MEDIATION CLAUSES

Enforceability and Impact

Mediation can only begin and continue on the basis of the parties' voluntary participation. Therefore, it is important to have clarity regarding the parties' desire to submit their dispute to mediation. This article adopts an international comparative perspective in analysing the issues that arise when parties dispute the validity and effect of their mediation clause. Mediation clauses give rise to three clear points for discussion: When are these agreements binding on the parties; to what extent should these agreements be enforced; and how should breaches of these agreements be remedied?

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I. Introduction

1 A private mediation – as opposed to court-annexed – can only begin and continue on the basis of the parties' voluntary participation. Therefore, it is important to have clarity regarding the parties' desire to submit their dispute to mediation.[1] The consent of the parties to pursue mediation can be contained in an individually negotiated contract or in a mediation clause within a commercial contract.[2] Often, these agreements require the parties to submit their dispute to mediation and, at the same time, prohibit the parties from starting arbitration or litigation while mediation is pending.[3]

1 Carlos Esplugues, "General Report: New Developments in Civil and Commercial Mediation – Global Comparative Perspectives" in *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives* (Carlos Esplugues & Louis Marquis eds) (New York: Springer, 2015) at p 28.

2 See also Maud Piers, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?" (2014) J Disp Resol 269 at 283.

3 Carlos Esplugues, "General Report: New Developments in Civil and Commercial Mediation – Global Comparative Perspectives" in *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives* (Carlos Esplugues & Louis Marquis eds) (New York: Springer, 2015) at p 33.

2 This article adopts an international comparative perspective in analysing the issues that arise when parties dispute the validity and effect of their mediation clause.[4] Mediation clauses give rise to three clear points for discussion: when are these agreements binding on the parties (Part II);[5] to what extent should these agreements be enforced (Part III);[6] and how should breaches of these agreements be remedied (Part IV)?[7]

3 For an agreement to be binding on the parties, it must firstly be both formally and substantively valid. Part II will examine the varying approaches in civil and common law jurisdictions, drawing on Austria, Australia, England and Wales, Germany, Singapore, the Netherlands and the US as illustrations. With the exception of Singapore, it is rare for the national legislators to address the mediation clause. Therefore, general national contract, procedural and private international laws may be of relevance. Despite the absence of legislation addressing the issue of validity and enforceability of the mediation clause, there is a growing pool of case law. The majority of case law is from common law jurisdictions due to their lengthier experience with mediation clauses. Part III of this article will argue for the necessity to enforce these agreements. In considering the arguments for and against enforcement, Part III will highlight the importance of acknowledging the legitimate grounds of a refusal to enforce. Subsequently, Part IV will assess the manner in which courts and arbitral tribunals remedy breaches of such agreements. This part will further explore the remedy best suited to the needs of commercial parties.

II. Binding mediation clauses: Validity and enforceability

4 In discussing the binding nature of mediation clauses, it is significant to note the boundary between these clauses and the main contract, and in the context of multi-tiered dispute resolution ("MDR") clauses, between the mediation tier and preceding and proceeding tiers. In line with the well-established dispute resolution principle of separability, mediation clauses ought to be viewed as an agreement

4 There are a growing number of disputes relating to the parties' mediation clause. According to a study by Cole, "In the seven-year period from 1999 to 2005, the number of reported opinions on Westlaw that addressed mediation issues increased from 172 in 1999 to 521 in 2005, a 303% increase": Sarah R Cole *et al*, *Mediation: Law, Policy & Practice* (US: Thomson Reuters, 2017) at p 203. See also James R Coben & Peter N Thompson, "Disputing Irony: A Systematic Look at Litigation about Mediation" (2006) 11 Harv Negot L Rev 43 at 105.

5 See paras 4–9 below.

6 See paras 10–24 below.

7 See paras 25–67 below.

that is separate from the main commercial contract.[8] Accordingly, a mediation clause is separable from the main contract; thus, it is not necessarily impeached or rendered void if the main contract is avoided, discharged, rescinded, frustrated, repudiated, or found to be void for illegality.[9] Therefore, the discussion of the validity of the parties' agreement to submit their current or future disputes to mediation should be isolated from the discussion of the validity of the main contract.

5 Moreover, it is legally correct to treat mediation clauses contained in MDR clauses as separable from the preceding and proceeding tiers, including the arbitration tier.[10] The Australian case of *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*[11] demonstrates the risk of treating tiers in MDR clauses as an integrated unit. In the case, the defendant treated the MDR clause as one agreement, assuming that it was sufficient to request a stay of proceedings to commence mediation in order to enforce the entirety of the dispute resolution clause that also included an arbitration tier. As the party never requested the enforcement of the arbitration tier, Giles J

8 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: Zheng Sophia Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (New York: Routledge, 2014) at p 74. See also Ellen van Beukering-Rosmuller & Patrick Van Leynseele, "Enforceability of Mediation Clauses in Belgium and the Netherlands" (2017) 21(3) *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 37 at 46 and Ronán Feehily, "The Contractual Certainty of Commercial Agreements to Mediate in Ireland" (2016) 6(1) *Irish Journal of Legal Studies* 59 at 64; for Germany, XII ZR 165/06 (BGH) (29 October 2008) at [27]–[28] (mediation clauses prevent court action). For the US case severing the agreement to mediate from the rest of the multi-tiered dispute resolution ("MDR") clause to save the MDR, see *Templeton Development Corp v Superior Court* 144 Cal App 4th 1073 at 1084; 51 Cal Rptr 3d 19 at 27 (2006). See also Renate Dendorfer-Ditges & Philipp Wilhelm, "Mediation in a Global Village: Legal Complexity of Cross-border Mediation in Europe" (2017) 5 YB on Int'l Arb 235 at 238. See NJW 1977, 2263 (BGH) (4 July 1977), where the court said clause was separable from the main contract and so the termination of the partnership did not end the conciliation obligations. See also OLG Rostock 2006 3 U 37/06 (18 September 2006) and Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Oxford: Hart Publishing, 2017) at p 189.

9 The same principle also applies to choice of court agreements in England under rr 6.20 and 11 of the UK Civil Procedure Rules (SI 1998 No 3132). See Mukarrum Ahmed, *The Nature and Enforcement of Choice of Court Agreements: A Comparative Study* (Oxford: Hart Publishing, 2017) at p 38 and David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (London: Sweet & Maxwell, 1st Ed, 2005) at pp 123–128.

10 Mukarrum Ahmed, *The Nature and Enforcement of Choice of Court Agreements: A Comparative Study* (Oxford: Hart Publishing, 2017) at p 39. See also *United Group Rail Service Ltd v Rail Corp New South Wales* [2009] NSWCA 177 at [89].

11 *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709.

only addressed the request to enforce the mediation tier. He found that the mediation tier was too uncertain to have a binding force and thus asserted jurisdiction, which left the arbitration clause contained in the contract unenforced.[12] This is in line with the findings of the author's empirical study of 172 mediation clauses where one agreement specifically pointed out this separation:[13]

> 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.

6 Without specific rules, general contract law rules govern the validity of mediation clauses. A binding contract must be both formally and substantively valid in order to be binding. Formal validity relates to the external expression of agreements. This includes considerations such as whether the agreement has to be in writing, signed, in a special font or colour, stapled or digital. Substantive (or material) validity concerns the legality of the content of the parties' agreement, their capacity and consent to enter the agreement, public policy, and sufficient certainty. Typically, these clauses have not given rise to mediation-specific legal issues relating to *formal* validity. This is because, unlike agreements to arbitrate, for a mediation clause to be formally valid, there are no special requirements outside of the applicable contract law requirements.[14] Likewise, relating to substantive validity, the contract law defences apply. Therefore, aspects relating to the overall validity of a contract are of importance, such as fraud, duress, and unconscionability.[15]

7 In circumstances where mediation clauses give rise to legal disputes, parties generally are in disagreement regarding either the *substantive* validity of their agreement or whether the obligations therein have been fulfilled. While there is consensus that mediation clauses in the commercial context (business-to-business or B2B) are substantively valid and enforceable as long as they are sufficiently certain and in line with public policy and mandatory rules, courts and arbitral tribunals approach enforceability on a case-by-case basis and

12 Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Oxford: Hart Publishing, 2017) at pp 190–191.

13 Survey respondent clause (14 March 2017) cl 12.3 (on file with author).

14 Peter Tochtermann, "Mediation in Germany: The German Mediation Act – Alternative Dispute Resolution at the Crossroads" in *Mediation: Principles and Regulation in Comparative Perspective* (Klaus J Hopt & Felix Steffek eds) (Oxford: Oxford University Press, 2013) at p 549. See also Burkhard Hess & Nils Pelzer, "Mediation in Germany: Finding the Right Balance between Regulation and Self-Regulation" in *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives* (Carlos Esplugues & Louis Marquis eds) (New York: Springer, 2015).

15 Sarah R Cole *et al*, *Mediation: Law, Policy & Practice* (US: Thomson Reuters, 2017) at p 188.

apply different *certainty* thresholds.[16] This is counterproductive for transnational parties and SMEs, as they are required to draft various clauses for each jurisdiction in which they have business. In absence of a uniform framework regulating the conditions for validity and enforceability of mediation clauses, it is important that the parties carefully draft their agreement in order to ensure its effectiveness.

8 Drawing from the author's comparative law analysis of the varying approaches to mediation clauses and private international law,[17] it can be concluded that for a mediation clause to be binding regardless of the jurisdictions seized, it must be sufficiently certain as well as indicate the parties' intention to be bound by the obligation to attempt mediation. The use of the words "shall" and "must" in the dispute resolution clause indicates that the parties must first to seek mediation before arbitration (compulsory).[18] The 1975 International Chamber of Commerce ("ICC") Case No 4230 concerned pre-arbitral conciliation where the claimant failed to initiate conciliation and the defendant had raised a jurisdictional objection. The tribunal decided that the clause had no binding force and that it had jurisdiction. The tribunal found that it had jurisdiction in accordance with the non-obligatory wording of the clause: "all disputes related to the present contract *may* be settled amicably" [emphasis added]. Likewise, ICC Case No 10256 (2000) (see also No 5872) involved a pre-arbitral requirement that was not binding, as the clause stipulated that the parties "may" initiate mediation. The tribunal found that the wording of the clause indicated that mediation was not mandatory: "either party … *may* refer the dispute to an expert for consideration of the dispute" [emphasis added]. According to the author, to ensure that a mediation clause meets the certainty threshold in the jurisdictions under study, it must address the following matters:[19]

16 Gary Born & Marija Šćekić, "Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'" in *Practising Virtue: Inside International Arbitration* (David D Caron *et al* eds) (Oxford Scholarship Online, 2015) at p 239.

17 See Maryam Salehijam, "A Call for a Harmonized Approach to Agreements to Mediate" in *Yearbook on International Arbitration and ADR* vol VI (Marianne Roth & Michael Geistlinger eds) (NWV, 2019).

18 An exception might be Germany: *LG Münster* of 21 December 2000 DstRe 2001, 604.

19 See also *Elizabeth Bay Development Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709; *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 and *Chinadotcom Corp v Hugh Morrow* [2001] NSWSC 209. Accordingly, for an alternative dispute resolution clause to be enforceable, all steps should be set out clearly and relevant rules and guidelines incorporated. See also Yun Zhao, "Revisiting the Issue of Enforceability of Mediation Agreements in Hong Kong" (2013) 1(3–4) *China-EU Law Journal* 115 at 125.

(a) the scope of the agreement (disputes covered);

(b) description of the procedure;

(c) procedure to select the neutral(s) and his or her payment;

(d) time frame for the mediation or timetable for compliance; and

(e) the obligation to refrain from acting (that is, initiating arbitration).

In reality, however, dispute resolution clauses tend to be drafted with little care. Practitioners and scholars frequently refer to dispute resolution clauses as "midnight clauses" since they are often concluded or copied and pasted so late in the day.[20] In a 2017 survey regarding the perception of dispute resolution professionals and experts of mediation clauses, 65% indicated that such agreements are often copied and pasted.[21] This is problematic as it raises the chances of the agreement being unenforceable if adjustments are made without sufficient research and if the copied clause is not suitable for enforcement in the relevant jurisdiction. The risk is even higher if two or more legal systems or adjudicative bodies are to scrutinise the clause.[22] Therefore, there is a probability that a mediation clause concluded hastily might not fulfil the certainty criteria.[23]

9 It is unlikely that there will be a change to the traditional drafting practices, so the certainty of mediation clauses will continue to be a challenge. Enforcing vague requirements for a process does not require parties to settle but merely to attempt to and so should not be as problematic as it is today.[24] Unmistakably, there is a need for a new approach to these agreements from the legislator and the courts. While it is possible for mediation clauses to be drafted following contractual principles so as to be held to be enforceable, the courts have the ultimate

20 Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Oxford: Hart Publishing, 2017) at p 223.

21 Maryam Salehijam, "ADR Clauses and International Perceptions: A Preliminary Report" (2017) *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement*.

22 Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Oxford: Hart Publishing, 2017) at p 223.

23 Michael Pryles, "Multi-Tiered Dispute Resolution Clauses" (2001) 18(2) J Int'l Arb 159 at 160.

24 See also Sarah R Cole *et al*, *Mediation: Law, Policy & Practice* (US: Thomson Reuters, 2017) at p 192. Moreover, in *Oglebay Norton Vo V Armco, Inc* 52 Ohio ST 3d 232; 556 NE 2d 515 at 521 (1990), the Ohio Supreme Court affirmed a trial judge's decision to order mediation. This was despite the parties having agreed to only "mutually agree upon a rate".

power to remedy breaches.[25] Therefore, it is important to pay regard to the current remedies available to enforce these agreements. The next part will discuss the need for enforcement and will provide an analysis of the varying remedies.

