

## Agreements to Negotiate in the Transnational Context – Issues of Contract Law and Effective Dispute Resolution

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### I. – INTRODUCTION

In international commerce, parties regularly include dispute resolution clauses into their contracts to make provision for future conflicts. Before being allowed to bring a claim in the respective state court or file a request for arbitration, the dispute resolution clause may require the parties to resort to structured negotiations or mediation. Only after such an attempt amicably to resolve the dispute has been made may they proceed to a final and binding decision by a court or an arbitral tribunal.

As mediation is on its way to establish itself in the European landscape,<sup>1</sup> parties – as a reaction to the institutionalisation of

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<sup>1</sup> In Germany, many courts are running pilot projects to assess the promise of mediation: see “Bericht der Projektgruppe Mediation bei den Berliner Gerichten vom 20.7.2005”; available at <<http://www.berlin.de/sen/justiz/gerichte/kg/mediation/projektgruppe.html>>. France integrated a set of provisions on mediation into the *Nouveau Code de la Procedure Civile*, introduced by Décr. n° 96-652 as of 22 July 1996. England has seen a considerable rise of mediation, see the report “Further Findings – A continuing evaluation of the Civil Justice Reforms”, available at <<http://www.dca.gov.uk/civil/reform/ffreform.htm>>. The European Union published a European Code of Conduct for Mediators in 2004 and a EU directive on certain aspects of mediation in civil and commercial matters, 2008/52/EC entered into force in June 2008.

mediation – will be increasingly willing to make use of alternative dispute resolution procedures, as recent developments in the United States show, where parties now refer to mediation without any initiative on the part of the courts.<sup>2</sup> Thus, an increasing number of contracts will include negotiation or mediation clauses.

As with any other contract, the parties may be in dispute about the obligations that arise from their agreement. Once first negotiations have failed, it may seem futile to engage in a structured negotiation or a mediation, the only difference being that a third person joins the negotiation table. In this situation, one of the parties might feel tempted to leave out the intermediary step and file an immediate request for arbitration or initiate proceedings in the state courts. In many cases, the opponent party will not hold the reluctant party to what had been agreed. However, if the opponent party insists on having its negotiation or mediation, the court or the arbitral tribunal will have to decide whether a proceeding in its forum is premature. Thus, the enforceability of the dispute resolution agreement is put to the test.

This article will analyse whether common as well as civil law courts have held the parties to what they have agreed. The comparative analysis will show that agreements to negotiate – with or without the assistance of a mediator – have binding force.

## II. – DEVELOPMENTS IN ENGLAND

### 1. Enforceability of agreements to negotiate

Before the rise of mediation, the English courts had to decide on clauses stipulating that the parties were bound to negotiate in good faith should a conflict arise. Only after such negotiations had been held would the parties be allowed to bring a claim.

<sup>2</sup> See Thomas STIPANOWICH, "ADR and the 'Vanishing Trial': The Growth and Impact of "Alternative Dispute Resolution", *Journal of Empirical Legal Studies* (2004), 843 *et seqq.*; available at <<http://www.iamed.org/pdf/Final%20Vanishing%20Trial%20Article%20TJS.pdf#search=%22aba%20section%20dispute%20resolution%20atlanta%20vanishing%20National%20Conference%20on%20Court-connected%20ADR%22>>.

The English courts, however, have declined to enforce such agreements. In *Courtney & Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd.*,<sup>3</sup> the parties had agreed to negotiate a fair and reasonable price for construction works to be carried out under a construction contract.<sup>4</sup> Lord DENNING M.R. held that the parties had not yet concluded a contract, as they had not agreed on the price. He then analysed whether the parties had at least concluded an agreement to negotiate and were therefore required to negotiate a fair and reasonable price. Disapproving Lord WRIGHT's reasoning in *Hillas & Co. Ltd. v. Arcos Ltd.*,<sup>5</sup> he found that an agreement to negotiate is not enforceable:

"If the law does not recognise a contract to enter into a contract [...] it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through: or if successful, what the result would be. It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law."<sup>6</sup>

Lord ACKNER subscribed to this view in *Walford v. Miles*,<sup>7</sup> arguing that an agreement to negotiate in good faith was not binding for lack of certainty:

"However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial positions of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. [...] A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here where the uncertainty lies. [...] Accordingly a bare agreement to negotiate has no legal content."<sup>8</sup>

<sup>3</sup> [1975] 1 W.L.R. 297.

<sup>4</sup> [1975] 1 W.L.R. 297, 301.

<sup>5</sup> (1932) 147 L.T. 503, 515, holding that an agreement to negotiate is enforceable.

<sup>6</sup> [1975] 1 W.L.R. 297, 301 at H.

<sup>7</sup> [1992] 2 A.C. 128.

<sup>8</sup> [1992] 2 A.C. 128, 138 at E to G.

## 2. Multi-tier dispute resolution clauses

### (a) *The case law before the Woolf Reforms*

In *Paul Smith Ltd. v. H & S International Holding Inc.*,<sup>9</sup> the Queen's Bench Division had to decide on the following multi-step dispute resolution clause, which went beyond a bare agreement to negotiate:

"If any dispute or difference shall arise between the parties hereto concerning the construction of this Agreement or the rights or liabilities of either party hereunder the parties shall strive to settle the same amicably but if they are unable to do so the dispute or difference shall be adjudicated upon under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more Arbitrators appointed in accordance with those Rules."

STEYN J. shared the Claimant's view that the first part of the clause would not be enforceable, even if the parties had envisaged to settle the dispute by way of conciliation in accordance with the ICC Conciliation Rules:<sup>10</sup>

"The plaintiffs rightly concede that the provisions that the parties shall strive to settle the matter amicably, and that a dispute shall, in the first place, be submitted for conciliation, do not create enforceable legal obligations." <sup>11</sup>

This judgement transcends the analysis in the cases referred to above, holding not only that an agreement to negotiate is not binding, but also extending this *rationale* to a conciliation agreement.

In 1993, the House of Lords in *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*<sup>12</sup> had to decide on a complex dispute resolution clause which was part of the Channel Tunnel Construction Contract:

"Settlement of disputes

(1) If any dispute or difference shall arise [...] then [...] such dispute or

<sup>9</sup> [1991] 2 *Lloyd's Rep.* 127.

<sup>10</sup> ICC Rules of Conciliation and Arbitration as of 1 January 1988.

<sup>11</sup> [1991] 2 *Lloyd's Rep.* 127, 131.

<sup>12</sup> [1993] AC 334.

difference shall [...] in the first place be referred in writing to and be settled by a panel of three persons (acting as independent experts but not as arbitrators) who shall [...] state their decision [...].

(2) [...] Such unanimous decision shall be final and binding upon the contractor and the employer unless the dispute or difference has been referred to arbitration as hereinafter provided.

[...] "

As a last resort the clause called for ICC Arbitration.

