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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Multi-Tiered Dispute Resolution Clauses after UML on Mediation 2018 and the Singapore Convention

Arabuluculuk Hakkında Model Kanun 2018 ve Singapur Konvansiyonu'nundan Sonra Çok Aşamalı Uyuşmazlık Çözüm Sözleşmeleri

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Abstract

Multi-tiered dispute resolution provides distinct stages, involving separate consecutive ADR procedures for dealing with and seeking to resolve disputes amicably first without a binding result (initial tiers), followed by a binding dispute resolution process, arbitration or litigation, as the last stage for a final and binding decision if the chosen ADR method does not work. Before complying with the ADR procedure in the dispute resolution clause of a contract, when one of the parties directly brings a claim before the arbitral tribunal, it is most likely that the other party will raise an objection regarding the effect of the non-fulfilment of ADR process. How will the tribunal decide regarding the issue? On the one side wording of such MTDR clauses is important on the other side it may be observed that mediation clauses are favourably enforced in comparison with negotiation clauses. Furthermore, the matter whether breach of the contract clause regarding initial ADR clauses is a substantive or procedural issue. Having decided these issues, a further question comes up: what would be the effect of non-fulfilment of such ADR clauses on an arbitration procedure. Of this question, there are several opinions and case reports opposing each other. With the praiseworthy effort of UNCITRAL UML on Mediation and the Singapore Convention together with the ADR rules of certain international dispute resolution institutions may encourage business people to make an effort to solve the disputes by enforcing the ADR procedures in their dispute resolution clauses.

Keywords

Arbitration, mediation, conciliation, negotiation, multi-tiered dispute resolution, condition precedent, admissibility, UNCITRAL Model Law on Mediation, Singapore Convention, stay of proceeding

Öz

Çok aşamalı uyuşmazlık çözüm metodu uluslararası ticari uyuşmazlıkların çözümünde tercih edilen bir yöntemdir. Asıl sözleşmenin içerisinde ya da ayrı bir sözleşme olarak tahkim ya da mahkeme yargılaması öncesinde tarafların müzakere, arabuluculuk gibi alternatif uyuşmazlık çözüm metotları ile uyuşmazlığı çözmelerini öngören, bu sayede hem zaman hem masraf bakımından usul ekonomisine uygun bir çözüm metodu sunan, aynı zamanda taraflar arasındaki ticari ilişkilerin devamına da yarar sağlayan bu yöntem uygulamada çeşitli meseleleri beraberinde getirir. Bu meselelerin başlıcaları, tahkim öncesi alternatif uyuşmazlık çözüm yoluna başvurunun taraflar bakımından yerine getirilmesi zorunlu usulî bir adım teşkil edip etmemesi ve taraflardan birisinin örneğin tahkim öncesi alternatif uyuşmazlık çözüm yoluna başvurmaksızın doğrudan tahkim yargılamasını başlatması halinde bu durumun tahkim yargılamasına etkisidir. Uluslararası anlamda kabul görmüş ortak bir uygulama ya da kuralın söz konusu olmadığı ve farklı yargı sistemlerinin farklı görüşler benimsediği bu meseleler değerlendirilirken, ilmi ve kazai içtihatlar dikkate alınmalıdır. Bununla birlikte modern dünyada uyuşmazlıkların daha kısa sürede ve daha dostane yollarla çözülmesi amacı doğrultusunda çok aşamalı uyuşmazlık çözüm metotlarının

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uygulanması bakımından hem uluslararası uyuşmazlık çözüm kurumlarının hem de UNCITRAL'in çabaları dikkate değerdir. Özellikle arabuluculuk bakımından 2018 yılında güncellenmiş ve revize edilmiş versiyonu yayımlanan Arabuluculuk Model Kanunu ve aynı yıl imzaya açılan Singapur Konvansiyonu değerlendirilmelidir. Çalışmada bu iki uluslararası enstrümanın çok aşamalı uyuşmazlık çözüm klozlarında öngörülen usulün uygulanmasına olan etkisi değerlendirilmektedir.

