THE STATE OF COMMERCIAL MEDIATION IN FINLAND

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ABSTRACT

Mediation in commercial disputes is minimal in Finland. Although there is an established regulatory framework for commercial mediation both in the European Union and at the Finnish national level, parties to a dispute appear to prefer other dispute resolution methods. This paper adopts a two-fold strategy to explore the possible reasons for this phenomenon. The first part outlines the current regulatory framework on commercial mediation and its implications on Finnish commercial mediation. The second part focuses on commercial mediation practise in Finland. This part looks into earlier studies regarding what methods of dispute resolution Finnish businesses and their external dispute resolution advocates tend to resort to. Also, interviews carried out with professionals of the Finnish commercial mediation sector and other experts in Finnish dispute resolution are used to map out some further reasons for the current state of commercial mediation in Finland. This examination produces three categories of reasons for the limited use of commercial mediation in Finland: the regulatory framework, the attitudes ingrained in corporate culture and reasons related to the organisation of commercial mediation.

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1. INTRODUCTION

"Finland is a developing country when it comes to institutional commercial mediation."[1]

This paper seeks an explanation to the above-cited statement. At the moment, commercial disputes are resolved via mediation rather infrequently in Finland. Although there are established national institutions providing mediation services, Finnish legislation enabling mediation in court as well as European Union legislation on the matter, the parties appear to prefer arbitration or litigation when it comes to dispute resolution.

To map the current state of mediation in Finland and the reasons for that, this paper first outlines the regulatory and institutional framework of mediation in Finland and then moves on to studies on alternative dispute resolution (ADR) in Finnish companies. To deepen the understanding of the topic, I carried out a restricted qualitative study on the attitudes of Finnish advocates on mediation[2]. All lawyers who participated in the study are members of the Finnish Bar Association (FBA). In the study, the lawyers were asked to read a fictitious dispute case, suggest a method of resolution and give explanation for the chosen method. Due to the method of the study, the study does not give extensive information on the attitudes of Finnish lawyers in general nor can conclusions be drawn on this basis. However, the study does provide an insight into the potential reasons of for the limited use of commercial mediation in Finland. The conversations with the representatives of the institutes providing commercial mediation, a former president of the Helsinki Court of Appeal and some members of the academia[3] have produced more potential explanations. The study may also serve as grounds for further studies in the field.

The use of mediation seems to have permanently embarked in Finland in many fields. The Act on Conciliation in Criminal and Certain Civil Cases (1015/2005) establishes a national conciliation office practise, where certain civil and criminal matters can be settled for free with the assistance of voluntary mediators.[4] The Act on Mediation in Labour Disputes (42/1962) regulates the settlement of disputes arising from collective agreement negotiations.[5] The Finnish court mediation of civil disputes is growing increasingly popular in family matters.[6] In addition to this, there are multiple initiatives concerning mediation of disputes in the context of school-related matters or in multicultural disputes.[7] Yet, when it comes to mediation of commercial disputes, which can be broadly interpreted 'as conflicts arising from any relationship with commercial

1 Koulu 2006, p. 30, see also Hietanen-Kunwald 2013, p. 76.
2 I would like to express my gratitude to all the advocates who kindly responded to the survey and consequently made the writing of this paper possible.
3 I would like to thank everyone, who warmly welcomed me to have a discussion with them and invested their time into this paper. The discussions contributed vitally to the argumentation of this article.
4 Ervasti and Nylund 2014, p. 506.
5 Ibid., p. 407.
6 Ervasti and Salminen 2015, p. 602--603.
7 Ervasti and Nylund 2014, p. 388 and 390.

nature contractual or not'[8], Finland does not play the leading role. It has been argued that Finnish businesses resolve their disputes mainly in arbitration and in litigation.[9]

The definition of 'a commercial dispute' is not straight-forward and has various dimensions. In this paper the focus is on business-to-business (B2B) disputes, since this paper focuses on the commercial users of mediation. It must be noted, however, that the scope of the businesses under scrutiny might fluctuate given the available sources. For instance, the studies used when discussing the Finnish companies' dispute resolution behavior in this paper represent the largest companies' positions[10]. However, the majority of the Finnish businesses are small and medium-sized enterprises (SME)[11]. The number of genuinely commercial disputes within the meaning of this paper in court mediation is difficult to establish from the statistics, since there is not more detailed information available on the parties to each case. Moreover, there is not an extensive record on all institutional mediation and ad hoc mediations are not reported. Nor is there is neither sufficient information on the total number of out-of-court commercial mediation in Finland.

The organisation of commercial mediation in Finland has developed to some extent; there is state established mediation, private institutions providing their services and ad hoc mediation. Yet, the use of commercial mediation is not remarkable. The total number of commercial mediations in Finland in a certain year cannot be estimated given the challenges to define 'commercial disputes'. However, the absolute majority of court mediation tackles family matters.[12] In the light of the supranational eagerness to promote commercial mediation and the established use of mediation in certain fields of dispute in Finland, one cannot but wonder the reasons for the implied lack of commercial mediation. Although Koulu only refers to institutional commercial mediation[13], this paper addresses both court and out-of-court mediation.

Based on the earlier studies and the interviews with seven professionals in Finnish dispute resolution, I have distinguished three sub-categories of reasons which might explain the phenomenon under scrutiny. It is highly likely that there are additional explanations for the limited use of commercial mediation in Finland. The reasons identified within the limits of this paper are the regulatory framework, the attitudes ingrained in corporate cultureal and reasons related to the organisations of commercial mediation. Each category will be discussed in an individual chapter.

