 128, [1992] 2 WLR 174 ("A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from these negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly, a bare agreement to negotiate has no legal content."); *Halifax Financial Services Ltd. v Intuitive Systems Ltd.*, [1999] 1 All ER 664; *Cable & Wireless Plc v IBM United Kingdom Ltd*, [2002] EWHC 2059 (Comm), [2002] 2 All ER (Comm) 1041 ("There is an obvious lack of certainty in a mere undertaking to negotiate a contract or settlement agreement, just as there is in an agreement to strive to settle a dispute amicably … No doubt, therefore, if in the present case the … clause … had simply provided that the parties should 'attempt in good faith to resolve the dispute or claim', that would not have been enforceable.")

[38] *Walford v Miles*, [1992] 2 A.C. 128, [1992] 2 WLR 174.

[39] Ibid.

[40] Ibid.

"… while negotiations are in existence either party is entitled to withdraw from these negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly, a bare agreement to negotiate has no legal content."[41]

Despite the above-mentioned concerns, the position disfavouring the enforceability of agreements to negotiate a dispute settlement has begun to weaken. This slow change in approach can be seen in *Wah and Anor v Grant Thornton International*,[42] decided in 2012 by English and Wales High Court.

In that case, a dispute arose between parties in connection with claimants' expulsion from a partnership by the respondent, and the dispute was referred to arbitration. Then, after the arbitral tribunal issued an award, the claimants decided to challenge the award, arguing that the tribunal lacked jurisdiction. The claimants based their argumentation on the basis that certain steps—among others, a conciliation—should have been undertaken before the parties could have initiated the arbitration proceedings. According to the claimants, these steps amounted to a condition precedent to arbitration.[43]

While the Court maintained the position that an agreement to negotiate in good faith (without more) is unenforceable, the Court went on to envisage a set of requirements that would aim at coping with the much-asserted uncertainty that accompanies such obligations, under which the Court would be ready to enforce such obligations.[44] The test was as follows:

"… whether the provision prescribes, without the need for further agreement: (a) a sufficiently certain and unequivocal commitment to commence a process; (b) from which may be discerned what steps each party is required to take to put the process in place; and which is (c) sufficiently clearly defined to enable the court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach."[45]

It should be noted, however, that the obligation that formed a part of the MDR clause in the case at hand did not met the aforementioned conditions. Moreover, English courts have not

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[41] Ibid.
[42] *Wah (Aka Alan Tang) & Anor v Grant Thornton International Ltd. and others*, [2012] EWHC 3198 (Ch).
[43] Ibid., para. 3.
[44] Ibid., para. 60.
[45] Ibid., para. 60.

(unfortunately) adopted this test as to the enforceability of MDR clauses. Instead, they considered MDR clauses and obligations arising under them on a case-by-case basis.[46]

Finally, the most recent (and probably also the most important) judgment was decided in 2014 in *Emirates Trading Agency LLC v Prime Mineral Exports Limited.* In that decision, which is regarded by many as a turnover with respect to enforceability of obligations to negotiate as part of an MDR clause, the court had to consider whether a clause containing a provision that that the parties must first seek to resolve a claim by friendly discussion can be enforced.[47]

The background facts may shortly be stated as follows. The applicant, Emirates Trading Agency Llc agreed to purchase iron ore from the respondent, Prime Mineral Exports Private Ltd. Emirates, however, failed to perform their duties under the contract because it had failed to lift the expected amount of iron ore. Consequently, Mineral Exports served Emirates with a notice of termination of the contract. Several meetings between the parties followed, aiming at resolving the situation. The negotiations, however, proved fruitless, and Mineral Exports referred its claim to arbitration. After the issuance of an award, Emirates applied to the court for an order determining that the arbitral tribunal lacks jurisdiction to hear and determine the claim.

The grounds for Emirates' action were that the contract contained a dispute resolution clause that provided for friendly discussions to be held for a continuous period of 4 weeks before one can exercise the right to refer the claim to arbitration. According to Emirates, such a stipulation constituted a condition precedent to arbitration; one that Mineral Exports had failed to satisfy. Accordingly, the arbitral tribunal lacked jurisdiction. Mineral Exports, on the other hand, argued otherwise. In Mineral Exports' view, the alleged condition precedent was unenforceable as it constituted an unenforceable agreement to negotiate.[48]

The issues before the court were therefore twofold: (1) whether the clause in question constituted an enforceable condition precedent to arbitration and (2) whether the parties complied with it, i.e. whether the "friendly discussions" were held, given that the clause amounted to enforceable condition precedent.

The court held that a clause providing for an obligation to undergo negotiations that aim at amicable dispute resolution is (assuming that certain requirements are met) an enforceable agreement. Accordingly, the clause in question constituted a condition precedent to the right to refer a claim to arbitration. Yet in the present case, the parties satisfied the condition precedent—

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[46] KRAUSS: *The Enforceability of Escalation*…, p. 149.

[47] *Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd.*, [2014] EWHC 2104 (Comm), para. 4 ("In case of any dispute or claim … the Parties shall first seek to resolve the dispute or claim by friendly discussion. Any party may notify the other Party of its desire to enter into consultation to resolve a dispute or claim. If no solution can be arrived at in between the Parties for a continuous period of 4 (four) weeks then the non-defaulting party can invoke the arbitration clause and refer the disputes to arbitration.")

[48] Ibid., paras. 1-24.

the obligation to "first seek to resolve the dispute or claim by friendly discussion". Thus, contrary to Emirates' view, the arbitral tribunal had competence to hear and determine the dispute. In conclusion, the Emirates' application was considered unfounded.[49]

In other words, contrary to previous court decisions regarding the issue of the enforceability of obligations to negotiate, the court in *Emirates Trading* held that an obligation to negotiate is—under certain conditions—capable of being enforced under English law.[50] The reasoning behind this change of standpoint can be summed up in the following.

First, the court decided to finally dismiss the findings from previous decisions. In court's view, the frequently cited case law proposing the unenforceability of (and not only) obligations to negotiate, can be distinguished on the facts. Whereas agreements to agree, i.e. an undertaking that lefts some terms to be agreed upon in future, are indeed unenforceable due to lack of essential terms (and therefore certainty), an agreement to seek and resolve a dispute in terms of a friendly discussion "is not incomplete" since "no essential terms are missing."[51]

In terms of the certainty, the fact that the clause provided for a specified time period within which the negotiations were to be held, was important for the court's decision to render the clause enforceable. The presence of the specific time frame countered the arguments against the enforceability that had been identified in previous decisions: the problem to determine for how long should parties negotiate in order to satisfy such an obligation. In this respect, according to the court, the requirement of the clause in question for "a continuous period of 4 … weeks" to elapse before a party can initiate arbitration provided the clause with a sufficient certainty.[52] In this respect, even if the parties were not trying to actually resolve the dispute, they would at least need to wait with the arbitration until the expiration of the time period. In that case, it is not difficult for a court to determine if a party decided to initiate arbitral proceedings prematurely.

This leads to next issue the court addressed in its reasoning—the standard for conducting such negotiations. One may contend that the uncertainty lies in what exactly is meant by engaging in "friendly discussion" or "good faith negotiations". In some cases, a party may argue that the other party's behaviour had not been in line with the friendly discussion or that it had acted in bad faith during the negotiation.

In this regard, the court (relying in most parts on the position of Australian courts[53]) held that the alleged difficulties of proving whether a party fulfilled its duties, i.e. whether or not it

[49] Ibid., paras. 72-73.
[50] Ibid., para. 64.
[51] Ibid., para. 64.
[52] Ibid., paras. 39,47, 52.
[53] *Coal Cliffs Collieries Pty Ltd v Sijehama Pty Ltd*, [1991] NSWLR 1 ("I do not share the opinion … that no promise to negotiate in good faith would ever be enforced by a court. … [P]rovided there was consideration for the promise, in some circumstance a promise to negotiate in good faith will be enforceable, depending upon its precise terms.");

complied with the negotiation process set out in a dispute resolution clause, does not by themselves mean that such obligations are to be devoided of their legal effects. Such reasoning is founded on the basis that doing so would be unreasonable in situations where there are no difficulties in ascertaining whether a party complied with its duties.[54]

Also, when it comes to the interpretation of the clause in question, the decision shows that a particular attention should be devoted to the wording of an MDR clause. The court emphasised the use of an imperative language. In this regard, "[t]he use of the word 'shall' clearly indicated that the obligation is mandatory." On the contrary, the usage of words like "may" might indicate that an obligation is not mandatory.[55]

Last but not least, striving to enforce a dispute resolution clause is in line with a public interest.[56]

In consequence, it can be inferred that the *Emirates* case has definitely put an end to the long-lasting question whether obligations to negotiate are legally binding and capable of being enforced by English courts and established the standpoint that obligations to negotiate as a part of an MDR clause can, and should, be under certain conditions enforced.

3.1.2 Obligation to Mediate

It has already been mentioned that initially the courts did not distinguish between obligations to mediate and obligations to negotiate. Accordingly, the rule established in *Courtney* was extended to obligations to mediate disputes, regarding such obligations as unenforceable.[57]

The approach, however, changed in 2002 in *Cable and Wireless v IBM*. Considered a breaking point with respect to mediation clauses,[58] the case concerned an obligation to undergo an institutional ADR procedure.

In the case at hand, Cable & Wireless Plc and IBM United Kingdom Ltd entered into a contract by which Cable & Wireless undertook to supply information technology services to IBM. Subsequently, a dispute arose between the parties regarding the contract's performance. The MDR clause in question provided for two steps to be taken prior to arbitration: first, the good

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United Group Rail Services Limited v Rail Corporation New South Wales, [2009] NSWCA 177 ("An agreement to agree to another agreement may be incomplete if it lacks essential terms of the future bargain. An agreement to negotiate, if viewed as an agreement to behave in a particular way may be uncertain, but is not incomplete.")

54 Ibid., para. 47 ("For example, a party who refused to discuss his claim at all could easily be shown to have breached the obligation to seek to resolve his claim by friendly discussion. Difficulty of proof of breach in some case does not mean that the clause lacks real content.")

55 Ibid., paras. 25-26.

56 Ibid., para. 52.

57 *Halifax Financial Services Ltd. v Intuitive Systems Ltd.*, [1999] 1 All ER 664.

