

2014

## Europe's Role in Alternative Dispute Resolution: Off to a Good Start?

Maud Piers

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

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

Available at: <https://scholarship.law.missouri.edu/jdr/vol2014/iss2/5>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

# Europe's Role in Alternative Dispute Resolution: Off to a Good Start?

*Prof. Dr. Maud Piers\**

## I. INTRODUCTION

### *European Interest for ADR*

ADR has become a topical issue in contemporary European procedural private law. Over the past fifteen years, European lawmakers have displayed particular interest in extra-judicial dispute resolution methods as part of a broader effort to promote better access to justice. For example, Directive 2008/52 sets out a framework for the use of mediation in cross-border disputes on civil and commercial matters.<sup>1</sup> The European Commission's influential Recommendations 98/257 and 2001/310,<sup>2</sup> which respectively deal with out-of-court dispute settlements and consensual dispute mechanisms, constitute a starting point for constructing a new approach to ADR. In March of 2013, the European Parliament and the European Council adopted a Directive and Regulation on Consumer ADR.<sup>3</sup> These are the most recent initiatives in a series of efforts to enhance consumer redress while improving the functioning of the internal market.

### *European Framework for ADR*

The focus of the recent EU ADR initiatives lies with consumer disputes. Except for the Mediation Directive, which covers "civil and commercial disputes," relevant European instruments in this field all deal with consumer ADR.<sup>4</sup> Inde-

---

\* The author is a Professor of European private Law at the University of Ghent (Belgium). She would like to thank the colleagues of the *Max Planck Institut für Ausländisches und Internationales Privatrecht* with whom she discussed her research throughout her stay there in 2012, and she expresses her gratitude in particular to Dr. Felix Steffek who provided the initial impetus for this research.

1. Council Directive 2008/52/EC of the European Parliament and of the Council of May 21, 2008 on certain aspects of mediation in civil and commercial matters, 2008 O.J. (L 136) 3 [hereinafter *European Parliament and Council Directive on Mediation*].

2. Commission Recommendation 98/257/EC of March 30, 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, 1998 O.J. (L 17), 115, 31 [hereinafter *Principles Applicable For Out-Of-Court Settlement*]; Commission Recommendation 2001/310, of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes not covered by Recommendation 98/257/EC, COM (2001) O.J. (L 109) 1016 [hereinafter *Principles Involved in Consensual Resolution*].

3. Directive 2013/11 of the European Parliament and of the Council of 27 March 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), O.J. (L 165), 63; Regulation 2013/11 of the European Parliament and of the Council on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), O.J. (L 165), 1.

4. Hodges rightfully points out that consumer ADR proceeds according to a quite distinct dynamic and occupies a different context than the traditional ADR mechanisms. He even proposes to use a new acronym for Consumer ADR: CADR. CHRISTOPHER J.S. HODGES, IRIS BENÖHR, & NAOMI CREUTZFELDT-BANDA, *CONSUMER ADR IN EUROPE* xix (Oxford Univ. Press 2012).

pendent of the question whether the EU would overstep the boundaries of subsidiarity and proportionality, one should also consider whether there is a need for the EU to regulate ADR beyond CADR.<sup>5</sup>

One of the typical advantages of ADR is its adaptability to the concrete circumstances in which it is deployed. There would not be as pressing a need for a strict set of ADR rules in cases where the consumer's position does not require special protection.<sup>6</sup> However, a number of recent initiatives have shown that a general, overarching framework for ADR would enhance legal certainty in Europe and improve access to justice.<sup>7</sup> The European Law Institute carefully advocates that there is a role to play for ADR in disputes relating to the CESL,<sup>8</sup> in the business-to-business (B2B) context, as well as in the business-to-consumer (B2C) context.<sup>9</sup> Without losing sight of the elaborate work already done by specialized institutions, such as the Uncitral,<sup>10</sup> there is a clear need for a more general European framework that consists of rules representing *minimum minimorum*<sup>11</sup> requirements applicable to ADR in Europe. Accordingly, the scope of this article will include all forms of commercial ADR.

### Research Background

Intra-community commerce cannot thrive without the existence of a "European area of justice based on the principle of mutual recognition."<sup>12</sup> Instruments that determine which institution has jurisdiction to solve a dispute, enforcement of choice-of-law/forum clauses, as well as of judgments, have improved access to justice in the Internal Market.<sup>13</sup> Intra-community trade has also benefited from the

5. *Id.* at xxxi.

6. Morse indeed rightfully points out that ADR may be practiced in a variety of different contexts where the policy issues each time are quite different. R. Morse, "[t]he substantive scope of application of Brussels I and Rome I: jurisdiction clauses, arbitration clauses and ADR agreements," ENFORCEMENT OF INTERNATIONAL CONTRACTS IN THE EUROPEAN UNION 207 (Johan Meeusen et al. eds., Intersentia 2004).

7. The University of Bayreuth recently took the initiative of bringing a number of world-renowned ADR experts together to discuss rules and principles that could serve as a guideline for parties involved in a European ADR procedure. A book setting out the results of this workshop is forthcoming. Dr. Felix Steffek was one of the co-organizers of this conference and was so generous as to discuss the seminal results of these discussions with the author. See REGULATING DISPUTE RESOLUTION (Felix Steffek et al. eds., Hart Publishing 2013).

8. Referring to "Common European Sales Law."

9. Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final 75-80 (2012), available at [http://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/S-2-2012\\_Statement\\_on\\_the\\_Proposal\\_for\\_a\\_Regulation\\_on\\_a\\_Common\\_European\\_Sales\\_Law.pdf](http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on_a_Common_European_Sales_Law.pdf).

10. Uncitral is the United Nations Commission on International Trade Law. This legal body of the United Nations specializes in worldwide commercial law reform. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, <http://www.uncitral.org/uncitral/en/index.html>.

11. In other words: the absolute minimum. See [www.wordsense.edu/minimum\\_minimorum](http://www.wordsense.edu/minimum_minimorum).

12. Commission Green Paper on Alternative Dispute Resolution in Civil and Commercial Law at 8, COM (2002) 196 final (April 19, 2002).

13. See, e.g., Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), 2001 O.J. (L 12) 1 (EC); Council Regulation 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000 (Brussels IIbis Regulation), 2003 O.J. (L 338) 1 (EC); Council Regulation 4/2009 of 18 December 2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, 2009 O.J. (L 7) 1 (EC).

broad recognition of arbitration as an efficient and legitimate means of commercial dispute resolution. The success of arbitration has much to do with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention).<sup>14</sup>

Contrary to what its title suggests, the New York Convention not only aims at recognition and enforcement of arbitral awards, but also requires signatory countries give binding effect to an arbitration agreement that meets the minimal requirements set out in the Convention.<sup>15</sup> With its 148 member states, the New York Convention has largely contributed to the success of arbitration as an effective means of dispute resolution, as well as enhanced the comfort level for engaging in cross-border trade far beyond the borders of the EU.<sup>16</sup> This article focuses on the following observations: (1) instruments of European (soft) law make few rules on ADR agreements, or no rules at all;<sup>17</sup> (2) member states each have their own legal approach; and (3) there is uncertainty about the qualification of ADR agreements from a private international legal perspective. Nonetheless, ADR agreements are of great importance for the legitimacy of the ADR procedure. Parties that go this route immediately proceed immediately to court when a valid agreement is in place. Still, there is no consensus on what constitutes a binding ADR agreement, the precise obligations of the parties under such an agreement, or the consequences for parties and courts in the event that one party refuses to honor his or her obligation to participate.

### *Research Objective*

This article will focus on ADR agreements in Europe, and examine whether and how a European law regulating ADR agreements could advance the use of ADR in the European cross-border context. It will suggest rules on the legal status of ADR agreements, which might result in further legal certainty for ADR in the European commercial sphere. These rules must give a decisive answer on the following questions:

Question 1: When does an ADR agreement have binding effect?

Question 2: What are the parties' obligations under an ADR agreement?

Question 3: Can the parties' obligations under an ADR agreement be enforced?

While laying out rules that fit the European legal context and meet the concerns expressed above, this article will draw on comparative research on ADR

---

14. See Albert Jan van den Berg, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UN AUDIOVISUAL LIBRARY OF INT'L L. 2 (2008), available at [http://legal.un.org/avl/pdf/ha/crefaa/crefaa\\_e.pdf](http://legal.un.org/avl/pdf/ha/crefaa/crefaa_e.pdf).

15. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 2, June 10, 1958, 21 U.S.T. 2517.

16. See generally *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), UN COMMISSION ON INT'L TRADE LAW, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited Jan. 3, 2015) (for a status map of the member states).

17. The ADR-agreement or ADR-clause as used in this paper refers generally to the *consent* of the parties to try and resolve their dispute through ADR. In other words, it does not refer to the agreement that *results* from the ADR process.

agreements in three European Member States, on the rules of established ADR institutions such as the International Chamber of Commerce (ICC), as well as on Article 13 of the Uncitral Model Law on International Commercial Conciliation.<sup>18</sup> Arbitration law will be a touchstone against which the quality of the proposed rules will be tested.

This article is constructed in four parts: Part II examines current definitions of ADR and further clarifies the scope of this article's research. Part III explores the existing European legal framework that marks ADR or gives guidance on how ADR can and should be organized in Europe. A more specific question will be whether these rules prescribe validity requirements for an ADR agreement. Part IV examines ADR agreements in different legal systems. This comparative research will answer what requirements are specifically imposed by Belgium, Germany and England, and what impact those valid clauses have in their respective countries. The three questions to be examined are reflected in the structure of Part IV. In the final section, Part V, this article will draw several general conclusions and offer a number of legislative proposals.

Before going into these three questions, it is essential to define the ADR-concept that is the subject of this article.

## II. DEFINING ADR IN EUROPE

ADR or Alternative Dispute Resolution is understood to cover mechanisms of dispute resolution where the parties to the dispute have agreed that a third-party neutral person, other than a judge, will contribute to resolving the dispute.<sup>19</sup>

### *Arbitration Excluded*

The range of mechanisms that reside under the denominator of ADR differs according to the interpretation of the term "alternative," which supplies the first letter in the acronym ADR. There is a range of discussion about this interpretation.<sup>20</sup> "Alternative" could relate to the contribution of a private neutral, as opposed to the intervention of a state judge. It might also simply relate to the techniques of dispute resolution used in ADR, which are alternative to the contentious nature of the traditional court proceedings.<sup>21</sup>

---

18. MODEL LAW ON INT'L COM. CONCILIATION Art. I § 3 (June 24, 2002) available at [http://www.uncitral.org/pdf/english/texts/arbitration/mlconc/03-90953\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/mlconc/03-90953_Ebook.pdf) (the term "conciliation" in the Uncitral Model Law includes all forms of ADR where a third person is asked to help parties reach an amicable settlement of their dispute).

19. See also CHRISTOPHER J.S. HODGES ET AL., CONSUMER ADR IN EUROPE xix (Hart Publishing Ltd. 2012); Rory Hogan, *ADR: Adding Extra Value to Law*, 78 ARB. 247 (2012); JACQUELINE NOLAN-HALEY ET AL., INTERNATIONAL CONFLICT RESOLUTION: CONSENSUAL ADR PROCESSES 17 (Thomas/West 2005); TANIA SOURDIN, ALTERNATIVE DISPUTE RESOLUTION 2 (Thomas Reuters 2008); NADIA ALEXANDER, INTERNATIONAL AND COMPARATIVE MEDIATION—LEGAL PERSPECTIVES (GLOBAL TRENDS IN DISPUTE RESOLUTION) 8-12 (Kluwer Law International 2009); SUSAN BLAKE ET AL., A PRACTICAL APPROACH TO ALTERNATIVE DISPUTE RESOLUTION 5-6 (Oxford University Press 2011).

20. See generally Nigel Blackaby et al., Redfern and Hunter on International Arbitration 45-46 (2009); Henry Brown & Arthur Marriott, *ADR: Principles and Practice* 12 (1999); Luke R. Nottage, *Is (International) Commercial Arbitration ADR?*, 20 The Arbitrator and Mediator 83 (2002).

21. *Id.*

Under the first definition, arbitration should be classified as ADR, while the latter definition excludes arbitration. The distinction between court proceedings and arbitration primarily concerns the private character, and the procedural flexibility, that characterizes arbitration. The arbitrator and the judge essentially carry out the same function, apportioning responsibility for a dispute.<sup>22</sup> The European Union legislator seems to follow the first, wider, definition of ADR, in its recent Directive on Consumer ADR.<sup>23</sup> Arbitration is thus included in the EU definition of ADR.<sup>24</sup> For the purposes of this article, the definition of ADR that excludes arbitration will be used.

Arbitration today has a different status than most other forms of ADR, not the least of which stems from extensive regulation through international instruments such as the New York Convention. This article touches upon the law governing arbitration agreements, to the extent that this is relevant to the purposes of this research.

### *Conventional ADR*

ADR is understood as a form of dispute resolution where a neutral third party, rather than a judge, is asked to assist the parties in settling their dispute. Negotiations among parties fall outside the scope of ADR. This article will not deal with ADR in the context of judicial proceedings where the court or a third party appointed by the court conducts an alternative procedure. It will focus on conventional ADR, and thus examine agreements in which parties consent to the resolution of their dispute through an out-of-court procedure. Court-ordered ADR and mandatory ADR imposed by Member States' legislation remain outside the scope of this article.

Conventional ADR consists of two important categories: binding (adjudicative) and non-binding (consensual) ADR. The first type is a form of dispute resolution in which a neutral third party renders a decision that is binding upon the parties in dispute.<sup>25</sup> Consensual or non-binding ADR does not confer such a coercive role to the neutral third party, as the neutral third party will merely facilitate

22. Eileen P. Carroll & Giles Dixon, *Alternative Dispute Resolution Developments in London*, 7 INT'L CONST. L. REV. 436, 437(1990).

23. See Commission Staff Working Paper Accompanying the Proposal (explicitly mentioning that the term ADR "covers non-judicial procedures, such as conciliation, mediation, arbitration, complaints boards") Commission Staff Working Paper Impact Assessment, Accompanying the Document Proposal for a Directive of the European Parliament and the Council on Alternative Dispute Resolution for Consumer Disputes (Directive on consumer ADR) and Proposal for a Regulation of the European Parliament and of the Council on Online Dispute Resolution for consumer disputes (Regulation on consumer ODR), at 7, SEC (2011) 1408 final (Nov. 29, 2011) [hereinafter *Commission Staff Working Paper*] (explicitly mentioning that the term ADR "covers non-judicial procedures, such as conciliation, mediation, arbitration, complaints boards"); see also Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), art. 2, 2013 O.J. (L165) 70 (mentioning in a more general fashion that it applies to "intervention of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution").