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8 UNCITRAL 2002, Article 1 (1), the definition was used in Koulu 2006, p. 56.
9 Autio 2014, p. 192, Roschier 2014, p. 12.
10 Autio 2014, p. 55, Roschier 2014, p. 4.
11 The Federation of Finnish Enterprises Webpage.
12 Ervasti and Salminen 2015, p. 602–-603.
13 Chapter 1, p.3; Koulu 2006, p. 30.

2. MEDIATION IN FINLAND – REGULATORY FRAMEWORK

2.1 Concept of Mediation

Before going any further, it is pertinent to attempt to define the concept of mediation. The difficulties encountered when defining mediation later become relevant when identifying some of the reasons for the limited use of mediation.

The key element of mediation is the third party who tries to assist the parties in a conflict.[14] From this point on, Tthere are various different models and approaches to mediation. On a theoretical level there may be distinguished at least three mediation models: the facilitative, the evaluative and the transformative model. In the facilitative model, the mediator facilitates the environment for a settlement[15]. An evaluative mediator may actively evaluate the parties' positions and give settlement proposals as well as evaluate the possible court outcome of the dispute.[16] The transformative model focuses on the parties and aims at empowering their communication[17]. In each type of mediation, or in a hybrid version, the role of the mediator and that of the parties in dispute vary.[18]

Also, the European Union legislation sets certain definitions for cross-border mediation in the Mediation Directive[19] but some discretionary powers are left for the national legislators.[20]Still, at the Finnish national level there is not a single definition for commercial mediation but the definition depends on the chosen set of mediation rules.[21] For instance, when it comes to court mediation and the mediation rules by the Finnish Bar Association, the role of the mediator has been argued to be almost identical and the rules to represent the facilitative model[22], whereas the conciliation rules of the Finnish Association of Civil Engineers ("RIL") could be more evaluative of by their nature[23].

One must orientate navigate in a conceptual jungle to understand the currently existing regulatory dimensions of commercial mediation. In Finland, mediation of commercial disputes occurs 'privately' and in official judicial bodies. Koulu uses the term 'private mediation' to describe mediation organised by independent institutions where the mediation is not subject to regulation

14 Carr 2014, p. 610.
15 Ervasti and Nylund 2014, p. 146.
16 Ibid., p. 155–-156.
17 Ibid., p. 162–-163.
18 Ervasti and Nylund 2014, p. 139.
19 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.
20 Hietanen-Kunwald 2013, p. 81.
21 Ibid., p. 86.
22 Ervasti and Nylund 2014, p. 407.
23 Interview with Petra Hietanen-Kunwald 2015.

by the state[24]. This may be called also 'institutional mediation'.[25] Court mediation, for its part, is carried out by official judicial bodies.

The rest of this chapter briefly explains the Finnish regulatory framework on commercial mediation before examining the regulatory reasons affecting the limited use of commercial mediation addressed in the discussions. The regulation governing commercial mediation is reviewed to help the reader to understand the pitfalls of the current regulatory framework. I will first outline the relevant EU legislation, then introduce the independent institutions and their mediation rules, and conclude with the national legislation and court mediation.

2.2 European Union Legislation

The European Union (EU) has set the stage for the use of commercial mediation in Europe by adopting a two-fold strategy in the governance of alternative dispute resolution (ADR) in civil matters.[26]. First, self-regulation has been encouraged by creating the European Code of Conduct for Mediators in 2004, which is a non-binding soft law instrument setting model principles to guide the European mediators in their work. Secondly, the Mediation Directive was enacted in 2008[27]. The measure facilitates the access to justice within the EU, which is a fundamental principle in securing the free movement of persons in the internal market.[28] The Directive's aim is to set the mediation of cross-border cases on equal footing with purely domestic disputes. This attempts to facilitate the use of mediation in cross-border cases[29].

The Mediation Directive has been in force for eight years now and the elements introduced in the instrument have met some criticism. A study conducted by the European Parliament to assess the impacts of the implementation of the Mediation Directive identifies the 'mediation paradox'.[30] This entails that despite the numerous proven benefits of mediation as a dispute resolution method and the Mediation Directive implemented to promote and facilitate mediation throughout the EU, the statistics suggest that, de facto, mediation still plays a minor role in the field of civil and commercial dispute resolution.[31].

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24 Koulu 2006, p. 3.
25 Ibid.
26 Koulu 2006, p. 129, Green Paper on Alternative Dispute Resolution in Civil and Commercial law, p. 27.
27 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.
28 Ibid., Recital (2).
29 Association for International Arbitration 2008, p. 13.
30 European Parliament Dictorate General for Internal Policies 2014, p. 1.
31 Ibid., p. 162.

