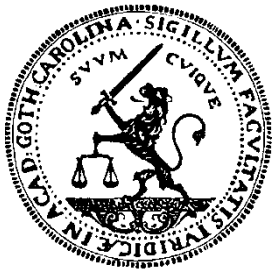

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Alternative Dispute Resolution in Business Contracts, especially mediation clauses

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Contents

Summary

The alternative dispute resolution (the "ADR") is an alternative dispute settlement procedure. It pursues the main objective to resolve the disputes arising between the parties to a contract in an amicable way with the aid of independent professionals or so-called neutrals. Nowadays the role of ADR is becoming more and more important, and the number of agreements containing ADR clauses is constantly increasing. One of the reasons for this growth is that the ADR is usually more effective and time-saving than the ordinary court proceedings. As the statistics reveals, 80 – 90% of the disputes being considered under ADR are successfully resolved.

The present paper examines the most popular technique for elective alternative dispute resolution within the EU, that is mediation (conciliation). It focuses mainly on mediation process in civil and commercial disputes.

This thesis describes the tendencies of ADR development in the EU and the related provisions of the EU legislation, UNCITRAL Model Law on International Commercial Conciliation (2002), as well as other rules specified by business institutions providing ADR-related services, such as ICC and CEDR. It also makes comparisons between the US and certain MSs' courts practice regarding the ADR issues. In addition, it considers the ADR in the light of the right to valid remedy (fundamental principle of the EU).

In order to give a deep insight into the topic, the paper describes also the ADR origin, its characteristics and applicability, as well as its advantages over litigation/arbitration proceedings that aimed at promoting ADR's larger expansion to business conflict settlement procedures.

Furthermore, it brings up the important ADR issues that the parties to a dispute may come across in the course of ADR application, in particular, viability of the contract obligation to resort to ADR, potential adverse consequences for the failure to comply with such obligation, confidentiality of the ADR process, impact on the statute of limitation, and obstacles that may occur while enforcing the settlement.

Specific ADR clauses should be tailored for each particular transaction, taking into account the various factors and circumstances that may have an impact on the parties' decision to refer to ADR. Therefore, guidance on the essential questions that are to be reviewed while drafting the ADR clauses in contracts are presented as well.

Preface

At the outset, I would like to emphasize my deep appreciation to my family. Especially to my dear spouse who has been supportive during the entire study process and without whom I would not have the opportunity to follow this programme.

I also would like to thank my supervisor Patrik Lindskoug, dear friends, classmates, for their time and discussions of questions raised while I was working on the current thesis. A special thanks to Jesper Giversen for his invaluable help in proofreading of this paper.

Marat Mukhamediyev

Abbreviations

ADR	Alternative Dispute Resolution
CEDR	Centre for Effective Dispute Resolution
CJEU	Court of Justice of the European Union
ECHR	The Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
ICC	International Chamber of Commerce
MS	Member States of the European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
US	United States of America

1 Introduction

1.1 Background

> *"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."*[1]

First, in order to eliminate possible misleading understanding of ADR, let me briefly define it. Generally, ADR can be defined as a dispute resolution mechanism where the disputing parties, driven with a desire to resolve the issue for their mutual benefits, try to settle their differences by amicable way (out of court and out of arbitration) with the assistance of the professional neutral. It is important to understand that there is, in principle, nothing common with the court/arbitration adjudication. As opposed to the court proceedings, the ADR process does not have procedural guarantees and bases exclusively on the parties will and good faith. The ADR process presupposes the settlement to be reached by the parties themselves and which, in turn, would have the contractual nature, whereas in the court proceedings it is a judge who, based on the grounds provided and confirmed with appropriate evidences as well as statute provisions issue a decision that settle a dispute and should be followed by everyone.

As mentioned above, the ADR has contractual nature, i.e. its applicability to a particular dispute arose can be agreed by the parties. The thesis will discuss issues related to the ADR process as the dispute settlement mechanism in commercial contracts, focusing mainly on mediation. Here, it is worth to clarify what the mediation is. Mediation is one of ADR mechanism where the disputing parties, with the assistance of an impartial third party – mediator, try to settle a dispute in an amicable way with a "win-win" outcome for the parties. The current paper will go through the mediation definition and its particular features in more detail in particular chapter below.

Base on the above, for those of us, who strives to draft precise, complete and even ideal, from a subjective perspective, contract provisions, drafting ADR clauses could seem to be a challenging exercise. This paper is going to provide a better understanding of some crucial points that from the author's point of view are essential and should be given special attention to while drafting ADR (mediation) clauses.

Disputes are an unavoidable element of day-to-day routines. We may face them everywhere, starting from simple domestic altercation to giant clashes

[1] Abraham Lincoln. 1850. *Notes for a Law Lecture*. www.classicreader.com/book/3331/59/

of corporate interests. Different interpretations of either the law itself or the provisions of a contract in particular, improper performance of the contract obligations by either party, as well as some other different issues may raise disputes. Eventually the number of these possible grounds is limitless. At the end, courts resolve these disputes through a long, costly and harassing process for both of the parties.[2]

Thus, for business the risk of litigation is getting higher. Business starts to shift its approach from trust to distrustbased and more concentration on the litigation risk assessment. This, in reality, may negatively affect relationships between contracting partners. Are there any other ways by which disputes can be settled? Here the concept of ADR comes, particularly the mediation.

Mediation development within the EU has been going on three diverse threads: (i) civil and commercial disputes; (ii) matrimonial disputes; and (iii) disputes on protection of consumer rights.[3] The paper will focus on civil and commercial disputes only.

The author of current paper believes that after having read this thesis the reader would be familiar with the general ADR notion and with such form of ADR as mediation particularly. I hope that this very paper will bring the deeper understanding of the ADR practical value, its distinctive features as well as some possible problematic issues that may arise shall one agrees on the ADR in a contract.

1.2 Purpose

The purpose of this paper is to determine and analyse the features peculiar to the mediation process as the ADR form focusing on the civil and commercial disputes, regulation of the mediation process within the EU, identification of law enforcement practice with respect to the issues that may arise in the process of the mediation application, as well as clarification of the points one shall give an attention while drafting the ADR clauses in commercial contracts. The paper aims to present the EU aspect of ADR (mediation), as well as, practical tips, which one would recommend giving a glance while drafting clauses in business contracts related to out-of-court dispute resolutions. Due to the fact that ADR concept originates from the US the thesis will present the US aspect as well, reviewing the courts positions towards some ADR-related issues.

This subject is of high importance due to its respective novelty in the EU and the growing interest from the business society and the EU institutions. Savings on the range of directions make the ADR a very magnetic form of

[2] Mose, D., H. Kleiner, B. 1999. *"The Emergence of Alternative Dispute Resolution in Business Today"*. Equal Opportunities International (Vol. 18 Num. 5/6). p. 54.
[3] Toulmin, J. 2010. *"Cross-Border Mediation and Civil Proceedings in National Courts"*. ERA 2010. para. 5.

dispute resolution. However, the legal aspects of this process should not stay in the shadow but on the contrary it should be the first point to look at.

1.3. Method and Material

Taking into account the purpose of this paper, the following provisions will fall under the consideration: (i) the Commission official documents issued during preparation work in relation to ADR development, (ii) a directive of the European Parliament and the Council, (iii) model law, as well as regulatory documents of institutions providing ADR-related services, such as ICC, CEDR. In order to clarify courts practical approach to some ADR (mediation) issues, the thesis will review available court cases of the CJEU, decisions of some national courts within the EU as well as the US case law. Afterwards the comparison between the mentioned courts conclusions made in the judgements with provisions of the enactments and other documents specified earlier will be done. By this comparison similarity and or differences in such conclusions and provisions of the EU law on the ADR matters will be identified.

Since the concept of ADR originated in the US and being aware of the fact that the UK is the only country within EU with the common law system, the author will also compare courts' judgments states there while considering pitfalls of ADR clauses in commercial contracts.

1.4 Disposition

Chapter 2 provides the general overview on the concept of the ADR, its origin and specific features. It also contains information on how the CJEU considers the ADR methods in the light of right of access to court (fundamental principle of the EU law) foreseen in the ECHR and the Charter on Fundamental Rights of the European Union. Then it briefly introduces the ADR development within the EU, in particular describing what official documents and legislative provisions were adopted in order to develop and regulate the ADR. The author also reviews the most common form of the ADR within the EU[4] such as mediation in the light of contract formation that starts from the process of negotiation as departure point of the possible dispute settlement.

Additionally, in Chapter 3, the author discusses the main issue of this paper, factors affecting the ADR drafting strategies in commercial contracts, the problematic areas of the ADR, including such issues as viability of obligation in a contract to have recourse to the ADR, consequences related to limitation periods and failure to comply with the provisions of the settlement agreement, as well as, confidentiality and possible obstacles that may balk enforceability of the settlement agreement.

[4] Lindell, B. 2007. *"Alternative Dispute Resolution and the Administration of Justice – Basic Principles"*. Scandinavian Studies in Law (Vol. 51). p. 312.

Case law of some MS's courts, as well as the US's courts one will be analysed in order to present a practical approach to some ADR issues.

In Chapter 4 the concluding remarks are presented as well as personal assessment of the issues that have arisen.

1.5 Delimitation

As mentioned above the ADR procedure being an alternative[5] dispute settlement procedure presupposes the main object, namely to resolve a dispute by the parties themselves in an amicable way using assistance of independent professionals. The parties do not recourse the particular case to the court/arbitration, but instead they attempt to settle the dispute in question before some of the parties will decide to commence either arbitration or litigation proceedings. No one can be aware of the details of the raised issues better than those involved in the conflict. However, no decision or ruling from a third party needs to be followed. Based on this, such forms of ADR that require an ultimate binding decision for parties to a conflict are out of scope of this work.

