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**Mediation Clause Decoded:
A Systematic Content Analysis**

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Mediation Clause Decoded: A Systematic Content Analysis

Maryam Salehijam*

When commercial parties conclude dispute resolution clauses that call for mediation, their aim is to resolve potential disagreements in a cost and time effective manner. Today, mediation clauses are faced with a high threshold for their enforceability. Comparative studies have shown that an enforceable mediation clause must address every aspect of the selected mechanism. Consequently, the parties are faced with the burden of meeting high requirements for certainty. However, as dispute resolution clauses are usually the last thing included in a contract, these essential elements are not necessarily negotiated. As a result, they face the risk of unenforceability. This is especially evident in the rising number of cases in which the parties dispute their obligations under a mediation clause. To provide clarity regarding the rights and obligations implied by a mediation clause, this paper reports on a unique study of 172 agreements. Rights and obligations coded include the obligation to set up the mediation, pay the neutral, attend in person, negotiate in good faith, refrain from litigation and rights such as access to interim measures and more. This article in addition to reporting on this unique study, assesses whether the agreements under analysis fulfill the current conditions for enforceability in selected states.

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Lorsque les parties à une transaction commerciale s'entendent sur une clause de résolution des différends prévoyant le recours à la médiation, leur objectif est de résoudre des désaccords potentiels de manière efficace en termes de coûts et de délais. Aujourd'hui, les clauses prévoyant la médiation font face à un seuil élevé pour être reconnues comme exécutoires. Des études comparatives ont montré que, pour être exécutoire, la clause de médiation doit prévoir tous les aspects du mécanisme sélectionné. En conséquence, les parties ont le fardeau de rédiger des stipulations contractuelles répondant aux exigences élevées concernant leur certitude. Toutefois, comme les clauses de résolution des différends sont souvent les dernières à être intégrées dans les contrats, ces éléments pourtant essentiels ne sont pas nécessairement négociés. Il en résulte que les clauses risquent de ne pas être reconnues comme exécutoires. Cette situation est particulièrement manifeste dans les affaires de plus en plus nombreuses où les parties contestent leurs obligations découlant de la clause de médiation. Afin de clarifier les droits et obligations implicites relatifs à ces clauses, cet article propose un rapport sur une étude unique de 172 contrats. Les droits et obligations étudiés comprennent l'obligation de mettre en œuvre la médiation, de payer un tiers neutre, d'assister à la médiation en personne, de négocier de bonne foi, de s'abstenir de poursuites judiciaires, ainsi que des droits comme celui de l'accès à des mesures intérimaires, entre autres. En plus de ce rapport, l'article évalue si les contrats analysés répondent aux exigences actuelles pour être reconnues comme exécutoires dans certains états.

I. Introduction

Parties are faced with an ever-growing number of alternative dispute resolution (“ADR”) mechanisms to resolve their commercial disputes. ADR in this study is used to describe non-binding dispute resolution mechanisms involving a third-party neutral. Therefore, binding mechanisms such as arbitration and those not involving a neutral, such as negotiation, are excluded. Today, the most common ADR mechanism is mediation. These mechanisms range from facilitative to evaluative models and act as alternatives to litigation and arbitration.¹ The freedom of parties to choose from a wide range of mechanisms has the potential for cost and time savings, as parties can control the way in which their dispute escalates and is to be solved.² Moreover, by pre-selecting their dispute resolution process, parties attempt to avoid a secondary conflict over how they are to resolve their dispute.³ It is therefore no surprise that the question of how disputes are to be resolved is often an aspect of commercial relationships.⁴ Dispute resolution clauses can prescribe one mechanism or multiple mechanisms; they can be simple or complex. Moreover, countless dispute resolution providers advertise to parties the incorporation of their standard clauses. However, with the exception of arbitration, little is known about the content of these clauses as well as the rights and obligations implied therein. Moreover, in a questionnaire conducted in the context of the author’s PhD regarding the perception of dispute resolution professional and experts to

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- 1 See Carlos Esplugues, “Civil and Commercial Mediation in the EU after the Transposition of Directive 2008/52/EC” in Carlos Esplugue, ed, *Civil and Commercial Mediation in Europe: Cross Border Mediation*, vol 2, 1st ed (Cambridge, UK: Intersentia Publishing Ltd, 2014) at 490 [Esplugues, “Civil and Commercial Mediation in Europe”]. See Nadja Alexander, “Four Mediation Stories From Across the Globe” (2010) 74:4 *The Rabel Journal of Foreign and Intl Private L* at 732–733 [Alexander, “Four Mediation Stories”]. See SI Strong, “Beyond International Commercial Arbitration? The Promise of International Commercial Mediation” (2014) 45 *Washington UJL & Policy* 11. See Thomas J Stipanowich & J Ryan Lamare, “Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 100 Corporations” (2014) *Harv Negot L Rev* 9.
- 2 Mauricio Gomm Santos, “The Role of Mediation in Arbitration: The Use and the Challenges of Multi-Tiered Clauses in International Agreements” (2013) *Doutrina Nacional* 9.
- 3 Laurence Boule, *Mediation: Principles, Process, Practice* 3rd ed (Riverwood, AUS: Ligare Pty Ltd, 2011) at 614.
- 4 See Santos, *supra* note 2 at 8; See also Boule, *supra* note 3 at 614, Catherine Bellsham-Revell, “Complex Dispute Resolution Clauses: Has the desire to control the dispute process led to increased uncertainty?” (2008) 11:5 *Intl Arb L Rev* 1. See David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement*, 1st ed (London, UK: Sweet & Maxwell, 2005) at 448. See Alabaro Lopez De Argumedo Pineiro, “Multi-Step Dispute Resolution Clauses” (10 January 2011), online: *Mondaq* <<http://www.mondaq.com/article.asp?articleid=117062>> [<https://perma.cc/Q4SQ-DFNF>].

ADR agreements, 65% of the respondents indicated that such agreements are often copied and pasted.⁵

To better understand these agreements, we carried out a systematic content analysis (SCA)⁶ of 172 mediation clauses.⁷ By employing a method not commonly used in legal science, this study gains new insights regarding the rights and obligations implied by these agreements. Moreover, since there are relatively few cases and rules that address the parties' mediation clause,⁸ this study is the first to address these questions in a systematic manner. The application of SCA is fitting since essential aspects of mediation and the duties of the parties are primarily regulated by their agreement to resort to mediation and the procedural rules of the relevant mediation provider.⁹ Some of the questions asked are as follows: Do the parties to a mediation agreement have to set up the mediation? Attend a minimum number of sessions? Personally Attend? Cooperate? Act in good faith? Attempt to settle? Refrain from seizing court or arbitral tribunals? Refrain from seeking interim measures? Comply with privacy and confidentiality obligations? This article, in addition to reporting the findings of this unique study, further assesses if the current requirements for enforceability are generally met by the agreements under analysis.

5 See Maryam Salehijam, "ADR Clauses and International Perceptions: A Preliminary Report" (2017) 3 *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement* 1 [Salehijam, "ADR Clauses"], where the result of the questionnaire were extensively discussed.

6 See Carlos Esplugues, "General Report: New Developments in Civil and Commercial Mediation – Global Comparative Perspectives" in Carlos Esplugues & Louis Marquis, eds, *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives* (Switzerland: Springer, 2015) 1 at 33 [Esplugues, "General Report"].

7 Section 2.1 of this article further defines "mediation".

8 See Esplugues, "General Report", *supra* note 6 at 58. See Peter G Mayr & Nemeth Kristin, "Regulation of Dispute Resolution in Austria: A Traditional Litigation Culture Slowly Embraces ADR" in Felix Steffek et al, eds, *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Portland, USA: Hart Publishing, 2013) 65 at 79. See Burkhard Hess & Nils Pelzer, "Regulation of Dispute Resolution in Germany: Cautious Steps towards the Construction of an ADR System" in Felix Steffek et al, ed, *Regulating Dispute Resolution ADR and Access to Justice at the Crossroads* (Portland, USA: Hart Publishing, 2013) 209 at 227 [Hess & Peltzer, "Regulation of Dispute Resolution in Germany"].

9 See Burkhard Hess & Nils Pelzer, "Mediation in Germany: Finding the Right Balance between Regulation and Self-Regulation" in Carlos Esplugues & Louis Marquis, ed, *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives* (Switzerland: Springer, 2015) 291 at 296 [Hess & Peltzer, "Mediation in Germany"]. See Charles Jarrosson, "Legal Issues Raised by ADR" in Arnold Ingen-Housz, ed, *ADR in Business: Practice and Issues across Countries and Cultures* (Alphen aan den Rijn, NL: Kluwer Law International, 2006) 157 [Legal Issues 2006] at 163. See Jan M Smits, *Contract Law: A Comparative Introduction* (Cheltenham: Edward Elgar Publishing, 2014) at 18. Moreover, the content of the ADR agreement is settled by the parties. See Klaus J Hopt & Felix Steffek, "Mediation: Comparison of Laws: Regulatory Models, Fundamental Issues" in Klaus J Hopt & Felix Steffek, ed, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013) at 31.

As mentioned above, this study has a twofold aim: first, to better understand the content and obligations of these agreements, and second, to assess whether the agreements under analysis fulfilled the current conditions for enforceability. To better understand the research conducted for this study, Section 2 provides a detailed overview of the research design including data collection, content coding, and literature review. Moreover, Section 2 establishes our definition of a “mediation agreement/clause”. The findings of the SCA are explored in Section 3 in the following order: the codes applied to categorize the mediation agreement, its content, and composition (Sections 3.1.–3.4.); the codes relating to preconditions for the mediation, commencement procedures as well as applicable rules (Sections 3.5.–3.6.); the codes applied to practical matters, such as the procedure to appoint the neutral, his/her payment and logistics (Sections 3.7.–3.8.); the codes focused on the various legal issues relating to the effect of the mediation agreement on subsequent proceedings, such as interim relief, limitation periods, obligations to refrain from acting (Sections 3.9.–3.11.); codes relating to the behavioral, temporal, and attendance obligations prescribed by the agreements and applicable institutional rules (Sections 3.12.–3.15.); and the codes focused on the ways the parties may terminate their mechanism as well as remedies/penalties for non-compliance (Sections 3.16.–3.17.). In section 4, this article assesses whether, in general, the agreements under analysis meet the current threshold for enforceability. The article concludes by determining whether wide-ranging trends or themes are evident in the agreements under analysis.

II. Research Design and Literature Review

SCA is a systematic and replicable technique applied to the analysis of a variety of texts, ranging from interview transcripts to legal texts such as case law and legislation.¹⁰ It is a research tool borrowed from empirical researchers.¹¹ In this article, SCA is defined as a research method used to objectively and systematically detect themes and trends in texts including legal instruments and contracts as well as communications.¹² In practical terms, SCA involves the application of codes to the data, that is, to mediation

¹⁰ See Steve Stemler, “An Overview of Content Analysis” (2001) 7:17 *Practical Assessment, Research & Evaluation* at 1. See Gus Van Harten, “Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration” (2012) *Osgoode Comparative Research in Law and Political Economy Research report* 41/2012 at 15. See Mark A Hall, “Coding Case Law for Public Health Law Evaluation” (2011) *Pub Health L Research* at 3.

¹¹ “Empirical simply means based on facts, rather than on theory or untested belief (e.g. political opinion or ideology.” See Deborah R. Hensler, *Designing Empirical Legal Research: A Primer for Lawyers* (2013) at 7.

¹² According to the widely accepted 1952 Berelson definition, content analysis is “a research technique for the objective, systematic and quantitative description of the manifest content of communication”. See Bernard Berelson, *Content Analysis in Communication Research* (New York: Free University Press, 1952) at 18.

agreements in this case. The section below further explains our research subject - “the mediation agreement/clause”.

A. *The Mediation Clause/Agreement*

Mediation is the most prominent ADR mechanism. It is a non-binding mechanism involving a neutral third-party (without any decision making powers) who assists the parties in their attempt to settle their dispute. Mediation has been defined by UNCITRAL Working Group II as “a widely used term for a process where parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of, or relating to, a contractual or other legal relationship.”¹³ Moreover, the *Mediation Directive* stipulates:

‘Mediation’ means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question.¹⁴

The only disagreement here is regarding the role of the neutral in guiding the parties in reaching a resolution of their dispute. To illustrate, “mediation” is at times referred to as “conciliation”, although the latter is a purely evaluative mechanism, while mediation can be either facilitative or evaluative.¹⁵ In facilitative mediation, the neutral third-party has no authority to impose a solution on the disputing parties and does not offer his/her advice on the outcome, while in evaluative methods, the neutral third-party makes formal and informal recommendations.

When parties make the choice to resort to mediation, they can record this choice in writing. However, there is disagreement regarding the

¹³ Working Group II, “International Commercial Mediation: Preparation of Instruments on Enforcement of International Commercial Settlement Agreements Resulting from Mediation Note by the Secretariat” (2017) UNCITRAL Working Paper A/CN.9/WG.II/WP.205 at 3.

¹⁴ EC, *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters*, [2008] OJ L 136/3 at article 3(a) [*EU Mediation Directive*].

¹⁵ See Maud Piers, “Europe’s Role in Alternative Dispute Resolution: Off to a Good Start?” (2014) 2014:2 J Disp Resol at 274. See Esplugues, “General Report”, *supra* note 6 at 11. See Nadja Alexander, “International and Comparative Mediation: Legal Perspectives” (2009) Kluwer L Intl at 10 [Alexander, “International and Comparative Mediation”]. In facilitative mediation, the neutral third-party has no authority to impose a solution on the disputing parties and does not offer his/her advice on the outcome, while in evaluative methods, the neutral third-party makes formal and informal recommendations.

appropriate title that should be applied to describe the parties' agreement to pursue mediation.¹⁶ This work uses the term "mediation agreement" to refer to the parties' pre- and post-conflict agreement to pursue mediation. Nevertheless, as many authors utilize the term "alternative dispute resolution clause", "mediation clause", "agreement to mediate", or "mediation agreement" to refer to the "mediation agreement", their wording is used when discussing their work.

Moreover, it should be noted that in this work, the term "mediation agreement" does not refer to the agreement between the neutral and the parties (the "appointment agreement"), the agreement that the parties sign at the beginning of their mediation (the "commencement agreement"), nor the agreement that records the parties' settlement (the "settlement agreement").¹⁷ Furthermore, mediation agreements are not the same as "agreements to agree", which is an agreement requiring the parties to enter into a subsequent agreement,¹⁸ nor "agreements to negotiate."¹⁹

A mediation clause/agreement²⁰ can be concluded before or after a dispute arises and can be a stand-alone contract or part of the main commercial contract (a clause).²¹ Furthermore, mediation agreements can be a tier in a multi-tiered dispute resolution clause ("MDR") as a step prior to adjudicative mechanisms such as arbitration and litigation.²² MDR clauses – also known as "(multi)-step", "mediation first", "waterfall" or "escalation" clauses – refer to dispute resolution agreements that contain multiple tiers

16 See Esplugues, "General Report" *supra* note 6 at 28.

17 Frank Diedrich defines the mediation agreement as the "contract to mediate between the parties", while referring to the contract between the parties and the mediator as the "mediator agreement". See Frank Diedrich, "International/Cross-Border Mediation within the EU - Place of Mediation, Qualifications of the Mediator and the Applicable Law" in Frank Diedrich, ed, *The Status Quo of Mediation of Europe and Overseas: Options for Countries in Transition* (Hamburg : Verlag Dr. Kovač, 2014) at 73–74. See P Jean Baker, "Young Lawyers: Selecting the Right Mediator" in *Alternative Dispute Resolution Committee, ABA Groups, Section Of Litigation* vol 15 no 2 (American Bar Association, 2011).