24. Commission Staff Working Paper, *supra* note 23, at 7.

25. See generally John Wright & Alexandra Bodnar, *Statutory Adjudication in the UK: Past, Present and Future*, 2 Nederlands-Vlaams Tijdschrift voor Bemiddeling en Conflict Management 42 (2012) (on the topic of the Dispute Adjudication Boards that are recurrently set up in the framework of a construction contract.)

the dispute resolution process of the parties. For instance, the neutral third party might recommend a solution that the parties are free to follow, but will not impose a ruling. Next to these two clear-cut types of ADR, there are also a number of hybrid forms of ADR, which combine both types of procedures.<sup>26</sup>

### *Commercial Consensual ADR*

This article addresses (commercial)<sup>27</sup> consensual ADR, or only those types of dispute resolution mechanisms where parties ultimately choose if they will accept a (proposed) settlement rather than going to court. The fundamental differences between consensual and adjudicative ADR preclude a common approach. Adjudicative ADR keeps the third-party neutral in the driver's seat. The success of consensual ADR largely depends on the good will of the parties to the dispute. This distinction clearly shapes what is expected from the parties in these procedures, as well as the manner in which the resulting obligations are enforced. Additionally, parties agreeing to consensual ADR would not forfeit the opportunity to have the courts rule on the merits of their dispute, should ADR not lead to a satisfactory outcome.

Conversely, adjudicative ADR has a more fundamental impact on a party's access to court. The settlement contract for instance is in principle not subject to review by courts. Adjudicative ADR should therefore be subjected to stricter conditions than a procedure that leaves the parties' right to go to a state court intact. This tension between the principle of party autonomy and the public policy concern of due process is also reflected in the different approach found in the Commission Recommendation 98/257 and the Commission Recommendation 2001/310, discussed further under Title III.<sup>28</sup> With regard to the ADR agreement and the parties' duties thereunder, overall conclusions would not be justified given the fundamental differences that distinguish adjudicative from consensual ADR. The focal point of this article will be consensual ADR. Emphasis here will lie on mediation, quoted as the prototype of consensual ADR.<sup>29</sup>

---

26. See generally HENRY BROWN & ARTHUR MARRIOTT, *supra* note 20, at 12-20; see also NEIL ANDRES, *THE MODERN CIVIL PROCESS* 213-216 (2008) (for a description of other types of ADR).

27. As opposed to ADR dealing with family or labor law disputes.

28. Commission Recommendation 98/257 is primarily, though not exclusively, geared towards situations in which a third party actively intervenes and imposes or formally proposes a decision. Commission Recommendation 2001/310 governs situations where a third party merely facilitates the resolution of a consumer dispute by bringing the parties together and assisting them. It is quite apparent that the first form of ADR is subject to much stricter rules than the consensual form of ADR that is regulated by Commission Recommendation 2001/310. The distinction made between the two recommendations is somewhat artificial and is not always in line with the practical reality. Mediation, for instance, may be modeled on different styles: a mediator in a *facilitative* mediation will not offer advice or his opinion as to the outcome of the case, whereas in *evaluative* mediation the mediator is expected to make formal or informal recommendations. See *supra* note 2.

29. Note that the task force responsible for the revision of the ADR Rules of the International Chamber of Commerce, proposed to call these new rules "ICC Rules for Mediation and Other Settlement Procedures." Under these proposed new rules, mediation will be the default settlement procedure that shall be used when parties have not specifically indicated another form of ADR. See <http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/>.

## III. EUROPEAN PROCEDURAL LAW FRAMEWORK

The EU has undertaken considerable efforts to promote ADR in the past fifteen years.<sup>30</sup> There are several relevant initiatives that play a role on various levels.<sup>31</sup>

*Sectorial Legislation*

A number of sector-specific Directives have included an ADR provision requiring the Member States to encourage out-of-court settlement schemes that meet adequate procedural guarantees for the parties involved, and to inform the European Commission (EC) on the decisions taken under the auspices of these ADR bodies.<sup>32</sup>

*Commission Recommendations*

Two EC recommendations have also established quality standards that ADR mechanisms must meet. The Communication from the Commission on the out-of-court settlement of consumer disputes<sup>33</sup> contains Commission Recommendation 98/257 of March 30<sup>th</sup>, 1998, and discusses principles applicable to the agencies responsible for out-of-court settlement of consumer disputes.<sup>34</sup> Commission Recommendation 98/257 addresses procedures where a third party actively intervenes and “proposes or imposes a solution” to the dispute.<sup>35</sup> 98/257 sets out seven prin-

30. In addition to initiatives summed up under this title, there are various other instruments that reflect the European discussion on and interest in ADR. These different initiatives are found in: Green paper of November 16, 1993, COM (1993) 576 (discussing the access of consumers to justice and the settlement of consumer disputes in the single market); Action Plan of February 14, 1996 COM (1996) 13 (discussing consumer access to justice and the settlement of consumer disputes in the internal market); Commission Recommendation 98/257 of March 30, 1998 (describing the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes); 15 O.J. L 31 (April 17, 1998); Communication from the Commission of March 30, 1998 COM (1998) 198 (explaining the out-of-court settlement of consumer disputes); Communication from the Commission of April 4, 2001 COM (2001) 161 (discussing widening consumer access to alternative dispute resolution); Commission Recommendation of April 4, 2001, COM (2001) 1016 (discussing the principles for out-of-court bodies involved in the consensual resolution of consumer disputes not covered by Recommendation 98/257/EC); Green Paper of April 19, 2002 COM (2002) 196, April 2002 (describing alternative dispute resolution in civil and commercial law).

31. *Id.*

32. See Article 17 Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000 (*Directive on Electronic Commerce*) (explaining certain legal aspects of information society services, in particular electronic commerce, in the Internal Market); 1 O.J. L. 178, (July 17, 2000); Article 3(13) Directive 2009/79/EC of the European Parliament and of the Council of July 13, 2009 (concerning common rules for the Internal Market in electricity); 55 O.J. L. 211 (August 14, 2009); Article 3(9) Directive 2009/73/EC of the European Parliament and of the Council of July 13, 2009 (concerning common rules for the Internal Market in natural gas); 94 O.J. L. 211 (August 14, 2009); Article 24 Directive 2008/48/EC of the European Parliament and of the Council of April 23, 2008 (discussing credit agreements for consumers); 66 O.J. L. 133 (May 22, 2008).

33. 98/257/EC: Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31998H0257>.

34. 115 O.J. L. 31 (April 17, 1998).

35. Paragraph 9, Recommendation 98/257.



principles with which out-of-court dispute mechanisms should comply.<sup>36</sup> These are the principles of independence, transparency, legal adversity, effectiveness, legality, liberty, and representation.<sup>37</sup> In the wake of this Recommendation, the Commission also established a network (ECC-net)<sup>38</sup> of national contact points,<sup>39</sup> designed both to facilitate the lodging of consumer complaints and to act as a contact for consumers who wish to settle their disputes out of court in other Member States.<sup>40</sup> The EC has launched a similar initiative with regard to disputes involving financial services.<sup>41</sup>

In 2001, the EC issued “Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes” (Recommendation 2001/310).<sup>42</sup> This recommendation applies to third-party bodies that attempt to resolve a dispute by bringing the parties together to convince them to find a solution by common consent, irrespective of their label.<sup>43</sup> It recommends that ADR bodies defer to four principles: impartiality, transparency, effectiveness, and fairness.<sup>44</sup> The principles of liberty (Recommendation 98/257/EC) and fairness (Recommendation 2001/310/EC) are relevant here and will be further discussed in this article.<sup>45</sup>

### *ADR Directive and ODR Regulation*

The European Parliament and the European Council respectively adopted the Directive on Consumer ADR<sup>46</sup> and the Regulation on Consumer ODR<sup>47</sup> in April and May of 2013. In the Directive on Consumer ADR, the Commission imposes rules regarding ADR procedures in disputes arising out of contracts for the sale of goods and the provision of services.<sup>48</sup> This Directive requires the following principles be implemented: access to ADR entities and procedures, expertise, impartiality, transparency, effectiveness, fairness, liberty, legality, and protection

---

36. This Recommendation is limited to out-of-court bodies where a third party proposes or imposes a decision to resolve a dispute (paragraph number 1 of the Communication from the Commission on widening consumer access to alternative dispute resolution, COM (2001) 161). See COM (2001) 161 and COM (2002) 196 (discussing the distinction that is made between out-of-court bodies where a third party proposes or imposes a decision to resolve the dispute, and out-of-court bodies involved in the consensual resolution of consumer disputes).

37. *Id.*

38. [http://ec.europa.eu/consumers/redress\\_cons/docs/ecc\\_network\\_centers.pdf](http://ec.europa.eu/consumers/redress_cons/docs/ecc_network_centers.pdf).

39. One in each of the 27 Member States plus one in Iceland and another in Norway.

40. Council Resolution of May 25, 2000 (EEJ-net), SEC (2000) 405, available at [http://europa.eu/legislation\\_summaries/other/l32043\\_en.htm](http://europa.eu/legislation_summaries/other/l32043_en.htm) (discussing a network at Community level of national bodies responsible for the out-of-court settlement of consumer disputes).

41. Information on this initiative is available on the website of the European Union, at [http://ec.europa.eu/internal\\_market/finservices-retail/finnet/index\\_en.htm](http://ec.europa.eu/internal_market/finservices-retail/finnet/index_en.htm)

42. Principles Involved in Consensual Resolution, *supra* note 2.

43. Article I(1) Commission Recommendation 2001/310/EC.

44. *Id.*

45. Principles Involved in Consensual Resolution, *supra* note 2; Principles Applicable For Out-Of-Court Settlement, *supra* note 2.

46. Directive of the European Parliament and of the Council of March 27, 2013 (discussing alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)); 63 O.J. L. 165 (June 18, 2013).

47. Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR); 1 O.J. L. 165 (June 18, 2013).

48. *Supra* note 46.

against the expiry of prescription and limitation periods. These principles follow from the principles set out in Recommendations 98/257 and 2001/310, yet the Directive on Consumer ADR defines in more detail how these quality requirements should be established and met.<sup>49</sup> The Directive also goes further, requiring that the Member States provide the option for the consumer to submit a dispute to ADR.<sup>50</sup> Thus, the Directive seems to adopt the point that this could be the better method to settle consumer disputes. The EU hopes these efforts might improve the functioning of the internal market.<sup>51</sup>

### *Mediation Directive*

The Recommendations and Proposals, as well as the sector-specific directives, are primarily geared towards B2C disputes. This differs from Directive 2008/52/EC of the European Parliament and of the Council of May 21 that applies to disputes in “civil and commercial matters” regardless of whether this concerns a B2B or a B2C relationship.<sup>52</sup> These instruments of procedural law set out the procedural framework within which Member States have ample leeway to regulate ADR.

## IV. THE ADR AGREEMENT IN THE EU

### *Arbitration Agreement*

The value and binding effect of arbitration agreements was settled more than half a century ago.<sup>53</sup> The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 was the global recognition of the binding character of arbitration agreements.<sup>54</sup> The 148 signatory states at the New York Convention are bound by the obligation to “recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.”<sup>55</sup>

Article II of the New York Convention stipulates how a court should respond to an action when a matter is the subject of an arbitration agreement.<sup>56</sup> The court shall, at the request of one of the parties, refer the parties to arbitration unless it finds that the arbitration agreement is “null and void, inoperative or incapable of being performed.”<sup>57</sup> The conditions for assessing the validity of an arbitration agreement are clear, and the parties as well as the courts know what is expected from them when a binding arbitration agreement is in place. Parties are at liberty

---

49. *Supra* note 2.

50. *Id.*

51. *Id.*

52. European Parliament and Council Directive on Mediation, *supra* note 1.

53. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 art. 2, June 7, 1959.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

to make more concrete arrangements on how arbitration should proceed, for instance, by referring to the rules of an arbitration institution. Should parties not comply with these private rules of procedure, then the national arbitration laws provide default mechanisms that should allow the arbitration to proceed in the absence of the recalcitrant party.<sup>58</sup>

The rather autonomous character of arbitration, and the rules laid out in the New York Convention, were important considerations when deciding to exclude arbitration from the private international law instruments adopted by the European Union. Article 1(2)(4) of the Brussels I Regulation explicitly states that arbitration is excluded from its scope.<sup>59</sup> The later exclusion of arbitration agreements, from what is now the Rome I Regulation, was more controversial but is nevertheless generally accepted today.<sup>60</sup>

### *ADR Agreement*

The ADR agreement is not as established as the arbitration agreement in the European Union. There is no uniformity on the status of an ADR agreement in either European private law, or in the laws of the EU Member States. The European instruments discussed above hardly deal with the questions of the binding effect and enforceability of an ADR agreement.<sup>61</sup> It is also not clear which private international law regime is applicable to ADR agreements. It is improbable that the Brussels I Regulation, or the Rome I Regulation, applies to the ADR agreement. A number of authors have argued against including ADR in the scope of these European regulations. But if there were no central governing ADR rules, the individual Member States' distinct laws on private international law would have to be employed when settling issues resulting from the transnational application of an ADR agreement. This could give rise to a series of problems. For instance, some countries classify ADR agreements as contractual in nature, whereas other legal systems consider ADR agreements to give rise to both procedural and substantive legal consequences. These different perspectives can produce fundamentally different precedent on validity, sanctions for non-compliance, duties of both parties and judges, and limitation of actions.

---

58. See J.F. POUURET AND S. BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 952 (Sweet & Maxwell, London 2007) (providing a comparative overview of the rules in the various European legal systems).

59. Council Regulation No. 44/2001 of December 22, 2000 (explaining jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), 2001 O.J. (L 012) 1-23 [hereinafter *Jurisdiction and Enforcement of Judgments in Commercial Matters*].

60. Christopher Morse, *The Substantive Scope of Application of Brussels I and Rome I: Jurisdiction Clauses, Arbitration Clauses and ADR Agreements*, in *Enforcement of International Contracts in the European Union* 203 (J. Meeusen et al. ed., Intersentia 2004).

61. Council Directive 2013/11/EC of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes, 2013 O.J. (L. 165).

*Issues Discussed*

These issues cannot all be the subjects of discussion at this point, and so the discussion turns to the two questions that are *mutatis mutandis*,<sup>62</sup> the subject of the quoted Article II of the New York Convention and which might be crucial to the successful launch of ADR in Europe.

The binding effect and validity of an ADR agreement poses an initial set of problems. Subpart A will discuss the substantive legal requirements that a valid and binding ADR agreement should meet. A second challenge concerns the duties that ensue from an ADR agreement. Subpart B will examine the obligations of the parties to an ADR agreement. Subpart C will confer how these obligations might be enforced and will explore with particularity the duties of courts to decide a dispute subject to an ADR agreement. This article will examine these questions in three countries where ADR is already firmly established in law. These countries are Belgium, England, and Germany.

*A. First Question: When does an ADR agreement have binding effect?**General EU Law*

ADR is an exception to parties' fundamental right of access to a court. An ADR agreement establishes that parties will either have a third person other than a judge make a final and binding decision regarding their dispute (adjudicative ADR), or will have this third person facilitate the resolution of their dispute amongst themselves (consensual ADR). The European lawmakers have not only accepted that parties may submit their dispute to ADR and give up their right to go to court, but have also been actively promoting ADR, as various instruments seek to lay out the context in which ADR might be useful in the European Union. As demonstrated in the next few paragraphs, these European instruments fail to give much direction on the binding effect of an ADR agreement, or the obligations that parties accrue as a result. Limited regulation of the ADR agreement is evident in the B2C context.

