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The Enforceability of Multi-Tier Dispute Resolution Clauses

A comparative analysis of enforcement in selected jurisdictions

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Abstract

Multi-tier dispute resolution (“MDR”) clauses are tailored clauses that prescribe a layered process of dispute resolution, wherein parties in dispute must first undertake one or more alternative dispute resolution processes before they can refer the dispute to adjudication before an arbitral tribunal or a court. The use of MDR-clauses has become increasingly commonplace in Nordic commercial contracts, but the extent to which a Nordic arbitral tribunal or court would be willing to enforce this order of dispute resolution, and what remedies or sanctions such enforcement would result in, are questions that neither legislators nor legal scholars have provided a comprehensive and satisfying answer to. This scholarly and legislative gap in turn calls into question the usefulness and efficiency of this increasingly common contractual clause.

This thesis aims to answer the question of what the Nordic (with a primary focus on the Finnish) legal systems can learn from the way legal scholars, legislators and judges in the Continental European and Anglo-American legal systems have approached the enforcement of MDR-clauses, and how such lessons could aid in creating a working legislative framework for their enforcement in the Nordics.

As a result of a general lack of discussion on the subject by Nordic lawyers, this thesis primarily employs a comparative method. Specifically, the comparative research focuses on jurisdictions within the Anglo-American legal system and their Continental European counterparts, where relatively definitive and mostly consistent case law and scholarly debate regarding the enforcement of MDR-clauses has emerged over time.

While the analysis concludes that enforceability of MDR-clauses in the Nordics is uncertain at best, it also identified several key concepts necessary for a functional legislative scheme allowing for such enforcement. Given the general disinterest in the subject matter shown by Nordic lawyers, this thesis concludes that legislative change is unlikely to develop on a national level, but rather that international harmonization, preferably from the EU, is required to effect change in the enforceability of MDR-clauses.

Index of abbreviations

ADR:	Alternative dispute resolution
COA:	Her Majesty's Court of Appeal in England
CPIL:	Swiss Federal Code on Private International Law
ECHR:	European Convention on Human Rights
EU:	The European Union
EWHC:	High Court of Justice in England
IBA:	International Bar Association
ICC:	The International Chamber of Commerce
KKO:	The Finnish Supreme Court
MDR:	Multi-tier dispute resolution
NCPA:	The Norwegian Civil Procedure Act
SCC:	The Stockholm Chamber of Commerce
SCOTUS:	Supreme Court of the United States
SH:	The Danish Maritime and Commercial Court
SMA:	The Swedish Mediation Act
UNCITRAL:	The United Nations Commission on International Trade Law

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1. Introduction

1.1 Multi-tier dispute resolution clauses

Multi-tier dispute resolution (“MDR”) clauses are tailored clauses that prescribe a layered process of dispute resolution. Each layer consists of a specific dispute resolution method and the process finally culminates in either binding arbitration or litigation.¹ The number of layers can vary, but MDR-clauses generally comprise one or two alternative dispute resolution (“ADR”) steps before allowing adjudicatory proceedings². A basic example of an MDR-clause is a dispute resolution clause requiring the contracting parties to attempt to settle their disputes through mediation or negotiation before initiating arbitral proceedings.³

The basic rationale behind an MDR-clause is built upon the assumption that no dispute is created equal. The stepped approach allows the parties to utilize cost and time efficient ADR-methods - such as negotiation or mediation - in solving smaller and/or less contentious conflicts, while still allowing for the possibility of adjudicatory dispute resolution should the first tier(s) of dispute resolution prove ineffective.⁴ Consequently, the function of the clause relies only upon the actual order in which the different tiers are to be consummated being mandatory, and does not (or in any case, should not) require all steps to be utilized before a dispute is finally settled. If, for instance, a hypothetical dispute is settled at the mediation stage, there is of course no need to continue on to subsequent steps of the MDR-ladder.⁵

¹ One could potentially imagine MDR-clauses prescribing arbitration followed by litigation, but such a clause would serve little purpose in most jurisdictions and is thus left outside the scope of this thesis.

² Adjudicatory proceedings shall for the purposes of this thesis mean either arbitration or litigation.

³ See, inter alia, Erlank, 2002, p. 8, Vlavianos et al., 2017, p. 5, Kayali, 2010, pp. 552–553, Tavendale et al., 2015, p. 32

⁴ Savola, 2006, p. 236

⁵ Depending on the stage at which the dispute is settled and the relevant jurisdiction there may exist secondary reasons to continue on through the ladder, e.g. confirmation of mediation settlements pursuant to the Finnish act on mediation in civil matters and confirmation of settlements in general courts (394/2011). Such measures, however, have little impact on the core function of MDR-clauses as they do not serve a dispute resolution purpose, but rather supports the efficiency of specific types of ADR.

To further illustrate what such an MDR-clause may look like, the ICC mediation model clause D serves as an apt example:

*“In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.”*⁶ (emphasis added)

As can be observed from the sample clause above, the contractual obligation that the clause creates is rather clear; proper consummation of the pre-arbitral step is mandatory, thus barring the parties’ access to arbitration before such consummation has taken place. The clause subsequently appears rather unproblematic from a purely contractual point of view; contracting parties are, pursuant to the general principle of freedom of contract, free to set out the terms of their agreements in accordance with their own wishes. In the context of MDR-clauses, such wishes would include conditions that must be fulfilled for the parties to be allowed to bring a dispute before an arbitral tribunal or a court of law.

MDR-clauses are not, however, despite their sound logical foundation and contractual nature, entirely as unproblematic as it may seem. The subject matter of the clauses (i.e., dispute resolution) places them with one foot in the world of contractual law, and the other in the world of civil procedure. In contrast to contractual law, procedural law relies much more heavily on a formalistic approach and substantive legal frameworks that places limits on the otherwise widely applicable freedom of contract.⁷ The result of this is that the actual function of the otherwise contractually permissible MDR-clause may be limited by what is (or what is not, as the case may be) possible, or even permissible under applicable civil procedural law.

⁶ Available at: <https://iccwbo.org/dispute-resolution-services/mediation/mediation-clauses/> clause D, last accessed 14.5.2020

⁷ Savola, 2006, p. 247

German courts and legal scholars have highlighted this double citizenship of MDR-clauses by characterizing them as three separate agreements encased in a single clause; (1) an agreement to solve disputes by utilizing voluntary ADR (predominantly a non-procedural agreement), followed by two procedural agreements, (2) a *pactum de non petendo*, i.e. an agreement not to sue the other party (which in an MDR-clause is in effect until the conditions of the first agreement are met), and lastly (3), an agreement on how disputes are to be adjudicated (by litigation or arbitration).⁸

1.2 MDR-clauses in the context of civil procedure regulation

As identified in the previous section, the feasibility of MDR-clauses cannot be analyzed and interpreted from a contractual perspective alone. In order to identify and fully understand the problems that MDR-clauses face, one first has to look at the limitations that applicable procedural law places on the clauses.

Seen from a procedural perspective, the substantive building blocks of an MDR-clause can be divided into two main components. Firstly, the pre-adjudicative steps which are generally comprised of one or more ADR-methods, and secondly, the adjudicative step.⁹ The latter of the two can further be divided into separate groups depending on whether the adjudicative step prescribes arbitration or litigation.

Regulation of ADR is generally sparse. No binding international legal framework has been established and the enforcement of ADR-steps in an MDR-clause are therefore wholly dependent on the national dispute resolution laws applicable to each individual dispute.¹⁰ The picture is, however, not much more encouraging on the national level. If one looks at the Finnish jurisdiction as an example, only mediation enjoys any form of legislative support and, even in that case, the support comes in the form of an act regulating the voluntary procedure of court confirmation of

⁸ Dendorfer-Ditges & Wilhelm, 2017, p. 237, see also Mitrovic, 2019, p. 569

⁹ It may be noted that some commenters (see Kajkowska, 2017, pp. 21) have further divided the ADR category into (1) consensual ADR (e.g. negotiation and mediation) and quasi-adjudicative ADR (e.g. expert determination and dispute boards). This division is based on the premise that the quasi-adjudicative has a (at least inferred) supporting legislative framework that the consensual ADR-methods lack.

¹⁰ Kajkowska, 2017, p. 45.

mediation settlements, and not in the form of regulation on the general binding nature of mediation agreements or the actual mediation procedure itself.¹¹ The lack of specific regulation is much the same in most western jurisdictions, and particularly those of the civil law variety, where the codified law is of central importance.¹²

Regarding the adjudicative step, however, legislation provides a more substantial support. The jurisdiction and powers of national courts are well defined in national civil procedure acts, and arbitral tribunals are regulated by a similar (albeit often less comprehensive) regulatory and legislative framework.¹³ The adjudicative step also has the added benefit of wide-ranging international legislation, mainly in the form of the New York convention that guarantees the enforceability of arbitral awards in all signatory states, further ensuring that e.g. arbitration and forum clauses are valid and enforceable even in an international context.¹⁴

Why then this disparaging legislative chasm between ADR and adjudication? One would be hard pressed to produce an accurate and comprehensive answer to the question, but I would argue that it can, in part, be explained from within the historical context of ADR.¹⁵ Both arbitration and ADR has seen a fast and continuous rise in popularity during the past century, perhaps most notably in the context of international commercial contracts. The use of ADR as a first step before – or in lieu of – litigation or arbitration in a commercial context became commonplace in the US

¹¹ The Finnish act on mediation in civil matters and confirmation of settlements in general courts (394/2011).

¹² See *inter alia* Adrian, 2013, p. 140 (Denmark), Sperr, 2013, p. 387 (Norway), Hess & Pelzer, 2013, p. 254 (Germany). See also the Swedish act (2011:860) on mediation in certain civil law disputes. A common feature among the aforementioned countries is that they do have specific acts regulating mediation, but which lack rules regarding the binding nature of mediation agreements and the effects of non-compliance with such agreements. Some scholars and judges have argued that the both the English and American arbitration acts should be applied *mutatis mutandis* to mediation clauses, but the arguments have been criticized and have as of yet not been embraced by a wider audience, see Garimella *et al.*, 2016, pp. 169, Kayali, D., 2010, p. 561 and Dobbins, 2005, p. 166.

¹³ *Ibid.*

¹⁴ See *Infra* chapter 5.1 regarding the scope of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

¹⁵ This thesis will use the commonly European definition of alternative dispute resolution (“ADR”), i.e. all forms of ADR (*inter alia* negotiation, mediation, expert determination, dispute adjudication boards) excluding arbitration. The reasoning behind this choice is to allow for a better terminological framework for differentiating between binding and non-binding tiers in multi-tier dispute resolution clauses.

as early as the 1970's, while the same development in Continental Europe did not take place until about 20 years later.¹⁶ This new evolution of dispute resolution did not reach the Nordic countries in earnest until the beginning of the new millennium.¹⁷

This continuous development of alternative dispute resolution may have led to legislators or courts falling behind the curve of the fast-paced legal practices, thus allowing legislative gaps to form.¹⁸ Such gaps become increasingly evident the more complex the legal practices get, as can be said to be the case with the creation and proliferation of the arguably complex MDR-clause.

Given the varying stages of ADR maturity and development in different parts of the world, in conjunction with the formation of the legislative gaps plaguing ADR in general, it is easy to see how parties to international commercial contracts can run into difficulties when interpreting or applying their ADR-clauses. The multi-tier dispute resolution clause is a good example of these problems. These clauses, which are commonly used in national as well as international commercial contracts around the world, lack a nationally as well as an internationally consistent legislative framework that supports their use and enforcement.¹⁹

1.3 Enforcement of MDR-clauses: the (perhaps) fatal flaw

Equipped with the knowledge of what an MDR-clause is, what its purpose is, how it is systematized and how it is (or isn't, as is all too often the case) regulated, we can now take a close look at the issues that these circumstances give rise to. The chief issue, in simple terms, is that the lack of clear civil procedural rules, both on an international and a national level, makes the enforcement of the clauses uncertain.

Enforcement in this context refers to an adjudicative body upholding the order of dispute resolution mechanisms agreed upon in the MDR-clause, i.e. barring (or otherwise hindering) the

¹⁶ Kayali, D., 2010, p. 551

¹⁷ For Finland see Anna Nylund et al. p. 225 and the Roschier Dispute Resolution Index, 2018, p. 9. These indicate a substantial increase in ADR-proceedings between 1998 and 2012, followed by a stagnation that has lasted to the present day. See Tochtermann, 2008, p. 705.

¹⁸ See Nylund et al. p. 410 for an outline of the slow pace of legislative change in the area of ADR in the Nordic countries.

¹⁹ Salehijam, 2018, p. 277

parties' access to subsequent steps of the clause before the previous steps have been complied with. The level of uncertainty associated with the enforcement of these clauses differs between jurisdictions, thus often presenting contracting parties with the unfavorable options of either having to accept a certain level of uncertainty or spending considerable time and resources on trying to decode the conditions for enforcement in the relevant jurisdiction, the latter task being one that in many cases, as a result of lacking legislation, cannot be satisfactorily completed.

This uncertainty is a problem not only for a party assuming that the agreed upon dispute resolution provisions are binding and, as such, will be upheld by an adjudicator, but also for a party that – as I would argue is often the case in the Nordic countries – assumes that the prescribed order of dispute resolution is of a merely suggestive nature. A party can, as a result and whether or not they are aware of it, not be certain what dispute resolution mechanisms they have available to them at any given time.

The question whether an MDR-clause is enforceable is unfortunately not the end of the matter, but instead gives rise to several secondary issues and uncertainties such as (i) the formal and drafting related requirements for a clause to be enforceable, (ii) the manner of enforcement (i.e. contractual sanctions for breach of contract or procedural remedies such as barring the parties from initiating subsequent dispute resolution steps), and (iii), availability of court review of decisions made in (ii) above.²⁰

The Danish Maritime and Commercial Courts ruling given in the case H-41-10A serves as a practical example of another unexpected, but nonetheless significant, secondary impact that the enforcement (or non-enforcement) of MDR clauses can have. The judge presiding over the case highlighted that there were (at the time) no provisions in Danish civil procedural law that stopped or extended the statute of limitations on claims during ADR, and had the clause been enforced, the claim would have become time-barred from litigation during the prescribed mediation procedure. When no legislative framework for MDR-clauses exists, issues such as the example above will continue to limit the usefulness of MDR-clauses in general.

²⁰ See *Infra* sections 3.2.3 and 3.2.4

Another issue that arises out of the procedural aspects of an MDR-clause is that an enforceable MDR-clause could potentially lead to limitations to rights to access to justice, as provided for in the constitutions of most jurisdictions as well as international law.²¹ This potential limitation comes in two different forms. Firstly, given the *pactum de non petendo* element of an MDR-clause mentioned in the section above, one could argue (as has been done by some scholars)²² that the agreement not to sue is a *de facto* limitation to access to justice. Secondly, the right to access to justice often contains a temporal element, i.e. access to justice must be provided for with some expediency, generally within a reasonable time.²³ One could again argue that the requirement to complete non-legally mandated ADR before access to justice is provided could jeopardize a party's fundamental right to access to expedient justice, particularly if the MDR-clause does not prescribe a set timeframe for the ADR step(s).

How the issues mentioned in this section have been approached and remedied varies between jurisdictions. Building upon a comparatively rich ADR-history, the jurisdictions within the Anglo-American legal system have developed a relatively definitive and mostly consistent case law regarding the enforcement of MDR-clauses. The same can to some extent be said for Continental Europe, where enforcement of MDR-clauses is now all but routine in many jurisdictions. Conversely however, ADR, and in particular the use of MDR-clauses, has had a later conception within the Nordic legal system and, while the use of such clauses is becoming more commonplace in the Nordics, no clear case law or legislative framework for their enforcement seems to exist. In fact, not only do the Nordic countries lack the (arguably) necessary legal framework to support the function of MDR-clauses, but legal scholars and practitioners alike seem to have shown little to no interest in the topic, as a result of which this region also lacks an academic foundation on which such a legal framework could be built.²⁴

²¹ See *inter alia* the Constitution of Finland 21 §, and the European convention on human rights (ECHR) art. 6.

²² Savola, 2006, p. 244

²³ ECHR art. 6.

²⁴ Savola, 2006, p. 236

Given the aforementioned disparity between the availability of legal sources²⁵ on MDR-clauses between the Nordic countries on one hand, and Continental Europe and Anglo-America on the other, this thesis is based on the premise that a comparative review of how these enforcement related issues have been handled in the Anglo-American and Continental European legal systems, where the use of MDR-clauses has a longer and richer history, can, at least partially, provide workable solutions for the challenges and lack of recognition that MDR-clauses are currently facing in the Nordic countries.

This thesis aims to answer the question of what the Nordic (with a primary focus on the Finnish) legal systems can learn from the way legal scholars, legislators and judges in the Continental European and Anglo-American legal systems have approached the enforcement of MDR-clauses, and how such lessons could aid in creating a working framework for their enforcement in the Nordics.