III. Desirability of enforcing mediation clauses

10 This part considers the dynamic relationship of commercial parties to argue for the enforcement of mediation clauses. To support this argument, this part analyses the factors that affect the question of enforcement, namely, access to justice, on the voluntary nature of these agreements, futility, public interest, and the objectives of commercial mediation. Following the discussion of the reasons for an enforcement-friendly approach to mediation clauses, this part ends by outlining a number of grounds to refuse enforcement despite there being a binding mediation clause.

A. Access to justice

11 The principle of access to justice is enshrined in various constitutions, as well as in international instruments, such as in Art 8 of the Universal Declaration of Human Rights[26] and Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[27] Today, access to justice is not as available and efficient as is desirable. Courts in developed countries and developing countries alike are increasingly criticised for their inefficiency, high costs and complicated procedures.[28] When the system of justice is inefficient, citizens themselves often attempt to resolve these shortcomings in both passive and active ways.[29] Passively, disputes are left unresolved, as in certain cases, it seems more inexpensive and sounder to do so.

12 Actively, the parties have looked to non-judicial (or alternative) means of dispute resolution. This explains why parties have increasingly

25 Didem Kayali, "Enforceability of Multi-Tiered Dispute Resolution Clauses" (2010) 27(6) J Int'l Arb 551 at 570.

26 Ratified 10 December 1948. Right to Effective Judiciary: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

27 Eur TS No 5, 213 UNTS 221, 1953 UKTS No 71 (4 November 1950; entry into force 3 September 1953). Right to a Fair Trial: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

28 See Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union* (Oxford: Routledge, 2011) at p 9.

29 *Global Perspectives on ADR* (Carlos Esplugues & Silvia Barona eds) (Cambridge: Intersentia, 2014) at p v.

entered into mediation clauses.[30] Therefore, even if mediation means that parties temporarily give up their fundamental right of access to a court,[31] by enforcing mediation clauses, courts are also indirectly addressing the current inefficiencies in the system of justice.

13 Furthermore, the pro-mediation policy of the European Union ("EU"), Australia, Singapore, US and Canada suggests that mediation does not hinder parties' access to justice to an extent that would run contrary to the right of access to justice. Mediation can foster access to justice, as it provides an avenue to remedy the current shortcomings in the system of justice of many states.[32] Thus, enforcing a mediation clause does not create a barrier to justice for the parties and might even be a way to achieve a swifter resolution of the dispute.

14 Two additional points demonstrate that mediation does not hinder access to justice. Firstly, the enforcing of a mediation clause does not oust the court's jurisdiction permanently, as the parties maintain the right to terminate the process.[33] Secondly, parties may apply for

30 According to numerous scholars, alternative dispute resolution ("ADR") institutions, and governments, the use of ADR to resolve disputes is on the rise. Regarding the rise of ADR see Michael Hwang SC, Loong Seng Onn & Yeo Chuan Tat, "ADR in East Asia" in *ADR in Business: Practice and Issues across Countries and Cultures* (Jean-Claude Goldsmith, Gerald Pointon & Arnold Ingen-Housz eds) (Alphen aan den Rijn: Kluwer Law International, 2006) at p 147; Annie De Roo & Rob Jagtenberg, "The Netherlands Encouraging Mediation" in *Global Trends in Mediation* (Nadja Alexander ed) (Germany: Centrale Für Mediation, 2003) at p 237; Albert Fiadjoe, *Alternative Dispute Resolution: A Developing World Perspective* (UK: Cavendish Publishing Limited, 2013) at p 1; Martin Fries, "Common Patterns of Consensual Conflict Resolution" (2012) KritV 121 at 122; and *Civil and Commercial Mediation in Europe: Cross-Border Mediation* vol II (Carlos Esplugues ed) (Cambridge: Intersentia, 2014) at p 492.

31 Maud Piers, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?" (2014) J Disp Resol 269 at 279.

32 Silvia Barona & Carlos Esplugues, "ADR Mechanisms and Their Incorporation into Global Justice in the Twenty-First Century: Some Concepts and Trends" in *Global Perspectives on ADR* (Carlos Esplugues & Silvia Barona eds) (Cambridge: Intersentia, 2014) at p 6; European Commission, *The 2016 EU Justice Scoreboard* (COM(2016) 199 final) at p 3. In 2011, Italy faced a backlog of five million cases: Michael H Martuscello, "The State of the ADR Movement in Italy: The Advancement of Mediation in the Shadows of the Stagnation of Arbitration" (2011) 24 NY Int'l L Rev 49. See also Jacqueline Nolan-Haley, "Is Europe Headed Down the Primrose Path with Mandatory Mediation?" (2011) 37 NC J Int'l & Com Reg 981 at 982. Regarding issues relating to access to justice in Eastern and Central Europe see European Forum on Access to Justice, *Access to Justice in Central and Eastern Europe: Forum Report* (2002).

33 Erich Suter, "The Progress from Void to Valid for Agreements to Mediate" (2009) 75 *Arbitration* 28 at 33; Jens M Scherpe & Bevan Marten, "Mediation in England and Wales: Regulation and Practice" in *Mediation: Principles and Regulation in Comparative Perspective* (Klaus J Hopt & Felix Steffek eds) (Oxford: Oxford University Press, 2013) at p 379.

interim measures, proving that the enforcing of the mediation clause does not endanger the parties' immediate interests. Through interim measures, parties can ensure that the dispute resolution process does not jeopardise their rights or property.[34] Such measures include injunctive relief and protective measures.

B. Voluntary nature of mediation

15 This work does not support the minority view that believes that the voluntary nature of mediation suggests that the parties should not be compelled to comply with their agreement.[35] Coercion *into* the mediation process must be distinguished from coercion *in* the mediation process.[36] Unlike the case for mandatory mediation where doubts remain, when parties agree to attempt mediation by concluding a mediation clause, there is no reason to doubt the need for coercion.[37] Even in the case of mandatory mediation, increasingly more jurisdictions are considering coercing the parties to *attempt* mediation through their court programs.[38]

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34 See *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Arthur W Rovine ed) (Leiden: Martinus Nijhoff Publishers, 2008) at p 53 and Association for International Arbitration, *Interim Measures in International Commercial Arbitration* (Antwerp: Maklu Publishers, 2007) at p 76.

35 See also Klaus J Hopt & Felix Steffek, "Mediation: Comparison of Laws. Regulatory Models, Fundamental Issues" in *Mediation: Principles and Regulation in Comparative Perspective* (Klaus J Hopt & Felix Steffek eds) (Oxford: Oxford University Press, 2013) at p 30; Shahla F Ali, *Court Mediation Reform: Efficiency, Confidence and Perceptions of Justice* (Cheltenham: Edward Elgar Publishing, 2018) at para 3.4.2; and Grant Jones & Peter Pexton, *ADR and Trusts: An International Guide to Arbitration and Mediation of Trust Disputes* (London: Spiramus Press Ltd, 2015) at p 35.

36 Peter Tochtermann, "Agreements to Negotiate in the Transnational Context – Issues of Contract Law and Effective Dispute Resolution" (2008) 13(3) *Uniform Law Review* 685 at 712. Moreover, according to Alexander, mediation can only become a true alternative to court proceedings "when it is subject to some degree of mandating": Nadja Alexander, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulator Reform" in *Mediation: Principles and Regulation in Comparative Perspective* (Klaus J Hopt & Felix Steffek eds) (Oxford: Oxford University Press, 2013) at p 175.

37 Peter Tochtermann "Agreements to Negotiate in the Transnational Context – Issues of Contract Law and Effective Dispute Resolution" (2008) 13(3) *Uniform Law Review* 685 at 712. See also Erich Suter, "The Progress from Void to Valid for Agreements to Mediate" (2009) 75 *Arbitration* 28 and Joel Lee, "Mediation Clauses at the Crossroads" [2001] SingJLS 81 at 92.

38 In the US and Australia, mandatory reference to alternative dispute resolution is viewed as an improvement to access to justice, not an impediment to the right of access to courts: see, *eg*, ss 53A, 53A(1)(a) and 53(1A) of the Australian Federal Court of Australia Act 1976 as amended by the Law and Justice Legislation Amendment Act 1997; US Civil Justice Reform Act 1990 28 USC §§ 471–482 and Alternative Dispute Resolution Act 1998 (Pub L 105-315; 112 Stat 2993). See also Arthur Marriott, "Mandatory ADR and Access to Justice" in *ADR, Arbitration, and*

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C. Futility of enforcement

16 A persisting argument against the enforcement of mediation clauses relates to futility.[39] Accordingly, it is useless to force an unwilling party to engage in a process that requires their participation to succeed. Indeed, the parties' willingness to participate is one of the most essential elements for the success thereof.[40] Although the futility argument has not been used in civil law jurisdictions,[41] in some common law jurisdictions courts have been traditionally reluctant to grant relief when the disputants refuse to participate in mediation, viewing the enforcement as futile.[42] If a party to a mediation procedure does not want to co-operate, the procedure is said to be fruitless, emphasising the need to obtain relief from a court or tribunal.[43] This attitude was prevalent until the mid-1980s in the US.[44]

17 Today, a larger majority of scholars and judges oppose the use of the futility argument against enforcement, as mediation often achieves results even in cases where the parties have been unwilling to settle.[45]

Mediation: A Collection of Essays (Julio C Betancourt & Jason A Crook eds) (Bloomington: AuthorHouse, 2014) at pp 270–271.

39 Alexander R Klett, Matthias Sonntag & Stephan Wilske, *Intellectual Property Law in Germany: Protection, Enforcement and Dispute Resolution* (Beck Online, 2008) at p 104. See also *Civil and Commercial Mediation in Europe: Cross-Border Mediation* vol II (Carlos Esplugues ed) (Intersentia, 2014) at p 589.

40 Didem Kayali, "Enforceability of Multi-Tiered Dispute Resolution Clauses" (2010) 27(6) J Int'l Arb 551 at 569. See also Sai R Garimella & Nizamuddin A Siddiqui, "The Enforceability of Multi-tiered Dispute Resolution Clauses: Contemporary Judicial Opinion" (2016) 24 IIUMLJ 157 at 166.

41 German courts have never supported the futility argument against the enforcement of mediation clauses: see BGH NJW 1984, 669; OLG Celle NJW 1971, 288p.

42 Lucy V Katz, "Getting to the Table Kicking and Screaming: Drafting an Enforceable Mediation Provision" (2008) 26(10) Alt to High Cost of Lit 183.

43 Liane Schmiedel, "Mediation in the Netherlands: Between State Promotion and Private Regulation" in *Mediation: Principles and Regulation in Comparative Perspective* (Klaus J Hopt & Felix Steffek eds) (Oxford: Oxford University Press, 2013) at p 711.

44 *In re Estate of Ferdinand Marcos Human Rights Litigation* 94 F 3d 539 (9th Cir, 1996), citing *Virginian Railway Co v System Federation No 40* 300 US 515 at 550 and 601 (1937).

45 Amy Schmitz, "Refreshing Contractual Analysis of ADR Agreements by Curing Bipolar Avoidance of Modern Common Law" (2008) 9(1) Harv Negot L Rev 1 at 64; Erich Suter, "The Progress from Void to Valid for Agreements to Mediate" (2009) 75 Arbitration 28 at 36; *International Research Corp plc v Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 130; *Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd* [2012] QSC 290; *Susan Dunnett v Railtrack plc* [2002] EWCA Civ 303 at [14]. In *R&F, LLC v Brooke Corp* 2008 WL 294517 (D Kan, 2008), the court enforced the contractual obligation to mediate instead of exercising its inherent power to compel mediation. Furthermore, in *Hyperion VOF v Amino Development Corp* 2008 WL 163624 (WD Wash, 2008), the court enforced the obligation

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There is certainly proof that skilled neutrals have the ability to sway unwilling parties to consider the opportunities of amicable dispute resolution.[46] Even in disputes where settlement is not possible, mediation can assist the parties in narrowing down their disputes and/or provide an opportunity to assess the strengths and weaknesses of their claim.[47] A mediation clause reflects the parties' intentions and should be enforced regardless of the consensual feature of mediation.[48]

D. Public interest

18 There are several arguments that demonstrate that public interest supports the enforcement of the mediation clause. Firstly, following the contractual approach, the national laws of many states do not accept the breaking of a contractual obligation simply because the obligation is to participate in a mediation procedure.[49]

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mediate against a challenge that absence of parties from a companion lawsuit would make mediation futile. See also Sarah R Cole *et al*, *Mediation: Law, Policy & Practice* (US: Thomson Reuters, 2017) at p 163.

46 As Dyson LJ pointed out in *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 at [22], "mediation often succeeds where previous attempts to settle have failed". The futility argument fails to take into account the intrinsic value of mediation in assisting the parties to minimise their differences and improve their mutual understanding. See also Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (New York: Kluwer Law International, 2009) at p 173; Yun Zhao, "Revisiting the Issue of Enforceability of Mediation Agreements in Hong Kong" (2013) 1(3–4) *China-EU Law Journal* 115.