2.3 Finnish Organizations of Commercial Mediation

2.3.1 The Finnish Bar Association

The Finnish Bar Association (FBA) has been the major developer of institutional commercial mediation in Finland[32]. In 1998, the association created its mediation rules under the influence of the facilitative mediation model used by the Centre for Effective Dispute Resolution (CEDR) in London[33]. Koulu argues that the FBA mediation model can arguably also represent the evaluative model since the mediator may give recommendations upon the parties' request.[34]. The Mediation Board of the FBA can appoint FBA's members as mediators, or the parties to the dispute can directly ask an advocate to be their mediator (ad hoc mediation).[35]. The FBA does not hold a record of the appointments of the mediators. A rough estimate is that since 1998 the FBA's Mediation Board has been involved in approximately some 20--30 mediations.[36] It is impossible to estimate the number of ad hoc mediations where the FBA Mediation rules are appliedis impossible to estimate, since the mediators are not obliged to inform the FBA on their mediation cases.[37]. However, there are statistics on the mediation training provided by the FBA. The FBA only educates its members on mediation. Approximately one third (700) of the FBA's members have participated in a one-day lecture-based training session and some 400 members have participated in a furthertwo-days long advanced course on mediation including simulations and practical training.[38] Considering that there are approximately 2 000 members in the Finnish Bar Association, only a fifth of the Finnish advocates haves participated in the more advanced training.[39].

2.3.2 The Finland Arbitration Institute

The Finland Chamber of Commerce (FCC) and, more precisely, the Finland Arbitration Institute (FAI)[40] has appointed conciliators since 2004.[41]. Since 2004, there have been two appointments.[42]. The FCC launched their Mediation Rules on 1 June 2016.[43]. The Mediation Rules are based on the facilitative mediation model, and the founding elements are the

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32 Esplugues and Marquis 2015, p. 276.
33 Interview with Antti Heikinheimo 2015.
34 Koulu 2006, p. 33.
35 Article 3 of the Finnish Bar Association's Mediation Rules.
36 Interview with Antti Heikinheimo 2015.
37 Esplugues and Marquis 2015, p. 277.
38 Ervasti and Nylund 2014, p. 407.
39 Interview with Antti Heikinheimo 2015, The Finnish Bar Association's webpage.
40 The Finland Arbitration Institute is the short form of the official name ""The Arbitration Institute of the Finland Chamber of Commerce"". FAI operates in connection with the Finland Chamber of Commerce but it carries out its functions independently of the Finland Chamber of Commerce.
41 The Finnish Ministry of Justice 2010, p. 26.
42 The Finland Arbitration Institute Statistics 2015.
43 FAI News 2016.

voluntariness and confidentiality of mediation. The Mediation Rules grant the parties and the mediatora great flexibility to tailor the mediation process as they see fit.[44]

2.3.3 RIL Sovittelu

RIL Sovittelu (English: Consiliation) is a company established by the Finnish Association of Civil Engineers (RIL), providing dispute resolution and risk management services in construction projects. Its mMediation, orto use in the terms of the instituteinstitute's terms, conciliation services have been provided since the 1980s[45]. RIL Sovittelu has recently created both facilitative and evaluative mediation rules.[46]. The preferred form of mediation is the facilitative model.[47]. Since the 1980s, RIL Sovittelu has considered roughly 60 cases, most of which have been mediated in a facilitative manner.[48]. The settlement rate is high: in the past 15 years only two mediations (out of 40 in total) have not resulted in a settlement.[49].

2.4 FINNISH LEGISLATION ON COMMERCIAL MEDIATION

With respect to legislation governing commercial mediation, three acts should be addressed. Firstly, the fifth chapter of the Code of Judicial Procedure (4/1734) enacted in 1991 introduced a mandatory tool for the judges to encourage the parties into a settlement in cases amenable to settlement.[50] The settlement can be a result of a judge-made proposal, but the parties can also reach a settlement through negotiations or in ad hoc mediation. Therefore, this way to reach a settlement does not necessarily have the features of mediation, and it has been argued that such settlements should be kept apart from the framework of commercial mediation.[51] It is, however, possible that many associate the encouragement of settlements in civil process to court mediation for linguistic reasons which are more elaborately discussed in the chapter explaining the organisational reasons[52].

An interesting proposal was put forward in the discussions: the popularity of the settlements during the civil litigation arguably affects the number of disputes left for the mediation proper.[53]. In 2015, approximately 353 500 civil cases were decided. To provide a breakdown of the figure, around 10 500 of the civil cases became pending by virtue of an extensive application for summons[54], whereas the majority of the cases (343 990) concerned e.g. simple undisputed

44 Interview with Heidi Merikalla-Teir 2016.
45 Interview with Helena Soimakallio 2015.
46 RIL Conciliation Webpage.
47 Interview with Helena Soimakallio 2015.
48 Ibid.
49 Ibid.
50 Section 19 and 26 of the fifth chapter (1052/1991) of the Code of Judicial Procedure 4/1734.
51 Ervasti and Nylund 2014, p. 400--401.
52 See Chapter 4.
53 Interview with Lauri Melander 2016.
54 In Finnish "laaja haastehakemus".

debt and were initiated by a more limited application for summons[55]. Of the 10 500 cases initiated by an extensive application for summons, 34 per cent were settled in accordance with the fifth chapter of the Code of Judicial Procedure, 32 per cent were decided by a district court and the remaining cases were either decided by a default judgement, left unexamined or set aside for other reason. Yet, when compared the number of settlements is compared to the total amount of civil cases in that year, the proportion of settlements is not that remarkable. It should be noted, however, that the majority of cases initiated with a more limited application for summons are often decided in a judgment by default when the action has not been opposed by the defendant. Such cases tend to concern debt collection where the settlement is not desired by either of the parties because the case has been initiated for enforcement purposes. In Sweden, for instance, such cases are managed by the enforcement authorities.[56] The settlement tool under the Code of Judicial Procedure is to be sharply distinguished from court mediation. Court mediation is a separate voluntary process, when again the encouragement of settlement in cases amenable to settlement is an obligatory part of the Finnish civil procedure.