The research question is intentionally broad as a result of the fundamental lack of legislation and research and what one can consequently assume to be a general lack of knowledge on the subject of MDR-clauses in the Nordic countries. The goal is to allow for the comparative analysis to be as comprehensive as possible while making few assumptions as to which identified avenues of approach to enforcement that could be applied in a Nordic context, while still allowing me to delve deeper into more specific lines of questioning where relevant to said context. Such specific questions include (1) the effects of the double citizenship (contractual – procedural) of MDR-clauses on their enforceability,²⁶ (2) the effects of non-compliance with MDR-clauses on the adjudicators jurisdiction and/or the admissibility of the claim, (3) fundamental questions concerning the suitability of enforceable MDR-clauses within the framework of fundamental legal protections such as the right to access to justice, (4) sanctions and remedies applied by

²⁵ The term source in this context includes all legal sources, but is mainly concerned with legislation, case law and academic works.

²⁶ This line of reasoning includes arguments relating to nature of the clause itself, i.e. should the clause itself be interpreted as being completely either contractual or procedural, or is it a hybridization containing elements of both?

adjudicators in case of non-compliance with MDR-clauses, and (5) to what extent drafting influences the enforceability of MDR-clauses.

Finally, based on the results of the comparative analysis, my aim is to identify which solutions to the questions above would best serve the purpose of MDR-clauses in general, while at the same time proposing how such solutions could be applied to the Nordic legal system. This latter goal will also take a deeper look at the possibility of legislative harmonization on different international levels.

2. Methodology

2.1 Background

Seen from a methodological perspective, the almost total absence in the Nordics of statutory rules, relevant case law and legal literature dealing with the use of MDR-clauses gives rise to the following question: how should one approach subjects and topics where the available source material is severely limited? The question is of fundamental importance as it all but eliminates the main methodical tool of the legal scholar, namely doctrinal research. Preliminary research on the topic showed, however, that questions related to the enforcement of MDR-clauses had, albeit sparsely debated in the Nordics, been the subject of significant legal research within other legal systems. As it is critical for any academic endeavor to utilize a methodology that best serves the goal of the research, it quickly became evident that methods other than the purely doctrinal had to be pursued if the research goals were to be achieved.

Based on the literature review performed as a preparation for this thesis, it could be established that MDR-clauses in general, and questions regarding their enforcement in particular, was a subject that has been widely researched on an international level. The vast majority of this scholarly work was geographically limited to the areas of Anglo-America and Continental Europe.

The review further showed that there were only minor regional differences between countries within the Anglo-American sphere (who are predominantly common law countries), and that MDR-clauses were routinely enforced. As is characteristic for the common law sphere, the legal

framework for enforcement was almost exclusively built upon case law.²⁷ Also, the manner of enforcement was largely consistent within this group; MDR-clauses were viewed as procedural agreements, and non-compliance with provisions of the clause were correspondingly subject to procedural remedies. Minor differences were, however, found in the requirements in these jurisdictions regarding, *inter alia*, the certainty of wording of the clauses in order for them to be binding and enforceable. A significant amount of debate among scholars could also be found regarding the categorization of non-compliance as either matters of jurisdiction or admissibility. However, no clear consensus on the matter was to be found.

The Continental European countries showed a similar consistency regarding enforcement of MDR-clauses, but with a notably broader explicit statutory support which, again, is characteristic of the civil law character of these countries. Another noteworthy difference between the two aforementioned groups was that the form of enforcement, i.e. the questions whether the clauses should be seen as substantive or procedural agreements and what remedies were available to the parties, was subject to argumentation and differing opinions on the level of court decisions as well as scholarly research.

The literature review also showed that the state-of-the-art of legal research into the enforcement of MDR-clauses in the Nordic countries is lagging behind its Continental European and Anglo-American counterparts by a significant degree. It may even be said to be practically non-existent as the review resulted in the identification of a handful of articles, none of which even attempted to provide an answer to the question of whether or not MDR-clauses were enforceable in the region.

2.2 Comparative method

As we are faced with the issue of searching for knowledge of, insights in, and solutions to, problems that are unfamiliar to our own legal system but more commonplace in others, one is naturally inclined to turn to the realm of the comparative legal method.

²⁷ Arguments have, however, been made for legislative support in *inter alia* England and the US, see Dobbins, R.N. 2005, p. 166 and *supra* note 12.

The comparative method has historically been seen to serve a multitude of purposes; it has been seen as a tool for (1) the gathering of knowledge of law elsewhere, (2) studying the taxonomy and evolution of law and legal systems/families, (3) the development of a legal system by adding influences from elsewhere, and (4) harmonization.²⁸ As stated in the research question, the aim of this thesis is to support the development of the Nordic legal system by gathering knowledge of the Continental European and Anglo-American legal systems. This coincides perfectly with the third purpose mentioned above. It has also been argued that one of the main purposes of comparative legal research is precisely this; the enhancement of the understanding of one's own legal system by the analysis and understanding of other legal systems.²⁹

This concept contains elements of what many legal scholars refer to as *legal transplants*, a concept that has often been criticized for ignoring or misinterpreting the social and historical context of legal rules within the compared legal systems.³⁰ The criticism is warranted and has to be taken into account whenever attempting to make a comparative analysis. When using comparative elements in this thesis, I have strived to avoid at least some of these contextual issues by (a), identifying the contextual background of foreign legal rules and concepts, (b) analyzing these rules and concepts within that context and (c) evaluating how and to what extent these rules and concepts could fit into the context of the Nordic legal systems. The concept of good faith negotiations (a not unusual ADR-component of MDR-clauses) provides us with a good example of the type of contextual issues that can arise within the sphere of comparative legal research; it has been argued in some Anglo-American legal systems that obligations to negotiate in good faith are unenforceable, at least in part, because the concept of good faith in itself lacks the necessary legal certainty.³¹ The same conclusion is not a given in Nordic or Continental European legal systems, where the concept is more developed and has its own, often, at least on a conceptual level, fairly well-established legal definition.

²⁸ Van Hocke, 2015, p. 2

²⁹ K. Schandbach, 1998, p. 335

³⁰ Collins, 1991, p. 396.

³¹ Trakman, L, & Sharma, K, 2014, pp. 605-607

While the main focus will be on the aforementioned development of knowledge within the Nordic legal system, I will also include the fourth tool in the historical toolbox of comparative legal research, namely harmonization. Harmonization will be explored based on the premise that it serves as attractive option for solving a multi-national need for regulation (as present in the Nordic countries with regards to the enforcement of MDR-clause), especially with consideration to the membership of the Nordic countries in the EU³² and the possibilities of harmonization within the existing international legislative framework that that membership provides.

Finally, the comparative method applied herein is of a functional nature.³³ Pursuant to the research question presented above, the aim of this thesis is not a closer analysis of the underlying legal rules regulating the enforcement of MDR-clauses in Anglo-America and Continental Europe, but rather to (1) analyze what effects the rules and arguments in these jurisdictions have upon the function of MDR-clauses, (2) identify which of these effects better serves this function, and finally (3) interpret how the same effect can be recreated in the context of the Nordic legal system.

2.3 Doctrinal method

While the research goals identified in section 1 above point towards a methodology based on the comparative method, it is important to note that comparative legal research seldom exist in a methodological vacuum, especially where the subject matter is directly related to black letter law. In this case, the subject matter is the enforcement of a contractual clause which ultimately is governed by case law as well as by contractual and procedural statutes. One would be hard pressed to achieve the research goals or find any academically meaningful answers to the research question of this thesis without at the same time utilizing the doctrinal method. This method concerns itself with the technical analysis of, and commentary on, black letter law.³⁴ While it would be an overstatement to say that a hybridized methodology, consisting of both comparative and doctrinal research methods, is utilized in this thesis, limited doctrinal research

³² Norway being the notable exception.

³³ Michaels, 2006, p. 342

³⁴ Salter, M, & Mason, J, 2007, p. 49.

is conducted to further understand the context of the identified legal rules, concepts and arguments. I would also argue that the any final analysis of whether or not the identified legal rules fit in into the existing legal framework of the Nordic countries, must include elements of both comparative and doctrinal research; we are first obliged to analyze the context of both the host (foreign) system and the target (domestic) system to see if the rules and argumentation could work outside the host system, a formally comparative exercise that in itself requires doctrinal analysis of existing statutory frameworks.

2.4 Thematical scope

Multi-tier dispute resolution clauses

While there seems to be some level of consensus regarding the core concept of MDR-clauses (as described above), the exact scope of the term is still somewhat ill defined. The uncertainty mainly pertains to the mandatory nature of pre-adjudicatory steps, i.e. should the term MDR be limited only to clauses that prescribe completion of ADR-steps as mandatory and contractual conditions precedent to adjudication, or should all clauses containing several dispute resolution mechanisms be described as MDR? As can be observed in the sample clause in section 1.1, proper consummation of the pre-arbitral step is mandatory, thus barring the parties' access to arbitration before such consummation has taken place. One can, however, find readily available examples of similar clauses where the pre-adjudicatory steps are purely voluntary, and as such dependent on the parties' consent *in casu*.³⁵ For the purpose of this thesis MDR-clauses will be defined as clauses prescribing mandatory and procedurally separate steps that, for the avoidance of doubt, constitute conditions precedent to subsequent steps. As a consequence, non-mandatory and so-called *hybrid* ADR-clauses, where different ADR-methods can be used concurrently or within the framework of the same procedure, are left outside the scope of this thesis, as they are generally not susceptible to the same enforcement-related problems as their non-concurrent counterparts.

³⁵ See "Model Mediation Clause – Combined Clause" among the SCC model clauses. Available at <https://sccinstitute.com/our-services/model-clauses/english/> last accessed 29.9.2020

Arbitration and litigation

An MDR-clause can prescribe either arbitration or litigation as the adjudicative and culminating step. It is important to note that the choice between these two alternatives can have a significant impact on how and if an MDR-clause is enforced. In the case of arbitration, the arbitral tribunal will make its' decision based on the rules that the disputing parties have agreed to in the arbitration agreement. Such rules often contains *inter alia* provisions regarding the jurisdiction of the tribunals, which, as section 3.2.4 below will show, can affect the enforceability of MDR-clauses. In effect, this means that any analysis of MDR-enforcement outcome where arbitration serves as the adjudicative step in an MDR-clause will be dependent on the particular provisions in the clause itself.³⁶ This counteracts the purpose of the comparative analysis, as the conditions for enforcement (assuming little to no limitations of freedom of contract in arbitration agreements in the applicable jurisdiction) remains the same regardless of the jurisdiction of the place of adjudication.

Conversely, a national is court bound by public law and cannot deviate from the constraints of such law, regardless of the terms of the agreement of the disputing parties, which makes MDR-clauses culminating in litigation a more apt starting point for a comparative analysis. It may also be noted that another limiting factor in the analysis of the enforcement of MDR-clauses in arbitral tribunals is that their awards are generally confidential, whereas national court cases are, as a rule, accessible to the public. For this reason, I will be primarily focused on the enforcement of MDR-clauses in national courts of law,³⁷ while still allowing for a more limited analysis of MDR-clause enforcement in arbitral tribunals where relevant sources are available.

ADR-methods

As was briefly covered in section 1.2 above, the ADR steps of an MDR-clause can further be dissected into two categories: (1) consensual ADR (e.g. negotiation and mediation) and (2) quasi-adjudicative ADR (e.g. expert determination and dispute boards). The first category is

³⁶ Savola, 2006, p. 247

³⁷ This also includes court review of arbitral awards where applicable, for instance in cases where national procedural law dictates that arbitral tribunal decisions made regarding the tribunals jurisdictions are grounds for court review. See *Ibid*, the Finnish arbitration act 41.1,1 § and *infra* note 105

generally considered to be consensual in nature, strives for consensus, and the role of any third party involved in the procedure (e.g. a mediator) is facilitative and not decision based. The second category on the other hand, is often not consensual, is adversarial in nature and results in a unilateral decision by the participating third party.³⁸It has been argued that the difference between the two categories has a significant enough impact on the enforceability of MDR-clauses to necessitate their separate analysis.³⁹ I have, however, decided not to limit the scope of this thesis based on the form of ADR prescribed in the clause. This decision is made with respect to the comparative nature of the research; the assumption that the aforementioned categories of ADR are fundamentally different in terms of enforcement overlooks the possibility that different jurisdictions have different approaches to the enforceability of ADR. Some jurisdictions might make no such distinction at all, and with the focal point of the thesis lying on the Nordic countries, where preliminary research shows no definitive history of enforcement, one is inclined to approach the subject from a sufficiently broad perspective and with limited prejudice as to what should or should affect enforceability of MDR-clauses.

2.5 Geographical scope

At the early stages of this thesis the goal was to attempt, by the way of doctrinal research, to analyze the enforceability of MDR-clauses in the Nordic countries. Initial research, further supported by the findings of the literature review, quickly showed that available source material was so limited that the pursuit would be all but impossible. As a result, the original geographical scope was supplemented by the addition of a comparative element consisting of the inclusion of a review of jurisdictions with a broader historical and legislative background regarding the enforcement of MDR-clauses.

It was evident based on the initial research that the Anglo-American sphere fulfilled these historical and legislative requirements, making this dispersed region an obvious choice for a comparative analysis. It is, however, in this context important to acknowledge what has been identified as a drawback of the comparative research method; results are often limited by the

³⁸ Kajkowska, 2017, p. 24

³⁹ *Ibid.* p. 21

researcher lacking deeper knowledge of that particular legal system as well as by possible linguistic barriers.⁴⁰ This limitation is particularly relevant to this case as I am, as the author, a Finnish law student being primarily familiar with the civil law system of Finland, but considerably less acquainted with the Anglo-American common law systems.

For this reason, and to allow for a more complete picture, a select number Continental European countries were also included in the basis for the comparative analysis.

A closer look at the selected countries within these groups is provided below:

Anglo-America: The research is primarily focused on three countries within this group: The United States of America, the United Kingdom⁴¹ and Australia. All of these are jurisdictions where the use and enforcement of MDR-clauses have a significant history as well as a developed case law.

Continental Europe: Based on preliminary findings in available literature, the following countries have been chosen as representatives of the Continental European legal system: Switzerland, Germany, France and Spain.

Nordic countries: As this paper is written in Finland, and the author therefore has a wider access to relevant databases and other source material in Finland, the latter will be the main focus for the Nordic portion of the thesis. Other Nordic countries⁴² are also covered to the extent that this is facilitated by available source material.

While fairly comprehensive, the geographical scope of this thesis can be justifiably criticized. Firstly, the particular countries selected to represent Continental Europe and Anglo-America are not numerous enough to allow a comprehensive overview of the enforceability of MDR-clauses in the entirety of those regions. On the other hand, it needs to be noted that the goal of this thesis is to identify argumentation and other legal solutions that could aid in the understanding and/or development of the Nordic, and particularly the Finnish, legal system. As such, it is

⁴⁰ Winterton, G., 1975, p. 81

⁴¹ Hereunder referred to as the "US" and the "UK" or "England" respectively. The latter will for the purposes of this thesis not include the hybrid legal system of Scotland.

⁴² With the limitation of Iceland where no relevant source material could be found.

therefore prudent to focus the scope of the review on regions and countries where such argumentation and legal solutions are plentiful. Secondly, the Continental European countries selected present a linguistic challenge; it may be argued that language barriers will hinder the research and further analysis of material from countries where the main legal language is not familiar to the author. This issue has been taken into account by selecting only countries from which numerous up to date English language, but nonetheless local, sources have been identified, and where the sources, despite perhaps differing argumentation by the relevant author, provide for similar accounts of the state of MDR-clause enforcement.

2.6 Structure

This thesis will be structured in a way intended to 1) elucidate the underlying concepts and issues related to MDR-clauses, 2) build upon those concepts and issues by providing contextual information, and 3) use that information to attempt to provide answers to the research questions. Following this basic idea, the structure of the thesis will be as follows:

Firstly, the benefits of MDR-clauses will be explained. This is of critical importance as their inherent usefulness underlines the importance of solving, or at least attempting to solve, the issues that they face. Following this, the problems surrounding the use and enforcement of MDR-clauses is explained. The next section will be the comparative analysis. Here the aforementioned issues and problems will be analyzed and covered in greater detail, separately for each selected jurisdiction. The comparative portion will also contain a sub-section, where the insights, policies and knowledge gathered in the comparative analysis will be condensed and analyzed independently from the legal schemes of the selected jurisdictions. This is done in an effort to identify if the lessons learned in Continental Europe and Anglo-America can be useful also when separated from their original jurisdictional context.

Following the comparative analysis, where the selected jurisdictions have been approached as separate elements, we will briefly look at attempts at, and possibilities of, solving the identified issues by harmonization on a global or multi-national scale.

The last section will thereafter attempt to use the information presented in previous sections to answer the research questions from a Nordic perspective.