I am aware of the fact that arbitration is deemed one of the ADR form. However, I disagree with this point of view due to the following reasons. Firstly, arbitration is in principle a court that characterised by the flexibility with regard to procedural rules as well as parties' possibility to choose an arbitrator based on information on the arbitrator competence. Secondly, arbitration is statute-based. Thirdly, arbitration award is a binding and enforceable[6] decision issued at the end of a particular case consideration. Fourthly, arbitration deprives parties of access to the public court whereas mediation does not. Fifthly, arbitration depending on the case can be quite an expensive procedure. Last but not least such global business institution as the ICC has separated the rules for the arbitration and the ADR.[7] Therefore, I hold the view that the arbitration itself is a separated procedure that probably cannot be considered neither as litigation *per se*, nor as the ADR procedure.

The ADR is a broad concept and includes different types of techniques, for instance, negotiation, mediation (conciliation), early neutral evaluation, collaboration etc. However, as mentioned in the Introduction part above the scope of this paper is limited by the mediation process with respect to civil and commercial disputes only.

[5] In some sourses the words *"appropriate"*, *"accelerated"* or *"adequate"* are used. See, for instance, Mackie, K., Miles, D., Marsh, W., Allen, T. 2007. *"The ADR Practice Guide: Commercial Dispute Resolution"* (Third ed.). p. 5.

[6] Convention on the Recognition and Enforcement of Foreign Arbitral Awards. New York. 1958.

[7] For more information on ths, see http://www.iccwbo.org/court/.

2 The ADR Concept

2.1 The nature of ADR

2.1.1 Background

The concept of ADR emerged in the US in the late 1970s. Favourable prerequisites for that happened to be slow, clumsy, unpredictable and costly court trials in the US. The ADR aimed at providing an alternative that would be more effective from a cost and time perspective.[8] After some 20 years, this concept came to the EU.

ADR may be defined as a structured process aimed at creating a resolution for a dispute through the usage of any technique benefiting the disputants, with assistance of a neutral party, as well as, not requiring a court decision (or any other binding ruling issued by third party on the case settlement). The general objective of the ADR is to settle a conflict in an amicable way and cut off potential litigation costs to businesses by setting aside the possibility of adjudication. By litigation costs we understand time, emotional wear-and-tear, financial expenses, and partner relationships.[9]

ADR procedures are alternative to the administration of justice. However, ADR cannot substitute adjudication, and application of any ADR techniques cannot be an obstacle to bring a dispute to a court or arbitration.

Enduring existence of ADR confirms that there is a demand for such procedures from the business society's point of view. There is a range of advantages that parties can gain from the ADR, such as process flexibility, parties focusing more on the facts of the case than the procedure, costs savings, short time period of dispute settlement, effectiveness, confidentiality, as well as, "keeping alive" further business relationships.[10]

The basis of ADR is a contract clause, i.e. a contractual obligation. A neutral party, engaged in the process, has power over neither party. In other words, even if the parties with assistance of a neutral party would agree on a settlement, failure to comply with such settlement by any of the parties would lead to a distinct court or arbitration hearing, but not to direct enforceability.[11]

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[8] Goldsmith, J., Pointon, G., Ingen-Housz A. 2006. *"ADR in Business: Practice and Issues Across Countries and Cultures"*. p. 7.

[9] Mose, D., H. Kleiner, B. 1999. *"The Emergence of Alternative Dispute Resolution in Business Today"*. Equal Opportunities International (Vol. 18 Num. 5/6). p. 54.

[10] See, for instance, Paulsson, J., Rawding N., Reed, L., Schwartz, E. 1999. *"The Freshfields Guide to Arbitration and ADR: Clauses in International Contracts"*. pp. 118-120.

[11] Goldsmith, J., Pointon, G., Ingen-Housz A. *"ADR in Business: Practice and Issues Across Countries and Cultures"*. p. 9.

It is worth noting that the ADR proposes an opportunity to the business community, including their legal councils, to find the solutions to the disputes via commercial settlements, which is obviously closer to business activities, than to address to justice in accordance with the order defined by law.[12]

It is worth noting that there are sets of rules adopted by, for instance, such global institutions as United Nation Commission on International Trade Law (the "UNCITRAL"), the International Chamber of Commerce (the "ICC") and aimed at regulating the ADR process. The thesis will consider them in more detail further in this work.

2.1.2 ADR features and applicability

Based on the definition of the ADR provided above, the ADR's legal nature and taking into account the limited frames of this paper we can briefly highlight the following ADR characteristics that are important and common for all types of elective ADR techniques. They also can be considered as advantages of the ADR:

- Confidential process unless otherwise agreed by the parties, that aimed at facilitating the settlement of a dispute between the parties (80 – 90 % of the disputes considered under the ADR had been successfully resolved).[13] We incline to think that the one of the reasons for such statistics can be the broad problem definition presumed in the ADR process which is opposite to administration of justice with the narrow problem definition.[14] This means that the parties focus not only at legal grounds but at other particularities of the case as well;
- Parties reach a settlement agreement by themselves acting in a good faith and follow their real will, however, with assistance of an objective and professional neutral party who as a rule does not assess the dispute, although can be requested to give his/her non-binding opinion on the dispute in question;
- Generally the process itself takes shorter period of time and as a result it turns to low cost procedure as compared to litigation/arbitration;[15]
- The parties mostly refer to interests and needs instead of rights and obligations.[16] It follows that the settlement is commonly tailored to the parties while considering a particular dispute and similar disputes can be settled in a different way subject to different ADR techniques. If the settlement is justifiable for the parties, its rationality is a

[12] Goldsmith, J., Pointon, G., Ingen-Housz A. *"ADR in Business: Practice and Issues Across Countries and Cultures"*. p. 16.
[13] Paulsson, J., Rawding N., Reed, L., Schwartz, E. 1999. *"The Freshfields Guide to Arbitration and ADR: Clauses in International Contracts"*. p. 110.
[14] The court applies law to cases with the uniform sercumstances. For this purpose all "non-legal" factors should be set aside and the narrow problem to be determined.
[15] This statement based on the assumption that the ADR procedure is efficient.
[16] Ibid. p. 316.

secondary matter. In other words, the parties create their own rule. In this regard it is worth noting that compromise between the parties can be based on uncertainty as well;[17]

- Parties do not limit themselves by the procedural rules as it appears during the litigation process. Therefore, such principles as equality and burden of proof that is inherent to the administration of justice does not need to be followed in the ADR process.[18] In the ADR process parties attempt to resolve a dispute with "win-win" outcome;[19]
- Responsibility for the outcome of the ADR process lies on the parties only due to the fact that it is the parties who make the final decision on conditions of the settlement agreement, even when the neutral party provides his/her opinion on the issues within the ADR process. Moreover, a neutral person is not a party to such agreement. However, if a neutral person is a lawyer then it is presumed that the neutral will not participate in the dispute settlement that somehow may have constituent elements of a criminal offence or a breach of mandatory public law obligations.[20] Some scholars suppose that liability of a neutral party can have place in case of gross negligence.[21]

Having considered the mentioned advantages of the ADR one still has to remember that the ADR mechanism does not follow the principle – "one-size-fits-all" and cannot be applicable to each and every situation. This means that an assessment of ADR potential success should take place in each particular case. Following matters are subject to review while drafting a brand new commercial contract or while considering possibility to settle a dispute by means of ADR in case when ADR clauses are absent in a contract:

- Whether both parties have the real willingness to settle a dispute. Here some hidden purposes could take place, e.g. tactical time protraction without genuine intention to resolve the conflict, parties' aversion to each other, substantial difference in economic power, etc.;[22]
- Whether the settlement of the dispute is required a precedent. Such situation potentially can take place when the dispute has the EU dimension and requires the interpretation of the EU law that, in turn, is vague and unclear. In this case, provided certain criteria are met[23] the court most probably will refer to the CJEU via preliminary ruling

[17] Ibid. p. 319. In case of uncertainty whether the particular evidence is not enough, the parties can share the potential risk.
[18] Ibid. p. 317.
[19] Brown, H., Marriott, A. 1999. *"ADR Principles and Practice"*. (Second ed.). p. 13.
[20] Goldsmith, J., Pointon, G., Ingen-Housz A. *"ADR in Business: Practice and Issues Across Countries and Cultures"*. p. 15.
[21] Ibid. p. 128.
[22] Paulsson, J., Rawding N., Reed, L., Schwartz, E. *"The Freshfields Guide to Arbitration and ADR: Clauses in International Contracts"*. p. 120.
[23] See, for instance, Case 283/81. *CILFIT v Ministry of Health*. [1982] ECR 341.

procedures[24] in order to get the CJEU's interpretation of the EU law. Additionally, sometimes necessity of interim measures can be a reason for the litigation;

- One may also have concerns that mere proposal to resort to the ADR may be considered by the counter party as evidence of the offerer's weak position. For elimination of these concerns, a contract should include detailed ADR clauses at the outset;[25]
- What kind of neutral party will better solve the issues. An expert in particular areas, professionals that know the ADR processes perfectly or just an individual whom the parties trust;[26]
- Generally, any statements, communications, documents provided by any party to a neutral party during an ADR procedure are confidential. A party should not present them in witness in litigation, arbitration or any other proceedings, unless otherwise provided by applicable law or the parties' agreement.[27]

In this light, one may conclude that ADR is a completely voluntary procedure that business partners may agree on, and eventually benefit from, shall they decide to resolve a dispute in an amicable way having assessed all pros and cons of the case at hand. It is very important to understand the genuine goals of a business partners before making decision in favour of the ADR. The author will focus on this moment in more detail in Chapter 3 below.

2.2 ADR and the right to valid remedy

As Article 6 of the ECHR states, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The CJEU declared the right to obtain an effective remedy as a general principle of the EU law.[28]

Same provisions also contains in Article 47 of the Charter of Fundamental Rights of the European Union, which says - *"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law."*[29]

[24] TFEU. Art. 267.
[25] Paulsson, J., Rawding N., Reed, L., Schwartz, E. *"The Freshfields Guide to Arbitration and ADR: Clauses in International Contracts"*. p. 122.
[26] Goldsmith, J., Pointon, G., Ingen-Housz A. 2006. *"ADR in Business: Practice and Issues Across Countries and Cultures"*. p. 10.
[27] See, for instance, Article 7 of ADR Rules of the International Chamber of Commerce.
[28] Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651. para. 18-19.
[29] The Charter of Fundamental Rights of the European Union. Art. 47.