The respondent moved for a stay of the proceedings under § 1 of the 1975 *Arbitration Act*.<sup>13</sup> Moreover, the respondent took the view that the court would possess the inherent power to stay the proceedings since the first part of the clause, which called for a decision by a panel of independent experts, had not yet been complied with. Emphasising the nature of the dispute resolution clause, Lord MUSTILL reasoned that the court had the inherent power to the stay the proceedings on the instant facts:

"[...] it must surely be legitimate to use the same powers to enforce a dispute-resolution agreement which is nearly an immediately effective agreement to arbitrate, albeit not quite."<sup>14</sup>

The two companies, in Lord MUSTILL's opinion, had drafted the clause as a result of arm's length negotiations between large-scale international enterprises experienced in international business and therefore rejected the attempt later to disregard what had been agreed upon:

"[...] I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reasons for

<sup>13</sup> § 1 Arbitration Act 1975: "(1) If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

<sup>14</sup> [1993] AC 334, 352 at H.

departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints [*sic!*] to the experts and if necessary to the arbitrators, that is where the appellants should go. The fact that the appellants now find their chosen method too slow to suit their purpose, is to my way of thinking quite beside the point." 15

In *Halifax Financial Services Ltd. v. Intuitive Systems Ltd.*<sup>16</sup> MCKINNON J. applied the rationale developed by Lord MUSTILL in the Channel Tunnel decision,<sup>17</sup> reasoning that the respective clause did no more "than make provision for the parties to negotiate, hopefully towards an agreement." 18 Only clauses calling for determinative as opposed to non-determinative procedures such as negotiation and mediation would be enforceable.<sup>19</sup>

(b) *The decision in Cable & Wireless v. IBM*

In 2002 the Queen's Bench Division of the Commercial Court rendered a groundbreaking decision reflecting the change in the English legal landscape initiated by the Woolf Reforms.<sup>20</sup>

As the English court system suffered from a constant case overload, the Lord Chancellor's Department appointed Lord WOOLF to assess the efficiency of the court system and make suggestions how the present problems might be solved. The remarkable result of Lord WOOLF's work was his report "Access to justice",<sup>21</sup> which became the basis for the English Civil Procedure Rules (CPR). The CPR calls for active case management by the courts.<sup>22</sup> The courts have to encourage the parties to use methods of alternative dispute resolution<sup>23</sup> and help them to settle their controversies amicably.<sup>24</sup> To

15 [1993] AC 334, 353 at C.

16 [1999] 1 All E.R. (Comm) 303.

17 [1999] 1 All E.R. (Comm) 303.

18 [1993] AC 334.

19 [1999] 1 All E.R. (Comm) 303.

20 For further details see Christopher Newmark, "Agree to mediate ... or face the consequences - A Review of the English courts' approach to mediation", *SchiedsVZ* (2003), 23 *et seq.*

21 Available at <<http://www.dca.gov.uk/civil/final/index.htm>>.

22 CPR 1.4.

23 CPR 1.4(2)(e).

provide the courts with the power actively to manage the cases on their dockets, the CPR allows the courts to impose cost sanctions on the parties. According to CPR § 44, the ground rule is that the prevailing party will be reimbursed its legal costs by the other side.<sup>25</sup> Nonetheless, the courts have discretion to deviate from this rule.<sup>26</sup> In exercising its discretion, the court must take into account the parties' endeavours to resolve the dispute amicably.<sup>27</sup> In consequence, even a party that entirely prevails might be refused reimbursement of its costs by the other side. *Vice versa*, the losing party might be ordered to bear a higher proportion of the opposing party's costs.

The English courts have shown great willingness to exercise this discretion which has led to a considerable decrease of cases on the dockets.<sup>28</sup> The courts in particular have been inclined to impose costs on a party which has unreasonably refused to consider and engage in mediation.<sup>29</sup> This practice has lately led to criticism, suggesting that it might violate the free access to justice principle enshrined in Article 6(1) of the 1950 *European Convention of Human Rights*.<sup>30</sup>

Against the background of these changes, the Queen's Bench Division of the Commercial Court had to decide on an ADR-clause in *Cable & Wireless Plc v. IBM United Kingdom Ltd.*<sup>31</sup> in October 2002.<sup>32</sup> Clause 41 of the contract stipulated:

"The Parties shall attempt in good faith to resolve any dispute or claim

<sup>24</sup> CPR 1.4(2)(f).

<sup>25</sup> CPR 44.3(2)(a).

<sup>26</sup> CPR 44.3(6).

<sup>27</sup> CPR 44.3(4) (a), (5)(a), CPR 44.5(3)(a).

<sup>28</sup> See "Further Findings – A continuing evaluation of the Civil Justice Reforms"; available at <<http://www.dca.gov.uk/civil/reform/ffreform.htm>>.

<sup>29</sup> For cost sanctions see *Dunnett v. Railtrack plc* (in administration) [2002] 1 WLR 803; *Hurst v. Leeming* [2002] C.P. Rep 59; *Halsey v. Milton Keynes General NHS Trust*; *Steel v. Joy and Halliday* [2004] EWCA Civ 576; *Burchell v. Bullard* [2005] EWCA Civ 358.

<sup>30</sup> The point was raised in *Halsey v. Milton Keynes General NHS Trust*; *Steel v. Joy and Halliday* [2004] EWCA Civ 576. See also A. Marriott, "Mandatory ADR and Access to Justice", *Arbitration*, 71 (2005), 307 *et seqq.*

<sup>31</sup> [2002] EWHC 2059 (Comm Ct).

<sup>32</sup> Karl MACKIE, "The Future for ADR Clauses After *Cable & Wireless v. IBM*", *Arbitration International* (2003), 345 *et seqq.*

arising out of or relating to this Agreement or any Local Services Agreement promptly through negotiations between the respective senior executives of the Parties who have authority to settle the same pursuant to Clause 40.

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

The decisive part of Clause 40, which was referred to, read:

"Any questions or difference [...] shall in the first instance be referred to the C&W Project Executive and the IBM Project Executive [...] for discussion and resolution [...]. If the matter is not resolved at such meeting, the matter shall be referred to the next level of C&W's and IBM's management [...]. *Neither Party nor any Local Party may initiate any legal action until the process has been completed, unless such Party or Local Party has reasonable cause to do so to avoid damage to its business or to protect or preserve any right of action it may have.*"  
[emphasis added]

Respondent moved for a stay of proceedings pending mediation in analogy to § 9 of the 1996 *Arbitration Act*, according to which paragraph the court must order a stay of proceedings pending arbitration upon request of either party bound by the arbitration agreement. The Claimant, however, submitted that the ADR clause was no more than an agreement to negotiate which was not enforceable for uncertainty. Moreover, the Claimant asserted that the last part of Clause 41 reflected that the clause was not binding on the parties.