3. Benefits and drawbacks of multi-tier dispute resolution

3.1 The use and benefits of MDR-clauses

The underlying rationale of MDR-clauses is that the tiered process allows for a cost and time efficient way of resolving disputes. The clauses are designed to allow contracting parties to solve smaller or otherwise less contentious issues at an early stage by using methods that require little effort and cost, the argument being that it is only the most difficult or contentious issues that should become subject to costly and time-consuming adversarial proceedings, such as arbitration or litigation. MDR-clauses also serve as a way of emphasizing cooperation within contractual relationships and have shown themselves to be quite common in long term contracts such as construction or IT-contracts.⁴³

Despite this logically sound foundation, many legal scholars and practitioners view binding MDR-clauses as fundamentally flawed. They argue that the success of any non-adjudicative form of dispute resolution, for instance negotiations, ultimately relies on a willingness of the contracting parties to participate in good faith, and if a party is unwilling to do so, the only effect the negotiations, and thus also the MDR-clause, would have is to create undue delay until the final adjudicative step can be exercised. If such willingness exists, again, there is nothing to prevent them from agreeing to resort to the same dispute resolution method on a voluntary basis.⁴⁴

While the criticism is warranted to a degree (undue delay will be discussed in more detail in section 28), there are several counter arguments that support the usefulness of MDR-clauses. Firstly, empirical research conducted in the United States shows that the settlement rate for court mandated mediation is not significantly lower than the corresponding rate for voluntary

⁴³ Dobbins, R., (2005), pp. 159–162, Krennbauer, S. (2010), pp. 199-200, Pryles, M. (2001), pp. 24-26, Tavendale *et al.*, (2015), pp. 32-33, Kayali, D. (2010), pp. 551-553.

⁴⁴ Born, 2015, p. 263

mediation, showing that successful mediation is not necessarily dependent on the parties' initial willingness to participate.⁴⁵ Secondly, even in cases where the likelihood of a successful outcome of ADR might initially be seen as low, the process can serve as a way of defining and specifying the dispute, in turn allowing for more efficient adjudicative proceedings down the line.

In addition to the two arguments presented above, the importance of the will and intent of the parties must be emphasized. Pursuant to fundamental contractual principles such as *pacta sunt servanda* and party autonomy, parties have a right to agree on whatever conditions they see as beneficial to them and their particular situation.

3.2 The problems - where commercial practice meets the judiciary

3.2.1 Background

It is important to note that while it can be argued that the rationale behind the MDR-clause – as presented above – is solid, the clauses are also routinely associated with negative consequences. The perhaps most significant shortcoming of MDR-clauses is that they are not always enforced. At this stage it is important to specify what enforcement in this context is meant to entail; the fundamental question is whether or not a court of law or an arbitral tribunal will enforce and uphold the different stages of dispute resolution as binding conditions precedent to subsequent stages, particularly when it comes to the stage that immediately precedes the adjudicative stage. An effective enforcement would mean that the arbitrator or judge finds that non-compliance with a previous step of the ADR-chain constitutes a jurisdictional bar to proceedings (or that the claim brought before the judge or arbitrator is inadmissible, as the case may be).⁴⁶ The problems relating to enforcement of MDR-clauses are exacerbated by the fact that there exists few, if any, clear legislative regimes that would create certainty as to their enforcement. It is also important to note that enforcement within the same jurisdiction may vary between state courts and arbitral tribunals.⁴⁷

⁴⁵ Tochtermann, P., (2008), p. 708

⁴⁶ Jolles, A., 2006, p. 239

⁴⁷ Salehijam, 2018, pp. 278-279

3.2.2 Enforcement of ADR

The person drafting a clause in which, for instance, an obligation to mediate disputes prior to resorting to arbitration is prescribed as mandatory, could perhaps reasonably expect that a counterparty would be barred from initiating or completing arbitration proceedings before any attempt at mediation has been made. This, however, has been shown to not always be the case, and there remains significant uncertainty on an international level as to what constitutes an enforceable MDR-clause, if it is held to be at all enforceable.

At the root of the uncertainty lies the fact that few⁴⁸ national legislative regimes lend express binding force to ADR agreements, i.e. make them mandatory for the contracting parties. Jurisdictions where ADR agreements, notwithstanding what has been said above, *can* achieve binding effect without legislative support almost invariably require varying levels of certainty in the wording used in the clause for such effect to exist.⁴⁹ This means that a lawyer wanting to include an MDR-clause in a contract, especially if it is of an international nature, has to pay close attention to the often quite diffuse requirements for enforcement (if any) that exist in the jurisdiction where the final adjudicative step is to take place. Gary Born, a seasoned and highly acclaimed practitioner and researcher in the field of international arbitration, has described *inter alia* the uncertainty that surrounds MDR-clauses as “a dismal swamp”,⁵⁰ aptly portraying what many lawyers and researchers may feel when analyzing the state of enforcement of MDR-clauses in general.

The general problems associated with the enforcement of MDR-clauses also, as will be presented in subsequent sections, give rise to a number of additional challenges.

⁴⁸ The exceptions being Spain, England and the US. The extent to which the legislative support actually exists is contested. In any case, such support, if it exists, is implicit and derived from legal acts not directly concerning ADR, see *Infra* note 12 and Garimella & Siddiqui, 2016, p. 179

⁴⁹ “Certainty in wording” is here taken to mean the certainty with which the clause provides for *inter alia* (i) the parties intent for the clause to be mandatory, (ii) the ADR process itself, (iii) time limits for completing the ADR process. See *infra* notes 65, 77 and 108

⁵⁰ Born, 2015, p. 1

3.2.3 The underlying nature of dispute resolution agreements

One of the central issues of enforcement in this context is the manner in which a clause is enforced by an adjudicator, or one could say, how the adjudicator approaches the clause itself. A dispute resolution clause can be interpreted as being of either a substantive or procedural nature, and the choice a judge or an arbitral tribunal makes on this matter has a significant impact on the remedies available to a contracting party aggrieved by non-compliance with the MDR-clause. It is, at its core, a question of the legal nature of ADR agreements. The procedural approach will be discussed in the section below, and this section will concentrate on the substantive interpretation.

If an MDR-clause is interpreted as being a substantive agreement, it will be enforced as any other substantive clause in a commercial contract, i.e. non-compliance results in a breach of contract, ultimately leading to possible substantive remedies such as damages, penalties or termination of the contract.

It also has the additional effect of not affecting any the admissibility of a claim or the adjudicators jurisdiction.⁵¹ Although this interpretation has been adopted by *inter alia* Swiss courts⁵² and advocated for by some Nordic commentators⁵³ it has also garnered a significant amount of, in the authors view well deserved, criticism.⁵⁴

The issue here is twofold; first, damages caused by non-compliance with an ADR-obligation would in most cases be all but impossible to quantify, and second, even if the aforementioned problem is solved by adding a liquidated damages clause,⁵⁵ one is still left with a perhaps more fundamental problem; interpreting MDR-clauses as substantive agreements *misses the point*. Many commentators have argued that the remedies available upon non-compliance with MDR-

⁵¹ Oetiker & Walz, 2017, p. 879

⁵² See Mitrovic, 2019, p. 561. Note that this stance has since been reversed by the Swiss Federal Supreme Court in later decisions.

⁵³ International Bar Association, 2015, p. 150-151

⁵⁴ Boog, 2008, pp. 106-107. Arguments have also been presented for a characterization of non-compliance as substantial issues with procedural remedies, although such approaches have not – at least explicitly – been adopted by courts or arbitral tribunals.

⁵⁵ Piers, 2014, p. 299, Mitrovic, M., 2019, p. 571

clauses are, whether or not the sustained damage is quantifiable, not compatible with the parties intent and the purpose of the clause. The argument here is that MDR-clauses, just as free-standing arbitration clauses or forum clauses, are aimed at conducting a dispute resolution procedure and are thus not part of the substantive agreement.⁵⁶

Notwithstanding what has been said above, the approach taken in most jurisdictions in both Anglo-America and Continental Europe has been – in the author’s view accurately – to view non-compliance as a procedural issue.⁵⁷ This approach gives the adjudicator the option of remedying non-compliance with procedural means such as declining jurisdiction, ordering a stay of proceedings and/or treating the claim as inadmissible, all in essence constituting a bar from adjudicative proceedings until the conditions precedent in the MDR-clauses have been fulfilled.⁵⁸

3.2.4 Characterization of issues of non-compliance

An adjudicator presented with a claim involving non-compliance with an MDR-clause must first decide how the question is to be characterized. The options most commonly discussed by legal scholars relate to admissibility and jurisdiction.⁵⁹ While this may at first glance seem like a purely academic undertaking, this section will outline the, sometimes severe, practical ramifications of this choice.

If non-compliance with an MDR-clause is seen as a jurisdictional issue, the basis for the defense will be that the agreement to arbitrate has not been activated. If no agreement to arbitrate exists, the arbitral tribunal lacks jurisdiction to hear the dispute. Conversely, if the claim is seen as one concerning admissibility, the defense will be based on the argument that an agreement to arbitrate exists, but that the non-compliance hinders the submission of substantive claims until the conditions precedent have been complied with.⁶⁰

⁵⁶ Salehijam, M., 2019, p. 213

⁵⁷ *Ibid.* pp. 2013-2014, see also Oetiker & Walz, 2017, pp. 873-874

⁵⁸ Mitrovic, M (2019), pp. 263-265. While it goes without saying, an adjudicator can also choose not to apply any remedies.

⁵⁹ See *inter alia* Oetiker & Walz (2017), p. 874-875

⁶⁰ Born, G., (2015), p. 243. Born also proposes a third option: “procedural”.

Before the question is discussed further, however, it is important to note that since no binding international legislative framework for the enforcement of MDR-clauses exist, the characterization options available to an adjudicator is ultimately decided by the procedural laws applicable in the relevant jurisdiction. As a result of terminological and legislative differences, it is not possible to provide a uniform approach to the exact consequences of these options in this section.⁶¹ These jurisdictional differences will be highlighted and discussed in further detail in the comparative analysis in sections 4 below.

3.2.5 Other practical considerations

When two parties have entered into a contract incorporating an MDR-clause that is binding in the relevant jurisdiction, they encounter another issue: time. MDR-clauses can cause delay, i.e. mandatory ADR-steps that have the effect of delaying meaningful arbitration or litigation.⁶² This is the case in particular when the parties to the dispute are of staunchly opposing opinions but are forced by contract to pursue good-faith negotiations or similar ADR-methods requiring mutual cooperation before their MDR-clause allows them to move on to subsequent, and potentially more meaningful steps.

At the more sinister end of the spectrum is the use of MDR-clauses as a dilatory tactic, i.e. as an intentional tool for causing delay. It is worth noting that the use of MDR-clauses for tactical purposes is not limited to circumstances surrounding the statute of limitations but can also affect a party's access to interim measures such as attachments.⁶³

⁶¹ For instance, the term “admissibility” has differing meanings in many jurisdictions, see Paulsson, J., (2005), p. 617

⁶² Tomic, K., 2017 p. 369

⁶³ Vlavianos, G.M., et al. 2017 chapter “Drawbacks”.

4. Comparative analysis

4.1 Anglo America

4.1.1 England and Wales

England stands as a stark contrast to the Nordic countries as regards the enforcement of MDR-clauses. The rule of thumb is that a sufficiently certain MDR-clause is enforceable by national courts.⁶⁴ This, however, leads us to the following question: What makes an MDR-clause sufficiently certain?

In his judgement in *Holloway v. Chancery Mead Ltd*, judge Ramsey J of the High Court of Justice in England (EWHC) formulated the following framework of conditions which became the principal way of determining the enforceability of an MDR-clause in England:

- A. A step cannot be contingent on the parties' mutual agreement.
- B. The administrative process for selecting a party to resolve the dispute must be adequately defined.
- C. The process, or a model for the process, should be set out in such detail as to make the process sufficiently certain.⁶⁵

If the aforementioned criteria are fulfilled in relation to a certain step in an MDR-clause, that step shall be viewed as enforceable and, thus, capable as serving as a condition precedent to the subsequent steps. The case *Sulamerica CIA Nacional de Seguros v. Enesa Engenharia* from Her Majesty's Court of Appeal in England (COA) serves as a good example of this framework. In the case, the parties had agreed to the following:

"[...] prior to a reference to arbitration, [the parties] will seek to have the Dispute resolved amicably by mediation [...] if the Dispute has not been resolved to the satisfaction of either party within 90 days of service of the notice initiating mediation, or if either party fails or refuses to participate in the mediation, or if either

⁶⁴ Jenkins et al. 2013, para. 9-70

⁶⁵ [2007] EWHC 2495 (TCC) para. 81

*party serves written notice terminating the mediation under this clause, then either party may refer the dispute to arbitration*⁶⁶

The COA deemed that this language did not meet the conditions described above. Firstly, it did not define the mediation process in certain enough terms. Secondly, it did not specify the selection process for a mediator. Further, essential matters remained to be agreed between the parties. Thus, the clause ultimately failed all three conditions. Since the first part of the MDR-clause was not enforceable, it could not be deemed a condition precedent for subsequent steps.⁶⁷

As the requirement of certainty in 3) above excludes vague descriptions of the parties' obligations, English courts have historically been dismissive of MDR-clauses where their first step consists of an undertaking to settle the dispute through good faith or amicable negotiation. Since such undertakings rely solely on the parties' mutual agreement (in the words of Lord Ackner: "*an agreement to agree*")⁶⁸ it could also be argued that such undertakings would not satisfy Judge Ramsey's first condition. The reasoning seems to be that it would be impossible for a court to determine whether or not the obligations were complied with.⁶⁹

This however changed with the case *Tang Chung Wah & Anor v. Grant Thornton International Ltd*, where the EWHC determined that a requirement to negotiate as an ADR-method could be enforced, provided it fulfils a list of five criteria consisting of:

*"[...] (a) a sufficiently certain and unequivocal commitment to commence a process; (b) from which may be discerned what steps each party is required to take to put the process in place; and which is (c) sufficiently clearly defined to enable the court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach."*⁷⁰

⁶⁶ [2012] EWCA Civ 638, para. 5

⁶⁷ Vlavianos, G.M., et al. 2017, chapter "England and Wales".

⁶⁸ See Lord Ackner's commentary on the case *WALFORD V MILES*: HL 1992 and [1992] 2 AC 128

⁶⁹ Kayali, 2010, p. 562

⁷⁰ [2012] EWHC 3198 (Ch) para. 60

While the MDR-clause in this particular case was deemed to be unenforceable as it contained no other meaningful description of the negotiation procedure than the term “*good faith*”⁷¹, it did open the door for the possibility of enforcement of the negotiation provisions.

The more recent ruling in *Emirates Trading Agency v. Prime Mineral Exports*⁷² tested the conditions outlined in the previously mentioned cases; the parties had entered into an agreement containing an MDR-clause where the first step consisted of good-faith negotiations (or “*friendly discussion*”, as it was described in the contract). The clause was upheld by the Commercial Court, i.e. seen to constitute binding conditions precedent, after first having been deemed unenforceable by an arbitral tribunal and despite containing no further description of the negotiation process.⁷³ The *Emirates* case has been the subject of many different scholarly interpretations – Garimella *et al.* describes the case as marking “*an important shift in the English jurisprudence on the enforceability of ADR procedures as conditions precedent to arbitration in a Multi-tiered dispute resolution clause*”. Others have been more apprehensive and noted that the case could be an outlier.⁷⁴

What the future implications of the case will be is uncertain, but it was made clear in the ruling that it was not meant to invalidate the conditions set by Ramsay J in the case *Holloway v. Chancery Mead*. This indicates that MDR-clauses in English jurisdictions are to be judged *in casu*, despite the frameworks outlined above.⁷⁵

In conclusion, it can be said that the English legal system applies a fairly consistent set of conditions that have to be complied with for an MDR-clause to be enforceable. As the conditions concern the level of detail used in the description of the ADR-methods, a lawyer can increase the likelihood of enforcement by drafting a comprehensive and detailed MDR-clause.

⁷¹ *ibid.* para. 57

⁷² [2014] EWHC 2104

⁷³ Tevendale, 2015 pp. 36-37 and Jeremy Andrews *et al.*, 2014

⁷⁴ Salehijam 2019, p. 291 and Garimella *et al.* 2016, p. 173

⁷⁵ Krauss, O. 2016 p. 149

4.1.2 Australia

Australian courts, through partially shared Commonwealth case law, generally follow the framework of conditions set by English courts, i.e. MDR-clauses can constitute conditions precedent for arbitration or litigation provided, *inter alia*, that the ADR-undertakings in the pre-arbitration/litigation stages are sufficiently certain. Australian courts have also deemed MDR-provisions regarding negotiations as legally binding, without taking a direct stance on whether they are certain enough to constitute conditions precedent for subsequent steps.⁷⁶

4.1.3 United States of America

Not unlike the situation in Commonwealth jurisdictions, enforceability of MDR-clauses is generally looked upon favorably by US courts. Unlike their English counterparts however, courts in the United States have not placed the same emphasis on the description of particular steps in the MDR-chain. The main focus has instead been on the compulsory nature of the language used to describe the conditional relationship between the different steps (“mediation is conditions precedent to arbitration” or “shall” instead of “may” or similar non-mandatory statements).⁷⁷ A further distinction is made between *substantive* and *procedural* conditions precedent, further signifying the contractual-procedural schism that MDR-clause face. While the distinction does not determine the *de facto* enforceability of the clause, it does determine whether the clause constitutes an outright jurisdictional bar to certain proceedings, or if the question of jurisdiction is to be ruled upon by the relevant adjudicator.⁷⁸

If conditions precedent set out in an MDR-clause are deemed to be procedural, then the relevant court or tribunal has jurisdiction to settle the dispute and any potential consequences of non-compliance with the terms of the clause, including ruling on its own jurisdiction. If, however, an MDR-clause is deemed to include substantive conditions precedent, then non-compliance would result in relevant court or tribunal lacking jurisdiction to try the case altogether.⁷⁹

⁷⁶ Vlavianos, G. M., et al. 2017, chapter Australia, see also United Group Rail Services Ltd v. Rail Corp New South Wales, where the New South Wales Court of Appeals rendered a judgement on negotiations as conditions precedent.