In this regards one, inter alia, may have concerns on whether a contractual obligation to settle potential future disputes through the ADR procedure could somehow affect the right of access to court. The Commission in Green Paper gives an affirmative answer to this question arguing that recourse to the ADR does not suspend the limitation period, which in turn can hinder the execution of the right to recourse to the court. [30]

However, the CJEU in its judgment in joined cases[31] proclaimed that provisions of the EU law[32] are to be interpreted as non-precluding legislation of the MS pursuant to which consideration of a case in the court is subject to the disputing parties' attempt to resolve the dispute out-of-court. In the CJEU case in question, the author can observe the argumentation line similar to the Commission's in the Green Paper. The CJEU determined conditions when domestic law imposing on disputing parties obligation to refer to an out-of-court settlement procedure, does not preclude them from having access to the justice, particularly

> *"…provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties, and only if … interim measures are possible in exceptional cases where the urgency of the situation so requires."*

Since in the above considered judgement the CJEU was tackling the questions in the consumer field in the light of general principle of the EU law – right to valid remedies, one may conclude that most probably the CJEU will use the same approach considering necessity to recourse to the ADR process in commercial disputes. In other words, the possible stand of the CJEU on the similar matter concerning commercial dispute will be the same as mentioned above, subject to existence of certain criteria.

It is possible that one would concerned how provisions of the ECHR are relevant to the commercial contracts that predominantly enter between companies that in turn are not subject to human rights. However, the commercial contracts are not always enter between the companies. For instance, the mentioned provisions of the ECHR can be actual in protecting weak party to a transaction in such deals as trader (individual entrepreneur) versus the giant retailer (company) or service provider (individual entrepreneur) versus the purchasing company or facilities owner (individual) versus lessee (company) etc. From the author perspective, in these cases it is necessary to check provisions of the applicable law with respect to criteria

[30] Green Paper on Alternative Dispute Resolution in Civil and Commercial Law. para. 62.

[31] Joined Cases C‑317/08, C‑318/08, C‑319/08 and C‑320/08. Disputes between end-users and providers of telecommunication services.

[32] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services. Art. 34.

mentioned above in the CJEU judgement as to make sure that the ADR clause in particular contract will not be deemed as preventing access to justice of a party to a contract (individual).

Using the mentioned above argumentation we may also explain a standard provision of the Model Mediation Agreement drafted by the CEDR and stating that the referral of a dispute under the CEDR mediation procedure does not affect any right that exists in accordance with Article 6 ECHR. [33]

However, turning back to mediation as a necessary condition before having resort to the court, I believe that here it could be observed a "clash" between the desire of a MS, via domestic law, to promote the ADR and perhaps lower courts dockets by way of making the ADR as an indispensable condition for possible recourse to a court, from the one side, and the voluntary nature of the ADR concept, from the other side. In this simple example we can state the fact that practical application of the ADR concept differs from its theoretical basis in such a crucial moment as the fundamental right to choose whether to have recourse to the ADR or not. Since this matter is not the focus of this paper, the author will not elaborate further on it.

Nevertheless, at the end of the day, perhaps, the internal market dictates such requirements. A non-expensive, fast and at the same time effective system of dispute managing is required in order to implement advantages of the internal market.[34]

2.3 Appreciation and ADR regulation in the EU

Generally, the EU positively accepted ADR. The incremental actions of the European Parliament, the Council, the Commission and the MS confirm this statement.

As the Commission and the Council mentioned in part 2 of the Vienna Action Plan in 1998[35] *"Judicial cooperation in civil matters is of fundamental importance to the "area of justice". The rules on conflicts of law or jurisdiction should therefore be amended, particularly as regards contractual and non-contractual obligations, divorce, matrimonial regimes and inheritance, and mediation should be developed …"*.

Further, the European Council on 15 and 16 October 1999 held meetings in Tampere on the creation of an area of freedom, security and justice in the

[33] Model Mediation Agreement of the Centre for Effective Dispute Resolution. para. 9.
[34] Goldsmith, J., Pointon, G., Ingen-Housz A. 2006. *"ADR in Business: Practice and Issues Across Countries and Cultures"*. p. 329.
[35] Council and Commission Action Plan of 3 December 1998 on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice. http://europa.eu/legislation_summaries/other/l33080_en.htm

European Union.[36] The European Council specially noted that the MS should create alternative, extra-judicial procedures.[37]

Following the meetings in question, the Commission in April 2002 adopted the Green Paper on alternative Dispute Resolution in Civil and Commercial Law (the "Green Paper"). In the Green Paper the Commission raised a range of questions on the ADR development within the EU subject to answer by the MS.

Going further, after consideration of MS' feedbacks,[38] in July 2004 at the European Commission Justice Directorate conference in Brussels the European Code of Conduct for Mediators (the "Code of Conduct") have been launched. The Code of Conduct aims to apply to civil and commercial disputes. Improvement of mediation quality and trust in mediation are the purpose of the Code of Conduct. It sets out a range of principles that can be applicable to mediator's activities under voluntary basis.

The following step in the ADR development direction was proposal of the European Parliament and the Council for a Directive on Certain Aspects of Mediation in Civil and Commercial Matters (the "Proposed Directive") made 22 October 2004. An Explanatory Memorandum to the Proposed Directive (the "Memorandum") underlined that the concept of access to justice should include promotion of access to the process of adequate dispute resolution and not just access to the judicial system.[39] The Proposed Directive offered two suggestions that were going to facilitate access to dispute resolution. First suggestion related to the establishment of minimum common rules within the EU on several key aspects of civil procedure. Such aspects include suspension of limitation period, enforcement of settlement agreements, confidentiality. The second suggestion concerned the court's tools indispensable for active promotion of mediation, however, without making the mediation compulsory or subject to specific sanctions.[40] Moreover, as a legal basis for adoption of the Proposed Directive the Memorandum highlighted proper functioning of the internal market, i.e. ensuring (i) access to dispute settlement mechanisms while executing by persons the four freedoms[41] and (ii) the freedom to provide and receive mediation services.[42]

Following the presentation by the Commission of the Proposed Directive, the European Parliament and the Council on 21 May 2008 issued the Directive on Certain Aspects of Mediation in Civil and Commercial Matters

[36] See http://ec.europa.eu/civiljustice/adr/adr_ec_en.htm
[37] Tampere European Council 15 and 16 October 1999 Presidency Conclusions. para. 30.
[38] See Summary of the responses to the Green Paper on alternative dispute resolution in civil and commercial law. 13 January 2003. JAI/19/03-EN.
[39] Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on certain Aspects of mediation in civil and commercial matters. para. 1.1.
[40] Ibid.
[41] This includes free movements of (i) goods; (ii) persons; (iii) services; (iv) capital.
[42] Ibid. para. 1.2.

(the "Mediation Directive").[43] The Mediation Directive addressed to MS except for Denmark.

The scope of the Mediation Directive limited by cross-border disputes in civil and commercial matters. However, the Mediation Directive states that nothing should prevent MS from applying provisions of the Mediation Directive to internal mediation process.[44] Therefore, taking the above mentioned into consideration, the following conclusion could be drawn: the provisions of the Mediation Directive are could be applicable and can be applicable for both cross-border and internal disputes and respective mediation processes.

The Mediation Directive is without prejudice to national legislation, making use of mediation compulsory or subject to incentives or sanctions provided that such national legislation does not prevent the parties from exercising their right of access to the judicial system.[45] Furthermore, it contains provisions on enforceability of settlement agreement, confidentiality of the mediation, impact of the mediation on limitation period. The transposition period for MS to bring their laws, regulations and administrative provisions in compliance with the Mediation Directive specified by period of time before 21 May 2011. As a result of the implementation of the Mediation Directive the Commission will, no later than 21 May 2016, prepare and submit to the European Parliament, the Council and respective Committees, a report on the application and impact of the Mediation Directive in MS.[46]

After amendments introduced by the Treaty of Lisbon[47] to TFEU, TFEU contains the obligation of the European Parliament and the Council to adopt measures necessary for the proper functioning of the internal market which aimed at ensuring the development of alternative methods of dispute settlement. In other words, the obligation in question now vested on the treaty level that confirms the great significance that the EU attaches to the development of the ADR.

Meanwhile, in reference to initiatives with international dimension we should refer to the UNCITRAL Model Law on International Commercial Conciliation (2002) (the "Model Law"). According to the Resolution of the General Assembly,[48] the General Assembly recognize the value for international trade of amicable methods[49] for settling commercial disputes, taking into account increasingly usage in international and domestic practice

[43] 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 Metters.
[44] Ibid. para. 8.
[45] Ibid. Art. 5(2).
[46] Ibid. Art. 11.
[47] Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community. Signed 13 December 2007. Effective from 1 December 2009.
[48] Resolution adopted by the General Assembly [on the report of the Sixth Committee (A/57/562 and Corr.1)] 57/18. Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law.
[49] Dispute settlement with third party assistance. (e.g. mediation/conciliation).

of such methods, as well as, believing that the Model Law would contribute to the development of harmonious international economic relations, recommends that all states give due consideration to the enactment of the Model Law, in view of the desirability of uniformity of the law of dispute settlement procedures and the specific needs of international commercial conciliation practice.

Apart from definition to conciliation, the Model Law foresees general provisions on conduct of conciliation, disclosure of information, confidentiality, admissibility of evidence in other proceedings, enforceability of settlement agreement. States wishing to enact the Model Law may modify some its provisions in order to accommodate particular national circumstances.

Therefore, one may arrive with a conclusion that the ADR was successfully accepted in the EU and proved to be the efficient tool resolving the disputes.