47 Ellen van Beukering-Rosmuller & Patrick Van Leynseele, "Enforceability of Mediation Clauses in Belgium and the Netherlands" (2017) 21(3) *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 37 at 52; *Idoport Pty Ltd v National Australia Bank* [2001] NSWSC 427; Magdalena McIntosh, "A Step Forward – Mandatory Mediations" (2003) 14 *Australasian Dispute Resolution Journal* 280. See also Michael Kallipetis, *Mediation Privilege and Confidentiality and the EU Directive* (Kluwer Law International, 2010) at p 123; and David Bamford, "Australia" in *Global Perspectives on ADR* (Carlos Esplugues & Silvia Barona eds) (Cambridge: Intersentia, 2014) at p 69.

48 Didem Kayali, "Enforceability of Multi-Tiered Dispute Resolution Clauses" (2010) 27(6) J Int'l Arb 551 at 569; Sarah R Cole *et al*, *Mediation: Law, Policy & Practice* (US: Thomson Reuters, 2017) at p 193.

49 Charles Jarrosson, "Legal Issues Raised by ADR" in *ADR in Business: Practice and Issues across Countries and Cultures* vol II (Arnold Ingen-Housz ed) (Alphen aan den Rijn: Kluwer Law International, 2011) at p 119. See also *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2006] 1 Lloyd's Rep 121 at [121], *per* Longmore LJ (it is "a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered") and Laurence Boulle, *Mediation: Principles, Process, Practice* (Australia: Ligare Pty Ltd, 3rd Ed, 2011) at p 637. In addition, according to the principle of *pacta sunt servanda*, an agreement must be performed, otherwise the other party ought to have a remedy for the breach: Didem Kayali, "Enforceability of Multi-Tiered Dispute Resolution Clauses" (2010) 27(6) J Int'l Arb 551 at 551; Ellen van Beukering-Rosmuller & Patrick Van Leynseele, "Enforceability of Mediation Clauses in Belgium and the Netherlands"

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19 Secondly, it is in the wider public interest to promote consensual resolution of disputes by supporting the enforceability of mediation clauses, as social peace is better served by consensual solutions.[50] For instance, § 253(3) of the German Code of Civil Procedure 2005 ("ZPO") requires the parties to submit a statement of claim that indicates whether the parties have previously attempted to mediate or engage in any form of mediation, and whether there are obstacles that are preventing such a procedure from taking place.[51] Likewise, in Singapore, Australia, the US and England there is a pre-litigation mediation obligation. To illustrate, the English Civil Procedure Rules[52] ("CPR") and CPR Practice Directions[53] as well as case law and court guides require parties to a dispute to attempt, regardless of a mediation clause, to resolve their conflict through mediation rather than proceeding to courts directly.[54] The successful inclusion of mandatory mediation in the system of justice takes this point further. There is empirical evidence that even when parties are required to attempt mediation, the rate of settlement is still impressively high.[55]

E. Aim of commercial mediation

20 Requiring parties to comply with their valid mediation clause is in line with the aim of commercial mediation, which is to resolve or

(2017) 21(3) *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement* 37 at 37.

50 Loong Seng Onn & Deborah Koh, "Enforceability of Dispute Resolution Clauses in Singapore" [2016] Asian JM 51. See also *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [40], *per* V K Rajah JA, followed in *International Research Corp plc v Lufthansa Systems Asia Pacific Pte Ltd* [2013] 1 SLR 973 (the High Court decided that a multi-tiered dispute resolution clause was enforceable).

51 Maud Piers, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?" (2014) J Disp Resol 269 at 291.

52 SI 1998 No 3132.

53 These are rules that supplement the Civil Procedure Rules (SI 1998 No 3132) ("CPR") and regulate minor issues or explain how the CPR should be understood.

54 Stuart Sime & Susan Blake, *A Practical Approach to Alternative Dispute Resolution* (Oxford: Oxford University Press, 1st Ed, 2011) at pp 76–79; Jens M Scherpe & Bevan Marten, "Mediation in England and Wales: Regulation and Practice" in *Mediation: Principles and Regulation in Comparative Perspective* (Klaus J Hopt & Felix Steffek eds) (Oxford: Oxford University Press, 2013) at pp 376–377; Maud Piers, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?" (2014) J Disp Resol 269 at 291.

55 Giuseppe De Palo, "Mandatory Mediation Is Back in Italy with New Parliamentary Rules" *ADR Center* (22 October 2013). National Alternative Dispute Resolution Advisory Council and Australian Institute of Judicial Administration, *Courts Referral to ADR: Criteria and Research* (by Kathy Mack) (2003) at pp 4 and 42. Alternative Dispute Resolution Center, *The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation* (9 June 2010) at p 33.

narrow commercial disputes in order to avoid costly litigation and arbitration and to preserve the parties' relationship.[56] Enforcing a mediation clause ensures that the choice of the parties and the needs of international business community are fulfilled.[57] Hence, the choice of one party to ignore its mediation obligation once a dispute arises without an actual attempt at mediation should not sabotage the agreement.[58] This is a sound argument when considering the existing pro-arbitration frameworks in the jurisdictions under analysis (another private dispute resolution mechanism).[59] Courts in the jurisdictions under analysis must resolve disputes regarding arbitration agreements in favour of arbitration even in instances where the agreement was the result of bribery.

F. Legitimate grounds for refusing enforcement of a valid mediation clause

21 It would run contrary to common sense to require parties to attempt mediation in all circumstances. Even when there is a binding mediation clause, there may be grounds that justify a refusal to enforce the parties' obligations. Two grounds that justify a refusal to enforce a

56 Didem Kayali, "Enforceability of Multi-Tiered Dispute Resolution Clauses" 27(6) J Int'l Arb 551 at 569; Thomas J Stipanowich, "Contract and Conflict Management" (2001) Wis L Rev 831 at 856–857; Amy Schmitz, "Refreshing Contractual Analysis of ADR Agreements by Curing Bipolar Avoidance of Modern Common Law" (2008) 9 Harv Negot L Rev 1 at 44; Thomas Schultz, "The Roles of Dispute Settlement and ODR" in *ADR in Business: Practice and Issues across Countries and Cultures* vol II (Arnold Ingen-Housz ed) (Alphen aan den Rijn: Kluwer Law International, 2011). See also *Dave Gretak Enters, Inc v Mazda Motors of American, Inc* 622 A 2d 14 at 23–24 (Del Ch, 1992); *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm); and Sarah R Cole *et al*, *Mediation: Law, Policy & Practice* (US: Thomson Reuters, 2017) at p 162.

57 Alexander Jolles, "Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement" (2006) 72 *Arbitration* 329 at 336; Didem Kayali, "Enforceability of Multi-Tiered Dispute Resolution Clauses" (2010) 27(6) J Int'l Arb 551 at 569.

58 Charles Jarrosson, "Legal Issues Raised by ADR" in *ADR in Business: Practice and Issues across Countries and Cultures* vol II (Arnold Ingen-Housz ed) (Alphen aan den Rijn: Kluwer Law International, 2011) at p 119.

59 See Gary B Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (London: Kluwer Law International, 5th Ed, 2016) ch 5 at para 17; Silvia Barona & Carlos Esplugues, "ADR Mechanisms and Their Incorporation into Global Justice in the Twenty-first Century: Some Concepts and Trends" in *Global Perspectives on ADR* (Carlos Esplugues & Silvia Barona eds) (Cambridge: Intersentia, 2014) at p 25; *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [1999] 3 WLR 811; and *World Duty Free Co Ltd v Republic of Kenya* ICSID Case No ARB/00/7 (4 October 2006).

mediation clause relate to abuse of process and the need for a court ruling[60] (precedent).

22 Abuse of process includes instances when the party seeking enforcement knowingly contributed to the non-compliance with the mediation clause or made substantive arguments before raising the plea of non-compliance.[61] In such instances, there is a waiver of the right to seek enforcement of the mediation clause.[62] Moreover, courts should not enforce mediation clauses if the party seeking enforcement is doing so as a delay tactic.[63]

23 Finally, the desirability to develop precedent is a policy argument against enforcement of mediation clauses. Precedence is of special importance in common law jurisdictions, where the law evolves through court rulings.[64] Here, the dilemma refers to the clash between the court's role to encourage settlement and its role in creating precedent.[65] Courts should place the public interest in enforcing contractual agreements and in promoting mediation above the need for precedent. There are a few instances, however, where the court relying on its discretionary power may refuse enforcement of a mediation clause based on the need for precedent. Such an instance may arise if a company wishes to establish precedent through a court ruling if it is facing many similar claims against one of its services or products.[66]

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60 *Black's Law Dictionary* (Bryan A Garner editor-in-chief) (West Group, 7th Ed, 1999) at p 1195 defines "precedent" as "[a] decided case that furnishes a basis for determining later cases involving similar facts or issues; [s]ee *stare decisis*". The World Trade Organization and International Court of Justice also follow previous rulings to some extent: see Gabrielle Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse? – The 2006 Freshfields Lecture" (2007) 23(3) Arb Int'l 357.

61 Lack of a plea implies that the party has waived their right to enforce their mediation clause as is the case with arbitration agreements under § 1031(1) of the German Code of Civil Procedure 2005.

62 Sarah R Cole *et al*, *Mediation: Law, Policy & Practice* (US: Thomson Reuters, 2017) at p 180; Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Oxford: Hart Publishing, 2017) at p 85.

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

64 Raimo Siltala, *A Theory of Precedent: From Analytical Positivism to a Post-Analytical Philosophy of Law* (Oregon: Hart Publishing, 2000) at p 121. See also John M Walker, "The Role of Precedent in the United States: How Do Precedents Lose Their Binding Effect?" Stanford Law School, China Guiding Cases Project (Commentary No 15) (29 February 2016).

65 See Stephen Goldberg *et al*, *Dispute Resolution: Negotiation, Mediation and Other Processes* (US: Wolters Kluwer Law & Business, 6th Ed, 2012).

66 Bill Marsh, Alexander Oddy & Jan O'Neill, "England and Wales" in *EU Mediation Law Handbook, Global Trends in Dispute Resolution* (Nadja Alexander, Sabine Walsh & Martin Svatos eds) (Alphen aan den Rijn: Kluwer Law International,

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24 When the exceptions to the enforcement of a binding mediation clause are not applicable and there is an agreement that ought to be enforced and protected from infringements, the next question is: How should breaches thereof be remedied? Part IV[67] will answer this question by firstly addressing how the legal nature of mediation clauses affects the range of remedies available. Subsequently, the range of remedies available in order to determine a preferred remedy will be examined.

IV. Remedies to a breach of the mediation clause

25 There are three potential ways for mediation clauses to be breached:

> (a) A party may passively violate its agreement by staying inactive once the other party has requested or initiated mediation, thereby frustrating the mechanism.
>
> (b) A party may not participate in mediation once the process has commenced or intentionally harm settlement efforts.
>
> (c) A party may initiate litigation/arbitration contrary to the agreement.[68]

When a party breaches the mediation clause, the aggravated party may want to seek assistance from courts or tribunals to enforce the obligations under the agreement. There are various approaches to remedying breaches of mediation clauses.[69] Primarily, the forum with jurisdiction over the dispute relating to the mediation clause has the power to remedy breaches of the agreement.[70] However, parties typically do not pre-select this forum; thus, again, there may be uncertainty regarding who has power to assess and enforce these agreements. The lack of certainty is especially problematic when the mediation agreement is a tier in an MDR clause calling for arbitration as the final step. The differing legal natures of the mediation clause on the one hand

2017) at p 214. See also Stephen Goldberg *et al*, *Dispute Resolution: Negotiation, Mediation and Other Processes* (US: Wolters Kluwer Law & Business, 6th Ed, 2012).

67 See paras 25–67 below.

68 Alexander R Klett, Matthias Sonntag & Stephan Wilske, *Intellectual Property Law in Germany: Protection, Enforcement and Dispute Resolution* (Beck Online, 2008).

69 Lucy V Katz, "Getting to the Table Kicking and Screaming: Drafting an Enforceable Mediation Provision" (2008) (2018) 26(10) Alt to High Cost of Lit 183.

70 Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (New York: Kluwer Law International, 2009) at p 184.

and the arbitration agreement on the other can lead to confusion about who has the power to enforce mediation tiers in an MDR clause.[71]

A. Legal nature of mediation clauses

26 The classification of mediation clauses is particularly relevant in the context of MDR clauses, as it is quite common for mediation clauses to be conditions precedent to arbitration. The question of the effect of mediation in the context of arbitration has given rise to quite a debate regarding the appropriate classification. There is a divide between the common law and civil law countries regarding the effect of a valid mediation tier on arbitration. Common law courts generally find mediation clauses to be of a procedural nature.[72] The approach of civil law jurisdictions to the legal nature of mediation clause, however, varies amongst states.[73]

27 The German *Bundesgerichtshof* ("BGH") held on two occasions that arbitral tribunals seated in Germany are entitled to assume jurisdiction regardless of whether the parties have complied with the preconditions in an MDR clause.[74] When faced with an unfulfilled

71 Christian Bühring-Uhle, Lars Kirchhoff & Gabriele Scherer, *Arbitration and Mediation in International Business* (Kluwer Law International, 2nd Ed, 2006) at p 228.

72 For the US, see *HIM Portland, LLC v Devito Builders, Inc* 317 F 3d 41 at 44 (1st Cir, 2003); *MB America, Inc v Alaska Pac Leasing* 132 Nev Adv Op 8 (4 February 2016) (where the Nevada Supreme Court enforced a contract's mediation provision as a condition precedent to litigation). For Singapore, see *International Research Corp plc v Lufthansa Systems Asia Pacific Pte Ltd* [2013] 1 SLR 973 at [191]. See also ICC Case No 12379 and ICC Case No 9812.