58 KRAUSS: *The Enforceability of Escalation*…, p. 148.; FLANNERY, MERKIN, *Emirates Trading*…, p. 65.; TOCHTERMANN, Peter. Agreements to Negotiate in the Transnational Context - Issues of Contract Law and Effective Dispute Resolution. *Uniform Law Review*, 2008, Volume 13, Issue 3, p. 690.

faith negotiations were to be held between the senior executives of the parties;[59] second, the negotiations (if unsuccessful) were to be followed by an ADR procedure administered by the Centre for Dispute Resolution.[60] In consequence, when Cable & Wireless initiated court proceedings, IBM contested the proceedings by applying for a stay of proceedings pending the dispute being referred to the above-mentioned ADR procedure.

The court held that an obligation to participate in an ADR procedure administered by an ADR institution is an agreement with sufficient certainty as to its legal contents, and can therefore be enforced by English courts.[61]

The court reasoned that a line must be drawn between an obligation to participate in an ADR procedure (such as mediation) and a mere promise to negotiate a dispute. Whereas the latter is unenforceable due to the lack of certainty (as laid down in *Courtney* and *Walford v Miles*), the former can and should be enforced. In the case at hand, "the parties have not simply agreed to attempt in good faith to negotiate a settlement."[62] The prescribed ADR procedure was subjected to a procedural framework developed by a well-established ADR institution, i.e. Centre for Dispute Resolution.[63] The document provided by the Centre for Dispute Resolution ("Model Mediation Procedure and Agreement") specified the terms upon which the parties would proceed with the mediation procedure.[64] In this regard, the obligation to mediate amounted to a "sufficiently defined mutual obligation".[65] Accordingly, the reasoning in *Walford v Miles*—the difficulty to determine whether a party complied with an obligation to negotiate—could not

[59] *Cable & Wireless Plc v IBM United Kingdom Ltd*, [2002] EWHC 2059 (Comm), [2002] 2 All ER (Comm) 1041 ("The Parties shall attempt in good faith to resolve any dispute or claim arising out of or relating to this Agreement … promptly through negotiations between the respective senior executives of the Parties who have authority to settle the same pursuant to Clause 40.")

[60] Ibid., ("If the matter is not resolved through negotiation, the Parties shall attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the Parties by the Centre for Dispute Resolution. However, an ADR procedure which is being followed shall not prevent any Party or Local Party from issuing proceedings.")

[61] Ibid.

[62] Ibid.

[63] Ibid., ("[The Centre for Dispute Resolution] is one of the best known and most experienced dispute resolution service providers in this country. It has over the last 12 years made a major contribution to the development of mediation services including mediation methodology and consultative services available to parties to disputes who need advice on both a choice of mediator and on appropriate procedures for mediation.")

[64] Ibid., ("This document sets out a model procedure which specifies the terms upon which the parties may proceed with a reference to mediation. This identifies (i) the functions of the mediator, including his power to chair, and determine the procedure for, the mediation, his attendance at meetings, his assistance in drawing up any settlement agreement, (ii) the duties of the participants, in particular that of providing to CEDR at least two weeks before the mediation a case summary and all documents referred to in it and others to be referred to; (iii) the entitlement of each party to send in confidence to the mediator documents or information which it wishes the mediator to have but not to disclose to the other party. There are also express provisions about the confidentiality of the proceedings and about how the fees, expenses and costs are to be borne.")

[65] Ibid.

apply to the present case, as the above-noted procedural guidelines ensured that there were "no serious difficulty in determining whether a party has complied with such requirements."[66]

Moreover, the court reasoned that an enforcement of agreement providing for a dispute resolution by way of ADR is in line with the public policy.[67] In this respect, it should be noted that the decision (to a certain extent) reflected a change in English legal landscape with respect to ADR. This change was initiated by the so called "Woolf Reforms", a set of suggestions prepared by Lord Woolf in order to fight the constant case overload in English court system. These suggestions then became the basis for English Civil Procedure Rules (CPR).[68] Accordingly, pursuant to CPR, the courts have a positive obligation to actually encourage the parties to use methods of alternative dispute resolution and to help them to settle the dispute in an amicable manner.[69]

In conclusion, ever since the decision in *Cable and Wireless v IBM*, English courts have endorsed the position favouring enforceability of mediation and other ADR procedures prescribed in MDR clauses. Accordingly, English courts seek to give them effect whenever the relevant dispute resolution clauses provide for a process that is sufficiently certain.[70]

The approach taken in *Cable & Wireless* was then followed in *Holloway v Chancery Mead Ltd*,[71] a case decided in 2007 by the England and Wales High Court. As far as the background of *Holloway v Chancery* is concerned, Mr and Mrs Holloway entered, as a buyer, into a contract for sale and purchase of property with Chancery Mead Ltd, as a seller. Subsequently, disputes arose between Mr and Mrs Holloway and Chancery Mead about the nature of defects in the property. The concerned dispute resolution mechanism provided for a conciliation to be held before a party can refer the matter to arbitration.[72] Moreover, the clause in question expressly stipulated that the conciliation process is a condition precedent to arbitration.[73] Nonetheless, the clause

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[66] Ibid.

[67] Ibid., ("For the courts now to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the CPR and as reflected in the judgment of the Court of Appeal in Dunnett v. Railtrack …"); *Dunnet v Railtrack Plc*, [2002] EWCA Civ 303.

[68] TOCHTERMANN: *Agreements to Negotiate*…, p. 690.

[69] CPR 1.4(2)(e)(f).

[70] *Holloway v Chancery Mead Limited*, [2007] EWHC 2495 (TCC), [2008] 1 All ER (Comm) 653, para. 81 ("First, … the process must be sufficiently certain. … Secondly, the administrative processes for selecting a party to resolve the dispute and to pay that person should also be defined. Thirdly, the process or at least a model of the process should be set out so that the detail of the process is sufficiently certain."); *Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors*, [2012] EWCA Civ 638, paras. 35 -36.

[71] *Holloway v Chancery Mead Limited*, [2007] EWHC 2495 (TCC), [2008] 1 All ER (Comm) 653.

[72] Ibid., para. 40 ("If any dispute shall arise between the Seller and the Buyer touching or concerning the construction or setting out of the dwelling house and/or the property either party shall at the written request of the other seek to resolve such dispute (and if to the extent that the subject matter of the dispute comes within the scope of the NHBC Dispute Resolution Service) through conciliation by the NHBC.")

[73] Ibid., para. 40 ("The making of a determination by an NHBC investigator shall be a condition precedent to any right to refer the matter to arbitration in accordance herewith save that the condition can be waived by consent of the parties.")

itself proved to be source of controversies between the parties. Thus, Mr and Mrs Holloway applied to court for a determination as to the true legal nature of the clause.

In line with the decision in *Cable & Wireless*, the court held the obligation to participate in conciliation procedure enforceable. Accordingly, it constituted a condition precedent to arbitration.[74] In its reasoning, the court, after having considered previous decision to the matter at hand, derived the following requirements that has to be met in order to constitute an enforceable obligation to attend ADR procedure:

> "[F]irst, … the process must be sufficiently certain in that there should not be the need for an agreement at any stage before matters can proceed. Secondly, the administrative processes for selecting a party to resolve the dispute and to pay that person should also be defined. Thirdly, the process or at least a model of the process should be set out so that the detail of the process is sufficiently certain."[75]

In the present case, all of these requirements were met; therefore, the conciliation process were regarded as sufficiently certain.[76]

The last decision that deserves further attention is one that was made in *Sulamerica CIA Nacional De Seguros & Ors v Enesa Engenharia & Ors*[77] in 2012.The case concerned a dispute between two companies: Sulamerica CIA Nacional De Seguros SA & Ors and Enesa Engenharia SA & Ors. The dispute arose under policies of insurance that had been agreed in connection with a construction of a hydroelectric generating plant in Brazil. An anti-suit injunction was ordered to restrain Sulamerica from pursuing proceedings against Enesa in the courts of Brazil. Consequently, Sulamerica appealed against the injunction order. In the light of the appeal, the court had to decide, inter alia, whether an MDR clause, constituted an enforceable condition precedent to arbitration. The clause in the question prescribed that the parties shall first "seek to have the dispute resolved amicably by mediation."[78]

The court contemplated that it is clear that both parties intended the obligation to mediate to be enforceable and mandatory. In this regard courts "should be slow to hold [that the parties]

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[74] Ibid., para. 85.
[75] Ibid., para. 81.
[76] Ibid., para. 82.
[77] *Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors*, [2012] EWCA Civ 638.
[78] Ibid., para. 5 ("If any dispute or difference of whatsoever nature arises out of or in connection with this Policy including any question regarding its existence, validity or termination, hereafter termed as Dispute, the parties undertake that, prior to a reference to arbitration, they will seek to have the Dispute resolved amicably by mediation.")

have failed to do so".[79] The court, however, continued to remark that "in order for any agreement to be effective in law it must define the parties' rights and obligations with sufficient certainty to enable it to be enforced."[80]

The court then moved to examine the clause. In court's view, the clause did not provide any guidelines as to the mediation process. The deficiency was further augmented by the fact that the clause did not contain any reference to a specific mediation provider.[81] As a result, even though the court demonstrated willingness to enforce obligation providing for a mediation, the clause in question did not met the requirement of sufficient certainty. Accordingly, the court held the clause incapable of giving rise to a binding obligation.[82]

3.1.3 Remedies under English Law

There are four potentially available remedies when it comes to a situation where a party is in breach of an MDR clause. English courts have considered the following remedies: (1) stay of proceedings, (2) injunction, (3) damages, and (4) cost sanctions.