2.4 Common ADR technique in EU

2.4.1 Starting point of communication - Negotiation

Negotiation as a "starting point" of all communications is a key element for successful application of the ADR. It can have different definitions. One of such definition that repels the core idea of negotiation can be sound as follows – consensual process where parties strive to agree on a conflict issue or potential conflict issue.[50] The general aim of negotiation[51] consists in achieving advantages that parties cannot achieve acting individually.

Depending on practical situation, a person can behave in line with ahead planned strategy. Generally, there are two main negotiation approaches distinguished in the literature, in particular adversarial and problem solving.[52] However, in practice the most negotiations are symbioses of mentioned approaches.

In order to be precise, let us briefly lay out hallmarks of each approach. Adversarial approach intends to take full advantage in favour of one party. Such negotiator views the structure of negotiation and respective switching through the prism of initial client's position staying close to it. He/she demands a lot and has intention to give away nothing. The target is to disseminate doubts concerning the position power of an opponent. Adherence to the approach in question amounts to a winner and loser in negotiations.[53] In contrast, a problem-solving approach in negotiation is searching for a solution that would be suitable for both negotiating parties.

[50] Jacqueline, M., Nolan-Haley. 2008. *"Alternative Dispute Resolution in a Nutshell"* (Third ed.). p. 16.
[51] Here, two-party negotiation under consideration.
[52] Ibid. p. 23.
[53] Ibid. p. 25.

Once a conflict arises, generally, the first step to the settlement is negotiation. Here perhaps the main concern the parties would have is whether the counterparty acts in a good faith in such a negotiation process and what consequences can lead the fact of failure to comply with this rule.

There are no CJEU decisions on this particular matter that we aware of. However, in Tacconi v HWS case[54] the CJEU stated that in case of *"…absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the parties to act in a good faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters…".*[55]

Tacconi v HWS case concerned liability for breaching the rule of law on acting in a good faith in pre-contractual negotiations. Here the court specified two points. Firstly, the liability that follows from the failure to conclude a contract, cannot be contractual liability. Secondly, lack of obligations, freely assumed by one party towards another one.

In this light, the possible conclusion can be that if a contract includes an obligation of the parties to negotiate future potential contractual disputes acting in a good faith (contractual obligation), then it is obvious that two points, specified by CJEU in Tacconi v HWS, will not exist. Therefore, such parties' duties will be contractual, which implies that failure to comply with the duty in question can be subject to further legal proceedings. Given in other words, the contract should include provision on parties' obligation to act in a good faith while negotiating any disputes arises from the contract or related to it. Moreover, it also might include liability provisions (financial sanctions) for failure to comply with such obligation. In this case, the proofing question is the one to be considered in addition.

However, if parties were not successful in dispute settlement via negotiation, then they may attempt to have mediation as a following step. Perhaps the parties will be more successful in reaching a settlement agreement with the professional assistance of an impartial third party - mediator. We are going to consider this form of the ADR below.

2.4.2 Definition of Mediation (Conciliation)

As already stated above, mediation in most cases is extension of failed negotiations but with assistance of impartial third party. Some scholars

[54] Case C-334/00. *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS).* ECR 2002. p. I-07357.
[55] Ibid. p. I-7395.

suppose that the term "mediation" is a synonym of term "conciliation".[56] Other distinguish the difference between these two terms saying that conciliation is a more formalistic form of ADR which does not suppose a neutral party to have separate meetings with each of the parties, whereas mediation is a more facilitative procedure where a neutral, as a rule, does not express his/her opinion on the matter in dispute but try to facilitate settlement by the parties themselves.[57] Meanwhile in conciliation a neutral party acts more active and can provide his/her opinion on how to settle the case, i.e. make a suggestion on possible outcomes of the case if it would be considered based on statute only. However, there is no recognized consistency on international level with respect to applicability of particular term to particular type of process.[58] This statement can also find its confirmation in the Model Law.[59]

Mediation is a form of the ADR in the process of which the disputing parties, with the assistance of an impartial third party – mediator try to settle a dispute in an amicable way with a "win-win" outcome for the parties. However, one should not mix the role of mediator with a judge or arbitrator. Mediator aimed to assist parties to reach settlement without any procedural guarantees and restrains. Settlement of a dispute and the terms of resolution are under the parties' ultimate control. Mediation process presupposes, on confidential basis, sharing information between the parties, meetings of the parties with mediator and with each other, depending on each particular case.[60]

For better understanding, let us emphasize characteristics specific for mediation:[61]

- Parties are free in having recourse to the mediation (voluntary will). However, depending on a contract terms and conditions or provisions of the applicable law, rejection of the mediation process can entail monetary punishment;
- Confidential procedure, unless some exceptions from this rule provided by the applicable law;
- Creativity. Parties may develop remedies that would not be available in the litigation process. Such type of remedies can be helpful in dispute between the parties that locate in different jurisdictions. In

[56] For example, in Sweden conciliation appears to have the same mening as mediation. See, for instance, Lindell, B. (2004) "*Mediation in Sweden*". ADR Bulletin. (Vol. 7, No. 5, Articel 3). p. 87. Available at: http://epublications.bond.edu.au/adr/vol7/iss5/3

[57] Goldsmith, J., Pointon, G., Ingen-Housz A. "ADR in Business: Practice and Issues Across Countries and Cultures". p. 82.

[58] Mackie, K., Miles, D., Marsh, W., Allen, T. 2007. "*The ADR Practice Guide: Commercial Dispute Resolution*" (Third ed.). p. 12.

[59] See Article 1 of UNCITRAL Model Law where "conciliation" determined as a process referred to by the expression either conciliation or mediation.

[60] Toulmin, J. 2010. "*Cross-border Mediation and Civil Proceedings in National Courts*". p. 394.

[61] Ibid. pp. 394-395.

this way the parties can avoid difficult legal issues related to differences in legislation, legal procedures etc. that may arise;[62]

- As a rule, a neutral party does not provide any opinion or recommendations to the parties regarding the dispute itself as well as its settlement. However, there can be exceptions from this rule, e.g. when the parties agreed between themselves and ask a mediator for an opinion. In any case such opinion does not have any binding power towards the parties;
- Parties may refuse to participate in the mediation at any time of its duration, but it is terms and conditions of particular contract to investigate on subject of any sanctions against such refusal. However, once a settlement agreement reached, drafted and signed by duly authorized representatives, it gathers legal force, subject to the applicable law.

After adoption of the Mediation Directive, the notion of the mediation has determined on the EU level. Thus, according to Article 3(a) of the Mediation Directive, mediation is *"a structured process, however named and referred to, whereby two or more parties to dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator"*. As we can see, the notion in question reflects characteristics of mediation, given earlier.

What are the advantages of mediation over the litigation? In addition to above mentioned specifics features of the ADR that make the procedure attractive to the parties we may also bring up the following points: avoidance of hasteful trials having "little" misunderstanding; parties have ability to keep a tight rein on the whole process and its upshot; information exchange before the mediation process; parties can mediate in parallel with court proceeding, or even stay the court proceeding for mediation purposes.[63] Nevertheless, some scholars express doubts concerning these advantages of the ADR.[64] However, we do not allege that by virtue of mediation disputing parties can be assured in completely correctness of the reached settlement of a dispute for them. It is all about what did them voluntary agree upon and accept to perform based on the situation at hand.

Thus, it has to be pointed out that the very features of the mediation considered above should be taken into account while drafting clauses of a commercial contract. Some of the most important provisions from the author perspective the paper will consider in the following Chapter.

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[62] Greensplan, D. *"ADR Strategies and Their Benefits"*. Global Reference Guide 2011: Litigation and Dispute Resolution.

[63] Jaeger, A., Hök, G. *"FIDIC – A Guade for Practicioners"*. 2010.

[64] See, for instance, Bingham, L. *"The Next Step: Research on How Dispute System Design Affects Function"*. Negotiation Journal (Vol. 18, No. 4). October 2002.

3 ADR in a Contract

3.1 What may influence the ADR strategy in a contract?

ADR clause in a contract is a clause according to which the parties agree to attempt to settle disputes that could arose from the contract or in connection with it by way of using one or more ADR methods. This clause may vary from standard simple, usually suggested by institutions that provide ADR-related services, to detailed clause regulating complex process. Parties are free to choose some particular ADR method, e.g. mediation, or leave such choice for later stage when a dispute will possibly arise. [65]

The ADR's core essence inclines towards non-binding ("without prejudice") approach aimed to discuss a dispute in a more comfortable confidential atmosphere. For successful mediation, the parties should be ready to explore different solution options and to listen to the other party's reasoning regardless of their initial stand.[66]

One may allege that there is no point to spend time for drafting detailed mediation clauses if the parties have the right to "escape" from it almost[67] any time. However, this way of thinking would be precocious as the ADR clauses puts this alternative method of dispute resolution on the parties' agenda and eliminates fears that parties may have in suggesting the ADR due to different reasons.[68]

In fact, the ADR clause simply needs to specify that the parties will use the ADR as a tool for disputes resolution. Parties to the contract need to assess and determine which kind of clause they would prefer in a particular contract. Even though the standard form of the clause is the easiest answer to the question is it not always the right decision. For example, the short type of clause may raise questions on type of ADR, procedure of appointment of a neutral, date when ADR process will be deemed to commence and complete, etc. There is a high probability to face difficulties in agreeing on mentioned spaces, once the parties in a conflict, that in turn will lead to a loss of the hole value of the ADR clause. At the same time, very detailed ADR clause may cause difficulties if parties would wish to have different ADR process than agreed on in the contract.[69] However, in such case the author believes that as far as the parties are willing to proceed with the ADR process they will be able to reach a consensus on this matter.

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[65] Mackie, K., Miles, D., Marsh, W., Allen, T. 2007. *"The ADR Practice Guide: Commercial Dispute Resolution"* (Third ed.). p. 151.
[66] Ibid. p. 152.
[67] Depends on a contract clause, e.g. in some contracts such a party would have such right only after commencement (first meeting with a neutral) of ADR procedure.
[68] Ibid.
[69] Ibid. 154.