Anahtar Kelimeler
Tahkim, arabuluculuk, çok aşamalı uyuşmazlık çözümü, Singapur Konvansiyonu, Arabuluculuk Model Kanunu, kabul edilebilirlik, dava şartı, yargılamanın ertelenmesi

Multi-Tiered Dispute Resolution Clauses after UML on Mediation 2018 and the Singapore Convention

I. Introduction

Multi-tiered dispute resolution ("MTDR") provides distinct stages, involving separate consecutive ADR procedures for dealing with and seeking to resolve disputes amicably, first without a binding result (initial tiers), followed by a binding dispute resolution process, arbitration or litigation, as the last stage for a final and binding decision if the chosen ADR method does not work.[1] These clauses are also known as "multi-track", "escalation", "multi step", "Water-fall" and "Wedding Cake" clauses.

In current international commercial relations, especially for complex construction contracts, joint venture agreements and other contracts where long-term relationships are created, MTDR clauses have increasingly been used for a more effective and less costly dispute resolution processes, since proper use may lead to earlier amicable settlement, thus, reduced costs, as well as maintaining commercial relationships.[2] By including an MTDR clause in a contract, the parties aim to make efforts that should settle a dispute prior to arbitration, and that arbitration will only be sought as a last resort.[3] Additionally, the national and international legal instruments on ADR[4] encourage business people to prefer the MTDR method.[5] Consequently, it is seen that ADR clauses in commercial contracts have become a part of the ordinary practice of business enterprises.[6] Presumably, as a result of these factors, the survey of corporate attitudes to international arbitration conducted by the School of International Arbitration, Queen Mary College, University of London and Pinsent Masons LLP in 2019 found that 67% of the respondents preferred to use arbitration "in combination

1 Michael Pryles, 'Multi-Tiered Dispute Resolution Clauses' (2001) JIA 18(2), 159; Craig Tevendale and Hannah Ambrose and Vanessa Naish, 'Multi-Tier Dispute Resolution Clauses and Arbitration' (2015) 1 Turk Com L Rev, 31, 32.

2 Gary B Born, *International Commercial Arbitration* (2nd Edition, Kluwer Law International 2014), 916; George M. Vlavianos and Vasilis F. L. Pappas and Bennett Jones, Multi-tier Dispute Resolution Clauses as Jurisdictional Condition Precedent to Arbitration in *The Guide to Energy Arbitrations* (ed. J William Rowley QC) (2nd Edition, 2017) <https://globalarbitrationreview.com/chapter/1142626/multi-tier-dispute-resolution-clauses-as-jurisdictional-conditions-precedent-to-arbitration> (accessed 22.4.2020), around fn.1; Didem Kayalı, 'Enforceability of Multi-Tiered Dispute Resolution Clauses' J. I.A. (2010) 27(6), 551-552 ("Enforceability"); Nuray Ekşi, *Tahkim Öncesi Uyuşmazlık Çözüm Usulleri ve Bu Usuller Tüketilmeden Tahkime Başvurulmasının Sonuçları* (1st Edition, Beta 2015), 1; Mustafa Serdar Özbek, *Alternatif Uyuşmazlık Çözümü ,* Volume 1, (4th Edition Yetkin 2016), 759-760; According to an international survey in 2014, the ability to preserve business relationship, faster resolution of the dispute and its lower cost were rated as the top three benefits of the combined use of processes (72.7%, 67.5%, and 63.6%, respectively); Dilyara Nigmatullina, 'The Combined Use of Mediation and Arbitration in Commercial Dispute Resolution: Results from an International Study', 33, no. 1 (2016) JIA, 72.

3 Alexander Jolles, 'Consequences of Multi- tier Arbitration Clauses: Issues of Enforcement' (2006) Arbitration 72(4), 329; Vlavianos and Pappas and Jones (n 2), around fn.2.

4 See Directive 2008/52 of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, [2008] OJ L136/3 ("Mediation Directive"), Uniform Mediation Act of the US 2001 ("US Mediation Act"), Hong Kong Mediation Ordinance (Cap. 620) 2013, Turkish Code of Civil Procedure Article 137 which encourages the parties of the dispute to mediate, Turkish Code of Mediation for Civil Disputes (Law no: 6325, Admission date:07.06.2012, Official Gazette 22.06.2012/28331).