The first available remedy—the stay of proceedings—is the main remedy available to a non-breaching party.[83] In this regard, an emphasis needs to be put on distinguishing between a situation where there is a breach of arbitration agreement from a situation where a party does not comply with an agreement providing for an ADR procedure, like, for instance, a mediation. In the case of the former, the determination whether or not to stay proceedings is a matter for the discretion of the court.[84] This general power to order a stay of proceedings is envisaged by a statutory provisions and CPR.[85] On the other hand, if a party to an arbitration agreement applies to a court for a stay of proceedings, the court has an obligation (subject to certain exceptions) to grant the stay.[86]

Being a discretionary power, the stay does not have to be ordered automatically; therefore, courts will not order the stay if they find the situation inappropriate. This means that a court will not order the stay if the prospect of a successful dispute settlement is so low that an engagement in ADR procedure would be a futile waste of efforts. In this regard, various factors and circumstances of the relevant case have to be considered before a court decides to exercise this

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[79] Ibid., para. 35.
[80] Ibid., para. 35.
[81] Ibid., para. 36.
[82] Ibid., para. 36.
[83] KAJKOWSKA, Ewelina. *Enforceability of Multi-Tiered Dispute Resolution Clauses*. Hart Publishing, 2017, p. 44.
[84] *Cable & Wireless plc v IBM United Kingdom Ltd*, [2002] EWHC 2059 (Comm), [2002] 2 All ER (Comm) 104.
[85] Section 49(3), Senior Courts Act 1981 ("Nothing in this Act shall affect the power of the Court of Appeal or the High Court to stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person, whether or not a party to the proceedings."); CPR 26.4(1)(2A).
[86] Section 9(1)(4), Arbitration Act 1996.

discretion. However, it should be noted that a "strong cause would have to be shown before a court could be justified in declining to enforce such an agreement."[87]

The second remedy known to English courts is an injunction. Essentially, an injunction is an equitable remedy (a remedy available at the discretion of the court when a common law remedies, such as, for instance, damages, are inadequate in order to compensate the claimant) that orders a party to restrain itself from a certain behaviour. In other words, a party is required not to act in a way which would amount to a breach of contract.[88]

In connection with a multi-tier dispute resolution, such an anti-suit injunction was first contemplated in the abovementioned *Cable & Wireless v IBM*.[89] In this regard, the aim of such an injunction would be to restrain the offending's party continuation of premature civil proceedings or arbitration brought in breach of a multi-tier dispute resolution clause.[90] However, even though an injunction might seem as a useful tool to enforce obligations arising under an MDR clauses, there are certain difficulties with respect to EU law.[91]

The third (at least theoretically) available remedy are damages. Claiming damages are another possibility as far as a breach of an MDR clause is concerned. While damages are a general and widely used remedy in common law jurisdictions, there have been discussions as to why claiming damages may be of a little use to an innocent party to an MDR clause. The main issue here is a very practical one—the quantification of the losses incurred.[92] Essentially, damages are (in principle) designed to compensate the innocent party for pecuniary losses. In other words, the purpose of damages is to put the innocent parties in the position they would have been if the breach had not occurred.[93] Some ADR methods, such as mediation and negotiation, are, however, are inherently voluntary—the parties are not obliged to settle. Accordingly, it cannot be said what the results would be even if such procedures were attempted. Simply put, no one can predict the outcome of mediation or negotiation. As a result, any damages sought by the innocent party would be purely speculative.[94]

Last but not least, there is a possibility of cost sanctions. Despite the fact that the general rule is to order the unsuccessful party to pay the costs of the successful party,[95] English courts have proved that they are more than willing to deviate from this rule where the successful party

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[87] *Cable & Wireless Plc v IBM United Kingdom Ltd*, [2002] EWHC 2059 (Comm), [2002] 2 All ER (Comm) 1041.
[88] ELLIOT, Catherine, QUINN, Frances. *Contract Law*. Pearson Longman, 2009, p. 330; STONE, Richard, DEVENNEY, James. *The Modern Law of Contract*. Routledge, 2015, p. 473.
[89] *Cable & Wireless Plc v IBM United Kingdom Ltd*, [2002] EWHC 2059 (Comm), [2002] 2 All ER (Comm) 1041.
[90] KAJKOWSKA: *Enforceability of Multi-Tiered…*, p. 45.
[91] Ibid., pp. 45-47.
[92] FLANNERY, MERKIN, *Emirates Trading…*, pp. 104-105.
[93] ELLIOT,QUINN: *Contract Law*, p. 331.
[94] FLANNERY, MERKIN, *Emirates Trading…*, p. 77.
[95] CPR 44.2(2)(a).

unreasonably denied attending ADR.[96] The "reasonableness" of ADR is then determined by having regard to all the circumstances of the particular case such as, for instance, the nature of the dispute, the merits of the case, the costs of mediation etc.[97]

3.2 Australia

At the outset, it is important to note that regarding the issue of enforceability of an MDR clauses there are historic differences between the approach of the English and Australian courts.[98] While the English court were, at first, strongly against the possibility of enforcing something as broad and abstract as an obligation to negotiate in good faith (indeed it took the English courts almost 30 years to acknowledge such a possibility), the Australian courts were much more open to the enforceability of such clauses.[99]

As early as in 1991, in *Coal Cliffs Collieries Pty Ltd v Sijehama Pty Ltd*,[100] the Supreme Court of New South Wales was given an opportunity to rule upon the enforceability of contracts to negotiate. The background facts may be shortly stated as follows.

Coal Cliff Collieries Pty Ltd and Sijehama Pty Ltd participated in negotiations, aiming at a conclusion of a joint venture. During the course of negotiation, heads of agreement were signed. Under the heads of agreement, the parties were to "proceed in good faith to consult together upon the formulation of a more comprehensive and detailed joint venture agreement."[101] Unfortunately, the Coal Cliff Collieries decided to cease with the negotiations and to abandon the possibility of the joint venture. Subsequently, the Sijehama initiated legal proceedings and claimed damages for a breach of the heads of agreement, arguing that the heads of agreement amounted to a binding and complete contract.[102]

The question presented before the court was whether the heads of agreements amounted to a legally binding contract. Whilst a court of first instance held that the heads of agreement indeed are to be regarded as a concluded contract,[103] the Supreme court had a different opinion. In the Supreme Court's view, the heads of agreement in question were "too illusory or too vague and uncertain to be enforceable."[104] To that effect, the court added that it is not up to courts to "fill the remaining blank spaces". In other words, courts should not be too eager when it comes

[96] *Dunnett v Railtrack Plc*, [2002] EWCA Civ 303; *Halsey v Milton Keynes General NHS Trust*, [2004] EWCA Civ 576.
[97] *Halsey v Milton Keynes General NHS Trust*, [2004] EWCA Civ 576, paras. 16-24.
[98] CHAPMAN, Simon. Multi-tiered Dispute Resolution Clauses: Enforcing Obligations to Negotiate in Good Faith. *Journal of International Arbitration*, 2010, Volume 27, Issue 1, p. 92.
[99] Ibid. p. 92.
[100] *Coal Cliffs Collieries Pty Ltd v Sijehama Pty Ltd*, [1991] NSWLR 1.
[101] CARR-GREGG, John. The Coal Cliff Collieries Pty Limited v. Sijehama Pty Limited. *AMPLA Bulletin*, 1991, Volume 10, Issue 4, p. 209.
[102] Ibid., pp. 209-210.
[103] Ibid., p. 209.
[104] Ibid., p. 211.

to adjusting agreements between parties; the determination of a contractual content should be primarily left to the parties.[105]

Nevertheless, it should be mentioned that the Supreme court stated that even though there was not a binding contract in the present case, it is possible that there will be cases where an obligation to negotiate will deserve to be enforced. In other words, an obligation to negotiate per se is not unenforceable. The court made a clear point to this end when it stated the following:

> "… [I]t will, I hope, be clear that I do not share the opinion of the English Court of Appeal that no promise to negotiate in good faith would ever be enforced by a court. I reject the notion that such a contract is unknown to the law, whatever its term."[106]

Nonetheless, the court's ruling was not unanimous. One of the judges advocated a dissenting opinion, promoting the unenforceability:

> "Negotiations are conducted at the discretion of the parties. They may withdraw or continue; accept, counter offer or reject; compromise or refuse, trade-off concessions on one matter for gains on another and be as unwilling, willing or anxious and as fast or as slow as they think fit. To my mind these considerations demonstrate that a promise to negotiate in good faith is illusory and therefore cannot be binding."[107]

To summarize, even though the Supreme Court of New South Wales did not find the concerned obligation to negotiate in good faith enforceable, the court (by majority) held that, as far as Australian law is concerned, the obligations to negotiate ought to be enforced wherever they are sufficiently clear. In other terms, the enforceability will depend on the construction of **a** particular contract.[108]

Another case that deserves closer attention is *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*, decided by the Supreme Court of New South Wales.[109] The dispute concerned a construction contract for construction works for the new Parliament House building in Canberra. The parties to the dispute were Hooper Bailie Associated Ltd and Natcon Group Pty Ltd. The parties proceeded to arbitrate the dispute. However, during the arbitral proceedings, the parties decided to enter into a conciliation agreement. (It is therefore interesting to notice that the

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[105] Ibid., p. 211.
[106] *Coal Cliffs Collieries Pty Ltd v Sijehama Pty Ltd*, [1991] NSWLR 1.
[107] Ibid.
[108] CARR-GREGG: *The Coal Cliff…*, p. 211.
[109] *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*, [1992] 28 NSWLR 194.

agreement was not in the form of a clause, as is the usual way, but the conciliation was agreed after the dispute came to be.) In terms of the agreement, the parties agreed to engage in a conciliation procedure, postponing the arbitration pending the conciliation. Further controversies arose when a liquidator was appointed to Natcon. Subsequently, Natcon (now represented by the appointed liquidator) decided not to participate in the conciliation. As a result, Hooper Bailie sought an order to stay the arbitral proceedings pending the conciliation.[110]

Two important questions were thus presented before the court: first, whether the conciliation procedure was sufficiently certain to be enforced; second, whether the court should order a temporary stay of proceedings.

As to the first question, the court held that when a conciliation process is sufficiently certain, an obligation to conciliate should be enforced. The court examined the agreement between the parties, namely the part that provided for conciliation conducted by a specified person in a specific place,[111] and found that there is a clear structure for the conciliation.

In addition, the court addressed the issue of the notion of good faith and the inherent uncertainty of such a notion. The court emphasised the fact that Natcon did not make any effort to participate in the conciliation. Put differently, there was no need to contemplate about the uncertainty surrounding the obligation to act in good faith since "Natcon [declined] to participate at all."[112] Accordingly, Natcon (obviously) did not adhere to its obligations.

As far as the second question is concerned—whether or not order the stay of proceedings—the court found that it has the power to stay arbitral proceedings; therefore, the court can indirectly enforce an agreement whereby parties agree to conciliate to before proceedings with arbitration. In that respect, the court stated that "there is nothing offensive in indirectly requiring participation in a process of dispute resolution provided there is sufficient certainty in the conduct required by the way of participation."[113]

In another decision made in *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*,[114] a dispute arose between Elizabeth Bay Developments Pty Ltd and Boral Building Services Pty Ltd in connection with two construction contracts. In the subsequent proceedings, Boral invoked mediation clauses contained in the contracts and applied for a stay of proceedings so that the mediation could take place. Both mediation clauses provided for a detailed process as to

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[110] Ibid.
[111] Ibid., ("The conciliation [will] be held before Eric Shick in Canberra. … No rules of evidence will apply. … Both parties [will] submit to the conciliator prior to the commencement of the conciliation a written summary of their case. …")
[112] Ibid.
[113] Ibid.
[114] *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*, [1995] 36 NSWLR 709.

the resolution of the dispute. Both mediation clauses were similar in nature and provided for specifics steps to be taken—a time frame and an ADR institution to administer the mediation.[115]

The question was similar to the one already considered in the previous case (*Hooper Bailie*), i.e. whether to treat an agreement to mediate as sufficiently certain pre-condition to arbitration.