Talking about detailed ADR clauses, the parties need to take into consideration the following general matters during the drafting process:[70] (i) should the parties have negotiations before starting the ADR; (ii) parties' obligation not to commence any proceedings before the ADR have been tried; (iii) identification of a moment when the ADR deemed to commence; (iv) how the ADR will affect on-going proceedings; (v) process of a neutral(s) appointment and requirements on his/her qualification; (vi) whether ADR should be organised by any institution providing ADR-related services; (vii) should the clause fix a particular ADR form, e.g. mediation, or foresee tiered structure; (viii) should the clause provide procedural rules such as documentation/information exchange, requirements to positions of persons attending meetings and making decisions[71]; (ix) how the parties should attend meetings with a neutral, separately or jointly; (x) will a neutral party be required or allowed to give a non-binding opinion on the most probable outcome of a case under consideration; (xi) how should the parties execute their obligations, undertaken under a contract, during the ADR process;[72] (xii) obligation to keep confidential all the information and documentation disclosed by the parties; (xiii) timetable of the ADR process; (xiv) scope of the ADR clause, i.e. what kind of disputes would fall under the clause;[73] (xv) dealing with the ADR costs; (xvi) arbitration clause (if the parties are willing to have it) if the ADR process fails.[74]

It is also highly recommended to analyse provisions of the applicable law ahead of the subject of enforceability on the settlement agreement.[75]

Additionally, it is worth noting some subjective factors that may also influence parties' decisions on appropriateness of the ADR. Thus, such dissuasive factors could be a lawyer or external consultant from the counterparty's side whose legal culture does not acknowledge the ADR. Noticeable indication on the existence of a hidden agenda can be irrational explanation of the counterparty's actions on to why it conceded the situation

[70] However, in each situation the clause is subject to separate analysis base on type of transaction, the likelihood of dispute, specifics of the parties relationships, etc.

[71] It is recommended to have a person in meetings who has the authority to make decisions that is not subject to any further approvals due to the following facts: (i) authority to make decision is crucial for the ADR as party interested in fast resolvance of a dispute, (ii) awarness of such person (as a rule someone of top management) on the dispute, factual backgrounds of which he/she could misunderstood before, being remoted from the disputing situation. Otherwise, there is always be a risk that a person without authority may agree on something that will not satisfy interests of brass hats.

[72] For instance, obligation of a contractor in the construction contract to continue the work during the mediation, etc.

[73] For instance, if dispute requires attendance of a third party which is out of ADR clause.

[74] Paulsson, J., Rawding N., Reed, L., Schwartz, E. 1999. *"The Freshfields Guide to Arbitration and ADR: Clauses in International Contracts"* (Second ed.). pp. 112 – 114.

[75] As folloing from Article 6 of the Mediation Directive, the content of the settlement agreement can be contrary to the law or the law may not provide for enforciability of the settlement agreement at all.

to deteriorate. Under such circumstances, the analysis of the counterparty's previous behaviour with respect to ADR process (if any) seems useful.[76]

However, the content of the ADR clause literally depends on business relationships and specific circumstances of a transaction.[77]

3.2 ADR issues

3.2.1 Is there a real obligation to have recourse to the ADR?

The question on "existence" of an obligation to have recourse to the ADR practically arise when one of the parties does not what to comply with it.

While analysing this question the thesis will be considering standard clauses offered by the world business organization that, inter alia, provides ADR related services, particularly the ICC.

Thus, ICC ADR Rules[78] suggest four possible ADR clauses: (i) Optional ADR; (ii) Obligation to consider ADR; (iii) Obligation to submit dispute to ADR with an automatic expiration mechanism; (iv) Obligation to submit dispute to ADR followed by ICC arbitration as required.

First suggested clause – "optional ADR": *"The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC ADR Rules."*[79] This clause does not create any commitments. It simply proclaims the parties right to consider ADR as a possible mechanism for dispute settlement. There will be no legal consequences for failure to comply with this clause by any of the parties. The clause in question serves as a simple reminder to the parties of the ADR availability. Moreover, the submission a dispute to the ICC under this clause will require the relevant agreement between the parties.[80] One may reasonably question the importance of such a clause. However, as one would say, such clause has more psychological angel. It is easier to offer the ADR when such possibility foresees in an agreement.[81]

Second suggested clause – "obligation to consider ADR": *"In the event of any dispute arising out of or in connection with the present contract, the*

[76] Goldsmith, J., Pointon, G., Ingen-Housz A. 2006. *"ADR in Business: Practice and Issues Across Countries and Cultures"*. pp. 27 – 28.
[77] Ibid. p. 11.
[78] ADR Rules of the International Chamber of Commerce (in force as from 1 July 2001).
[79] Ibid. p. 4.
[80] Goldsmith, J., Pointon, G., Ingen-Housz A. 2006. *"ADR in Business: Practice and Issues Across Countries and Cultures"*. p. 117.
[81] Ibid. p. 75.

parties agree in the first instance to discuss and consider submitting the matter to settlement proceedings under the ICC ADR Rules."[82]

As it can be seen from the clause, parties agree on discussion of the possible submission of a dispute to ICC. However, there are no requirements as to how such discussion should follow. In other words, it neither presupposes obligatory attendance at meetings nor exchange by any correspondence in this regard. Just as in the fist suggested clause, in case of failure to comply with this obligation none of the parties would face any adverse legal consequences.[83]

Third suggested clause – "obligation to submit dispute to ADR with an automatic expiration mechanism": *"In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, the parties shall have no further obligations under this paragraph."*[84]

The clause creates contractual obligation to participate in settlement under the ICC ADR Rules for the fixed period.

Nevertheless, in consideration of the provisions of Article 10(1)(a) of the Model Law, which states that a party cannot in any litigation proceedings rely on, introduce as evidence or give testimony or evidence on an invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings, it seems that in case of either party failure to comply with this obligation it will not bear any legal consequences.[85]

Fourth suggested clause – "obligation to submit dispute to ADR followed by ICC arbitration as required": *"In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, such dispute shall 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."*[86]

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[82] ADR Rules of the International Chamber of Commerce. p. 4.
[83] Goldsmith, J., Pointon, G., Ingen-Housz A. *"ADR in Business: Practice and Issues Across Countries and Cultures"*. p. 117.
[84] Ibid.
[85] Ibid. pp. 118 – 119.
[86] ADR Rules of the International Chamber of Commerce. p. 4.

The fourth clause differs from the third as to repercussions that fall due the period expiration.[87]

All clauses, suggested by the ICC, are not strict and therefore can be modified as well as the ICC ADR Rules themselves,[88] with limited exceptions, based on the parties' needs and interests.[89]

In the meantime, the parties may wish to have an obligation in their contract with greater legal effect compared to what are suggested by the ADR ICC Rules, as a mandatory condition that come before the commencement of the litigation. Practically such obligation means that the parties should appoint a neutral person and participate at least in one meeting with the neutral. Further, if any party will decide that there is no point to have ADR procedure, it may end it, unless otherwise agreed by them. As distinct from the clauses, suggested by the ICC, expiration of some period will not be a ground for termination of the ADR procedure.[90]

In the light of voluntary nature of the ADR process and access to justice as a general principle of the EU, one may fairly question the appropriateness of a mandatory ADR clause. However, here the mandatory action is submission of a dispute to the ICC. Further, either party can terminate the ADR procedure pursuant to Article 5(1) of the ICC ADR Rules, after having had first meeting with a neutral. Nevertheless, different jurisdictions may have different approach to mandatory ADR clause.[91]

Are there any adverse consequences for failure to comply with obligation to resort to the ADR are the subject of the following paragraph.

3.2.2 Adverse consequences for failure to comply with the obligation to resort to the ADR

At the first blush, it could be anticipated that there will be no point to put a dispute under the ADR process if a party, from the very beginning, does not want to resort to the ADR for a dispute settlement, as they will not reach any solution.

However, this statement could be argued. First, since a contract includes parties' obligation to resort to the ADR this obligation should be performed as any other contractual duty. Under some national laws, the mere fact that the obligation relates to the mediation does not allow to a party breach terms and conditions of the contract. Here the parties should follow the principle

[87] Goldsmith, J., Pointon, G., Ingen-Housz A. *"ADR in Business: Practice and Issues Across Countries and Cultures"*. p. 119.
[88] Subject to approval of ICC.
[89] ADR Rules of the International Chamber of Commerce. Art. 1.
[90] Goldsmith, J., Pointon, G., Ingen-Housz A. *"ADR in Business: Practice and Issues Across Countries and Cultures"*. p. 119.
[91] Goldsmith, J., Pointon, G., Ingen-Housz A. *"ADR in Business: Practice and Issues Across Countries and Cultures"*. p. 75.

pacta sunt servanda and have remedies against breach of the obligation in question. Second, the assessment of whether the ADR process is a rational decision in particular case should be made unanimously, by both parties. Therefore, unilateral assessment of the ADR viability by only one of the parties cannot pull off the whole ADR process.[92]

Nevertheless, what type of remedy can a party to a contract use against the other party for non-performance of the undertaken obligation? Since it is a contractual obligation, the parties might foresee a penalty clause or payments for compensation for losses. With respect to penalty clause, practically it is rare to find such clause in a contract.[93] At the same time, such remedy as compensation of losses would implies certain problematic issues such as difficulties in valuation of damages as well as exclusion of performance required, that is set to be a preferable remedy over the payment of damages.[94] Therefore, it seems that a party interested in the ADR process should undertake actions aimed at compelling the other party to properly execute obligations under the contract, e.g. in case of initiation of litigation by a party, a counterparty can file a motion requesting stay of the proceedings and order the parties, at least, try to settle the dispute via the ADR.