*EU Consumer Law*

The Commission Recommendations 98/257 and 2001/310 lay out the requirements for a valid ADR agreement, though only in relation to B2C disputes.<sup>63</sup> The Directive on Consumer ADR reiterates these rules.<sup>64</sup> Procedural instruments and substantive consumer law has, at least indirectly, an effect on ADR proceed-

---

62. "All necessary changes having been made." The term is often used to mean that which concerns a first thing, applies by analogy to a new thing. *Mutatis Mutandis*, BLACK'S LAW DICTIONARY (9th ed. 2009).

63. Principles Applicable For Out-Of-Court Settlement, *supra* note 2; Principles Involved in Consensual Resolution, *supra* note 2.

64. This was not the case in the original Proposal. De Coninck pointed out that the Proposal for an ADR Directive could be improved on this point. See Hans De Coninck, *Europese Voorstellen voor een Alternatieve en een Online Geschillenregeling* [European Proposals for an Alternative and Online Dispute Resolution], 94 DROIT DE LA CONSOMMATION/CONSUMENTENRECHT [Consumer Law] 187 (2012).

ings in which consumers are involved. Directive 93/13<sup>65</sup> is key to establishing the binding nature of B2C ADR-agreements.<sup>66</sup> Next follows a discussion on the procedural framework set out by the European legislator, as well as the contract law provisions laid down in the Unfair Terms Directive 93/13 that have crept into the procedural law and practice of different national legal systems.

### *EU Procedural Consumer Law*

Recommendation 98/257, and Recommendation 2001/310, have both been of particular importance to ADR in Europe. The first Recommendation applies to procedures that lead to the settling of a dispute “through the active intervention of a third party that proposes or imposes a solution.”<sup>67</sup> Recommendation 2001/310 applies to procedures where a third-party neutral facilitates the resolution of a dispute by “bringing the parties together and assisting them.”<sup>68</sup> Note that consensual ADR may fall under either Directive depending on how active a role the third party plays.

Recommendation 98/257 sets out a number of standards that should guarantee party equality and consumer freedom of contract.<sup>69</sup> Important here is Article VI of Recommendation 98/257 that has influenced national law through EU law, and also a Directive to conform interpretations by courts.<sup>70</sup> Article VI of Recommendation 98/257 articulates what is known as the “principle of liberty,” which advocates strong protection of the consumer’s fundamental right to justice.<sup>71</sup> According to this principle of liberty, parties cannot commit to an out-of-court procedure “prior to the materialization of the dispute.”<sup>72</sup> Furthermore, Article VI indicates that “a decision taken by the body concerned” may only be binding on a party if that party is informed in advance of the binding nature of out-of-court procedures, and has specifically accepted those procedures.<sup>73</sup>

The foundation of the principle of liberty is the right of access to courts stipulated in Article 5 of the European Convention on Human Rights and in Article 47 of the Charter of Fundamental Rights of the European Union.<sup>74</sup> Recommendation 98/257 refers to Article 6 when reasoning that the right of access to courts is “a fundamental right that knows no exceptions . . .” and the out-of-court procedures

65. Council Directive 93/13/EC, art. 29, of April 5, 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 095) [hereinafter Unfair Terms in Consumer Contracts].

66. Its effect is not limited to the determination of the legal value of a consumer ADR agreement, as I explained in a previous publication. The ECJ has held Directive 93/13 also sets obligations for courts overruling the validity and enforceability of an arbitral award. Case C-168/05, *Elisa Maria Mostaza Claro v. Centro Móvil Milenium SL*, [2006] ECR I-10421 (ECJ); Case C-40/08 *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, [2009] ECR I-09579 (ECJ).

67. European Parliament and Council Directive on Mediation, *supra* note 1, at paragraph 9.

68. Principles Involved in Consensual Resolution, *supra* note 2.

69. Principles Applicable For Out-Of-Court Settlement, *supra* note 2.

70. See generally Maud Piers, *Consumer Arbitration in the EU: A Forced Marriage with Incompatible Expectations*, 2(1) J. INT. DISP. SETTLEMENT 209 (2011); Maud Piers, *Spillovers of European Consumer Law: Validity of Arbitration Agreements . . . And Beyond*, 22 AM. REV. INT’L ARB. 625 (2011).

71. Principles Applicable For Out-Of-Court Settlement, *supra* note 2.

72. *Id.*

73. *Id.*

74. Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 5 (1950), available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

cannot merely replace the court proceedings.<sup>75</sup> From this follows that out-of-court proceedings cannot legitimately prevent parties from bringing their case before the state courts “unless they [the parties] expressly agree to do so, in full awareness of the facts and only after the dispute has materialized.”<sup>76</sup> Pursuant to Recommendation 98/257, parties may not validly assent to a pre-dispute agreement in which they consent to an out-of-court body that will render a decision or propose a solution.<sup>77</sup> A quasi-identical provision can be found in Article 10 of the Directive on Consumer ADR.<sup>78</sup>

A similar provision appears in Recital 14 of Recommendation 2001/310, which states ADR procedures “may not deprive consumers of their right to bring the matter before the courts unless they expressly agree to do so, in full awareness of the facts and only after the dispute has materialized.”<sup>79</sup> Subsection B of this Recommendation further sets forth a transparency principle that should guarantee the parties only commit to ADR after they are given sufficient information about the nature and performance of a particular dispute resolution method.<sup>80</sup> Subsection D prescribes that, pursuant to the principle of fairness, parties should be informed that they have a right to refuse to participate and may withdraw at any time, accessing the legal system or another out-of-court redress mechanism if dissatisfied with the performance or operation of the agreed upon ADR procedure.<sup>81</sup> The Directive on Consumer ADR contains provisions to the same: Article 7 (Transparency), Article 9 (Fairness) and Article 10 (Liberty).<sup>82</sup>

### *European Substantive Consumer Law*

An ADR agreement is a particular type of contract hovering between contract law and procedural law. The EU has not had much review of these topics in its procedural law instruments. Substantive law requirements, to which consumer contracts are subjected, shape the procedural context in which the disputes are resolved. Crucial here is Directive 93/13 on Unfair Terms in Consumer Contracts, which requires that courts apply sanctions against abusive clauses in consumer contracts.<sup>83</sup> Article 3(1) of Directive 93/13 provides “a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”<sup>84</sup>

Specifically relevant for ADR is consideration 1(q) of the Annex to the Directive.<sup>85</sup> This provision lists as unfair a term that operates by “excluding or hindering the consumer’s right to take legal action or exercise any other legal reme-

---

75. Principles Applicable For Out-Of-Court Settlement, *supra* note 2, at paragraph 21.

76. *Id.*

77. *Id.*

78. Directive on Consumer ADR, *supra* note 3.

79. Principles Involved in Consensual Resolution, *supra* note 2.

80. *Id.*

81. *Id.*

82. Directive on Consumer ADR, *supra* note 3.

83. Council Directive 93/13/EEC of the European Parliament and of the Council of April 5, 1998 on unfair terms in consumer contracts, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:en:HTML>.

84. *Id.* at Art. 3(1).

85. *Id.* at Annex 1(q).

dy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions.”<sup>86</sup>

Article 6 of the Directive requires that under national law, Member States provide such an unfair term not be binding on the consumer.<sup>87</sup> On its face, directive 93/13 does not exclude the validity of pre-dispute ADR clauses.<sup>88</sup> Additionally, the clause put forward in consideration 1(q), does not carry an unequivocal indication each ADR clause is unfair. It is debatable whether all ADR clauses might be considered to hinder “a consumer’s right to take legal action or exercise any other legal remedy.”<sup>89</sup> The European Court of Justice has confirmed the importance of protecting a consumer’s free will when entering arbitration procedures, though the Court did not go so far as to prohibit the use of arbitration agreements altogether.<sup>90</sup>

It is reasonable to accept the reasoning of the European Court of Justice in that adjudicative forms of ADR can be *a fortiori*<sup>91</sup>: extended to consensual ADR agreements.<sup>92</sup> In the case of *Rosalba Alassini v. Telecom Italia SpA*,<sup>93</sup> the European Court of Justice was receptive towards national laws that impose prior implementation of a consensual out-of-court settlement procedure, provided a number of conditions are met to guarantee a party has effective access to courts should they fail to settle.<sup>94</sup> In *Alassini*, the Court ruled on a question concerning legislation imposing an additional step for access to courts and was not concerned with the validity of the agreement to which the parties agreed to consent to ADR. This case highlights a trend of accepting the imposition of consensual ADR, and does not provide a decisive answer on the question of the validity of such an agreement with consumers.

### *The EU Law Status Quo*

The EU law contains some general indications on the validity of an ADR agreement, and on consumer ADR agreements in particular. The recently adopted Directive on Consumer ADR confirmed such validation of ADR agreements and Consumer ADR agreements is soon to become good law.<sup>95</sup> Pursuant to general

---

86. Note that a similar provision has been enlisted under Article 84(d) of the CESL (“Common European Sales Law”).

87. *Id.* at art. 6.

88. *Id.*

89. *Id.*

90. See generally ECJ 26 October 2006, Case 168/05 *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I-10421; ECJ 6 October 2009, Case 40/08 *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* [2009] ECR I-09579. The court (the European Court of Justice, or ECJ), in *Mostaza* and *Asturcom*, clearly set out the obligation of the courts to examine the fairness of an arbitration clause. The ECJ indicated the rules of the Directive 93/13 apply to arbitration clauses and are mandatory law. The ECJ, moreover, held the effect of this directive is not limited to the determination of the legal value of a consumer arbitration agreement, but also lays down obligations for the courts that rule on the validity and enforceability of an arbitral award.

91. “For similar but more convincing reasons.” Dictionary.com, <http://dictionary.reference.com/browse/a+fortiori>.

92. The impact of a consensual ADR agreement on the parties’ right to go to court is *temporary* and thus less far-reaching than when parties agree on arbitration *instead* of going to court.

93. ECJ 18 March 2010, Joined Cases C-317/08 and C-320/08 *Rosalba Alassini and Others v. Telecom Italia SpA and Others* [2010] ECR I-02213.

94. *Id.*

95. Directive on Consumer ADR, *supra* note 3.

European Private law, it is accepted that parties may give up their right to go to trial before or after a dispute has arisen. Consent to ADR agreements can be established by an individually negotiated contract or by an ADR clause that is part of a standard contract drafted by one of the parties. It is still essential the parties willingly and knowingly opt out of their right to immediately go to court. An ADR agreement only has legal effect to the extent that the parties agree on its binding nature. ADR thus finds a basis in the principle of party autonomy.<sup>96</sup> The binding effect of an ADR agreement is less evident when inserted in a standard form contract that was drafted by a party that clearly enjoyed an economically stronger position and greater bargaining power than the other contracting party.<sup>97</sup>

The consumer is the prototype of an economically weaker party. For ADR procedures where the neutral third party proposes or imposes a solution, there is greater suspicion of pre-dispute ADR clauses in a seller's standard terms. EU law does have a strong bearing on the validity of the ADR agreement in the EU Context. By announcing the Directive on Consumer ADR, the European legislature effectively established a positive law framework.<sup>98</sup> Nevertheless, EU rules on the binding effect of an ADR agreement are limited, determining only that a consumer cannot be bound by an ADR agreement executed before the dispute arises, and also set out the conditions under which consumer ADR may be validly conducted. Other elements concerning the B2C ADR agreements, and its effect, are not regulated.

#### *Member States' Laws*

Until recently, and except for arbitration, most EU Member States' legislation did not contain specific rules on ADR or ADR agreements. Questions on the validity and binding effect of an ADR agreement were to be resolved by looking at general principles of contract law, procedural law, and even private international law.<sup>99</sup> It is only in the last decade that Member States' legislatures gave more attention to out-of-court dispute settlements. Much of the focus of these new laws centers on mediation, which is not surprising given the adoption of the EU Mediation Directive referred to above.<sup>100</sup> Even today, many European Member States have no particular legislation or rules regulating the application of ADR, or determining the effect and enforceability of an ADR agreement.<sup>101</sup> These issues thus remain unclear in a number of countries. In the following analysis, the rules governing ADR agreements in the few countries that do recognize their enforceability and effect, namely Belgium, England and Germany, are examined.

---

96. This principle of party autonomy is a concept that is borrowed from contract law, but that has been attributed a number of qualities in the context of alternative dispute resolution. For an extensive discussion of the principle of party autonomy in the context of ADR, I refer to the elaborate writings on this principle in the context of arbitration law. See generally Piers, *supra* note 70.

97. *Id.*

98. Directive on Consumer ADR, *supra* note 3.

99. *Commission Green Paper on Alternative Dispute Resolution in CIVIL AND COMMERCIAL LAW*, at 31, COM (2002) 196 final (April 4, 2002).

100. Directive on Consumer ADR, *supra* note 3.

101. Examples of states not having any particular legislation include: Hungary, the Netherlands and Sweden.



*Belgian Law*

Belgian law contains rules on mediation,<sup>102</sup> conciliation,<sup>103</sup> and settlement through an ombudsman.<sup>104</sup> Conciliation and the ombudsman procedure are less relevant for this article, and mediation will be the focus. According to the Articles 1724 *iuncto* 1725 of the Belgian Judicial Code, parties may agree to mediate issues that can be the subject matter of a settlement agreement and which regard the validity, conclusion, interpretation, performance or breach of a contract.<sup>105</sup>

The law of contracts governs the validity and effect of mediation agreements.<sup>106</sup> The law of contracts applies *mutatis mutandis*<sup>107</sup> to other types of ADR agreements as well. A relevant example of an applicable contract law rule used in ADR agreement interpretation is that agreements will be found valid only if its subject matter is defined or determinable.<sup>108</sup> This means a general reference to an indeterminate ADR mechanism will not result in a valid agreement. Parties must specifically define which ADR mechanism they wish to pursue in case of a dispute. In order to sufficiently fulfill this requirement, the parties may refer to mediation without further specifications.<sup>109</sup> Pursuant to Article 1134 of the Belgian Civil Code,<sup>110</sup> parties are under an obligation to comply with an ADR agreement in good faith.<sup>111</sup>

Note that Belgian doctrine accepts that Belgian consumer law does not prevent consumers from agreeing to ADR provided that a number of conditions are met.<sup>112</sup>

The Consumer Protection Law<sup>113</sup> does not adopt the list set out by the Directive 93/13,<sup>114</sup> but rather formulates rules based on what constitutes an unfair

102. CODE JUDICIAIRE [C. JUD.] art. 1724-1737 (Belg.)

103. CODE JUDICIAIRE [C. JUD.] art. 731-34 (Belg.)

104. Law 21 [Ombudsman on reform of certain economic public enterprises] of Mar. 27, 1991, BELGISCH STAATSBLAD [B.S.] [Official Gazette of Belgium] 6155. *See also* Royal Decree 18 [concerning the ombudsman for the energy sector] of Feb. 12<sup>th</sup>, 2008 [BELGISCH STAATSBLAD [B.S.] [Official Gazette of Belgium] 9136; Law 29 [concerning the organization of the market for electricity] of May 11<sup>th</sup>, 1999 [BELGISCH STAATSBLAD [B.S.] [Official Gazette of Belgium] 16264; Law 12 [concerning the transportation of gaseous and other products through pipes] of May 7<sup>th</sup>, 1965 [BELGISCH STAATSBLAD [B.S.] [Official Gazette of Belgium].