COLEMAN J. rejected the latter argument. He reasoned that it was clear from Clause 40 that the option to initiate legal proceedings was limited to interim and conservatory measures. Therefore the mere wording of the clause did not impede enforceability.<sup>33</sup> Moving to the crucial question in the case, COLEMAN J. had to determine whether the dispute resolution clause differed from a mere agreement to negotiate in such a way that it could be held enforceable. Emphasising that the clause referred to an elaborate

<sup>33</sup> [2002] EWHC 2059 (Comm Ct) at 20.

and detailed set of rules which applied to the administration of the mediation by the Centre for Effective Dispute Resolution (CEDR), the clause went beyond a mere agreement to negotiate in good faith. According to the CEDR mediation procedure, the parties were of course free to reach a settlement; Nonetheless, they were clearly required to appoint a mediator, initiate the mediation and present their case and documents to the mediator.<sup>34</sup> Therefore a minimum degree of collaboration was expected of either party:

“It is to be observed that the parties have not simply agreed to attempt in good faith to negotiate a settlement. In this case they have gone further than that by identifying a particular procedure, namely an ADR procedure as recommended to the parties by the Centre for Dispute Resolution. [...] This provision [article 14 of the CEDR Model Mediation Procedure] clearly provides for withdrawal after the mediator has been appointed and the mediation has commenced. It thus envisages a certain minimum participation in the procedure.”<sup>35</sup>

In the opinion of COLEMAN J., only the first part of the clause, which contained an obligation to negotiate in good faith, was not enforceable.

In contrast to the mere agreement to negotiate, the courts could easily verify whether the parties had complied with the steps required under the CEDR Rules.

Over and above these strictly legal considerations, however, COLEMAN J.’s decision was also influenced by the dramatic changes resulting from the introduction of the CPR and its policy in favour of alternative dispute resolution:

“There is now available a clearly recognised and well-developed process of dispute resolution involving sophisticated mediation techniques provided by trained mediators in accordance with procedures designed to achieve settlement by the means most suitable for the dispute in question. That this is a firmly established,

<sup>34</sup> [2002] EWHC 2059 (Comm Ct) at 29. In *Cott UK Ltd v. F E Barber Ltd* [1997] 3 All E.R. 540 at 548 *et seq.*, Judge HEGARTY QC did not exercise his discretion to stay the proceedings, even though finding that the ADR clause in principle was binding. As the clause did not refer to a set of rules offered by an ADR provider, the *ad hoc* procedure might “produce confusion and delay rather than producing a short, speedy and cheap determination of the dispute.”

<sup>35</sup> [2002] EWHC 2059 (Comm Ct) at 21, 22.

significant and growing facet of English procedure is exemplified by the judgement of BROOKE LJ. in *Dunnett v. Railtrack Plc* [...]. For the courts now to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the CPR and as reflected in the judgement of the Court of Appeal in *Dunnet v. Railtrack* [...]."<sup>36</sup>

Although the instant clause referred to the mediation rules of a well-known ADR provider, *Coleman J.* mentioned as *dictum* that he would also hold a mediation clause enforceable if it did not refer to a set of mediation rules as long as the obligation to mediate became sufficiently clear from the wording of the clause:

"I would wish to add that contractual references to ADR which did not include provision for an identifiable procedure would not necessarily fail to be enforceable by reason of uncertainty. An important consideration would be whether the obligation to mediate was expressed in unqualified and mandatory terms. [...] The wording of each reference will have to be examined with these considerations in mind. In principle, however, where there is an unqualified reference to ADR, a sufficiently certain and definable minimum duty of participation should not be hard to find."<sup>37</sup>

In consequence, the court adjourned the proceedings pending mediation but did not order a stay, this being the common practice of the Commercial Court.<sup>38</sup>

(c) *Leicester Circuits Ltd v. Coates Brothers Plc*

The decision in *Leicester Circuits Ltd v. Coates Brothers Plc*<sup>39</sup> in the following year shows that while the English courts are not only willing to enforce mediation agreements, they may be inclined to impose cost sanctions if the parties unreasonably withdraw from the mediation. In this case, the parties agreed to mediation, appointed a neutral and sent their statements of fact to the mediator. Before the first session had begun, the Claimant refused to continue to

<sup>36</sup> [2002] EWHC 2059 (Comm Ct) at 28.

<sup>37</sup> [2002] EWHC 2059 (Comm Ct) at 32.

<sup>38</sup> *Coleman J.* did not order a stay because this would have deviated from the practice of the Commercial Court, where the normal practice is to adjourn the proceedings or extend the time limits [2002] EWHC 2059 (Comm Ct) at 34.

<sup>39</sup> [2003] EWCA Civ 290 and 333.

participate in the mediation as instructed by his insurer. The court however decided that this did not serve as sufficient justification to decline participation in the mediation process:

"[...] We take the view that having agreed to mediation it hardly lies in the mouths of those who agree to it to assert that there was no realistic prospect of success. We do not of course assume that the mediation would have been successful, but we reject the idea that we should treat Coates' decision to withdraw from the process as simply an acknowledgement of the fact that they had agreed to something which was pointless." 40

In consequence, the court ordered Claimant to pay part of the costs even though he had entirely prevailed in the litigation:

"It seems to us that the unexplained withdrawal from an agreed mediation process was of significance to the continuation of this litigation. We do not for one moment assume that the mediation process would have succeeded, but certainly there is a prospect that it would have done if it had been allowed to proceed. That therefore bears on the issue of costs." 41

Thus, the decision substantiates the extent to which English courts require participation in mediation. It is not sufficient just to appoint a mediator, to furnish him with statements of facts but then to withdraw without having attended an initial mediation session. Rather, the parties will have to submit reasonable justification for their refusal to proceed with mediation. If not, they face the risk of the courts exercising their discretion as to the sharing of the costs to their dismay.

### **III. – ENFORCEABILITY OF MEDIATION AGREEMENTS IN THE UNITED STATES OF AMERICA**

In recent years, a considerable number of U.S. court decisions have had to deal with the question as to whether a mediation agreement is enforceable. This is hardly surprising since mediation has matured in the United States over the last three decades and is now a widely accepted dispute resolution mechanism, which finds great support on the part of the judiciary. In the first in-depth analysis of U.S. case

40 [2003] EWCA Civ 333 at 18 *per* Judge LJ.

41 [2003] EWCA Civ 333 at 27 *per* Judge LJ.

law on mediation, Professors James COBEN and Peter THOMPSON undertook the laudable task of searching U.S. court decisions rendered during the period 1999-2003 for decisions on mediation and of drawing the first coherent picture of litigation on mediation in the United States.<sup>42</sup> They found more than 1200 decisions, of which 279 dealt with the enforcement of mediation agreements.<sup>43</sup> 122 of these enforcement decisions specifically addressed the question as to whether a mediation clause requires the parties to mediate.<sup>44</sup> As in England, some parties refused to abide by the mediation clause and immediately filed a request for arbitration or a suit with the state courts. The opposing party then asked the relevant forum to enforce the duty to mediate. The number of decisions on this question tripled in frequency from 1999 to 2003.<sup>45</sup>

### 1. Application of the Federal Arbitration Act to mediation agreements

It is quite surprising to a European lawyer to find that federal<sup>46</sup> as well as state courts<sup>47</sup> invoke the *Federal Arbitration Act* (FAA) to enforce mediation agreements. § 2 FAA stipulates that an arbitration agreement is valid and can only be revoked on such grounds as exist at law or in equity for the revocation of any contract.<sup>48</sup> If one of

42 James COBEN / Peter N. THOMPSON, "Disputing Irony: A Systematic Look at Litigation About Mediation", 12 *Harvard Negotiation Law Review* (2006), 43 *et seq.* See also Hamline's Mediation Case Law Projekt, available at: <<http://www.law.hamline.edu/adr/mediation-case-law-project.html>>.