This question may also find some clarification in Article 13 of the Model Law, which states the following: *"Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings."*

As we can see from the provision of the Model Law above, control over the obligation to resort to the ADR and not to initiate the litigation proceeding during specified period, entrusted on the court or arbitral tribunal. That is, from the author's point of view, additional assurance from legislator aimed to support the contractual obligation on resort to the mediation.

An example for this we can see in the UK court practice. Thus, in Cable & Wireless Plc v. IBM United Kingdom Ltd.,[95] the court based on the contract provision stated that the parties should attempt in good faith to resolve any dispute/claim via the ADR procedure as recommended by the CEDR,[96] made the following conclusion: *"… the appropriate course in the present case is for the hearing of the claim for declaratory relief to be adjourned*

[92] Ibid. p. 119.
[93] Ibid. p. 120.
[94] Ibid.
[95] *Cable & Wireless Plc v. IBM United Kingdom Ltd.* [2002] EWHC 2059 (Comm Ct).
[96] Ibid. para. 23.

until after the parties have referred all their outstanding disputes to ADR."[97]

There was also wide court practice on the matter in question in the US. In Cecala v. Moore,[98] defendants moved to stay the proceedings based on mediation provision in the contract with plaintiffs. The court, relying on provisions of the statute ruled to stay the proceedings pending mediation notwithstanding the plaintiffs' arguments that complaint is out of the scope of the mediation clause.[99]

In Philadelphia Housing Authority v. Dore & Associates Contracting, Inc.[100] the court concluded that the plain language of the contract between the parties requires the dispute which is under consideration of the court have been submitted to a contracting officer with the right of defendant to choose whether submit the dispute to a court or proceed with arbitration or mediation. The court found that the contracting officer did not issue its decision in a way allowed the defendant to use any of the options available. Based on the above, the court had stayed proceedings during referral of the dispute to the contracting officer for it settlement in the order determined in the contract.[101]

In Tunnell-Spangler & Assocs., Inc. v. Katz,[102] the plaintiff alleged that the defendant has waived the right to mediation or arbitration provided in the contract. However, the court was not convinced since it looked at the situation from a different angle. In particular, the court mentioned the defendant's actions to be undertaken for acceptance of the judicial process. Contrary to the plaintiff's allegation, the court determined that the defendant did not accept the judicial process. As a result, the court ruled that the plaintiff's claim should be dismissed without prejudice in favour of the ADR process.[103]

In Gray and Associates, LLC v. Ernst & Young LLP,[104] the plaintiff tried to convince the court that mediation/arbitration clause was included in the executed agreement because of the defendant's fraud actions. The court held that there were not enough evidence provided by the witness of such allegation. Therefore, the parties were ordered to proceed with

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[97] Ibid. para. 41.
[98] *Cecala v. Moore*, 982 F.Supp. 609 (N.D. Ill. 1997).
[99] The plaintiffs were arguing, inter alia, that they base their complait on the statutory law but not on the contract.
[100] *Philadelphia Housing Authority v. Dore & Associates Contracting, Inc.*, 111 F.Supp.2d 633, 636 et seq. (E.D. Penn. 2000).
[101] Ibid.
[102] *Tunnell-Spangler & Assocs., Inc. v. Katz*, No. 3030 100380, 2003 WL 23168817 (Pa. Com. Pl. Dec. 31, 2003).
[103] Ibid.
[104] *Gray and Associates, LLC v. Ernst & Young LLP*, No. 24-C-02-002963, 2003 WL 23497702 (Md. Cir. Ct. June 11, 2003).

mediation/arbitration according to the provisions of the agreement, entered between the parties.[105]

The similar court position we can observe in court practice of some MS. Thus, French *Cour de cassation* (Supreme Court) in its decision of 14 February 2003 made the same conclusion.[106] The French Supreme Court stated that *"a clause in an agreement which provides for a mandatory reconciliation procedure prior to submitting claims to a judge … imposes a restraint on the judge, if called for by the parties"*.[107] This judgement supported the enforceability of the ADR clause. Therefore, a party that breaches the obligatory mediation clause by way of initiating adjudication proceedings is under the risk that the proceedings being terminated at the request of other party.[108]

In reference to the EU legislation, the Mediation Directive in Article 5(1) states the right of a court, based on the circumstances of a case under consideration, to invite parties to resort to the mediation as mechanism for dispute settlement. The Mediation Directive without prejudice to national legislation makes the use of mediation compulsory or subject to incentives/sanctions. However, such legislation should not prevent the parties from exercising their right of access to justice.[109]

It follows from the cases mentioned, that the courts enforced mediation agreements between parties by applying principles of contract law.[110] In light of the mentioned above, one may conclude with greater degree of probability that failure to comply to follow the ADR process, envisaged in a contract, as adverse consequences may lead to dismissal of a claim of a plaintiff with or without prejudice when another party to a contract insist on having an ADR process instead of litigation.[111]

The issue on adverse consequences, however, is subject to analysis in each particular case from the perspective of the applicable law, as it can provide special remedies against non-compliance with the ADR provisions.

3.2.3 Confidentiality

As it follows from the previous chapter the ADR process presupposes information exchange between the parties to a conflict and between the parties and a neutral party (mediator). Without any doubts, here one of the main concerns that the parties would have is the matter of confidentiality, as

[105] Ibid.
[106] Goldsmith, J., Pointon, G., Ingen-Housz A. *"ADR in Business: Practice and Issues Across Countries and Cultures"*. p. 121.
[107] See http://www.cedr.com/index.php?location=/news/archive/20030704.htm
[108] Ibid.
[109] The Mediation Directive. Art. 5(2).
[110] Tochtermann, P. 2008. *"Agreements to Negotiate in the Transnational Context – Issues of Contract Law and Effective Dispute Resolution"*. p. 703.
[111] Coben, J., Thompson, P. 2006. "Disputing Irony: A Systematic Look at Litigation About Mediation". p. 109.

one of the parties or mediator might be forced to witness in any further litigation proceedings. Therefore, the importance of confidentiality in the mediation process is not under dispute.[112]

In this respect, the author is going to analyse the provisions of the Mediation Directive, the Model Law and the extended US court practise.

The Mediation Directive confirms the importance of confidentiality in the mediation and aims at providing a minimum level of compatibility of civil procedural rules concerning protection of confidentiality of mediation processes in civil and commercial judicial proceedings.[113] There is also a separate article in the Mediation Directive dedicated to this matter. Thus, according to Article 7 of the Mediation Directive, unless the parties to a dispute agree otherwise, MS should ensure that none of those involved in the administration of the mediation including a neutral party should be compelled to witness in civil and commercial judicial proceedings or arbitration on any information arising out of, or, in connection with such mediation. However, there are some exceptions, in particular when disclosure of this information required due to overriding considerations of MS' public policy[114] or due to implementation or enforcement of the settlement. At the same time, MS are free to enact stricter measures directed towards the protection of mediation confidentiality.[115]

Having considered the provisions of the Model Law[116] on the same issues, we can notice the general and conceptual similarity of their clauses in this regard.

In addition the confidentiality provision also included in the Code of Conduct. Article 4 of the Code of Conduct fixes an obligation of the mediator to keep confidential, all the information arising out of, or, in connection with the mediation, except for cases when the mediator should disclose such information in accordance with the law or based on the ground of public policy.

There is a presumption of privacy and confidentiality of the mediation process in the ICC ADR Rules. However, the applicable law can provide exceptions from this general rule.[117]

Because of lack by this moment of the CJEU case law on the matter under consideration, the thesis will review the US and UK courts' case law to

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[112] Sussman, E. April 2006. *"A brief survey of US case law on enforcing mediation settlement agreements over objections to the existence or validity of such agreements and implications for mediation confidentiality and mediator testimony"*. p. 35.
[113] The Mediation Directive. para. 23.
[114] Such as to enshure the protection of children's best interests or in order to prevent harm to the physical/psycho-logical integrity of a person.
[115] The Mediation Directive. Art. 7(2).
[116] The Model Law. Art. 9 and 10.
[117] The ICC ADR Rules. Art. 7.

clarify their practical positions with respect to confidentiality of the mediation process.

Thus, in Beazer East Inc. v Mead Corporation,[118] the court as an explanation to necessity of confidentiality of the mediation process stated that confidentiality provision *"permits and encourages counsel to discuss matters in an uninhibited fashion often leading to settlement"*.[119]

In its order, issued as a result of consideration of Princeton Insurance Co v Vergano case,[120] the court mentioned that open exchange between the parties themselves as well as between the parties and mediator is reachable, provided that participants of the mediation can be sure that nobody will use what is said during the process of mediation in their detriment in further litigation process. The court further stated, *"This rationale has sometimes been extended to mediators to encourage mediators to be candid with the parties by allowing the mediator to block evidence of the mediator's notes and other statements by the mediator."*[121]

Venture Investments Placement v Hall[122] case shows that contractual provisions on confidentiality of the mediation process impose an obligation to all its participants and leads to an injunction. In particular the court ordered that a party *"should be restrained from referring to, or disclosing (either verbally or in writing) to any other person (natural or corporate) any part of the discussion which took place, … in the course of the mediation process on …, or the content of any document produced in consequence of, or arising out of, that meeting."*[123]

The Royal Courts of Justice in case Halsey v Milton Keynes NHS Trust[124] made it clear *"that it was common ground before us (and we accept) that parties are entitled in an ADR to adopt whatever position they wish, and if as a result the dispute is not settled, that is not a matter for the court. As is submitted by the Law Society, if the integrity and confidentiality of the process is to be respected, the court should not know, and therefore should not investigate, why the process did not result in agreement."*[125]

In light of the mentioned above, we can sum up that the legislation as well as the case law assigns high priority to the confidentiality of the whole mediation process. It is notable that the court practice in the US and the UK courts are running in the similar vein and ensure adherence of mediation confidentiality, subject to the applicable law. However, with respect to the MS we may reasonably assume, to some degree, a different approach on this

[118] *Beazer East Inc. v Mead Corporation*, 412 F 3d 429 (3d Cir 2005).
[119] Ibid. para. 14.
[120] *Princeton Insurance Co. v Vergano*, 883 A 2d 44 (Del Ch 2005).
[121] Ibid. para. II(2)B.
[122] *Venture Investments Placement v Hall* [2005] EWHC 1227 (Ch).
[123] Ibid. p. 23.
[124] Halsey v Milton Keynes NHS Trust [2004] EWCA Civ 576.
[125] Ibid. para. 14.

matter, due to exceptions stipulated in the Mediation Directive, subject to requirement of public policy and procedures on settlement enforcement.