18 "Agreements to agree" are often identified by common law courts as unenforceable.

19 See Boule, *supra* note 3 at 621.

20 In this article, the terms clause and agreement are used synonymously.

21 See Peter Tochtermann, "Mediation in Germany: The German Mediation Act -Alternative Dispute Resolution at the Crossroads" in Klaus J Hopt & Felix Steffek, ed, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013) at 549 [Tochtermann, "Mediation in Germany"].

22 See David Cairns, "Mediating International Commercial Disputes: Differences in U.S. and European Approaches" (2005) 60:3 *Disp Resol J* at 64. Jiménez Dyalá Figueres, "Multi-Tiered Dispute Resolution Clauses in ICC Arbitration", (2003) 14:1 *ICC International Court of Arbitration Bulletin* at 71.

of dispute resolution mechanisms.²³ There are many options to design these clauses, ranging from two to several tiers. MDR clauses typically require the parties to first attempt non-binding processes such as negotiation followed by mediation, and envisages arbitral or court proceedings as the final stage.²⁴

MDR clauses are common in contracts where the issues are complex or when the contract is intended to endure over a longer period, such as joint venture, franchising, building and construction, as well as finance and lease agreements.²⁵ The freedom to choose from a wide range of mechanisms enables the parties to control the way in which their dispute escalates and is to be solved.²⁶ Consequently, the parties may settle their dispute sooner and more cheaply than by waiting for a binding decision. MDR clauses can be drafted in diverse ways as they are based on party autonomy.²⁷ This study also considers MDR clauses, by checking whether the agreements under analysis form part of a MDR clause.

B. Data Collection

The collection of mediation agreements for the analysis was limited to selected states with developed economies and justice systems but with varying approaches to enforcement of mediation agreements. The focus is limited to four EU Member States, namely Austria, England,²⁸ Germany, and the Netherlands, as well as three leaders in the rise of mediation, namely Australia, the United States of America, and Singapore. As previously mentioned, the choice for the above Member States was intentional and

23 See Michael Pryles, "Multi-Tiered Dispute Resolution Clauses" (2001) 18:2 J Intl Arb at 159. See Oliver Krauss, "The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith Under English Law" (2016) 2 McGill J Disp Resol at 143. See Jason D. File, "United States: multi-step dispute resolution clauses" (2007) IBA Legal Practice Division: Mediation Committee Newsletter at 36. Gary B. Born, *International Commercial Arbitration*, 2nd ed (Alphen aan den Rijn : Kluwer Law International, 2014) at 279 [Born, "International Commercial Arbitration"]. See Edna Sussman & Victoria A. Kummer, "Drafting the Arbitration Clause: A primer On the Opportunities And The Pitfall" (2012) 67:1 Disp Resol J at 6.

24 Krauss, *supra* note 23 at 144. Alexander Jollies, "Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement" (2006) 72:4 Arbitration at 329. See Julian DM Lew, et al, *Comparative International Commercial Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2013) at paras 8, 62.

25 See Boule, *supra* note 3 at 614.

26 See Joseph, *supra* note 4 at 448. See Laine Fogh Knudsen & Signe Balian, "Alternative Dispute Resolution Systems Across the European Union, Iceland and Norway", (2014) 109 *Procedia - Social and Behavioral Science* at 945. See Giuseppe De Palo & Romina Canessa, "New Trends for ADR in the European Union," in Pablo Cortés, ed, *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford: Oxford University Press, 2016) at 412.

27 See Krauss, *supra* note 23. See Gary B Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 4th ed (Alphen aan den Rijn: Kluwer Law International, 2013) at 103 [Born, "International Arbitration and Forum Selection Agreements"].

28 This study focuses on the legal and practical situation regarding ADR in England and Wales; however, in order to facilitate discussion, the reference to 'England' is to be understood as a reference to 'England and Wales'.

motivated by their varying approaches to mediation. To illustrate, in Austria, a pioneer in mediation law and practice,²⁹ mediation and mediators are extensively regulated,³⁰ while in England, there is little state intervention. In addition, while in Germany and England, mediation is interlinked with the courts, in the Netherlands, mediation was advanced without compulsory rules using financial incentives and as a mechanism not forced upon the parties.³¹

Random sampling was employed to gather the agreements, as it was impossible to estimate the population of mediation agreements.³² Moreover, while numerous mediation agreements are freely available on the websites of dispute resolution providers and in practitioner guidebooks, such a sample does not include the agreements drafted by in-house counsel or specialized law firms. Thus, in addition to collecting freely available clauses, this study also set out to collect clauses directly from ADR professionals and experts. A test call requesting such clauses on various platforms with ADR professionals as audience proved only slightly effective, since many professionals indicated their inability to participate due to confidentiality or firm policy.³³ In light of this response, the decision was made to change the approach to gathering these clauses. Research into potential avenues resulted in the selection of a questionnaire instead of a general call for clauses. Through the questionnaire, ADR professionals and experts could indicate why they may not be willing or able to provide such clauses (i.e. confidentiality, too much effort, or other).

The online, self-administered questionnaire,³⁴ which was open from 9 February to 30 April 2017, targeted ADR professionals and experts—including lawyers, in-house counsel, academics, and neutrals—with experience in drafting, inserting, or enforcing dispute resolution clauses that

29 See Markus Roth & David Gherdane, “Mediation in Austria: The European Pioneer in Mediation Law and Practice” in Klaus J Hopt et al, ed, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013).

30 See Christine Mattl, et al, “Mediation in Austria” in Nadja Alexander, ed, *Global Trends in Mediation* (Netherlands: Kluwer Law International, 2006) at 64: “Austria is one of the few European countries to have enacted progressive mediation legislation which not only recognises mediation as a profession but provides detailed criteria for training and qualifications of civil mediators.”

31 See John M. Bosnak, *The European Mediation Directive: More Questions Than Answers*, in Arnold Ingen-Housz, ed, *ADR in Business: Practice and Issues across Countries and Cultures* (Alphen aan den Rijn, NL: Kluwer Law International, 2010) at 625: “Compared to other continental European countries, the Netherlands has a well-developed mediation structure”.

32 For more discussion of sample and population see Frans L. Leeuw & Hans Schmeets, *Empirical Legal Research: A Guidance Book for Lawyers, Legislators and Regulators* (Northampton: Elgar, 2016) at 158–159.

33 Sample response “We have in-house precedents which we use with guidance notes for contract drafters but we don’t share those outside the firm. The basic approach in terms of mandatory/non-mandatory/tiered clauses is similar to the approach taken by many organisations.”

34 A questionnaire that the respondent completes on his/her own without intervention or involvement of the administrator.

provide for ADR mechanisms. To ensure that only the targeted audience responded to the questionnaire, two additional safeguards were implemented: (1) the call for participation emphasized that the questionnaire targeted legal professionals with experience in drafting, inserting, or enforcing dispute resolution agreements that provided for ADR and mediation; and (2) the questionnaire was manipulated to contain conditional questions that filtered out participants.

C. Content Coding

The coding employed in this study followed four stages as outlined by Hall and Wright:

1. [...] create a tentative set of coding categories a priori. Refine these categories after thorough evaluation, including feedback from colleagues, study team members, or expert consultants.
2. Write a coding sheet and set of coding instructions (called a “codebook”), and train coders to apply these to a sample of the material to be coded. Pilot test the reliability (consistency) among coders by having multiple people code some of the material.
3. Add, delete, or revise coding categories based on this pilot experience, and repeat reliability testing and coder training as required.
4. When the codebook is finalized, apply it to all the material.³⁵

The initial list of codes was created on the basis of scholarly works and case law that address the rights and obligations implied by mediation agreements.³⁶ Section 2.4 further explains the terminology employed in the literature on the topic. The codes are descriptive and reflect the obligations and rights as well as essential aspects contained in the agreements. They are used to facilitate the counting of obligations in order to assess the frequency of reoccurrence thereof. Moreover, the choice was made to apply split coding instead of lumpier coding in order to generate a more nuanced analysis.³⁷ The data was analyzed twice to ensure the objectivity and reliability of the codes assigned.³⁸

³⁵ See Mark A Hall & Roland F Wright, “Systematic Content Analysis of Judicial Opinions” (2008) 96 Cal L Rev at 107.

³⁶ The final code book is available upon request. See also Johnny Saldaña, An Introduction to Codes and Coding, in Johnny Saldaña, ed, *The Coding Manual for Qualitative Researchers*, (London: SAGE, 2015) at 144.

³⁷ *Ibid* at 23.

³⁸ See Marta Cominetti & Peter Seele, “Hard Soft Law or Soft Hard Law? A Content Analysis of CSR Guidelines Typologized Along Hybrid Legal Status”, (2016) 24:127 *Schwerpunktthema* at 134.

D. Literature Review

To set the parameters for this study and to establish a coding list, relevant works addressing the content of mediation agreements were analyzed. The paragraphs below provide an overview of the analysis. The literature is presented in a chronological order to demonstrate the persisting gap that this study addresses.

Early on, in 2005, David Joseph argued that mediation agreements result in privacy and confidentiality obligations.³⁹ Soon after, in 2006, Jarrosson addressed the question “what is the extent of the parties’ obligations when they agree to resort to ADR?”⁴⁰ He argued that, in principle, the effect of an ADR agreement depends on the terms the parties have agreed on.⁴¹ On this basis, he created four labels for various types of ADR agreements:

1. provisions that create no obligation, such as those that make a mere declaration of intention to consider the possibility of ADR once a dispute arises;⁴²
2. provisions that create limited obligations, such as those that only require the parties to discuss/consider ADR;⁴³
3. provisions that create an obligation for a short period, such as those containing a time limit to institute ADR as a condition precedent to arbitration/litigation while also indicating that if a party does not reply to a request to initiate, participate, or continue the process, the parties are free from the obligation to mediate;⁴⁴ and
4. provisions that create real obligations such as those requiring ADR as a precondition to arbitration or litigation.⁴⁵

Regarding the first and second type of agreements, there are numerous rulings from common law jurisdictions that confirm when parties merely agree to consider mediation, they are not legally bound to pursue such mechanism.⁴⁶

39 See Joseph, *supra* note 4 at 450: “most institutional provisions make express provision in this regard, see e.g. art 7 of the ICC ADR rules. Likewise, see art 9 of the UNCITRAL model law on international commercial conciliation, and art 6 of preliminary draft EU directive.”

40 Jarrosson updates his article “Legal Issues Raised by ADR” in 2010 with minor changes to the section on the obligations created by the ADR agreement. See Jarrosson, “Legal Issues 2006” *supra* note 9; and see Charles Jarrosson, “Legal Issues Raised by ADR” in Arnold Ingen-Housz, ed, *ADR in Business: Practice and Issues across Countries and Cultures* Vol II (Alphen aan den Rijn, NL: Kluwer Law International, 2010) [Legal Issues 2010] at 157.

41 *Ibid.*

42 *Ibid* at 163.

43 For example, see ICC Model Clause B: Obligation to Consider the ICC Mediation Rules.

44 If the agreement provides for a time limit to institute ADR, the expiration of this limit ends the parties’ obligation to commence ADR.

45 See Jarrosson, “Legal Issues 2010”, *supra* note 40 at 166.

46 See Maryam Salehijam, “A Call for a Harmonized Approach to Agreements to Mediate”, (2018) 1 YB International Arbitration and ADR [Salehijam, “A Call for a Harmonized Approach”].

Thus, if a party refuses to discuss the matter, the mediation is not set in motion and there are no adverse consequences for the refusing party.⁴⁷ This article does not code agreements that are not binding on the parties due to their voluntary nature (i.e. “the parties may consider mediation”).

Regarding the third type of provisions, Jarrosson argues that if a party unreasonably refused to participate in setting up the ADR proceedings, liability may arise depending on the wording of the ADR clause/agreement.⁴⁸ He lastly claimed that the fourth type of provisions is fulfilled if the parties appoint a neutral and attend at least one mediation session.⁴⁹ In addition to his division of ADR agreements, Jarrosson noted that certain obligations are incumbent upon the parties, such as the obligation for the proceedings to be kept confidential.⁵⁰ The requirement of confidentiality is reinforced in several mediation laws as well as mediation agreements.⁵¹ In order to assess the importance of confidentiality for the parties, this study coded the agreements for “confidentiality” and “privacy”.

Two years later, in 2008, Tochtermann in relation to the German approach, opined that:

At the very least, the parties will be required to initiate the mediation by appointing a mediator and furnishing him with statements of fact. Moreover, they must attend a first mediation session. Since the parties concluded the mediation agreement to overcome the barriers which they would face in direct negotiations, they will also be required to participate in a caucus session, where the mediator may point out the chances of the mediation structures and inform the parties of its basic principles, so that the mediation has a chance to start off even where emotions are high.⁵²

Subsequently, in 2009, Alexander addressed the parties’ duties in mediation in general, not specifically under a mediation agreement.⁵³ According to her, once a mediation has commenced, the parties may be obliged to act reasonably in relation to the mediation and to participate in good faith. Since she does not directly address the obligations arising from the parties’ mediation agreement, her findings were only considered during the creation

⁴⁷ According to Article 4(2) of the UNCITRAL *Model Conciliation Law*, if a party does not receive an acceptance to an invitation to conciliation within a specific period, it can treat such silence as a rejection of the invitation. See UNCITRAL, *Model Law on International Commercial Conciliation with Guide to Enactment and Use*, 2004 at article 4(2) [*Model Law on Conciliation*].

⁴⁸ Jarrosson, “Legal Issues 2010”, *supra* note 40 at 164. Model Law on Conciliation, *supra* note 47 at article 10(1)(a). The article stipulates that there is no liability for the refusal to participate in ADR proceedings.

⁴⁹ See Jarrosson, “Legal issues 2010”, *supra* note 40 at 166.

⁵⁰ *Ibid.*

⁵¹ See, for example, *EU Mediation Directive*, *supra* note 14.

⁵² Peter Tochtermann, “Agreements to Negotiate in the Transnational Context - Issues of Contract Law and Effective Dispute Resolution”, (2008) 13:3 *Unif L Rev* at 708 [Tochtermann, “Agreements to Negotiate”].

⁵³ Alexander, “International and Comparative Mediation”, *supra* note 15 at 225.

of the codes applicable to the parties' behavioral obligations during the mediation.