105. LAW 10 [Law concerning arbitration] of October 1967 BELGISCH STAATSBLAD [B.S.] [Official Gazette of Belgium] 11360.

106. Ken Andries, HET BEMIDDELINGSBEDING. GELDIGHHEID, EFFECT, INHOUD EN AFDWINGBAARHEID [The Mediation Clause. Validity, Effect and Enforceability.] 5 (2007); Devenyn, *infra* note 299, at 67-84; M.E. Storme, *Vaststellings- en Geschillenbeslechtingsovereenkomsten* [Definition and Settlement Agreements], in BIJZONDERE OVEREENKOMSTEN [Special Agreements] 588 (Kluwer 2008).

107. "All necessary changes having been made." The term is often used to mean that which concerns a first thing, applies by analogy to a new thing. *Mutatis Mutandis*, BLACK'S LAW DICTIONARY (9th ed. 2009).

108. CODE CIVIL [C.CIV.] art. 1128 (Belg.); *see also* W. VAN GERVEN AND S. COVEMAEKER, *Verbindenissenrecht* [Contract Law] 133 (Acco, Leuven/Voorburg 2006).

109. K. Andries, *infra* note 229, at 322.

110. Law Concerning Arbitration, *supra* note 105.

111. K. Andries, *supra* note 106, at 5.

112. [Law concerning commercial practices and consumer protection] of Apr. 6, 2010, BELGISCH STAATSBLAD [B.S.] [Official Gazette of Belgium] Apr. 12, 2010, 20803; [Law on misleading and comparative advertising, unfair terms and distance contracts agreements regarding the liberal professions] or Aug. 2, 2002, BELGISCH STAATSBLAD [B.S.] [Official Gazette of Belgium] July 20, 5104.

113. [Law concerning commercial practices and consumer protection] of Apr. 6, 2010, BELGISCH STAATSBLAD [B.S.] [Official Gazette of Belgium] Apr. 12, 2010, 20803 (overruling earlier Law of

term, and provides a non-exhaustive list of unfair terms. The list includes a clause in which a consumer renounces his right to take legal action against the seller.<sup>115</sup> The Liberal Professions Law aims to implement Directive 93/13 on unfair terms in Consumer Contracts, and sanctions the use of unfair terms in contracts between professionals and clients. It did so according to the Directive's model and adopts the same list of unfair terms found in the Annex to Directive 93/13.<sup>116</sup>

A clause which excludes or hinders consumers' right to legal action would be considered an unfair term. A consensual ADR clause does not exclude or unlawfully hinder a party's right to go to court, and thus does not infringe consumer law. The situation is different where an ADR clause creates an imbalance between the parties' rights and obligations, for instance, by granting a seller the exclusive right to appoint the neutral third party.<sup>117</sup>

Pursuant to Article 1725 of the Belgian Judicial Code, a contract in which parties agree to submit their dispute to mediation before resorting to any other dispute resolution method also has an effect on a *procedural* level: its existence and ensuing obligations should be respected by the *court* to whom its existence was pointed out.<sup>118</sup> It is unclear whether the procedural consequences of a mediation agreement are analogous to those of other ADR agreements, as no judgments have been rendered that could give an indicative answer to this question.

### England

ADR has grown rapidly in England over the past 20 years. The Commercial Court and the High Court took the lead in promoting ADR as an effective means of dispute resolution.<sup>119</sup> The new Civil Procedure Rules of 1999 clearly reflect the idea that the disputing parties in particular, and the court system in general, could benefit from a less adversarial approach to dispute resolution.<sup>120</sup> The new Civil Procedure Rules<sup>121</sup> state that their purpose is to ensure courts deal with cases just-

---

July 14, 1991 BELGISCH STAATSBLAD [B.S.] [Official Gazette of Belgium] Aug. 29, 1991, 18726, amended by Law of Dec. 7, 1998, BELGISCH STAATSBLAD [B.S.] [Official Gazette of Belgium] Dec. 23, 1998, 20703 (revised in light of the 1998 implementation of Directive 93/13).

114. Council Directive, *supra* note 65, available at [http://www.eu-consumer-law.org/consumer\\_study\\_part2c\\_en.pdf](http://www.eu-consumer-law.org/consumer_study_part2c_en.pdf).

115. Note that this provision is more restrictive than in the Directive 93/13 where it was sufficient that a consumer's right to take legal action or exercise any other legal remedy was *hindered*.

116. Act of 3 April 1997, replaced by the Act of 2 August 2002 on misleading and comparative advertising, unfair contract terms and distance marketing in respect of liberal professions – Liberal Professions Act – LPA.

117. Ken Andries, *Bemiddelingsbeding* [Mediation Clause], 242 NIEUW JURIDISCH WEEKBLAD [New Legal Weekly] 327 (2001).

118. Andries, *supra* note 106, at 5; E. De Groote, *Wet van 21 Februari 2005 tot Wijziging van het Gerechtelijk Wetboek in Verband met de Bemiddeling* [Act of 21 February 2005 Amending the Judicial Code in Connection with the Mediation], 2 AD REM 10 (2005); Devenyn, *infra* note 229, at 67-84L. Demeyere, *The Belgian Law on Mediation: An Early Overview*, 61 DISP. RES. J. 91 (2006); G. Closset-Marchal, *Les Accords Procéduraux et le Procès Civil* [The Procedural Agreements and Civil Trial], 3 *Tijdschrift voor Belgisch Burgerlijk Recht/Revue Générale de Droit Civil Belge* [General Review of Belgium Civil Law] 126, 127 (2012).

119. Practice Note (Commercial Court: Alternative Dispute Resolution) Cresswell J [1994] 1 All ER 34.

120. Note that only arbitration is regulated by a distinct statutory regime in England. This was done by the Arbitration Act 1996. The most relevant references to ADR are found in the CPR.

121. Rule 1.1 CPR; Rule 1.4(2)(e) CPR (U.K.).

ly.<sup>122</sup> One way to further this objective is by active case management, which includes “encouraging the parties to use an alternative dispute resolution procedure if the court considers it appropriate to do so, and also by facilitating the use of such procedure.”<sup>123</sup> Also important here are the two recent laws that implemented the Mediation Directive;<sup>124</sup> these laws only regulate international mediation and do not affect the domestic ADR laws.<sup>125</sup>

It is in this same ADR-favorable environment that English courts have come to recognize the validity of an ADR agreement, provided certain conditions are met. The English courts, however, have not traditionally been favorable towards giving procedural effect to agreements to mediate.<sup>126</sup> The English courts have also extended this line of reasoning to ADR agreements,<sup>127</sup> but the case of *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*<sup>128</sup> heralded a shift on this policy.

In *Channel Tunnel Group*, the House of Lords recognized and enforced an ADR clause: “those who make agreements for the resolution of disputes must show good reasons for departing from them.”<sup>129</sup> An important consideration of the Lords concerned the carefully drafted clause and the fact that “all concerned must have recognized the potential weaknesses of the two-stage procedure and concluded despite them there was a balance of practical advantage over the alternative of proceedings before the national courts of England and France.”<sup>130</sup> The Lord’s focus on “the careful and clear language” of the ADR clause illustrates if a clause is unclear and ambiguous, rendering it unenforceable.<sup>131</sup>

The real breakthrough for ADR agreements came in the case of *Cable & Wireless Plc v. IBM UK Limited*.<sup>132</sup> In *Cable & Wireless*, the Commercial Court upheld the enforceability of a clause where the parties had not specifically defined a particular method of dispute resolution.<sup>133</sup> The parties had instead agreed to “an ADR procedure as recommended to the parties by the Centre for Dispute Resolution.”<sup>134</sup> The Court considered this to be “a sufficiently defined mutual obligation upon the parties” and concluded the clause was valid and enforceable.<sup>135</sup> The Court went a step further by adding that a reference to ADR that does not include

122. Rule 1.1 CPR (U.K.).

123. Rule 1.4(2)(e) CPR (U.K.).

124. The Cross-Boarder Mediation (EU Directive) Regulations 2011, 2011 S.I. 1133; The Civil Procedure (Amendment) Rules 2011, 2011 S.I. 88.

125. And this in spite of the fact that ministry of justice was sympathetic to the idea of a broader application. Andrew Hildebrand, *The United Kingdom*, in *EU MEDIATION LAW AND PRACTICE* 374, 377 (G. De Palo and M.B. Trevor eds., Oxford University Press 2012).

126. *Walford v. Miles* [1992] 1 All ER 453 (U.K.); *Courtney & Fairbairn Ltd. v. Tolaini Bros. (Hotels) Ltd.*, [1975] 1 W.L.R. 297 (U.K.).

127. *See Paul Smith Ltd. v. H & S Int’l Holding Co. Inc.*, [1991] 2 Lloyd’s Rep., 127, 131 (the plaintiffs rightly conceded provisions that the parties shall strive to settle the matter amicably, and a dispute shall, in the first place, be submitted for conciliation, do not create enforceable legal obligations). *See also* K.P. Berger, *Law and Practice of Escalation Clauses*, 22 *ARB. INT’L* 1, 7-8 (2006).

128. *Channel Grp. v. Balfour Beatty Ltd.*, [1993] 1 All E.R. 664.

129. *Id.*

130. *Id.*

131. *See also* *Cott UK Ltd. v. FE Barber Ltd.*, [1997] 3 All E.R. 540; *SUSAN BLAKE ET AL.*, *A PRACTICAL APPROACH TO ALTERNATIVE DISPUTE RESOLUTION* 89 (Oxford 2011).

132. [2002] C.L.C. 1319, available at <http://www.bailii.org/ew/cases/EWHC/Comm/2002/2059.html>.

133. *Id.* at 1319.

134. *Id.*

135. *Id.*

a provision for an identifiable procedure could be enforceable.<sup>136</sup> The court would then have to assess whether the reference was expressed in “unqualified and mandatory terms.”<sup>137</sup> The reference to ADR should thus be binding and non-optional.<sup>138</sup> What is important here is that “a sufficiently certain and definable minimum duty should be easy to find.”<sup>139</sup> If it is not, then the clause will not be enforceable.<sup>140</sup>

One must keep in mind this was a case of first impression, and thus cannot alter the historically stricter approach towards recognition and enforcement of ADR agreements. It does, however, reflect an important change in attitude among English lawmakers.<sup>141</sup> Note that consensual ADR agreements do not seem to fail the test of unfairness set out in the Unfair Terms in Consumer Contracts Regulations of 1999.<sup>142</sup>

### Germany

In Germany, ADR combines procedural as well as substantive law elements. Yet, other than arbitration, German procedural law does not contain provisions on the conclusion of an ADR agreement.<sup>143</sup> The German Civil Code (*Bürgerliches Gesetzbuch* or BGB) thus primarily governs ADR agreements. Mediation is also the primary focus of German ADR law. The new German Mediation Act that implemented the European Mediation Directive became effective in July 2012.<sup>144</sup>

ADR clauses are subject to requirements of general contract law.<sup>145</sup> This means that ADR agreements must clearly express the parties' will to use ADR and define the particular disputes that parties intend to resolve there.<sup>146</sup> This latter condition is known as the “bestimmtheitserfordernis” and is especially important

---

136. *Id.*

137. *Id.*

138. Karl Mackie, *The Future for ADR Clauses after Cable & Wireless v. IBM*, 19 ARB. INT'L 345, 349 (2003).

139. *Cable & Wireless plc v. IBM United Kingdom Ltd.*, [2002] C.L.C. 1319. See also Blake, *supra* note 131; Hildebrand, *supra* note 125; Mackie, *supra* note 138, at 347.

140. See Sulamerica CIA Nacional de Seguros S.A. v Enesa Engenharia S.A. [2012] EWCA (Civ) 638, [2012] 2 All E.R. 795 (Eng.).

141. L. Kah Cheong, *Agreements to Mediation; The impact of Cable & Wireless plc v. IBM United Kingdom Ltd.*, 16 SINGAPORE ACADEMY OF LAW JOURNAL 530, 535 (2004).

142. The Unfair Terms in Consumer Contracts Regulations 1999, S.I. 2008. The English courts have on several occasions examined the fairness of arbitration and other adjudication clauses. Regulation 5(5) of Regulations 1999 refers to an illustrative list of unfair clauses which includes a term “excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions . . .” This term is found in paragraph number (q) of the list provided for in Schedule 2 of the Regulations 1999. Regulations 1999 replaced the eponymous 1994 Regulations (No. 3159) which the English legislature adopted to implement the EC Council Directive on Unfair Terms in Consumer Contracts.

143. Horst Eidenmüller, *Vertrags- und Verfahrensrecht der Wirtschaftsmediation: Mediationsvereinbarungen, Mediatorverträge, Mediationsvergleiche, Internationale Mediationsfälle [Contractual and Procedural Law of the Commercial Mediation: Mediation Agreements, Contracts Mediator, Mediation Comparisons and International Mediation Cases]* 9-10 (2001).

144. See B. Grundmann, *Grusswort zum Mediationsgesetz*, 5 *SchiedsVZ* 229 (2012); S. Kreissl, *Mediation – Von der Alternative zum Recht zur Integration in das Staatliche Konfliktlösungssystem*, 5 *SchiedsVZ* 230 (2012); J. Risse, *Das Mediationsgesetz – eine Kommentierung*, 5 *SchiedsVZ* 244 (2012).

145. See, e.g., HEIN KÖTZ, *VERTRAGSRECHT* 39 (Mohr, Siebeck, Tübingen, 2nd ed. 2009).

146. Eidenmüller, *supra* note 143; Trams, *infra* note 217, at 97-98.

when parties are agreeing on a dispute resolution method for future disputes. The agreement must point out the specific relationship and potential dispute that is being modified by the agreement (“all disputes arising out of or in relation with this contract”).<sup>147</sup> A general reference to possible future disputes will not amount to a valid agreement. ADR is allowed only for those disputes regarding rights of which the parties may dispose.<sup>148</sup>

It is also important that the parties’ ADR agreement not restrict access to courts in the event the parties do not manage to end their dispute through out-of-court proceedings. An agreement other than an arbitration agreement that stipulates the parties must use ADR instead of going to court would thus violate parties’ right of access to a court.<sup>149</sup>

One issue that arises under the German ADR framework is whether the ADR agreement should itself designate the third-party neutral whose task it is to facilitate the dispute resolution process, or alternatively, whether the agreement should simply define a procedure for the appointment of such a third-party neutral. One author argued the designation or determinability of a mediator is an essential part of a mediation agreement.<sup>150</sup> It is also generally accepted that ADR agreements are free of formalities.<sup>151</sup> A written requirement could only have a function *ad probationem* and not *ad validitatem*.<sup>152</sup> German doctrine points out that an ADR clause is subject to the provisions in Articles 305 et seq. BGB on unfair terms in standard contracts.<sup>153</sup> There will be an even stricter scrutiny when consumers are involved.<sup>154</sup>

German law is not explicit on the enforceability of ADR agreements. The German courts have ruled in favor of recognition and enforcement of certain ADR agreements.<sup>155</sup> The German Federal Supreme Court ruled a conciliation clause must be enforced when it clearly expresses the parties’ intention to solve problems through this form of ADR before going to the courts.<sup>156</sup> It is generally accepted that this ruling could also be extended to other forms of ADR, particularly in mediation agreements.<sup>157</sup> German courts have also refused to treat claims where the

147. Trams, *infra* note 217, at 97-98.

148. Hannes Unberath, *Mediationsklauseln in der Vertragsgestaltung* [Mediation Clauses in the Contract Form], NEUE JURISTISCHE WOCHENSCHRIFT [New Legal Weekly] 1320, 1322 (2011).