3.2.4 Statute of limitation

In this section, we are going to consider the question of tolling the statute of limitation on the ground of initiation of mediation process.

Generally, the commencement of the mediation process does not suspend running of the statute of limitation unless otherwise provided by law. That is why the Commission in the Green Paper specially noted that for the ADR promotion it is necessary to introduce amendments to the national civil procedural rules of the MS with respect to statute of limitation. Therefore, the statute of limitation could be suspended once the ADR process begins and renew after such procedure ends without a settlement being reached.[126]

In this respect, in mentioned earlier judgement of the French Supreme Court of 14 February 2003, the court has come to the same conclusion. The court in question held that when an agreement contains an obligation of the parties to submit possible future disputes to conciliation *"initiation of the procedure suspends the limitation period until the procedure has terminated"*. [127]

After adoption of the Mediation Directive the MS have got obliged to ensure that the parties to mediation are not subsequently prevented from initiation of judicial proceedings/arbitration on the same case by expiration of limitation/prescription periods during the mediation.[128] Taking into account the date established for the MS in order to bring their domestic legislation in compliance with the provisions of the Mediation Directive, i.e. 21 May 2011, presently we cannot objectively assess its implementation in the MS. Some MS already have such provisions under the national law. Thus, for example, in Sweden according to the Code of Judicial Procedure mediation presupposes institution of action. Therefore, commencement of the mediation process interrupts the statute of limitation.[129] Some similar provision we can find in the German law, where recourse to approved ADR bodies suspending the statute of limitation.[130]

Meanwhile, it should be noted that the suspension of the statute of limitation was also touched in the Model Law. Thus, there is a suggested text on suspension of the statute of limitation for those states that might wish to introduce such provision into their domestic law. The suggested version of the text is as follows:

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[126] The Green Paper. para. 69.
[127] Goldsmith, J., Pointon, G., Ingen-Housz A. *"ADR in Business: Practice and Issues Across Countries and Cultures"*. p. 124.
[128] The Mediation Directive. Art. 8.
[129] Lindell, B. (2004) *"Mediation in Sweden"*. ADR Bulletin. (Vol. 7, No. 5, Articel 3). p. 88.
[130] The Green Paper. para. 69.

"Article X. Suspension of limitation period
1. When the conciliation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the conciliation is suspended.
2. Where the conciliation proceedings have terminated without a settlement, the limitation period resumes running from the time the conciliation ended without a settlement agreement."[131]

As we can see, today the parties who decided to mediate their disputes are protected by the Mediation Directive from the risk that possible future litigation proceedings of the disputed issues would be dismissed by the court on the ground of expiration of the statute of limitation.

3.2.5 Obstacles to enforcement of settlement

What is the next step after the mediation successfully finished by reaching the settlement agreement? The next step is the proper execution of the settlement agreement by the parties. However, what if one of the parties refuses to follow the agreement reached due to any reason. This particular question raised a substantial case law in the US. We are going to consider some of cases hereafter.

At the outset, it is necessary to ensure the proper form of the settlement agreement. Thus, in Golding v Floyd case[132] court denied the enforcement of the settlement stating that handwritten memorandum signed by the parties was not a binding agreement, because, by its plain language, it was "subject to" the execution of a formal agreement. The mentioned case demonstrates how the wording of the settlement document can be an obstacle in its enforcement.

In Weddington Productions Inc v Flic,[133] the court found that the one page so called Deal Point Memorandum, signed by the parties, clearly shows that the parties neither reached, nor objectively manifested, a meeting of the minds on the material terms of a settlement. Based on this point the court had refused to enforce a settlement agreement.

In another case - Catamount Slate Products Inc v Sheldon,[134] the court took position according to which when the parties intended to have executed written document in order to undertake obligations under the settlement agreement, an oral settlement agreement based on notes of parties' councils, have been made during the mediation process, cannot be enforceable.

[131] The Model Law. Art. 4. Footnote.
[132] *Golding v Floyd*, 539 S E 2d 735 (Va 2001).
[133] *Weddington Productions Inc v Flic*, 71 Cal Rptr 2d 265 (Cal App 2 Dist 1998)
[134] *Catamount Slate Products Inc v Sheldon*, 845 A 2d 324 (Vt 2003).

Moreover, the court in Winston v Mediafare Entertainment Corporation,[135] defined factors facilitating in determination of whether the parties were intended to be bound in the absence of written documentation executed by both parties, in particular *"The court is to consider (1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing. … These circumstances may be shown by 'oral testimony or by correspondence or other preliminary or partially complete writings'."*[136]

As follows from the mentioned court cases, it is very important to pay enough attention to and be careful with wording of any correspondence that parties have to write and exchange during the mediation process, particularly to stipulations that one of the parties may include as a compulsory condition of enforceability of the settlement. They should ensure that such wording reflects their real intention, e.g. make the settlement enforceable after it has been putted in writing only. Parties should agree on all material terms and conditions of the settlement agreement, otherwise there most probably still is a risk of its non-enforceability. As it furthermore follows from the mentioned judgments that the matters related to a settlement enforcement date, as well as, actions of the parties that confirm performance of the settlement should be determined in the settlement agreement in order to simplify the proving process on this regard.

The mentioned pitfalls, faced in the US court practice, related to contractual relations, as the settlement agreement is a contract. Similar traps exist in EU as well.[137]

It is worth noticing that some other actions can also guarantee the enforceability of the settlement, such as confirmation by the court of a settlement. This however depends on provisions of the applicable law. In some MS, the law provides the possibility under parties' request to confirm the settlement by a court as a judgement.[138]

As we mentioned earlier the Mediation Directive contains certain provisions on enforceability of the settlement agreement. Thus, according to Article 6 of the Mediation Directive the MS should *"ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable*

[135] *Winston v Mediafare Entertainment Corporation*, 777 F 2d 78 (2d Cir 1985).
[136] Ibid. para. 12.
[137] Mackie, K., Miles, D., Marsh, W., Allen, T. 2007. *"The ADR Practice Guide: Commercial Dispute Resolution"* (Third ed.). p. 274.
[138] For instance, such mechanizm exists in Sweden in case of court-referred mediation. See Lindell, B. (2004*) "Mediation in Sweden"*. ADR Bulletin. (Vol. 7, No. 5, Art. 3). p. 87.

unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability."

As it follows from the literal interpretation of the article in question, a party may request enforceability of the content of the executed written agreement provided there is an explicit consent of other party exists. Here, one may have concern why a party should have a consent of other party in order to make a request in question, if they already voluntary had expressed their will and consent by executing the settlement agreement.[139] It follows that execution of the settlement agreement is not enough for its enforceability and additional consent of other party is required. For the author, it seems that this may lead to an obstacle in order to make the settlement enforceable, as the parties may abuse this provision.

Thus, in order to eliminate unexpected surprises, it would be recommended to foresee in the settlement agreement, precise provisions stating and confirming the parties' right to seek enforceability on the settlement content and the parties' unconditional consent to such actions of the other party to the settlement agreement.

[139] See, for instance the Model Law which does not require additional consent of a party for enforcement of a settlement agreement.

4 Concluding remarks

One of the essential elements of the effective functioning of the EU internal market is, amongst others, the non-expensive, fast and complete dispute resolution system. The latter's vital role reasonably justifies the rapid-paced development of the ADR concept within the EU.

The ADR process provides merely an alternative path for dispute resolution and is distinguished by its characteristics. It implies that the most suitable procedures should be determined and applied once each particular dispute arises in order to contemplate the essence of an exact matter. In this regard, it is worth mentioning that mediation can be used as a filter mechanism before litigation proceedings so that the parties to the dispute arisen and having a commercial/human nature, can at least attempt to resolve the conflict in an out-of-court order. This system brings, inter alia, such positive effects as (i) off-load the courts' docket, as well as, (ii) reduce the possible delays in a dispute settlement to a minimum.

Within the framework of the ADR techniques, the mediation process has a critical importance. The issues described in this paper regarding mediation exist due to the mere fact that the mediation is a completely voluntary process from which the disputing parties may quit at any stage. In other words, it has no procedural guarantees, and the parties' consent to submit their dispute to mediation is a matter of contractual obligations. However, pursuant to the Mediation Directive, under the MS's national law, mediation may be compulsory or subject to incentives or sanctions, provided that such national law does not prevent the parties from exercising their right of access to justice.

Voluntary nature of the mediation process requires a precise and clear ADR clause in a contract, enhancing the parties' obligation to resort to the ADR. In this respect, the parties may choose a simple way, that is to refer to the rules of institutions that provide ADR-related services (e.g. ICC, CEDR), or compose a brand new clause that addresses a specific situation. In this case, there is a range of matters that the parties should bear in mind. Generally, these matters include, inter alia, procedural details of the ADR process; confidentiality of all the information and documentation circulating between the parties, as well as between the parties and the neutral person during the mediation process; execution by the parties of their obligations during mediation; scope of the mediation, i.e. what type of disputes will fall under mediation; mandatory provisions of the applicable legislation with respect to the enforceability of the settlement agreement; how the parties should deal with the ADR costs; and whether the parties have to refer the dispute to arbitration if the ADR process is failed.