Court mediation is regulated under the Act on Mediation in Civil Matters and Confirmation of Settlements in General Courts (394/2011) (the Mediation Act). The Finnish court mediation is a process conducted by a judge in the court where the matter is pending.[57] Pursuant to the Mediation Act, the mediation process poses primarily a facilitative role for the mediator, although the mediator is allowed to propose an amicable solution if the parties so wish.[58]. The court mediation resembles greatly the Mediation Rules of the Finnish Bar Association[59], and consequently represents the classical model of facilitative mediation also used by the Centre for Effective Dispute Resolution (CEDR). In 2014, there were 1219 court-annexed mediations, which is 15 per cent of all the civil disputes brought before the Finnish general courts.[60] As mentioned above, the majority of the cases handled in court mediation concerned family law (775).[61]. Similarly, employment disputes (55) and inheritance disputes (11)[62] are not commercial disputes and should be excluded, when estimating the number of court-annexed mediations with a commercial nature in 2014. The remaining 378 cases may include disputes of commercial nature but a precise number is impossible to establish without further information on the disputes.

The Mediation Act also implements the major harmonisation measures of the Mediation Directive: the enforceability of mediation settlement agreements, the preservation of mediation's confidentiality in other proceedings, and the suspension of limitation and prescription periods

55 In Finnish "suppea haastehakemus".
56 Interview with Lauri Melander 2016.
57 Section 5 (1) of the second chapter of the Court Mediation Act 394/2011.
58 Section 7 of the second chapter of the Court Mediation Act 394/2011, Ervasti and Nylund 2014, p. 398.
59 Ervasti and Nylund 2014, p. 407.
60 Ervasti and Salminen 2015, p. 603.
61 Ibid., p. 602--603.
62 Ibid., p. 606.

during mediation.[63] When it comes to the enforceability of mediation settlements, the Finnish Mediation Act has adopted broader scope than that of the Directive, as also domestic out-of-court settlements are enforceable under certain criteria. Hence only the foreign settlement agreements without a cross-border element are excluded fromof the scope.[64]

The Mediation Act has been criticised for the vagueness of the enforceability criteria. The Act sets out the following criteria for the confirmation of an out-of-court mediation settlement. The settlement must be the result of a 'structured process'. The process should be based on an agreement, rules or similar an arrangement[65]. The parties should voluntarily and on their own initiative seek the settlement.[66]. This means to exclude mediation where the mediator gives expert opinions or recommendations for settlement. The act therefore suggests that the parties should use a facilitative model in the mediation[67]. Finally, there must be a trained mediator who assists the process.[68]. The confirmation is processed in writing and certain formalities (the parties' names, the subject matter of the dispute, the contents of the settlement, and the name of the mediator) are required in the content of the settlement.[69].

The scope of the Mediation Act is not clear, since it does not establish what kind of mediation is deemed sufficiently facilitative.[70]. The required role of the mediator might exclude the evaluative mediation carried out by the RIL Sovittelu[71]. The legislator does not tell whether the assessment of the process is done ex ante or ex post.[72] In practise, this might lead the parties to a frustrating situation, where non-binding suggestions by the mediator exclude the parties from enjoying the Mediation Act's benefits.[73]. It has been argued that the attractiveness of mediation might suffer, since one cannot be certain whether the settlement can be enforced[74]. Also, in the experience of the RIL Sovittelu's CEO, the institute's mediation services mainly attract claims under the threshold of EUR 5.000.000. The parties often want to have an enforceable decision for disputes concerning larger sums.[75]

Counterarguments exist though. It has been pointed out that the confirmation of a settlement is not necessarily an important factor in the choice of mediation, since the idea of the very dispute resolution method is to voluntarily find an option that serves both parties' interests. If such option

63 Articles 6, 7 and 8 of the European Directive 2008/52/EC.
64 European Parliament Dictorate General for Internal Policies 2014, p. 87.
65 Section 18 (1) of the third chapter of the Court Mediation Act 394/2011.
66 Ibid.
67 Ibid., Proposal by the Finnish Government 284/ 2010, p. 25.
68 Chapter 3, S 18; Government Proposal 284/2010, p.25, European Parliament Dictorate General for Internal Policies 2014, p. 88.
69 Sections 19 and 20 of the third chapter of the Court Mediation Act 394/2011.
70 Hietanen-Kunwald 2013, p. 88.
71 Interview with Petra Hietanen-Kunwald 2015.
72 Hietanen-Kunwald 2013, p. 88.
73 Interview with Petra Hietanen-Kunwald 2015.
74 Ibid.
75 Interview with Helena Soimakallio 2015.

is found, there should not be a need for the confirmation[76]. The parties have indeed voluntarily accepted the settlement. Additionally, if the parties wish to confirm their settlement regardless of the arguable non-necessity, the FCC Mediation Rules provide that the parties may, subject to the consent of the mediator, agree to appoint the mediator as an arbitrator and request him or her to confirm the settlement agreement in an arbitral award.[77] Since mediation is so flexible a process, there are alternatives to the confirmation process. This is not to say that the narrow scope of the confirmation of out-of-court settlements before general courts might still nourish the negative attitude towards mediation.