149. Trams, *infra* note 217, at 98.

150. *Id.* at 99-106.

151. *Id.* at 41; Tochtermann, *infra* note 215, at 549.

152. See ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], BUNDESGESETZBLATT [BGBl.] 3786, as amended, § 1031 (Ger.).

Ad probationem means for the sake of evidence while ad validitatem means for the sake of validity. Again, this is different for arbitration agreements.

153. Trams, *infra* note 217, at 45; Tochtermann, *infra* note 215, at 539; Unberath, *supra* note 148, at 1323.

154. Tochtermann indicates that a standard mediation clause should contain specific provisions when a consumer is involved. The consumer contract should indicate mediation must be impartial and independent, is not a binding procedure, and the mediator will not render a decision. See Tochtermann, *infra* note 215, at 539.

155. BGH 18 November 1998, NEUE JURISTISCHE WOCHENSCHRIFT [New Legal Weekly] 647 (1999); BGH 4 July 1977, NEUE JURISTISCHE WOCHENSCHRIFT [New Legal Weekly] 2263 (1977).

156. *Id.*

157. BGH 18 November 1998, NEUE JURISTISCHE WOCHENSCHRIFT [New Legal Weekly] 647 (1999); BGH 4 July 1977, NEUE JURISTISCHE WOCHENSCHRIFT [New Legal Weekly] 2263 (1977).

parties have not yet complied with their agreement to pursue dispute resolution through conciliation.<sup>158</sup>

*B. Second Question: What are Parties' Obligations Under an ADR Agreement?*

*Pacta Sunt Servanda*<sup>159</sup> v. Party Autonomy

Two premises underlying consensual ADR and which work to limit the spectrum of obligations to which parties may be bound can be defined with certainty under European law. First, parties to an ADR agreement agree to initially try to resolve their disputes through an alternative means of dispute resolution instead of immediately attempting to resort to state courts. Second, it is generally accepted that parties to a consensual ADR agreement cannot be forced to accept a settlement proposed by the other party to the dispute or by the neutral third party who stepped in to facilitate the dispute resolution.<sup>160</sup> Parties may step away from negotiations that take place within the framework of the agreed upon ADR process when they see no potential positive outcome.<sup>161</sup> It is not always clear where the *pacta sunt servanda*<sup>162</sup> principle ends, and where the parties' freedom to resign from ADR begins. The tension between these two principles gives rise to a myriad of questions on the obligations of parties to an ADR agreement and on whether, and to what extent, parties should make an effort to resolve their dispute through ADR.

Parties may not know when they are under an obligation to cooperate in setting up an ADR mechanism. Parties may also indicate at the outset that they do not believe ADR will work for their particular dispute and then justify that refusal to start or participate in the ADR proceedings. Additionally, it is not clear whether parties have a right, in spite of their ADR agreement, to take their dispute to court, or whether it is always a violation of their *pactum de non petendo*. In the event that parties cooperate in setting up the ADR proceedings, is not clear how parties should behave to comply with their contractual obligations. There is a thin line between futilely making a settlement decision under the ADR agreement, and a breach of contract for not complying with the commitment to pursue ADR. Finally, legal requirements of contract law and procedural law do not always fit practical reality, and it may seem pointless for parties to participate in ADR. This article examines the different legal systems in Europe that have dealt with these issues.<sup>163</sup>

---

158. See discussion *infra* Part IV.C.

159. This is a latin phrase that refers to the theorem that agreements should be kept or observed.

160. This is a recurring theme throughout this article and throughout European ADR law.

161. C. JUD. art. 1729 (Belg.), available at <http://www.cepani.be/en/mediation/belgian-legislation> (last visited January 10, 2015) ("Each party may terminate at any moment the mediation proceedings on a without prejudice basis.") (Translation by the Belgian Center for Arbitration and Mediation (Cepani), on <http://www.cepani.be>).

162. See *supra* note 159.

163. Note it is not self-evident *in abstracto* to establish the parties' obligations under an ADR agreement; the concrete obligations of the parties may differ depending on the particularities to which they consent in their specific ADR agreement.

*Three Categories of Obligations*

Three categories of obligations are distinguished when parties consent to an ADR agreement. First, there are obligations that compel parties to perform certain actions in the setting-up phase of ADR proceedings. Second, parties are under an obligation to work towards a solution of their dispute. Third, parties are obliged to refrain from certain actions. Belgian, German, and English laws have each separately dealt with these obligations in legal practice.<sup>164</sup>

*Category 1: Obligation to Set Up ADR Proceedings*

Several Belgian authors have tackled the issue of the parties' obligation to set up and participate in mediation proceedings.<sup>165</sup> The Belgian mediation legislation is not clear on this matter. Article 1729 of the Belgian Judicial Code states each party may, at any time, end the mediation proceedings without suffering prejudice from this action.<sup>166</sup> Belgian scholars agree this article only supports a party's freedom to withdraw from mediation once the process has commenced.<sup>167</sup> This reasoning is based on a study of legislative history of mediation law. The reports of parliamentary debates reveal the Belgian legislature had no intention of forcing a recalcitrant party to start mediation.<sup>168</sup> The wrongful refusal to begin mediation, according to the Belgian Parliament, would not result in a procedural sanction, although it could lead to contractual damages; this implies that Belgian law accepts a limited duty to give effect to a mediation agreement.<sup>169</sup> Parties to a mediation agreement are under a contractual obligation to participate in setting up mediation, but they cannot be forced to cooperate in finding a solution to the dispute.<sup>170</sup> Participation includes appointing a mediator and providing the mediator with information necessary for him to perform his mediator duties.<sup>171</sup> This contractual obligation to organize proceedings could be extended to all consensual ADR agreements.

There is no specific provision in the English Civil Procedure Rules (CPR) that describes parties' obligations under ADR agreements. Regardless of whether there is an ADR agreement, the English CPR and the CPR Practice Directions,<sup>172</sup>

---

164. Note that in Belgium and Germany, there is little literature on these issues other than in connection to mediation. Therefore, the mediation legislation and practice will be a leading source of information; where possible, I will extrapolate principles and rules of mediation to ADR.

165. See Andries, *supra* note 117, at 326.

166. C. JUD. art. 1729 (Belg.), available at <http://www.cepani.be/en/mediation/belgian-legislation> (last visited January 10, 2015).

167. See Andries, *supra* note 117, at 326.

168. Amendment 7, Parliamentary Debates Chamber of Representatives 2003-04, 0327/005, 5; Report, Parliamentary Debates Senate 2004-05, 3-781/7, 43-44, available at <http://www.lachambre.be/kvvcr/showpage.cfm?section=flwb&rightmenu=right&language=fr&cfm=ListDocument.cfm> (last visited January 10, 2015).

169. *Id.* See also Andries, *supra* note 117, at 326.

170. Andries, *supra* note 117, at 326.; Devenyn, *infra* note 229, at 74-75.

171. Devenyn, *infra* note 229, at 74-75.

172. These are rules that supplement the Civil Procedure Rules and that regulate minor issues or explain how the CPR should be understood. On practice directions, see <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01#IDATJXKC>.

as well as case law and court guides,<sup>173</sup> require parties to attempt to resolve their conflicts through ADR rather than through court proceedings.<sup>174</sup> For example, the Practice Direction on Pre-Action Conduct,<sup>175</sup> states going to court should be a last resort, and even though ADR is not compulsory, parties should always consider whether ADR might enable them to settle the matter.<sup>176</sup> A less vague indication of the parties' concrete obligation to set up an ADR procedure can be found in Article G1.8 of the Admiralty and Commercial Courts Guide.<sup>177</sup> This provision allows the admiralty and commercial courts to issue an "ADR order" in the terms set out in Appendix 7 to the Guide.<sup>178</sup> Such a draft order sets out four clear obligations the court may impose upon parties to the dispute, two of which are relevant here. First, the court may order the parties to exchange a list of three neutral individuals who could conduct the ADR procedures.<sup>179</sup> Second, the ADR order may stipulate that parties must "in good faith endeavor" agree to a neutral individual or panel from these lists.<sup>180</sup> From this, it appears that although parties cannot be forced to find a solution through ADR, they should at least attempt resolution through the ADR process.<sup>181</sup>

German law encourages parties to arrive at an amicable settlement of their dispute, and to consider court proceedings only as a means of last resort. Article 253(3) of the German Code of Civil Procedure (ZPO), requires a statement of claim that should indicate whether parties have previously attempted to mediate or engaged in any form of ADR, and whether there are obstacles preventing such a procedure taking place.<sup>182</sup> In this regard, Article 15a of the Introductory Law to the German Code of Civil Procedure (EGZPO), requires parties first try ADR

---

173. See SUSAN BLAKE ET AL., *A PRACTICAL APPROACH TO ALTERNATIVE DISPUTE RESOLUTION* 76-79 (Oxford University Press, Oxford 2011); Jens M. Scherpe and Bevan Marten, *Mediation in England and Wales: Regulation and Practice*, in *Mediation*; PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE 376-377 (Klaus Hopt and Felix Steffek eds., Oxford University Press 2013).

174. *Supra* note 172; BLAKE ET AL., *supra* note 173, at 76-79; Scherpe & Marten, *supra* note 173, at 376-77.

175. These protocols set out the different steps that parties should follow before issuing proceedings and aim to enable the parties to solve the disputes amongst themselves without having to start litigation proceedings. Rule 1.1(1) Practice Direction Pre-Action Protocol. There are pre-action protocols for specific types of claims, such as construction and engineering disputes, defamation, housing disrepair case, etc. The Practice Direction Pre-Action Protocol covers those disputes that cannot be categorized under one of the specific pre-action protocols. These pre-action protocols can all be found on the website of the English Ministry of Justice at <http://www.justice.gov.uk/courts/procedure-rules/civil/protocol>.

176. Practice Direction Pre-Action Conduct, art. 8.1 (U.K.). Courts may even require evidence that the parties considered some form of ADR.

177. Admiralty and Commercial Courts Guide, 9th Ed. (2011), available at <http://www.justice.gov.uk/downloads/courts/admiraltycomm/admiralty-commercial-court-guide-9th-edition.pdf>.

178. *Id.*

179. *Id.* at App'x 7, § 1.

180. *Id.* at App'x 7, § 2.

181. *Id.*

182. Bürgerliches Gesetzbuch [BGB] (Civil Code) 5 Dec. 2005, BUNDESGESETZBLATT [BGBl, Federal Law Gazette], § 253 (3) (1-3) (Ger.) ("Die Klageschrift soll ferner enthalten: 1. die Angabe, ob der Klageerhebung der Versuch einer Mediation oder eines anderen Verfahrens der außergerichtlichen Konfliktbeilegung vorausgegangen ist, sowie eine Äußerung dazu, ob einem solchen Verfahren Gründe entgegenstehen . . .") [Information as to whether, prior to the complaint being brought, attempts were made at mediation or any other proceedings serving an alternative resolution of the conflict were pursued, and shall also state whether any reasons exist preventing such proceedings from being pursued].



(*obligatorische Streitschlichtung*)<sup>183</sup> before commencing litigation proceedings in court.<sup>184</sup> Yet, there are few German legal provisions describing the parties' duties under an ADR agreement.<sup>185</sup>

German doctrine and the German Federal Supreme Court have advanced the view that parties who agree to mediate as a preliminary step before embarking upon court proceedings will be obliged to set up the mediation.<sup>186</sup> This entails appointing the mediator and engaging in the first mediation session.<sup>187</sup> Parties must also pay their share of the advancement costs of mediator's fees and institutional fees in the case that institutional mediation is agreed upon.<sup>188</sup> The German Federal Supreme Court has also agreed.<sup>189</sup>

### Category 2: Obligations to Find a Solution

Pursuant to Article 1729 of the Belgian Judicial Code, parties may at any time and without prejudice, withdraw from mediation procedures.<sup>190</sup> Therefore, there is no procedural obligation to participate in the mediation process. Article 1134 of the Belgian Civil Code imposes a contractual duty on the parties to execute their ADR contract in good faith.<sup>191</sup> It is unclear what this good faith obligation to perform entails or when parties have sufficiently complied with their duty to participate. Some authors state it suffices when the parties are present at the mediation meeting,<sup>192</sup> but others remain doubtful about the usefulness and legitimacy of such an objective interpretation.<sup>193</sup> Given the possibility for a caucus, an ADR mechanism such as mediation does not require the parties meet each other in person.<sup>194</sup>

The Belgian legislature rejected an amendment requiring an obligatory meeting with the mediator as a minimum requirement of good faith, for the court or arbitral tribunal to lift the stay of proceedings.<sup>195</sup>

The English laws *sensu stricto*<sup>196</sup> do not explicitly state how a party should behave during the ADR procedure. However, the Practice Direction on Pre-Action Conduct lays clear instructions on how parties should exchange information prior to litigation<sup>197</sup> so that they "will have a genuine opportunity to re-

183. German phrase for compulsory arbitration or a mandatory attempt to settle a dispute.

184. See R. ZÖLLER, ZIVILPROZESSORDNUNG KOMMENTAR [Civil Procedure Comment] Paragraph 43 (Cologne 2010).

185. These are discussed under the next subpart (e.g., the provisions of the BGB on good faith etc.)

186. BGH 18 November 1998, *supra* note 157.

187. Tochtermann, *infra* note 215, at 549; Eidenmüller, *supra* note 143, at 9; Trams, *supra* note 217, at 138.

188. Tochtermann, *infra* note 215, at 549; Eidenmüller, *supra* note 143, at 9; Trams, *supra* note 217, at 138; F. Steffek, *Rechtsvergleichende Erfahrungen für die Regelung der Mediation* [Comparative Legal Experience for the Regulation of Mediation], in 74 RABELS ZEITSCHRIFT 851 (2010).

189. BGH 18 November 1998, *supra* note 157.

190. Code Judiciaire [C. Jud.] art. 1729 (Belg.).

191. Code Judiciaire [C. Jud.] art. 1134 (Belg.).

192. B. Allemeersch and P. Schollen, *De Nieuwe Bemiddelingswet* [The New Mediation], 38 RECHTSKUNDIG WEEKBLAD [Right Qualifications Weekly] 1485 (2004-05).

193. Andries, *supra* note 106, at 15.

194. *Id.*

195. Amendment 12, Parliamentary Debates Senate 2004-05, 3-781/3, 5.

196. "In the strict sense."