⁷⁷ Krennbauer 2010, p.202

⁷⁸ Vlavianos, G. M., et al. 2017, chapter The United States

⁷⁹ *Ibid.*

A case that provides a good example of the distinction between substantive and procedural conditions is the US Supreme Court (SCOTUS) ruling *BG Group plc v. Republic of Argentina*, where the parties had agreed to submit disputes to a local court before commencing arbitration. The MDR-clause was formulated in such a manner that it merely described under which conditions arbitration proceedings can be initiated, not whether or not there was a contractual obligation to arbitrate.⁸⁰ SCOTUS said the following in its verdict: “*The litigation provision is consequently a purely procedural requirement – a claims processing rule that governs when arbitration may begin, but not whether it may occur or what its substantive outcome will be on the issue in dispute*”.⁸¹ The principal difference between a procedural and a substantive condition, in the light of the abovementioned quote, is that the former describes, *inter alia*, how or when a certain MDR-step is to be realized, whereas the latter sets out conditions for whether or not a certain step can be used at all and what the result of compliance or non-compliance is.

Furthermore, SCOTUS held that in the absence of clear language to the contrary, the presumption is that parties that agree on a specific forum – in this case arbitration – also intend for that forum to decide on matters regarding the meaning and application of the agreed upon procedure.⁸² In other words, unless the relevant contract explicitly states otherwise, it is up to the agreed upon court or tribunal to rule on its own jurisdiction. Conversely, had the clause stated that commencement of litigation proceedings in a local court was a condition precedent – or using other similar mandatory language – to arbitration, non-compliance with a previous step in the MDR-chain could constitute a jurisdictional bar for parties to commence proceedings in relation to a latter step.⁸³

It is important to note that *BG Group plc v. Republic of Argentina* does not mean that MDR-clauses that contain procedural provisions lose their significance entirely, just that the relevant

⁸⁰ *Ibid.*

⁸¹ *BG Group plc v. Republic of Argentina*, 572 U.S. (2014) p. 9

⁸² *Ibid.*

⁸³ *Ibid.* The SCOTUS ruling in the case is supported by subsequent rulings as for instance the case *Int’l Ass’n of Bridge, Structural v. EFCO Corp and Constr. Products Inc.* by the Court of Appeals for the Eight Circuit.

court or tribunal has jurisdiction to hear the case. It is within the realm of possibility that such a court or tribunal would conclude that they lack jurisdiction and dismiss the case.

The case *HIM Portland LLC v. DeVita Builders Inc* from the U.S. Court of Appeals for the First Circuit provides an example of the phrasing of an MDR-clause in a way that constitutes substantive conditions precedent. HIM Portland and DeVita Builders had entered into an agreement that contained the following clause: “Section 9.10.1: Claims, disputes and other matters in question arising out of or relating to this Contract shall be subject to mediation as a condition precedent to arbitration or the institutional of legal or equitable proceedings by either party”⁸⁴ (emphasis added). The court’s conclusion was that the wording made it apparent that the parties’ intention had been to bar arbitration until the conditions precedent had been satisfied.⁸⁵ Subsequent cases⁸⁶ from appellate courts in the United States support the notion that phrasing containing “*conditions precedent*” is adequate to override the presumption described in *BG Group plc v. Republic of Argentina*.⁸⁷

The goal, then, should be for the person drafting an MDR-clause to use language constituting or incorporating substantive provisions. This can be achieved by the use of mandatory language that clearly outlines that earlier steps are conditions precedent to later steps.

There are, however, signs that United States courts are abandoning their previously strong reliance on mandatory language. MDR-clauses have been enforced in a number of recent cases⁸⁸ where the clauses have lacked the clear and mandatory wording mentioned above.⁸⁹

While the legal framework for the enforcement of MDR-clauses in the US has developed through case law, there are also a few district court level cases in the US that supports the notion that mediation obligations are analogous to arbitration agreements and can be enforced with reference to the Federal Arbitration Act. This view has however been mildly criticized as curious

⁸⁴ HIM Portland LLC v. DeVita Builders Inc – Case No. 02-1955 (2003), chapter I.

⁸⁵ Ibid. chapter III.

⁸⁶ Ponce Roofing Inc v. Roumel Corp.

⁸⁷ Vlavianos, G. M., et al. 2017, chapter The United States

⁸⁸ Kemiron Atlantic Inc v. Aguakem International Inc (Court of Appeals for the Eleventh Circuit) and Red Hook Meat Corp v. Bogopa-Columbia Inc (SCOTUS)

⁸⁹ Vlavianos, G. M., et al. 2017, chapter The United States, last paragraph

by Dobbins, the one of few researchers to discuss the case, and one should be cautious of interpreting this as the prevailing stance on the issue in the US.⁹⁰

4.2 Continental Europe

4.2.1 Switzerland

Switzerland lacks specific codified law regulating non-compliance with MDR-clauses, and instead relies, much like the Anglo-American countries referred to above, on general principles of contract law to solve such disputes. As a consequence of this, the development of the foundation on which the enforcement of MDR-clauses is built in Switzerland is, to a large extent, based on case law.⁹¹

A number of cases from lower Swiss courts, beginning in 1999,⁹² have resulted in decisions where MDR-clauses have been enforced, a stance that has later been upheld by several decisions to the same effect from the Swiss Federal Supreme Court⁹³. This is not to say that all MDR-clauses are enforceable by default under Swiss law; certain requirements set by general principles of contract law must be fulfilled for such enforceability to ensue. Firstly, these general principles dictate that the wording of the clause must indicate that the parties' intent was to make the pre-adjudicatory dispute resolution steps mandatory. Secondly, the wording of the clause must make it clear exactly when the pre-adjudicatory tier is satisfied. Swiss courts have exemplified these requirement by arguing that a set time limit for the pre-arbitral tier serves as an indicator of the mandatory nature of the step, as does providing an exact time for the compliance (or non-compliance, as the case may be).⁹⁴ Lastly, a party invoking the non-compliance of an MDR-clause must do so in good faith. In practice this means that a party has to, at the very least, propose the

⁹⁰ Dobbins, R.N. (2005), p. 166-167

⁹¹ See, *inter alia*, Oetiker & Walz, 2017, p. 874 and Boog, 2008, p. 105.

⁹² The first case, to the Authors knowledge, being Cassation Court of the canton of Zürich, Decision dated March 15th, 1999, no. 29. See also Erlank, 2007, p. 30.

⁹³ *Inter alia* Decisions 4A. 18/2008, BGE 142 III 239 and BGE 142 III 296 from 2016.

⁹⁴ Oetiker & Walz, 2017, pp. 105-106, see also the Swiss Federal Supreme Court decision 4A. 18/2008

commencement of pre-arbitral steps before invoking the counter party's non-compliance with the clause.⁹⁵

It may then be said that Swiss case law provides a consistent legal framework for the enforcement of MDR-clauses: these are enforceable but are nonetheless subject to validity requirements set in the general principles embodied in Swiss contract law. Where the Swiss courts have shown considerably less consistency, however, is in the manner in which these clauses have been enforced.⁹⁶ As mentioned in section 3.2 above, the challenges relating to the manner of enforcement can essentially be divided into two separate issues: (1) whether or not remedies available are substantive or procedural in nature, and (2) if procedural, what specific action the court or adjudicator should take. These aforementioned issues have been subject to a fair amount of debate in Swiss courts and among legal scholars.

In 1999, the Cassation Court of the canton of Zürich ruled⁹⁷ that, contrary to arbitration clauses⁹⁸ that have procedural effects granted to them by the virtue of statutory law, MDR-clauses lack any statutory support in procedural law and are therefore substantive in nature and are not to be viewed as procedural requirements that have to be complied with before the initiation of adjudicative proceedings. As a result, the recourse available to the aggrieved party were held to be purely substantive in nature, e.g. contractual damages.⁹⁹ Later Swiss case law¹⁰⁰ from the Federal Supreme Court has, however, reversed the earlier precedent and criticized the approach as insufficient, as according to article 97 of the Swiss Code of Obligations, claims for damages must be substantiated, and as such substantiation would be all but impossible in the case of non-compliance with an MDR-clause. The difficulty can be attributed to the fact that MDR-clauses do not mandate a successful ADR-result, e.g. agreement during negotiation, and that the actual

⁹⁵ This also entails actual participation in the pre-arbitral step, should the counter party accept the proposition, see Oetiker & Walz, 2017, p. 878, Mitrovic, 2019, pp. 563-564 and Boog, 2008, p. 110.

⁹⁶ Mitrovic, 2019, pp. 560-561, see also Boog, 2008, p. 106.

⁹⁷ *Supra* note 93

⁹⁸ "Arbitration clauses" are here meant to indicate clauses providing only for arbitration without prior ADR.

⁹⁹ Mitrovic, 2019, p. 561

¹⁰⁰ See BGE 142 III 296

extent of any damage caused is therefore impossible to quantify.¹⁰¹ This would then, in practical terms, result in there being no effective recourse available to a party that objects to the non-compliance of an MDR-clause.

This current approach of treating non-compliance with MDR-clauses as procedural and not substantive, initiated by the Swiss Federal Supreme Court's decision BGE 142 III 296, still leaves open the question of what procedural remedies should be available to the court or arbitral tribunal and the aggrieved party, i.e. what action the adjudicator should take to remedy the breach. Mitrovic presents four different options from a Swiss perspective: (1) the arbitral tribunal could decline jurisdiction on the basis of the claim before it being brought prematurely,¹⁰² (2) the arbitral tribunal could declare the claim temporarily inadmissible, (3) the arbitral proceedings could be stayed until the breach is remedied, or (4) no remedies at all.¹⁰³

One could here argue that, with the exception of alternative (4), the choice made by the arbitral tribunal is of little or no consequence to the claimant – the end result either way is that arbitration cannot proceed until the pre-arbitral steps of the MDR-clause are satisfied. From a Swiss perspective, however, this is not necessarily true as article 190 of the Swiss Federal Code on Private International Law (“CPIL”) states that an arbitral award can be challenged in court “if the arbitral tribunal erroneously held that it had or did not have jurisdiction”¹⁰⁴. This would, in effect, mean that any arbitral award under alternative (1) above opens the door for court challenges to that award. Conversely, alternatives (2) and (3) would technically not be questions of jurisdiction but instead admissibility and therefore not be subject to possible court challenges.

To make matters more problematic, the Swiss Federal Supreme Court has, however, consistently argued that any non-compliance with MDR-clauses, regardless of which of alternatives (1) to (3) above is used in the arbitral proceeding, can be challenged under CPIL art. 190.¹⁰⁵ This stance by

¹⁰¹ Mitrovic, 2019, p. 562, this argumentation is based on the interpretation that the agreement to arbitrate is conditional on the pre-arbitral steps having been complied with, and that the tribunal lacks jurisdiction until such time. See also Oetiker & Walz, 2017, p. 875

¹⁰² *Ibid.* p. 563–564

¹⁰³ *Ibid.* p. 565–566

¹⁰⁴ The Swiss Federal Code on Private International Law art. 190 (2)(b)

¹⁰⁵ Mitrovic, 2019, pp. 563–564

the Swiss courts has been heavily criticized by commentators such as Stojilkovic, who critically highlights the fact that the court, in the landmark case BGE 142 III 296, decided that the proper remedy for non-compliance should be a stay of proceedings (notably a decision that implies existing jurisdiction of the tribunal) while at the same time basing its right of review on art. 190 CPIL, which assumes that the tribunal lacked jurisdiction.¹⁰⁶

The problem with the approach of an arguably unlimited right to challenge an arbitral tribunal's decisions on non-compliance with MDR-clauses adopted by the Swiss Federal Supreme Court is that it undermines one of the more fundamental purposes of an MDR-clause: Efficiency. Court challenges to such an arbitral award (or decision, as the case may be) could in many cases lead to significant delays in resolving the underlying dispute, as the case may move from the tribunal to the court and then back to the tribunal again.

In summary, it can be said that MDR-clauses are enforceable under Swiss law, but that the case law based legal framework for such enforcement is somewhat problematic, in that it currently allows for wide reaching court review of any decision made by an arbitral tribunal on the matter. The latter case law has however been the subject of some criticism and may be subject to future change.

4.2.2 Germany

When analyzing the state of enforcement of MDR-clauses in Germany, one is obliged to first take notice of the fact that Germany lacks a comprehensive regulation of ADR in general. ADR agreements are therefore, as the reader of this thesis will notice is the case for most countries covered herein, subject chiefly to the general rules and principles of (in this case German) contract law.¹⁰⁷ Pursuant to these general rules and principles, binding ADR agreements are subject to certain requirements: (1) the parties' express intent to use ADR, (2) the relevant ADR-mechanism

¹⁰⁶ Stojilkovic, 2016, p. 906.

¹⁰⁷ While Germany has a Mediation act (Ger: *Mediationsgesetz*), it does not, nor does any other German civil procedure act, regulate the binding effect of ADR agreements. See Salehijam, 2018, p. 293.

must be clearly defined, and (3) the types of disputes that are subject to the agreement must be identified.¹⁰⁸

Within the framework described above, German courts have shown a strong propensity towards enforcing MDR-clauses that fulfill the aforementioned criteria. In line with Swiss law, German courts and scholars have also subscribed to the procedural approach concerning the characterization of the clause as well as the remedies for non-compliance with MDR-clauses.¹⁰⁹

Contrary to non-definitive stance of the Swiss courts on what available procedural remedy a court or tribunal should choose when presented with a claim of non-compliance with MDR-clauses, the German courts have developed a consistent and arguably sound policy for the choice based on Federal Court of Justice¹¹⁰ decisions dating back to the early 1980s.¹¹¹ In the view of the German Federal Court of Justice, ADR-agreements are procedural in nature and therefore comparable to arbitration agreements and should, at least as far as questions of jurisdiction and admissibility is concerned, be interpreted as such. The result, then, is that a court or arbitral tribunal should in the case of non-compliance with pre arbitral steps, claim jurisdiction but declare the action inadmissible for the moment.¹¹² The thinking is that the purpose of an MDR-clause is not to exclude the jurisdiction of the adjudicative step, but rather to require certain other steps to be completed before the adjudicative steps becomes available. Or in the words of Mitrovic: “Pre-arbitral tiers presumably do not address the question ‘if’ the arbitral tribunal is competent to hear a claim at all, but only ‘when’ it is competent to do so”¹¹³.

The line of reasoning provided by both the German courts and Mitrovic on the issue of jurisdiction v. admissibility seems to stand up to scrutiny. The parties have, after all, explicitly agreed on a specific final adjudicator in the MDR-clause, and it would seem to be contrary to the parties’

¹⁰⁸ *Ibid.* pp. 293-294

¹⁰⁹ Mitrovic, 2019, p. 568

¹¹⁰ Ger: *Bundesgerichtshof*

¹¹¹ See *inter alia* Bundesgerichtshof cases BGH, NJW 1984, pp. 669 and BGH, NJW 1999, pp. 647

¹¹² Mitrovic, 2019, p. 569

¹¹³ *Ibid.*

intent to question the competence of such an adjudicator, barring any substantive law to that effect.

German courts and scholars have in connection with arguments concerning MDR-clauses also tackled an issue that has thus far gone unmentioned; the *pactum de non petendo* – agreement not to sue – element of MDR-clauses. One could argue that this type of agreement serves as the basis of MDR-clauses, as they stipulate that a certain ADR undertaking is to be completed and should that not be the case, a party may not sue (whether in court or in arbitral proceedings) the other party. In effect, the German courts view MDR-clauses as three separate legal acts: (1) an ADR agreement that is connected to (2) an arbitration (or other adjudicative) agreement by (3) a waiver or agreement to not bring action, that together create a procedural agreement (Ger: *prozessvertrag*).¹¹⁴ This, then, raises the question of the validity of *pactum de non petendo* agreements in general, as they could be argued to encroach on the fundamental right of access to justice of the parties. This issue was carefully considered by the German Federal Court of Justice in the 1998 case VIII ZR 344/97¹¹⁵, where the court conceded that the right of access to justice was indeed a fundamental right, but while an agreement excluding this right completely would not be valid, less severe limitations or modifications to this right could, with reference to the freedom of contract, be legally valid if agreed upon by the parties. Waivers of the right to sue, as used in MDR-clauses, were deemed to be a permissible limitation of the right of access to justice.¹¹⁶

The current state of enforcement of MDR-clauses in Germany can thus be stated to be relatively certain, both in that such clauses are routinely enforced by courts as well as arbitral tribunals and in that the approach to, and the form of enforcement of, MDR-clauses, are well established and non-controversial. MDR-clauses are seen as procedural agreements and non-compliance leads to the claim being temporarily inadmissible until such time when the pre adjudicatory steps have been satisfied.