Finally, criminal matters and certain civil matters can be subject to mediation pursuant to the Act on Conciliation in Criminal and Certain Civil Case (1015/2005). The mediation is organised in national conciliation office practise under the guidance of voluntary mediators.[78] The scope of the application in civil matters is, however, very limited, since at least one of the parties to the civil dispute must be a natural person. Additionally, the dispute ought to be of minor nature, taking into account the subject and the claims put forward in the dispute.[79]

All in all, when it comes to the Finnish regulatory framework concerning commercial disputes, it may be concluded that the use of commercial mediation is limited. As for now, there are only a relatively small number of commercial mediation cases annually. In contrast, the legal framework has, in increasing number of cases, managed to attract parties to use mediation e.g. in family disputes or in certain criminal matters. It was established that the encouragement to settle under the Code of Judicial Procedure and the limited enforceability of the out-of-court settlements might explain the limited use of commercial mediation. In the discussions carried out with the relevant stakeholders it has become apparent, however, that the reasons for this do not exclusively lie in the regulatory framework. It seems that the parties resorting to commercial mediation and the organisation of the dispute resolution method in Finland might provide further explanations for the limited use. The next chapter will focus on the potential users of commercial mediation.

3. COMMERCIAL MEDIATION IN FINNISH PRACTISE

3.1 Mediation in Corporate Culture

This paper started by introducing the mediation paradox: despite the benefits globally associated to mediation, the Mediation Directive has not significantly increased the number of commercial mediations. To understand the reasons for the mediation paradox in the Finnish context, it is

76 Ervasti and Nylund 2014, p. 400.
77 Interview with Heidi Merikalla-Teir 2016.
78 Ervasti and Nylund 2014, p. 506.
79 Ervasti and Nylund 2014, p. 504.

beneficial to dismount to the actual users of commercial mediation: the Finnish businesses and their advocates. Two recent empirical studies[80] on the Finnish businesses' motives and behaviour in dispute resolution are useful for this purpose. The studies conclude that the most preferred dispute resolution method is arbitration, leaving litigation as the second best alternative.[81]

Most interesting finding from the corporate governance point of view are the dispute management policies and techniques used amongst the Finnish companies. 27 per cent of the Finnish companies had written policies on the appropriate dispute resolution methods.[82] Additionally, 76 per cent of the Finnish companies draft model dispute resolution clauses. Also, a systematic review of the contractual dispute resolution clauses was conducted by 61 per cent of the companies. Yet, only 8 per cent of all the responding Nordic companies had recently made changes to the handling of disputes. Also, only 10 per cent of total respondents considered changes in the near future.[83]

As the statistics show, the preferred dispute resolution method was arbitration. We can therefore assume that the dispute management policies and techniques by the companies mostly support the use of arbitration, which is the preferred dispute resolution method amongst most companies. Since only small changes or revision concerning the dispute resolution management has occurred or has been planned, the limited use of mediation is understandable. One could come to a conclusion that the corporate culture does not favour the use of mediation.

In the discussions with professionals of commercial mediation and some experts of Finnish dispute resolution I identified some support for premise of the anti-mediation attitude amongst the Finnish companies. The CEO of RIL Sovittelu pointed out that mediation is rarely included in the Finnish contract terms.[84] The conversations provided for more explanation as to the reasons why the Finnish companies seem to prefer other dispute resolution methods to mediation. Lauri Melander, the former President of the Helsinki Court of Appeal, brought an interesting angle to the discussion. Acting frequently as an arbitrator, Melander has sensed that the business executives rather prefer to 'externalise' the dispute resolution to an arbitrator, instead of putting themselves in the line. The executives might be afraid of losing a good business relationship if they gave their faces to the dispute.[85]

Finnish corporations seem to use arbitration and traditional litigation instead of mediation. Such dispute resolution policy is firmly 'locked' in the Finnish corporate culture, since few companies

80 Roschier 2014, Autio 2014.
81 Roschier 2014, p. 7.
82 Ibid., p. 15.
83 Ibid., p. 16
84 Interview with Helena Soimakallio 2015.
85 Interview with Lauri Melander 2016.

have changed or are planning on changing the model. Since dispute resolution clauses are contractual clauses, both of the contracting corporations should be willing to include mediation in the dispute resolution clauses. Given the dominant preference for arbitration and litigation, it might take some time before more Finnish companies start considering the use of mediation.

3.2 Premises of Case Study

As stated above, the Finnish businesses seem to favour other dispute resolution methods to mediation. But what is the role of the companies' advocates in this respect? The novelty of this paper is the attempt to define the Finnish advocates' attitudes towards and knowledge ofn mediation and to evaluate whether that can influence the use of commercial mediation in Finland. Since there already areis data on the businesses, this paper wishes to add to the discussion a new angle by looking into the external dispute resolution advocates.

The scope of the advocates is narrowed down to the members of the Finnish Bar Association, who have experience in commercial dispute resolution andwho work in a law firm in Helsinki, the capital of Finland. A search engine on the FBA's webpage was used to limit the search results with three filters (Advocates providing legal service for corporate clients; Advocates with the expertise in dispute settlement; Advocates in Helsinki) to find interviewees fulfilling the criteria[86]. By the concept of 'knowledge' the paper means to refer to the advocates' decision to use or not to use mediation in a fictional mediation bias case and their understanding of the benefits of the mediation in relevant cases. 100 advocates representing the selected scope were randomly picked and asked to participate in the case study. The selected advocates were sent an email, where they were invited to participate in a study on the commercial dispute resolution culture of Finland. The focus of the study was concealed, since the author did not want to lead the interviewees to any particular answer. Altogether 18 answers were received.