197. Practice Direction on Pre-Action Conduct (2014), Rule 7, available at [http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd\\_pre-action\\_conduct#7.1](http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct#7.1); see also

solve the matter without needing to start proceedings.”<sup>198</sup> If parties have not come to a settlement, then “at the very least, it should be possible to establish what issues remain outstanding so as to narrow the scope of the proceedings and therefore limit potential costs.”<sup>199</sup> Even if parties complete the procedure without having found a resolution, they should still undertake a further review of their respective positions to see if proceedings can be avoided.<sup>200</sup>

Appendix 7 to the Admiralty and Commercial Courts Guide sets out requirements for parties when the court issues an ADR order.<sup>201</sup> The Guide states the court should order parties to “take such serious steps as they may be advised to resolve their disputes by ADR procedures.”<sup>202</sup> Additionally, if the case is not settled, parties are charged with a number of duties to the court.<sup>203</sup> These two instruments only give a limited indication of what, pursuant to English law, might constitute acceptable obligations for parties that are bound by a duty to proceed to ADR.

English case law is more precise on the standards for holding parties liable for breach of ADR agreements. The English courts have ruled on several occasions that parties to an ADR agreement are bound to make a reasonable effort to come to a resolution of their dispute.<sup>204</sup> This can be discerned from judgments in which courts decided on the repartition of costs and where a winning party’s behavior served as a justification for deviation from the “loser pays” rule.<sup>205</sup> In contrast to Belgian law, English courts made clear that “an unjustified failure to give proper attention to the opportunities afforded by mediation” might have pecuniary consequences.<sup>206</sup> The Court of Appeal in *Halsey v. Milton Keynes Gen. NHS Trust* set out a test to determine whether a refusal to mediate is reasonable or not.<sup>207</sup> A refusal to mediate, a last minute withdrawal from a planned mediation,<sup>208</sup> or making an offer in a bullying way without intending to resolve the dispute in question and without giving the other party adequate time to prepare,<sup>209</sup> might all lead to an adverse decision on the costs.

---

SUSAN BLAKE ET AL., *A PRACTICAL APPROACH TO ALTERNATIVE DISPUTE RESOLUTION* 80-81 (Oxford University Press 2011).

198. *Practice Direction on Pre-Action Conduct* (2014), Annex A, Rule 6.1, available at [http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd\\_pre-action\\_conduct#6.1](http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct#6.1).

199. *Id.*

200. *Id.* at Annex A, Rule 6.2.

201. *The Admiralty and Commercial Courts Guide* (2013), Appendix 7, available at <http://www.justice.gov.uk/downloads/courts/admiraltycomm/admiralty-and-commercial-courts-guide.pdf>.

202. *Id.* at App. 7, Sec. 4.

203. *Id.* at App. 7, Sec. 5.

204. *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] 1 W.L.R. 3002, paragraph 16; see also Shirley Shipman, *Alternative Dispute Resolution, the Threat of Adverse Costs, and the Right of Access to Court*, in *THE CIVIL PROCEDURE RULES TEN YEARS ON* 341 (Deirdre Dwyer ed., Oxford University Press 2009) (discussing the case in more elaborate detail).

205. Shipman, *supra* note 204, at 341.

206. *Hurst v. Leeming*, [2001] EWHC 1051, paragraph 10 (Lightman, J.) (“must be anticipated as a real possibility that adverse consequences may be attracted”).

207. *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] 1 W.L.R. 3002, paragraph 16; see also Shipman, *supra* note 204 (discussing the case in more elaborate detail).

208. *Leicester Circuits Ltd. v. Coates Bros. Plc.*, [2003] EWCA (Civ) 333 (Eng.), available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=ew/cases/EWCA/Civ/2003/333.html&query=Leicester%20Circuits>.

209. *Société Internationale de Telecommunications Aeronautiques S.C. v. The Wyatt Co. (UK)*, [2002] EWHC 2401, available at [http://www.cedr.com/library/edr\\_law/SITA\\_v\\_watson\\_wyatt\\_x\\_2.pdf](http://www.cedr.com/library/edr_law/SITA_v_watson_wyatt_x_2.pdf).

The German laws of civil procedure give little-to-no indication of what is expected from parties in the process of finding an amicable solution to a dispute. It is clear the parties who agreed to consensual ADR cannot be forced to agree to a proposed solution. The new German Mediation Act expressly states parties may end the mediation at any time,<sup>210</sup> thus subscribing to the German tendency to define mediation as a voluntary process.<sup>211</sup> It is unclear to what extent parties must make an effort to come to an amicable settlement, or when they may legitimately withdraw from an ADR procedure.

The general law of contract provides only pointers. Parties to an ADR agreement are bound by explicit obligations to which they consented, but also by the legal and more general obligations that are stipulated in Articles 241 and 242 of the BGB.<sup>212</sup> Article 242 of the BGB provides a general obligation to act in good faith.<sup>213</sup> Article 241(2) requires parties show consideration for the rights and interests of the other party to contractual or legal relationships.<sup>214</sup> Parties are also bound by the general contract law requirement against undue influence or the use of threats during the negotiations.<sup>215</sup> These contract law provisions govern the parties' contractual duties under an ADR agreement, although they remain vague on the concrete actions that parties need to undertake when pursuing an amicable settlement of a dispute. Different opinions can be found in legal doctrine in this respect. One author argues parties are free to negotiate in a way to best further their personal interests,<sup>216</sup> but another author is of the opinion that the parties should further the mediation according to their abilities.<sup>217</sup> Ultimately, there remains no duty to give particular information during the mediation, yet there is the understanding and requirement that parties should not misrepresent the facts. Any information given should be veracious.<sup>218</sup>

### *Category 3: Obligation to Refrain From Acting*

Article 1725(1) of the Belgian Judicial Code clearly states that parties, who sign a mediation agreement, are agreeing to resort to mediation for any dispute relating to the validity, conclusion, interpretation, performance, or breach of a contract before resorting to any other dispute resolution method.<sup>219</sup> Thus, parties

210. Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung [GERMAN MEDIATION LAW], July 21, 2012, Bundesgesetzblatt [BGBl.] at 1577, § 2(5) (Ger.).

211. S. Koenig, *Germany*, in *EU MEDIATION LAW AND PRACTICE* 141 (Oxford University Press 2012).

212. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, Bundesgesetzblatt [BGBl.], I page 3719, as amended, § 242 (Ger.), available at [http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p0725](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0725).

213. *Id.*

214. *Id.* at §241 (2).

215. P. Tochtermann, *Mediation in Germany: The German Mediation Act – Alternative Dispute Resolution at the Crossroads*, in *MEDIATION PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE* 549 (Oxford University Press 2012).

216. *Id.*

217. K. Trams, *Die Mediationsvereinbarung – Eine Vertragsrechtliche Analyse* 138 [The Mediation Agreement – A Contract Legally Possible Analysis] (Tectum Verlag Marburg 2008).

218. *Supra* note 215; Trams, *supra* note 217, at 146.

219. Translation by Cepani, on <http://www.cepani.be>. The original Dutch text states: “Elke overeenkomst kan een bemiddelingsbeding bevatten, waarbij de partijen zich ertoe verbinden voor eventuele geschillen in verband met de geldigheid, totstandkoming, uitlegging, uitvoering of verbre-

temporarily limit their right of access to the courts. This *pactum de non petendo*<sup>220</sup> is considered to be implied in an ADR agreement in other jurisdictions.

English law is clear about the contractual obligation to avoid litigation when parties have previously agreed to alternative dispute resolution.<sup>221</sup> German law is not explicit about the fact that parties to an ADR agreement are bound by a dilatory waiver not to sue. The German Federal Supreme Court interpreted a parties' conciliation agreement as implying a *pactum de non petendo*.<sup>222</sup> There seems to be unanimity among legal scholars that the same reasoning also holds for mediation agreements.<sup>223</sup> These legal systems all prohibit the continuance of the proceedings, discussed in the next section.

### *C. Third Question: Can the Parties' Obligations Under an ADR Agreement be Enforced?*

No clear rules. There is no uniform regulation on what a national court should do when dealing with a dispute in which the parties have previously agreed to ADR. The rules on enforceability of the parties' obligations under an ADR agreement all must be enforced through national law. Belgian, English, and German contract and procedural law set out similar scenarios on how to enforce compliance with an ADR agreement.

#### *Belgium*

Belgian contract law does not provide adequate means of enforcing an ADR agreement. Although the preferred remedy under Belgian contract law is specific performance,<sup>224</sup> this might not be the best approach in the context of ADR. Imposing a penalty ("dwangsom"<sup>225</sup> or "astreinte"<sup>226</sup>) to encourage an unruly party to comply with his contractual obligations would likely lead that party to pretend to participate in the ADR process, yet, a party who refuses to live up to his commitment to solve the dispute through mediation or ADR may be charged with damag-

---

king van de overeenkomst eerst een beroep te doen op bemiddeling en dan pas op elke andere vorm van geschillenbeslechting." [Any contract can include a mediation clause, whereby the parties undertake for any disputes relating to the validity, conclusion, interpretation, performance or breach of the agreement first recourse to mediation and then to any other form of dispute resolution].

220. The Latin phrase *pactum de non petendo* means "agreement not to sue."

221. N. Andrews, *The Modern Civil Process* 231 (Mohr Siebeck Tübingen 2008); K. Mackie, *The Future for ADR Clauses After Cable & Wireless v. IBM*, 19 ARB. INT'L 3, 348 (2003).

222. *Supra* note 220; Bundesgerichtshof [BGH] [Federal Court of Justice], Nov. 18, 1998, NEUE JURISTISCHE WOCHENSCHRIFT, 647, 1999 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice], July 4, 1997, NEUE JURISTISCHE WOCHENSCHRIFT, 2263, 1977 (Ger.).

223. P. Tochtermann, *supra* note 215, at 538-39, 549; Tram, *supra* note 217, at 26, 117; H. Eidenmüller, *Vertrags- und Verfahrensrecht der Wirtschaftsmediation* 9 (Verlag Dr. Otto Schmits, Cologne 2001); K. P. Berger, *Law and Practice of Escalation Clauses*, 22 ARB. INT'L 1, 6 (2006).

224. Cour de Cassation [Cass.] [Court of Cassation], Apr. 14, 1994, ARR. CASS. 1994, 374 (Belg.); Cour de Cassation [Cass.] [Court of Cassation], Mar. 13, 1998, JLMB 2000,136 (Belg.); Cour de Cassation [Cass.] [Court of Cassation], Jan. 30, 2003, AR C000632F, <http://jure.juridat.just.fgov.be> (Belg.); B. Claessens, W. Van Putten, M. Vega Leon, T. Hens, J. Deene, & S. Vereecken, *De uitwerking van de overeenkomst tussen partijen*, in BESTENDIG HANDBOEK VERBINTENISSENRECHT 1828 (2007); B. Wylleman, *Over de gedwongen uitvoering van overeenkomsten: in natura of bij equivalent?*, 163-65, AJT 1995-96.

225. Imposing a penalty ("dwangsom" or "astreinte").

226. *Id.*

es for breach of contract.<sup>227</sup> Preference should be given to this means of redress for contractual breach.<sup>228</sup> However, it may be difficult to measure the damages that a party has suffered. Furthermore, the amount of damages will generally be negligible.<sup>229</sup>

Belgian law does not provide procedural sanctions that may compel a party to comply with an ADR agreement to which it has previously agreed. In the context of mediation, it would be contrary to Article 1729 of the Belgian Judicial Code to compel a party to participate in mediation under the imminent threat of suffering prejudice.<sup>230</sup> On the contrary, Article 1725(2) of the Belgian Judicial Code provides an indirect means to enforce the parties' obligation to avoid litigation or arbitration proceedings before attempting to resolve the dispute through mediation. This legal provision states the court or arbitral tribunal receiving a dispute that is the subject of a mediation agreement, shall suspend the examination of the case, unless, with regard to the dispute in question, the mediation agreement is invalid or has ceased to exist.<sup>231</sup> Such a stay cannot be ordered *sua sponte*, but should be requested by any party *in limine litis*.<sup>232</sup>

The court or arbitral tribunal may continue handling the case once one or more parties has notified the registry and other parties of the fact that mediation has ended.<sup>233</sup> In principle, and pursuant to Article 1729 of the Belgian Judicial Code, parties may notify the courts or arbitrators of such an ending at any time, even before mediation has started.<sup>234</sup> Thus, the enforcement of this *pactum de non petendo*<sup>235</sup> does not compel a party to mediate. It merely punctuates a party's unhindered access to courts and should give the claimant pause for reflection on the potential benefits of the mediation to which he committed himself before the dispute arose.<sup>236</sup> The Belgian legislature clearly indicated in its parliamentary debates that such a stay could only have a very limited effect and only results in a moment of reflection.<sup>237</sup>

---

227. The Belgian legislature in the parliamentary debates leading up to the adoption of the mediation law indicated damages would be an appropriate remedy to compensate for a party's refusal to comply with his prior commitment to mediate the dispute. Parliamentary Debate of the Senate, Amendment 12, 3-781/3, 5 (2004-2005).

228. As indicated in the above, the Belgian legislature rejected the Senate's proposal to require parties meet at least one time with the mediator before the courts or arbitrators could lift up the stay of the proceedings pursuant to Article 1725(2) of the Belgian Judicial Code. See K. Andries, *supra* note 106, at 75-77 (providing analysis of the Belgian law and parliamentary debates).

229. *Id.* at 44-48; K. Andries, *Bemiddelingsbeding* [Mediation Clause], in NIEUW JURIDISCH WEEKBLAD [New Legal Weekly] 242, 324-25 (2001); M.A. Devenyn, *Commentaar bij Artikel 1725* [Comments on Article 1725], in ARTIKELSGEWIJZE COMMENTAAR GERECHTELJK RECHT [Comments on the Articles of Court Law] 78-79 (2012).

230. Code Judiciaire [C.JUD.] art. 1729 (Belg.).

231. CODE JUDICIAIRE [C.JUD.] art. 1725 § 2 (Belg.).

232. *Id.*

233. *Id.*

234. Code Judiciaire [C.JUD.] art. 1729 (Belg.).

235. "Agreement not to sue."