¹¹⁴ Dendorfer-Ditges & Wilhelm, 2017, p. 237, see also Mitrovic, 2019, p. 569

¹¹⁵ BGH, NJW 1999, pp. 647

¹¹⁶ Mitrovic, 2019, p. 569-570 and Salehijam, 2018, p. 295

4.2.3 France

Questions of non-compliance with MDR-clauses has in France had a more varied past in than its Continental European counterparts analyzed above; French courts have routinely dismissed the approach of substantive remedies for non-compliance, but nonetheless struggled for a long time with what, if any, procedural remedies should be applied.¹¹⁷ Between the years 2000 and 2001, two separate chambers of the Court of Cassation¹¹⁸ made two fundamentally differing decisions on the available remedies for non-compliance.¹¹⁹ The chamber presiding over the case argued that no remedies at all can be applied in such cases, effectively making the relevant MDR-clause non-enforceable, while the other chamber came to the conclusion that the claim brought before it was inadmissible.¹²⁰ The uncertainty stemming from this division was, however, solved in the later landmark case *Poiré v. Tripier* where the same court stated that “*a contractual clause establishing mandatory mediation procedure prior to court proceedings constitutes an obligatory bar to proceedings if invoked by the parties*”.¹²¹ In support of its argument in this case, the court cited art. 122 of the French Code of Civil Procedure that regulates the inadmissibility of claims. The aforementioned article contains a list of grounds on which a claim for inadmissibility may be presented, but this list does not include, be it explicitly or otherwise, a ground that would be applicable to the non-compliance with pre-adjudicative steps agreed upon by the parties. The court found that the list provided in art. 122 had not been intended to be exhaustive and further concluded that non-compliance with an MDR-clause should be viewed as grounds for inadmissibility pursuant to said article.¹²²

It may be noted that the Court of Cassations stance on *Poiré v. Tripier*, as cited above, did not only concern the general binding nature of MDR-clauses, but interestingly also implied that a

¹¹⁷ Mitrovic, 2019, pp. 571-572

¹¹⁸ Fra: *Cour de Cassation*. One of four French courts of last resort, for all intents and purposes comparable to a supreme court.

¹¹⁹ Tochtermann, 2008, p. 705

¹²⁰ Mitrovic, 2019, pp. 571-572, see also the Cour de Cassation decisions *Clinique du Morvan v. Vermuseau*, January 23rd, 2001 (1st chamber), and *Peyrin et autres v. Polyclinique des Fleurs*, July 6th, 2000 (2nd chamber).

¹²¹ Cour de Cassation decision *Poiré v. Tripier*, February 14th, 2003 (mixed chamber), see also Constantinescu & Corchis, 2017, p. 59

¹²² Mitrovic, 2019, pp. 571-572

court would not enforce non-compliance *ex officio*, i.e. if not explicitly invoked by a party. This is an important aspect of MDR-clauses that is easily overlooked. Parties who agree to the use of mandatory ADR prior to adjudication may justifiably want to rely on non-compliance being sanctioned or remedied in some way or another. One nonetheless have to acknowledge, in light of the fact that one of the main benefits of MDR-clauses is efficient dispute resolution, that enforcement *ex officio* would be all but efficient if both parties want to waive the pre-adjudicative requirement. After all, there may in many cases be little to gain by forcing disputing parties, who are both of the opinion that ADR would be futile, to jump through an extra proverbial pre-adjudicative hoop before their dispute can be finally settled.

The court's argumentation in *Poiré v. Tripier* has since been upheld and further developed by subsequent Court of Cassation cases. With *Medissimo v. Logica*¹²³ and *Biogaran v. International Drug Development*,¹²⁴ the French doctrine of MDR-enforcement was supplemented by the court requiring mandatory wording and the provision of a sufficiently exact ADR-procedure for an MDR-clause to be enforceable. The latter case also clarified a previously untouched issue, namely the admissibility of counterclaims. The issue can be exemplified as follows: if a claim is made to an adjudicative body in accordance with an MDR-clause, and the opposing party wishes to make a counterclaim, would that counterclaim also be subject to the pre-adjudicative requirements in the MDR-clause? The courts stance was that counterclaims should not be subject to any such requirements absent explicit wording to the contrary in the clause itself. An additional clarification provided by the aforementioned cases was that the effects of a claim being inadmissible would be that the proceedings would close and that, as such, an order of stayed proceedings until the non-compliance has been satisfied would not be an option open to French courts.¹²⁵

I would argue that the approach of French courts to the last point raised above is problematic. If we again revert to the underlying rationale of MDR-clauses, namely efficiency, it does not seem

¹²³ Cour the Cassation decision *Medissimo v. Logic*, April 29th, 2014 (Commercial Chamber).

¹²⁴ Cour the Cassation decision *Biogaran v. International Drug Development*, May 24th, 2017 (Commercial Chamber)

¹²⁵ Mitrovic, 2019, pp. 572-573, Ravillon, 2017, p. 662

practical that proceedings have to be started from scratch after the non-compliance has been satisfied. Such an approach would invariably lead to time lost as a result of e.g. preparatory obligations such as discovery (if and where applicable), applications and formation of tribunals and appointments of arbitrators (again if and where applicable).

4.2.4 Spain

Spain is somewhat of a rarity when it comes to enforcement of MDR-clauses in Continental Europe, as it is argued that enforceability there enjoys explicit statutory support. This statutory support is based on rather general provisions in the Spanish Civil Code and are thus not explicit in relation to the procedural nature of MDR-clauses, but Spanish courts have nonetheless shown a wide propensity for enforcing MDR-clauses based on the code, even when a clear and definite ADR-procedure has not been provided for in the clause.¹²⁶

The argument that the Spanish Civil Code provides statutory support for the enforcement of MDR-clauses seems to be based on a number of separate provisions in the code, and even here opinions seem differ among legal scholars. Garimella *et al* argue that MDR-clauses are enforced based on (1) art. 6.4, which allows agreements that are not contrary to applicable law and do not harm third parties, (2) art. 1255, which provides for freedom of contract and (3) art. 1090, containing a *pacta sunt servanda*-type provision.¹²⁷ The articles mentioned above are general contractual provisions and principles that are present in almost every single legal system the world over, and that are therefore, in my opinion, not indicative of the express legislative support that Garimella *et al* seems to argue for.

Cremades, on the other hand, makes reference to articles 1125 and 1127 of the Spanish Civil Code in his attempt at explaining the foundation for the enforcement of MDR-clauses in Spain.¹²⁸ This effort is, in my view, more successful. Article 1125(1) and (2) stipulates the following:

¹²⁶ See Garimella & Siddiqui, 2016, pp. 171 and 179 and Cremades, 2004, p. 14.

¹²⁷ Garimella & Siddiqui, 2016, p. 179

¹²⁸ Cremades, 2004, p. 14.

“Obligations for whose performance a certain day has been set shall only be enforceable upon the arrival of such date. Certain day shall be deemed to mean a date which must necessarily arrive, even though it is uncertain when it will do so”.

What this means, for the purposes of enforcement of MDR-clauses, is that pre-adjudicative obligations where e.g. negotiations must continue for a set number of days before the parties can resort to arbitration, could be enforceable under article 1125. In this case, the adjudicative step of the MDR-clause is the obligation referred to in the article and the passing of the exact number of days of negotiations is the *certain date*. When these hypothetical circumstances are applied to the text in the article, the result is that the arbitration agreement becomes enforceable only upon the completion of negotiations. It should here be noted that this is the author’s own interpretation of the context provided by Cremades, who did not provide his own explicit arguments for why the mentioned articles allow for enforceable MDR-clauses under Spanish law.

4.3 The Nordic Countries

4.3.1 Finland

While MDR-clauses are frequently used in Finnish commercial contracts,¹²⁹ there is as of yet no statutory law regulating their enforcement. The Finnish academic field has been relatively quiet on the issue.¹³⁰ Finnish lawmakers have in fact been almost entirely silent on the subject of so called out of court mediation; the only act that explicitly regulates non-court connected ADR is the Act on mediation in civil matters and confirmation of settlements in general courts, chapter 1 section 1 of which states *“This Act applies to mediation in civil matters and contested petitionary matters in general courts (court mediation). The Act also provides for confirmation of enforceability of a settlement reached in out of court mediation”*.¹³¹ As such, the law does not at all regulate the enforceability of mediation agreements, but rather the enforceability of settlements reached as a result of mediation, and thus takes no stance on the enforceability of MDR-clauses.

¹²⁹ Savola, 2006, p. 235

¹³⁰ Savola, 2006, pp. 235-236

¹³¹ Fin: *Laki riita-asioiden sovittelusta ja sovinnon vahvistamisesta yleisessä tuomionistuimessa* (394/2011)

What about court mediation then, could this regulated concept perhaps open up for analogous interpretation that could be applied to MDR-clauses? Anything more than a cursory glance at the act reveals this to be a non-starter as the process for court mediation is entirely voluntary and initiation of proceedings requires both parties' consent, in effect in practice making it impossible to in a binding way agree to an obligatory pre-adjudicatory step in advance of the dispute actually arising.¹³²

One of the few Finnish legal scholars who have commented on MDR-enforcement in Finland, Mika Savola, speculates on whether or not MDR-clauses are enforceable under Finnish law, concluding that the answer may depend on whether the final adjudicative tier is a national court or an arbitral tribunal. Concerning the national courts, Savola's reasoning is very much in line with argumentation of the German courts presented in section 4.2.2 above, namely that a *pactum de non petendo* that completely waives the parties' right to sue would be unenforceable, but that a limitation to the right to sue in the form of pre-adjudicatory ADR requirements may well be an acceptable to Finnish courts under the umbrella of freedom of contract.¹³³

He also argued that potential delay in gaining access to adjudication caused by the mandatory pre-adjudicatory steps inherent in MDR-clauses could jeopardize the parties' right to access to justice pursuant to art. 6(1) of the European Convention for the Protection of Human Rights ("ECHR"), and therefore (presumably) prevent their use in Finland. It remains unclear whether Savola intended his comments to be taken as a general warning of possible unintended consequences of the use of MDR-clauses in the EU, or if it is to be taken as an argument against their use altogether. In either case, this argument has lost much of its relevance as a judgement from the European Court of Justice handed down in 2010, four years after Savola's comment, explicitly concluded that mandatory out-of-court proceedings were not contrary to the ECHR, provided that they, *inter alia*, (1) do not result in a binding decision, (2) do not cause a substantial delay in litigating, and (3) are not excessively costly.¹³⁴

¹³² *Ibid.* Chapter 1, Section 1 (3).

¹³³ Savola, 2006, p. 244

¹³⁴ European Court of Justice (Fourth Chamber) of 18 March 2010 *Rosalba Alassini v Telecom Italia SpA* (c-31/08).

Answers to the question whether or not MDR-clauses are enforceable can seemingly not be found in Finnish statutory law and have to be found elsewhere.

Case law on the enforcement of MDR-clauses is limited to a single Supreme Court ruling (KKO 1995:81). In this case, the two contracting parties had agreed to apply the General Conditions for building Contracts (YSE 1983), 68 §¹³⁵ of which stipulates that when a construction project is finished, the parties' accounts are to be settled in a procedure that, amongst other things, involve a final settlement meeting. The claimant had terminated the agreement and brought a case in a local court against the respondent for damages caused by breach of contract. The respondent argued that the case should be dismissed as premature since no settlement of accounts had been made prior to the initiation of litigation. The Supreme Court ruled that the parties had expressly agreed to adhere to the General Conditions and that by doing so, they had agreed to settle their accounts in accordance with YSE 1983 68 §. The purpose of the settlement procedure was to resolve claims between the parties and allowing the case to proceed in court prior to such a procedure having been carried out would have meant a unilateral right for the claimant to ignore the agreed upon provision. The case was thus dismissed as inadmissible on the grounds that the claim had been presented prematurely.¹³⁶

One could argue that the case should be viewed as an outlier because i) it concerned provisions in General Conditions, and not an express MDR-clause in the agreement itself, ii) it is the only Supreme Court ruling on the issue of enforceability of MDR-clauses in the country, and iii) two out of five judges (as well as the rapporteur) were of a dissenting opinion, all of which further diminishes the value of the case as precedent. In his comments on the case, Savola points out that this, while not necessarily definitive, would at least seem to indicate that MDR-clauses could be enforceable under Finnish law, even without express legislative support.

It would be dangerously presumptive to argue that the case has created a clear and binding precedent for the enforcement of MDR-clauses in Finland, especially in the light of the lack of

¹³⁵ YSE 1983 has since been replaced by YSE 1998, where the relevant paragraph now is 73 §.

¹³⁶ KKO 1995:81, see also International Bar Association, 2015, pp. 73-74

subsequent cases on the issue. What can be said, however, is that the possibility of state court enforcement of MDR-clauses cannot be dismissed outright.¹³⁷

In light of the above, it seems that MDR-clauses very well could, in the absence of any evidence to the contrary, be enforceable under Finnish law. The only relevant case law that exists under Finnish jurisdiction does indeed seem to indicate that being the case.

4.3.2 Sweden

As Sweden lacks relevant case law, the question of enforcement of MDR-clauses in the country is mostly theoretical. It has been argued that a Swedish court would not have the option of limiting a person's – corporate or otherwise – access to justice without explicit statutory support, and that no such support exists today.¹³⁸ The preparatory works for the Swedish Mediation Act (SMA)¹³⁹ even expressly states that an agreement to mediate in accordance with the SMA does not hinder the commencement of either litigation or arbitration.¹⁴⁰ An MDR-clause where arbitration is contingent upon prior ADR-techniques (other than mediation in accordance with the SMA) lacks the same statutory clarity.

Notwithstanding what has been said above about the lack of case law, there is a case from the Supreme Court of Sweden (NJA 1971 p. 453) that indirectly tangents enforcement of MDR-clauses. The two contracting parties had in that particular case entered into a contract where they agreed that any decision rendered by party "A" could not be challenged by party "B" in a court of law. The Supreme Court ruled that the clause in question did not have any effect on the jurisdiction of the Swedish ordinary courts. While the case did not concern MDR-clauses *per se*, it does demonstrate the unwillingness of Swedish courts to allow privately agreed upon limitations to their jurisdiction.¹⁴¹ One should, however, not draw any definitive conclusions on the enforcement of MDR-clauses in Sweden based on the aforementioned case alone, as the

¹³⁷ *Ibid.*

¹³⁸ *Ibid* p. 199

¹³⁹ Swe: *Lag (2011:860) om medling i vissa privaträttsliga tvister*

¹⁴⁰ Proposition 2010/11:128 p. 41. It shall be noted that this only applies to mediation in accordance with the SMA. Whether or not this lends itself to analogous interpretation with regards to MDR-clauses containing other ADR-techniques is unclear.

¹⁴¹ Finn Madsen, *Commercial Arbitration in Sweden*, 2007, p. 188.

agreement not to sue between the parties was a pure *pactum de non petendo* (i.e. unconditional) and not, as is the case in an MDR-clause, a mere postponement of the right to sue until the relevant preconditions have been met. As has been described section 4.2.2, there are strong arguments to be made for that the possible effect that MDR-clauses have on the right to access to justice is permissible under e.g. the ECHR.

The question of enforcement of MDR-clauses in Swedish state courts is in other words uncertain, which is supported by Swedish legal experts proposing that any issues relating to remedies or jurisdiction resulting from non-compliance with a previous step in an MDR-clause would ultimately have to be ruled upon by the arbitrator or judge in question on an *in casu* basis.¹⁴²

4.3.3 Denmark

As its Nordic sibling-countries, Denmark has only limited case law regarding the enforcement of MDR-clauses. A notable case is The Danish Maritime and Commercial Court (SH) ruling given in the case H-41-10, where the court decided to proceed with the review of the case despite the parties' non-compliance with an MDR-clause in which they had agreed to submit to mediation before proceeding to litigation.

As with the Finnish case KKO 1995:81, one should be wary of drawing too definite a conclusion based on the SH ruling. Firstly, the motive of the party that invoked the MDR-clause was seemingly to hinder the opposing party from suspending the statute of limitation of its claims.¹⁴³ The court explicitly concluded that a party's interest to suspend the statute of limitations supersedes the interest of upholding a mediation clause. Secondly, the parties had initiated - ultimately unfruitful - mediation after the commencement, but before the conclusion of the litigation process, which the court had also taken into consideration.¹⁴⁴

¹⁴² International Bar Association, 2015 p. 200

¹⁴³ At the time, the statute of limitation in Denmark could only be suspended through legal action (i.e. litigation). The Danish law on statute of limitations has since changed, and suspension is now possible through commencement of mediation proceedings, further limiting the relevance of H-41-10.