73 In the Netherlands, the agreement to mediate is classified as contractual in nature: Aujke van Hoek & Joris Kocken, "The Netherlands" in *Civil and Commercial Mediation in Europe: Cross-Border Mediation* vol II (Carlos Esplugues ed) (Cambridge: Intersentia, 2014) at p 452. For jurisdictional qualification, see *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm); case no 4A-124/2014 (Supreme Court, Switzerland) (7 July 2014); *Société Polyclinique des Fleurs v Peyrin* 2e Ch Civ (*Cour de Cassation*, France) (6 July 2000); and *International Research Corp plc v Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 130. For qualification as a matter of admissibility, see No I ZB 1/15 (BGH) (9 August 2016) and No I ZB 50/15 (BGH) (14 January 2016); *X GmbH (précédemment V GmbH) v Y Sàrl, lère Cour de droit civil* 4A_46/2011 (2011) 29 ASA Bull 643 at 651 *ff*.

74 No I ZB 1/15 (BGH) (9 August 2016); No I ZB 50/15 (BGH) (14 January 2016): on 9 August 2016, the *Bundesgerichtshof* ("BGH") confirmed its previous ruling that compliance with a tier in a multi-tiered dispute resolution clause is not a question of jurisdiction but of admissibility. The leading judgment in Germany is the BGH decision of 23 November 1982 (NJW 1984, 669) concerning a contract about the takeover of a veterinary practice that required conciliation in front of a veterinary chamber. However, the claimant filed in court without conciliating. The defendant thus claimed inadmissibility of the dispute. On appeal, the BGH overturned the

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mediation clause, courts and tribunal should dismiss the claim as "currently unfounded" (*zur Zeit unbegründet*).[75] Therefore, mediation clauses exclude actionability (*Klagbarketi*) of the claim not the jurisdiction of the court or tribunal.[76] Similarly, a mediation clause in Austria in principle does not influence court proceedings at any stage.[77] Adherence to a mediation clause is voluntary and thus not a precondition to litigation.[78]

28 In the common law jurisdictions under analysis, courts find that a valid mediation clause forms a jurisdictional barrier, or they choose not to exercise their jurisdiction pending a mediation. In other words, a court or tribunal must refuse jurisdiction when faced with a party wishing to enforce a valid mediation clause. Thus, if the court finds that the tribunal lacks jurisdiction, it can order a stay or injunction of the arbitration.[79] Moreover, the arbitral award may be annulled if the tribunal took jurisdiction despite a valid and unfulfilled mediation clause.

29 In light of the different legal nature denoted to mediation clauses, the question arises if there is a preferred approach. There seems

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decision of the lower court and enforced the clause. The court found that the clause was imperative (*Mußbestimmung*). Mandatory character of clause was supported by its purpose, which was to keep disputes out of court and to give members an opportunity to resolve disputes cheaply and confidentially. Therefore, the court clarified the binding nature of alternative dispute resolution clauses.

75 Rupert Bellinghausen & Julia Grothaus, "Escalation Clauses: No Longer a Tripping Hazard for Arbitrations with Seat in Germany?" *Kluwer Arbitration Blog* (1 December 2016); Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Oxford: Hart Publishing, 2017) at p 187. See also Mathias Wittinghofer, "Application to Have Arbitration Declared (In)Admissible – A German Torpedo to Arbitral Proceedings?" *Kluwer Arbitration Blog* (5 November 2015).

76 Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Oxford: Hart Publishing, 2017) at p 36.

77 Ulrike Frauenberger-Pfeiler, "Austria" in *Civil and Commercial Mediation in Europe: Cross-Border Mediation* vol II (Carlos Esplugues ed) (Cambridge: Intersentia, 2014) at p 12.

78 If a mediation clause/contract blocked access to court, it would be contrary to the principle of voluntariness: Ulrike Frauenberger-Pfeiler, "Austria" in *Civil and Commercial Mediation in Europe: Cross-Border Mediation* vol II (Carlos Esplugues ed) (Cambridge: Intersentia, 2014) at pp 12–13.

79 In England, according to ss 31 and 32 of the Arbitration Act 1996 (c 23), the court can review the tribunal's jurisdiction once the latter has determined it positively and upon the application of the party who has not taken steps in the arbitral proceedings. See *Excalibur Ventures v Texas Keystone* (2011) EWHC 1624 (Comm) at [64], *per* Gloster LJ. For the US, see the Federal Arbitration Act of 1925 USC 9 § 3 (1990). See, *eg*, *Howsam v Dean Witter* 537 US 79 (2002); *PacifiCare Healthy Systems Inc v Book* 538 US 401 (2003); 285 F 3d 971 (2003); 123 Ct 1531 (2003); and *Green Tree Financial Corp v Bazzle* 123 S Ct 2402 (2003).

to be support for treating the mediation clause as an admissibility barrier from some pro-arbitration scholars.[80] According to Born and Šćekić, only if the parties make it unequivocally clear that they do not want the arbitrators to assess the compliance with pre-arbitration procedural requirements may the mediation clause be treated as posing a barrier to the arbitrator's jurisdiction.[81] This stance follows the notion that the arbitrators, not the court, may determine if a condition precedent to arbitration is satisfied.[82] However, the opposing view states that, if the conditions precedent to arbitration are not fulfilled, it is futile to talk about the enforcement of the arbitration itself. Arbitration should only commence when and if the conditions precedent are met.[83]

30 In addition, supporters of the view that mediation clauses form a barrier to the admissibility of the claim rely on the presumption that the parties desire a centralised forum for the resolution of disputes that excludes courts.[84] This argument cannot be supported for two reasons.

31 Firstly, it does not take into account that parties tend to formulate mediation as a condition precedent to arbitration. Therefore, there is no evidence that the parties want a centralised forum for the resolution of all of their disputes including those relating to their dispute

80 See also Ewelina Kajkowska, "Enforceability of Multi-Step Dispute Resolution Clauses: An Overview of Selected European Jurisdictions" in *Procedural Science at the Crossroads of Different Generations* vol 4 (Loïc Cadiet *et al* eds) (Luxembourg: Nomos Verlag, 2015).

81 Gary Born & Marija Šćekić, "Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'" in *Practising Virtue: Inside International Arbitration* (David D Caron *et al* eds) (Oxford Scholarship Online, 2015) at p 259. See also Ewelina Kajkowska, "Enforceability of Multi-Step Dispute Resolution Clauses: An Overview of Selected European Jurisdictions" in *Procedural Science at the Crossroads of Different Generations* vol 4 (Loïc Cadiet *et al* eds) (Luxembourg: Nomos Verlag, 2015) at p 172 and Jan Paulsson, "Jurisdiction and Admissibility" in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (Gerald Aksen & Robert Briner ed) (ICC Publishing, 2005) at p 602.

82 Sarah R Cole *et al*, *Mediation: Law, Policy & Practice* (US: Thomson Reuters, 2017) at p 174; *Gillette Air Conditioning Co, Inc v Satterfield & Pontikes Construction, Inc* 2010 WL 5067683 (WD Tex, 2010); *Knowles v Community Loans of America, Inc* 2012 WL 5868622 (SD Ala, 2012); *Universal Forum of Cultures Barcelona 2004 SL v Council for a Parliament of the World's Religions*, 2013 WL 1196607 (ND III, 2013).

83 Yun Zhao, "Revisiting the Issue of Enforceability of Mediation Agreements in Hong Kong" (2013) 1(3–4) *China-EU Law Journal* 115 at 128.

84 Gary Born & Marija Šćekić, "Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'" in *Practising Virtue: Inside International Arbitration* (David D Caron *et al* eds) (Oxford Scholarship Online, 2015) at p 259; Ewelina Kajkowska, "Enforceability of Multi-Step Dispute Resolution Clauses: An Overview of Selected European Jurisdictions" in *Procedural Science at the Crossroads of Different Generations* vol 4 (Loïc Cadiet *et al* eds) (Luxembourg: Nomos Verlag, 2015) at p 173.

resolution clause. In fact, parties often tend to take disputes relating to the dispute resolution clause to courts as the ultimate source of justice. If the parties intend for the tribunal to make a final determination regarding whether their mediation clause has been fulfilled, they may do so in their clause by inserting the following provision: "Any dispute regarding the parties' obligations under the mediation clause/tier must be determined by arbitration."

32 Secondly, arbitral tribunals have shown a tendency to treat preconditions to arbitration as non-mandatory or have wrongly assessed the parties' compliance with the binding nature of these agreements.[85] This violates the principle of *pacta sunt servanda*.[86] Parties who conclude a mediation clause as a precondition to arbitration do so precisely because they want to have an obligation to attempt amicable settlement and thereby a binding mechanism as a last resort.[87] It is, therefore, essential that courts can review the determination of arbitrators regarding mediation clauses to safeguard the parties' agreement.[88] In these cases, the party wishing to enforce a valid agreement has faced delay and additional expenses as they have had to seek the assistance of national courts.[89] It is moreover important to note that arbitration can

85 *Empresa Nacional de Telecommunicaciones (Colombia) v IBM de Solombia SA (Colombia)* – Decision of ICC Tribunal (17 November 2004), where the tribunal found that a conciliation tier blocked access to administrative justice as established in Art 229 of the Colombian Constitution 1991. However, this is a narrow and formalist view, as conciliation provides an additional avenue for access to justice. See, *eg*, ICC Case No 1140 Final Award (2010) XXXVII YB Comm Arb 32 (an agreement to pursue alternative dispute resolution (other than arbitration) is a "primary expression of intention" and "should not be applied to oblige the parties to engage in fruitless negotiations or to delay an orderly resolution of the disputes"); and *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm), where the party who sought to enforce the agreement faced delay and expenses as it had to argue for enforceability in front of the court in light of the tribunal finding that it had jurisdiction.

86 An agreement must be kept: Joel Lee, "Mediation Clauses at the Crossroads" [2001] SingJLS 81 at 93; see further paras 33–60 below.

87 "By the 20th century, the problems of arbitration were manifold: Arbitrators were accused of being frightened of appeals if they departed from court-like procedures; lawyers were blamed for 'hijacking' the process and 'seeking to bind [non-legal advisors] with legal science'": Penny Brooker, *Mediation Law: Journey through Institutionalism to Juridification* (New York: Routledge, 2013) at p 19. See also Klaus P Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration* (Alphen aan den Rijn: Kluwer Law International, 3rd Ed, 2015) at p 47.

88 This argument stands contrary to Ewelina Kajkowska, "Enforceability of Multi-Step Dispute Resolution Clauses: An Overview of Selected European Jurisdictions" in *Procedural Science at the Crossroads of Different Generations* vol 4 (Loïc Cadiet *et al* eds) (Luxembourg: Nomos Verlag, 2015) at p 173. See also Michael Pryles, "Multi-Tiered Dispute Resolution Clauses" (2001) 18(2) J Int'l Arb 159.

89 In case of pre-arbitral procedural requirements, various US courts have held that the arbitrator(s) have the final say regarding whether their requirements are

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be a costly and time-consuming process that is increasingly mimicking court litigation in terms of evidence, submissions, disclose, witness statements and expert opinions.[90] To treat a mediation clause as a simple pre-arbitral requirement would minimise mediation as a dispute resolution mechanism of the parties' choice.[91]

B. The toolbox of remedies

33 Part III[92] discussed how there is growing support from the courts, the business community, the legislator, dispute resolution providers and intergovernmental organisations for the recognition and enforcement of mediation clauses.[93] Typically, courts and tribunals review compliance with a mediation clause following a plea by the defendant before substantive arguments.[94] This is because mediation involves a private choice by private parties; thus, in accordance with party autonomy, the parties are free to walk away from their agreement if they mutually agree. Today, in absence of a harmonised approach, the national applicable law determines the type of remedy available in disputes involving a violation of a mediation clause.[95] Hence, parties who have a preferred remedy in mind should pay significant attention to the law applicable to the enforcement of their clause.

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fulfilled: see *Dialysis Access Ctr, LLC v RMS Lifeline, Inc* 638 F3d 367 at 383 (1st Cir, 2011) and *Howsam v Dean Witter* 537 US 79 (2002).

90 "Despite litigation's downward trend, discontent with arbitration has never been more widespread": Brian A Pappas, "Med-Arb and the Legalization of Alternative Dispute Resolution" (2015) 20 Harv Negot L Rev 157 at 161. See also Robert N Dobbins, "The Layered Dispute Resolution Clause: from Boilerplate to Business Opportunity" (2005) 1 Hastings Bus LJ 159 at 174.

91 Ulrike Frauenberger-Pfeiler, "Austria" in *Civil and Commercial Mediation in Europe: Cross-Border Mediation* vol II (Carlos Esplugues ed) (Cambridge: Intersentia, 2014) at p 12.

92 See paras 10–24 above.

93 Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (New York: Kluwer Law International, 2009) at p 186. See also Peter Tochtermann, "Agreements to Negotiate in the Transnational Context – Issues of Contract Law and Effective Dispute Resolution" (2008) 13(3) *Uniform Law Review* 685 at 710. This is also reflected in Art 13 of the United Nations Commission on International Trade Law (hereinafter "UNCITRAL") Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation GA Res 73/199, adopted at the United Nations General Assembly, 73rd Session (20 December 2018) and Art 10(2) of the International Chamber of Commerce Mediation Rules (1 January 2014).