In 2013, Andrews discussed the expectations that arise from an agreement to mediate. However, he did not address the obligations therein. The expectations are as follows:

1. the third-party neutral will be impartial, independent, and competent (trained)
2. the process will be confidential;
3. the aim of the mediation is to arrive at a settlement of all or part of the dispute; and
4. the subsequent settlement will be concluded or at least evidenced in writing.⁵⁴

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

Seven years following Jarrosson's initial attempt to make sense of the various obligations that arise from ADR agreements, Bach and Gruber tackled the same question in the context of German law. According to them, such agreements often contain both positive and negative obligations.⁵⁵ They oblige the parties to mediate in order to resolve all or some of their dispute, and they oblige the parties to refrain from initiating court or arbitration proceedings prior to the termination of the mediation.⁵⁶ If a more detailed approach is applied to the division of Bach and Gruber, it appears that the three obligations are implied: the parties must set up the mediation, attempt to resolve the dispute, and refrain from pursuing a binding mechanism.

In the same year, Hess and Pelzer also reflected on the parties' obligations in Germany. Similarly, they found that in accordance with the principle of voluntariness and §2(5) of the Germany Mediation Law, the parties may leave the mediation at any time once the mediation has commenced.⁵⁷ According to Hess and Pelzer, Piers as well as Tochtermann, in Germany, the principle of *pacta sunt servanda* requires the parties must appoint a mediator, at the minimum attend a first meeting, and comment on the substance of the dispute.⁵⁸ Moreover, they find that there is a general duty to cooperate in the mediation and to negotiate in good faith.⁵⁹

⁵⁴ See Neil Andrews, *Andrews on Civil Processes: Arbitration and Mediation*, (Cambridge, UK: Intersentia 2013) at para 2.28.

⁵⁵ See Ivo Bach & Urs Peter Gruber, "Germany", in Carlos Esplugues, José Luis Iglesias & Guillermo Palao, ed, *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, vol 1 (Cambridge, UK: Intersentia, 2013) at 165.

⁵⁶ *Pactum de non petendo*.

⁵⁷ Hess & Pelzer, "Regulation of Dispute Resolution in Germany", *supra* note 8 at 227.

⁵⁸ Piers, *supra* note 15 at 292; Esplugues, "Civil and Commercial Mediation in Europe", *supra* note 1 at 606. Hess & Pelzer, "Regulation of Dispute Resolution in Germany", *supra* note 8 at 227; Tochtermann, "Mediation in Germany", *supra* note 21 at 549.

⁵⁹ Hess & Pelzer, "Regulation of Dispute Resolution in Germany", *supra* note 8 at 227. See §242 Civil Code (Germany).

Hopt and Steffek also address the consequences of mediation clauses. Accordingly, these agreements “can contain substantive as well as procedural elements. Possible substantive elements are the duties to:

1. prepare the mediation;
2. to participate in the mediation;
3. to negotiate in good faith; and
4. to only initiate litigation if mediation fails.”⁶⁰

They also argue that the parties do not have to agree to a settlement.⁶¹ Hopt and Steffek appear to be distinguishing the same obligations as Bach and Gruber, while adding the obligation to negotiate in good faith similar to Hess, Pelzer, and Alexander.

Regarding Austria, another Germanic system, Frauenberger-Pfeiler notes that a mediation clause obliges the parties to jointly seek mutually satisfactory results and in doing so, refrain from actions that endanger the goal of a mutual settlement.⁶² She also argues that basic principles of mediation encourage the parties to disclose the information necessary to reach a settlement, to take no court action during the mediation, and to treat information from the other party with confidentiality.⁶³ In addition, the parties should in principle attend all mediation sessions.⁶⁴ However, there are no written legal rules on these principles and thus these duties cannot be enforced in Austria, as it would contravene the principle of voluntariness.⁶⁵ Therefore, in Austria, the parties are free to withdraw from the mediation at any time despite of an agreement.⁶⁶

In 2014, Piers divided the various obligations contained in a mediation agreement into three categories:

1. the obligation to set up the ADR proceeding;
2. the obligation to find a solution; and
3. the obligation to refrain from acting.⁶⁷

She points to the same obligations as Bach and Gruber, and Hopt and Steffek while explicitly outlining the distinct obligation of working towards a solution. The obligation to find a solution is in line with the settlement expectation discussed by Andrews. However, this obligation does not mean that the parties can be forced to agree to a proposed solution as also noted

⁶⁰ Hopt & Steffek, *supra* note 9 at 31, 63.

⁶¹ *Ibid* at 63.

⁶² See Ulrike Frauenberger-Pfeiler, “Austria”, in Carlos Esplugues, José Luis Iglesias & Guillermo Palao, ed, *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures* vol 1 (Cambridge, UK: Intersentia, 2013) at 11.

⁶³ *Ibid*.

⁶⁴ *Ibid*.

⁶⁵ *Ibid* at 12.

⁶⁶ See Mayr & Kristin, *supra* note at 79.

⁶⁷ Piers, *supra* note 15 at 290–295.

by Frauenberger-Pfeiler.⁶⁸ According to Piers, the above contractual duties of the parties to a mediation agreement do not address the concrete actions that the parties must take in the pursuit of a settlement.⁶⁹ This leads to conflicting opinions in the legal doctrine.⁷⁰

While some are of the opinion that the parties are free to negotiate in the manner that best fits their personal interests,⁷¹ others argue that the parties must further the mediation according to their abilities.⁷² For instance, an obligation arising from the “ADR order” that may be issued in accordance with Article G1.8 of the Admiralty and Commercial Courts of England is the duty to agree on a neutral in good faith. Therefore, Piers finds that while the parties cannot be forced by the court to find a solution through mediation, they are obliged to, at the minimum, attempt to resolve their dispute through mediation.⁷³ In addition, although there is no duty to give particular information during the mediation procedure, the parties are expected not to misrepresent the facts.⁷⁴ Lastly, Piers finds that there is a general duty to pay the neutral.⁷⁵

Subsequently, in 2015, Berger found that “the agreement to mediate is a contract that obliges the parties to settle their dispute through mediation and not before the domestic courts or an international arbitral tribunal.”⁷⁶ Here, he implies that the parties have an obligation to refrain from acting as suggested by several authors above. Accordingly, a “party is merely required to make an honest, reasonable and conscientious effort to resolve the dispute through mediation.”⁷⁷ Thus, he points to behavioral obligations.

Contrary to Piers, Born and Šćekić claim that obligations under an agreement to mediate are usually limited.⁷⁸ They base their argument on the claim that such agreements imply that the parties are to discuss an issue, not to reach a specific outcome. Hence, the authors seem to argue against an implied obligation to find a solution. The claim of Born and Šćekić is supported by Esplugues who argues that an agreement to mediate does not mean the parties are obliged to settle.⁷⁹ In agreement, Magnus finds that in

68 *Ibid* at 294.

69 Piers, *supra* note 15 at 294.

70 Tochtermann, “Agreements to Negotiate,” *supra* note 52.

71 *Ibid* at 549.

72 See K.Trams, *The Mediation Agreement – A Contract Legally Possible Analysis*, (Marbug: Tectum Verlag, 2008) at 138. See Piers, *supra* note 16 at 294.

73 Piers, *supra* note 15 at 291.

74 *Ibid* at 294.

75 *Ibid* at 292.

76 See Peter Klaus Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*, 3rd ed, (Alphen aan den Rijn : Kluwer Law International, 2015) at para 6.39.

77 *Ibid* at 132.

78 See Gary B Born & Marija Šćekić, *Pre-Arbitration Procedural Requirements: ‘A Dismal Swamp’*, in David D. Caron et al, ed, *Practising Virtue: Inside International Arbitration* (Oxford: Oxford University Press, 2015) at 239.

79 See Esplugues, “General Report” *supra* note 6 at 33.

a mediation a party must cooperate and further the process, but it does not have to accept a compromise.⁸⁰

In line with the Born and Šćekić, in 2017, Kajkowska restated the lack of a minimum standard of compliance and further noted that in states where mediation agreements are enforced, what is required of the parties is at a minimum the instituting of the mechanism by appointing the mediator.⁸¹ Her view is considered by van Beukering-Rosmuller and Van Leynseele, who find that a mediation clause creates a duty for the parties to reach an agreement on the appointment of the neutral or the process for appointment.⁸² Thus, the duty to attempt mediation is breached if a party torpedoes the appointment.⁸³ However, they add that the parties must also agree to meet with the mediator at least once.⁸⁴

This study opted to include all of the above distinguished obligations/expectations with the exception of those relating to the neutral's characteristics or behavior, as many legislative acts already address the duties of the neutral.⁸⁵ Moreover, the obligations of the neutral do not arise from the parties' mediation agreement, but from the agreement the parties conclude with the neutral once the dispute arises. This study further divided the various obligations to numerous sub-codes. The next Section provides a detailed discussion of the coding results.

III. Findings

In total, 172 mediation agreements were formatted for coding.⁸⁶ At the end of the second round of coding, there were 38 codes and 199 sub-codes.⁸⁷ The discussion of our findings follows the typical structure of a mediation agreement. It is important to note that where relevant the sections below reflect on the compatibility of the content of the agreements with the legislation in selected states. These reflections are summarized in Section 4.

80 Ulrich Magnus, "Mediation in Australia: Development and Problems" in Klaus J Hopt et al, ed, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013). See also Alexander, "Four Mediation Stories", *supra* note 1. at 732, 747.

81 See Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Oregon: Hart Publishing, 2017) at 137.

82 See Ellen van Beukering-Rosmuller & Patrick Van Leynseele, "Enforceability of mediation clauses in Belgium and the Netherlands" (2007) 21:3 *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* at 50.

83 *Ibid.*

84 *Ibid* at 51.

85 "Parties' duties in mediation are less developed and discussed than mediator's duties." See Hopt & Steffek, *supra* note 9 at 63.

86 It is again emphasized that this study does not provide a detailed content coding of the parties' agreement to negotiate nor arbitrate, even if they are contained in a MDR clause alongside a mediation agreement.

87 The codebook is available on request.

E. Composition of the Mediation Agreements

The SCA revealed that 81% of the agreements coded required mediation in the context of a MDR clause.⁸⁸ This is unsurprising since the promotion of mediation as the preferred alternative to litigation and arbitration has resulted in dispute resolution providers and commercial parties increasing the drafting of agreements that contain MDR clauses that call for mediation prior to other binding procedures.⁸⁹ However, it should be noted that the trend to conclude MDR agreements does not mean that they are widespread. The questionnaire conducted in the context of this research asked “How often do you estimate that commercial dispute resolution clauses that you have drafted, inserted, applied and/or enforced make a reference to non-binding mediation (i.e. mediation/conciliation)?” Of the 354 respondents to the question, the majority (63%) indicated that it is *not* common practice for dispute resolution clauses in commercial contracts to make a reference to mediation or conciliation.⁹⁰

The study further sought to assess the structure of the 139 MDR clauses. Figure 1 provides a sample of a typical MDR clause.

Figure 1 – *Sample Three-step clause*

“Three-Stage Process: Negotiation, Mediation, Arbitration
 a. Negotiation Between Executives
 The parties shall attempt in good faith to resolve any dispute arising out of or relating to this [Agreement] [Contract] promptly by negotiation [...].
 b. Mediation
 If the dispute has not been resolved by negotiation as provided herein within [45] days after delivery of the initial notice of negotiation, [or if the parties failed to meet within [20] days,] the parties shall endeavor to settle the dispute by mediation [...].
 c. Arbitration
 Any dispute arising out of or relating to this [Agreement] [Contract], including the breach, termination or validity thereof, which has not been resolved by mediation as provided herein [within [45] days after initiation of the mediation procedure] within [30] days after appointment of a mediator], shall be finally resolved by arbitration [...].”⁹¹

⁸⁸ The percentages in this article are rounded up.

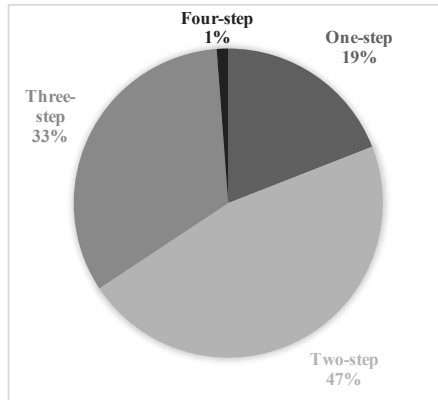
⁸⁹ See Cairns, *supra* note 22. Krauss, *supra* note 23. See Quek Anderson, “A Coming Of Age for Mediation in Singapore” (2017) 29: Sing Ac LJ at 292. See Pace Law School, “Drafting Step Clauses: An Empirical Look At Their Practicality And Legality”, online (pdf): *Pace Law School* <<http://www.cisg.law.pace.edu/cisg/IICL-NE.html>> [<https://perma.cc/TG73-PYA4>]. See Craig Tevendale, et al, “Multi-Tier Dispute Resolution Clauses and Arbitration” (2015) 1:1 Turkish Com L Rev at 31. See Sai Ramani Garimella & Nizamuddin Ahmad Siddiqui, “The Enforceability Of Multi-Tiered Dispute Resolution Clauses: Contemporary Judicial Opinion”, (2016) 24:1 IJUM LJ at 166. See Marko Mear, “Enforceability of Mediation in Multi-tiered Clauses: the Croatian Perspective” (28 May 2015), online (blog) : Kluwer Arbitration Blog : <<http://arbitrationblog.kluwerarbitration.com/2015/05/28/12521/>> [<https://perma.cc/K7P2-LHD4>]. See Kah C. Lye, “A Persisting Aberration: The Movement to Enforce Agreements to Mediate” (2008) 20:1 Sing Ac LJ at 1.

⁹⁰ See Salehijam, “A Call for a Harmonized Approach”, *supra* note 46 at 31.

⁹¹ Questionnaire Respondent #567.

The coding revealed that 80 agreements were two-step clauses, 57 were three-step clauses, while 2 called for a four-step dispute resolution process. Figure 2 provides an illustration of the most common structure for the agreements under analysis.

Figure 2- *Composition of Mediation Agreements*



Noteworthy is that the majority (84%) of the two-step clauses called for mediation/conciliation prior to a binding mechanism.⁹² This trend was not evident in the three-step clauses, which almost all called for negotiation,⁹³ mediation, and finally arbitration/litigation.

F. Type of Mechanism: Mediation or Conciliation?

The choice was made to code separately for conciliation and to not treat conciliation and mediation as synonyms during the coding in order to demonstrate the rarity of dispute resolution clauses calling for conciliation. Of the 172 clauses, only 7 called for conciliation. The findings of this study reaffirm the shift in UNCITRAL Working Group II's choice of terminology in their discussion of an instrument on the enforcement of international commercial settlement agreements resulting from mediation. The shift from using the term "conciliation" to now "mediation" is explained

⁹² Thus, it is not common to require negotiation prior to mediation in a two-step clause.