¹⁴⁴ International Bar Association, 2015 p. 60

One possible interpretation is that the end result would have been the opposite – i.e. a lack of jurisdiction for the court or a stay of proceedings until mediation had been concluded - had it not been for the aforementioned circumstances.

4.3.4 Norway

ADR in Norway can be considered more developed than in the rest of the Nordic countries. Not because its arbitral tribunals rival the international fame of the likes of the SCC, but because a vast ADR system has been developed within the Norwegian civil procedure system. The Norwegian Civil Procedure Act (NCPA)¹⁴⁵ makes five different types of mediation available for civil disputes. Most of these are purely judicial, however, and gives limited insight into how the Norwegian justice system handles MDR-clauses in relation to non-judicial ADR.¹⁴⁶

That being said, there are parallels that can be drawn between the dispute resolution mechanisms offered by the NCPA and purely contractual MDR-clauses. The NCPA prescribes a mandatory mediation before a mediation board for small claims¹⁴⁷ as a first instance. If the claim is large enough to not fall under the aforementioned provision, the parties are still subject to section 5-4, which states that a party seeking to initiate litigation proceedings must first explore whether the dispute could be settled through amicable negotiations.

It should be noted that section 5-4 does not result in any obligation to actually carry out negotiations (not to mention settling the matter). As such, the practical effects of section 5-4 remain insignificant. Historically, a failure to comply with such provision only affects the court's ruling on attorney fees and other costs, and even these instances are rare.¹⁴⁸

Just as with the statutory law described above, it has been argued that a purely contractual MDR-clause would not limit a Norwegian state court's jurisdiction, and that any effects would be confined to substantive remedies such as damages.¹⁴⁹

¹⁴⁵ Norwegian: Lov om mekling og rettergang i sivile tvister – LOV 2005-06-17-90

¹⁴⁶ Anna Nylund et al. p. 97

¹⁴⁷ Claims of a value of less than 125 000 NOK (ca. 13 000 EUR).

¹⁴⁸ International Bar Association, 2015, p. 150-151

¹⁴⁹ *Ibid.*

Enforcement of MDR-clauses in Nordic state courts can, in conclusion, be said to be uncertain. To the extent that it can be argued that there is such a thing as a common Nordic approach to the enforcement of MDR-clauses, the essence of this would have to be this uncertainty. It can be noted that the amount of legal research regarding the issue is close to non-existent¹⁵⁰ in comparison with the Anglo-American sphere. This, in conjunction with the scarcity of relevant case law, seems to point towards the question being seen as either irrelevant and/or of trivial value to the Nordic legal communities.¹⁵¹

4.4 A few words on enforcement in arbitral tribunals

Non-judicial arbitral tribunals are not bound by the same civil procedural laws as state courts and can therefore use a more flexible set of rules and practices.¹⁵² As a result of this relative independence, arbitral tribunals have adopted a decidedly Anglo-American approach to MDR-clauses. These are viewed as contractual clauses like any other and are to be interpreted in that light, but within the framework of the particular tribunal's own regulation and the substantive law that governs the contract.¹⁵³ There are numerous arbitral tribunals technically falling within the scope of this comparative analysis but for the sake of brevity, this chapter will only focus on two tribunals; (i) the Stockholm Chamber of Commerce, which administers a substantial international (and particularly Nordic) case load¹⁵⁴, and (ii) the International Chamber of Commerce, which serves as one of the largest arbitral tribunals for commercial disputes in the world.¹⁵⁵

¹⁵⁰ Savola, 2005 p. 235 and based on the literature review performed in preparation for this thesis.

¹⁵¹ In a survey conducted by the International Bar Association in 2015, where legal professionals from a plethora of different countries described the enforcement of MDR-clauses in their own jurisdictions, the common consensus among Nordic lawyers was that enforcement was unclear, with the exception of Norway where enforcement was seen as very unlikely (see International Bar Association, 2015 pp. 60, 72-73, 150-151 and 199).

¹⁵² Arbitral tribunals are nonetheless indirectly bound by state arbitration law, in as far as they want their rulings to achieve legal force and effective enforcement.

¹⁵³ Tevendale, C., et al. 2015, p. 39

¹⁵⁴ According to "SCC Statistics 2017" Around half of the SCC caseload of 2017 was of an international nature, of which the Nordic countries amounted to roughly 20 %.

¹⁵⁵ White & Case, 2018, p. 10-11

The 2017 ICC rules of arbitration (ICC Arbitration Rules) do not regulate the enforceability of MDR-clauses directly, but the ICC has given numerous rulings on the subject of enforcement of MDR-clauses. The common approach taken in these rulings is that clauses which are sufficiently unambiguous in their black letter text are enforceable by the tribunal.¹⁵⁶ In the case 14079, the ICC presented the opinion that counterclaims that had not been subject to previous adjudication – as required by the MDR-clause – presented a jurisdictional bar from arbitration proceedings. The tribunal’s determination in this case provides a good description of how the ICC interprets MDR-clauses; firstly, it was concluded that the tribunal was bound by the clause as it was formulated in the contract. Secondly, it was acknowledged that while the applicable law in that case (and in general within civil law countries) see counterclaims as a permitted substantive defense to the main claim, the parties were within their rights to limit the application of such applicable law in the contract. As the clause contained the phrasing “*any dispute of any kind whatsoever*”,¹⁵⁷ it was deemed to encompass any form of counterclaims not addressed in the prerequisite adjudication.¹⁵⁸

In the eyes of the ICC, an MDR-clause is a purely contractual issue (as long as the applicable law of the contract is silent on the particular subject) and the question of enforcement is dependent on the wording of the clause itself.¹⁵⁹ As mentioned, this bears a striking resemblance to the prevailing view in the United States and England, where enforcement is contingent on clear and precise drafting.

Article 2 of the 2014 SCC mediation rules states the following: “*unless the parties have agreed otherwise, an agreement to mediate pursuant to these Rules does not constitute a bar to court proceedings or a bar to initiate arbitration*”.¹⁶⁰ An astute observer will notice that this wording does not explicitly allow MDR-clauses in which mediation is a condition precedent to arbitration,

¹⁵⁶ Kayali 2015, pp. 567-568 see particularly the ICC cases 4230, 6276, 8462, 9977, 9984 and 10256.

¹⁵⁷ Carlevaris, A., 2014 pp. 10-12

¹⁵⁸ *Ibid.*

¹⁵⁹ Kayali 2010 pp. 567-568 shows that the qualifying criteria for mandatory language is the same “shall” or “conditions precedent” (as opposed to “may” or similar) as referenced in connection to enforcement in the US, see *Supra* note 77

¹⁶⁰ Article 2, Mediation Rules 2014, The Arbitration Institute of the Stockholm Chamber of Commerce.

but rather establishes as a rule of thumb that the parties can initiate arbitration regardless of compliance with the undertaking to mediate. The 2017 SCC arbitration rules take no stance on the issue and only a limited number of SCC arbitral rulings are made public. Of the cases that have been made public, case 21/1999 is of particular relevance to MDR-clauses. The two contracting parties in the case had entered into an agreement where it was confirmed that adjudication shall precede arbitration and that only therein mentioned persons can serve as adjudicators in disputes arising from the agreement. One of the parties objected that the adjudicator that presided over their dispute was not named in the agreement. When the dispute escalated to arbitration before the SCC, the arbitrator was made aware of the discrepancy and concluded that adjudication had not been carried out in accordance with the agreement, and that, consequently, the conditions precedent for arbitration had not been fulfilled. The arbitral tribunal was found to lack jurisdiction to settle the dispute.¹⁶¹ In addition to the more general jurisdiction question, two interesting observations can be made on the basis of case 21/1999; (a) the MDR-clause lacked clear and mandatory language,¹⁶² pointing towards a comparatively lax view on the formalistic conditions placed upon MDR-clauses by other tribunals and courts, and (b) the arbitrator expressly indicated that the effects of an MDR-clause are to be judged from a purely contractual standpoint.

Despite a more limited amount of case law, it seems that SCC shares the ICC's mainly permissive attitude towards the enforcement of MDR-clauses.

4.5 Lessons learned

The purpose of this section of the thesis is to analyze the information gathered above in an effort to create a comprehensive view of what alternatives and legislative schemes exist in support of enforcement of MDR-clauses, and of to what degree they could be used to further the

¹⁶¹ Stockholm Arbitration Report 2000:2, pp. 83-84

¹⁶² *Ibid.* p. 60. Note that clause 25.2 never explicitly states that adjudication has to be completed before the matter can proceed to arbitration, although such a conclusion can be inferred. On the contrary, the clause states that "Either party may refer a decision of the Adjudicator to an Arbitrator [...]" (emphasis added).

understanding of MDR-enforcement in the Nordic countries or even serve as potential legal imports.

4.5.1 General requirements for enforcement

First and foremost, it can be fairly conclusively stated that MDR-clauses have been shown to be routinely enforced in all analyzed countries except the Nordic countries. The reason for this discrepancy can to the authors knowledge and understanding not be found, at least not conclusively, in any circumstances that have to do with the Nordic legal system in and of itself. I would be inclined to argue that a partial reason can be found in the fact that ADR is a newer and less familiar concept to the Nordic countries, and that it is only a question of time until MDR-related conflicts start showing up in Nordic courts.¹⁶³ As most, if not all, jurisdictions that allow the enforcement of MDR-clauses seem to do so based on case law, it would follow that countries that have been exposed to a fewer number of ADR-related disputes would be statistically less likely to develop the necessary legal precedents necessary for MDR-enforcement.

Another observation that can be made is that (barring sporadic arguments from legal scholars to the contrary)¹⁶⁴ no country or legal system seems to provide explicit statutory rules supporting the enforcement of MDR-clauses. It is difficult to identify some uniform reason for this, as no academic or other sources seem able to provide a coherent answer. If forced into speculation, one could argue that the problem is one of categorization. One possible contributing reason would then be the fact that some of the analyzed countries have separate legal acts for (1) arbitration, (2) civil procedure in national courts, and (3) mediation, and that the division leads to difficulties in comprehensively regulation concepts like MDR-clauses that belong to all or some of them. To add to the complexity, it may be noted that MDR-clauses as defined in this thesis can potentially include many different forms of ADR (e.g. negotiations) that more often than not completely lack substantive legal support of any kind. The German solution to this is rather interesting in light of the problem of categorization; by splitting up the MDR-clause in three separate parts (ADR Agreement, *pactum de non petendo*, and an adjudicatory agreement) you

¹⁶³ Savola touches on this subject, see Savola, 2006, p. 235

¹⁶⁴ *Supra* note 12

can regulate each part separately while still allowing for the whole clause to be binding and enforceable by virtue of the *pactum de non petendo*.¹⁶⁵

While this could be a possible reason for the lack of explicit statutory support, it is hardly the only contributing reason; countries such as France, where all substantive rules of civil procedure are contained in the same code of civil procedure would seem to counter the above-mentioned point.

The lack of explicit legislative support notwithstanding, it was also evident that all of the countries where MDR-clauses were routinely enforced applied general rules and principles of contract law to the clauses.¹⁶⁶ An element of these rules and principles that seem to be communally shared between these jurisdictions is the need for a clear and unambiguous statement by the parties in the MDR-clause as to the binding and mandatory nature of the adjudicative requirements. Another common requirement for enforcement, although not necessarily identifiable as one pertaining to general contract law was a requirement for the ADR-portion of the clause to be sufficiently well defined. The reason for this would seem to be procedural rather than based on contract law; if no actual end-date or point for the ADR-step can be identified it would be impossible for a court or arbitral tribunal to determine whether the conditions have been fulfilled or not.¹⁶⁷ This also ties into the enforcement related issues raised by English and Australian courts regarding agreements to agree. If we set aside any possible theoretical arguments regarding whether or not one can actually agree to agree on something, the fundamental procedural issues of agreements to agree are somewhat similar to those mentioned above; it would be problematic for a court to determine compliance when compliance itself (achieved agreement) means the dispute is solved, and conversely, if the dispute has not been solved, then the parties cannot have agreed and have therefore not complied with the pre-adjudicative requirements. It could be

¹⁶⁵ *Supra* note 116

¹⁶⁶ See *inter alia supra* notes 96 and 128

¹⁶⁷ The reason for this would seem to be procedural rather than based on contract law; if no actual end-date or point for the ADR-step can be identified it would be impossible for a court or arbitral tribunal to determine whether the conditions have been fulfilled

characterized as a paradox of sorts, but one that could easily be solved by adding a time limit to the negotiation step after which the parties may resort to adjudication.

Of note was also the fact that the comparative analysis showed that many courts were unwilling to take a stance on non-compliance with MDR-clauses *ex officio*. The reasoning here could be argued to be self-evident, if both parties to a dispute want to waive the pre-adjudicative requirements of the clause, they should be able to do so based on the freedom of contract.

Continental European courts also seemed to share the policy of only allowing claims of non-compliance with MDR-clauses if the claims were made in good faith. As we have seen in decisions from some Anglo-American courts, the term *good faith* is not necessarily always well defined in all legal system and it might therefore be problematic for a judge to objectively determine if a claim is made in good faith or not.¹⁶⁸ Thankfully, *inter alia* the Swiss courts provides a simple test for the determination of good faith in cases like this; a claim is made in good faith if the party making such a claim has made a genuine effort to initiate ADR-proceedings.¹⁶⁹

4.5.2 The nature of MDR-clauses and remedies for non-compliance

A clear majority of the countries analyzed favored the procedural rather the substantive approach to MDR-agreements, meaning that remedies available to non-compliance should be procedural in nature, i.e. a stop to adjudicative proceedings, in one form or another, until the pre-adjudicative requirements have been satisfied. This choice was justified by Swiss judges as being the only practicable solution, as the alternative would be a remedy in the form of damages which would be difficult to quantify.¹⁷⁰

The issue might however not be as clear cut as the Swiss policy would indicate. One could for instance imagine an MDR-clause where the parties have agreed on liquidated damages in case of non-compliance, in which case I would argue that the clause should be seen as procedural agreement but with a purely substantive remedy. The reasoning behind such a clause could be that the parties might want to pre-emptively avoid the risk of delay that would follow from the

¹⁶⁸ Trakman, L, & Sharma, K, 2014, pp. 605-607

¹⁶⁹ *Supra* note 95

¹⁷⁰ *Supra* note Salehijam, M., 2019, p. 213

claim being moved from adjudication back to ADR and then potentially back to adjudication again if the ADR fails. To address this concern, it could be workable to modify the policy so only presume that MDR-clauses are procedural, but still allow for decisions to the contrary if the wording of the clause explicitly supports a substantive approach.

As for the characterization of non-compliance with MDR-clauses as an issue of either admissibility or jurisdiction, I would argue that the findings of the comparative analysis have been shown to have little or no bearing on the application of lessons learned therein to Nordic or Finnish circumstances. Whether a court or arbitral tribunal chooses to use the terminology of admissibility or jurisdiction has been shown to be dependent more on the terminology specific to the relevant jurisdiction and its laws. The fact that many distinctions also seem to get lost in translation does not help the situation.¹⁷¹

A related question that merits some discussion in this section, however, is what the effect the ending of adjudicative proceedings shall have in the case of non-compliance. The analysis above shows that we have two main options to choose from. The adjudicator has the option to dismiss the case entirely, meaning that should the parties later satisfy the pre-adjudicative requirements and subsequently want to bring the claim before the adjudicator again, they would have to start the adjudicative proceedings from scratch. The other option is to order a stay of proceedings, effectively leaving the action pending while the parties satisfy the pre-adjudicative requirements, whereafter they can pick up the adjudicative proceedings where they left off. Many courts have in their arguments presented the latter option as preferable, as it saves the parties time and effort by avoiding a start-up of proceedings twice.¹⁷² At the end of the day however, courts are bound by the procedural legal framework of their jurisdiction, and the options presented here are not necessarily available to all courts.

¹⁷¹ Paulsson, J. 2005, pp. 608-609

¹⁷² See *inter alia*, Mitrovic, M., 2019, pp. 564-566. Barring effects of rights to court review, no difference is here made between dismissing the case as temporarily inadmissible or declining jurisdiction.

4.5.3 Key points

The comparative analysis has resulted in the identification of the following key points¹⁷³ of value for a practically workable legislative regime for the enforcement of MDR-clauses:

- a codified legislative framework for enforcement would be preferable to a case law-based policy, as it would result in better consistency and predictability;
- time and cost limits for ADR-procedures should be instituted for jurisdictions within the EU in order to guarantee compliance with the requirements set by the European Court of Justice;
- claims of non-compliance should only be available to a party that does so in good faith, i.e. has undertaken demonstrable efforts to initiate ADR-proceedings;
- the intent of the parties to make the pre-adjudicative requirement mandatory should be explicitly and unambiguously demonstrated in the wording of the clause;
- the ADR-procedure that constitutes the pre-adjudicative requirement should be sufficiently certain as to allow for an adjudicator to determine exactly when compliance with the requirement is achieved;
- adjudicators should not be allowed to rule on non-compliance *ex officio*, as the opposite would mean a deviation from the principle of freedom of contract of the disputing parties;
- MDR-clauses should, unless otherwise implied by the wording of the clause, be interpreted as procedural agreements to which procedural remedies shall apply;
- the default remedy, if legally possible under the applicable national procedural law, should be a stay of proceedings until the pre-adjudicative requirements have been satisfied;
- non-compliance with pre-adjudicative requirements should not limit a party's right to present counterclaims to the relevant adjudicative body during ongoing proceedings, unless otherwise implied by the wording of the clause; and
- non-compliance with pre-adjudicative requirements should not limit a party's right to apply for interim measures.