5 Klaus Peter Berger, 'Law and Practice of Escalation Clauses' (2006) 22(1) Arbitration International, 1.

6 Mine Tan Dehmen, 'Tahkim Öncesi Müzakere ya da Uzlaşma Yollarının Tüketilmemiş Olmasının Tahkim Yargılamasına Etkisi', 2005-2006/1-2 MHB, 453.

with ADR mechanisms in an MTDR process."[7] Today it is not uncommon to find MTDR clauses in international contracts.[8] Entertainment, engineering and construction contracts,[9] which can generally be defined as complex and long-term contracts, are significant examples whose parties frequently prefer MTDR.[10] In fact, some of the biggest commercial projects such as the "Athens International Airport" project, the "Rio-Antirio Bridge" project, the "Channel Tunnel Contract", and the "Hong Kong Airport Core Programme" included MTDR clauses.[11]

Nevertheless, the operation of MTDR clauses has produced some problems in international dispute resolution practice.[12] The centre of these problems is the enforceability of the initial steps in MTDR clauses, and the consequences of non-compliance with these requirements. Unfortunately, neither arbitral tribunals around the world nor national courts have consistently dealt with the matter. [13] Consequently, despite the need for consistency and a certainty of approach throughout the international arbitration community, different jurisdictions have adopted different approaches.[14]

Internationally, in cases where there have been non-fulfilled initial tiers before arbitration, there is a risk that the decisions of tribunals may effectively be overturned at the enforcement stage. This is exacerbated by both poorly drafted MTDR clauses,[15] and application of different laws to validity and enforceability of initial tiers in different levels of dispute resolution since every country has different requirements for a valid initial tier. These inconsistencies lead to significant uncertainty in international arbitral practice both in terms of the legal effectiveness of party choice to agree to enter into these initial tiers,[16] and ultimately the validity and enforceability of subsequent awards.[17]

7 International Arbitration Survey – Driving Efficiency in International Construction Disputes <http://www.arbitration.qmul.ac.uk/research/2019/> Accessed 26.03.2020; However it should be added that according to an international survey on combined use of mediation with arbitration the participants were asked to indicate what triggered the combined use of processes in the dispute they were involved. In answering this question the participants could select from eleven options and specify any other trigger. Only 25.9% of the participants selected the model multi-tiered clause of an arbitration institute as trigger. This result shows that arbitration institutions need to engage more actively in the promulgation of multi-tiered dispute resolution clauses. Nigmatullina (n 2), 55-56.

8 Kayalı, Enforceability (n 2), 554.

9 See FIDIC Red Book 2017, p.8, p.49, Article 21 in p.100; Yellow Book p.8, p.53, Article 21 in p.100; Silver Book 2017; In all FIDIC Books as Golden Principle 5 it is stated that "All formal disputes must be referred to a Dispute Avoidance/Adjudication Board (or a Dispute Adjudication Board, if applicable) for a provisionally binding decision as a condition precedent to arbitration." The FIDIC Golden Principles 1st Edition 2019 <https://fidic.org/sites/default/files/_golden_principles_1_6.pdf> Accessed 31.03.2020.

10 Tanya Melnyk, 'The Enforceability of Multi-tiered Dispute Resolution Clauses: the English Law Position' Int. A.L.R. (2002) 5(4), 114.

11 Cited in Berger (n 5), 394; Melnyk (n 10), 113.

12 For example, pre-arbitration negotiations where the parties are entrenched in their positions and the possibility of reaching an agreement is futile, can lead to an unnecessary waste of time and expense, and where a limitation period is set to expire before the contractually mandated negotiation period, a claim can be barred Vlavianos and Pappas and Jones (n 2), around fn.4.

13 Born (n 2), 916.

14 James H Carter, 'Issues Arising from Integrated Dispute Resolution Clauses' in Albert Jan van den Berg (ed), *New Horizons in International Commercial Arbitration and Beyond*, (ICCA Congress Series 2004) Beijing Volume 12, 446; Pryles (n 1), 446.