43 COBEN / THOMPSON, *supra* note 42, 105.

44 *Ibidem*.

45 *Ibidem*.

46 *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1 (1<sup>st</sup> Cir. 2004); *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d (9<sup>th</sup> Cir. 1998).

47 *Fisher v. GE Medical Systems*, 276 F.Supp.2d 891 (M.D. Tenn. 2003); *Mortimer v. First Mount Vernon Industrial Loan Ass.*, No. Civ. AMD 03-1051, 2003 WL 23305155 (D. Md. May 19, 2003); *CB Richard Ellis, Inc. v. American Environmental Waste Management*, No. 98-CV-4183 (JG), 1998 WL 903495 (E.D.N.Y. Dec. 4, 1998); *Cecala v. Moore*, 982 F.Supp. 609 (N.D. Ill. 1997); *AMF, Inc. v. Brunswick, Corp.*, 621 F.Supp. 456 (S.D.N.Y. 1985).

48 9 U.S.C. § 2: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an

the parties then moves for a stay of proceedings, the court has to grant the application pursuant to § 3 FAA.<sup>49</sup>

*(a) Explanations for the application of the FAA to mediation agreements*

The courts may perhaps have sought refuge in the FAA to enforce mediation agreements for reasons of terminology. Whereas arbitration is considered to be a member of the ADR family in the United States,<sup>50</sup> the acronym is understood only to refer to non-determinative dispute settlement mechanisms in Europe.<sup>51</sup> In the United States the acronym ADR is therefore understood rather in contrast to litigation before the state courts.<sup>52</sup> This is why the courts may have been more willing to apply a provision that was originally drafted for adversarial arbitration proceedings to the cooperative process of mediation.

While this understanding of the acronym ADR may have supported the extensive construction of the FAA, the main reasons are found in the history of the FAA itself as well as in its construction by the U.S. Supreme Court.

*(aa) The history of the FAA*

existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

<sup>49</sup> 9 U.S.C. § 3: "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

<sup>50</sup> Jean R. STERNLIGHT, "Is Binding Arbitration A Form of ADR?: an Argument that the Term " 'ADR' has Begun to Outlive its Usefulness", *Journal of Dispute Resolution* (2000), 97 *et seq.*

<sup>51</sup> Jörg RISSE, *Wirtschaftsmediation*, Verlag C.H. Beck, München (2003), § 1 at 10 and § 15 at 1 Fn. 2; Henry BROWN / Arthur MARRIOTT, *ADR Principles and Practice*, 2<sup>nd</sup> ed., Sweet & Maxwell UK (), at 2-001 *seq.*; David St John SUTTON / Judith GILL, *Russell on Arbitration*, 22<sup>nd</sup> ed., Thomson Sweet & Maxwell UK (2003), at 1-005.

<sup>52</sup> See STERNLIGHT, *supra* note 50.

Before the FAA entered into force, U.S. courts regarded arbitration agreements with great hostility, inherited from the English mother country.<sup>53</sup> According to the traditional doctrine of revocability, either party could withdraw from the arbitral proceedings at any time before the award was made.<sup>54</sup> Moreover, arbitration agreements were held to violate public policy because they ousted the courts from their jurisdiction.<sup>55</sup> By promulgating the FAA in 1924 Congress intended to put an end to this hostility towards arbitration.<sup>56</sup>

(bb) *The U.S. Supreme Court's jurisprudence "in favor of arbitration"*

Since the entry into force of the FAA, the attitude of the courts towards arbitration has changed completely. Arbitration received much support from the U.S. Supreme Court<sup>57</sup> which explicitly emphasised the historic intentions of the drafters of the FAA:

"Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favouring arbitration agreements, notwithstanding any state

<sup>53</sup> Gary B. BORN, *International Commercial Arbitration*, 2<sup>nd</sup> ed., Kluwer Law, Deventer / Boston (2001), 35 *et seq.* and 156 *et seq.* For a detailed overview see SCHMITZ, "Refreshing Contractual Analysis of ADR Agreements by Curing Bipolar Avoidance of Modern Common Law", 9 *Harvard Negotiation Law Review*, 1 (2004), 27 *et seq.*

<sup>54</sup> *Restatement (First) of Contracts*, § 550, Comment a (1932): "The authority of the arbitrator is revocable by either [party] at any time before an award is made, and though the revocation is a violation of the agreement, the injured party is without substantial redress." The doctrine stems from the Vynior's Case, 77 *Eng. Rep.* 595, 599 (K.B. 1609): [defendant was free to] "countermand [the arbitration agreement], for one cannot by his act make such authority, power or warrant not countermandable which is by law or of its own nature countermandable."

<sup>55</sup> *Kill v. Hollister*, 1 Wils. 129, 95 *Eng. Rep.* 532 (1746). For U.S. cases see *Home Ins. Co. v. Morse*, 87 U.S. 445, 457 F. (1847); *Dickinson Mfg. Co. v. American Locomotive Co.*, 119 F. Supp. 488 (M.D.Pa. 1902).

<sup>56</sup> H.R. Rep. No. 96, 68<sup>th</sup> Cong., 1<sup>st</sup> Sess., 1-2 (1924).

<sup>57</sup> *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S.Ct. 1212 (1995); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927 (1983); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647 (1991); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346 (1985); *Dean Wittner Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S.Ct. 1238 (1985); *Scherk v. Alberto-Culver Company*, 417 U.S. 506, 94 S.Ct. 2449 (1974).

substantive or procedural policies to the contrary. [...] The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability.”<sup>58</sup>

As a result, U.S. courts now decided in favour of arbitration, referred to the U.S. Supreme Court’s jurisprudence and applied its *rationale* as a guideline for the proper construction of arbitration agreements.

When the rise of mediation throughout the United States subsequently confronted the courts with the question as to whether mediation agreements were enforceable, the courts referred to this *rationale* as well.

(b) *Application of § 3 FAA to ADR clauses*

(aa) *AMF Inc. v. Brunswick Corporation*

The broad construction of the FAA is favoured by a lack of definition, the term “arbitration” not being defined by the FAA itself.<sup>59</sup> Thus, for the first time, the District Court for the Southern District of New York held in *AMF Inc. v. Brunswick Corporation*<sup>60</sup> that the Respondent was required to participate in a non-binding expertise which the parties’ dispute resolution clause had called for to settle the dispute. AMF had put forward that the clause calling for settlement through a non-binding expertise was enforceable under the FAA. In the court’s opinion, the ambit of the FAA not only extended to binding arbitration but to every dispute resolution mechanism intended to “settle” the dispute.<sup>61</sup> Respondent countered this argument, holding that the FAA only applied to

<sup>58</sup> *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 at 24-25, 103 S.Ct. 927 at 941 (1983).

<sup>59</sup> 9 U.S.C. Section 2: “A written provision in [...] a contract evidencing a transaction involving commerce to *settle by arbitration* a controversy thereafter arising out of such contract or transaction, or refusal to perform the whole or any part thereof [...] shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” [*emphasis added*].

<sup>60</sup> *AMF, Inc. v. Brunswick, Corp.*, 621 F.Supp. 456 (S.D.N.Y. 1985).