94 CAM Case No 7211, Final award (24 September 2013) published in (2014) XXXIX *Yearbook on Commercial Arbitration* 263.

95 Charles Jarrosson, "Legal Issues Raised by ADR" in *ADR in Business: Practice and Issues Across Countries and Cultures* vol II (Arnold Ingen-Housz ed) (Alphen aan den Rijn: Kluwer Law International, 2011) at p 120.

34 National courts and tribunals remedy breaches of mediation clauses differently. In most jurisdictions, there are no specific rules on how courts ought to give effect to the parties' agreement. There is no consensus regarding the appropriate remedy for a failure to comply with a mediation clause. The choice of a preferred remedy reflects the consequence of the various remedies at hand. Singapore is an exception in this regard, where in accordance with the Mediation Act[96] the court may stay proceedings in light of a valid mediation clause.

35 There are four categories of remedies to breaches of mediation clauses: financial remedies including damages and adverse costs orders; specific performance; stay orders and dismissals; as well as injunctions.[97] Furthermore, as will be discussed below,[98] there have been instances of courts annulling arbitral awards or refusing to compel arbitration not as a remedy to a breach of a mediation clause but rather as a consequence.

36 There is a distinction between restorative, deterring and compelling remedies:

> (a) Restorative remedies (such as damages) put the party back in the position it was in in relation to its rights, privileges and property before the breach.
>
> (b) Remedies that force parties to comply with their actual agreement (such as specific performance) directly enforce the obligations contained in the agreement onto the parties.
>
> (c) Remedies that deter parties from violating their obligations (such as stays) aim to discourage parties from breaching their agreements.[99]

The following subsections will provide an overview of the various remedies and their categorisation.

(1) Financial remedies

37 The contractual remedy of compensatory damages is available to the party who seeks the enforcement of its mediation clause. Contractual damages tend to be compensatory in nature and aim to put

96 Act 1 of 2017.

97 See also Ronán Feehily, "The Contractual Certainty of Commercial Agreements to Mediate in Ireland" (2016) 6(1) *Irish Journal of Legal Studies* 59 at 98. Other potential remedies are not discussed in light of their rarity. Moreover, consequences such as the vacating of arbitral awards are not discussed as they do not relate to remedies to a failure to comply with an agreement to mediate.

98 See paras 53–60 below.

99 They are, in other words, a scare tactic. See Katy Barnett, *Accounting for Profit for Breach of Contract: Theory and Practice* (Oxford: Hart Publishing, 2012) at p 27.

the plaintiff back in the position it would have been in if the parties had complied with their agreement.[100] Therefore, they are a restorative remedy. In theory, a party could claim damages on the basis of a violation of a contractual duty to participate in a process.[101] However, such a claim will likely fail, as it is difficult to find quantifiable loss.[102] Damages might arise if the other party hired a neutral, rented a venue for the mediation, disclosed trade secrets or faced a loss of reputation from having to defend the claim in court.[103] In all other cases, damages are an impractical remedy to the breach of the mediation clause as it is difficult to quantify loss.[104] Thus, damages as a remedy does not result in the enforcement of the mediation obligation.

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100 Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (New York: Kluwer Law International, 2009) at p 208.

101 Ulrike Frauenberger-Pfeiler, "Austria" in *Civil and Commercial Mediation in Europe: Cross-Border Mediation* vol II (Carlos Esplugues ed) (Cambridge: Intersentia, 2014) at p 14; *Civil and Commercial Mediation in Europe: Cross-Border Mediation* vol II (Carlos Esplugues ed) (Cambridge: Intersentia, 2014) at p 605; Liane Schmiedel, "Mediation in the Netherlands: Between State Promotion and Private Regulation" in *Mediation: Principles and Regulation in Comparative Perspective* (Klaus J Hopt & Felix Steffek eds) (Oxford: Oxford University Press, 2013) at p 731. See also *Sunrock Aircraft Corp Ltd v Scandinavian Airlines System Denmark-Norway-Sweden* [2007] EWCA Civ 882; [2007] 2 Lloyd's Rep 612.

102 Maud Piers, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?" (2014) *Journal of Dispute Resolution* 269 at 299; *Civil and Commercial Mediation in Europe: Cross-Border Mediation* vol II (Carlos Esplugues ed) (Cambridge: Intersentia, 2014) at p 606; Ivo Bach & Urs P Gruber, "Germany" in *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures* vol I (Carlos Esplugues, José Iglesias & Guillermo Palao eds) (Cambridge: Intersentia, 2013) at p 166; Ronán Feehily, "The Contractual Certainty of Commercial Agreements to Mediate in Ireland" (2016) 6(1) *Irish Journal of Legal Studies* 59 at 101; Lye Kah Cheong, "A Persisting Aberration: The Movement to Enforce Agreements to Mediate" (2008) 20 SAcLJ 195 at 209; Lucy V Katz, "Getting to the Table Kicking and Screaming: Drafting an Enforceable Mediation Provision" (2008) 26(10) Alt to High Cost of Lit 183; Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Oxford: Hart Publishing, 2017) at p 72. See also Fabian Friedrich, "The Enforceability of Mediation Clauses – the Approach of English and German Courts and ICC Arbitral Tribunals" (2005) 5 *SchiedsVZ* 250 at 253; Christian Bühring-Uhle, Lars Kirchhoff & Gabriele Scherer, *Arbitration and Mediation in International Business* (Kluwer Law International, 2nd Ed, 2006) at p 231; and Ulrike Frauenberger-Pfeiler, "Austria" in *Civil and Commercial Mediation in Europe: Cross-Border Mediation* vol II (Carlos Esplugues ed) (Cambridge: Intersentia, 2014) at p 13.

103 Burkhard Hess & Nils Pelzer, "Mediation in Germany: Finding the Right Balance between Regulation and Self-Regulation" in *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives* (Carlos Esplugues & Louis Marquis eds) (New York: Springer, 2015) at p 296; David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (London: Sweet & Maxwell, 1st Ed, 2005) at para 14.16.

104 Yun Zhao, "Revisiting the Issue of Enforceability of Mediation Agreements in Hong Kong" (2013) 1(3–4) *China-EU Law Journal* 115 at 126.

38 Aside from contractual damages,[105] courts in common law jurisdictions have at times contemplated the awarding of nominal damages.[106] Nominal damages are minimal monetary damages awarded to the party who was right but has not suffered any substantial injury or loss.[107] They are resorted to by parties who can prove breach of contract but cannot prove damages.[108] Nominal damages could be an interesting remedy to combine with other remedies.[109] However, the imposing of nominal damages also does not equate to the enforcing of the mediation clause.

39 Some common law courts may resort to cost sanctions if a party unreasonably refuses to attempt mediation prior to litigation.[110] Such sanctions are imposed regardless of whether the parties had a mediation clause. Rather, they are used in instances where the parties unreasonably refuse to attempt mediation. It is conceivable, however, that cost sanctions may be used to prompt compliance with a mediation clause. Cost sanctions involve the court's refusal to grant the winning party their legal costs. English courts have discretion to impose adverse cost orders on a party unreasonably refusing to mediate regardless of who wins the legal dispute at trial.[111] Likewise, in the American case of *Frei v*

105 That is, damages awarded for breach of contract.

106 *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 at [32], *per* Kirby P, where he discussed the possibility of nominal damages. See also Nathalie Voser & Aileen Truttmann, "Multi-tier Dispute Resolution Clauses: Consequence of Non-compliance with Pre-arbitral Procedural Requirements" *Thomas Reuters: Practical Law* (30 June 2011) at p 410.

107 Nominal damages can be as low as $1. See Jeffrey Beatty & Susan Samuelson, *Business Law and the Legal Environment* (Boston: West, 4th Ed, 2006) at p 410.

108 *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 at [32].

109 As will be discussed at paras 61–67 below.

110 *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 at [16] (the English Court of Appeal reversed the "loser pays" rules in light of the wining party's refusal to comply with a court order to engage in alternative dispute resolution); *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288; *Thakkar v Patel* [2017] EWCA Civ 117. For Singapore, see O 59 r 5(*c*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). See also Joel Lee, "Singapore" in *Global Perspectives on ADR* (Carlos Esplugues & Silvia Barona eds) (Cambridge: Intersentia, 2014) at p 415. There is also a potential possibility in Australia, where a court cannot decline jurisdiction, but may impose sanctions and procedural remedies: Civil Dispute Resolution Act 2011 (Cth) ss 11 and 12. See also Ulrich Magnus, "Mediation in Australia: Development and Problems" in *Mediation: Principles and Regulation in Comparative Perspective* (Klaus J Hopt & Felix Steffek eds) (Oxford: Oxford University Press, 2013) at p 876.

111 Civil Procedure Rules (UK) (SI 1998 No 3132) Pt 36. Bill Marsh, Alexander Oddy & Jan O'Neill, "England and Wales" in *EU Mediation Law Handbook, Global Trends in Dispute Resolution* (Nadja Alexander, Sabine Walsh & Martin Svatos eds) (Alphen aan den Rijn: Kluwer Law International, 2017) at p 216. Cost sanctions awarded: *Yorkshire Bank plc and Clydesdale Bank Asset Finance Ltd v RDM Asset Finance Ltd* and *JB Coach Sales* (UK) (30 June 2004) (unreported); *Gill v RSPCA* (2009) EWHC 2990 (Ch); *Laporte v Commissioner of Police of the*

(*cont'd on the next page*)

Davey,[112] the court barred lawyer fees in line with the parties' dispute resolution agreement as the defendant had refused to conduct mediation.[113] Courts may, moreover, impose cost sanctions if one party acted unreasonably during the mediation or withdrew from it prematurely.[114]

40 The issue of costs is important especially in small and medium-sized disputes as they represent a large portion of the total amount in dispute.[115] Evidently, the allocation of costs matters to the parties and the threat thereof can be an effective deterrent. Nonetheless, like damages, cost sanctions alone are not an adequate remedy to a breach of a mediation clause as they do not restore the lost opportunity to discuss the dispute with a trained neutral.[116]

Metropolis [2015] EWHC 371 (QB). Cost sanctions not awarded: *ADS Aerospace Ltd v EMS Global Tracking Ltd* [2012] EWHC 2904 (TCC).

112 124 Cal App 4th 1506 (Cal Ct App, 2004).

113 *Frei v Davey* 124 Cal App 4th 1506 at [150] (Cal Ct App, 2004). See also Lucy V Katz, "Getting to the Table Kicking and Screaming: Drafting an Enforceable Mediation Provision" (2008) 26(10) Alt to High Cost of Lit 183 at 185 and Sarah R Cole *et al*, *Mediation: Law, Policy & Practice* (US: Thomson Reuters, 2017) at p 180. For costs sanctions, see *Lee v GEICO Indemnity Co* 2009 WI App 168; 321 Wis 2d 698; 776 N W 2d (Ct App, 2009) (court has statutory and inherent authority to order sanctions against a party who failed to appear in person at mediation).

114 For England, see *Laporte v Commissioner of Police of the Metropolis* [2015] EWHC 371 (QB). See also *Making Mediation Law* (Nadja Alexander & Felix Steffek eds) (Washington: International Finance Corporation, 2016) at p 34; Stuart Sime & Susan Blake, *A Practical Approach to Alternative Dispute Resolution* (Oxford: Oxford University Press, 1st Ed, 2011) at p 94. For the US, see James R Coben & Peter N Thompson, "Disputing Irony: A Systematic Look at Litigation about Mediation" (2006) 11 Harv Negot L Rev 43 at 115–120; *Peoples Mortgage Corp v Kansas Bankers Surety Co* 62 F App'x 232 (10th Cir, 2003); and *Segui v Margrill* 844 So 2d 820 at 821 (Fla Dist Ct App, 2003).

115 Petra Butler & Campbell Herbert, "Access to Justice *versus* Access to Justice for Small and Medium-sized Enterprises: The Case for a Bilateral Arbitration Treaty" (2014) 26 NZULR 186 at 197; Federation of Small Businesses, *Tied up: Unravelling the Dispute Resolution Process for Small Firms* (November 2016) at p 6; Rupert M Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009) at p 129; *E-Commerce: Law and Jurisdiction* (Dennis Campbell ed) (Aspen Publishers, 2003) at p 150; Alternative Dispute Resolution Center, *The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation* (9 June 2010) at pp 18 and 22; Carlos González-Bueno, "Arbitral Tribunal's Decisions on Costs Sanctioning the Parties for Counsel Behaviour: A Phenomenon Expected to Increase?" *Kluwer Arbitration Blog* (16 April 2014).

116 Amy Schmitz, "Refreshing Contractual Analysis of ADR Agreements by Curing Bipolar Avoidance of Modern Common Law" (2008) 9(1) Harv Negot L Rev 1 at 55.