15 Simon Chapman, 'Multi-tiered Dispute Resolution Clauses: Enforcing Obligations to Negotiate in Good Faith' (2010) 27(1) JIA, 89.

16 See for example, *Elizabeth Bay Developments Pty Ltd v. Boral Building Services Pty Ltd* (1995) 36 NSWLR 709.

17 See *International Research v. Lufthansa*.

II. Rise of ADR And MTDR in Comparison with Arbitration

A. Arbitration

International commercial arbitration, as an alternative to state courts, has been an attractive dispute resolution system for more than a century, mostly as a result of the New York Convention 1958 (NYC) and widespread adaptation of UNCITRAL Model Law (UML) on Arbitration. On the one side, the NYC, which has been ratified by 162 countries,[18] has provided a transnational enforcement system for arbitration agreements and arbitral awards,[19] on the other side adoption of UML on Arbitration by eighty states in 111 jurisdictions has brought almost uniformity on national substantive laws applicable to international arbitration.[20] Additionally, especially neutrality of arbitration and the finality of arbitral awards are shown as the other reasons to prefer arbitration.[21]

Although arbitration continues to be a welcomed alternative, it has recently been the subject of criticisms. It has been criticised as being more costly and also being slower than even proceedings in a court of the first instance.[22] It has been stated that arbitration has been transformed from a flexible, expedited, and less costly means of dispute settlement to a mechanism that mirrors the traditional judicial process.[23] With regard to differences between arbitration in which the judicial role of arbitrators is reaching a final and binding award, and ADR after which parties may just reach a settlement agreement that is not as binding as the arbitral award explained below, arbitration may not be counted as an ADR method.[24]

B. ADR Methods

The deficits in arbitration directed business people to ADR methods.[25] ADR, as a complementary process to arbitration, emerged in the late 1970s in the United States and became popular in Europe at the beginning of the 1990s. It is perceived as resolving disputes in an informal process through commercial settlement agreements,

18 Status < https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 > Accessed 26.03.2020.

19 See Article II of NYC ("Each contracting states shall recognise arbitration agreement." under the conditions NYC requires), Article III of NYC ("Each contracting states shall recognise arbitral awards as binding and enforceable...").

20 Status < https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status > Accessed 26.03.2020.

21 Walter Mattli, 'Private Justice in a Global Economy: From Litigation to Arbitration' (2001) International Organization, 944.

22 Gary B Born, 'Planning for International Dispute Resolution' (2000) JIA 17(3), 66.

23 Markus Petsche, 'Mediation as the Preferred Method to Solve International Business Disputes? A Look into the Future' (2013)4 I.B.L.J., 252.

24 Didem Kayalı, 'Uluslararası Ticari Sözleşmelerde Basamaklı Uyuşmazlık Çözüm Şartları' ("MTDRC", Essays In Honour of Halûk Konuralp, Volume 1 (Yetkin Press 2009), 502; Süha Tanrıver, 'Hukuk Uyuşmazlıkları Bağlamında Alternatif Uyuşmazlık Çözüm Yolları ve Özellikle Arabuluculuk', TBB Dergisi, (2006)64, 153; Hakan Pekcanıtez, 'Alternatif Uyuşmazlık Çözümleri', Hukuki Perspektifler Dergisi, (2005)5, 15; İbrahim Özbay, 'Alternatif Uyuşmazlık Çözüm Yöntemleri' Erzincan Üniversitesi Hukuk Fakültesi Dergisi, 10(3-4) 2006, 460, 473-474; Nagehan Okumuş, Hakem Kararlarının İptali, pHD Thesis, Erzincan Binali Yıldırım Universtiy 2018, 6; As the opposite view, some scholars are in the opinion of that arbitration is an ADR method. Özbek, Volume 1, 213; Cengiz Serhat Konuaralp, Alternatif Uyuşmazlik Çözüm Yolları: Tahkim, phD Thesis, Istanbul University 2011, 129.