¹⁷³ The list is not meant to be an exhaustive list of issues identified in the comparative analysis.

5. Harmonization – is there room for common ground?

5.1 Background

As stated in the introduction to this thesis, one of the principal hurdles that drafting lawyers and contracting parties face when using MDR-clauses is that the conditions necessary for enforcement and the form such enforcement may take are in many cases subject to a large degree of uncertainty. It is also probable that many parties making use of these clauses are unaware of the underlying uncertainty.

A large degree of this legal uncertainty can in my opinion be ascribed to a general lack of statutory support for MDR-clause enforcement on both international and national levels. As has been showed in the comparative portion of this thesis, most legal regimes analyzed rely heavily on case law to support enforcement. This is also surprisingly true for the (noticeably civil law) countries of Continental Europe that normally emphasize codified law above case law.¹⁷⁴ In fact, many researchers and commentators have argued that it is indeed the lack of clear legislation that is the root cause of the aforementioned uncertainty.¹⁷⁵

As one can only speculate as to why e.g. Switzerland, Germany and France - countries which have all seen a large amount of supreme court level cases regarding enforcement of MDR-clauses – have not amended their legislative acts on civil procedure to clarify or at least cement this issue, more prudent questions at this point would perhaps be;

- 1) on what level should substantive law regarding the enforcement of MDR-clauses be implemented, and
- 2) with what content?

The first question is one closely related to harmonization. Phrased in another way one could ask whether or not a national scheme (potentially separate for each country) would solve the issues surrounding uncertainty or if international harmonization would be the better approach.

¹⁷⁴ Piers, 2014, p. 271

¹⁷⁵ *Supra* note 12. See also Kajkowska, 2017, p. 21 & 45

Before the second question is tackled in greater detail, one first has to understand how ADR is currently being regulated in an international context. On a national level the answer to this question is fairly simple: ADR agreements (and therefore also MDR-clauses) are regulated under national civil procedure law. If the ADR agreement is cross border, however, the applicable law is determined by private international law, which despite its name is based on national rules regulating how the applicable law should be chosen. The end result is that the law applicable – and thus the rules either allowing or disallowing the enforcement of MDR-clauses – to ADR-agreements is entirely based on national laws even if the agreement itself is of an international nature.¹⁷⁶ While this should come as no surprise to readers familiar with the rules of private international law, it does highlight some of the difficulty inherent in proposing international legislative solutions to uncertainty regarding the enforcement of MDR-clauses.

Actual substantive change to this effect has to come from a national level, in turn meaning that a fully globally consistent legal scheme for enforcement of MDR-clauses would in theory require legislative change on a national level in all countries on earth. From a practical point of view, any such efforts would in all probability be futile, but one can nonetheless get *close enough* to global harmonization to have a significant impact on the enforcement of MDR-clauses in international contracts. For an example of this, one does not have to look further than the legislative scheme regulating international arbitration; much of the popularity of international arbitration is owed to the success of the New York Convention¹⁷⁷ regulating e.g. the enforcement of arbitral awards on an international level.¹⁷⁸ 165 countries are party to the convention and have incorporated it into their procedural law, which would indicate that harmonization of the enforceability of arbitral awards is about as close to global as practically possible.¹⁷⁹ The success of the New York

¹⁷⁶ Dendorfer-Ditges & Wilhelm, 2017, p. 238 and Salehijam, 2018, p. 283

¹⁷⁷ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

¹⁷⁸ Piers, 2014, pp. 270-271

¹⁷⁹ <http://www.newyorkconvention.org/countries> last accessed 29.9.2020.

Convention would seem to indicate that a similar solution would be possible also for questions regarding the enforceability of ADR-agreements.¹⁸⁰

Armed with this knowledge, it would then be possible to conclude that although codification of an MDR-enforcement regime has to take place on a national level, then to the extent that harmonization is strived for, it would be desirable for that the foundations of such legislation to come from an international source. Multiple possible alternatives of legal schemes intended to achieve harmonization has been considered and proposed by legal scholars and international organizations alike¹⁸¹, some of these which have broader appeal from a Finnish perspective will be presented below in greater detail.

5.2 UNCITRAL

The United Nations Commission on International Trade Law has issued a number of model laws concerning *inter alia* international arbitration and mediation. These models laws are meant to serve as models for nations that consider adopting new or changed legislation in these areas of law.¹⁸² Beyond just serving as a model for legislators, I would also argue that they have the additional (albeit perhaps not explicit) possible benefit of facilitating harmonization by allowing for a common background for separate national legislative regimes.

Article 14 of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation¹⁸³ contains the following clause that pertain to the enforceability of MDR-clauses:

¹⁸⁰ The New York Convention does not only regulate the enforceability of international arbitral awards, but also the validity of international arbitration agreements, further indicating that a similar solution applied to ADR agreements could lend validity to such agreements on a global scale. See art. II of the New York Convention.

¹⁸¹ In addition to those presented in sections 5.2-3 below, *inter alia* the UNIDROIT principles of international commercial contract law contain regulation that could be applicable to MDR-clauses.

¹⁸² <https://uncitral.un.org/en/texts> last accessed 29.9.2020

¹⁸³ UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf last accessed 29.9.2020

“Where the parties have agreed to mediate 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 mediate or as a termination of the mediation proceedings.”

There are, as I see it, a number of challenges with pursuing harmonization based on the UNCITRAL model law. Firstly, the wording in art. 14 – I here refer to “[...] *except to the extent necessary for a party, in its opinion, to preserve its rights*” – is diffuse enough to create uncertainty regarding the conditions for enforcement. It is of course possible, and perhaps probable, that adoption of the model law would result in case law clarifying the exact meaning of above cited text, but the need for such clarification in and of itself would defeat the purpose and benefits of codifying law regarding MDR-enforcement in the first place. Garimella *et al* propose that this ambiguous wording was a conscious choice by the drafters of the model law, made in an effort to avoid parties being forced to mediate against their will¹⁸⁴. Secondly, MDR-clauses are only touched upon in art. 14 of the model law, which concerns only the enforceability of the *pactum de non petendo*¹⁸⁵ portion of an MDR-clause, and thus leaves out important aspects such as what remedies are available to parties and/or the adjudicator.¹⁸⁶ This is not to say that harmonization through wide spread adoption of national laws based on the UNCITRAL model law on mediation is necessarily a bad or problematic option, but for this to be an acceptable approach, the contents of the model should, in my opinion, be amended so as to cover the issues raised in section 3.2 above. If no such amendments are made the aforementioned questions of scope and remedies will be left to the legislators of the implementing nations to decide, which opens up for national differences that counteract the harmonization effort.¹⁸⁷

¹⁸⁴ Garimella & Siddiqui, 2016, p. 168 and Kajkowska, 2017, p. 171.

¹⁸⁵ Dendorfer-Ditges & Wilhelm, 2017, p. 237, see also Mitrovic, 2019, p. 569

¹⁸⁶ Kajkowska, 2017, p. 45

¹⁸⁷ *Ibid.*

The United Nations have also as recently as 2018 introduced the so-called Singapore Convention on Mediation¹⁸⁸ that in effect serves as a *mutatis mutandis* version of the New York convention, with the notable difference, however, that the Singapore Convention does not regulate the ADR-agreements themselves, but only the settlement agreements that result from mediation.¹⁸⁹ The convention has currently been ratified by only six signatories, and the extent of adoption will thus remain to be seen. What can be said at this point, however, is that the recency of both the UNCITRAL model law on mediation as well as the Singapore Convention (both being from 2018) indicates that it is unlikely that the issues relating to MDR-clauses raised above will be addressed in the near future.¹⁹⁰

5.3 EU

When contemplating the option of pursuing ADR (and by extension MDR) harmonization on a European level, it may be noted that the EU has been cautious in its efforts to intervene in national legislation on legal procedure. Several directives concerning ADR have been implemented in the EU but have generally been either sector specific¹⁹¹, mainly focused on business to consumer agreements¹⁹² or, as is the case with the mediation directive¹⁹³, concerned chiefly with the enforcement of agreements *resulting from* mediation, and as such have no direct effect on the recognition or enforceability on commercial ADR agreements in the member states

¹⁸⁸ United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation"), see also https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements last accessed 29.9.2020

¹⁸⁹ *Ibid.* See also *supra* note 11 for comparative purposes.

¹⁹⁰ As reference can be used the fact that the previous amendment to the UNCITRAL model law on mediation was from 2002, indicating a fairly long time between amendments.

¹⁹¹ See *inter alia* Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) wherein art. 17 contains an obligations for member states to encourage the use of ADR in consumer disputes.

¹⁹² Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR). See also Piers, 2014, pp. 275-277

¹⁹³ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters

in general.¹⁹⁴ This lacking harmonization in the field of commercial ADR agreements is further evidenced by the discrepancies identified in the comparative sections 4.2 and 4.3 above.

While the above-mentioned directives have not achieved a here sought-after harmonization of ADR-agreements that would result in clear conditions for the enforcement of MDR-clauses, they do show indications of such a regulation not being all too far-fetched. EU-law does indeed not exclude the possibility that ADR agreements can be binding, nor is the Unions right to legislate in this area excluded pursuant to primary legislation. The Directive on Consumer Law allows for *inter alia* binding ADR in consumer disputes, and a similar directive applicable to also commercial ADR agreements would therefor arguably fit the currently prevailing policy of the EU.¹⁹⁵

Based on this reasoning, European private law professor Maud Piers has proposed a European legislative framework for ADR agreements that would force European courts and arbitral tribunals to enforce MDR-clauses. Her well-reasoned proposal covers four articles of which numbers three and four cover most of the enforcement related issues identified in section 3.2 above:

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

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

Article 4: Duties of the Parties Under an ADR Agreement

- A. Unless the parties stipulate otherwise, parties to an ADR agreement shall refrain from initiating arbitral or judicial proceedings with respect to the dispute that is the subject of the ADR agreement, up until the moment they comply with the duties defined in section B of this article, or any other moment specified by the parties in the ADR agreement.*
- B. Parties to an ADR agreement are under an obligation to set up the ADR mechanism. To comply with this obligation, the parties must take the following steps:*

¹⁹⁴ *Ibid* art. 6. “Agreements resulting from mediation” refers to the actual result of the mediation, comparable in this context to the regulation in the New York Convention concerning the enforceability of arbitral awards.

¹⁹⁵ Piers, 2014, p. 301

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

C. *Each party shall cooperate in good faith with the third party.*¹⁹⁶

Piers' proposal is in my opinion as close to a proverbial home run as can be achieved. Contrary to the regulation in the UNCITRAL model law, she has gone beyond just allowing for the possibility of enforcement of MDR-clauses – one can argue that the UNCITRAL model law does little more than acknowledge that MDR-clauses exist – in that she also takes on other challenges that we have identified in the comparative section above. In art. 3(A) she clarifies the general consensus that non-compliance is not looked at by the court *ex officio* (“if a party so requests”), art. 3(B) solves the issue of access to interim measures identified in sections 3.2.5 and 4.4 above, art. 4 (B)(3) sets out a minimum requirement for determining compliance with the pre-adjudicative steps and also covers the good faith test developed by *inter alia* the Swiss courts.¹⁹⁷ It may also be noted that the proposal covers “ADR agreements” and not only mediation which allows for the enforcement of MDR-clauses containing other ADR-procedures.

This being said, some additions may still be proposed based on the results of the comparative analysis in section 4. A more comprehensive law would also include provisions regulating;

1. the suspension of any statute of limitations applicable to the claim for the duration of the ADR-proceedings, and preferably, and
2. the effects of the wording “declare the action inadmissible”, i.e. whether the action is dismissed outright or if it results in a temporary stay of proceedings.

From a Nordic point of view, one potential drawback of harmonization on the EU level is of course that Norway is not a member state.

¹⁹⁶ Piers, 2014, p. 306

¹⁹⁷ Supra note 95

6. A closer look at enforcement in the Nordics

We have thus far managed to highlight what I believe to be the critical lessons learned from the comparative analysis of MDR-enforcement and thereafter evaluated possible avenues of approach to harmonization based on those critical lessons. The next step is to apply this knowledge to the context of the Nordic countries in an effort to provide practical solutions to the issues of MDR enforcement as they currently stand.

6.1 Litigation v. Arbitration

Indications currently are, absent any clear legislative framework to the contrary and pursuant to what we have seen in section 4.3, that Nordic courts under most circumstances will chose to not limit their own jurisdiction in the case of non-compliance with MDR-clauses. How should a Nordic lawyer wanting to use such a clause then proceed in order to maximize the chances of an MDR-clause being enforceable, despite this unfavorable outlook?

The first step is to draft the clause in a way that provides a court or tribunal with ADR-processes and provisions that are clear enough to be enforceable (this will be discussed in more detail below).¹⁹⁸ The second step is to choose dispute resolution methods where enforcement is as probable as possible. As we have seen in section 4.4, arbitral tribunals have shown a much greater propensity to enforce MDR-clauses than Nordic national courts. Hence one should, to the extent possible, use arbitration under a set of rules and in a tribunal (e.g. the ICC or the SCC) where the enforcement of MDR-clauses is as close to certain as possible.

6.2 Drafting an enforceable MDR-clause

An English lawyer wanting to draft a binding MDR-clause can use the framework established by Judge Ramsey J in *Holloway v. Chancery Mead Ltd*, and an American lawyer will be well advised to use sufficiently mandatory language. Drafting related criteria for enforcement in Continental Europe are less stringent than their Anglo-American counterparts, and we can therefore rather

¹⁹⁸ Internationa Bar Association 2015, pp. 61-62 (Denmark), 77 (Finland), 151 (Norway) and 200-201 (Sweden).

confidently assume that a clause that is enforceable under both English and US law would also be enforceable under German, Swiss, French and Spanish law.

A Nordic lawyer is greeted by a bit of a conundrum at this stage, however, since no such drafting related requirements have been developed in these jurisdictions. Given this uncertainty, this section will look more closely at the elements necessary to fulfill the requirements for an enforceable MDR-clause pursuant to the requirement identified in the comparative analysis. In doing so, the assumption is that one ends up with a clause that is not only enforceable in the above-mentioned countries and arbitral tribunals, but also creates the best possible likelihood of enforceability in Nordic state courts. Emphasis will also be put on substantive content so as to – to the greatest extent possible – avoid the practical problems outlined in section 3.2.5.

6.2.1 ICC as the baseline

The following sample arbitration clause uses as a starting point the ICC standard non-concurrent mediation-arbitration MDR-clause, with certain changes made in an effort to achieve, to the greatest extent possible, the results described above. The clause, in an unchanged form reads as follows:

“In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.”¹⁹⁹

Considering the source of the clause, one has to assume that it would be considered binding and valid by an ICC arbitral tribunal. One can also deduce – in light of chapter 4.1 – that it contains a sufficient level of mandatory language (also evident by “... such dispute *shall* thereafter be finally

¹⁹⁹ <https://iccwbo.org/dispute-resolution-services/mediation/mediation-clauses/> last accessed 1.10.2020
While it is noted that this is a mediation clause, the ICC makes reference to this specific clause as the recommended clause for mediation-arbitration MDR <https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/> last accessed 1.10.2020

settled under the Rules of Arbitration...”). In an effort to widen the geographical reach of its enforceability, one should first look at what criterion the English courts place on MDR-clauses:

A. *A clearly defined administrative process for selecting the resolving party.* While article 5(1-2) of the ICC Mediation Rules does regulate mediator selection, the main processes outlined therein is based on a joint nomination by the parties to the dispute, with the ICC International Centre for ADR having a secondary right to unilaterally appoint a mediator in the absence of party nominations. A reference to the relevant mediation rules may in this case be sufficient to fulfill the criterion, but for the sake of clarity and in an effort to minimize the risk of further disagreement and delay, the parties should in the MDR-clause name the mediator or mediators that will preside over the mediation. In case such a provision is not possible or desirable, the clause should make it clear that the mediator will be appointed by an independent third party (a named person or organization).²⁰⁰

In any case, a drafting lawyer should always strive towards the referenced ADR rules being clear enough to make the process enforceable without requiring the parties to agree on a mediator or arbitrator after the fact.