The knowledge is tested by a case study. As a basis for this study, I have used a competition case written by Rosemary Jackson for the preliminary rounds of the International Chamber of Commerce's (ICC) International Commercial Mediation Competition in 2014.[87] The ICC is an institute of commercial mediations on cross-border disputes.[88]. The institute has educated and developed ADR rules since its establishment in 1919.[89]. Relying on the years of expertise, which total to almost 100, it is arguable that the case chosen by the ICC authorities to their Mediation Competition realistically reflects the world of commercial mediation, and is therefore suitable for testing the Finnish lawyers' knowledge on mediation. The case concerns a construction dispute between a fictional state and a company: the capital of Bellevania, Belletown, and a construction company Urban Contractors in neighbouring Urbania.

86 The Finnish Bar Association's advocate search engine.
87 Bond and Wall 2015, p. 116.
88 Bond and Wall 2015, p. 5.
89 Ibid.

The case was translated into Finnish to help the Finnish advocates to associate the case to the Finnish context. First, the knowledge ofn the benefits of mediation is measured by asking the advocates to read the mediation bias case and to decide upon the case facts which dispute resolution method best suits the conflicts of the case. Given that the case is particularly designed for mediation, the facts of the case are likely to lead a reader trained on mediation to a conclusion finding mediation as the most suitable dispute resolution method. Second, the advocates are asked to state the reasons that made them choose the very dispute resolution method they chose. The second question seeks to recognize the reasons that affect the advocates' willingness to recommend a particular dispute resolution method.

Given the very limited number of answers, which is typical in empirical research, the results of the case study are not statistically reliable.[90]. Therefore, the results acquired in the case study can only be used foron the background of this paper. Additionally, the chosen scope offor the Finnish advocates carries problems. As was mentioned earlier in this paper, only a third of the Finnish advocates have received mediation education by the Finnish Bar Association. Proportionally, the majority of such advocates work in Helsinki.[91] The advocates chosen for the case study were narrowed down to the advocates in the law firms ofinof Helsinki, which quite likely distorts the results, since the mediation educated advocates might be overly represented. Another critical comment concerns the advocates who answered to the case study. In the contacting process the webpages of the law firms were used to search the relevant contact information of the chosen advocates. Often when the advocate consented to participate in the case study the author noticed that she or he had mentioned some experience in mediation or arbitration ion her/his biography. Thereby, there is a risk that the majority of the participants are ADR-orientated, which again might distort theresearch results. Still, it is interesting to notice certain tendencies that are in line with ideas presented elsewhere in this paper.

3.3 Question 1: To Mediate or Not To Mediate

The first question concerned the dispute resolution method suitable for the imaginary case. The following pie chart presents the various dispute resolution methods mentioned in the answers tofor the first question. Many interviewees considered negotiation as the primary method for theexample case example. Yet, according to the case facts 'the parties have been unable to agree on the terms on which to continue the project or on which to abandon it'. Therefore, one could assume that negotiations in such a situation would not be productive anymore. For that reason, it is interesting to compare the answers after excluding the negotiation suggestions and base the comparison in such cases on the secondary suggestions. The Chart 1 presents the answers excluding negotiations.

90 Barlett, Kotrlik and Higgins 2001, p. 48.
91 The List of mediators on the FBA's webpage.

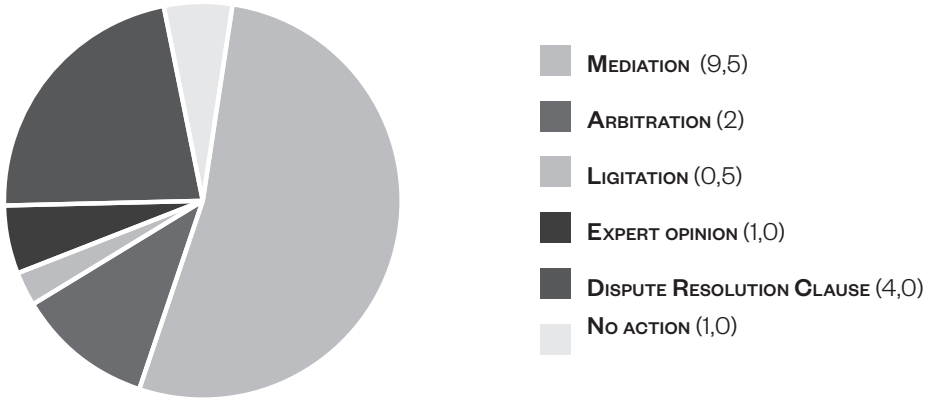

***Chart 1**: Primary Dispute Resolution Method Suggested Excluding Negotiations. Presents the number of respondents.*

The results show that the absolute majority of the advocates who responded to this survey are generally aware of mediation and would recommend it in situations that have several mediation-friendly elements. This, which indicates that they have a certain level of knowledge ofn mediation. Some respondents recommendedalternatively two alternatives for dispute resolution methods. In such cases boththe pie chart sections representing the two alternatives were increased bywith 0.5. One respondent specifically mentioned the ICC mediation as a suitable process. Excluding the one reference to ICC mediation, the respondents did not specify whether they would recommend institutional, court-annexed or ad hoc mediation. Looking at the definitions used by the respondents, three types of mediation definitions can be distinguished. Only one respondent specified that 'facilitative mediation' should be the mediation model. The majority referred to 'mediation' or to 'mediate the matter' without defining more particularly which mediation model would be used.[92] Four respondents mentioned that an external third party should lead the 'mediation'. One of the four previous respondents clarified that such a third party should know the construction law well.