<sup>61</sup> *AMF, Inc. v. Brunswick, Corp.*, 621 F.Supp. 456, 461 (S.D.N.Y. 1985).

binding arbitration that replaced litigation.<sup>62</sup> The District Court granted AMF's petition, as the term arbitration would defy easy definition and the dispute resolution clause would not necessarily have to refer to "arbitration" for the FAA to be applicable:

"If the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration. The arbitrator's decision need not be binding in the same sense that a judicial decision needs to be to satisfy the constitutional requirement of a justiciable case or controversy. Under these circumstances of this case, the agreement should be characterized as one to arbitrate."<sup>63</sup>

(bb) *Application to mediation agreements in Cecala v. Moore*

This analysis was extended for the first time to mediation agreements by the District Court of the Northern District of Illinois, Eastern Division in *Cecala v. Moore*.<sup>64</sup>

In this case, the Respondent moved for a stay of proceedings under § 3 FAA on the ground that the dispute resolution clause contained in a real estate contract required the parties to resort to mediation before they were entitled to proceed to arbitration. Although the FAA was not applicable for lack of interstate commerce in this case,<sup>65</sup> the District Court referred to a similar provision in the *Illinois Uniform Arbitration Act*<sup>66</sup> and relied on the

<sup>62</sup> *AMF, Inc. v. Brunswick, Corp.*, 621 F.Supp. 456, 459 (S.D.N.Y. 1985).

<sup>63</sup> *AMF, Inc. v. Brunswick, Corp.*, 621 F.Supp. 456, 460 (S.D.N.Y. 1985). Also relying on the decision in *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d (9<sup>th</sup> Cir. 1998) at 1208 f. for a non-binding arbitration according to the American Arbitration Association rules. Moreover see *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1 (1<sup>st</sup> Cir. 2004): "[...] The question is how closely the specified procedure resembles classic arbitration and whether treating the procedure as arbitration serves the intuited purposes of Congress. [...] To us, this [the procedure specified in the contract] is arbitration in everything but name."

<sup>64</sup> *Cecala v. Moore*, 982 F.Supp. 609 (N.D. Ill. 1997).

<sup>65</sup> *Cecala v. Moore*, 982 F.Supp. 609, 611 f. (N.D. Ill. 1997).

<sup>66</sup> 710 Ill. Comp. Stat. 5/2(d): "Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this Section [...]."

inherent power of the courts to stay proceedings.<sup>67</sup> Accordingly, the court ordered a stay of the proceedings pending mediation.<sup>68</sup>

(cc) CB Richard Ellis, Inc. v. American Environmental Waste Management

In *CB Richard Ellis, Inc. v. American Environmental Waste Management*,<sup>69</sup> the District Court of the Eastern District of New York explicitly relied on the decision in *AMF Inc. v. Brunswick Corporation*<sup>70</sup> to enforce a mediation agreement. The court reasoned that the FAA defined arbitration as a procedure to “settle” conflicts and that therefore mediation agreements would come within its ambit.<sup>71</sup>

(dd) Fisher v. GE Medial Systems

Also in line with these decisions is the case *Fisher v. GE Medial Systems*.<sup>72</sup> In this employment dispute the parties first had to try to resolve any controversies within the corporation by direct negotiations. If these attempts failed, the contract provided for mediation in accordance with the rules of the AAA, before the parties were allowed to bring a claim. The court again reasoned that § 3 FAA applied to mediation agreements:

“The FAA does not precisely define what processes constitute “arbitration”, and the Supreme Court and Sixth Circuit have not done so. However the Sixth Circuit has explained: The policy in favor of the finality of arbitration is but one part of a broader goal of encouraging informal, i.e., non-judicial resolution of labor disputes. It is not arbitration per se that federal policy favors, but rather final judgment of differences by a means selected by the parties. If the parties agree that a procedure other than arbitration shall provide a conclusive resolution of their differences, federal labor policy encourages that procedure no less than arbitration.

<sup>67</sup> See *infra* at III.2.

<sup>68</sup> *Cecala v. Moore*, 982 F.Supp. 609, 613, 615 (N.D. Ill. 1997).

<sup>69</sup> *CB Richard Ellis, Inc. v. American Environmental Waste Management*, No. 98-CV-4183 (JG), 1998 WL 903495 (E.D.N.Y. Dec. 4, 1998) at \*2.

<sup>70</sup> *AMF, Inc. v. Brunswick, Corp.*, 621 F.Supp. 456 (S.D.N.Y. 1985).

<sup>71</sup> *CB Richard Ellis, Inc. v. American Environmental Waste Management*, No. 98-CV-4183 (JG), 1998 WL 903495 (E.D.N.Y. Dec. 4, 1998) at \*2.

<sup>72</sup> *Fisher v. GE Medical Systems*, 276 F.Supp.2d 891 (M.D. Tenn. 2003).

[...] Similarly, a New York district court has reasoned that the structure of the FAA depicts arbitration as a process that will “settle” the controversy [citing *CB Ellis v. American Env’tal Waste Management*]. [...] This court is persuaded that “arbitration” in the FAA is a broad term that encompasses many forms of dispute resolution. [...] Federal policy favors arbitration in a broad sense, and mediation surely falls under the preference for non-judicial dispute resolution.”<sup>73</sup>

(c) *Court decisions and current legal developments in the United States opposing the application of the FAA to mediation agreements*

(aa) *Dissenting decisions by U.S. courts*

However, the extensive construction of the FAA also had its detractors. In *Harrison v. Nissan Motor Corporation U.S.A.*, the United States Court of Appeal of the Third Circuit argued that a dispute settlement procedure under the Pennsylvania *Automobile Lemon Law* and the *Magnuson-Moss Warranty Act* did not qualify as arbitration under the FAA. The procedure called for mediation followed by arbitration, the outcome of which was only binding on the consumer if he accepted the decision of the arbitrator:<sup>74</sup>

“Although it defies easy definition, the essence of arbitration, we think, is that, when the parties agree to submit their disputes to it, they have agreed to arbitrate these disputes through to completion, *i.e.* to an award made by a third-party arbitrator. Arbitration does not occur until the process is completed and the arbitrator makes a decision. Hence, if one party seeks an order compelling arbitration and it is granted, the parties must then arbitrate their dispute to an arbitrators’ decision, and cannot seek recourse to the courts before that time. [...] But the informal alternative dispute resolution process contemplated by the Lemon Law does not fit this characterization.”<sup>75</sup>

<sup>73</sup> *Fisher v. GE Medical Systems*, 276 F.Supp.2d 891, 893 *et seq.* (M.D. Tenn. 2003).

<sup>74</sup> 73 P.S. § 1958: “If the manufacturer has established an informal dispute settlement procedure which complies with the provisions of 16 C.F.R. Pt. 703, as from time to time amended, the provisions of [73 P.S. § 1958] [allowing to bring a civil action in case of nonconformity of a vehicle] shall not apply to any purchase as it relates to a remedy for defects or conditions affecting substantial use, value or safety of the vehicle. The informal dispute settlement procedure shall not be binding on the purchaser [...]”