236. K. Andries, *supra* note 229, at 326.

237. Amendment nr. 25, Parliamentary Debates Chamber of Representatives 2003-04, 3-781/13, 12.

## England

English contract law opposes specific performance of an ADR agreement.<sup>238</sup> The courts have shown themselves prepared to award damages for breach of an ADR agreement on a number of occasions.<sup>239</sup> In *Sunrock Aircraft Corp Ltd. v. Scandinavian Airlines System Denmark-Norway-Sweden*, the Court of Appeals indicated a party could be entitled to damages calculated on the basis of the amount that would have resulted from the ADR process if the parties had complied with the dispute resolution clause.<sup>240</sup> In a case regarding a breach of an exclusive jurisdiction clause, the court held a party's damages were the costs the party reasonably incurred in foreign proceedings brought in breach of an exclusive jurisdiction clause.<sup>241</sup> Of course, the same issues of proof arise here as set out under the section on Belgian law.<sup>242</sup>

The most efficient measures to encourage ADR can be found in procedural law. English law provides for two procedural measures that may be applied when certain conditions are met and that should induce parties to try to solve their disputes through ADR.<sup>243</sup> First, a court may give effect to the *pactum de non petendo* included in the ADR agreement by staying the proceedings initiated in violation of the agreement.<sup>244</sup> Second, the court may award pecuniary redress through sanctions against the party that breached the ADR agreement.<sup>245</sup> Courts

---

238. In English contract law, damages were traditionally the primary remedy, and specific performance was only exceptionally ordered. These exceptions have become quite numerous over the years, and it seems the English approach is not fundamentally different from the Civil Law tradition. An important difference is under English law, parties requiring specific performance still need to prove damages are inadequate. J. Cooke and D. Oughton, *The Common Law of Obligations*, 262 (Butterworths, London 2000); E. Peel, *Treitel – The Law of Contract*, 1099 (Sweet & Maxwell, London 2011); P. Birks, *English Private Law*, 874 (Oxford University Press 2000).

239. *Id.*

240. *Sunrock Aircraft Corp. Ltd. v. Scandinavian Airlines Sys. Denmark-Norway-Sweden*, [2007] EWCA (Civ) 882, 2 Lloyd's Rep. 612 (Eng.).

241. *Union Discount v. Zoller* [2002] 1 W.L.R. 1517 (Eng.).

242. For example, in the *Sunrock Aircraft* case there was no evidence to support what the outcome would have been of the expert determination agreed upon in the ADR clause.

243. Note that it has been questioned at several occasions whether the English courts have the power to order parties to mediate or submit to ADR. In the case of *Halsey v. Milton Keynes Gen. NHS Trust*, (2004) 1 W.L.R. 2002 (Eng.), the Court of Appeal held it did not have the power to order parties to conduct a mediation and such an order "would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6 [of the European Convention on Human Rights]." Under reference to the case of *Deweere v. Belgium*, 2 Eur. Ct. H.R. 439 (1980), of the European Court of Human Rights, the Court of Appeals did, however, accept that the right of access to the court may be waived, provided such a waiver is subjected to particularly careful review so as to ensure the claimant is not subject to constraint when agreeing to ADR. The reasoning of the Court was questioned and rejected by several authors. See A. Hildebrand, *The United Kingdom*, in *EU MEDIATION LAW AND PRACTICE*, 385 (Oxford University Press 2012); J.M. Scherpe and B. Marten, *Mediation in England and Wales: Regulation and Practice*, in *MEDIATION PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE* 377-78 (Oxford University Press 2012). The latter authors question this repudiation of mandatory mediation under English law, and amongst other reasons, in light of Article 5(2) of the Mediation, which expressly acknowledges the use of compulsory mediation. Rule G1.8 of the Admiralty and Commercial Court Guide explicitly provides the court may order parties to consider ADR, which is of course not the same as forcing them to proceed to ADR. Appendix 7 to the Admiralty and Commercial Court Guide sets out to what obligations such an order may subject the parties.

244. *Id.*

245. *Id.*

cannot compel a party to proceed to ADR; they can only strongly encourage him or her to do so.<sup>246</sup>

The court's power to stay the proceedings was set out in the case of *Cable & Wireless v. IBM United Kingdom Ltd.*<sup>247</sup> The Commercial Court held there was a breach of the ADR clause because the parties had not previously employed mediation.<sup>248</sup> The Court placed a stay upon the court proceedings.<sup>249</sup> The Commercial Court in *Cable* held a stay should not be an automatic consequence, but "strong cause would have to be shown before a court could be justified in declining to enforce such an agreement."<sup>250</sup> The court may refuse a stay when ADR would be "a completely hopeless exercise."<sup>251</sup> The Commercial Court also indicated arguments against the stay will be given much less weight in the face of an ADR agreement than in the context of a case management conference in the absence of an ADR agreement.<sup>252</sup> Parties that previously assessed the appropriateness of ADR in future disputes will have only a weak basis for inviting the court to withhold enforcement once a dispute arises. The Commercial Court's stay was in line with previous case law,<sup>253</sup> with the ADR provisions in the Admiralty and Commercial Court Guide,<sup>254</sup> and with what is required under the current Civil Procedure Rules.<sup>255</sup>

In the subsequent case of *DGT Steel & Cladding Ltd. v. Cubitt Building & Interiors Ltd.*, the High Court established a number of factors to be considered when determining whether to grant a stay when there is an ADR agreement.<sup>256</sup> The Court held considerations should include the extent parties had complied with requirements in the applicable pre-action protocol, and whether the chosen ADR mechanism would be suitable for resolving the dispute.<sup>257</sup> The decision also held that a court should evaluate and compare the costs that both types of procedure generate, and whether the proposed ADR mechanism is in accordance with the overriding objective of the CPR.<sup>258</sup>

Independent of the establishment of an ADR Agreement, when making its decision on costs, an English court may take into account the efforts made "before and during the proceedings in order to try to resolve the dispute."<sup>259</sup> The Court applied this rule in the case of *Halsey v. Milton Keynes Gen. NHS Trust*, where

---

246. *Id.*

247. *Cable & Wireless Plc v. IBM United Kingdom Ltd.*, [2002] EWHC 2059 (Comm); *See also* N. ANDREWS, *THE MODERN CIVIL PROCESS* 231 (Mohr Siebeck, Tübingen 2008); A. Hildebrand, *The United Kingdom, in EU MEDIATION LAW AND PRACTICE* 386 (Oxford University Press 2012); S. BLAKE ET AL., *A PRACTICAL GUIDE TO ALTERNATIVE DISPUTE RESOLUTION* 89 (Oxford University Press 2011).

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

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *See* *Channel Tunnel Grp. Ltd. v. Balfour Beatty Constr. Ltd.* [1993] AC 334 (Eng.); *Cott U.K. Ltd. v. FE Barber Ltd.* [1997] 3 All E.R. 540 (Eng.); *and* *Cape Durasteel Ltd. v. Rosser and Russell Bldg. Services Ltd.* [1995] 46 Con L.R. 75 (Eng.).

254. *See* D8.9 and Rule 61.12 Admiralty and Commercial Court Guide (U.K.).

255. Article 26(4) of the Civil Procedure Rules provides, for instance, that a court will order a stay in the event both parties so request, or may do so of its own initiative when it considers this appropriate.

256. *DGT Steel & Cladding Ltd. v. Cubitt Bldg. & Interiors Ltd.* [2007] BLR 371 (Eng.).

257. *Id.*

258. *Id.* *See also* S. Blake et al. *supra* note 131, at 89.

259. Civ. P. R. 44.5(3)(ii) (Eng.).

there was no ADR agreement, but the Court of Appeals had issued an order to engage in ADR; an order one party had ignored.<sup>260</sup> The Court of Appeals held the “loser pays” rule could be reversed when there were indications that the winning party unreasonably refused to take part in an ADR process.<sup>261</sup> The *Halsey* Court found the following factors important: (1) the nature of the dispute, (2) the merits of the case, (3) the extent to which other settlement methods have been attempted, (4) whether the costs of the ADR process would be disproportionately high, (5) whether any delay in setting up and attending the ADR process would have been prejudicial, and (6) whether the ADR process had a reasonable prospect of success.<sup>262</sup> This rule was applied and further refined in subsequent case law.<sup>263</sup>

### *Germany*

German law displays a similar dichotomous approach that distinguishes the procedural effect of an ADR agreement from the material remedies to which parties may resort when seeking its enforcement.

On the basis of German contract law, parties have remedies at their disposal to induce the recalcitrant party to take part in the agreed-upon ADR procedure.<sup>264</sup> The effectiveness of these remedies may vary, depending on the rights they aim to restore. For instance, a party's good faith duty to negotiate and participate in the ADR procedure cannot be easily exacted.<sup>265</sup> A party who refuses to perform according to this prior commitment may be ordered to compensate the damage caused by his breach of contract.<sup>266</sup> This will most likely appear problematic not only because it would lead to an ill-fated attempt to settle, but also because it would be nearly impossible to assess the existence and the amount of damage ensuing from his refusal to take part in the negotiation. A liquidated damages clause might meet these objections, although it would remain difficult to prove that a party breached its duty to negotiate in good faith. To the contrary, a party could effectively be ordered to pay his agreed-upon share of the advance on the costs.<sup>267</sup> In practice, such a remedy will not particularly set the ADR procedure

---

260. *Halsey v. Milton Keynes Gen., N.H.S. Trust*, [2004] 1 W.L.R. 3002; *see also* Blake et al., *supra* note 131, at 95-100; Hildebrand, *supra* note 125, at 385; NEIL ANDREWS, *THE MODERN CIVIL PROCESS* 228-30 (Mohr Siebeck, Tübingen 2008); Shirley Shipman, *Alternative Dispute Resolution, The Threat of Adverse Costs, and the Right of Access to Court*, in *THE CIVIL PROCEDURE RULES TEN YEARS ON* 327-40 (Oxford University Press 2009) (discussing this case).

261. *Halsey v. Milton Keynes Gen. N.H.S. Trust*, [2004] 1 W.L.R. 3002, [16].

262. *Id.*

263. *See* *Malkins Nominees v. Société Finance*, [2002] EWHC (Ch) 1221 (Eng.); *Neal v. Jones Motors*, [2002] EWCA (Civ) 1730 (Eng.); *McCook v. Lobo*, [2002] EWCA (Civ) 1760 (Eng.); *Société Internatioale de Télécommunications Aéronautiques SC v. The Wyatt Co. Ltd.*, [2002] EWHC (Ch) 2401 (Eng.); *Boyd v. Ministry of Def.*, [2003] EWHC, ADR.L.R. 12/16 (Eng.); *Royal Bank of Can. Trust Ltd v. Sec'y of State for Def.*, [2003] EWHC 1479 (Eng.); *Corenso Ltd. v. The Bumden Grp. PLC*, [2003] EWHC (QB) 1805 (Eng.); *Hurst v. Leeming*, [2003] 1 Lloyd's Rep 379; *Leicester Circuits v. Coates Bros. PLC*, [2003] EWCA (Civ) 333 (Eng.); *Allen v. Jones*, [2004] EWHC (QB) 1189 (Eng.); *McMillam Williams v. Range*, [2004] EWCA (Civ) 294 (Eng.); *Daniels v. Comm'r of Police for the Metropolis*, [2005] EWCA (Civ) 1312 (Eng.); *Hickman v. Blake Laphorn*, [2006] EWHC (QB) 12 (Eng.); *P4 Ltd., v. Unite Integrated Solutions PLC*, [2007] BLR 1 (Eng.); *Palfrey v. Wison*, [2007] EWCA (Civ) 94 (Eng.); *and* *Rolf v. De Guerin*, [2011] EWCA (Civ) 78 (Eng.).

264. Koenig, *supra* note 211, at 141.

265. *Id.*

266. *Id.*

267. *Tochtermann*, *supra* note 15, at 521, 550.



on a good start or further the willingness to participate in the dispute resolution process.

The German Federal Supreme Court has held that the violation of the *pactum de non petendo* implied in an ADR agreement will lead to the rejection of a claim by the court or by the arbitral tribunal on the basis of inadmissibility.<sup>268</sup> The Court has ruled on several occasions that when a party raises the existence of a clear conciliation agreement, the claim should be held inadmissible.<sup>269</sup> The ADR agreement serves private interests and therefore the court may not of its own volition declare the action inadmissible.<sup>270</sup> Parties must raise the existence of the ADR agreement *in limine litis*,<sup>271</sup> prior to any other exception or claim.<sup>272</sup>

The German ZPO does not yet contain an explicit provision that prescribes for the rejection of a claim on the basis of inadmissibility in the event of an ADR agreement. Some authors argue such an action is legitimate by referring to Article 1032(1) German ZPO.<sup>273</sup> This provision establishes a duty for the courts to reject a claim that is brought in violation of a valid arbitration agreement.<sup>274</sup> This duty applies *mutatis mutandis* to situations where parties agreed on other forms of ADR agreements.<sup>275</sup> Other authors put forward the *pactum de non petendo* leads to a “Leistungsverweigerungsrecht”: the right to refuse to act in the sense of Article 205 BGB, which leads to a suspension of the limitation period.<sup>276</sup>

Thus far, the “loser pays” rule has not been reversed when a winning party unreasonably refuses to take part in an ADR procedure.<sup>277</sup> The recent Article

268. Such an “*Ausschluss der Klagbarkeit*” [Exclusion of *Klagbarkeit*] does not need to be explicitly agreed upon by the parties. This implied in the case of mediation as well as a conciliation clause. KAI TRAMS, DIE MEDIATIONSVEREINBARUNG – EINE VERTRAGSRECHTLICHE ANALYSE [The Mediation Agreement – A Contract Legally Possible Analysis] 118-19 (Marburg 2008), p. 118-119. Parties may also agree on court proceedings that run parallel with the ADR proceedings, in which case there will be no *pactum de non petendo* [agreement without asking]. B. Hess, § 43. *Rechtsgrundlagen der Mediation* [Legal Basis of Mediation], in HANDBUCH MEDIATION 1060 (Beck, 2009). Additionally, the German Federal Supreme Court has also held one party’s bad faith refusal to participate in ADR (by failing to advance costs) would free the other party from complying with the implied *pactum de non petendo*. Bundesgerichtshof [BGH] [Federal Court of Justice], Nov. 18, 1998, NEUE JURISTISCHE WOCHENSCHRIFT, 647, 1999 (Ger.).

269. Bundesgerichtshof [BGH] [Federal Court of Justice], Nov. 18, 1998, NEUE JURISTISCHE WOCHENSCHRIFT, 647, 1999 (Ger.); see also Bundesgerichtshof [BGH] [Federal Court of Justice], July 4, 1997, NEUE JURISTISCHE WOCHENSCHRIFT [New Legal Writing Week], 2263, 1977 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice], 1984, NEUE JURISTISCHE WOCHENSCHRIFT [New Legal Writing Week], 669 (Ger.); HORST EIDENMÜLLER, VERTRAGS- UND VERFAHRENSRECHT DER WIRTSCHAFTSMEDIATION [Contract and Procedural Law of the Commercial Mediation] 12 (Cologne 2001); Tochtermann, *supra* note 215, at 538-39; Trams, *supra* note 217, at 119-20; Peter Tochtermann, *Verhandlungsverträge* [Negotiating Contracts], 11 ZEITSCHRIFT FÜR ZIVILPROZESS INTERNATIONAL [International Journal of Civil Procedure] 458 (2006).

270. *Id.*

271. *Limine Litis*, *supra* note 228.

272. Zivilprozessordnung [ZPO] [CODE OF CIVIL PROCEDURE], Oct. 10, 2013, Bundesgesetzblatt [BGBl.], § 282(3) (Ger.).

273. Zivilprozessordnung [ZPO] [CODE OF CIVIL PROCEDURE], Oct. 10, 2013, Bundesgesetzblatt [BGBl.], § 1032(1) (Ger.).

274. *Id.*

275. Klaus Peter Berger, *Law and Practice of Escalation Clauses*, 22 ARB. INT’L L 1, 6 (2006); see also Bundesgerichtshof [BGH] [Federal Court of Justice], Nov. 18, 1998, NEUE JURISTISCHE WOCHENSCHRIFT, 647 (Ger.).