⁹³ The coder opted to code clauses requiring meeting between the senior representatives as "negotiation" although the clause did not explicitly state negotiation.

in the advanced copy of the 68th Session “the instruments should refer to “mediation” instead of “conciliation”, as it was a more widely used term.”⁹⁴

Furthermore, although the clauses and institutional rules address the process of mediation, it was rare to explicitly define mediation. Only five institutional rules address the definition of mediation, namely the CEDR Model Mediation Procedure,⁹⁵ the NAI Mediation Rules,⁹⁶ the mediation rules of the Institute of Mediations and Arbitrators Australia,⁹⁷ and the Mediation Rules of USA&M.⁹⁸

In addition, despite the active promotion of online dispute resolution (“ODR”) especially by the EU through its legislative initiatives,⁹⁹ only three clauses called for it. Again, there is disagreement regarding the definition of ODR. There appear to be mainly two definitions.¹⁰⁰ The first defines “ODR” as the use of the internet or artificial intelligence (AI) to guide the parties in using ADR. The second is to refer to online dispute resolution platforms as “ODR”. For us, relying on technology such as video streaming or file exchange software does not change the process the parties are engaged in. Therefore, ODR should only cover instances where parties use online platforms or AI to resolve their disputes wholly. The lack of reference to ODR specifically could be related to the fact that commercial disputes are often resolved outside of the ODR framework with some technological assistance. This is not to understate the benefit of ODR, which is beneficial in small disputes (low monetary valued), disputes arising from an online transaction

94 See Working Group II, “Settlement of Commercial Disputes - International Commercial Mediation: Preparation of Instruments on Enforcement of International Commercial Settlement Agreements Resulting from Mediation” (2018) at 2, online (pdf): *UNCITRAL* <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/o83/16/PDF/V17o8316.pdf?OpenElement>> [<https://perma.cc/MRQ5-H9E9>].

95 See “Model Mediation Procedure” (2018) at 2, online (pdf): *Center for Effective Dispute Resolution* <https://www.cedr.com/about_us/modeldocs/?id=21>.

96 See “Mediation Rules” (2017) at 6, online (pdf): *Netherlands Arbitration Institute* <<https://www.nai-nl.org/downloads/NAI%20Mediation%20Rules%201%20January%202017.pdf>> [<https://perma.cc/ZD3D-NQFG>].

97 See “Mediation and Conciliation Rules” (2001) at 1, online (pdf): *The Institute of Arbitrators and Mediators Australia* <<https://www.iama.org.au/sites/default/files/resources/rules-guidelines/mediation-and-conciliation/mcrules.pdf>> [<https://perma.cc/N2ZE-LLU4>].

98 See “Mediation Procedures” (2018) online: *United States Arbitration and Mediation* <https://usam.com/mediation-procedures/>.

99 EC, *Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC* [2009] OJ L 165/63 [*Directive on Consumer ADR*].

100 See Julia Hörnle & Pablo Cortés, “Legal Issues in Online Dispute Resolution”, (2014) at 1, online (pdf): *Judiciary UK* <<https://www.judiciary.uk/wp-content/uploads/2015/02/Legal-Issues-Hornle.pdf>> [<https://perma.cc/PD6X-MV8L>]. See Richard Birke & Louise E. Teitz, “US Mediation in the Twenty-first Century: The Path that brought America to Uniform Laws and Mediation in Cyberspace” in Nadja Alexander, ed, *Global Trends in Mediation* (2003) at 388.

including consumer disputes, and when parties cannot face each other due to emotional or technical reasons.¹⁰¹

Moreover, it was surprising to see seven clauses calling for binding mediation despite mediation being almost unanimously defined as a non-binding process (Figure 3 provides sample of such agreements). Calling for binding mediation contradicts the nature of mediation. It further brings into question the validity of the clause.¹⁰²

Figure 3 – Sample of a binding mediation clause

“Any dispute less than \$ _____ in value shall be subject to binding mediation [...]”¹⁰³

Lastly, two disputes called for the mechanism that the parties are to resort to be determined by the mediation provider and one called for resort to a dispute board. It is important to note that when the wording of a mediation agreement makes resort to the envisaged mechanism an option (“may”), the parties are not bound by a concrete obligation other than to conduct mediation.¹⁰⁴

G. Scope and Separability

The disputes that fall within a particular dispute resolution clause are determined according to the wording of the agreement.¹⁰⁵ In line with the widespread requirement for dispute resolution clauses to have a clear scope, 95% of the agreements under analysis specified the scope of disputes covered by the agreement. Interestingly, two of the agreements contained a financial scope, which prevented the mediation and arbitration of small disputes (Figure 4 provides a copy of a clause with a financial scope).

Figure 4 – Sample of scope

“In the event the total amount in dispute is higher than USD 50,000, the parties agree to submit the Dispute to settlement proceedings under the [insert from approved institutions] mediation rules.”¹⁰⁶

101 See Hopt & Steffek, *supra* note 9 at 66.

102 Hopt & Steffek, *supra* note 9 at 66. See also *Lindsay v Lewandowski*, 43 Cal. Rptr (3d) 846 at 1623 (Cal App 4th at 2006). See *Bowers v Raymond J Lucia Companies, Inc* 206 724 (Cal App 4th 2012) 724.

103 See Construction Dispute Resolution Services, “Suggested Contract Language for Construction-Related Dispute Resolution Alternatives”, online: *CDRS* <http://www.constructiondisputes-cdrs.com/suggested_contract_language_for.htm> [<https://perma.cc/38JW-VS2C>].

104 See Salehijam, “A Call for a Harmonized Approach”, *supra* note 46 at 11.

105 See Alexander, “International and Comparative Mediation”, *supra* note 15 at 190.

106 Questionnaire Respondent #33.

Moreover, six clauses addressed separability, with one specifying that the mediation portion of the clause is separable from the rest of the dispute resolution clause (Figure 5).

Figure 5 – *Sample of separability*

“If any provision hereof is held to be invalid or unenforceable in whole or part, the validity and enforceability of the remainder of such provision and other provisions of this Agreement shall not be affected.”¹⁰⁷

In theory, the mediation agreement should be viewed separately from the commercial contract as well as the agreement to negotiation and agreement to arbitration/litigate. The doctrine of separability is supported on the basis of party autonomy, legal certainty, international comity, and the policy to give effect to dispute resolution clauses.¹⁰⁸ In addition, courts recognize the separability of mediation tiers from negotiation and arbitration tiers.¹⁰⁹

H. *Preconditions to the Mediation Tier*

As discussed in Section 3.1 regarding the composition of the dispute resolution clauses, there is a tendency for three-step and some two-step dispute resolution clauses to require some form of negotiation or meeting in the first tier. This section further discusses the complexities of the preconditions for mediation. 40% of the agreements analyzed required the parties to negotiate or have a meeting between specified persons prior to the mediation. Surprisingly, 11 of these clauses contained a multi-staged negotiation/meeting phase, with 72% of the 11 requiring a structured form of correspondence prior to the negotiation/meeting.

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

¹⁰⁷ Survey respondent clause – emailed 14-03-2017.

¹⁰⁸ See Zheng Sophia Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law*, (Oxford: Routledge, 2014) at 74.

¹⁰⁹ See Salehijam, “A Call for a Harmonized Approach”, *supra* note 46 at 4.

The remaining clauses with a precondition to mediation called for a meeting between managers, directors, senior representatives, or meetings between designated dispute representatives. Here the majority (90%) of the clauses specified a time-frame. It seems that when the meetings require the attendance of higher up individuals, the parties are far more concerned with specifying the time-frame for the meetings. Again, the time-frame to comply as well as the rules on counting the days differed amongst the clauses. Ranging from 1 meeting to 45 days “from to the dispute notice”, “request notice”, or “the meeting of the executives”.

Moreover, 14 of the clauses waived the precondition to negotiate if the parties failed to meet within a specified time; ranging from 10 to 30 days. 64% of the agreements requiring negotiation stipulated 30 days, 29% stipulated 20 days, and 7% stipulated 10 days. There were starting times for these periods ranging from “[...] days after the delivery of the notice of dispute” to “[...] days after the delivery of notice of negotiation”.

Interestingly, one agreement clearly stipulated that the failure to negotiate cannot be relied upon to refuse mediation (see Figure 6 for a copy).

Figure 6 – *Sample of failure to negotiate*

“During the course of the mediation, no party can assert the failure to fully comply with paragraph A, as a reason not to proceed or to delay the mediation.”¹¹⁰

There has yet to be a case where a party refused mediation on the basis of an unfulfilled negotiation tier. There have, however, been several cases where a party refused to arbitrate on the basis of an unfulfilled negotiation tier.¹¹¹ Therefore, it remains to be seen whether an unfulfilled negotiation tier will prevent a party from enforcing the mediation tier. Furthermore, it should be noted that scholars and courts remain split as to whether the agreements to negotiate are enforceable. Until the *Emirates* case,¹¹² English judges have stipulated that agreements to negotiate are too uncertain to be enforceable, while Australian judges supported the enforceability of agreements to negotiate.¹¹³

If parties have stipulated in mandatory terms the requirement to negotiate as a condition precedent to mediation, then the principle of *pactum de non petendo* requires the enforcement of such an agreement. However, while there are numerous provisions that suspend limitation periods when

110 See New York City Bar, “Compilation of Sample Mediation Clauses” (2016) at 4, online (pdf): NYC Bar <<https://www2.nycbar.org/pdf/report/uploads/20073042-CompilationofSample-MediationClausesALTDIS442016.pdf>> [<https://perma.cc/XP88-A38V>].

111 See *Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd* [2014] EWHC 014 (Comm).

112 *Ibid.*

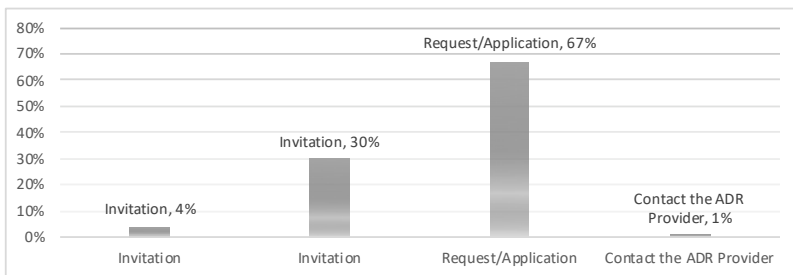
113 See *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) NSW (24 NSWCA).

the parties attempt to mediate, there are no such protections in the case of negotiations. Therefore, the process of negotiation may endanger the parties' rights. Lastly, if the requirement to negotiate/meet is not stipulated in a specific time-frame and without referral to who is to attend, there is too much uncertainty regarding what is required of the parties. In the words of Sheety, "[t]he period of time for negotiation or mediation (which should not be too long) should be triggered by a defined and indisputable event, such as a written request to negotiate or mediate under the clause or the appointment of a mediator."¹¹⁴

I. Procedure to Commence/Trigger Mediation

When parties agree to pursue mediation to resolve their disputes, it is important to know how they ought to start the prescribed mechanism. As stipulated above, in this study, both the mediation agreement and the applicable institutional rules were coded. 60% of the agreements and the applicable institutional rules studied described the procedure to commence the mediation. The majority of the procedures were contained in the applicable institutional rules categorized under the headings "Initiation of Mediation", "Request for Mediation", or "Commencement of Proceedings/Mediation". The most common method to commence mediation was the filing of a request or application followed by the sending of an invitation to the other party to participate (Figure 7).

Figure 7 – Procedure to commence mediation



Interestingly, 15 agreements contained a time component stipulating that the parties are to commence mediation in a specified period ranging from 10 to 90 days. The average number of days was 29.5, while the most

¹¹⁴ See Sundaresh Menon, *Arbitration in Singapore: A Practical Guide* (Sweet & Maxwell, 2014) at 154.

common number of days were 15 and 28 (four agreements).¹¹⁵ The markers for the start of the time-frame within which the parties must commence their mediation ranged from “from the file being sent to neutral”, “from notification of mediation”, “after request for mediation”, “after referral to mediation”, “after referral by the contractor”, “from date of mediation notice”, “from event giving rise to the dispute”, to “from expiry of time to challenge neutral”. While it is rare to regulate the mediation proceedings, in Austria, a proponent of regulation of mediation, the beginning and end of the mediation are regulated in instances where the parties use a registered mediator: “the beginning of the mediation is the agreement of the parties that the dispute shall be resolved by mediation. Mediation ends, when a party or the mediator refuses to continue the mediation, or when there is a final outcome of the mediation procedure.”¹¹⁶ Other national mediation rules, such as the German *Mediation Act* as well as the English and the Dutch mediation framework, tend to be silent on how mediation is to be initiated.

J. Applicable Law and Jurisdiction

According to Alexander, when parties conclude a mediation agreement, they often do not consider future disputes that may arise nor the jurisdictions in which the mediation is to take place.¹¹⁷ In this study, only 9% of the agreements addressed the governing law of the mediation agreement. 6% of the agreements coded specified the governing law of the mediation. Moreover, a mere fourteen agreements (8%) stipulated the jurisdiction with power to settle disputes arising from or relating to the mediation agreement. Four of those agreements gave the courts where the mediation takes place the authority to determine dispute relating to the agreement.

Although relatively few clauses designate a governing law for the agreement and mechanism, close to 71% of the clauses pre-selected the applicable institutional rules. Furthermore, five of the institutional rules indicated that the applicable rules were superior, while nine indicated that the content of the agreement was superior. The use of dispute resolution providers in mediation is prevalent. This was also confirmed by a Pace University Survey of the International Association for Contract & Commercial Management (IACCM) members and in-house counsel that use MDR clauses. 44% of the respondents indicated that they opt to have an institution administer the mediation.¹¹⁸ In our study, only 27% of the agreements coded specifically designated that the named institution ought to administer the mechanism. Nevertheless, it is probable that if parties

115 1 – within 10 days; 4 – within 15 days; 4 – within 28 days; 3- 30 days; 2 – 45 days; 1 – within 3 months (90 days from event giving rise to dispute).

116 Art 17 Abs. 1 *Law on Mediation in Civil Law Matters* (Austria) [*Austrian Mediation Act*].

117 Alexander, “International and Comparative Mediation”, *supra* note 15 at 70.

118 “Drafting Step Clauses”, *supra* note 89 at 9.

select applicable institutional rules, they also aim to have the institution administer these rules and vice versa.¹¹⁹

K. *Third-Party Neutral and Payment*

Reiterating section 2.4, this article does not address the statutory and contractual obligations of the neutral, as such obligations are not relevant to the discussion of the obligation of the parties to a mediation agreement. Nevertheless, for a mediation agreement to be enforceable, it must address the selection of the neutral, and in common law jurisdictions, his/her remuneration.¹²⁰ Thus, this study anticipated that the majority of the agreements/applicable institutional rules would address the selection of the neutral. Confirming this prediction, 84% of the agreements and/or the applicable institutional rules contained a procedure to appoint/select the neutral.