<sup>75</sup> *Harrison v. Nissan Motor Corp. USA*, 111 F.3d 343, 350 (3<sup>rd</sup> Cir. 1996); applying

Moreover, in *Lynn v. General Electric Company*,<sup>76</sup> the United States District Court for the District of Kansas refused to apply the FAA to a mediation clause, arguing that by signing an arbitration agreement the parties forfeited their right to have litigation which was not true for a mediation agreement.<sup>77</sup>

(bb) *Recent legal developments opposing a broad construction of the FAA*

Finally, the drafting history of the *Revised Uniform Arbitration Act* (RUAA) in 2000<sup>78</sup> as well as the *Uniform Mediation Act* (UMA)<sup>79</sup> goes against a broad construction of the FAA. The preliminary drafts of the UMA included a proposal to amend the UAA so as to support the enforcement of mediation agreements.<sup>80</sup> This proposal was however abandoned in the course of the deliberations.<sup>81</sup> The drafting committee was of the opinion that the courts would enforce mediation agreements under principles of contract law and therefore no further statutory support was necessary.<sup>82</sup>

## 2. Enforcing mediation agreements under contract law

Occasionally courts followed another approach and enforced mediation agreements by applying principles of contract law.<sup>83</sup>

the same principles *Dluhos v. Strasberg*, 321 F.3d 365, 369 f. (3<sup>rd</sup> Cir. 2003). See also *Salt Lake Tribune Publishing Company, LLC v. Management Planning, Inc.*, 390 F.3d 684, 689 f. (10<sup>th</sup> Cir. 2004).

<sup>76</sup> *Lynn, et al. v. General Electric Company*, No. 03-2662-GTV-DJW, 2005 WL 701270 (D. Kan. Jan. 20, 2005).

<sup>77</sup> *Lynn, et al. v. General Electric Company*, No. 03-2662-GTV-DJW, 2005 WL 701270 (D. Kan. Jan. 20, 2005) at \*6.

<sup>78</sup> *Revised Uniform Arbitration Act*, available at <<http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm>>.

<sup>79</sup> Available at <<http://www.law.upenn.edu/bll/ulc/mediat/UMA2001.htm>>.

<sup>80</sup> 23-30 July 1999 Annual Meeting Draft, § 5(i).

<sup>81</sup> Compare changes to June 1999 Draft at 5, available at <<http://pon.harvard.edu/guests/uma/revjune99.htm>> to Draft December 1999, available at <<http://www.pon.harvard.edu/guests/uma/drafts/dec.99.htm>>.

<sup>82</sup> See annotation to UMA § 5(i) Annual Meeting Draft, July 23-30, 1999.

<sup>83</sup> *E.g. Philadelphia Housing Authority v. Dore & Associates Contracting, Inc.*, 111 F.Supp.2d 633, 636 *et seq.* (E.D. Penn. 2000); *Lakeland Fire District v. East Area General Contractors, Inc.*, 16 A.D.3d 417 (Supr. Ct. N.Y., Appell. Div. 2005); *Waterman v.*

In *HIM Portland v. Devito Builders*,<sup>84</sup> the First Circuit held that parties have to abide by a mandatory mediation agreement that is part of a med/arb clause. The Claimant intended to initiate arbitration without going through mediation and referred to the U.S. Supreme Court's judgements in favour of arbitration.<sup>85</sup> The First Circuit nonetheless rejected this argument:

"Under the plain language of the contract, the arbitration provision of the agreement is not triggered until one of the parties requests mediation." <sup>86</sup>

In *Kemiron Atlantic v. Aguakem International*, the 11<sup>th</sup> Circuit came to the same conclusion:

"Although there is an arbitration agreement between the parties, it is conditioned by the plain language of [...] the Agreement. Then, and only then, [when a mediation has been conducted without success] is the arbitration provision triggered. The FAA's policy in favor of arbitration does not operate without regard to the wishes of the contracting parties. [...] By placing those conditions in the contract the parties clearly intended to make arbitration a dispute resolution mechanism of last resort." <sup>87</sup>

As the application of the FAA to mediation agreements has to be rejected,<sup>88</sup> the policy in favour of arbitration stemming from it does not influence the contract analysis of the mediation agreement. Only the contract law of the respective state is to be applied, as was

*Waterman*, No. FA010726150, 2003 WL 1962782 (Conn. Super. April 3, 2003); *Philadelphia Housing Authority v. Dore & Assocs. Contracting, Inc.*, 111 F.Supp.2d 633 (E.D. Penn. 2000); *Annapolis Professional Firefighters Local 1926, IAFF, AFL-CIO, et al. v. City of Annapolis*, 100 Md.App. 714 (1993); *DeValk Lincoln Mercury, Inc. v. Ford Motor Company*, 811 F.2d 326 (7<sup>th</sup> Cir. 1987); *AMF Incorporated v. Brunswick Corporation*, 621 F.Supp. 456, 461 et seqq. (S.D.N.Y. 1985).

<sup>84</sup> *HIM Portland, LLC v. Devito Builders, Inc.*, 317 F.3d 41, 44 (1<sup>st</sup> Cir. 2003).

<sup>85</sup> See *supra* III. 1.(a)(bb).

<sup>86</sup> *HIM Portland, LLC v. Devito Builders, Inc.*, 317 F.3d 41, 44 (1<sup>st</sup> Cir. 2003).

<sup>87</sup> *Kemiron Atlantik, Inc. v. Aguakem International, Inc.*, 290 F.3d 1287, 1291 (11<sup>th</sup> 2002).

<sup>88</sup> Against an application of the FAA also SCHMITZ, *supra* note 53, 46 et seqq. and 59 et seqq., THOMAS E. CARBONNEAU, *The Law and Practice of Arbitration*, 2<sup>nd</sup> ed. (2007), 120 et seqq. and STIPANOWICH, *supra* note 2, 858 et seqq.

rightly held by the Court of Special Appeals for Maryland in *Annapolis Prof. Firefighters Local 1926 v. City of Annapolis*:

“The AMF court [referring to *AMF v. Brunswick Corp.*<sup>89</sup>] stretched to find this process [mediation] one of arbitration because of its view that the enforceability of the clause depended on whether the Federal Arbitration Act was applicable. We need not make that stretch. We believe that, as a matter of Maryland common law, consistent with the liberal approach now taken to alternative dispute resolution agreements generally, a written agreement to submit either an existing or a future dispute to a form of alternative dispute resolution that is not otherwise against public policy will be enforced at least to the same extent that it would be enforced if the chosen method were arbitration.”<sup>90</sup>

<sup>89</sup> *AMF, Inc. v. Brunswick, Corp.*, 621 F.Supp. 456 (S.D N.Y. 1985). See supra III. 1. b).

<sup>90</sup> *Annapolis Professional Firefighters Local 1926, IAFF, AFL-CIO, et al. v. City of Annapolis*, 100 Md.App. 714 (1993)

If, therefore, mediation agreements can be enforced under principles of contract law, the crucial question is whether an agreement to mediate is not enforceable for lack of certainty or if it goes beyond a mere agreement to negotiate. If – in line with the English court decisions analysed above<sup>91</sup> – this question is answered in favour of enforceability, the courts not only are entitled indirectly to enforce the mediation clause by ordering a stay of proceedings, but they may also order specific performance of the mediation agreement.<sup>92</sup>

However, as a consequence of the legally flawed application of the FAA, the U.S. courts seem to be confused about how exactly a mediation agreement is to be enforced.<sup>93</sup> Whereas some courts order a stay of the proceedings,<sup>94</sup> others order specific performance.<sup>95</sup> Again, other courts dismiss the claim with<sup>96</sup> or without<sup>97</sup> prejudice.