The author acknowledges that the arguably vague references to mediation could be due to the fact that the study was based on an imaginary case. The author mentioned in the email sent to the respondents that the study concerned the commercial dispute resolution culture of Finland. Yet the online questionnaire format did not include references to the Finnish context but only talked about the imaginary case facts. Consequently, the lawyers might have struggled with associating the fictional world to the available dispute resolution methods of Finland. To get more specific answers, it would have been beneficial to emphasise more clearly the objectives of the study, and ask the respondents to imagine that the case had happened in Finland.

92 In Finnish the following terms were used: sovintomenettely; sovittelumenettely, sovitella asia.

Also arbitration, litigation, expert opinions, and the reference to the dispute resolution clause were mentioned as suitable dispute resolution methods. The case facts were silent on the existence of a dispute resolution clause between the parties. The attention to such clauses by the advocates is, however, very much in line with the fact that many companies seem to favour the use of business resolution clauses.

3.4 Question 2: Reasons For The Chosen Method of Dispute Resolution

The second question posed in the survey was to investigate the reasons that affected the respondent's choice ofn the certain dispute resolution method. The questions aim to identify the motives behind the lawyer's choice foron recommending certain dispute resolution methods to the client. Three groups of reasons affecting the respondent's decision were identified: reasons related to the nature of the dispute,; reasons related to the chosen dispute resolution method, and other reasons. The two first categories consisted of commonly accepted benefits of Mediation and Arbitration: the parties' joint interest; high monetary interest; the complexity of the dispute; the type of the dispute; the disputed matter open to interpretation (the nature of the dispute); rapidness; no appeal; expertise available; non-publicity; flexibility; confidentiality (dispute resolution method).[93] The reasons related to the nature of the dispute and the dispute resolution method are not so interesting because they are not special reasons applying toin the Finnish context, but internationally acknowledged reasons. Thus, more interesting reasons in the light of this paper were the other reasons.

Four4 respondents mentioned the contractual agreements, such as a dispute resolution clause, as decisive for their choice. This was noted already when going through the answers for the first question. One could assume that in real life also other respondents would take their client's dispute-related contractual agreements into account, but since the case facts were silent on such clauses, the other respondents have probably assumed its non-existence. The role of the dispute resolution clauses in determining the dispute resolution method seems to be decisive.

Another thing somewhat related to the previous comment is the 'client's will' that two respondents mentioned as being a factor affecting the recommendation. This might sound obvious, since of course the lawyer will not force the client but merely advise him or her. Yet, the fact that in one respondent's view the starting point is to define the client's expectations forof the dispute resolution, is an indication of where the incentive for a certain dispute resolution method comes from: the businesses. In another respondent's experience the Finnish businesses are perhaps not so fond of mediation, because they sometimes associate mediation withto negotiations and do not see the added value of such 'pro-longed negotiations'. The CEOs hesitate to propose a dispute resolution method, thatwhich is too similar to negotiations, to the board of directors, when they can suggest arbitration. In arbitration

93 Carr 2014, p. 587--590 and p. 610--624, Liebmann 2011, p. 180--182.

the neutral arbitrator concludes the dispute and the CEOs do not have to participate in the formation of the outcome.[94]

It is dangerous to draw any straight-forward conclusions given the limited and problematic scope of the case study. Bearing in mind the business behaviour studies discussed earlier and the comments learned in the discussions with the stakeholders, we could still take something out of the case study. It seems that sometimes the dispute resolution clauses prevent the lawyers from recommending mediation. It is also possible that the business clients do not appreciate mediation as a dispute resolution method, although the lawyer would see its benefits.

3.5 Organisation of Commercial Mediation in Finland

The last group of explanations foron the lack of commercial mediation identified in the discussions with the relevant stakeholders could be placed under the heading 'organisational reasons'. In this paper, the concept covers both education, the mediation society, and the Finnish language.To start with the education, Eeducation on commercial mediation is quite limited in Finland. The training in commercial mediations is only provided for the members of the FBA and forto the judges.[95] Since only thirty-five per cent of the Finnish advocates have participated in basic mediation training by the FBA, and only twenty per cent of the advocates have chosen to advance their knowledge in a more extensive training provided by the institute, it has been argued that it is not very likely that both parties to a dispute would be represented by an advocate who is well aware of mediation's benefits[96]. This has potential to affect the choice forof the dispute resolution method. The limited educational possibilities in commercial mediation in Finland haves potentially an effect on the business culture, too. Since the business lawyers cannot easily get education on commercial mediation, it is understandable that the use of mediation remains low.

It has also been argued that the training of mediation could be increased at the university level.[97]. As a matter of fact, there are four universities with a faculty or a department of law in Finland.[98]. Judging by the mandatory courses provided atin the universities, at least the University of Helsinki, the University of Turku and the University of Eastern Finland list mediation as a learning goal in their course on civil procedure[99]. When it comes to the optional studies, the University of Helsinki offers several courses solely devoted tofor mediation or the alternative dispute

94 Interview with Tuomas Lehtinen 2015.
95 The Finnish Ministry of Justice 2010, p. 39.
96 Interview with Antti Heikinheimo 2015.
97 Interview with Antti Heikinheimo 2015.
98 The University of Helsinki; The University of Turku; The University of Lapland and the University of Eastern Finland.
99 Course Catalogue of the University of Helsinki, Faculty of Law, Course Catalogue of the University of Turku, Faculty of Law, Course Catalogue of the University of Eastern Finland, Department of Law.

resolution in general.[100]. The University of Turku provides a track on mediation in the optional studies, and the students of the university have participated in the ICC's Commercial Mediation Competition.[101]. However, this is the situation now but when the corporate lawyers of today were students, the situation was different as mediation is quite a novel field. Mediation embarked in Finland in the 1980s[102] and the FBA's mediation rules were only established in 1998, being the first set of mediation rules genuinely applicable to any kind of commercial mediation. First legislation on commercial mediation was enacted in Finland in 2006 when the Act on Court-Annexed Mediation (663/2005) came into force. This can potentially explain the limited use of mediation amongst the Finnish businesses.