The court's holding in the case was twofold: first, a mediation clause that requires a further agreement as to the terms of mediation proceedings is not sufficiently certain to be enforced; second, an agreement which envisions an attempt at good faith negotiations is not sufficiently certain to be given effect.[116]

The first holding was found on the basis that although the parties undertook efforts to devise a detailed procedure regarding the resolution of the disputes, there was a major stumbling block in their undertaking. According to the guidelines prescribed the Australian Commercial Dispute Centre, the parties would need a mediation appointment agreement which sets out the terms of mediation. The fact that the mediation clauses would require "to sign an unknown agreement as an important step in the process of mediation" would require from Elizabeth Bay "conduct of unacceptable uncertainty".[117]

Similarly, with respect to the second holding, the court denied to give any effect to the undertaking to negotiate in good faith towards a settlement of the dispute.

In court's view both obligations did not meet the requirements considered in *Hooper Baillie* case—the sufficient certainty as to the ADR procedure. As a result, the court dismissed Boral's motion for the stay of proceedings.[118]

Another case to consider is *Aiton Australia Pty Ltd v Transfield Pty Ltd*.[119] The case concerned a dispute between Aiton Australia Pty Ltd and Transfield Pty Ltd which arose under construction contracts. These contracts contained an MDR clause providing for an obligation to negotiate the dispute[120] and an obligation to engage in mediation.[121] Even though Aiton made several attempts to invoke the dispute resolution clause, Transfield did not take proper steps to comply with the clause. This uncooperative behaviour led Aiton to start court proceedings, disregarding the

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[115] Ibid., ("… [E]ither party shall give to the other notice in writing of the dispute or difference and at the expiration of seven days, unless it shall have been otherwise settled, the parties agree to first endeavour to settle the dispute or difference by mediation administered by the Australian Commercial Disputes Centre (ACDC). … In the event that the dispute has not been settled within 28 days (or such other period as agreed to in writing between the parties hereto) after the appointment of the mediator the dispute shall be submitted to arbitration administered by and in accordance with the Arbitration Rules of the ACDC.")

[116] Ibid.

[117] Ibid.

[118] Ibid.

[119] *Aiton Australia Pty Ltd v Transfield Pty Ltd*, [1999] NSWSC 996.

[120] Ibid., para. 8 ("The … [Transfield] and … [Aiton] shall make diligent and good faith efforts to resolve all Disputes …] before either party commences mediation, legal action or the expert Resolution Process, as the case may be.")

[121] Ibid., para. 8.

process set out in the MDR clause. Subsequently, Transfield contested the initiation of proceedings and applied for a stay of proceedings, arguing the compliance with the MDR clause to be a condition precedent to commencing either litigation or arbitration.[122]

As far as the mandatory nature of the MDR clause was concerned, the court, when interpreting the clause, held that the clause in question is clearly obligatory. The clause required to be strictly observed and constituted a necessary precondition to the right to commence proceedings. The use of words and phrases such as "shall", "before either party commences mediation [or] legal action", "compulsory pre-condition to the right to proceed with legal action" undoubtedly points to the mandatory nature of the clause.[123]

Furthermore, the court held that, in principle, the parties are free to postpone legal proceeding (be it litigation or arbitration) provided that they expressly agree mediation to be a condition precedent. Of course, it all depends on whether the clause in question is enforceable in terms of the requirements of certainty.[124]

The court first turned to consider the mediation clause. The court observed that, although elaborated, the mediation clause was silent about mediator's costs.[125] While the lack of this provision might have been resolved by implying the terms, in the present case, the clause did not met requirements for such an implication.

One of the conditions to imply a term into a contract is that the implied terms must be so obvious that "it goes without saying".[126] According to the court, this condition was not satisfied. Therefore—as to the mediator's costs—the clause continued to remain uncertain. In consequence, this was the major reason that lead the court to hold the mediation clause unenforceable.[127]

Then, the court went on to elaborate upon the issue of the enforceability of the obligation to negotiate. In this respect, the court reasoned that a procedure consisting of an obligation to negotiate that contains a condition precedent ought to be certain, so that a party is able to determine when such a procedure comes to an end.[128] In this regard, the clause in the case at hand stipulated time frames within which the procedure were to be followed.[129] Accordingly, the

[122] Ibid., paras. 1-22.
[123] Ibid., para. 35.
[124] Ibid., paras. 42-43.
[125] Ibid., para. 65.
[126] Ibid., para. 66.
[127] Ibid., para. 70.
[128] Ibid., paras 74-75.
[129] Ibid., para. 8 ("If the representatives of the parties are unable to resolve a Dispute within 15 days after Notice from one Party to the other of the existence of the dispute (the "Dispute Notice") and after exchange of the pertinent information, either party may, by a second Notice to the other Party, submit the Dispute to the Designated Officers of Supplier and Purchaser. A meeting date and place shall be established by mutual Contract of the Designated Officers. However, if they are unable to agree, the meeting shall take place at the Site on the 10th

court stated that "it cannot be said that in the absence of agreement, the parties would not know when the condition precedent is satisfied and when they thus have the option of instituting proceedings."[130]

However, the court found that it is not possible to sever the mediation clause and the clause providing for negotiations. Following this logic, the court held the negotiations clause unenforceable as well. That being said, if, on the other hand, it had been possible to sever this clause from the mediation clause, the clause prescribing the detailed negotiations would have been enforceable.[131]

In addition, the court contemplated upon the question of remedy in case of the breach of MDR clauses. In that matter, the court held that it would not order specific performance. The reason was that the supervision of such performance is untenable. On the other hand, the court held that a proper remedy would be to stay (or adjourn) the proceedings until such time as the agreed ADR procedure is completed.[132] The power to grant a stay is derived from "[court's] inherent jurisdiction to prevent abuse of its process".[133]

Last but not least, there is a decision decided in 2009 in *United Group Rail Services Ltd v Rail Corporation New South Wales*[134] by the Supreme Court of New South Wales.

The case concerned a dispute arising under a construction contract. The contract contained detailed dispute resolution clause that, inter alia, contained an obligation to "meet and undertake genuine and good faith negotiations with a view to resolving disputes"[135] and an obligation to mediate if the negotiations proved unsuccessful.[136] An arbitration was conceived as a last resort.

The court decided to follow the reasoning in *Coal Cliffs*, i.e. that in general an obligation to negotiate can be under certain conditions enforced. In this respect, the court distanced itself from the position of English courts taken in their early decisions (*Courtney* and *Walford v Miles*).[137]

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business day after the date of the second Notice. The Designated Officers shall meet in person and each shall afford sufficient time for such meeting (or daily consecutive meetings) as will provide a good faith, thorough exploration and attempt to resolve the issues. If the Dispute remains unresolved 5 Business Days following such last meeting, the Designated Officers shall meet at least once again within 5 Business Days thereafter in a further good faith attempt to resolve the Dispute. For any Dispute which is unresolved at the conclusion of such meeting, each Party shall submit within 10 days thereafter a written statement of its position to the other party and the Dispute shall be immediately submitted to mediation. …")

[130] Ibid., para. 77.

[131] Ibid., paras. 70-71, 174.

[132] Ibid., para. 26.

[133] Ibid., para. 27.

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

[135] Ibid., para. 15 ("… [T]he dispute or difference is to be referred to a senior representative of each of the Principal and Contractor who must … meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference; …")

[136] Ibid., para. 15 ("[I]f they cannot resolve the dispute or difference within 14 days after the giving of the notice … the matter at issue will be referred to the Australian Dispute Centre for mediation.")

[137] Ibid., paras. 63-67.

The court then went on to elaborate on the notion of good faith. In terms of the parties' undertaking to engage in good faith negotiations, the court held that there is an identifiable standard of behaviour imposed upon the parties: "honesty is such a standard."[138] By agreeing to engage in good faith negotiations, the parties agree to behave in a particular way.[139] In this regard, such an undertaking is not incomplete. Though the court admitted that this standard is subjective in nature.[140]

Nonetheless, the court continued that there can very well be situations where it will be easy to determine whether the parties actually complied with an obligation to negotiate in good faith. In other terms, in such cases, a court will be able to determine the breach of such obligations; it may even be "blindly obvious". Therefore "[u]ncertainty of proof [alone] … does not mean that this is not a real obligation with real content."[141]

Moreover, the enforceability of such obligations is important in terms of public policy. It is more than welcome to encourage parties to make use of efficient ADR techniques. In that respect, ADR procedures create a possibility to resolve dispute without engaging in (usually) costly judicial proceedings, that in turn promotes the efficient use of public and private resources.[142]

As a result, having regard to the foregoing, the court held that the obligation to undertake genuine and good faith negotiations was not uncertain, had identifiable content, and therefore ought to be enforced.[143]

On the other hand, as far as the obligation to mediate the dispute was concerned, the court held it unenforceable. The obligation to mediate in the case at hand was "short and lacking detail [and] [n]o detailed procedure was set down."[144] As a matter of fact, the clause referred to a non-existing ADR institution: Australian Dispute Centre for Mediation did not exist.[145]

3.3 France

3.3.1 Legal Framework

The use of consensual ADR was imported from America by Quebec by ADR practitioners during the "ADR boom". Since then, ADR has become a popular method to resolve disputes in

[138] Ibid., para. 65.
[139] Ibid., para. 64.
[140] Ibid., para. 65.
[141] Ibid., para. 74.
[142] Ibid., para. 78.
[143] Ibid., para. 81.
[144] Ibid., para. 83.
[145] Ibid., para. 83.

France.[146] (The ADR oriented approach is even further accentuated by the existence of a general mandatory obligation to attempt to resolve a dispute in amicable manner before a party is allowed to pursue a claim before a court.)[147] In this regard, mediation and conciliation are leading ADR techniques.[148]

At the outset, it should be noted that as far as French legal order is concerned, there is a distinction between mediation and conciliation. The principles and the process itself of mediation and conciliation are rather similar; both methods aim to find an amicable solution to the dispute between the parties with a help of a neutral third party.[149] The main difference is that in France a conciliator is a regulated legal profession.[150] This distinction is a result of historical development in France.[151] Nonetheless, some authors reject this traditional approach and use the terms interchangeably pointing out that there is no difference in the normative regime governing mediation and conciliation. Moreover, a conciliation is also sometimes equated to negotiations between the parties without a presence of a third party.[152] Thus, for the purposes of this thesis, the terms "mediation" and "conciliation" are used interchangeably.