Regarding the remuneration of the neutral, a majority of the agreements/institutional rules (63%) addressed this aspect. The most common division (95%) was to equally divide the costs. Evidently, there is a clear trend regarding the division of costs. This is key, as it neutralizes the argument in the Australian case of *Aiton*,¹²¹ that is, that it is not obvious how the third-party is to be remunerated.¹²² Furthermore, in Germany, according to Tochtermann, when parties do not pre-agree on the payment of the neutral, the fees will be determined with reliance on customary hourly rates.¹²³

L. *Logistics: Venue, Language, etc.*

When mediation agreements or the institutional rules address the logistics of the mechanism such as the venue, date, and language, the parties save considerable time as they do not have to agree on these aspects once a dispute arises. According to Tümpel and Sudborough, “ADR clauses often do not contain provisions regarding the place and the language of the ADR proceedings, although such provisions are often contained in arbitration

119 *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*. (1995) 36 NSWLR 709. The parties, by selecting the ACDC to administer their mediation, had incorporated the guidelines by reference.

120 Salehijam, “A Call for a Harmonized Approach”, *supra* note 46.

121 *Aiton Australia Pty Ltd v Transfield Pty Ltd*, [1999] NSWSC 996 at para 67.

122 *Ibid* at para 66.

123 Tochtermann, “Agreements to Negotiate”, *supra* note 52 at 523. See also Jörg Risse, *Wirtschaftsmediation*, C.H. Beck, 2003, 542 at para 9. See Civil Code (Germany) *supra* note 59 at art 612.

clauses.”¹²⁴ The paragraphs below outline the findings in relation to the above authors’ claim.

Selecting a “seat”¹²⁵ for the arbitration seems to be a key factor in the parties’ dispute resolution choices. In this study, 63% of the agreements studied addressed the venue/location of the dispute, with one agreement designating the seat of mechanism.

Coding was also carried out to check the parties’ language choices. 27% of the agreements and the applicable rules addressed how the language is to be determined, with one requiring it to be the same language as the agreement. Typically, the language is determined by the neutral following a consultation with the parties or by the dispute resolution provider.

M. *Interim Relief and Provisional Measures*

The power to order interim measures can be concurrent between both courts and arbitral tribunals.¹²⁶ A concern that commonly arises when parties agree to mediation is whether the parties may continue to access arbitral tribunals or courts to seek interim relief/provisional measures. 37% of the agreement addressed this concern by specifically allowing the parties to seek interim relief/provisions measures. There were, however, two agreements that were confusing as they only addressed the parties’ right to seek interim relief/provisional remedies while arbitration is ongoing.¹²⁷ Therefore, it was unclear if the parties may rely on such remedies while the mediation is ongoing.

In principle, mediation agreements should not prevent the application for interim measures, as there are certain disputes that may require the filing of suit in order to prevent further harm (i.e. IP disputes).¹²⁸ In such instances, the envisaged dispute resolution mechanism may not always be helpful to the parties. Alexander also argues that the temporary waiver of the right to file a claim does not affect the application for certain interim relief, unless there is a contractual agreement to the contrary.¹²⁹ Moreover, there is judicial support for the right to seek interim relief from many courts.

124 Hannah Tümpel & Calliope Sudborough, “ICC ADR Rules 2001-2010: Current Practices, Case Examples and Lessons Learned”, in Arnold Ingen-Housz ed *ADR in Business: Practice and Issues across Countries and Cultures* (Alphen aan den Rijn, NL: Kluwer Law International, 2010) at 261–262 § II.

125 The “seat” implies the legal jurisdiction where the ADR is carried out and therefore the supervisory forum and applicable *lex fori*.

126 Kajkowska, *supra* note 81 at 222.

127 These agreements were excluded from the count of the total agreements addressing interim relief/provisional remedies.

128 See DLA Piper, “Drafting an Effective Alternative Dispute Resolution Clause Under Texas Law: News and Insights from Austin” (2012), online: *DLA Piper* <[129 See Alexander, “International and Comparative Mediation”, *supra* note 15 at 205.](https://www.dlapiper.com/en/canada/insights/publications/2012/02/drafting-an-effective-alternative-dispute-resolution_/> [https://perma.cc/C3BL-A5TU].</p>
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In 2008, the Court of Breda held that safeguarding measures, such as freezing orders, are possible despite an ongoing mediation procedure.¹³⁰ Singapore has taken a step further by regulating this right in Article 8(3) of the 2017 *Mediation Act*: “(3) The court may, in making an order under subsection (2), make such interim or supplementary orders as the court thinks fit for the purpose of preserving the rights of the parties.”¹³¹ In Germany, amongst other jurisdictions, this right also exist in the framework of arbitration. §1033 ZPO stipulates that “[i]t is not incompatible with an arbitration agreement for a court to grant, before or during arbitral proceedings, an interim measure of protection relating to the subject-matter of the arbitration upon request of a party.”¹³²

N. Limitation and Prescription Periods

Not all legal systems provide for the suspension or extension of limitation periods when the parties engage in mediation. Consequently, the parties’ substantive claim may be time-barred. It is important that while the parties attempt mediation they feel at ease that their right to file a claim in courts or otherwise is not affected by the termination of limitation periods.¹³³ The parties can include a provision extension or suspension limitation periods in their mediation clause, or a waiver of the right to rely on limitation periods for the duration of the mediation.¹³⁴ 19% of the agreements addressed this concern, with more than half requiring limitation periods to be extended while the other half required their suspension (Figure 8).

Figure 8 – Sample of limitation/suspension periods

“RULE 10 Extension of Limitation Period

1. If, during the mediation, a limitation period for bringing any proceedings in relation to the Dispute expires, the parties agree that:
 - a. the limitation period will be extended by the number of days from the date of reference of the Dispute to mediation to the date of termination in accordance with these Rules;
 - b. they will not rely, in any arbitral or judicial proceedings, on expiry of the limitation period other than as calculated in accordance with this Rule.”¹³⁵

“All applicable statutes of limitation and defences based upon the passage of time shall be tolled until 15 days after the Earliest Initiation Date.”

¹³⁰ Voorzieningsrechter Rechtbank Breda 10 October 2008, *LJN* BF7611. See also Rechtbank Arnhem 18 November 2003, *LJN* AQ2547 (family case concerning change of husband’s assets).

¹³¹ *Mediation Act* (Singapore), (2017) Rep of Singapore Gov Gaz 26 at s 8(3) [*Singapore Mediation Act*].

¹³² §1033 Code of Civil Procedure (Germany).

¹³³ Hopt & Steffek, *supra* note 9 at 34.

¹³⁴ Kajkowska, *supra* note 81 at 223.

¹³⁵ See Resolution Institute, “Mediation Rules” (2016) at 5, online (pdf): *Resolution Institute* <<https://www.resolution.institute/documents/item/1897>> [<https://perma.cc/8Z8Q-E4ZP>].

Although the length of the suspension or extension varied, they never exceeded 30 days. The most frequent suspension or extension period was 20 days. Moreover, it is common for limitation periods to be paused or extended while parties attempt to settle their disputes. For instance, with mediations in Austria that involve a registered mediator, Article 22(1) of the *Mediation Act* states that “[t]he commencement and subsequent continuation of mediation with a registered mediator shall suspend the commencement and continuation of the limitation period as well as other notice period regarding pursuit of the rights and claims which are subject to mediation.”¹³⁶ The parties may also agree in writing that other obligations and rights between them that are not subject to the mediation should also be affected.¹³⁷ In Germany, art 203 of the German Civil code (*Bürgerliches Gesetzbuch*) specifically allows for the suspension of limitation periods in case of negotiations, and in this case, mediation is considered a form of negotiation.¹³⁸

In addition, Article 8 of the *European Mediation Directive*¹³⁹ requires Member States to “ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.” However, as the *Mediation Directive* does not require Member States to implement it in relation to domestic mediations. For instance, in Austria, Netherlands and England, the *Directive* does not apply to domestic mediations.¹⁴⁰ The difference between the rights and obligations implied by domestic versus cross-border mediation is especially evident in Austria. As above noted, in Austria, mediations involving a registered mediator suspend limitation periods, while cross-border mediations that fall under Part 4 of the *Cross-Border Mediation Regulations* extend the limitation period until the end of the mediation procedure.¹⁴¹ Thus, to protect their legal interests, the parties must take action at the latest three months after the end of the mediation. Moreover, the parties cannot agree to suspend the limitation period in relation to other rights and obligations between them, while this is not the case with mediations involving unregistered mediators.¹⁴² An issue that remains in relation to disputes pertaining to mediation agreements is that when the parties dispute their agreement, limitation periods relating to the main commercial dispute are not paused.

136 *Austrian Mediation Act*, *supra* note 116.

137 See Frauenberger-Pfeiler, *supra* note 63 at 22.

138 Civil Code (Germany), *supra* note 59.

139 See *EU Mediation Directive*, *supra* note 14.

140 *Ibid* at art 1–2.

141 *Cross-Border Mediation (Directive) Regulations* (UK), 2011, part 4.

142 See Esplugues, “Civil and Commercial Mediation in Europe” *supra* note 1 at 702.

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

According to Eidenmüller and Groserichter, mediation agreements often address the possibility of competing and/or subsequent litigation and arbitration.¹⁴³ This is because the aim of mediation is to avoid parallel proceedings and hence there is typically an obligation for the parties not to commence litigation nor arbitration within a specific time-frame or to have proceedings stayed.¹⁴⁴ Some clauses clearly make mediation mandatory before the parties may resort to adjudicative process while others require that the parties refrain from participating in binding mechanisms while mediation is ongoing. As discussed above, there were 125 MDR agreements that required mediation prior to a binding mechanism. We further coded for agreements as well as institutional rules that precluded a binding mechanism if the parties have not initiated mediation or while mediation is ongoing. In total, 133 agreements and institutional rules required the parties to refrain from litigating or arbitrating before initiating mediation and while mediation is ongoing (Figure 9).

Figure 9 – *Sample of institutional rules that prohibit resort to a binding mechanism while mediation is ongoing*

“Resort to Arbitral or Judicial Proceedings

16. The parties undertake not to initiate, during the mediation, any arbitral or judicial proceedings in respect of a dispute that is the subject of the mediation [...].”¹⁴⁵

“§ 8 DUTIES OF THE PARTIES

(1) [...] mediation proceeding must be conducted before the commencement of a court proceeding or an arbitration related to the subject matter of the mediation proceeding.”¹⁴⁶

Although English judges have on numerous occasions stipulated that it must be clear that mediation agreements require mediation as a condition precedent to a binding mechanism to be enforceable, the study found that many clauses do not say explicitly that the mediation is a condition precedent. Often, the clauses stipulate that the parties “shall” or “must” mediate, failing which they “shall” resort to a binding mechanism (Figure 10 provides an example of a clause that does not explicitly mention the word precondition).

143 See Horst Eidenmüller & Helge Groserichter, “Alternative Dispute Resolution and Private International Law” (2015) SSRN at 8.

144 *Ibid.*

145 See JAMS, “JAMS International Clause Workbook” (2018), online (pdf): *JAMS* <<https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-International-Clause-Workbook.pdf>> [<https://perma.cc/3TF8-WMH5>].

146 EUCON, “Mediation Rules” (2013) online: (pdf) *EUCON* https://www.eucon-institut.de/wp-content/downloads/pdf/EUCON_Mediation_1_Verfahrensordnung_English.pdf> at §8.

Figure 10 – *Sample of mediation as a condition precedent*

“In the event that the dispute has not settled within twenty-eight (28) days following referral to ADC, or such other period as agreed to in writing between the parties, the parties shall submit the dispute to arbitration in [insert seat/place of the arbitration].”¹⁴⁷

The agreements coded most commonly prescribed for arbitration following mediation,¹⁴⁸ 15% prescribed litigation, 3% expert determination, and less than 1% neutral evaluation. Furthermore, 12% of the clauses did not specify a binding mechanism and instead provided for options that parties can choose from while finalizing their agreement (Figure 11). The findings of this study regarding the obligation to refrain from arbitration are similar to the abovementioned survey conducted by Pace Law School, which found that 74% end the clause with arbitration.¹⁴⁹

Figure 11 – Obligation to refrain from acting



When parties provide a time-frame for compliance with the various tiers of a MDR clause, there is certainty regarding when that tier can be considered exhausted.¹⁵⁰ 58% of the clauses that obliged the parties to refrain from acting further specified a time-frame ranging from 10 to 90 days with an average of 53 days. When there is a time-frame, there is a need to clearly identify the starting point of such a period. If there is ambiguity, the court or tribunal might reach different conclusions regarding when the mediation tier can be considered as exhausted.¹⁵¹ Such a scenario maybe result in the invalidity of the subsequent arbitral award.¹⁵²

The starting points in our study ranged from “referral to mediation”, “appointment of neutral”, “date of acceptance of mediation”, “invitation to participate”, “notice of mediation”, “mediation demand”, “initiation of mediation”, “from filing of the request to engage in mediation”,

147 See ADC, “ADC Dispute Resolution Sample Clauses” (2015) at 7.

148 63% of the agreements that contained an obligation to refrain from acting specified arbitration.

149 See “Drafting Step Clauses”, *supra* note 89.

150 See Kajkowska, *supra* note 81 at 220.

151 *Ibid.*

152 *Ibid.*

to “notice of dispute” (Figure 12).¹⁵³ The most common starting points were “initiation of mediation” and “notice of dispute”. This is in line with Tümpel and Sudborough, who found that the average duration of 2001-2010 ICC ADR proceedings from transfer to the neutral until the termination of the proceedings was around three months.¹⁵⁴

Figure 12 – *Sample of agreements with time-frame for the mediation*

“If mediation would not resolve the subject matter of the dispute within 30 days after the commencement of the mediation procedure, then either party may commence legal proceedings in an appropriate court to resolve the matter.”¹⁵⁵

“If at the conclusion of 90 days after service of the Notice of Dispute [...] the parties are unable to agree to a mediator, within 45 days after Notice of [...] then the dispute shall be resolved by binding arbitration [...]”¹⁵⁶

Moreover, 20% of the agreements that contained an obligation to refrain from acting further specified that the parties are exempt from this obligation if the other party fails to participate in the mediation. The study further found two clauses that specifically allowed parallel arbitration, implying that the obligation to mediate exists, but is not a precondition. The enforceability of these two clauses is therefore less certain.

Lastly, seven clauses in the dataset required the staying/suspending of litigation and arbitration while mediation is ongoing. Five of these agreements required that the parties apply for the staying of proceedings.

When mediation agreements contain not only an obligation to submit the dispute to mediation but also a prohibition to commence court proceedings or arbitration, they seem to contain two obligations.¹⁵⁷ The latter obligation is easier to enforce.¹⁵⁸ The obligation to use mediation as a precondition to litigation and arbitration exists in many jurisdictions¹⁵⁹ With the exception of the Netherlands, in the jurisdictions under analysis, the obligation to refrain from commencing other proceedings is enforceable.¹⁶⁰ Despite being a leader in mediation, in 2006, the Dutch High Court rejected

153 Days from referral to ADR – 7 days, After appoint of third party neutral – 10 days, After date of acceptance – 1 day, After invitation – 2 days, After notice of ADR - 3 days, after written demand – 2 days, after initiation – 20 days, from filling of request to commence ADR – 9 days, from notice of dispute – 13 days.