(2) Specific performance

41 Specific performance is a substantive remedy that requires/compels the party violating its dispute resolution clause to comply with its agreement.[117] Specific performance is an ideal remedy to the breach of a mediation clause when a party is unwilling to attempt mediation, as it directly enforces the parties' obligations.[118] While not discussed in civil law jurisdictions, when a contract is drafted with sufficient certainty, it should be possible to enforce the mediation clause and supervise it.[119] Nevertheless, in Austria, there is strong emphasis on the principle of voluntariness in a mediation.[120] Therefore, a party cannot *prima facie* enforce its agreement by having a court order the other party to attend a mediation session.[121]

42 Common law courts may grant specific performance if damages are inadequate.[122] As demonstrated above,[123] damages are inadequate to remedy breaches of mediation clauses. However, with the exception of US courts, national courts under analysis are reluctant to resort to specific performance. For instance, the general rule in Australia is that

117 Ronán Feehily, "The Contractual Certainty of Commercial Agreements to Mediate in Ireland" (2016) 4(1) *Irish Journal of Legal Studies* 59 at 100. See also Kenneth F Dunham, "Binding Arbitration and Specific Performance under the FAA: Will This Marriage of Convenience Survive?" (2004) 3(2) J Am Arb 187.

118 Amy Schmitz, "Refreshing Contractual Analysis of ADR Agreements by Curing Bipolar Avoidance of Modern Common Law" (2008) 9(1) Harv Negot L Rev 1; Lye Kah Cheong, "A Persisting Aberration: The Movement to Enforce Agreements to Mediate" (2008) 20 SAcLJ 195 at 212. See also Joel Lee, "Mediation Clauses at the Crossroads" [2001] SingJLS 81 at 92 and Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (New York: Kluwer Law International, 2009) at p 202. See also *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm); [2002] CLC 1319 at [8].

119 Erich Suter, "The Progress from Void to Valid for Agreements to Mediate" (2009) 75 *Arbitration* 28 at 35; Sabine Koenig, "Germany" in *EU Mediation Law and Practice* (Giuseppe De Palo & Mary B Trevor eds) (Oxford: Oxford University Press, 2012) at p 141. See also Maud Piers, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?" (2014) J Disp Resol 269 at 299.

120 Markus Roth & David Gherdane, "Mediation in Austria: The European Pioneer in Mediation Law and Practice" in *Mediation: Principles and Regulation in Comparative Perspective* (Klaus J Hopt & Felix Steffek eds) (Oxford: Oxford University Press, 2013) at p 249.

121 Nadja Alexander, Anna Howard & Dorcas Quek Anderson, "UNCITRAL and the Enforceability of iMSAs: The Debate Heats up" *Kluwer Mediation Blog* (19 September 2016); Christoph Leon & Irina Rohracher, "Austria" in *EU Mediation Law and Practice* (Giuseppe De Palo & Mary B Trevor eds) (Oxford: Oxford University Press, 2012) at p 14.

122 Theodore Eisenberg & Geoffrey P Miller, "Damages *versus* Specific Performance: Lessons from Commercial Contracts" (2015) 12(1) J Empirical Legal Stud 29 at 30; Kenneth F Dunham, "Binding Arbitration and Specific Performance under the FAA: Will This Marriage of Convenience Survive?" (2004) 3(2) J Am Arb 187.

123 See para 37 above.

equity will not order specific performance of a dispute resolution clause as supervision of the performance is untenable.[124] However, in the US, specific performance may be ordered whenever it is equitable.[125] Despite the clear utility of specific performance, resort to this remedy remains rare.[126]

43 Thus far, due to a lack of statutory foundation, resort to specific performance remains an exceptional remedy to breaches of mediation clauses. Kulm argues that if there is a legislative policy decision to foster alternative dispute resolution ("ADR"), there is also a need to soften the rules on specific performance. Otherwise, attempts to sanction a breach of a mediation clause would be frustrated.[127] Specific performance, unlike damages and cost sanctions, may offer a true enforcement mechanism.

(3) Stays and dismissals

44 When a party breaches its mediation clause by commencing litigation or arbitration contrary to the agreement, there are two prominent remedies that apply depending on the jurisdiction seized, namely stays and dismissals.[128] Both stays and dismissals are procedural remedies that are used to indirectly enforce a mediation clause and deter parties from breaching their agreements.[129] Thus, they are deterring

124 *Aiton Australia Pty Ltd v Transfield Pty Ltd*, [1999] NSWSC 996 at [26]: the court found that it cannot order specific performance of the clause in question due to the difficulty of supervision.

125 See §2-716 of the US Uniform Commercial Code 2012, "Buyer's Right to Specific Performance or Replevin". See also Peter Tochtermann, "Agreements to Negotiate in the Transnational Context – Issues of Contract Law and Effective Dispute Resolution" (2008) 13(3) *Uniform Law Review* 685 at 711. Singapore Law Watch, "Mediation" (updated 30 September 2018) <https://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-03-mediation> (accessed May 2019).

126 *New South Wales v Banabelle Electrical Pty Ltd* [2002] NSWSC 178 at [29]; *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm); [2002] CLC 1319. See also *Civil and Commercial Mediation in Europe: Cross-Border Mediation* vol II (Carlos Esplugues ed) (Cambridge: Intersentia, 2014) at p 607 and *Philadelphia Housing Authority v Dore & Associates Contracting, Inc* 11 F Supp 2d 633 (ED Pa, 2000).

127 Rainer Kulms, "Mediation in the USA: Alternative Dispute Resolution between Legalism and Self-Determination" in *Mediation: Principles and Regulation in Comparative Perspective* (Klaus J Hopt & Felix Steffek eds) (Oxford: Oxford University Press, 2013) at p 1269; *Lynn v General Electric Co* 2005 WL 701270 (D Kan, 2005); *Annapolis Professional Firefighters Local 1926, IAFF, AFL-CIO v City of Annapolis* 642 A 2d 889 at 894 ff (Md App, 1994).

128 Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Oxford: Hart Publishing, 2017) at p 155.

129 Regarding stays being an indirect remedy, see David Spencer & Michael Brogan, *Mediation Law and Practice* (Cambridge: Cambridge University Press, 2006) at p 410.

remedies. A stay order pauses the proceedings until the parties comply with their agreement while through a dismissal the claim will have to be refiled if the mediation is unsuccessful. The difference between these procedural remedies is further described below.[130] On the basis of this comparison and the paragraphs above,[131] the article will discuss the preferred legal remedy below.[132]

45 Common law courts and ICC arbitral tribunals often grant a stay of proceedings[133] as a remedy for breach of a mediation clause.[134] Stay orders are based on the court's inherent power and on the tribunal's contractual power.[135] Singapore has enacted legislation reaffirming that courts have the statutory power to stay their own proceedings in light of a valid and written mediation clause.[136] If a party does not honour its mediation clause, the other party can request that the binding forum seized (courts or arbitral tribunals) orders a stay of its own proceedings

130 See paras 45–49 below.

131 See paras 33–44 above.

132 See paras 61–67 below.

133 A stay means that the proceedings are halted until the parties have complied with their obligations.

134 See also *Santos Ltd v Flour Australia Pty Ltd* [2016] QSC 129 at [28]; Rainer Kulms, "Mediation in the USA: Alternative Dispute Resolution between Legalism and Self-Determination" in *Mediation: Principles and Regulation in Comparative Perspective* (Klaus J Hopt & Felix Steffek eds) (Oxford: Oxford University Press, 2013) at p 1269; *Philadelphia Housing Authority v Dore & Associates Contracting, Inc* 111 F Supp 2d 633 (ED Pa, 2000) (Federal District Court stayed court proceedings); *Mobility Transit Services, LLC v Augusta, Georgia* 2013 WL 3225475 (SD Ga, 2013) (stay); *Mark v Neundorf* 147 Conn App 485; 83 A 3d 685 (2014); *United States v Bankers Insurance Co* 245 F 3d 315 at 321 *ff* (4th Cir, 2001); *Lynn v General Electric Co* 2005 WL 701270 (D Kan, 2005); *CV Richard Ellis, Inc v American Environmental Waste Management* No 98-CV-4183 (JG); 1998 WL 903495 (EDNY, 1998); James R Coben & Peter N Thompson, "Mediation Litigation Trends: 1999–2007" (2007) 1(3) *World Arbitration & Mediation Review* 395 at 397; Sarah R Cole *et al*, *Mediation: Law, Policy & Practice* (US: Thomson Reuters, 2017) at p 163; and James R Coben & Peter N Thompson, "Disputing Irony: A Systematic Look at Litigation about Mediation" (2006) 11 Harv Negot L Rev 43 at 105. For tribunals see Marko Mećar, "Enforceability of Mediation in Multi-tiered Clauses: The Croatian Perspective" *Kluwer Arbitration Blog* (28 May 2015) and ICC Case No 6276.

135 Inherent power of US courts to grant stays: *United States v Bankers Insurance Co* 245 F 3d 315 at 322 (4th Cir, 2001); *AMF, Inc v Brunswick Corp* 621 F Supp 456 (SDNY, 1985).

136 Singapore Mediation Act 2017 (Act 1 of 2017) ss 8(1) and 8(2).

until the defaulting party has complied with its agreement.[137] When court or arbitral proceedings are stayed, so are time bars.[138]

46 Switching to dismissals, recourse to dismissals to enforce mediation clauses is prevalent in jurisdictions where the mediation agreement is deemed to have a substantive nature.[139] Through a dismissal, a legal claim is dismissed instead of suspended; hence, the parties have to file the claim again if the ADR process does not lead to a settlement.[140] German courts relying on the above logic have rejected actions on the basis that they are "temporarily/currently inadmissible" in light of an agreement to conciliate.[141]

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137 Stays are always on plea of defendant (not *ex officio*). For Australia, see *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996 at [166]; Mike Hales, "Australia" in International Bar Association Litigation Committee, *Multi-Tiered Dispute Resolution Clauses* (1 October 2015) at p 13; and Colin Loveday *et al*, "Australia" in *Global Legal Insights – Litigation & Dispute Resolution* (Michael Madden ed) (London: Global Legal Group, 3rd Ed, 2014) at p 9. For England, see Neil Andrews, "Mediation in England: Organic Growth and Stately Progress" (2012) 9(9) *Revista Eletrônica de Direito Processual* 571 at 581. On powers to promote alternative dispute resolution, see rules 26.4 and 1.4 of the Civil Procedure Rules (a party may request in writing a stay and court on its own initiative can authorise a stay). For the US, see James R Coben & Peter N Thompson, "Disputing Irony: A Systematic Look at Litigation about Mediation" (2006) 11 Harv Negot L Rev 43 at 108.

138 Koen Lenaerts, Ignace Maselis & Kathleen Gutman, *EU Procedural Law* (Oxford: Oxford University Press, 2014) at p 759; *Blackstone's EU Treaties & Legislation 2015–2016* (Nigel Foster ed) (Oxford: Oxford University Press, 26th Ed, 2015) at p 199.

139 *Civil and Commercial Mediation in Europe: Cross-Border Mediation* vol II (Carlos Esplugues ed) (Cambridge: Intersentia, 2014) at p 613; Rupert Bellinghausen & Julia Grothaus, "Escalation Clauses: No Longer a Tripping Hazard for Arbitrations with Seat in Germany?" *Kluwer Arbitration Blog* (1 December 2016).

140 Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (New York: Kluwer Law International, 2009) at p 204.

141 Within the period of time set by the court: German Code of Civil Procedure 2005 § 282(3); VIII ZR 344/97 (BGH) (18 November 1998); XII ZR 165/06(BGH) (29 October 2008) at [22]; Klaus P Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2015) at p 128. See also Clifford Chance, *International Mediation Guide: Second Edition* (by Ronald Austin *et al*) (2016) at p 41; Alexander R Klett, Matthias Sonntag & Stephan Wilske, *Intellectual Property Law in Germany: Protection, Enforcement and Dispute Resolution* (Beck Online, 2008) at p 123; Stefan Rützel & Andrea Leufgen, "Germany" in *Global Legal Insights – Litigation & Dispute Resolution* (Michael Madden ed) (London: Global Legal Group, 2014); Burkhard Hess & Nils Pelzer, "Regulation of Dispute Resolution in Germany: Cautious Steps towards the Construction of an ADR System" in *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Felix Steffek & Hannes Unberath eds) (Hart Publishing, 2014) at p 224; and Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Oxford: Hart Publishing, 2017) at p 198.

47 The BGH decision of 18 November 1998[142] confirmed the inadmissibility of claims if there is a failure to comply with the conciliation clause.[143] The court came to its conclusion by finding that a conciliation clause has a comparable effect to an arbitration clause.[144] Likewise in the *LG Münster* decision of 21 December 2000,[145] the court stipulated that the clause in question had the effect of a *pactum de non petendo*[146] and the proceedings were thus found to be initiated prematurely making the claim temporarily inadmissible (*derzeit nicht zulässig*).[147]

48 Although the question has yet to go in front of the courts, in Austria, the potential for a dismissal is based on the prediction that a mediation clause constitutes a temporary waiver to the right to start litigation; thus, a claim brought in violation thereof is not yet actionable (*mangelnde Klagbarkeit*).[148] However, it remains to be seen if Austrian courts are open to enforcing mediation clauses in commercial contracts in light of Austria's particular view of the principle of the voluntariness of mediation.[149]

49 When courts and tribunals order a stay of proceedings or dismiss a case in light of an unfilled mediation clause, they are staying their own proceedings or dismissing the claims brought in front of them. Moreover, as evident from the case law on mediation clauses, courts in their supervisory role also have the power to order stays of arbitration proceedings and can declare cases inadmissible to

142 NJW 1999, 647.

143 The case involved a clause requiring conciliation before a relevant tax adviser's chamber. Similar reasoning should by followed by arbitral tribunals as confirmed in the decision of *OLG Frankfurt am Main* 1998, NJW 1999, 647, where the court stipulated that the conciliation step should precede arbitration in the same manner as it does for litigation. Thus, mediation clauses block the commencement of arbitration. See also NJW-RR 1998, 778; XII ZR 165/06, NJW 637 (2009); VIII ZR 344/97, NJW 647 (1999); and Kristina Osswald & Gustav Flecke-Giammarco, "Germany" in *EU Mediation Law Handbook, Global Trends in Dispute Resolution* (Nadja Alexander & Sabine Walsh eds) (Alphen aan den Rijn: Kluwer Law International, 2017) at p 260.