When it comes to mediation (and conciliation), the main source of law is French Code of Civil Procedure. The crucial parts are Arts. 72 – 131 CPC relating to a *mediation juridique*, i.e. mediation ordered by a judge during court proceedings, and Arts. 1528 – 1541 CPC, which provide a legal base for *mediation conventionelle*, i.e. a contractually agreed mediation.[153] There is, however, no provision regulating the enforceability of mediation (or other ADR) clauses. That is, there are no provisions akin to those regulating arbitration clauses such as Art. 1448 CPC. In other words, in France, there is no legal basis that would provide a court with a power to stay proceedings where one of the parties circumvented an MDR clause.[154]

In this regard, French law lacks a statutory base to cope with situation where the parties agreed beforehand to make an access to court conditional upon participating in mediation. In this

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[146] KAJKOWSKA: *Enforceability of Multi-Tiered…*, p. 87.
[147] Art. 56 of French Code of Civil Procedure ("[L]'assignation precise également les diligences enterprise en vue de parvenir à une resolution amiable du litige. …")
[148] KAJKOWSKA: *Enforceability of Multi-Tiered…*, p. 87.
[149] MATHE, Charline. L'efficacite de la clause de conciliation [online]. Charlinemath.wordpress.com, 10 june 2015 [cit. 3 august 2017]. Available at < https://charlinemathe.wordpress.com/2015/06/10/lefficacite-de-la-clause-de-conciliation/>
[150] Ibid. p. 304.
[151] WIETEK, Delphine. Chapter 12: France. In ALEXANDER, Nadja, WALSH Sabine, SVATOŠ, Martin (eds). *EU Mediation Law Handbook*. Kluwer Law International, 2017, p. 309.
[152] KAJKOWSKA: *Enforceability of Multi-Tiered…*, p. 87.
[153] Arts. 72 – 131 and 1528 – 1541 of French Code of Civil Procedure; WIETEK: *EU Mediation Law…*, p. 304.
[154] Art. 1448 of French Code of Civil Procedure ("When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable.")

situation, the French jurisprudence has played an important role when shaping the standpoint towards MDR clauses as it has to rely on the general rules of civil procedure[155]

3.3.2 Enforceability of MDR Clauses in France

Initially, the French Court of Cassation did not have a uniform point of view with respect to enforceability of MDR clauses. While there were few decisions upholding the enforceability of obligations arising under such clauses,[156] the majority of early judgements took a different approach and decided to treat mediation clauses as mere non-binding aspirations of the parties.[157]

The turning point came in 2003 in *Poiré v Tripier*. The case put an end to the uncertainty connected to the question of the enforceability of MDR clauses in France. The Court of Cassation gave effect to an MDR clause that provided for prejudicial conciliation (mediation). In this regard, the holdings in *Poiré v Tripier* marked the start of an ADR oriented approach and set a trend to be followed in French jurisprudence.[158]

There was, however, one aspect of MDR clauses that did not receive much attention by French courts: they did not elaborate at all on the specific condition under which should an MDR clause be enforced. In this regard, one may notice that there was not any serious attempt to come up with a list of requirements that would provide guidance in this matter. As a matter of fact, the Court of Cassation even seemed to not differentiate between mediation clauses and clauses that provide for simple negotiations without the neutral party and a procedural framework. In a number of cases, such as the above-mentioned *Poiré v Tripier*, the Court limited itself only to state that clauses in contracts providing for a process of obligatory pre-action conciliation give rise to a possibility to raise a plea of inadmissibility.[159]

Another milestone came with the decision in the *Meddissimo v Logica*.[160] In that case, the court explicitly held that an MDR clause that does not provide for any particular details related to a procedural framework is not obligatory and thus will not be enforced by courts.[161]

Moreover, the courts have held that the wording of an MDR clause is a key factor when it comes to enforceability. Therefore, to limit the possibility of a dispute, it is more than recommended to use an unambiguous and precise language that does not leave any doubt as to

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155 KAJKOWSKA: *Enforceability of Multi-Tiered…*, p. 89.
156 Cass., Civ. 3, 5 July 1989, n° 86-16309, Bull. 1988 I n° 84.
157 Cass., Soc., 26 January 1994, n° 91-40464, 91-41777, 91-41778, Bull. 1994 V n° 32; Cass., Civ. 1, 23 January 2001, n° 98-18679, Bull. 2001 I n° 11; Cass., Civ. 1, 6 March 2001, n° 98-15502, Bull. 2001 I n° 58.
158 Cass., Com., 17 June 2003, n° 99-16001, Bull. 2003 IV n° 101; Cass., Civ. 2, 16 December 2010, n° 09-71575, Bull. 2010, II, n° 212; Cass., Civ. 1, 28 March 2012, n° 11-10347.
159 Cass., Ch. mixte, 14 February 2003, n° 00-19423, 00-19424, Bull. 2003 MIXTE n° 1.
160 Cass., Com., 29 April 2014, n° 12-27004, Bull. 2014, IV, n° 76.
161 Ibid.

the parties' intention to engage in ADR.[162] Nonetheless, there have also been cases where courts applied less strict threshold to enforce MDR clauses.[163]

To sum up, as far as the enforceability of multi-tied clause in French legal order is concerned, it mainly depends on a positive response to the following questions: First, is the amicable dispute resolution clause mandatory? Second, is the amicable dispute resolution clause a condition precedent to the right to refer a claim to litigation or arbitration. Last but not least, is the amicable dispute resolution clause procedure sufficiently detailed?[164]

3.3.3 Remedies under French Law

Since there is not any statutory sanction for the breach of an ADR procedure, the French courts have had to rely on the general rules of civil procedure. In the abovementioned *Poiré v Tripier* case, the court ruled that that non-compliance with an obligation to participate in ADR procedure allows the innocent party to raise a plea as to inadmissibility (*fin de non-recevoir*) of the claim.[165] Since then the approach have been endorsed and followed in French jurisprudence.[166]

To illustrate, Art. 122 of French Code of Civil Procedure states that "a plea of non-admissibility is any ground whose purpose is to get adversary's claim declared inadmissible, without entering into the merits of the case, for lack of right of action, such as not being a proper party, lack of interest, statute of limitation, fixed time-limit or res judicata."[167] Successfully pleading inadmissibility results in the court concluding the proceedings without adjudicating the merits of the case. Importantly, such a declaration of inadmissibility is without a res judicata effect. Therefore, a party can latter (after it complied with a prescribed ADR) recommence the litigation.[168]

Apart from the plea of inadmissibility, other possible remedies considered were: specific performance, damages or liquidated damages.

The idea behind the possibility of specific performance was to use a similar approach which is being applied with respect to the enforcement of arbitration clauses. (For instance, where a party refuses to nominate an arbitration in accordance with an arbitration clause, the

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162 Cass., Civ. 1, 6 February 2007, n° 05-17573, Bull. 2007 I n° 55 ("The disputed clause required the parties to engage in "consultations" prior to resorting to arbitration. The court held that the parties' failure to reference the process properly as "conciliation" rendered the clause unenforceable.); Cass., Civ. 3, 23 May 2012, n° 10-27596.
163 Cass., Civ. 1, 28 March 2012, n° 11-10347.
164 TRAVAINI, Gregory. *Multi-tiered dispute resolution clauses, a friendly Miranda warning.* [online]. kluwerarbitrationblog.com, 30 September 2014 [cit. 5 August 2017]. Available at: < http://kluwerarbitrationblog.com/2014/09/30/multi-tiered-dispute-resolution-clauses-a-friendly-miranda-warning/>.
165 Cass., Ch. mixte, 14 February 2003, n° 00-19423, 00-19424, Bull. 2003 MIXTE n° 1.
166 Cass., Com., 17 June 2003, n° 99-16001, Bull. 2003 IV n° 101.
167 Art. 122 of French CCP.
168 KAJKOWSKA: *Enforceability of Multi-Tiered…*, p. 92.

other party can apply to court to make the nomination instead.)[169] However, even though the specific performance is a preferred remedy in France, such a remedy cannot be applied in relation to MDR clauses, as there is not any statutory foundation to support it.[170]

With respect to damages, the prevailing opinion is that the nature of an ADR process, such as mediation or negotiations, makes it hard (if not impossible) to quantify the exact amount of damages to be awarded to innocent party.[171] Nonetheless, there is still the possibility to agree on liquidated damages.[172]

3.4 Germany

3.4.1 Legal Framework

In Germany, the primary source of regulations of mediation is the Mediation Act (*MediationsG*). The act transposed the EU Directive 2008/52/EWG and entered into force in 2012.[173] The act does not differentiate between domestic and cross-border mediation. Therefore, it will apply to any mediation held in Germany (similarly to *lex fori* or *lex arbitri*).[174]

Nonetheless, the number of its provisions is rather low as it only regulates general and fundamental matters related to mediation.[175] As a result, the parties enjoy a great amount of contractual freedom with respect to modifying the mediation process. They can make use of it through tailoring their own mediation procedure, for instance, by contracting for a mediation clause, or through reference to institutional rules of some well-regarded ADR institutions in Germany.[176]

Interestingly, in Germany, there is no judicial mediation, i.e. a procedure in which judges act as mediators, as German law emphasises the private sector when it comes to mediation.[177] This is further accentuated by the fact that a court can refer the parties (through a non-binding suggestion) to an external mediation procedure.[178]

Unfortunately, there are no statutory provisions that regulate the matter of the enforceability of MDR clauses. In consequence, the matter has been left for German jurisprudence to decide.[179]

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[169] Ibid., p. 100.
[170] Ibid., p. 100.
[171] KAJKOWSKA: *Enforceability of Multi-Tiered…*, p. 100.
[172] Ibid., p. 100.
[173] OSSWALD, Kristina, FLECKE-GIAMMARCO, Gustav. Chapter 13: France. In ALEXANDER, Nadja, WALSH Sabine, SVATOŠ, Martin (eds). *EU Mediation Law Handbook*. Kluwer Law International, 2017, p. 352.
[174] Ibid., p. 356.
[175] § 1-9 MediationsG.
[176] Ibid., pp. 357, 361; KAJKOWSKA: *Enforceability of Multi-Tiered…*, p. 65.
[177] OSSWALD, FLECKE-GIAMMARCO: *EU Mediation Law…*, p. 356.
[178] § 278a ZPO.
[179] KAJKOWSKA: *Enforceability of Multi-Tiered…*, p. 66.