The Finnish mediation society is not that active, either, and it is remarkably less present thanthe that of the arbitrators. Santtu Turunen, a researcher atin the University of Helsinki, points this out by comparing the state of the Finnish arbitration society to the commercial mediators[103]. There are no associations or events solely devoted tofor the promotion of commercial mediation in Finland. Only the Finnish Forum for Mediation (FFM), promoting the entire mediation field, posts information on court mediation and mediation under the FBA rules on their webpage.[104]. InFor comparison, at the moment there are three Finnish universities participating annually in the Willem C. Vis International Commercial Arbitration Moot, and the competition produces a number of active alumni, who possibly promote arbitration in real disputes.[105]. The Finnish Arbitration Association (FAA) promotes the practise and recognition of Finnish Arbitration nationally and abroad, and the Young Arbitration Club Finland (YACF) promotes arbitration for legal professionals in various fields by actively organising events for its members [106]. The Finland Arbitration Institute organises the Helsinki International Arbitration Day event and, other seminars, andas well as represents Finnish arbitration abroad.[107]. Each association also provides information on their agenda in English on their webpages.[108].

Finally, also the concept of mediation in Finnish is not unequivocal. There isare more than one expression for mediation in commercial matters. As was mentioned in the chapter on the definition for mediation, in the Finnish context mediation can mean various types of dispute resolution with different methods. Two different expressions are used when referring to such mediation: 'sovittelu' and 'sovinto'. The Finnish Bar association, for instance, uses the latter for

100 Ibid.
101 Ibid.
102 Ervasti and Nylund 2014, p. 503.
103 Interview with Santtu Turunen 2015.
104 The Finnish Forum for Mediation Webpage.
105 Interview with Santtu Turunen 2015.
106 The Finnish Arbitration Association Webpage and Turunen 2015, The Young Arbitration Club Finland Webpage.
107 The Finland Arbitration Institute Webpage.
108 Ibid.

the institute's mediation rules, which are called sovintomenettelysäännöt. Court mediation applies the former term, and court mediation is called tuomioistuinsovittelu.

Another problem arises when one looks at the Finnish Code of Judicial Procedure, and more precisely the judges' obligatory tool to encourage the parties to settle the dispute if the dispute is amenable to settlement. In Finnish, the term 'sovinto' is applied here as well, although the settlement within the meaning of the Code of Judicial Procedure is very different from the court-annexed mediation. Similar vaguenessunclarity surfaces in legal literature: the settlements by virtue of the Code of Judicial Procedure are sometimes addressed as 'sovittelu' in court'[109].

The current use of terminology in thethe Finnish language can be confusing by not drawing clear distinctions between settlements in civil litigation and mediation in the meaning of this paper. This may be particularly difficult for parties of a dispute, who lack the legal training, and thereby are prone to rely on more familiar methods of dispute resolution. This leads them to neglect the newer possibilities, which they may not even be aware of.

4. CONCLUSION

The aim of this paper was to examine the possible reasons for the limited use of commercial mediation in Finland. In this process, I applied former studies, relevant legal literature and the interviews with stakeholders in Finnish commercial mediation. As a result, the paper outlines three categories of reasons to explain the current state of commercial mediation. Firstly, the regulatory framework may include aspects that do not attract parties to mediation. The Finnish civil procedure might confuse the potential users of mediation. EveryoneAll does not necessarily acknowledge the added value of a facilitative mediation process. This might lead to the preference of the possibility to reach a settlement in civil procedure, without considering the surplus that mediation could bring about. Additionally, the limited availability of confirmation for out-of-court mediations might diminish the attractiveness of this dispute resolution method.

Secondly, a major reason for the limited use of mediation in commercial disputes seems to lie in the Finnish corporate culture. Although there is the opportunitypossibilit yfor court mediation, as well as there are three institutions providing mediation services, the parties still tend to favour other dispute resolution methods. Thirdly, there are peculiarities in the organisation of commercial mediation that might explain to some extent the limited use of mediation in commercial disputes. It has been argued that there is a shortage of education, and that Finland does not have an active mediation society, which is something that exists in the Finnish arbitration sector. Also the equivocal Finnish terms referring to commercial mediation might play a minor role in this matter, too.

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109 Turunen 2005, p. 24.

Finland is not the only EU Member State where commercial mediation has not been welcomed with a standing ovation –- the European Union suffers from the 'mediation paradox'. Yet, there is no reason to stop there and conclude that mediation is nothing for the Finnish commercial disputes. There areis a small number of successful commercial mediations in Finland, which suggests the potential of the method. Also future measures taken by the European Union as well as the recently launched FCC Mediation Rules may contribute to the development of the Finnish mediation culture. As a response to the statement presented in the beginning of this paper: Finland may indeed be a developing country when it comes to institutional commercial mediation, but hopefully, it might finally start to develop further.

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