25 Kayalı, Enforceability (n 2), 552.

which is only proposed to the parties for their adoption but cannot be imposed on them.[26] The only way to enforce these settlements, if the losing party does not enforce it voluntarily, is a personal lawsuit based on a breach of contract, since there has been no internationally ratified and applicable instrument equivalent to NYC that provides for the enforcement of settlement agreements.[27] This is one of the commonly cited impediments for ADR methods.[28]

"ADR" is an "umbrella" term that covers a range of methods of dispute resolution such as negotiation, mediation, conciliation, expert determination, dispute resolution boards, fact-finding, early neutral evaluation, mini-trial and etc..[29] Negotiation and mediation are generally accepted as the main ADR methods.[30]

Negotiation is a process whereby representatives of the parties try to settle the disputes without any intervention of a third person and it is considered to be the least disruptive and least expensive method of dispute resolution.[31]

Mediation and conciliation are forms of assisted negotiation. Mediators and conciliators—neutral third persons—help the parties to agree in a settlement for the solution of their dispute. While a mediator has no authority to propose a solution to the parties,[32] a conciliator makes proposals for, and draws up the terms of, a settlement.[33] However, it is alleged that the terms "mediation" and "conciliation" are often used interchangeably both in practice and literature.[34] In this paper, by acknowledging the difference between mediation and conciliation, the explanations regarding "mediation" will also cover "conciliation".

III. Legal Feature of Initial Tiers Before Arbitral Procedure

Parties of a MTDR clause normally shall begin with commencing the initial ADR step to solve their disputes. If the initial process does not result in a settlement, parties

26 Kayalı, Enforceability (n 2), 551; Jean-François Poudret and Sébastien Besson, Comparative Law of International Arbitration, (Sweet&Maxwell 2007), para 13.

27 Mustafa Erkan, Arabuluculuk ve Singapur Sözleşmesi, (1st Edition, XII Levha 2020), 63; See below works of UN for a convention on recognition and enforcement of settlement agreements.

28 Edna Sussman, 'The Singapore Convention Promoting the Enforcement and Recognition of International Mediated Settlement Agreements', 2018 (3) ICC Dispute Resolution Bulletin, 42.

29 Dishi Bhomawat, 'Multi-Tier Dispute Resolution Clauses in Contracts- With special focus on Entertainment and Construction Contracts' (2014) 1(3) IJRA, 41; Poudret and Besson (n 26), para 13; Ekşi (n 2), 4; Ziya Akıncı, Milletlerarası Ticari Uyuşmazlıkların Alternatif Çözüm Yolları, (1996) BATİDER, 102-108; Bilgehan Yeşilova, *Milletlerarası Ticari Tahkimde Mahkemelerin Yardımı ve Denetimi*, (1st Edition, Güncel Hukuk 2008), 524.

30 Jane Jenkins, *International Construction Arbitration Law*, Arbitration in Context Series Volume 3, (2nd edition, Kluwer Law International 2013), 53.

31 Kayalı, Enforceability (n 2), 553.

32 Manuel Liatowitsch and James U Menz, 'Alternative Dispute Resolution' in Elliott Geisinger and Nathalie Voser (eds.), *International Arbitration in Switzerland: A Handbook for Practitioners*, (2nd edition, Kluwer Law International 2013), 313.

33 Liatowitsch and Menz, 314.

34 Bhomawat (n 29), 42; see Article 1(3) of UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018.

commence arbitration for a binding and final award. However, after a dispute arises, it is common that one of the parties does not comply with the procedure designed in the contract and commence arbitration directly. Since, contrary to an arbitral award,[35] there is global recognition system for neither ADR clauses nor settlement agreements reached after the ADR process, and these agreements are not final as an arbitral award[36], at this point, the legal effectiveness of the initial ADR tiers in MTDR clauses becomes an issue.

Before complying with the ADR procedure in the dispute resolution clause of a contract, when one of the parties directly brings a claim before the arbitral tribunal, it is most likely that the other party will raise an objection regarding the effect of the non-fulfilment of the ADR process. How will the tribunal decide regarding the issue? There are several possibilities: The tribunal may reject this objection on the ground that the initial ADR tiers do not bring any binding obligation and/or are not enforceable, and continue proceeding with the case. Certain issues, such as the wording of the ADR clause and the type of chosen ADR method have effects on such a decision. The tribunal may accept such an objection and may render a decision to stay the arbitral proceeding until fulfilment of the ADR process or directly dismiss the case on the grounds of a lack of jurisdiction or by rendering the matter as a breach of contract, the tribunal may award compensation. Especially here, the legal characterisation of these ADR clauses has fundamental importance.