276. Bürgerliches Gesetzbuch [BGB] [Civil Code], Jan. 2, 2002, Bundesgesetzblatt [BGBl.], I page 3719, as amended, § 205 (Ger.); See also Trams, *supra* note 217, at 119-20 (examining this point of view).

277. Tochtermann, *supra* note 215, at 521, 540.

105(4) of the German Code of Civil Procedure on Family Matters allows a judge to take into account a party's unreasonable refusal to attend an information session on family mediation when making his decision on the costs of the court procedure.<sup>278</sup> There is no corresponding or more applicable provision in the German ZPO allowing for such a reversal.

## V. THREE CONCLUSIONS AND FOUR LEGISLATIVE PROPOSALS

### *Conclusion 1: An ADR Agreement Has Binding Effect, Provided a Number of Conditions are Met*

European law does not oppose parties entering into binding ADR agreements, although there are still built-in measures of protection when a consumer is involved in the transaction. First of all, European law recommends consumers agree to an ADR agreement only after a dispute has arisen. Moreover, it is recommended that a consumer expressly agree to ADR in full awareness of the nature and consequences of his choice, and that consumers be informed of their right to refuse to participate or withdraw at any time from the ADR process. These recommendations have to a large extent been resumed in the Directive on Consumer ADR, and thus, will soon become legally enforceable provisions.<sup>279</sup> Second, the European Unfair Terms Directive 93/13<sup>280</sup> provides broader legal protection. The Unfair Terms Directive does not prevent consumers from entering into valid and binding ADR agreements. Pursuant to Article 3 of this Directive, a valid ADR clause must not be abusive.<sup>281</sup> In other words, it shall not be contrary to the standard of good faith or to the disadvantage of the consumer, create a significant imbalance in the parties' rights and obligations under the ADR agreement. For instance, an agreement that gives the seller a privileged position in the appointment of the third person will be considered an unfair term.<sup>282</sup>

These European provisions set out the legal framework within which ADR agreements could have valid and binding effect on consumers. ADR agreements directed at commercial disputes not involving consumer contracts remain outside the direct sphere of influence of the EU law. There is no uniform regulation on ADR agreements in general.

Comparative research shows ADR agreements should first comply with general contract law standards. As displayed by the laws of Belgium, Germany, and England, the ADR contract's subject matter should be clearly defined or at least determinable.<sup>283</sup> This requirement relates foremost to the establishment of the chosen ADR mechanism. The ADR agreement should specifically indicate whether existing disputes or future disputes arising from the defined legal rela-

---

278. Article 150(4) FamFG: “. . . if the court can otherwise distribute the costs at reasonable discretion, it can also take into consideration with whether a partner of a judicial arrangement has not followed to the participation in an exchange of information after §135, provided that the partner has excused this not enough . . . .” § 150(4), FamFG.

279. Directive on Consumer ADR, *supra* note 3.

280. Council Directive 93/13/EEC, *supra* note 65.

281. *Id.*

282. *Id.*

283. See Belgian Civil Code, *supra* note 108; German Civil Code, *supra* note 212; English Civil Code, *supra* note 239.

tionship will be the object of the settlement. The “bestimmtheitserfordernis”<sup>284</sup> applies to a range of disputes to be submitted to ADR. The ADR agreement, must clearly establish the ADR mechanism that will be employed, and what the obligations are under this contract.

### *Conclusion 2: Parties’ Obligations Under the ADR Agreement*

Party autonomy is a fundamental principle of contract law and has a dual role in ADR. Parties are generally bound by an ADR agreement to which they consented on the basis of their free will. Parties may temporarily opt out of their right to submit disputes to a state court, instead agreeing to attempt to resolve their conflicts through alternative dispute resolution. The principle of party autonomy becomes important again, when a dispute arises and parties remain free to reject any settlement proposal that may result from the ADR proceedings.

Exercising freedom of contract principles at this second stage is weighed against the effect of the *pacta sunt servanda* principle that binds parties to their commitments under the ADR agreement. These commitments are considered to comprise three broad categories of obligations. First, parties undertake not to submit disputes to the courts. This obligation is the so-called *pactum de non petendo*. Second, parties agree to set up an ADR mechanism. Third, they agree to pursue an amicable solution of their dispute through the agreed upon alternative dispute resolution mechanism.

This article seeks to answer the question that is raised: to what extent may parties be bound by these obligations when the party-autonomy principle allows parties to walk away from a settlement? It would be absurd and inefficient to oblige parties to endure and invest in an ADR procedure when it is obvious that this will not lead to a positive outcome. On the other hand, the *pacta sunt servanda*<sup>285</sup> principle holds a party liable for not living up to prior commitments. This ambivalent situation could be averted by clearly specifying what is expected under the agreement. Parties could, for instance, list their specific obligations in the ADR agreement. In practice, this will likely occur when parties refer to institutional ADR rules. Alternatively, the law applicable to ADR could provide for default rules in which the parties’ obligations are established. Such a law would greatly enhance legal certainty and promote a more workable ADR system. The example set by arbitration regulations, such as the New York Convention, shows statutory enforcement mechanisms can be highly useful. These mechanisms presuppose clarity on the obligations that need to be enforced.

To that end, an ADR law should: (1) require parties to be bound by the *pactum de non petendo* until the moment in which they have complied with their obligations to participate in the ADR procedure; and (2) clearly state at what point they are considered to have fulfilled their obligation to participate in ADR. This participation duty creates an obligation to set up the ADR mechanism, on the one hand, and creates on the other a good faith obligation to make reasonable efforts to reach a solution. In order to comply with the duty to set up an ADR mecha-

---

284. This entails an agreement must clearly express the parties’ agreement and define the specific obligations to which the parties have agreed.

285. Latin for “promises must be kept.” *Pacta Sunt Servanda*, BLACK’S LAW DICTIONARY (9th ed. 2009).

nism, parties must appoint a third party, pay the necessary advances of costs, and attend a first mediation meeting.

My suggestions *de lege ferenda*<sup>286</sup> are inspired by the comparative research set out above and by well-considered ADR Rules of the International Chamber of Commerce. Article 5 of the ADR Rules of the International Chamber of Commerce require parties to promptly take part in a first-round discussion with the third party, during which parties are to attempt to reach agreement on settlement techniques to be used, and on the specific ADR procedures to be followed.<sup>287</sup> Attendance of such a meeting is imperative. Article 6(1) indicates parties may not withdraw from ADR prior to this discussion.<sup>288</sup> Article 5 also subjects parties to a duty to cooperate in good faith with the neutral.<sup>289</sup> An important consideration that lies at the basis of the suggested rules can be found in a series of scientific studies that weaken the so-called “futility argument.” A number of authors reject the point of view that enforcing an ADR agreement would be a futile exercise, and offer the countervailing argument that ADR procedures are designed to facilitate settlement precisely at a time when the parties’ relationship is at its worst.<sup>290</sup> Moreover, the intervention of a skilled third party at this precise moment is exactly what parties had in mind when agreeing on ADR in the first place, and this prior commitment of the parties should not be ignored.<sup>291</sup>

### *Conclusion 3: Enforceability of the ADR Agreement*

An ADR agreement might set out different types of obligations as described above. Depending on the nature of the obligation, contract law may provide more or less adequate measures to remedy a party’s breach of contract. It will, for instance, be close to impossible to enforce a party’s obligation to negotiate in good faith. Specific performance will not amount to a legitimate remedy and the award of damages will not be practicable. Another example is the obligation to pay a provision of the costs at the outset of the ADR procedure, which may, to the contrary, be more easily made the subject of an order for specific performance.

Here, the relevant question is how an optimal legal environment can be created that does not simply remedy a breach of contract, but also encourages parties to comply with contractual obligations. In the context of arbitration, the role of the

---

286. Latin for “the law in the making” meaning suggestions or recommendations with a view to the future law. BLACK’S LAW DICTIONARY (9th ed. 2009).

287. *ICC Rules of Arbitration*, INT’L CHAMBER OF COMMERCE, art. 5, <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/ICC-Rules-of-Arbitration/> (last visited Jan. 4, 2015).

288. *Id.* Art. 6(8). The UNCITRAL Model Law on International Commercial Conciliation chooses a different approach. See Interview with Mr. Jernej Sekolec, Former Secretary of UNCITRAL, July 2009, in *International and Comparative Mediation – Legal Perspectives*, KLUWER L. INT’L 367 (Alphen an den Rijn 2009).

289. *Id.* art. 5.

290. Rohan Batra, *The Enforcement of Multi-Tiered Dispute Resolution Clauses: Its New Facet and Exclusion*, 15 *VINDOBONA JOURNAL OF INTERNATIONAL COMMERCIAL LAW & ARBITRATION* 175 (2011); Lucy V. Katz, *Getting to the Table, Kicking and Screaming: Drafting an Enforceable Mediation Provision*, 36 *ALTERNATIVES TO THE HIGH COST OF LITIGATION* 183 (2008); Lucy V. Katz, *Enforcing an ADR Clause: Are Good Intentions all you Have?*, 26 *AM. BUS. L. J.* 575, 583 (Sept. 1998); D. Ryan Nayar, *Texas ADR 101: Analyzing the Use of Compulsory Mediation Clauses in Commercial Contracts: Advantages, Enforceability, and Drafting Guidelines*, 40 *TEX. J. BUS. L.* 257, 276 (2004).

291. *Id.*

courts appears to be key. The success of arbitration as a means of international commercial dispute resolution can partially be traced back to the worldwide recognition of the binding effect of an arbitration agreement. The New York Convention is clear on the obligation of parties and courts to enforce an arbitration agreement.<sup>292</sup> Article II(3) of the New York Convention clearly states that a court must refer parties to arbitration when seized of an action in a matter covered by the parties' arbitration agreement.<sup>293</sup> A court should only intervene when one of the parties has made the request, unless the court finds the agreement is null and void, inoperative or incapable of being performed.<sup>294</sup> In other words, a court should declare itself without jurisdiction and thus refrain from judging on the merits of the dispute. The parties are then denied access to court and should turn to arbitration to solve their dispute.

A similar rule could be introduced for ADR agreements where the courts would have to refrain from deciding on the merits of the case as long as the parties have not fulfilled their obligations under the ADR agreement. That is why it is so important that the obligations of the parties under an ADR agreement be clearly defined. The Uncitral Working Group on Arbitration and Conciliation recognized that a pending procedure in court, or before an arbitral tribunal, is likely to have a negative impact on the chances of reaching a settlement.<sup>295</sup> Yet, no consensus was found for a general rule that would prohibit parallel proceedings. Article 13 of the Uncitral Model law on International Commercial Conciliation does not contain a general rule that would prohibit the parties from initiating arbitral or judicial proceedings when a conciliation clause is in place.<sup>296</sup> It only states a court or arbitral tribunal must give effect to an express agreement not to initiate arbitral or judicial proceedings during a specified period of time, or until a specified event has occurred.<sup>297</sup> The judge or arbitral tribunal may bar further proceedings only when the parties have explicitly waived their right to go to court or arbitration during the conciliation.

The *ratio legis*<sup>298</sup> behind the Uncitral Model Law was the consideration that limiting parties' rights might, in certain situations, discourage parties from entering into conciliation proceedings. This contention does not constitute an overriding argument in light of the objectives of procedural efficiency and legal certainty that such a rule could establish. Neither does it outweigh the *pacta sunt servanda* principle that is a basic element of European contract law. A second argument behind the Uncitral Working Group was that a strict rule of inadmissibility might raise constitutional law issues in a number of countries where access to court is considered an inalienable right.<sup>299</sup> The latter argument is important in the context of a model law that needs to be "marketable" in a large number of countries. This notion is less relevant in the European Union setting when weighed against policy considerations.

---

292. N.Y. Convention, *supra* note 15, at art. II (1).

293. *Id.* at art. II(3).

294. *Id.*

295. Guide to Enactment and Use of the Uncitral Model Law on International Commercial Conciliation, Article 13, 53 (2002).

296. *Id.*

297. *Id.*

298. The reason or purpose for making a law. BLACK'S LAW DICTIONARY (9th ed. 2009).

299. Guide to Enactment and Use of the Uncitral Model Law on International Commercial Conciliation *supra* note 295.

*Proposals for Legislation*

This article resulted from an assessment that, in Europe, there is no uniform approach towards the ADR agreement, which constitutes the basis of a valid consensual ADR procedure. In the following section, legal provisions are suggested that may *de lege ferenda*<sup>300</sup> obviate the obscure status of the ADR agreement.<sup>301</sup> These proposed laws depart from existing notions of European Law, e.g., consumer laws, without revisiting their long-standing interpretation. In addition, the proposed legislation is intended to operate within the European legal framework, as it currently exists. Finally, the proposed legislation tackles a number of issues where uniform legislation would be valuable, and leaves a number of issues out of the equation such as limitation periods. This article intends to give the initial impetus for further thought on this matter.

*The Four Articles of Proposal**Article 1: The ADR Agreement—Lex Generalis*

- A. An ADR agreement is an agreement by which parties consent that, before going to courts, a third person other than a judge shall contribute to finding a solution for all or certain disputes which have arisen or which may arise between them within a defined legal relationship, and which can be the object of a settlement.
- B. An ADR agreement may be in the form of an ADR clause in a contract or in the form of a separate agreement.
- C. An ADR agreement shall be valid and binding provided the chosen ADR mechanism is defined or determinable.

*Article 2: The Consumer ADR Agreement—Lex Specialis*

- A. For the purposes of this law, a consumer means a natural person who acts for purposes that are outside of business, profession or trade.
- B. A consumer and a seller may validly conclude an ADR agreement after the dispute has arisen.
- C. A consumer ADR agreement shall not be valid if, contrary to good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer, for instance by granting a preferred situation to the seller with respect to the appointment of the third party.

---

300. "From law to be passed." BLACK'S LAW DICTIONARY (9th ed. 2009).

301. These propositions are based on the comparative research of how England, Belgium and Germany deal with ADR agreements. Moreover, internationally renowned instruments such as the UNCITRAL Model Law on International Commercial Arbitration and ADR Rules of the International Chamber of Commerce have inspired the following proposals.

D. A consumer ADR agreement shall explicitly state that parties have a right to refuse to participate and may at any time withdraw and access the legal system when they are dissatisfied with the performance or operation of the agreed upon ADR procedure.

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

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

B. It is not incompatible with an ADR agreement for a party to request, and for a court to order, interim measures of protection.

*Article 4: Duties of the Parties Under an ADR Agreement*

A. Unless the parties stipulate otherwise, parties to an ADR agreement shall refrain from initiating arbitral or judicial proceedings with respect to the dispute that is the subject of the ADR agreement, up until the moment they comply with the duties defined in section B of this article, or any other moment specified by the parties in the ADR agreement.

B. Parties to an ADR agreement are under an obligation to set up the ADR mechanism. To comply with this obligation, the parties must take the following steps:

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

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