This paper determined certain issues that may occur in connection with the ADR clause in commercial contracts. Reviewing the viability of different

types of the ADR clauses depending on the degree of real obligations arising from the implications of their wording, it clarified that the ADR clause may stipulate the parties' obligation to submit a dispute to the ADR once it arises according to the provisions of the applicable law. Furthermore, with respect to adverse consequences for the parties in case they breach the obligation in question, it was analysed and identified that the courts practice in the US and some MSs is similar on this issue and considers the enforcement of such obligation as contractual. Based on this fact and considering contests of the counter party to a dispute, the courts dismissed the claims filed under the contracts having the ADR clause, with or without prejudice, ordering the parties to endeavour to settle the disputes in the agreed order.

Further, analysing the confidentiality concerns within the ADR process, it was confirmed that at the EU level, unless otherwise agreed by the parties, the Mediation Directive guarantees confidentiality. However, MS national law may specify exceptions, in particular when the disclosure of such information is required due to the overriding considerations of MS's public policy or due to the implementation or enforcement of the settlement. Moreover, the review of the US and the UK court practice demonstrates that high priority is given to the confidentiality of the mediation process.

Having considered the issue relating to the statute of limitation, we may conclude that the parties who have decided to mediate their dispute are protected under the Mediation Directive from the risk that the possible future litigation proceedings of the disputed issues will be dismissed by the court because of the expiration of the statute of limitation.

Furthermore, analysis of the court practice has clarified that particular attention should be paid to the wording of any correspondence between the parties during the mediation process. The latter are responsible for ensuring that the settlement-related documents reflect their real intention to agree on all material terms and conditions of the settlement agreement. The parties are also bearing the risk for the non-enforceability of such obligation. It follows from the judgments that the issues related to the settlement enforcement date as well as the actions of the parties that confirm performance of the settlement should be determined in the settlement agreement in order to simplify the proving process in this regard. The pitfalls that are reflected in the US case law are coming from the recognition of the ADR obligations as contractual relations. Similar traps exist in the EU as well.

Personally for the author of current paper it seems that mediation process is definitely not the right answer in any dispute. For instance, the author does believe that in the field of financial services (e.g. bank loans, leasing activity) where, as a rule, agreements accompanied with measures aimed at ensuring performance of obligations (e.g. pledge, guarantee) the ADR will be considered as proper and useful form for dispute resolution. Contrary, it is more possible that there will be low creditor's interest to recourse to the

ADR process. This can be explained as follows. Generally, the reasons for such disputes are non-execution by a debtor the obligation to pay back. The latter situation happens mostly in case of the debtor's insolvency. Therefore, there is no point to agree on some further actions during the ADR process as it probably will be easier for the creditor to apply to the mentioned measure that ensured the performance of the debtor's obligations under the contract.

Taking into account the ADR features, there are positive sides of the ADR process that the author can emphasise from the business perspective. First, it is the reputation aspect. A company that prioritizes the ADR can have strong reputation as a prudent and firmly business directed partner since such approach would bring the litigation to a minimum level. It also can play into the hands of a company in a case when assessment of the risks related to the company is required (e.g. risk assessment by a bank of the paying capacity of a potential debtor; during the Due Diligence procedures for the purpose of the M&A transaction, etc.). Second, the low possibility that the disputing parties will refer to a court for interim measures such as arrest of the debtor's bank account or property. Therefore, there will not be unnecessary interventions to the company's business operation that in turn may hamper company's activity.

At the same time, the mediation process in some cases can be considered as dangerous in the sense that any party can abuse its right to have resort to mediation using it for the purposes of the time protraction for any reason other than a dispute settlement and which is not in favour of a counter party to the dispute. In such case, the mediator should act professionally in identifying whether the parties to a dispute have the real willingness to agree on settlement. Therefore, much attention should be taken to the professional education of the mediators. In addition to some specific knowledge on the disputing subject, the mediators should be good psychologists as well.

According to the Mediation Directive, by this time the MS should have to bring their national legislation in compliance with the provisions of the Mediation Directive. In addition, the Commission by 21 May 2016 has to file to the European Parliament, the Council and the European Economic and Social Committee a report on the impact and application of the Mediation Directive in the MS. The author believes that based on the report in question and extensive CJEU case law related to the mediation process, the further development directions as well as measures to be taken will be determined.

As a final note, it should be mentioned that the elements of the drafting process described here are not absolute and depend on the particular practical situation. The main objective of these elements is to diminish the potential problems within the mediation process, as well as, to back up the mediation agreement in the court/arbitration if any party against another party's consent commences litigation proceedings before the ADR process. Due to the fact that mediation is, as a rule, a delicate procedure, one should

be careful when insisting on certain elements mentioned above, so as not to hamstring the whole mediation process.

Bibliography

Books

Brown, H., Marriott, A. 1999. *ADR Principles and Practice.* (Second ed.). Sweet and Maxwell. London.

Goldsmith, J., Pointon, G., Ingen-Housz A., 2006. *ADR in Business: Practice and Issues Across Countries and Cultures.* Kluwer Law International. The Netherlands.

Jacqueline, M., Nolan-Haley. 2008. *Alternative Dispute Resolution in a Nutshell* (Third ed.). St. Paul, Minn. West.

Jaeger, A., Hök, G. 2010. *FIDIC – A Guide for Practitioners*. Springer-Verlag Berlin Heidelberg.

Mackie, K., Miles, D., Marsh, W., Allen, T. 2007. *The ADR Practice Guide: Commercial Dispute Resolution* (Third ed.). Tottel Publishing Ltd. West Sussex.

Paulsson, J., Rawding N., Reed, L., Schwartz, E. 1999. *The Freshfields Guide to Arbitration and ADR: Clauses in International Contracts* (Second ed.). Kluwer Law International. The Hague.

Articles

Bingham, L. *"The Next Step: Research on How Dispute System Design Affects Function"*. Negotiation Journal (Vol. 18, No. 4). October 2002.

Coben, J., Thompson, P. 2006. *Disputing Irony: A Systematic Look at Litigation About Mediation.* pp. 43 – 146.
http://www.ipadrblog.com/uploads/file/Coben_Disputing_Iron_0.pdf

Darek, M., Brian, H. Kleiner, 1999. *"The emergence of alternative dispute resolution in business today"*. Equal Opportunities International (Vol. 18 Iss: 5/6) pp. 54–61.

Lindell, B., 2007. *"Alternative Dispute Resolution and the Administration of Justice – Basic Principles"*. Scandinavian Studies in Law (Vol. 51) pp. 312-344.

Lindell, B. 2004.*"Mediation in Sweden"*. ADR Bulletin. (Vol. 7, No. 5, Article 3).

Mose, D., H. Kleiner, B. 1999. *"The Emergence of Alternative Dispute Resolution in Business Today"*. Equal Opportunities International (Vol. 18 Num. 5/6). pp. 54 - 61.

Nigel, B., 2009. *"Alternative Dispute Resolution"*. Legal Information Management 9 (2009) pp. 195-198.

Sussman, E. April 2006. *A brief survey of US case law on enforcing mediation settlement agreements over objections to the existence or validity of such agreements and implications for mediation confidentiality and mediator testimony*. New York. Mediation Committee Newsletter.

Thomas, M. Federico. 1997. *Drafting ADR Provisions in Commercial Contracts.* www.tba.org/Journal_TBArchives/jul97/tbj-jul97-adr.html

Tochtermann, P. 2008. *Agreements to Negotiate in the Transnational Context – Issues of Contract Law and Effective Dispute Resolution.* pp. 685 – 712. http://www.unidroit.org/english/publications/review/articles/2008-3-tochtermann-e.pdf

Toulmin, J. 2010. *"Cross-border mediation and civil proceedings in national courts"*. Published online. ERA 2010.

Table of Cases

CJEU Cases

Case 283/81. *CILFIT v Ministry of Health.* [1982] ECR 341.

Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

Case C-344/00. *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS).* [2002] ERC 2002.

Joined Cases *Rosalba Alassini v Telecom Italia SpA* (C-317/08) and *Filomena Califano v Wind SpA* (C-318/08) and *Lucia Anna Giorgia Iacono v Telecom Italia SpA* (C-319/08) and *Multiservice Srl. V Telecom Italia SpA* (C-320/08). OJ C 236, 13.9.2008.

The UK Cases

Cable & Wireless Plc v. IBM United Kingdom Ltd. [2002] EWHC 2059 (Comm Ct).

Venture Investments Placement v Hall [2005] EWHC 1227 (Ch).

The USA Cases

Beazer East Inc. v Mead Corporation, 412 F 3d 429 (3d Cir 2005).

Catamount Slate Products Inc v Sheldon, 845 A 2d 324 (Vt 2003).

Cecala v Moore, 982 F.Supp. 609 (N.D. Ill. 1997).

Golding v Floyd, 539 S E 2d 735 (Va 2001).

Gray and Associates, LLC v. Ernst & Young LLP, No. 24-C-02-002963, 2003 WL 23497702 (Md. Cir. Ct. June 11, 2003).

Princeton Insurance Co. v Vergano, 883 A 2d 44 (Del Ch 2005).

Tunnell-Spangler & Assocs., Inc. v. Katz, No. 3030 100380, 2003 WL 23168817 (Pa. Com. Pl. Dec. 31, 2003).

Weddington Productions Inc v Flic, 71 Cal Rptr 2d 265 (Cal App 2 Dist 1998).

Winston v Mediafare Entertainment Corporation, 777 F 2d 78 (2d Cir 1985).

Official Documents

Charter of Fundamental Rights of the European Union (2000/C 364/01)

Council and Commission Action Plan of 3 December 1998 on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice.

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.

Green Paper on Alternative Dispute Resolution in Civil and Commercial Law [COM/2002/0196 final].

Summary of responses to the Green Paper on alternative dispute resolution in civil and commercial law. 31 January 2003.

Tampere European Council 15 and 16 October 1999 Presidency Conclusions.

The Convention for the Protection of Human Rights and Fundamental Freedoms. 4 November 1950. Rome.

Documents of institutions providing ADR-related services

ADR Rules of the International Chamber of Commerce (in force as from 1 July 2001)

Model Mediation Agreement of the Centre for Effective Dispute Resolution