154 See Tümpel & Sudborough, *supra* note 124 at 259.

155 Survey respondent clause 31 – emailed 14-03-2017.

156 Survey respondent clause 56 – emailed 15-05-2017.

157 See Esplugues, “General Report” *supra* note 6 at 33.

158 *Ibid.*

159 See Salehijam, “A Call for a Harmonized Approach”, *supra* note 46. Tania Sourdin, *Alternative Dispute Resolution*, 4th ed (Thomson Reuters, 2012) at 356.

160 See Salehijam, “A Call for a Harmonized Approach”, *supra* note 46 at 22.

the enforceability of agreements to mediate by relying on the voluntary nature of mediation.¹⁶¹

P. *Obligation about Time and Time-frames*

As discussed previously under the Sub-section “2.4 Literature Review”, the majority of scholars support the idea that a mediation agreement binds the parties to at least attend one mediation session/meeting before they can unilaterally terminate the mediation. Furthermore, Bach and Gruber rely on §2(5) of the German *Mediation Act*, which states that the parties may “end the mediation at any time”, to argue that the wording suggests that the parties cannot refuse to mediate, they can only terminate a mediation once it has commenced and thus refuse to settle.¹⁶² This approach was supported in the English cases *Leicester Circuits Ltd v Coates Brothers Plc*¹⁶³ and *Roundstone Nurseries Ltd v Stephenson Holdings Ltd*.¹⁶⁴ In these cases, the withdrawal from the mediation before the first mediation session was sanctioned by refusal to allow recovery of costs.¹⁶⁵

Scholars agree that the unwilling party should be compelled to hear the other party’s offer and/or the mediator in order to fulfil their obligation in the mediation agreement.¹⁶⁶ More narrowly, in the American case of *Fluor Enterprises, Inc v Solutia Inc.*,¹⁶⁷ the court held that the plaintiff had fulfilled a pre-litigation mediation requirement by simply selecting a mediator. Therefore, the filing of an action after the selection of a mediator, but before the actual mediation, was deemed appropriate.

In this study, the code “time” signifies the minimum time the parties must participate in the mediation. 38% of the mediation agreements contained the code “obligation time/duration”. The majority (85%) of the agreements that addressed the obligation about time/duration stipulated a minimum amount of time that the parties must participate in the mediation. The minimum time ranged from a specific number of hours, days, or sessions. The most common requirement (93%) was for the parties to attend a minimum number of sessions/meetings.¹⁶⁸ The number of sessions again had a varying range (see Figure 13 below). The duration of the mediation

161 See Liane Schmiedel, “Mediation in the Netherlands: Between State Promotion and Private Regulation”, in Klaus J Hopt et al, ed, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013) at 732.

162 See Bach & Gruber, *supra* note 55 at 166.

163 *Leicester Circuits Ltd v Coates Brothers Plc* [2003] EWCA Civ 333 Longmore LJ.

164 *Roundstone Nurseries Ltd v Stephenson Holdings Ltd* [2002] EWHC 1431 (TCC).

165 See Susan Blake, Julie Browne, and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution*, 1st ed (Oxford: Oxford University Press, 2011).

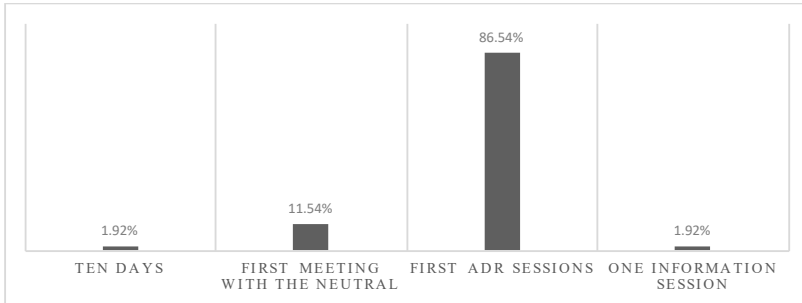
166 See Bach & Gruber, *supra* note 55 at 165–166.

167 *Fluor Enterprises, Inc v Solutia Inc* 147 F Supp 2d 650 (S.D. Tex. 2001).

168 One agreement required one full day of ADR; Two agreements addressed minimum number of hours (4 and 7 hours respectively).

is relevant not only to the parties, but also to the mediator and the courts/arbitrators.¹⁶⁹

Figure 13 – Obligations regarding minimum number of sessions/days



The findings of this study correlate with a study of court-annexed mediations in Germany, which established that mediations last an average of 2.7 months (81 days) and only one session.¹⁷⁰ Likewise, according to a Dutch study of mediations from 1998 to 2004, the average timeframe for mediation from request to settlement is 2.5 months (75 days).¹⁷¹

a. Rules on Counting Days/Time

Only 38% of the agreements analyzed designated the date and time of the mechanism or a procedure to determine them. Moreover, 34% of the agreements contained rules on when the mechanism is deemed to have commenced. The most common starting points were “the receipt of request by the mediation provider” and “notice of dispute”. It is important to have clear guidelines on when the mediation is deemed to have commenced to avoid disputes on the matter. For example, a dispute relating to this issue arose in the *Fluor Enterprises* case.¹⁷² The parties had agreed to mediate for a 30-day period, but disagreed on which actions commenced the procedure that set this period in motion. Lastly, only 4% of the agreements contained rules on counting days. It is surprising to see a lack of attention paid to the rules on counting the days, as 38% of the agreements analyzed contained

169 See Esplugues, “Civil and Commercial Mediation” *supra* note 1 at 700.

170 See Reinhard Gregor, “Abschlussbericht zur Evaluation des Modellversuchs Güterichter” (2007), online (pdf): *Friedrich-Alexander-Universität Erlangen-Nürnberg* <<https://www.reinhard-gregor.de/dateien/gueterichter-abschlussbericht.pdf>>.

171 See “Schonewille, Winst maken bij het oplossen van geschillen: conflictmanagement en mediation in Nederlandse ondernemingen” (2004), online (pdf): *ACB Mediation* <http://mediationbedrijfsleven.nl/files/marktonderzoek_rapport%20ACB%202004.pdf>.

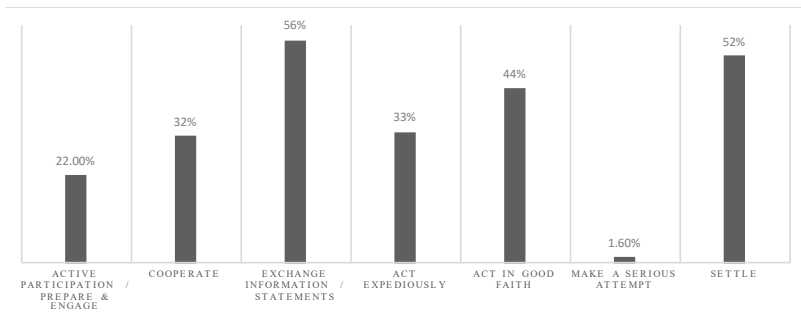
172 *Fluor Enterprises Inc*, *supra* note 167.

a time period for the mediation. To reiterate, when there is a time-frame, there is a need to clearly identify the starting point of the period. If there is ambiguity, the court or tribunal might reach different conclusions regarding when the mediation tier can be considered as exhausted.¹⁷³

Q. Behavioral Obligations

One of the main challenges of addressing the parties' obligations under a mediation agreement is to know the extent of participation that is required of them. In this study, 73% of the clauses and institutional rules addressed the parties' behavioral obligations. The code "behavior" relates to the way in which the parties are to behave prior to and during the mediation. The obligations regarding behavior were further divided to "active participation (prepare and engage)", "cooperation", "exchanging of information", "expeditious behavior", "good-faith", "serious attempt", and "settle". The most reoccurring obligations as to behavior were to exchange information and to settle (Figure 14).

Figure 14 –Parties' Behavioral Obligations



a. Exchanging of Information

The obligation to exchange information often relates to the need to exchange written statements regarding the dispute as well as the details, such as names and addresses, of those to be involved in the mechanism. Of the clauses requiring the parties to exchange information, one specified the requirement to make oral statements (Figure 15).

¹⁷³ See Kajkowska, *supra* note 81 at 220.

Figure 15 –*Sample of making oral statement*

“At the mediation conference, each party should be prepared to make a brief oral statement explaining his or her perspective.”¹⁷⁴

The duty to provide the third party neutral with information is not regulated nor mandated by courts. Nevertheless, the parties are expected not to misrepresent the facts.¹⁷⁵ The requirement to exchange information is also found in civil procedure rules of many states. For instance, although the law in England does not explicitly address how a party must behave during a mediation procedure,¹⁷⁶ there are clear instructions regarding how the parties should exchange information prior to litigation in the *Practice Direction on Pre-Action Conduct*.¹⁷⁷

b. Settle

As discussed in the Sub-section “2.4 Literature Review”, there is consensus amongst scholars, legislatures and judges that a mediation agreement does not require the parties to come to a settlement but merely that they make a real effort to come to a resolution.¹⁷⁸ To further study the need to settle, this study coded the agreements under analysis for “settle”. 38% of the agreements addressed the issue of settlement. Of these 65 agreements, the majority (88%) required the parties to “endeavor” or “attempt” to settle their dispute via mediation. Furthermore, two clauses required that the parties make suggestions for settlement. Interestingly, eight agreements required the parties to settle their dispute via mediation using the mandatory language (Figure 16).

¹⁷⁴ See Johnson & Johnson, “Model International ADR Clause Pacific Basin Option 1” in Kathleen M Scanlon, *Drafting Dispute Resolution Clauses: Better Solutions for Business* (New York: International Institute for Conflict Prevention & Resolution, 2006) at 129–130.

¹⁷⁵ Piers, *supra* note 15 at 289.

¹⁷⁶ *Ibid* at 292.

¹⁷⁷ *Ibid*.

¹⁷⁸ See *PPG Industries, Inc. Construction Engineering Service Agreement* in Scanlon, *supra* note 174 at 162.; see also Krauss, *supra* note 23 - no obligation under statute or other law to accept a proposed settlement during ADR.

Figure 16 – *Sample of obligation to settle*

“Any controversy or claim arising out of or relating to this contract or breach thereof shall be settled by mediation [...]”¹⁷⁹

“If any dispute arises in connection with this agreement, the parties agree to enter into mediation in good faith to settle such a dispute and will do so in accordance with the CEDR Model Mediation Procedure.”¹⁸⁰

Mediation agreements that require parties to settle their dispute via mediation are unlikely to be enforced, since a core feature of mediation is its non-binding nature.¹⁸¹ Parties cannot be forced to accept a settlement proposed by the other party or the neutral whose task is to facilitate the dispute resolution process.¹⁸² This is in line with the principle of voluntariness in mediation, which is also highly valued in Austria and the Netherlands. In Germany, §2(5) of the *Mediation Act* emphasizes the right of the parties to end the mediation at any time.¹⁸³ Likewise, in the US and other common law jurisdictions, there is no obligation under state or other law to agree to a settlement during a mediation session.¹⁸⁴

c. Act in Good Faith

The third most common obligation relating to the code “behavior” was the requirement to act in good faith.¹⁸⁵ However, when parties agree to conduct mediation in good faith, there is potential for disagreement regarding what good faith entails.¹⁸⁶ While it is easy to assess if a party has attended a mediation session, it is more difficult to test the good faith of parties towards the negotiations.¹⁸⁷ Black’s Law Dictionary defines “good faith” as “a state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or

179 Scanlon, *supra* note 174 at 162.

180 “Model Mediation Procedure” (2018) at s 9, online (pdf): *Centre for Effective Dispute Resolution* <www.cedr.com/about_us/modeldocs/?id=21>;

181 See Esplugues, “Civil and Commercial Mediation in Europe”, *supra* note 1 at 603; also see Esplugues, “General Report” *supra* note 6 at 33, and Mayr & Kristin, *supra* note 9 at 79.

182 Piers, *supra* note 15 at 289.

183 See *Mediation Act*, (21 July 2012) Federal Law Gazette I 1577 [*German Mediation Act*].

184 See Rainer Kulms, “Mediation in the USA: Alternative Dispute Resolution between Legalism and Self-Determination” in Klaus J Hopt et al, ed, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013) at 1279.

185 33% of all agreements.

186 See Paul Stothard, Stuart Bruce et al, “Investment Protection and International Dispute Resolution in Singapore” in Denis Brock (ed), *Arbitration in Singapore: A Practical Guide*, (London, UK: Sweet & Maxwell, 2014).

187 See Tevendale, *supra* note 89 at 38. Kulms, *supra* note 185 at 1279.

to seek unconscionable advantage.”¹⁸⁸ In relation to the obligation to mediate in good faith, it can be said to contain the following elements: to conduct the mediation, to have an open mind, to be willing to consider settlement proposals, and to propose settlement options.¹⁸⁹

Nevertheless, there is reluctance by some common law courts to the recognition of the duty of good faith.¹⁹⁰ English courts have been traditionally hostile to the doctrine of good faith.¹⁹¹ There is no general obligation of good faith in English law and the parties have no statutory obligation to tell the truth or observe other norms of behavior.¹⁹² However, in *Carleton*,¹⁹³ the English Justice Jack did find that a party who took an unreasonable stance in mediation is in the same position as a party who refused to mediate and therefore can be sanctioned. Conversely, in the US, the duty of good faith is recognized as a general principle of contract law that is implied in all commercial contracts.¹⁹⁴ According to §205 of the *American Restatement (Second) of Contracts*, “every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”¹⁹⁵ Furthermore, good faith is an “overriding and eminent principle” in the US *Uniform Commercial Code*.¹⁹⁶ Moreover, in the 1999 Australian case of *Aiton*, Einstein J reflected on a commercial contract requiring the parties to negotiate in good faith and found that:

188 “A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage”.

See Bryan A. Garden, *Black’s Law Dictionary*, 7th ed (St Paul, Minnesota: Thomson Reuters, 2014) at 701.

189 See Alan Limbury, “ADR in Australia” in Arnold Ingen-Housz ed, *ADR in Business: Practice and Issues Across Countries and Cultures* (Alphen aan den Rijn, NL: Kluwer Law International, 2010) at 429.

190 See John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer*, 2nd ed (Oxford University Press, 2011) at “Part III: the Role of Good Faith”.

191 See Krauss, *supra* note 23 at 148. See Herbert Smith Freehills, “How Far Can You Act in Your Own Self-interest? The Role of Good Faith in Commercial Contracts” (2016), online <<http://hsfnotes.com/wp-content/uploads/sites/7/2016/01/Contract-disputes-practical-guides-4-Good-faith.pdf>>.

192 See Jens M Scherpe & Bevan Marten, “Mediation in England and Wales: Regulation and Practice” in Klaus J Hopt et al, ed, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013) at 406.

193 *Carleton (Earl Malmesbury) v Strutt and Parker*, [2008] EWHC 424 (QB).

194 See Steven J. Burton “Breach of Contract and the Common Law Duty to Perform in Good Faith”, (1980) 94 Harvard L Rev at 371.