3.4.2 Enforceability of MDR Clauses in Germany

In this regard, the leading judgment is the decision of the Federal Court of Justice of 23 November 1983. The case concerned a take-over of a veterinary practice. The clause in question provided for conciliation procedure to be held before a veterinary chamber. It read:

> "In any case of a dispute between the parties or controversies as to an interpretation of contractual provisions, the parties are under the obligation to first refer the dispute or controversies the [competent veterinary chamber], which will act as an arbitrator".[180]

The claimant, however, bypassed the agreed upon procedure and filled the claim in court. The question was, therefore, what (if any) consequences are to be devised from the non-participation in the conciliation procedure.[181]

At the outset, the court held that the clause cannot be regarded as an arbitration clause since it does not provide the veterinary chamber with a power to issue a decision that is binding and final. The court, however, construed the clause as a mediation clause, because the real task of the veterinary chamber was to facilitate an amicable resolution of the dispute.[182] As to the mandatory nature of the clause, the court continued to examine the wording of the clause. It pointed out that while the formulation "should" may (depending on the circumstances) point to the conclusion that a clause is of a voluntary nature, the wording "in any case" does not leave any room to doubt the mandatory nature in this case.[183]

Moreover, the court went further—beyond the wording—to consider the purpose of the clause. According to the court, the very purpose of the clause in question was to restrict the actionability of the claim until the mediation procedure had been attempted.[184]

At this point, it must be noted that in Germany the prevailing opinion in both jurisprudence and literature is that parties are, in general, free to restrict the actionability of the claim (*Klagbarkeit*). Such a restriction is not unreasonable with respect to the right of access to justice (courts).[185] In this regard, the court further endorsed this approach and dismissed the claim as in admissible.[186]

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[180] BGH, 23 November 1983, VIII ZR 197/82, NJW 1984, 669, para. 1.
[181] Ibid.
[182] Ibid., para. 8.
[183] Ibid., para. 11.
[184] Ibid., para. 12.
[185] OLG Celle, 31 July 1970, NJW 1971, 228. ("The court ascertained the sanctions for breach of conciliation clauses. The case established that failure to attempt conciliation before filling the claim in court excludes actionability of the claim, i. e. the ability to raise the claim in court.); BGH, 4 July 1977, NJW 1977, 2263, para. 7 ("It is only when such conciliation fails, that ordinary judicial proceedings may be taken.").
[186] BGH, 23 November 1983, VIII ZR 197/82, NJW 1984, 669, para. 17.

It follows from the above-mentioned case, that it was not the first time a German court dealt with the question of enforceability of a mediation clause. The enforceability of mediation clauses was confirmed as early as in 1970 in the decision of the regional court of appeals in Celle[187] and subsequently in the decision of the Federal Court of Justice of 4 July 1977 where the court held that: "[The clause] does not produce any doubts about the binding nature of the conciliation clause."[188]

It follows from the aforementioned that German law was rather quick to accept the binding nature of conciliation clauses and to lay down foundation for the enforceability of MDR clauses. Even though there were some objections based on the fact that the clause lacked "clear timetable" as to the ADR procedure,[189] the pro-enforceability approach of multi-tier dispute resolution clauses haven been since confirmed in a number of subsequent decisions.[190]

3.4.3 Remedies under German Law

It has been already mentioned that, in Germany, it is well-established that non-compliance with an MDR clause leads to a claim being rejected as inadmissible (unzulassig). It is entirely up to the parties to dispose with the actionability of the claim (Klagerbarkeit). They are free to restrict their right to go to a court (pactum de non petendo).[191]

In one of its decision, the Federal Court of Justice compared the effects of a conciliation clause to those of an arbitration clause under § 1032 (1) ZPO. In both cases, the claim is to be dismissed as inadmissible.[192] In addition, the court recalled that the procedural effects of a conciliation clause are not observed *ex offo*; therefore, a party has to be active and raise the objection of non-compliance with the procedure.[193]

It follows from the above that German courts enforce mediation clauses by procedural means. Substantive consequences, i.e. the possibility of contractual remedies such as damages or specific performance are considered only in theory and not applied in practice. The problem with specific performance lies (again) in the voluntary nature of some ADR methods. As to the damages, it has been argued that it is impossible to come up with precise quantification of losses incurred.[194]

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187 OLG Celle, 31 July 1970, NJW 1971, 228.
188 BGH, 4 July 1977, NJW 1977, 2263, para. 8.
189 BGH, 4 July 1977, NJW 1977, 2263, para. 9.
190 BGH, 18 November 1999, NJW 1999, 647, para. 5; Brandenburgishes OLG, 18 September 1996, ANWBL 1998, 281; OLG Frankfurt a. M., 7 November 1997, NJW-RR 1988, 778; BayObLG, 16 November 1995, NJW-RR 1996, 910.
191 KAJKOWSKA: *Enforceability of Multi-Tiered…*, p. 71.
192 BGH, 18 November 1999, NJW 1999, 647, para. 7.
193 Ibid., para. 6.
194 KAJKOWSKA: *Enforceability of Multi-Tiered…*, p. 71.

3.5 Switzerland

3.5.1 Legal Framework

In Switzerland, consensual ADR techniques have a long and profound tradition.[195] In this respect, (also) Swiss law distinguishes between conciliation and mediation.[196] A conciliation process is conducted before a state authority (Schlichtungsbehörde),[197] and it constitutes (subject to few exceptions) a mandatory prerequisite for bringing the claim before courts.[198] On the other hand, mediation is conducted by private individuals[199] and it is not mandatory.[200] (Although it is possible attend mediation instead of conciliation, if the parties agree to do so.[201]) Moreover, contrary to a mediator, a conciliator can be more active as a he or she has an authority to submit settlement proposals.[202] Nonetheless, the subject of both mediation and conciliation is rather same—negotiations assisted by third neutral party whose sole purpose is to facilitate amicable settlement between the parties.[203] Furthermore, especially in international settings, both terms tend to be used interchangeably.[204]

With respect to sanctions for non-compliance with mediation clauses, in cases where Swiss law does not call for mandatory conciliations,[205] there are no statutory sanctions.[206]

3.5.2 Enforceability of MDR Clauses in Switzerland

There is not much case law when it comes to the issue of MDR clauses in Switzerland. That, however, does not stop the issue from being a matter of great controversy among both Swiss courts and commentators. The pivotal question is whether obligations, such as an obligation to mediate or an obligation to negotiate that stems from MDR clauses are of substantive or procedural nature. The answer to this question is crucial in dealing with a failure to comply with obligations under MDR clauses. In this respect, if an obligation to mediate the dispute is viewed as purely substantive in nature, the available remedies can only consist of standard remedies available under contract law—a typical example being the damages. If,

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[195] MEIER, Isaak. Chapter 14: Mediation and Conciliation in Switzerland. In ALEXANDER, Nadja (ed). *Global Trends in Mediation.* 2nd edition. Kluwer Law International, 2006, p. 373.
[196] Arts. 197 – 212 of Swiss CCP ("Title 1 Attempt at Conciliation"); Arts. 213 – 218 of Swiss CCP ("Title 2 Mediation").
[197] Art. 201(1) of Swiss CCP.
[198] Art. 197 of Swiss CCP.
[199] Art. 215 of Swiss CCP.
[200] Art. 214(1) of Swiss CCP.
[201] Art. 213(1) of Swiss CCP.
[202] LIATOWITSCH, Manuel, MENZ, James. Chapter 13: Alternative Dispute Resolution. In GEISINGER, Elliot, VOSER, Nathalie (eds). *International Arbitration in Switzerland: A Handbook for Practitioners.* 2nd edition. Kluwer Law International, 2013, p. 321.
[203] Ibid., p. 315.
[204] Ibid., p. 320.
[205] Art. 198 of Swiss CCP.
[206] KAJKOWSKA: *Enforceability of Multi-Tiered…*, p. 108.

however, such clauses are to be considered procedural in nature, then other remedies in relation to either court or arbitral proceedings become available.[207]

Unfortunately, Swiss courts are not unanimous regarding the consequences of non-compliance with MDR clauses. Furthermore, the approach of Swiss courts with respect to litigation differs significantly from that in the case of arbitration.[208]

The first decision to consider is the judgement of 15 March 1999 by Kassationgericht Zurich.[209] The case concerned a construction contract that, inter alia, provided for a dispute resolution by way of conciliation. According to the dispute resolution clause, the parties were obliged to submit all their dispute to conciliation procedure. Only if the parties had not agreed within 30 days after the recommendation of conciliators could they proceed with litigation. One of the parties, however, bypassed the agreed upon procedure and decided to file the claim with the court.

In its reasoning, the court considered the relationship between a contractually agreed private conciliation procedure and the procedural (public) law. In this regard, the court held that while procedural law provides for prorogation and arbitration agreements, there is no mention regarding conciliation (or mediation) agreements. Therefore, the failure to participate in conciliation procedure cannot lead any procedural consequences. Nevertheless, the court added that such contracts are still valid and enforceable agreements in terms of substantive law and can, therefore, be enforced through the means of contractual law such as damages.[210]

Such a position is of course not free of controversies. Commentators point out to the inefficiency of substantive remedies, arguing that, for instance, damages can hardly be an effective way to enforce mediation clause, as it is difficult (if not impossible) to ascertain the exact amount of damages.[211] One cannot help but notice that while courts regard mediation clauses as enforceable, the lack of efficient remedies can make the enforceability seem only illusory. (In this regard, some authors actually presume that regarding the Swiss law, mediation or conciliation clauses with respect to litigation are in fact unenforceable.)[212]

Another decision that deserves attention is the decision of 23 April 2001 by the Court of Appeals in Thurgau. In the case at hand, the court was tasked with deciding what consequences arise from the failure to undergo an ADR procedure before pursuing the claim in court

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[207] JOLLES, Alexander. Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement. *Arbitration: The Journal of the Chartered Institute of Arbitrators*, 2006, Issue 4, p. 329; KAJKOWSKA: *Enforceability of Multi-Tiered…*, p. 108; BOOG, Christopher. How to Deal With Multi-Tiered Dispute Resolution Clauses. *ASA Bulletin*, 2008, Volume 26, Issue 1, pp. 106 - 107.
[208] KAJKOWSKA: *Enforceability of Multi-Tiered…*, p. 112.
[209] Kassationgericht Zürich, 15 March 1999, ASA Bulletin, Volume 20, Issue 2, pp. 376-381.
[210] Ibid., pp. 373 -376.
[211] JOLLES: *Consequences of Multi-tier…*, p. 336.
[212] KAJKOWSKA: *Enforceability of Multi-Tiered…*, pp. 111-112; MEIER: *Global Trends…*, p. 385.