B. *The process, or a model for the process, should be set out in sufficiently certain detail.* The reasoning behind this condition is that a court or tribunal has to be able to determine whether a certain condition has been complied with; if the process is described summarily or unclearly, it might be impossible to enforce.²⁰¹ One way to make a process sufficiently certain is to set a timeframe within which the process has to take place. A party wanting to prove non-compliance only has to show that sufficient time has not passed.²⁰² Another alternative is to describe the process and its stages in detail, or as in the case of the ICC-clause, to reference process rules where the same information can be found.²⁰³ Practicing

²⁰⁰ International Bar Association, 2015, p. 61.

²⁰¹ Savola 2005 p. 265 and Tevendale 2015 p. 40

²⁰² Krauss 2016, p. 151

²⁰³ It again bears repeating that one in such a situation must be certain that the rules referenced contain the necessary information.

dispute resolution lawyers from the Nordic countries have emphasized the importance of a well-defined process when drafting MDR-clauses.²⁰⁴

C. *Steps contingent on the parties agreement.*²⁰⁵ The enforcement of ADR-methods such as good-faith negotiations or amicable cooperation of a similar nature is questionable at best²⁰⁶ and they would almost certainly be deemed unenforceable by any Nordic state court.²⁰⁷ Hence it would not be wise to incorporate such processes into an MDR-clause where the purpose is for them to act as binding conditions precedent to adjudication. If such a condition is to be included in an MDR-clause regardless of said risks, it is again recommended that the framework described above concerning a mediation-arbitration MDR-clause is used so as to make the process identifiable and allow for objective determination of compliance or non-compliance. It has also been suggested that a statement to the effect that the parties expressly waive their rights to initiate arbitration or litigation during the mediation or negotiation stage could increase the chances of enforcement.²⁰⁸

D. *Mandatory language.* While “shall” undeniably constitutes mandatory language in the context of the ICC-clause, one should for the avoidance of doubt clarify that mediation – be it upon termination or in accordance with any other criteria agreed upon by the contracting parties²⁰⁹ – is a condition precedent to arbitration.²¹⁰

Furthermore, case law reviewed in this thesis has shown that the following issues can alleviate some of the problems associated with MDR-clauses:

1. Delay and access to interim measures. As described in chapter 2.2, one of the potentially problematic aspects of MDR-clauses is that they can be a source of unwanted delay or

²⁰⁴ International Bar Association 2015, pp. 77, 201.

²⁰⁵ It has been argued that mediation also constitutes an agreement to agree (Dobbins 2005 p. 165), but since it can be differentiated from negotiations through it is relatively certain procedure and administration by a third-party adjudicator they will be treated separately herein.

²⁰⁶ Tevendale 2015 p. 40

²⁰⁷ International Bar Association 2015, pp. 73 and 151

²⁰⁸ Savola, 2006 p. 239

²⁰⁹ A set time period from the time of filing of the mediation request is used in the sample clause.

²¹⁰ See Tevendale 2015 p. 40, International Bar Association 2015, pp. 77 and 200, Kayali 2010 pp 572-573

otherwise hinder access to interim measures. The time limits described in B) above may be helpful when attempting to deal with this problem, but interim measures are generally a very time sensitive issue and a more apt solution may be to add a provision to the clause that allows a party to pursue interim measures in a court of law (or before an arbitral tribunal where available) despite not having completed the ADR requirements.²¹¹ It is common for arbitration rules to contain similar provisions (often in optional form), making a clarification of the parties intent to that effect appropriate.²¹²

2. Counterclaims. To avoid a situation similar to ICC Case No. 14079 where counterclaims that had not been subject to mediation before arbitration could not be heard by the tribunal – one should avoid using broad and all-encompassing phrasing like “all disputes”. If the intention is to not limit the parties from presenting counterclaims at the arbitration level, such a clarification should be made in the clause. This will typically be the case, considering that most disputes that reach the stage of arbitration are contentious, and that new mediation proceedings for any new counterclaims would rarely serve any purpose other than to waste both parties’ time and resources.

6.3 Legislation as the way forward for Finland

The Nordic countries all share a similar legal tradition, which arguably constitutes its own legal system within the civil law systems. As such, it is not surprising to see that the Nordic countries share a very similar approach to ADR in general and to MDR-clauses in particular.²¹³ One of the main features of the Nordic legal system is its reliance on codified law, as opposed to the civil law practice with a heavier reliance on case law. The main driver of legal change in the Nordics can thus be said to be legislative changes and additions and any significant legal change would most probably have to come through the legislative process. It would not be unreasonable to argue that a policy or legal scheme allowing for the enforcement of MDR-clauses would indeed be the

²¹¹ Dobbins, 2005, p. 168

²¹² e.g. The ICC Rules of Arbitration article 28, the Arbitration Act of Finland 5 §, UNCITRAL Model Law on International Commercial Arbitration, Chapter II article 9.

²¹³ For general similarities see and compare for instance the Arbitration Act of Finland 5 §, the Arbitration Act of Sweden 4 §, the Arbitration Act of Norway 6 §, the Danish Arbitration Act of 2005 section 4.

only way to achieve significant change on the subject, especially given that the Nordic jurisdictions currently contain no codified references to MDR-clauses at all. This is not to say that it would be impossible for a policy of MDR enforcement to naturally develop through case law in Finland – the case KKO 1995:81 could even be argued to hint at such a possibility – but given the extremely low number of MDR-related cases that evidently end up in Finnish courts one might have to wait a considerable time for such developments to manifest themselves.

Another issue to consider here is that the enforcement of MDR-clauses has, as mentioned in section 4.3, not been a highly debated or even contentious issue in the Nordics. The lack of legislation supports this notion. As recently as 2018, the Finnish Ministry of Justice asked a select group of representatives from the legal and business sector to give their opinions on a possible change to the Arbitrations Act of Finland.²¹⁴ The act was seen to be outdated. A majority of the responses were primarily concerned with efforts to internationalize the act, mainly by modeling it after the UNCITRAL Model Law on International Commercial Arbitration. None of the respondents specifically named MDR-clauses as an issue of concern in the current act.²¹⁵ Nothing has developed from the Ministry questionnaire as of yet, and the likelihood of any changes that would encompass MDR-clauses is perhaps further diminished by the fact that the corresponding Swedish act was amended in 2019, without the addition of provisions regarding the enforcement of MDR-clauses.²¹⁶

In light of what has been said above, it is my belief that the interest in MDR-clauses and their enforcement is too low among Finnish lawyers and lawmakers for any legislative change to independently develop on a national level within the near future. This leaves us with the remaining option of the initiative for such a legislative change coming from an international level. This would indeed be preferable, as it would result in harmonization that as discussed in section 5.1 would provide a significant boost to the certainty and predictability of MDR-clauses in international commercial contracts. From a Finnish point of view it would be good if any such

²¹⁴ As published on lausuntopalvelu.fi by the Finnish Ministry of Justice

²¹⁵ It should be noted that the UNCITRAL model law for mediation contains provisions allowing for the enforcement of such clauses, see *Supra* note 183.

²¹⁶ <https://www.regeringen.se/492bb7/contentassets/dc5763f3515c41b882812788d27a85f5/en-modernisering-av-lagen-om-skiljeforfarande.pdf>

international push for harmonization should come from the EU in the form of a directive, as Finnish lawmakers would then, absent any interest in the issue of their own, be forced to enact legislation supporting the enforcement of MDR-clauses.

Regardless of where the legislative change comes from, the shopping list of issues that need to be covered by such a regulation and that we have identified above remain the same. We can as a result propose a model for any future Finnish (or international) law regulating the existence and enforcement of MDR-clauses. As pointed out in section 5.3, Piers has already provided us with a workable foundation for such a law that would, with the proposed additions mentioned in the aforementioned section, result in a law that would satisfactorily solve most, if not all, of the issues and uncertainties identified in the comparative analysis.

7. Conclusions

The comparative analysis has shown that the common law based Anglo-American sphere has shown a great willingness to enforce MDR-clauses, provided that certain conditions are met. Mandatory language can be described as the *core condition* as it is present in a consistent form in most, if not all, Anglo-American jurisdictions. While courts in the United States seem satisfied with the *core conditions*, MDR-clauses in the Commonwealth countries need to fulfill additional substantive conditions, in which the processes of the different ADR-steps must be described in sufficient detail²¹⁷.

In the civil law world of Continental Europe, a similar willingness to enforce MDR-clauses is evident. Contrary to the Anglo-American sphere, however, where the points of contention regarding MDR enforcement have chiefly been related to the wording of the clause, Continental European courts have been less concerned with the specific requirements²¹⁸ for enforcement, and instead focused much of the debate on the available remedies of non-compliance.

²¹⁷ The condition in which the parties cannot agree to agree (e.g. good faith and/or amicable negotiations) is deemed to be uncertain since *Emirates Trading v. Prime Mineral Exports*, see chapter 3.1.2.

²¹⁸ This is not to say that they have been ignored completely, see *Supra* note 108.

Little doubt remains today as to the enforceability of MDR-clauses in all of the Anglo-American and Continental European countries subject to review in this thesis. There are some slight variations as to the specific requirements for ADR-agreements to be enforceable between the countries, but the core concepts are the same; there must be clear intent between the contracting parties for the MDR-clause to be binding, and the ADR-procedures employed as pre-adjudicative steps are to be certain enough to allow the court or arbitral tribunal to determine whether or not the step has been completed. Another shared element is that substantive remedies to non-compliance have been universally rejected.

When it comes to the Nordic countries, two things become apparent in the light of the above analysis of enforcement of MDR-clauses; (i) the question of enforcement has arisen in a very limited number of court cases, and (ii) where the question has arisen, the courts have shown a propensity to disallow contracting parties to limit their own access to state courts.²¹⁹ The first point mentioned suggests that MDR-clauses generally are viewed as non-binding as far as the jurisdictional aspect is concerned. The second shows indications of a general unwillingness of Nordic courts to limit their own jurisdiction. Where MDR-clauses have been viewed as legally binding, the effects have generally been limited to damages and other substantive remedies. This could be seen as evidence of a conflict between the core principle of freedom of contract on the one hand and a strong emphasis on access to (state controlled) justice on the other. The latter comes with heavy legislative support on a constitutional and fundamental rights level and would seem to have won the proverbial war of the Nordics, at least for the time being.²²⁰

This Nordic stance could, and in my opinion justifiably so, be criticized for being outdated. Recent precedence from the European Court of Justice shows that not only should enforceable ADR-agreements not be seen as a limitation of the right to justice, but it could also even be viewed as enhancing such rights.²²¹

²¹⁹ The notable exception being KKO 1995:81, which has a questionable impact on contemporary enforcement of MDR-clauses in Finland, see chapter 4.3.1

²²⁰ See for instance Section 21 of the Constitution of Finland, citing an explicit right to have a dispute settled by a court and the case NJA 1971 p. 453 by the Swedish Supreme Court.

²²¹ See *Supra* note 116 and 134. Note, however, that this interpretation requires that certain basic requirements are met in the process, *inter alia* the ADR-process not being prohibitively slow or costly.

In addition to Nordic arguments relating to fundamental rights, the lack of recognition that MDR-clauses face here can at least partially be explained by a general lack of interest in, or understanding of, ADR in general and MDR-clauses in particular. One can expect this to slowly change as ADR becomes more popular in the Nordics, but the required change to the Nordic legislative regimes that would be necessary for a predictable and at least somewhat certain enforcement of MDR-clauses is not to be expected anytime soon.

One could, in summary, say that enforcement of MDR-clauses in national courts in the Nordics is uncertain at best, while the odds are significantly better in Nordic arbitral tribunals such as the SCC. For the time being it is, however, apparent that MDR-clauses are being used (with increasing frequency) in the Nordics, and that the legislative void that currently exists regarding their uncertain enforcement will eventually become an large enough of an issue to garner the attention of legislators and/or judges.

Arbitral tribunals largely follow the U.S. methodology when it comes to enforcement, i.e. the main emphasis is put on whether the language of the clause is sufficiently mandatory. Consequently, contracting parties and drafting lawyers in the Nordics that intend to create binding and enforceable MDR-clauses should set out to use arbitration instead of litigation as the last and final step of the clause. The odds of enforcement can be increased further by clear and precise drafting where the beginning, end, and further conditions for compliance with specific provisions can be easily ascertained by an adjudicator.

Furthermore, the comparative analysis identified a number of secondary (but nonetheless critical) issues that arise as a result of enforceable MDR-clauses, relating to, *inter alia*; access to interim measures during the ADR-phase, the continuation or suspension of statutes of limitation during the ADR-phase, the right to present counter claims during the adjudicative phase without having to complete previous ADR steps, whether enforcement should result in a suspension of the adjudicative procedure or a dismissal of the case, adjudicators not being able to rule on questions of compliance with MDR-clauses *ex officio*, and consequences of binding *pactum de non petendo* agreements on the right to access to justice. These issues were not encountered in all the analyzed jurisdictions of Anglo-America and Continental Europe, nor did all of the

jurisdictions where they were encountered have workable solutions for them. As the framework for the enforcement of MDR-clauses has developed through case law in these jurisdictions, it is natural that only the specific issues that have ended up before a court or arbitral tribunal gets incorporated into the law of that jurisdiction.

The discovery and compilation of the aforementioned secondary issues was one of the main goals of the functional comparative analysis in this thesis, as they provide Nordic legislators, legal scholars and lawyers alike with a comprehensive shopping list that can be utilized to develop a functional approach to MDR-clause enforcement in the Nordics, while at the same time being able to avoid the pitfalls that have already been discovered by trial and error in other jurisdictions.

The final answer that this thesis attempts to answer is, how should the lessons learned through comparative analysis be applied to the Nordic legal system? As previously mentioned, allowing law to develop organically in courts, as has been the case for all the analyzed Anglo-American and Continental European countries, has the significant drawback of being time consuming and it is easy for the aforementioned secondary issues to be overlooked unless such issues happen to be relevant to the (assumably) low number of MDR related cases that end up before the judiciary. Such an approach would also run counter to the Nordic civil law legal systems focus on codified law. Consequently, the best way forward for the Nordics is undoubtedly legislative in nature.

While there are some potential legal developments within the field of ADR in the Nordic countries – specifically in Finland, with a potential new arbitration act on the horizon – it is still very much uncertain how such developments will affect MDR-clauses, if at all. The general Nordic consensus seems to be that current ambiguity regarding enforcement is an issue of limited importance, which is surprising considering the increasing prevalence of the clause within the Nordic business community. Further legislative development in the field of ADR is needed to clarify the question of enforcement in Nordic state courts, whether the result such development will be enforcement or a lack thereof.

It would seem likely that should such legal development happen, it would likely have to come from outside the Nordic countries themselves. The EU would be a likely, and in my opinion

welcome, candidate for such international influence. Harmonization would indeed be, considering the aforementioned general lack of interest in the subject that is apparent in the Nordics, the only plausible source of MDR regulation if one is to expect such legislation within the foreseeable future. There have already been some commendable attempts by legal scholars like Maud Pierce to draft functional and unambiguous legislation on the subject of MDR-clause enforcement on the level of EU secondary law.

Until legislative change on the subject is achieved in the Nordics, either locally or through international harmonization, Nordic lawyers wanting to use MDR-clauses in their contracts are forced to live with the uncertainty that surrounds the clauses' enforcement in Nordic courts. Precise and unambiguous drafting that incorporates the critical issues identified in this thesis can, however, increase the likelihood of enforcement.

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57. The Constitution of Finland (Fin: Suomen perustuslaki (731/1999))
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Swedish Supreme Court

76. NJA 1971 p. 453

The Danish Maritime and Commercial Court

77. SH 2015.H-0041-10

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78. Emirates Trading Agency LLC v Prime Mineral Exports Private Limited [2014] EWHC 2104
79. Holloway v. Chancery Mead Ltd [2007] EWHC 2495 (TCC)
80. Sulamerica CIA Nacional de Seguros v. Enesa Engenharia [2012] EWCA Civ 638
81. Tang Chung Wah & Anor v. Grant Thornton International Ltd [2012] EWHC 3198
82. Walford v. Miles [1992] 2 AC 128

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83. BG Group plc v. Republic of Argentina
84. Golder v. The United Kingdom
85. HIM Portland LLC v. DeVita Builders Inc
86. Kemiron Atlantic Inc v. Aguakem International Inc
87. Ponce Roofing Inc v. Roumel Corp
88. Red Hook Meat Corp v. Bogopa-Columbia Inc

Arbitral Awards

89. ICC Case No. 4230
90. ICC Case No. 6276
91. ICC Case No. 8462
92. ICC Case No. 9977
93. ICC Case No. 9984
94. ICC Case No. 14079
95. SCC Case 21/1999

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96. Cassation Court of the canton of Zürich, Decision dated March 15th, 1999, no. 29.
97. The Federal Supreme Court decision BGE 142 III 296
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101. BGH, NJW 1999, pp. 647

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102. *Clinique du Morvan v. Vermuseau*, January 23rd, 2001 (1st chamber)
103. *Poiré v. Tripier*, February 14th, 2003 (mixed chamber)
104. *Medissimo v. Logic*, April 29th, 2014 (Commercial Chamber).
105. *Biogaran v. International Drug Development*, May 24th, 2017 (Commercial Chamber)
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