144 Lower courts have followed similar reasoning (see *Brandenburgisches OLG* decision of 18 September 1996). See also NJW-RR 1998, 778 (*OLG Frankfurt am Main*), which involved a conciliation clause in an agreement for the sale of a tax advisory practice. Under § 1032(1) of the German Code of Civil Procedure 2005, courts must dismiss cases brought in violation of arbitration agreements.

145 DStRE 2001, 614.

146 German Code of Civil Procedure 2005 §1029; Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Oxford: Hart Publishing, 2017) at p 69.

147 See NJW-RR 1996, 910 (BayObLG) and NZM 2003, 327 (LG Stralsund).

148 See 8 ObA 2128/96s (OGH) (17 April 1997); 1 Ob 300/00z (OGH) (17 August 2001); and 4 Ob 203/12z (OGH) (15 January 2013).

149 Ob 161/97a (OGH) (15 July 1997); Austrian Mediation Act (*Zivilrechts*-Mediations-Gesetz) (BGBl I 2003/29), especially Arts 1(1), 16(2) and 17(1).

arbitration.[150] If a party objects to the tribunal's jurisdiction or the admissibility of the dispute, the case will end up in front of the courts eventually. Thus, it is efficient in terms of costs and time to review the determination of the tribunal regarding jurisdiction or admissibility at the "front end".[151] If a party seeks to stop an arbitration or litigation abroad, stays and dismissals are not appropriate as the court no longer plays a supervisory role. In these cases, as discussed below,[152] courts may potentially rely on injunctions.

(4) Injunctive relief

50 In case a party prematurely initiates binding proceedings such as court proceedings or arbitration contrary to a mediation clause, an injunction can act as an extraordinary remedy to restrain the continuation of such proceedings abroad.[153] Likewise, a party may request an injunction to prevent the other party from commencing binding proceedings. An anti-suit injunction seeks to prevent the initiation or continuation of court proceedings, while an anti-arbitration injunction seeks to prevent the initiation or continuation of arbitral proceedings. Anti-arbitration injunctions can be issued against a party and the tribunal while anti-suit injunctions can only be issued against a party.[154]

150 Rainer Kulms, "Mediation in the USA: Alternative Dispute Resolution between Legalism and Self-Determination" in *Mediation: Principles and Regulation in Comparative Perspective* (Klaus J Hopt & Felix Steffek eds) (Oxford: Oxford University Press, 2013) at p 1269; Alan Limbury, *ADR in Australia* (Kluwer Law International, 2010). See *Semco, LLC v Ellicott Machine Corp International* 1999 WL 493278 (ED La, 1999) and *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 at 206, *per* Giles J.

151 Romesh Weeramantry, "Anti-Arbitration Injunctions: The Core Concepts" at p 2 https://cil.nus.edu.sg/event/the-context-legitimacy-and-future-of-anti-arbitration-injunctions-in-investment-arbitration (accessed May 2019); Nicholas Poon, "The Use and Abuse of Anti-Arbitration Injunctions: A Way Forward for Singapore" (2013) 25 SAcLJ 244 at 252. See also *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2012] 1 WLR 920 at [99]; *Excalibur Ventures LLC v Texas Keystone Inc* [2011] 2 Lloyd's Rep 289 at [99].

152 See paras 50–52 below.

153 Nicholas Poon, "The Use and Abuse of Anti-Arbitration Injunctions: A Way Forward for Singapore" (2013) 25 SAcLJ 244 at 250.

154 Romesh Weeramantry, "Anti-Arbitration Injunctions: The Core Concepts" at p 2, https://cil.nus.edu.sg/event/the-context-legitimacy-and-future-of-anti-arbitration-injunctions-in-investment-arbitration (accessed May 2019) at p 1. See also Martin Gusy & Matthew Weldon, "Anti-suit Injunctions and Anti-arbitration Injunctions in the US Enjoining Foreign Proceedings" *Practical Law* (2014); Nicholas Poon, "The Use and Abuse of Anti-Arbitration Injunctions: A Way Forward for Singapore" (2013) 25 SAcLJ 244 at 247.

51 The jurisdiction to grant injunctions against commencing or continuing proceedings falls under the general supervisory function of the courts with jurisdiction over the injunction question and the party that has commenced or would commence binding proceedings.[155] Courts in the common law jurisdictions under analysis have a wide discretion to grant an injunction,[156] while such relief is not available in the civil law jurisdictions under focus.[157] Moreover, in the EU, anti-suit injunctions cannot be used to halt court proceedings commenced contrary to a dispute resolution agreement in other member states.[158] The same policy could apply to mediation clauses.[159] There are, however, no barriers against the issuing of anti-arbitration injunctions in cases where a party commences arbitral proceedings before complying with the mediation tier.[160] This is because the judgment only relates to court proceedings protected by the recast Brussels I Regulation.[161]

155 Neil Andrews, *Andrews on Civil Processes: Arbitration and Mediation* (Intersentia, 2013) at p 69. See also, for the US, *US China Trade & Development Corp v MV Choong Yong* 837 F 2d 33 (2nd Cir, 1987); Jennifer L Gorskie, "US Courts and the Anti-Arbitration Injunction" (2012) 28(2) Arb Int'l 295 at 299; and *Kaepa, Inc v Achilles Corp* 76 F 3d 624 at 626 (5th Cir, 1996).

156 Senior Courts Act 1981 (c 54) (UK) s 39; *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871; *Airbus Industrie GIE v Patel* [1999] 1 AC 119; *Donohue v Armco* [2002] 1 Lloyd's Rep 425; *Turner v Grovit* [2002] 1 WLR 107; *Turner v Grovit* [2004] ECR I-3565; *OT Africa Line Ltd v Magic Sportswear Corp* [2005] 2 Lloyd's Rep 170.

157 However, see § 1004 of the German Civil Code 1900 (BGB) regarding prohibitory injunction; Oberlandesgericht (OLG) Düsseldorf (10 January 1996). Against anti-foreign arbitration injunctions, see John J Barceló III, "Anti-Foreign Suit Injunctions to Enforce Arbitration Agreements", paper presented at Fordham Conference (18–19 June 2007). Regarding the enforcement of an English anti-suit injunction see *West Tankers, Inc v Ras Riunione Adriatica de Sicurta SpA* (2005) 2 Lloyd's Rep 257; (2005) 2 All ER (Comm) 240. See also Marco Stacher, "You Don't Want to Go There – Antisuit Injunctions in International Commercial Arbitration" (2005) 23(4) *ASA Bulletin* 640 at 645 and Emmanuel Gaillard, *Anti-suit Injunctions in International Arbitration* (Juris Publishing, 2005).

158 *Allianz SpA v West Tankers Inc* Case C-185/07; [2009] ECR I-663. See also Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; and *Nori Holdings Ltd v Public Joint-Stock Co 'Bank Otkritie Financial Corp'* [2018] EWHC 1343 (Comm).

159 Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Oxford: Hart Publishing, 2017) at p 45.

160 Neil Andrews, *Andrews on Civil Processes: Arbitration and Mediation* (Cambridge: Intersentia, 2013) at p 204.

161 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter "Brussels I (recast) Regulation").

52 Anti-arbitration injunctions have given rise to discussions regarding the need to protect arbitration. There are claims that such injunctions violate customary public international law, block access to a pre-agreed forum, interfere with contractual rights and are a violation of a State's supervisory right to review. Despite the above concern, injunctions are essential to prevent abuse of process, prevent relitigation of disputes and circumvent multiple proceedings.[162] Therefore, to avoid abuse of process and to protect arbitration, an anti-arbitration injunction should only be granted if the tribunal refuses to enforce the parties' valid mediation clause and before the party seeking enforcement has made substantive claims regarding the commercial dispute.

(5) Refusal to enforce and compel

53 Breaches of mediation clauses do not only result in one party having the right to seek a remedy but also have an effect on the enforceability of arbitration, as well as arbitral awards and court judgments. Courts in the US have on several instances vacated arbitral awards in light of a failure to conduct mediation as a condition precedent.[163] Moreover, courts in the US have refused to compel arbitration in light of an unfilled mediation tier and have thereby retained jurisdiction over the disputes.[164] The refusal is based on the argument that when the condition precedent to arbitration is not fulfilled, the arbitration tier is not triggered.[165] Courts of appeal have emphasised that the protection of the Federal Arbitration Act[166] ("FAA") does not operate without regard to the wishes of the parties,[167] thereby

162 See John Joy, "Anti-Arbitration Injunctions: A Comparison of Approaches and the Problem of National Court Interference" (2015) 3(2) *European International Arbitration Review* 35.

163 International Bar Association Legal Practice Division, *Mediation Committee Newsletter* (2007) at p 34; *DeValk Lincoln Mercury Inc v Ford Motor Co* 811 F 2d 326 at 336 (7th Cir, 1987).

164 *HIM Portland LLC v DeVito Builders Inc* 317 F 3d 41 at 44 (1st Cir, 2003); *Kemiron Atlantic, Inc v Aguakem International Inc* 290 F 3d 1287 at 1291 (11th Cir, 2002). See also International Bar Association Legal Practice Division, *Mediation Committee Newsletter* (July 2007) at p 33 and Sarah R Cole *et al*, *Mediation: Law, Policy & Practice* (US: Thomson Reuters, 2017) at p 180.

165 Sarah R Cole *et al*, *Mediation: Law, Policy & Practice* (US: Thomson Reuters, 2017) at p 163. Regarding a condition precedent to arbitration, see *Morgan v Parra* 2013 WL 1500467 (NJ Super Ct App Div, 2013); *Amir v International Bank of Commerce* 419 SW 3d 687 (Tex App, 2013); *Perdue Farms, Inc v Design Build Contracting Corp* 263 F App'x 380 at 383 (4th Cir, 2008); and *R&F, LLC v Brooker Corp* 2008 WL 294517 (D Kan, 2008).

166 9 USC §§ 1–14 (US).

167 *HIM Portland LLC v DeVito Builders Inc* 317 F 3d 41 (1st Cir, 2003); *Kemiron Atlantic, Inc v Aquakem International, Inc* 209 F 3d 1287 (11th Cir, 2002). See also Sarah R Cole *et al*, *Mediation: Law, Policy & Practice* (US: Thomson Reuters, 2017)

(*cont'd on the next page*)

highlighting the ineffectiveness of arbitration provisions when conditions precedent are not fulfilled.[168]

54 The right to set aside domestic awards on the basis of a lack of substantive jurisdiction is addressed in s 67 of the English Arbitration Act 1996.[169] According to the Act, a party to the arbitral proceedings may apply to the court to challenge an award of an arbitral tribunal regarding its substantive jurisdiction or to ask for an order declaring the ward on merits to be of no effect due to a lack of substantive jurisdiction.[170] Likewise, ss 21(9) and 21A(4) of the Singapore Arbitration Act[171] stipulate that a court may review the arbitral tribunal's award on jurisdiction.[172]

55 Here the question becomes: Can courts refuse to enforce arbitral clauses and awards that fall under the protection of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[173] ("New York Convention")? Article II(1) of the New York Convention requires contracting states to recognise a written agreement to arbitrate. In addition, according Art III, contracting states shall recognise and enforce valid arbitral awards. However, both Arts II and III contain exceptions to the obligation to enforce. The valid grounds for refusal in the case of Art II include if the arbitration agreement is null and void, inoperative, or incapable of being performed.[174] The valid grounds to refuse enforcement of an arbitral award are listed under Art V. Of relevance is the exception of lack of jurisdiction and public policy.[175] Setting aside an arbitral award on the basis of a lack of jurisdiction of the tribunal is found in most normative models based on the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration[176] and

at p 174 and James R Coben & Peter N Thompson, "Disputing Irony: A Systematic Look at Litigation about Mediation" (2006) 11 Harv Negot L Rev 43 at 109.

168 *Kemiron Atlantic, Inc v Aquakem International, Inc* 209 F 3d 1287 at 1291 (11th Cir, 2002); *Safaer v Nelson Financial Group, Inc* 422 F 3d 289 (5th Cir, 2005).

169 c 23.

170 Arbitration Act 1996 (c 23) (UK) ss 67(1)(a) and 67(1)(b). See also s 73. The English High Court upheld a challenge under s 67 in *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm).

171 Cap 10, 2002 Rev Ed.

172 Section 48(1)(*b*)(ii) stipulates that domestic awards "may be set aside by the Court if the Court finds that … the award is contrary to public policy".

173 330 UNTS 3 (10 June 1958; entry into force 7 June 1959).

174 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) (hereinafter "New York Convention") Art II(3).

175 New York Convention Art V(2)(b).

176 A/40/17, Annex I; A/61/17, Annex I (21 June 1985; amended 7 July 2006).

the New York Convention.[177] Moreover, according to Art V(2)(a)(iv) of the New York Convention, if the constitution of the tribunal was contrary to agreement, the award may be set aside.[178]

56 In theory, an arbitral award that ignores a valid mediation clause can be contrary to both the dispute resolution clause and to procedural public policy.[179] Therefore, if a mediation tier is ignored, the arbitration agreement is not activated. Future amendments of the New York Convention could clearly stipulate this exception as a triggering related issue.