proceedings. The court held that such an obligation is non-binding as the parties are not free to agree on matters belonging to the domain of public law. Nonetheless, it added—in obiter dictum—that in case of litigation, the claimant would first have to submit the dispute to the agreed ADR procedure. Failure to do so would result in inadmissibility of the claim.[213]

However, the situation is entirely different when it comes to arbitration. It is suggested that there are two main ways to enforce ADR obligations in relation to arbitration. The first assumes that non-compliance with a mediation clause results in the lack of jurisdiction of arbitral tribunal. Under the second proposition, premature claims should be rendered inadmissible by temporarily suspending the proceedings.[214]

The possibility to affect the competence of an arbitral tribunal was first confirmed in *Vekoma v Maran*, a decision made by the Federal Supreme Court of Switzerland on 17 August 1995.[215] The case in question concerned a delivery contract for coke breeze between a Dutch company, Transport en Handelmaatschappij Vekoma BV and an American company, Maran Coal Corporation. The contract, among other things, contained an MDR clause that provided for arbitration as the final stage of a dispute resolution procedure. In addition, the clause contained a provision stipulating that the arbitral proceedings can only be initiated within the 30 days after it has been agreed that the dispute cannot be resolved by negotiations.[216]

A dispute arose between the parties, and Maran decided to initiate arbitration that ended in issuing an award in favour of Maran. This led Vekoma to seek the annulment of the award before the Supreme Court on the grounds that arbitral tribunal had wrongly assumed its jurisdiction. Finally, the court set aside the award, stating that Maran had failed to initiate the arbitration within the set time limit.[217]

Not only that this case confirmed that non-compliance with an obligation to mediate or (as was the case here) to negotiate, affects the jurisdiction of arbitral tribunal (and exposes an award to the danger of annulment), but it also constitutes a great example of what are the consequences of badly written multi-tier dispute resolution clauses.

The pivotal question in *Vekoma v Maran* was when exactly the parties agreed that they can no longer settle the dispute through negotiation. The exact moment of the "failure of negotiation" was of crucial importance, because the 30-day time limit, within which the party had to initiate arbitration, would only be triggered by such a moment. Needless to say, such a vague and subjective criterion (essentially, a "meeting of minds" regarding the inability to resolve the

[213] OGer Thurgau, 23 April 2001, ASA Bulletin, 2003, Volume 21, Issue 2, p. 419.
[214] KAJKOWSKA: *Enforceability of Multi-Tiered…*, pp. 111-112.
[215] BGer, 17 August 1995, ASA Bulletin, 1996, Volume 14, Issue 4, pp. 673-679.
[216] Ibid., p. 674.
[217] Ibid., pp. 678-679.

dispute by the way of negotiation was required to trigger the "temporary" arbitration clause[218]) inherently leaves a wide scope for interpretation, thus, making it possible to come to different conclusions.

Without going into further details, this is exactly what happened in *Vekoma v Maran*. Both the arbitral tribunal and the court examined the case file and considered the exchange of communication between the parties after the dispute has arisen. Whereas the arbitral tribunal came to a conclusion that the request for arbitration had been made within the 30 day contractual limitation period, the court, on the other hand, ruled that the arbitration had been initiated late. On that basis, the court proceeded to set the award aside due to the lack of jurisdiction.[219] A lot of time, effort, and money was wasted only because the court and the arbitral tribunal had different opinions regarding the moment of the failure of negotiations.

The viewpoint that non-compliance with an MDR clause affects the jurisdiction of an arbitral tribunal was also considered by the Appellate Court of Zurich in a decision of 11 September 2001. In that case, the respondent refused to co-operate in the appointment of an arbitrator. The respondent argued that the appointment was premature because the parties had committed to engage in conciliation before commencing arbitration. Since the claimant had allegedly not participated in conciliation, a condition precedent to arbitration was not met. In this regard, the court held that it was not its role to determine whether the requirements for arbitration had been met and held that issues regarding jurisdiction ought to be decided by arbitrators and not by a court. It follows that the court (albeit indirectly) confirmed the opinion that non-compliance with MDR clause gives rise to procedural consequences.[220]

However logical it may seem to decline the jurisdiction an arbitral tribunal when the first tier of an MDR clause had not been complied with, there are some that view such an approach as unreasonably strict and impractical in certain situations.[221] The Swiss Federal Supreme Court considered this issue and accentuated the importance of the principle of good faith in arbitration.[222]

The decision of 6 June 2007 by the Federal Supreme Court of Switzerland concerned two licensing contracts that included an MDR clause that provided for conciliation to be held before the parties can proceed to arbitration.[223] Not long after the parties signed the contract, disputes arose in relation to the performance of both contracts. At first, the parties attempted to resolve

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[218] BGer, 17 August 1995, ASA Bulletin, 1996, Volume 14, Issue 4, p. 675.
[219] FRIEDLAND, Paul D. The Swiss Supreme Court Sets Aside an ICC Award. *Journal of International Arbitration*, 1996, Volume 13, Issue 1, p. 114.
[220] KAJKOWSKA: *Enforceability of Multi-Tiered…*, p. 114; JOLLES: *Consequences of Multi-tier…*, pp. 330-331.
[221] BOOG: *How to Deal…*, p. 109.
[222] BGer, 6 June 2007, 4A_18/2007, ASA Bulletin, 2008, Volume 26, Issue 1, pp. 87-102.
[223] Ibid., p. 88.

the differences through negotiations. These attempts, however, proved fruitless, and one of the parties, having lost the patience, resorted to arbitration. After an award was issued, the unsatisfied party moved to challenge the award before the court, arguing that obligatory conciliation procedure should have been held before any arbitral proceedings could have been initiated.[224]

Even though the court ultimately ruled that the clause in question was not binding, the court added that it would not enforce such a clause even if it had constituted a binding legal obligation as the behaviour of challenging party was not in accordance with the principle of good faith. To elaborate, the court pointed out to the fact that while the challenging party pleas the lack of tribunal's competence to hear the dispute on the grounds that a mediation procedure had not been carried out, the objecting party did actually nothing to introduce such a procedure. In other words, according to the court, a party cannot rely on the non-compliance with an ADR procedure and claim lack of jurisdiction, when it itself did not undertake any steps to initiate the procedure.[225]

The above noted case also touched the issue of inadmissibility of the claim.[226] Under the second interpretation, a failure to comply with obligations arising out of MDR clauses gives rise to procedural consequences. However, according to this proposition, the failure does not affect the jurisdiction of the arbitral tribunal, but it affects the conduct of arbitral proceedings. Accordingly, when an arbitral tribunal is presented with a justified objection regarding an obligation to mediate or make use of another ADR procedure first, the tribunal should temporarily stay the proceedings, allowing the parties to undergo the agreed procedure.[227]

Though it has already been mentioned that there is not much attention dedicated to the MDR clauses in Swiss jurisprudence, even less attention has been spent over the issue of requirements that have to be met in order for an ADR procedure constitute a mandatory precondition to arbitration (or litigation), i.e. a binding legal obligation. In this regard, the only case where the court considered the issue is the above-noted decision from 6 June 2007.

In that case, the court stated that first (that is before one can reflect on consequences of non-compliance with an obligation to mediate) it is important to determine whether the "obligation" in question amounts to a mandatory precondition to arbitration or whether it should be merely regarded as some sort of an "aspiration" of the parties. The court held that in order to do so, one must make use of general principles of contract interpretation, and construe the will of the parties.[228] When interpretation the clause, the court paid particular attention to the

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[224] Ibid., pp. 87-89.
[225] Ibid., pp. 99-100.
[226] Ibid., p. 90.
[227] KAJKOWSKA: *Enforceability of Multi-Tiered…*, p. 114; BOOG: *How to Deal…*, pp. 109-110.
[228] BGer, 6 June 2007, 4A_18/2007, ASA Bulletin, 2008, Volume 26, Issue 1, p. 97.

wording of the clause (the last sentence of the clause indicated that pending negotiations do not constitute an impediment to a conduct of arbitral proceedings[229]) and to the fact that the clause did not provide for any time period within which the mediation procedure should have been introduced and terminated.

Moreover, the court also considered the fact that there had already been unsuccessful attempts at amicable dispute resolution, thus expressing doubts about whether in the context of the present case, would additional ADR be of any use. Finally, having regard to the foregoing, the court held that the clause in question did not create any binding obligations.[230]

[229] Ibid., p. 88.
[230] Ibid., pp. 97-99.

4 Conclusion

In order to conclude, a restatement of both the main hypothesis and its three sub-hypothesises is appropriate. The main hypothesis stated at the outset of this thesis is as follows: As far as international commercial arbitration is concerned, there is a common practice among national courts with respect to the enforceability of multi-tier dispute resolution clauses.

The sub-hypothesises are then as follows: (1) a multi-tier dispute resolution clause per se is enforceable; (2) there is a consensus as to the requirements that a multi-tier dispute resolution clause must poses in order to be enforceable; and (3) there is a consensus as to remedies in case of a breach of multi-tier dispute resolution clause.

4.1 1st Sub-Hypothesis

Having regard to what has been said in previous chapters, one might notice that common law jurisdictions have provided more insight regarding the question whether MDR clauses should be treated as binding legal obligations or as mere non-binding aspirations. Especially English case law shows that English courts have treated the agreements to settle the dispute amicably (whether by negotiations or mediation) with a certain degree of scepticism.

Initially, English courts have held the opinion that MDR clauses are not legally binding. It has been argued that they are nothing more than an expression of hope that there would be amicable discussions. This reluctance to enforce MDR clauses primarily revolved around the issue of certainty with respect to legal undertakings. It has been suggested that these clauses (especially those providing for simple negotiations) are too uncertain (and vague) to be given legal effect.

In this regard, obligations arising under MDR clauses were equated to an agreement to agree—agreement where the parties have yet to agree on essential terms in order to conclude the final agreement. Furthermore, the courts have been pointing out to difficulties with ascertaining whether the parties have complied with obligations arising under these clauses. That is, courts ought to be able to determine which exact steps is the party required to do in order to discharge its obligation to negotiate.

Only later, English courts have started to treat MDR clauses as enforceable undertakings. This turnover can be attributed to the change of public policy in terms of dispute resolution, i.e. the preference of ADR over classical methods of dispute resolution such as litigation or litigation.

On other hand, other jurisdictions did not consider the issue to such a degree as it has been in England. For example, Australian courts (while also being part of a common law jurisdiction) have accepted the enforceability of MDR clauses rather quickly; the enforceability (in narrow

sense) was not contested. In France, similarly to England, MDR clauses were first treated as non-bindings aspirations. Nonetheless, the approach then also shifted towards the approach favouring enforceability. Also, Swiss and German courts view MDR clause as enforceable. As a matter of fact, in Germany, the enforceability has never even been contested.