195 See *Restatement (Second) of the Law of Contracts* § 205 (1981).

196 See *Uniform Commercial Code* § 1-201 (1952).

It is clear that a tension may exist between negotiation from a position of self-interest and the maintenance of good faith in attempting to settle disputes. However, maintenance of good faith in a negotiating process is not inconsistent with having regard to self-interest.¹⁹⁷

In Australia, the obligation of good faith is sufficiently certain and enforceable.¹⁹⁸

Lastly, courts in pro-good faith civil law jurisdictions, such as Germany, imply the good faith obligation into contractual arrangements.¹⁹⁹ According to §242 BGB, the parties are under a general duty to cooperate in the mediation process and to negotiate in good faith.²⁰⁰ In addition to the above duties in the BGB, the parties are bound by the general contract law requirement against undue influence and the use of threats during the mediation procedure.²⁰¹ §203 of the German Civil code on limitation periods²⁰² and the principle of good faith protects the parties from the loss of rights during the mediation.²⁰³

However, as Section 3.15 outlines, mediation negotiations are covered by confidentiality, which begs the question of how the parties' behavior can be assessed.²⁰⁴ It is submitted that the parties' pre-negotiation steps (preliminary) leading to the mediation are not covered by confidentiality, which mitigates the issue of proof. Therefore, good faith of the parties can be assessed regarding the following steps: answering the request to mediate, discussions regarding the choice of neutral, discussions regarding the practical aspects of the mechanism, and the need to attend the first session.²⁰⁵

d. Cooperation, Active Participation, and a Serious Attempt

Referring further to various obligations imposed on the parties by their ADR agreement, this study coded for “cooperate”, “active participation or prepare and engage”, and “serious attempt.” Forty agreements required that parties cooperate (Figure 17), Twenty-eight required active participation or to prepare and engage (Figure 18), and two require the parties to make a serious attempt (Figure 19).

197 *Aiton Australia Pty Ltd v Transfield Pty Ltd*, [1999] NSWSC 996 at para 83. See also *United Group Rail Service Ltd v Rail Corporation New South Wales*, [2009] NSWCA 177 at para 81, and *Cliff Collieries Pty Ltd v Sijehama Pty Ltd*, [1991] NSWLR 24 1 at para 26.

198 See Limbury, *supra* note 189 at 7.

199 See Alexander, “International and Comparative Mediation”, *supra* note 15 at 196. In the Netherlands, when parties conclude a mediation agreement, they are obligated to negotiate in good faith. See Schmiedel, *supra* note 162 at 731.

200 See Civil Code (Germany), *supra* note 59 at art 242.

201 Tochtermann, “Agreements to Negotiate”, *supra* note 52 at 549; Piers, *supra* note 15 at 294.

202 See Eidenmüller & Groszrichter, *supra* note 143 at 123. Berger, *supra* note 76 at 128.

203 *Ibid.*

204 See van Beukering-Rosmuller & Van Leyneele, *supra* note 82 at 52.

205 *Ibid* at 54.

Figure 17 – *Sample cooperate*

“The parties must cooperate fully with the mediator, including by providing all information that he or she reasonably requests.”²⁰⁶

Figure 18 – *Sample active participation or prepare/engage*

“M-9. Responsibilities of the Parties [...] the parties and their representatives shall, as appropriate to each party’s circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.”²⁰⁷

Figure 19 – *Sample make a serious attempt*

“By consenting to mediate or conciliate under these Rules, the parties agree to engage in the mediation or conciliation in good faith and in a forthright manner and make a serious attempt to resolve the dispute.”²⁰⁸

Again, the question arises whether courts can or should impose these obligations. In the Austrian context, Frauenberger-Pfeiler comments that although the parties are free to negotiate in a way to protect their interests, they may not misrepresent facts, make threats, or exert undue influence.²⁰⁹ Likewise in Germany, in addition to the duty to negotiate in good faith, there is a general duty to cooperate in the mediation process.²¹⁰ In relation to Australia, Magnus notes that “[w]here the parties have agreed on mediation [...], there is also a general duty on each party to further the mediation procedure in a reasonable way.”²¹¹ Thus, a party must cooperate and not impede the mediation procedure.

The need to cooperate is also stipulated by the Law Society of England and Wales in the *Civil and Commercial Mediation Accreditation Scheme*: “Each party must use its best endeavors to comply with reasonable requests made by the mediator to prompt the efficient and expeditious resolution of the disputes. If either party does not do so, the mediator may

206 Survey respondent clause 3 – emailed 14-03-2017

207 See AAA, “Drafting Dispute Resolution Clauses – American Arbitration Association” (2013) at 18, online (pdf): *American Arbitration Association* <https://www.adr.org/sites/default/files/document_repository/ICDR%20Guide%20to%20Drafting%20International%20Dispute%20Resolution%20Clauses%20-%20English.pdf>.

208 See “Sample Mediation Clause” (2018), online: *Chicago International Dispute Resolution Association* <<http://www.cidra.org/samplemediation>>.

209 Frauenberger-Pfeiler, *supra* note 62 at [pinpoint].

210 See Hess & Pelzer, “Regulation of Dispute Resolution in Germany”, *supra* note 8 at 227.

211 *Supra* note 80 at 893. At the federal level, see *Native Title Act 1993*, 1993/110, s 31(1)(b). At the state level, see *Civil Procedure Act 2005*, 2005/28 s 27; *Farm Debt Mediation Act 1994*, 1994/91 s 11; *Court Procedures Rules 2006* in *Court Procedures Act 2004*, 2004/50; *Uniform Civil Procedures Rules 1999*, in *Supreme Court of Queensland Act 1991*, 1991/111 s 325.

terminate the mediation.”²¹² English courts have at times used cost sanctions against a party acting unreasonably.²¹³ In *Halsey v. Milton Keynes Gen. NHS Trust*, the Court of Appeal set out a test to determine whether the refusal to mediate was reasonable.²¹⁴ Unreasonable behavior includes a refusal to mediate, a last minute withdrawal from a planned mediation, making an offer in an aggressive manner without a real intention to resolve the dispute, and not giving the other part enough time to prepare.²¹⁵ Bach and Gruber take this a step further and argue that the unwilling party should be compelled to hear the other party’s offer, and/or that the mediator must fulfil their obligation under the mediation agreement.²¹⁶

e. Act Expediently

The fourth most common recurring behavioral obligation was the obligation for the parties to conduct the process expeditiously.²¹⁷ In other words, the parties ought not to delay the process unreasonably. There is no legal test regarding whether the parties can be deemed to have acted as such.

R. *Obligation to Attend in Person*

Fruitful mediation can only take place if individuals with the power to settle (possessing decision-making authority) attend the mediation sessions. The code “attendance” denotes agreements that require the parties or their representatives to personally attend the mediation. 47% of the agreements analyzed require personal attendance by the parties or by someone with authority to agree to a settlement. In *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd*,²¹⁸ the Singapore Court of Appeal found that the conditions precedent to arbitration were not satisfied, as the respondent failed to send their “Director Customer Relations” and “Managing Director”. Accordingly, in Singapore, parties are bound by their contract regarding who must attend the mediation.

The requirement to personally attend a mediation session is found in some legislation. In Florida, Rule 1.720(b) of the *Civil Procedure* stipulates

²¹² *Civil and Commercial Mediation Accreditation Scheme*, Annex C, c. 10

²¹³ See *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] 1 WLR 3002 at para 16. See also Shirley Shipman, “Alternative Dispute Resolution, the Threat of Averse Costs, and the Right of Access to Court” in Deirdre Dwyer, *The Civil Procedure Rules Ten Years On*, (Oxford: Oxford University Press, 2009).

²¹⁴ *Halsey v Milton Keynes Gen NHS Trust*, *Supra* note 213.

²¹⁵ See *Leicester Circuits Ltd v Coates Bros Plc*, [2003] EWCA 290 (Eng). See *Earl of Malmesbury v Strutt & Parker*, [2008] EWHC 424 (QB). See *Societe Internationale de Telecommunications Aeronautiques S.C v The Wyatt Co*, [2003] EWHC 2401 (Ch) at para 11.

²¹⁶ See Bach & Gruber, *supra* note 55 at 165–166.

²¹⁷ 24% of all agreements.

²¹⁸ *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another*, [2013] SGCA 55.

that “[i]f a party fails to appear at a duly noticed conference with good cause, the court upon motion shall impose sanctions, including an award of mediator and attorney’s fees and other costs, against the party failing to appear.”²¹⁹

Moreover, in Australia and Germany, personal attendance is required unless the parties have agreed otherwise (e.g. via online mediation).²²⁰ Likewise, in England, mediation may be attended in person or via another means of communication (e.g. ODR).²²¹ Conversely, in the Netherlands, there is no legal requirement for personal attendance.²²²

The study further coded for whether there were stipulations relating to the parties’ lawyers. The code “representation” focuses on whether the agreements require the parties to be accompanied by legal counsel. 53% of the agreements specified that the parties must have representatives consulting them. This requirement is perhaps meant to prevent parties from potential duress or fraud during the mediation proceedings. Although there are no rules against having representatives in the mediation proceedings, some argue that, since counsel is often focused on protecting the legal position of the parties, he or she might be too focused on legal rights and duties instead of long-term interest.²²³ There is, however, generally no prohibition of having legal representatives join the process as long as the parties to the mediation agree.²²⁴

S. *Obligation of Privacy and Confidentiality*

The SCA revealed that 15% of agreements contained provisions regarding privacy (Figure 20) while 70% of the agreements addressed confidentiality (Figure 21).

Figure 20 – *Sample privacy*

“9. Privacy

Mediation conferences and related mediation communications are private proceedings. The parties and their representatives may attend mediation conferences. Other persons may attend only with the permission of the parties and with the consent of the mediator.”²²⁵

²¹⁹ *Florida Civil Rules of Procedure* (2019), r 1.720.

²²⁰ Magnus, *supra* note 80 at 894 and Tochtermann, “Agreements to Negotiate” *supra* note 52 at 555.

²²¹ Scherpe & Marten, *supra* note 192 at 406.

²²² See Schmiedel, *supra* note 161 at 733.

²²³ See also Geetha Ravindra, “Role of Attorneys in Mediation Process” at 1, online (pdf): www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/role_of_attorney_in_mediation_process.authcheckdam.pdf.

²²⁴ See *Mediation Act* (Germany) at s §2(4).

²²⁵ Survey respondent clause 22 – emailed 14-03-2017.

Figure 21 – *Sample confidentiality*

“CONFIDENTIALITY Article 16

1. The mediator shall not disclose any information provided to him or her by a party or witness without the consent, as appropriate, of that party and witness.
2. The mediator shall not be compelled to divulge such information, or to testify in regard to the mediation in any proceedings unless required to do so by law.
3. The parties shall maintain the confidentiality of the mediation and shall not – except where its disclosure is required by law or is necessary for purposes of implementation and enforcement – rely on, or introduce as evidence in any arbitral, judicial, or other proceeding, any observations, statements or propositions made before or by the mediator or any documents produced in relation to the mediation proceedings.”²²⁶

Confidentiality is an extension of the right to privacy in the US.²²⁷ The confidentiality of mediation is one of its purported benefits. Confidentiality is of importance at two levels: between the parties and neutral (inside) and between the communications during the process and the outside world (outside).²²⁸ In the agreements studied, the obligation to maintain confidentiality was often imposed on the parties as well as the neutral. The need to protect confidentiality of the mediation is further reiterated in various legislative acts, including the *Mediation Directive*.²²⁹ However, the approach to confidentiality differs amongst the common law jurisdictions and continental systems.²³⁰

According to §1(1) of the German *Mediation Act*, mediation is defined as “a confidential and structured procedure, in which the parties voluntarily and on their own responsibility try to achieve an amicable resolution of their conflict with the support of one or more mediators.”²³¹ However, the Law is not clear regarding the application of the confidentiality obligation to the parties themselves. Therefore, it is for the mediation agreement to require the parties to comply with the obligation of confidentiality.²³² This is confirmed in the Netherlands, where Article 5 of the *Cross-Border Mediation Law* stipulates that confidentiality of the process must be expressly agreed upon by the parties and the mediator in their commencement agreement.

²²⁶ See “P.R.I.M.E. Finance Mediation Rules” (2016) at art 16, online (pdf): *P.R.I.M.E. Finance* <primefinancedisputes.org/files/2017-01/prime-arbitration-and-mediation-rules-v1801171c.pdf>.

²²⁷ See Susan Oberman, “Confidentiality in Mediation: An Application of the Right to Privacy” (2012) 27:3 *Ohio St J Disp Resol* 539 at 542.

²²⁸ See Loong Seng Onn, “Mediation” (2015) at 11, online (pdf): *Singapore Management University* <ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=4772&context=sol_research>.

²²⁹ See *EU Mediation Directive*, *supra* note 14 at art 7. See *Evidence Act* (Austl), 1995/2, s 131(1). See also Michel Kallipetis, “Mediation Privilege and Confidentiality and the EU Directive” in Arnold Ingen-Housz, ed., *ADR in Business: Practice and Issues across Countries and Cultures II* (Alphen aan den Rijn, NL: Kluwer Law International, 2010) 183 at 184.

²³⁰ See Bosnak, *supra* note 31 at 650.

²³¹ See *Mediation Act* (Germany), *supra* note 223 at §1(1).

²³² See, for example, „DIS Mediation Rules“ (2010) at s 10.1, online: *Deutsche Institution für Schiedsgerichtsbarkeit* <www.disarb.org/de/16/regeln/dis-mediation-rules-id31>.

²³³ Consequently, the parties and the mediator are free from the obligation to testify regarding the information exchanged during the mediation.²³⁴ Likewise, in Austria, confidentiality is the cornerstone of mediation.²³⁵ However, outside the duty of confidentiality imposed on the mediator, the courts do not deem evidence inadmissible if the information became knowledge for the parties during the mediation. Thus, a breach of liability only results in damages. To ensure compliance with a confidentiality clause, parties to an Austrian mediation often also include a financial clause calling for a heavy fine in case of a breach.²³⁶

Confidentiality is also protected in Singapore through section 9 of the *Mediation Act 2017*, which prohibits disclosure of mediation communication.²³⁷ Furthermore, section 10 requires permission for the admission of mediation communication as evidence in litigation.²³⁸ Likewise in Australia, the confidentiality of the communication in the mediation is protected.²³⁹ Lastly, in England, the confidentiality of the mediation may be regulated by the parties in the neutral/commencement agreement.²⁴⁰ English courts will not consider ‘without prejudice’ material, unless privilege is waived.

Confidentiality, however, can be problematic when a party is attempting to prove breach of the mediation clause as a result of the other party’s actions during the procedure.²⁴¹ For example, if a party acted in bad faith during the mediation, the overriding protection of confidentiality

²³³ *Supra* note 141.

²³⁴ In addition, the Netherlands Mediation Institute Mediation Rules contain three principles, one of which is confidentiality: confidentiality and secrecy are to be observed during and after the mediation, by all parties concerned. These three basic principles are also found in the UNCITRAL Model Rules on Conciliation. See Annie De Roo & Robert Jagtenberg, “The Netherlands Encouraging Mediation” in Nadja Alexander, ed, *Global Trends in Mediation* (2003) at 243.