57 Next, the question arises whether a court can refuse to enforce a foreign judgment issued despite a valid mediation clause. In this regard, three instruments that address foreign judgments must be mentioned, namely the recast Brussels I Regulation, the Hague Draft Convention on the Recognition and Enforcement of Foreign Judgments[180] ("Draft Hague Convention"), and the US Uniform Foreign Money Judgments Recognition Act[181] ("UFMJRA").

177 UNCITRAL Model Law on International Commercial Arbitration (A/40/17, Annex I; A/61/17, Annex I) (21 June 1985; amended 7 July 2006) Arts 34(2)(a)(i), 34(2)(a)(iii), 34(2)(a)(iv), 36(1)(a)(i) and 36(1)(a)(iii); European Convention on International Commercial Arbitration (484 UNTS 364) (21 April 1961; entry into force 7 January 1964) Art IX; Ewelina Kajkowska, "Enforceability of Multi-Step Dispute Resolution Clauses: An Overview of Selected European Jurisdictions" in *Procedural Science at the Crossroads of Different Generations* vol 4 (Loïc Cadiet *et al* eds) (Luxembourg: Nomos Verlag, 2015) at p 164.

178 Jack M Graves & Joseph F Morrissey, "Arbitration as a Final Award: Challenges and Enforcement" in Joseph F Morrissey & Jack M Graves, *International Sales Law and Arbitration: Problems, Cases, and Commentary* (Aspen Publishers, 2008) at p 467.

179 Article V(2)(b) of the New York Convention refers to public policy without distinguishing between substantive and procedural public policy. Substantive public policy involves matters such as the merits of a decision (abuse of rights, discrimination, expropriation, and abuse of principles such as *pacta sunt servanda* and good faith), while procedural public policy involves matters such as the procedure in which the award was rendered (such as particle neutrals, fraud, and breach of natural justice). Article V(1) must be invoked by a party seeking refusal to enforce. See also Magdalena Inglot, "Separability of or Overlap between Public Policy and Procedural Grounds for Refusal of Enforcement of Foreign Arbitral Awards under the New York Convention" (2015) 4(1) *Polish Review of International and European Law* 41 at 44.

180 Hague Conference on Private International Law, Special Commission on the Recognition and Enforcement of Foreign Judgments, Working Document No 262 REV (24–29 May 2018). See <https://www.hcch.net/en/projects/legislative-projects/judgments> (accessed May 2019).

181 13 ULA 261 (2002) and Supp 2013.

58 According to the recast Brussels I Regulation, EU member states must recognise and enforce judgments issued in another member state.[182] The recognition of a judgment shall be refused where, on the application of the person against whom enforcement is sought, one of the grounds referred to in Art 45 is found to exist. Of interest here is that recognition may be refused if it would be contrary to public policy.[183] However, the recast Brussels I Regulation makes it clear that the courts cannot refuse enforcement on the basis of a lack of jurisdiction.[184] The US approach provides an interesting contrast to the above: according to the UFMJRA, courts have discretion to refuse to enforce a judgment if the rendering court lacked subject-matter jurisdiction.[185]

59 The Draft Hague Convention differs from the recast Brussels I Regulation as it lists valid jurisdiction of the rendering courts as a requirement for eligibility for recognition and enforcement.[186] Furthermore, Art 7(1)(d) provides that enforcement may be refused if the proceedings were contrary to the parties' agreement regarding in which court the dispute is to be resolved. This clause does not specifically address dispute resolution clauses and is limited to choice of court agreements. Nevertheless, it is clear that this exception points to the importance of party autonomy. Therefore, Art 7(1)(d) should be redrafted to stipulate that an exception to enforcement includes instances where the judgment is contrary to a valid "dispute resolution clause". This stipulation would further reflect the goal of Art 24: "This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention."

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182 Brussels I (recast) Regulation Art 36.

183 Brussels I (recast) Regulation Art 45(1)(a).

184 Brussels I (recast) Regulation Art 45(3):

> Without prejudice to point (e) of paragraph 1, the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction.

Krombach v Bamberski ECLI:EU:C:1999:446 (28 March 2000); *Bavaria Fluggesellschaft Schwabe & Co KG v Eurocontrol* ECLI:EU:C:1977:132; 1977 ECR 1517 at 1525–1526. See also Tomaž Keresteš, "Public Policy in Brussels Regulation I: Yesterday, Today and Tomorrow" (2016) 8(2) *Lexonomica* 77 at 83 and Magdalena Inglot, "Separability of or Overlap between Public Policy and Procedural Grounds for Refusal of Enforcement of Foreign Arbitral Awards under the New York Convention" (2015) 4(1) *Polish Review of International and European Law* 41 at 44. There is no international understanding of public policy: Juliane Oelmann, "The Barriers to the Enforcement of Foreign Judgments as Opposed to Those of Foreign Arbitral Awards" (2006) 18(2) Bond LR 77 at 81–82.

185 Uniform Foreign Money-Judgments Recognition Act 13 ULA 261 (2002) Art 4(a)(3).

186 Draft Hague Convention on the Recognition and Enforcement of Foreign Judgments 2018 Art 5(1).

60 When parties are made aware of the above consequences, they are potentially deterred from breaching their mediation clauses. Therefore, the refusal to enforce arbitral awards and court judgments and to compel arbitration is not in itself a way of indirectly encouraging compliance with a mediation clause.

C. A preferred remedy

61 An overview of the remedies used when a party breaches its mediation clause has been provided above.[187] The discussion covered financial remedies, specific performance, injunctive relief, stays and dismissals, as well as refusal to compel and enforce. The aim of the overview is to demonstrate the oftentimes confusing panoply of means available to deal with mediation clauses and their enforcement.[188] To address this inconsistency, this part will suggest guidelines for selecting the appropriate remedy.[189] In discussing the preferred approach, this part distinguishes between remedies in instances where a party (a) refuses to attend mediation but has not initiated court or arbitral proceedings; (b) has entered into the mediation process but is not actively participating or is intentionally harming settlement efforts (that is, refusing to respond to settlement offers); and (c) has taken the substantive dispute directly to a court or tribunal. Furthermore, this part reflects on the distinction drawn between restorative remedies[190] (Code "Restore"), those that deter parties from violating their obligations (Code "Deter"), and those that force parties to comply with their actual agreement (Code "Comply").

187 See paras 33–60 above.

188 The difficulty created by these varying approaches was confirmed by a study carried out by Stacie I Strong where 14% of respondents to the 2014 Strong survey on the use and perception of international commercial mediation indicated that it was impossible or very difficult to enforce agreements to mediate domestic disputes: "26% said it was somewhat difficult, 39% said it was easy, 12% said that the issue was largely untested and 7% said that they did not know." When the same respondents were asked about their perception of the difficulty faced in enforcing agreements to mediate international commercial disputes in the respondents' home jurisdiction, the percentage of respondents finding it impossible or very difficult rose to 19%, "and the number of those indicating that enforcement was somewhat difficult went up to 30%": Stacie I Strong, "Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation" University of Missouri School of Law Legal Studies Research Paper No 2014-28 (2014) at pp 39–40.

189 See Table 1 below.

190 See paras 33–60 above.

Table 1 – Potential Remedies According to the Moment of Breach[191]

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

62 As stipulated above,[192] recourse to specific performance is an ideal remedy to the breach of a mediation clause when a party refuses to attempt mediation (breach type (a)) or stays inactive despite invitations to commence mediation (breach type (b)).[193] This is because through specific performance parties are compelled to fulfil the obligations under their mediation clause. However, with the exception of the US courts wrongly relying on the FAA, this remedy has not been utilised due to common law courts' traditional reluctance. Therefore, in discussing a preferred remedy, one must remain cautious of the factual limits. Courts are unlikely to resort to this remedy unless a legislative framework similar to that for arbitration requires otherwise.

63 When a party has initiated court or arbitral proceedings despite a valid mediation clause (breach type (c)), injunctions against arbitrations and court proceedings seated abroad as well as stay orders for local proceedings are appropriate. The preference for stays over dismissals is justified from an efficiency viewpoint.[194] It is clear that dismissals are impractical for commercial parties. A dismissal would mean that the aggrieved party must pay a registration and administration fee anew in order to reconstitute the proceedings or tribunal.[195] Conversely, when a court orders a stay of court or arbitral proceedings, the same court or tribunal can hear the case without the

191 Although not discussed in this part, the instances of courts refusing to enforce arbitral award and compel arbitration when the parties have failed with their agreement reflect yet another avenue to deter breaches of mediation clauses.

192 See paras 41–43 above.

193 Amy Schmitz, "Refreshing Contractual Analysis of ADR Agreements by Curing Bipolar Avoidance of Modern Common Law" (2008) 9(1) Harv Negot L Rev 1. See also Lye Kah Cheong, "A Persisting Aberration: The Movement to Enforce Agreements to Mediate" (2008) 20 SAcLJ 195 at 212.

194 See paras 26–32 above.

195 Sai R Garimella & Nizamuddin A Siddiqui, "The Enforceability of Multi-tiered Dispute Resolution Clauses: Contemporary Judicial Opinion" (2016) 24 IIUMLJ 157 at 190.

need to appoint a new tribunal.[196] A dismissal does not protect the claim from time bars and limitation periods, while a stay pauses time bars and limitation periods. Therefore, stays are more time- and cost-effective than dismissals.[197]

65 Stays are possible in Germany through the application of §§ 251 and 278a(4) and 278a(5) of the ZPO.[198] In Austria, in accordance with § 168 of the Austrian Code of Civil Procedure 1895, the parties may agree to suspend proceedings. Such a procedural agreement can be concluded at the same time as the mediation clause. Thus, the parties must opt for this. The possibility to stay proceedings to enforce a mediation clause was also envisaged in the Netherlands in the unsuccessful Bill (*Wetsvoorstel*) 33723 of 21 November 2012.[199] However, a stay is a suspension of the proceedings; it does not mean that the parties are forced to engage in mediation.[200] Rather, through a stay, the parties are simply given an opportunity to explore settlement options.[201]

66 Turning to the utility of financial remedies, regardless of the type of breach, it is important to the note the differing effect of cost sanctions and damages. It has been demonstrated,[202] through the imposing of damages, that the obligations in mediation clauses are not enforced; they simply are a restorative remedy if there are quantifiable costs. Likewise, cost sanctions in themselves are not a remedy but merely provide for an adverse consequence. Therefore, these financial consequences do not restore the lost opportunity of settlement through

196 See Marko Mećar, "Enforceability of Mediation in Multi-tiered Clauses: The Croatian Perspective" *Kluwer Arbitration Blog* (28 May 2015) and Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Oxford: Hart Publishing, 2017) at p 93.

197 See also *Halim v Great Gatsby's Auction Gallery, Inc* 516 F 3d 557 at 561 (7th Cir, 2008); Marko Mećar, "Enforceability of Mediation in Multi-tiered Clauses: The Croatian Perspective" *Kluwer Arbitration Blog* (28 May 2015); and Rupert Bellinghausen & Julia Grothaus, "Escalation Clauses: No Longer a Tripping Hazard for Arbitrations with Seat in Germany?" *Kluwer Arbitration Blog* (1 December 2016).

198 German Code of Civil Procedure 2005 ("ZPO") § 278(5): courts may refer parties to mediation, conciliation and alternative dispute resolution generally. If the parties agree then § 251 of the ZPO grants the courts the power to rest proceedings upon the application of the parties in circumstances where the outcome of mediation or similar processes would make this appropriate.

199 Tweede Kamer, *Proposed Article III*, 33 723, nr 3 (2012–2013) at p 19.

200 Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Oxford: Hart Publishing, 2017); Neil Andrews, *The Modern Civil Process: Judicial and Alternative Forms of Dispute Resolution in England* (Rottenburg: Deutsche Nationalbibliothek, 2008) at para 11.39.

201 Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Oxford: Hart Publishing, 2017) at p 44.

202 See paras 37–40 above.

mediation and should be relied on in conjunction with a "comply" type remedy.

67 The above paragraphs have demonstrated that a preferred remedy to the breach of a mediation clause is one that compels the parties to participate in the mediation process. This is because other remedies do not return the opportunity for settlement that mediation offers. Building on this logic, breaches of mediation clauses should face several consequences depending on the stage at which the breach occurred. Sanctions to breaches of mediation clauses are essential, as a lack thereof sets disincentives for participation in mediation.[203]

V. Conclusion

68 This article discussed the issues that arise from the differing approaches to the validity and enforceability of mediation clauses. Today, these differences create additional barriers for parties wishing to resort to mediation. In light of the growing number of disputes involving mediation clauses, it is time for a more comprehensive approach. The need for a framework regulating the mediation agreement and its enforcement is supported by many. However, the regulation of dispute resolution is complex as it takes place at every level; in both formal and informal ways. This complexity increases at the multinational/international level as issues become more complicated once different systems with differing approaches are involved. A functioning harmonised approach to mediation clauses ought to follow practices that are best suited to the needs of commercial parties.

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203 Rainer Kulms, "Mediation in the USA: Alternative Dispute Resolution between Legalism and Self-Determination" in *Mediation: Principles and Regulation in Comparative Perspective* (Klaus J Hopt & Felix Steffek eds) (Oxford: Oxford University Press, 2013) at pp 1278–1279.