<sup>91</sup> See *supra* at II(2)(b).

<sup>92</sup> *E.g. CertainTeed Corp. v. Celotex Corp. and Celotex Asbestos Settlement Trust*, No. Civ.A. 471, 2005 WL 217032 (Del. Ch. Jan. 24, 2005) at \*14: “[...] The only possible relief CertainTeed could receive for any failure of Celotex to mediate is an order of specific performance. By its very nature, an obligation to mediate is simply an obligation to attempt, with the aid of a third party neutral, to resolve a dispute in good faith. It is an ‘agreement to try to agree’.”

<sup>93</sup> Drafting Committee UMA, 23-30 July 1999 Annual Meeting Draft, Annotation to § 5 (i).

<sup>94</sup> *Mortimer v. First Mount Vernon Industrial Loan Ass.*, No. Civ. AMD 03-1051, 2003 WL 23305155 (D. Md. May 19, 2003) at \*3, dismissing request to order specific performance.

<sup>95</sup> See *e.g. Fisher v. GE Medical Systems*, 276 F.Supp.2d 891, 896 (M.D. Tenn. 2003).

<sup>96</sup> See *e.g. Gray and Assocs., LLC v. Ernst & Young LLP*, No. 24-C-02-002963, 2003 WL 23497702 (Md. Cir. Ct. June 11, 2003).

<sup>97</sup> *E.g. Mortimer v. First Mount Vernon Indus. Loan Assoc.*, No. Civ. AMD 03-1051, 2003 WL 23305155 (D. Md. May 19, 2003): dismissal of complaint without prejudice for failure to mediate; *Tunnell-Spangler & Assocs., Inc. v. Katz*, No. 3030100380, 2003 WL 23168817 (Pa. Com. Pl. Dec. 31, 2003): dismissing defendant’s motion to dismiss without prejudice based on unfulfilled obligation to mediate.

#### IV. – THE POSITION OF THE AUSTRALIAN COURTS

In Australia, the courts are in principle also willing to enforce mediation agreements under contract law<sup>98</sup> provided the wording of the mediation clause is sufficiently clear.<sup>99</sup>

The most prominent early decision is *Hooper Bailie Associated Ltd v. Natcon Group Pty Ltd*.<sup>100</sup> GILES J. held that the agreement to mediate was enforceable on the grounds that:

“what is enforced is not co-operation and consent but participation in a process from which co-operation and consent might come.<sup>101</sup> [...] An agreement to conciliate or mediate is not to be likened ... to an agreement to agree. Nor is it an agreement to negotiate, or negotiate in good faith, perhaps necessarily lacking certainty and obliging a party to act contrary to its interests. Depending upon its express terms and any terms to be implied, it may require of the parties participation in the process by conduct of sufficient certainty for legal recognition of the agreement.”<sup>102</sup>

The decision in *Elizabeth Bay Developments Pty Ltd v. Boral Building Services Pty Ltd*<sup>103</sup> relied on *Hooper Bailie* but did not enforce the mediation agreement in question for lack of certainty. Although the mediation clause referred to a mediation administered by the Australian Commercial Disputes Centre (ACDC), the same judge held that the clause was not sufficiently certain as – in a meticulous analysis – he found inconsistencies between the guidelines of the ACDC and the standard mediation agreement, which the ACDC suggested be used.

<sup>98</sup> Laurence BOULLE, *Mediation: principles, process, practice*, 2<sup>nd</sup> ed., Chatswood, N.S.W.: LexisNexis Butterworths (2005), 422.

<sup>99</sup> *Ibidem*, 425 *et seq.* But see the unreported decision of the Supreme Court of Queensland, 12 March 1990, cited by Michael PRYLES, “Multi-Tiered Dispute Resolution Clauses”, *Journal of International Arbitration* (2001), 159, 162 Fn. 4.

<sup>100</sup> *Hooper Bailie Associated Ltd v. Natcon Group Pty Ltd* (1992) 28 NSWLR 194.

<sup>101</sup> *Idem*, at 206.

<sup>102</sup> *Idem*, at 209.

<sup>103</sup> *Elizabeth Bay Developments Pty Ltd v. Boral Building Services Pty Ltd* (1995) 36 NSWLR 709.

This decision was followed by *Aiton Australia Pty Ltd v. Transfield Pty Ltd*.<sup>104</sup> Here, the court held that, upon the motion being granted, it would enforce the mediation agreement only indirectly by ordering a stay of proceedings but not through specific performance.<sup>105</sup> EINSTEIN J. held that the instant mediation clause was not enforceable because the parties had not made provision for the apportionment and determination of the mediator's remuneration.<sup>106</sup> He therefore declined to exercise the court's inherent jurisdiction to stay the proceedings.<sup>107</sup>

Whereas the courts in New South Wales impose considerable burdens on the drafters of dispute resolution clauses, the Victoria Supreme Court shows more flexibility on this issue. In *Computershare Ltd. v. Perpetual Registrars Ltd (No 2)*,<sup>108</sup> the court upheld a mediation clause although the particularities of the dispute resolution process had not yet been agreed upon. In the view of the Victoria Supreme Court, the flexibility of the mediation process would make it very difficult for the parties to provide for all details of the mediation procedure in advance.

## V. – RECENT DEVELOPMENTS IN CIVIL LAW COUNTRIES

### 1. France

In civil law jurisdictions, mediation is still a relatively new phenomenon. Nonetheless, in France at least the question of

<sup>104</sup> *Aiton Australia Pty Ltd v. Transfield Pty Ltd* (1999) 153 FLR 236.

<sup>105</sup> *Idem*, at 246, 26 and 43: declining to order specific performance because supervision of performance pursuant to the clause would be untenable. But see *The Heart Research Institute Ltd and Anor v. Psiron Ltd* [2002] NSWSC 646 at 74 and 79, being inclined to order specific performance of a dispute resolution process where no constant supervision of the order is necessary.

<sup>106</sup> *Aiton Australia Pty Ltd v. Transfield Pty Ltd* (1999) 153 FLR 236 at 251, 64 *et seqq.*

<sup>107</sup> *Idem*, at 244, 26; see also *Morrow et al. v. Chinadotcom corp. and XT3 Pty Ltd* [2001] NSWSC 209, declining to enforce a clause for lack of certainty where the clause only referred to "dispute resolution to the Australian Commercial Disputes Centre" without selecting mediation out of the five dispute resolution services offered by ACDC.

<sup>108</sup> *Computershare Ltd v. Perpetual Registrars Ltd (No 2)* [2000] VSC 233 [14].

whether parties are required to mediate has already reached the doors of the highest instance.