²³⁵ See Marianne Roth & Marianne Stegner, “Mediation in Austria” (2013) 3 YB Intl Arb 367 at 371. For EU-only mediators, § 3 of the *EU-Mediation Act* [EU-MA 2011] states that “mediators and any other participants in the mediation proceedings are obliged not to testify in court or in an arbitration in civil or commercial matters about information they obtained during the mediation”. “This means that § 3 of the EU-MA 2011 establishes the obligation to refuse to testify for the mediator and any other person involved in the mediation proceedings; yet it is only a right to refuse to answer similar to § 321 of the Act on Civil Procedure (*Zivilprozessordnung*), but no legal prohibition of questioning as laid down in § 320 (4) of the Act on Civil Procedure for Austrian registered mediators.” See Martin Risak & Christina Lenz, “Austria” in Nadja Alexander & Sabine Walsh, ed, *EU Mediation Law Handbook, Global Trends in Dispute Resolution 7* (Netherlands: Kluwer Law International, 2017) 33 at 55.

²³⁶ Risak & Lenz, *supra* note 230.

²³⁷ See *Mediation Act* (Singapore), *supra* note 131 at s 9.

²³⁸ *Ibid* at s 10.

²³⁹ Magnus, *supra* note 80 at 888, for “privilege of confidentiality”.

²⁴⁰ See Bill Marsh et al, “England and Wales” in Nadja Alexander & Sabine Walsh, ed, *EU Mediation Law Handbook, Global Trends in Dispute Resolution 7* (Alphen aan den Rijn, NL: Kluwer Law International, 2017) 203 at 228.

²⁴¹ In the US, privilege affects the parties’ ability to prove breaches of obligations in mediation.

See Sarah R. Cole et al, *Mediation: Law, Policy & Practice* (Thomson Reuters, 2017) at 197.

supersedes the possibility to prove the irregular behavior.²⁴² Nevertheless, case law originating from the US indicates that the courts have attempted to clarify good faith mediations. The court in *A.R. Reynolds & Sons*²⁴³ sanctioned a party for not participating in good faith on the basis of the following arguments: “Availability by telephone is insufficient because the absent decision-maker does not have the full benefit of the ADR proceedings, the opposing party’s arguments, and the neutral’s input”; “mediation is a process in which the parties must work together, with the assistance of a trained facilitator, to devise a solution to their dispute”; “passive attendance at mediation cannot be found to satisfy the meaning of participation in mediation ...”; “adherence to a predetermined resolution, without further discussion or other participation, is irreconcilable with risk analysis, a fundamental practice in mediation”; “the court finds that the counsel to Wells Fargo sought to control the procedural aspects of the mediation by resisting filing a mediation statement and demanding to know the identities of the other party representatives”; “the party representative who was sent into the mediation does not appear to have had the authority to enter into creative solutions that might have been brokered by the mediator.”²⁴⁴

T. Procedure to Terminate Mediation and Maximum Time Limits

As mentioned above, the parties can include a mediation tier in their MDR clause as a condition precedent to binding processes. Hence, it is important for the parties to know how they can effectively mark the end of their mediation proceedings before moving on to arbitration/litigation.²⁴⁵ There have been several instances where disagreements regarding whether the mediation tier had been met have resulted in additional costs. In *Allied World Surplus Lines Insurance Company v. Blue Cross and Blue Shield of South Carolina*,²⁴⁶ the parties had started mediation but the mediator did not declare the mediation to be at an impasse and therefore there was uncertainty regarding whether the mediation had ended. The court found that any ambiguity regarding communication with the parties should be resolved in favor of the mediation not ending.²⁴⁷

In this study, 65% of agreements contained a procedure to terminate the mechanism. There were often several options to end the mediation,

242 See van Beukering-Rosmuller & Van Leyneele, *supra* note 82 at 51.

243 See Blake, Brown & Sime, *supra* note 165 at 107.

244 See *In re A.T. Reynolds & Sons, Inc.*, 424 BR 76 at 85 & 93 (NY Bank 2010).

245 See Strong, *supra* note 1 at 32–33. “[I]t would be useful to consider what constitutes rejection or termination of mediation, since there is a considerable amount of debate about that particular issue, especially in the context of multi-tiered (step) dispute resolution clauses.” See also Born, *supra* note 23 at 841–849.

246 See *Allied World Surplus Lines Insurance Company v Blue Cross and Blue Shield of South Carolina*, 2017 US Lexis 136983 at 2 (SC Dist Ct).

247 *Ibid.* Dispute is not ripe and thus dismissal is appropriate under Rule 12 (b)(1).

ranging from the execution of the settlement agreement; written or verbal declaration of the neutral; by a declaration or “notice of declaration” by one or all of the parties; no communication between the parties and the neutral for X number of days; by the lapsing of the time set for mediation; failure to appoint or pay the neutral; by declaration of the dispute resolution provider; and conclusion of a written record of the final propels of the parties and the neutral.²⁴⁸ Uniquely, two German dispute resolution providers explicitly stipulate that only after the first mediation session, can the procedure be terminated.²⁴⁹ § 2 (5) of the German *Mediation Act* also sets out several causes of termination: “The parties can terminate mediation at any time. The mediator can terminate the mediation, especially when he is of the opinion that autonomous communication or settlement between the parties is not to be anticipated.”²⁵⁰ The wording of the institutional rules is also reflected in Austria. According to §17(1) of the Austrian *Mediation Act*, the mediation terminates upon the declaration of any party.²⁵¹

As stipulated above, one of the factors determining the termination of the mediation is the time limit set by the parties. Of the agreements under analysis, 14% contained a maximum time limit for the mediation. The maximum number of days ranged from 15 to 90 days, with the average number of days standing at 47.5 days. Additionally, three clauses called for three-hour long sessions. The time limits, however, had differing starting marks ranging from “the date of commencement of the mechanism”, “from the dispute notice”, “from the mediator receiving instructions”, “from the date of submission”, “from the signing of the mediator agreement”, “from the referral to mediation”, to “from the request for mediation”. If parties wish for courts to find certainty in their mediation agreement, the inclusion of a maximum time limit is advisable, as it clarifies when the obligation to attempt mediation ends.

²⁴⁸ See AAA, *supra* note 207 at 18.

²⁴⁹ Article 5. Closure of the procedure “5.1. After the first mediation session, mediation can be terminated at any time by one of the participants as well as by the mediator himself. A demolition of mediation is to be justified, but there is no claim to that effect” (Live Mediation; Beispiel einer Mediationklausel). See “Mediation Rules” (2013) at article 13(4), online (pdf): < https://www.eucon-institut.de/wp-content/downloads/pdf/EUCON_Mediation_1_Verfahrensordnung_English.pdf >. “ Each party is entitled to terminate the mediation proceeding at any time after the first mediation meeting in writing vis-à-vis EUCON and the mediator. The mediation proceeding ends two weeks after the receipt of such declaration, unless the mediation proceeding continues prior to this deadline amicably”.

²⁵⁰ *Supra* note 183.

²⁵¹ *Supra* note 116.

U. Remedy for Non-Compliance

Potential remedies for a failure to comply with a mediation tier includes liquidated damages,²⁵² indemnity,²⁵³ procedural or substantive consequences, and specific performance.²⁵⁴ There is no consensus regarding the appropriate remedy for a failure to comply with a mediation agreement. When parties do not comply with their mediation agreement, the most common remedies are stays and dismissals.²⁵⁵ Parties may draft their mediation clause to stipulate a remedy for a failure to comply with the agreed procedure. In this study, only 4% of the agreements contained such a stipulation. The most common remedy was the right to recover all costs and expenses followed by the inability to recover costs.²⁵⁶

IV. Meeting the Certainty Threshold

This study had a twofold aim. First, to provide a better understanding of the content and obligations contained in mediation agreements and second, to assess whether the agreements under analysis fulfilled the conditions for enforceability in selected states. Turning to our second aim, it is undeniable that commercial parties must draft with caution if they wish to ensure the enforceability of their agreement.²⁵⁷ For a clause to be binding, it must indicate with mandatory language that the parties intended to be bound by mediation and be certain.²⁵⁸ In common law jurisdictions, the parties must also clarify the binding nature of the agreement as a condition precedent to other mechanisms.²⁵⁹ Moreover, in all jurisdictions under analysis, an enforceable agreement should address the following points:

1. The scope of the agreement (disputes covered);
2. Description of the procedure;

252 Liquidated damages may prove problematic in legal systems that follow the penalty doctrine, which makes the clause unenforceable unless it addresses a proportionate estimation of the loss.

253 Indemnity against loss arising from a failure to comply with the ADR obligation avoids the difficulties associated with penalty clauses. A promise of reimbursement of costs is problematic as at times such loss is unquantifiable.

254 See Kajkowska, *supra* note 81 at 222.

255 See Ronán Feehily, “The Contractual Certainty of Commercial Agreements to Mediate in Ireland” (2016) 6:2 Irish J Leg Studies 59. Other potential remedies are not discussed in light of their rarity. Moreover, consequences such as vacating of arbitral awards are not discussed as they do not relate to remedies to a failure to comply with an agreement to mediate.

256 Five agreements provided for the recovery of costs and two stipulated that the violating party cannot recover costs.

257 See Salehijam, “A Call for a Harmonized Approach,” *supra* note 46.

258 The use of the word “shall” and “must” in dispute resolution clause indicates that the parties must first to seek mediation before arbitration (compulsory).

259 See also ICC International Court of Arbitration Case No. 9984, June 1999: the wording of the clause indicated that ADR is an obligation; the tribunals found the clause binding upon the parties.

3. How to initiate the procedure;
4. Procedure to select the neutral(s) and his/her payment;
5. The parties' minimum participation obligations, including attendance (personal and time related) and behavior (cooperate, meaningful discussions, etc.);
6. The obligation to refrain from acting (i.e. initiating arbitration),
7. Place of the mechanism or method for selection thereof;
8. Time-frame for the mediation or timetable for compliance; and
9. Procedure to terminate mechanism.²⁶⁰

Additionally, to ensure efficiency, it is advisable that the agreements address the following elements: applicable procedural and substantive law; governing jurisdiction; applicable institutional rules (attention must be made to the version agreed to); consequence for a failure to comply (stay, dismissal, damages, sanctions, etc.); effect on limitation periods; and the language of mediation or method for selection thereof.

Regarding the common law requirement to use mandatory wording to set mediation as a condition precedent to binding mechanisms, many agreements establish the mandatory nature of the mediation through using the wording "shall" and "must". Turning to point (i), 95% of the clauses under analysis specified the scope of disputes covered by the agreement. Moreover, all except two agreements described the relevant dispute resolution mechanism to be followed. With the majority calling for mediation. However, it was rare for the agreements or institutional rules to define mediation. Therefore, again, almost all of the clauses also addressed point (ii).

Regarding point (iii) "how to initiate the procedure", 60% of the agreements studied described the procedure to commence the mediation, while all of the applicable institutional rules prescribed a clear procedure to commence the mechanism, with the most common process being the filing of a request or application followed by the sending of an invitation to the other party to participate. The large majority of the agreements (84%) also addressed the selection of the neutral and therefore also complied with point (iv), while a lesser percentage (63%) governed his/her payment, but commonly required the costs to be equally divided.

Turning to how the agreements addressed the parties' participation obligations (v), the picture is less clear. As eloquently noted by Jarrosson, *without doubt, the most troublesome question in mediation, at the present stage of tis development, is how to define the precise obligations of the parties.*²⁶¹ The study coded for the following obligations: behavioral obligations, obligation to attend in person, and obligations regarding privacy, and confidentiality. 73% of the agreements and institutional rules coded address the parties' behavioral obligations. The most reoccurring obligations as to

²⁶⁰ See Salehijam, "A Call for a Harmonized Approach", *supra* note 46 at 11–12.

²⁶¹ See Jarrosson, "Legal Issues 2010" *supra* note 40 at 163.

behavior were to exchange information and to attempt/endeavor to settle. Good faith was the third most common obligation followed by the duty to cooperate, participate actively as well as to be prepared and to engaged in the mechanism. Furthermore, almost half of the agreements required personal attendance by the parties or for someone with authority to settle. The most common requirement was for the parties to attend at least one mediation session/meeting. In addition, 70% of the clauses required that the parties and the neutral ensure confidentiality of the proceedings while 15% of the agreements addressed privacy.

Arguably the most important effect of mediation agreements relates to the obligation to refrain from arbitration/litigation (point (vi)). 77% of the agreements and applicable institutional rules prohibit parties from engaging in binding mechanism while mediation is ongoing. Slightly more than half of the agreements that required the parties to refrain from acting further specified a time-frame that averaged around 53 days (point (viii)).

In relation to the obligation to refrain from acting, it is important to know how the mediation can be terminated (point (ix)). Again, the majority of the agreements (65%) outlined specific procedures or factors that would bring the mediation to an end, with 14% setting a maximum time-frame for the mechanism (again, point (viii)).

Lastly, despite the importance of pre-selecting the governing jurisdiction and applicable law in order to have legal certainty when a dispute arises, only a minority of the agreements (8% and 9% respectively) addressed these aspects. Moreover, only 19% of the agreements specifically stipulated that the parties had the right to seek interim relief/provisional measures.

From the above, it is clear that many of the agreements under analysis had a high level of compliance with the general conditions for enforceability. However, the majority of the agreements incorporated institutional rules and therefore it remains to be seen if clauses calling for ad hoc mediation would meet the threshold for enforceability. The next section, in concluding this work, outlines a potential solution to the currently drafting problems.

V. Concluding Remarks

Through an in-depth content analysis of 172 agreements, this study aimed to uncover common practice/trends regarding the rights and obligations implied by mediation agreements. Subsequently, these results were tested against the current conditions for enforceability, resulting in the conclusion that the large majority of the agreements would likely be found enforceable as they addressed essential elements sufficiently, especially since they tended to call for institutional mediation. However, the issue remains that parties have a tendency to copy and paste their dispute resolution clauses, which may give rise to uncertainty. Therefore, it is suggested that the

common trends detected in our studied be relied upon by legislators to create default rules that can counteract potential gaps in mediation agreements.

In absence of default rules, a simple omission might result in the invalidity of a mediation agreement. For instance, if a mediation agreement fails to address the remuneration of a neutral, the courts in certain jurisdictions, such as in England and Wales, will find the clause to be void for uncertainty. Default rules can provide standard solutions for problems typical to these agreements. The positive effect of default provisions for the promotion of mediation can be based on the success story of arbitration; arbitration frameworks of many jurisdictions contain default rules.

Any potential default rules should consider addressing the following factors: how to initiate procedure; the scope of the agreement (disputes covered); applicable procedural and substantive laws; procedure to select the neutral(s) and the payment of the neutral; place of the mechanism or method for selection thereof; language of mechanism or method for selection thereof; the parties' obligations including attendance, behavioral, temporal, etc.; obligation to refrain from acting; consequence for a failure to comply (stay, dismissal, damages, sanctions, etc.); and the procedure to terminate the mechanism as well as time-frames. Nevertheless, further research is needed regarding best practices regarding the enforcement of mediation agreements. While the study was successful in uncovering trends in the dataset, it is advisable that more agreements be studied to provide for more representative findings.