In consequence, the first sub-hypothesis is confirmed: an MDR Clause per se is enforceable. As of right now, all of the examined jurisdiction is of the opinion that MDR clauses are capable of being enforced. In fact, their enforcement is in line with public policy—the preference of ADR over adjudicatory procedures.

4.2 2nd Sub-Hypothesis

Moving on to the important question—what are the requirements that should an MDR clause possess to assure its (smooth) enforcement. The examined case law demonstrates that an MDR clause is—above all—a contract. Therefore, one must make use of general principles of contract law and subject the MDR clause in question to interpretation. A usual starting point when interpreting is the wording. In this regard, an MDR clauses need to be drafted in a way that it clearly shows that it is (1) mandatory and (2) sufficiently certain.

In terms of the first condition, it seems to be settled that in order for an MDR clause to be viewed as a mandatory precondition to arbitration (and not as mere moral aspiration), the use of imperative language is of particular importance. Words and phrases such as "shall", "must", "compulsory", "before", "in any case" and "condition precedent to any right to refer the dispute to arbitration" ensure the mandatory nature of MDR clauses. On the other hand, employing permissive terms such as "may" or "should", puts the party arguing the clause to be a condition precedent to arbitration in a difficult position.

Nonetheless, while examining the language of a particular clause is important part of the interpretation process, some courts have shown that they are prepared to go beyond the wording to consider the meaning, purpose or commercial efficacy of such clauses. Yet the need for a clear and precise language cannot be underestimated.

With respect to the second condition, it has been constantly emphasised throughout the thesis that an MDR clause must contain some degree of definiteness. In this respect, it is crucial that an ADR process, be it negotiation or mediation, must contain a sufficiently detailed procedural framework. This framework must ensure that: (1) there is no need to any further agreement between the parties in order start, or continue with the process, (2) the parties must be able to objectively determine when the prescribed procedure ends. In other words, the parties must be able to determine when the obligation (constituted as a condition precedent) is satisfied so that they can proceed to arbitration.

There is a difference between an obligation to negotiate and obligation to participate in mediation. An MDR clause providing for a mediation may refer to an institutional mediation provider. Such an institution usually administers the mediation according to its own mediation rules. Therefore, if that is the case, the danger of not being enforced due to the lack of certainty, is substantially minimised. Still, when drafting the MDR clause the parties should make sure that the concerned mediation indeed provides for the above-mentioned detailed process.

As far as the obligation to negotiate is concerned, the key to have the obligation enforced is to set out a detailed process. Since, there is (naturally) no option to refer to institutional rules, it is up to the parties to devise the process. The aim here is to specify starting and ending point of the negotiations. The starting point can be marked, for example, by having a party to serve a specified notice of the dispute to the other party. An objectively determinable ending point, then, can be achieved by agreeing on a time period which would need to lapse before one could initiate arbitration. In this regard, certainty can be obtained by having the time period triggered by the notice of the dispute. As a result, courts will then have no problem in determining whether a party initiated an arbitration after the time period had elapsed. In other words, there would be no difficulties in ascertain whether a condition precedent to arbitration was complied with.

Nonetheless, some courts, namely in Australia, proposed the view that the obligation to negotiate impose an obligation to do so in accordance with good faith as well. In this respect, it was suggested that the principle of good faith imposes a certain standard of genuine and honest behaviour to abide to while they are negotiating. Such an approach has been strongly opposed under English law, emphasising the lack of objective criteria to determine such a standard. Be it as it is, one fact remains the same—there have not been a single decision upholding a simple obligation to negotiate in good faith as a part of an MDR Clause.

It was reasoned that the requirement for a specific time frame is what ensures the objective determination as to when the time period elapsed. It may be said, therefore, that an obligation to negotiate (with a time frame) is viewed more as a temporary obligation not to initiate litigation or arbitration (*pactum de non petendo*), than as a positive obligation to engage in negotiations between the parties.

4.3 3rd Sub-Hypothesis

As far as remedies relating to MDR clauses are concerned, none of the above-mentioned jurisdictions contain a legal framework that would address the issue of the non-compliance with MDR clauses providing for arbitration. Accordingly, the issue has been left for courts to decide. Nonetheless, there seems to be a common ground that substantive remedies are inadequate; hence, procedural remedies are needed.

When it comes to substantive remedies—especially the damages—they are not effective with respect to MDR clauses. The issue is simple: it is impossible to quantify the damages regarding obligation to seek dispute resolution. In relation to specific performance, it would be difficult for courts to police such an order. Moreover, there are no statutory provisions to support it.

As a result, procedural remedies are preferred. Yet a distinction must be made between situations where a party seeks the enforcement during the course of arbitral proceedings and situations where a party seeks the enforcement after an arbitral award has been made.

In the case of the former, a court may stay arbitral proceedings pending a completion of procedure prescribed by an MDR clause. However, such a remedy cannot be regarded as a common practice as only common law courts have demonstrated willingness to order the stay of arbitral proceedings, while civil law have not considered such a remedy at all. A possible explanation may lie in the fact that a stay of arbitral proceedings is (in a way) similar to another remedy—anti-suit injunction. In this respect, anti-suit injunction as such is a remedy known exclusively to common law. Whatever the reasons, when it comes to the stay of arbitral proceedings, there is not any consensus on the international level.

Insofar as the second situation is concerned, it is commonly held that an award made bypassing obligations arising under an MDR clause can be set aside on the ground that these obligations constituted a condition precedent to arbitration. Accordingly, it is more than appropriate for an arbitral tribunal to make sure that all the parts of an MDR clause which are intended to be a condition precedent to arbitration are complied with. Otherwise, all the invested time, efforts and money may end up lost.

Nevertheless, some courts have reasoned that in certain situations it would not be reasonable to annul an arbitral award. An annulment of the award would not be appropriate in situations where a party seeks the annulment, even though the party did not make any efforts to actually engage in a procedure stipulated by an MDR clause. In this regard, it was held that in order to prevent the occurrence of "unfair" or "unreasonable" situations that may result from challenging the tribunal's competence to hear and decide a case, a regard is to be had to the principle of good faith.

Similarly, it would be reasonable to annul an award in situations where obligation to negotiate or mediate seems to be obviously futile, especially when there has been a number of unsuccessful attempts at amicable settlement of the dispute. Again, the issue is more prominent in case of obligation to negotiate; as such, the conduct arbitral proceedings does not prevent the parties from talking to each other.

Notwithstanding the above-mentioned, the non-abuse-of-rights approach (which one might connect with the principle good faith) is far from being an internationally recognised standard by which courts would decide. Likewise, an argument that engaging in ADR would be futile and, therefore, a waste of time, has not received wide acceptance from courts. Such arguments have been usually dismissed on the basis that parties should perform their duties to which they freely agreed (*pacta sund servanda*).

In consequence, the third sub-hypothesis is confirmed only partially: there is a consensus as to remedies in case of a breach of MDR clause to the extent that a non-compliance with an obligation arising under MDR clause that amount to a condition precedent to arbitration leads to the annulment of an arbitral award.

4.4 Confirmation of Main Hypothesis

Considering the foregoing, the main hypothesis is for the most part confirmed. Therefore, to answers the main question—whether there is any consensus, as far as national courts are concerned, about the requirements of the enforceability of MDR clauses—*yes* there is.

As far as international commercial arbitration is concerned, there is a common practice amongst national courts with respect to the enforceability of MDR clauses: an MDR clause per se is enforceable and there is a consensus as to the requirements that an MDR clause must poses in order to be enforceable. With respect to the remedies, procedural remedies are preferred. A non-compliance with MDR clause (under certain circumstance) is a ground for the challenge of arbitral award. Nonetheless, some courts have demonstrated that they will not grant these procedural remedies automatically. The party that seeks such a remedy must display a genuine interest in participating in the ADR—for instance, by taking concrete steps to bring the ADR in motion.

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Abstract

The subject-matter of this thesis is the multi-tier dispute resolution in international commercial arbitration, i.e. a situation where the parties (usually through a clause in a contract) agree on their course of action in case a dispute arises between them. As a general rule, this process contains at least two or three distinct stages: negotiation, mediation, and litigation or arbitration. The initial stages, i.e. negotiation and mediation, aim to prevent the escalation of the dispute and to avoid costly and lengthy judicial proceedings. Notwithstanding these commendable objectives, these clauses are not free of controversies. The controversies are primarily concerned with the enforceability of such clauses. The uncertainty is all the greater when viewed in the international context where various viewpoints from different jurisdictions may collide. Accordingly, the thesis analyses certain jurisdictions and strives to answer the question whether, as far as international commercial arbitration is concerned, it is possible to abstract certain common grounds from the practice of national courts with respect to the enforceability of multi-tier dispute resolution clauses.

Abstrakt

Diplomová práce pojednává o vícestupňovém řešení sporů v mezinárodní obchodní arbitráži. Práce tak míří tak na případy, kdy si strany dohodnou (zejména formou smluvní doložky) jak postupovat po vzniku sporu. Tyto doložky zpravidla stanovují alespoň dvě nebo tři na sebe navazující stádia. Obvykle taková doložka stanovuje tři fáze, a to negociaci, mediaci a soudní či rozhodčí řízení. Úvodní fáze, tj. negociace a mediace, mají za úkol zabránit, aby se spor dále vyhrotil, a předejít tak zdlouhavému a nákladnému soudnímu či rozhodčímu řízení. Nehledě na tyto chvályhodné cíle jsou však tyto doložky předmětem kontroverzí. Spory se točí především okolo jejich právní závaznosti a vymahatelnosti. Tyto nejasnosti jsou dále umocněny jejich zasazením do mezinárodního právního prostředí, kde se zákonitě střetávají myšlenkové proudy z různých právních řádů. Účelem této práce je tedy provést analýzu vybraných právních řádů a nalézt tak odpověď na otázku, zdali, pokud jde o mezinárodní obchodní arbitráž, lze z praxe národních soudů vyabstrahovat určitá pravidla pro vymahatelnost smluvních doložek ukládajících vícestupňové řešení sporů.

Key Words

ADR, arbitration, good faith, international commercial arbitration, mediation, multi-tier dispute resolution, negotiation, national courts

Klíčová slova

ADR, rozhodčí řízení, dobré víra, mezinárodní obchodní arbitráž, mediace, vícestupňové řešení sporů, negociace, národní soudy