Whereas the first and second chambers of the *Cour de Cassation* rendered opposing decisions as to the enforceability of mediation clauses in 2001,<sup>109</sup> the *chambre mixte* of the *Cour de Cassation* decided to harmonise the diverging court decisions in *Poiré v. Tripier* in 2003.<sup>110</sup> The *Cour de Cassation* dismissed the claims as temporarily inadmissible, because the parties had not fulfilled their contractual obligation to mediate.<sup>111</sup> Therefore, if the language of the mediation clause is sufficiently clear, French courts will enforce the clause once a party invokes it as a bar to litigation. In a recent decision, the Commercial Chamber of the *Cour de Cassation* affirmed the *Poiré v. Tripier* ruling and held that this defence may be raised at every stage of the proceedings.<sup>112</sup>

## 2. Switzerland

In contrast, the Swiss *Kassationsgericht* Zürich decided in 1999<sup>113</sup> that a conciliation agreement was not a bar to litigation under cantonal procedural law. In the opinion of the *Kassationsgericht*, such agreements are a matter of substantive rather than procedural law. Since the civil procedure rules did not provide for the possibility to conclude conciliation agreements, such agreements could not be raised as a defence to the court's jurisdiction. The consequences of a breach of such an agreement therefore would rather have to be determined under the applicable substantive law.<sup>114</sup> However, the Federal Supreme Court of Switzerland in a recent decision seems to show willingness to enforce the duty to mediate, where the wording of the mediation clause shows that the parties opted for mediation

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<sup>109</sup> Decision by the *Cour de Cassation*, 23 January 2001 and 6 March 2001, *Revue de l'arbitrage* (2001), 749 with commentary by Jarrosson.

<sup>110</sup> *Cour de Cassation*, 14 February 2003, *Revue de l'arbitrage* (2003), 403 *et seq.*, with commentary by Jarrosson.

<sup>111</sup> For a detailed summary see C. JARROSSON, "Observations on *Poiré v. Tripier*", *Arbitration International* (2003), 363 *et seq.*

<sup>112</sup> *Cour de Cassation*, *Chambre comm.*, N° 02-11519 v. 22.2.2005.

<sup>113</sup> 20 ASA Bulletin 2, 373 *et seq.* with commentary by Voser.

<sup>114</sup> See *supra* note 113.

as a mandatory intermediary step and where a party insists upon having mediation and raises the point immediately.<sup>115</sup>

### 3. Germany

In Germany, the question as to whether a mediation clause is enforceable has not yet been explicitly decided upon. However, the German Federal Supreme Court has ruled on dispute settlement clauses that call for comparable forms of ADR. It has held that in the presence of a conciliation clause clearly reflecting the intention of the parties only to refer to litigation as a last resort, the court will enforce the ADR agreement indirectly by rejecting the claim as temporarily inadmissible upon objection of either party.<sup>116</sup>

## VI. – CONCLUSION

The analysis shows that mediation clauses will be enforced in most jurisdictions. This international trend is also reflected by the wording of Article 13 of the 2002 UNCITRAL *Model Law on International Commercial Conciliation*<sup>117</sup> as well as the respective drafting materials.<sup>118</sup> Moreover, Article 2 A of the 2001 *ICC ADR Rules* requires

<sup>115</sup> Swiss Federal Supreme Court – Arret du 6 juin 2007 1<sup>ère</sup> Cour de droit civil, 4A\_18/2007.

<sup>116</sup> Federal Supreme Court, *Neue Juristische Wochenschrift (NJW)* (1977), 2263; Federal Supreme Court, *(NJW)* (1984), 669, Federal Supreme Court, *(NJW)* (1999), 647; Horst EIDENMUELLER, *Vertrags- und Verfahrensrecht der Wirtschaftsmediation* (2001), at 13. Dissenting decision: Federal Labor Court, *Urt. v. 18.5.1999 – 9 AZR 682/98, ZKM 2000, 47.*

<sup>117</sup> Art. 13 Resort to arbitral or judicial proceedings. “Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, *such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with*, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings.” *[emphasis added]*

<sup>118</sup> Comment to Art. 13, (p.) 53: “The consequence of that provision is that *the court or arbitral tribunal will be obliged to bar litigation or an arbitration from proceeding* if that would be in violation of the agreement of the parties (see UNCITRAL, Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation, A/CN.9/514, para. 75).” *[emphasis added]*

the parties at least to attend the first mediation session and evaluate the potential of the process before they may withdraw from the proceedings.<sup>119</sup>

English and U.S. courts in principle enforce mediation clauses if the wording is sufficiently clear and reflects the parties' intention only to proceed to litigation or arbitration as a last resort after mediation has been attempted. However, U.S. courts arrive at this result by following different dogmatic paths. Either they apply the Federal Arbitration Act, or they rely on their inherent power to stay proceedings or they simply invoke principles of contract law.

Australian courts also rule in favour of enforceability. However, in some cases, the courts require the mediation clause to be thoroughly drafted and to make detailed provision for the mediation procedure. Hence, the degree of certainty for the clause to be enforceable as a contract has to be considerably higher in the opinion of the majority of the Australian courts as compared to English jurisprudence.<sup>120</sup>

Common law courts, however, still seem to be reluctant to order specific performance of the duty to mediate. Nevertheless, since damages would not constitute an adequate remedy, the time seems ripe for the courts to make such an order.<sup>121</sup> Where this does not seem appropriate on the facts of the individual case, the court or the arbitral tribunal may exercise its discretion to the contrary.

One might, however, on principle reject the idea of enforcing a mediation clause: if a party is unwilling to negotiate with the other side, enforcing the mediation clause may cause nothing more than an undue delay to the final resolution of the conflict by the arbitral tribunal or the state court. Moreover, such practice could be contrary to the fundamental principle of self-determination in contractual negotiations as reflected by Article 2.1.15 of the *UNIDROIT Principles of International Commercial Contracts* (2004) and moreover violate one of the core principles of mediation.

<sup>119</sup> Guide to Art. 2 A ICC ADR Rules 2001.

<sup>120</sup> See text *supra* II.2.(b).

<sup>121</sup> From the Australian perspective: BOULLE, *supra* note 98, 446; from the U.S. perspective: STIPANOWICH, *supra* note 2, 867 *et seq.*, SCHMITZ, *supra* 53, 63 *et seqq.*

The results of empirical research in the United States do not however support this concern. Most studies show that the settlement rate in mandatory mediation is not significantly lower than the rate which results from voluntary participation in mediation.<sup>122</sup> Thus, some degree of coercion *into* mediation – to be distinguished from coercion *in* mediation – can have a healing effect and open the door to an amicable solution of the controversy. As the parties agreed in advance to give an amicable solution a chance by including a mediation clause into their contract, such “coercion” seems even less troublesome.

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

What is enforced is not a duty to agree, but the minimum participation in the mediation procedure, which might open the door to an outcome of mutual gain.

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<sup>122</sup> Bobbi McADOO / Nancy A. WELSH / Roselle L. WISSLER, “Institutionalization – What do empirical studies tell us about court mediation?”, *Dispute Resolution Magazine* (Winter 2003), 8, 10; Roselle WISSLER, “Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research”, 17 *Ohio State Journal on Dispute Resolution* (2002), 641, 697.