It is mostly stated that most national courts and arbitral tribunals have been reluctant to find that pre-arbitral steps constitute jurisdictional conditions precedent to commencing arbitration, absent clear language to that effect within the multi-tier clause. However, a number of jurisdictions appear to be more inclined to find such steps to constitute jurisdictional conditions precedent, even in the absence of clear language, yet the tendency is not dismissing the case but staying the process until the pre-arbitral procedure is completed.

A. Wording of MTDR Clauses

The wording of MTDR leads us to determine whether the initial ADR processes are consensual which means they do not impose any binding obligation or mandatory which renders the process as a matter of condition precedent to arbitration. This issue initially depends on the wording of such clauses. Therefore, the wording and interpretation of the clause in question are decisive.[37] Under general contract

35 See Article II of NYC ("Each contracting states shall recognise arbitration agreement..." under the conditions NYC requires).

36 Ekşi (n 2), 20.

37 Berger (n 5), 3; Ekşi (n 2), 28; Kayalı, MTDRC (n 24), 508; Tan Dehmen (n 6), 459; Tevendale and Ambrose and Naish (n 1), 35.

interpretation principles,[38] the interpretation is based on the investigation whether the initial ADR tiers are "sufficiently clear and certain" to create a legally binding obligation.[39]

It has been formerly claimed that ADR procedures such as negotiation and mediation are essentially consensual in nature, therefore, not legally enforceable under judicial supervision.[40] For example, in ICC Case No 8445 , the tribunal commented that clauses requiring attempts to settle a dispute amicably are primarily an expression of intention and "should not be applied to oblige the parties to engage in fruitless negotiations."[41] However it is now generally accepted that the wording of the ADR clause must be examined to decide the enforceability of the said clause.

Mostly, it is alleged that the use of "soft" wording such as "may" indicates that parties have "option" not "obligation" to refer to preliminary ADR procedures.[42] Whereas, using more mandatory and stronger words such as "shall" is a signal that fulfilling the initial tiers is a legal obligation.[43] On the other hand, it should be noted that some scholars, by disregarding the language of the clause, state that although an initial ADR tier before arbitration is provided in the dispute resolution clause, if a party refers the dispute directly to arbitration, this may lead to debates on validity of arbitral award on the grounds of invalidity of the arbitration agreement, excessive jurisdiction of an arbitral tribunal and arbitral procedure which is not in accordance with the agreement of the parties.[44] In a similar manner, another scholar without making any distinction between "may" or "shall", claims that if parties willingly agree on mediation to solve possible disputes in the future, it should be possible to make parties forcibly perform mediation process. Such a rule should be inserted in the law; otherwise it may be asserted that before exhausting the ADR process directly bring a case before court/tribunal invalidate the ADR clause.[45]

38 Domitille Baizeau, Anne-Marie Loong, 'Multi-tiered and Hybrid Arbitration Clauses' in Manuel Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International 2013), 1455.

39 Pryles (n 1), 24; Christian Oetike and Claudia Walz, 'Non-Compliance with Multi-Tier Dispute Resolution Clauses in Switzerland', (2017) 35(4), ASA Bulletin,876; *Sulamerica v. Enesa*, paras 33-35.

40 Ibid; *Halifax Financial Services Ltd. v. Intuitive Systems Ltd.* [1999] 1 All ER 664 ("*Halifax v. Intuitive*"), paras 307-311; Kayalı, Enforceability (n 2), 559; "The escalation system should provide a flexible framework for the resolution of disputes, but should not, however, force the parties into a tight 'corset' of dispute resolution levels which are mandatory and must be 'executed' in each individual case, before the dispute is able to be submitted to the arbitral tribunal provided for at the end of the escalation ladder." Berger, 5.

41 ICC Case No. 8445, 26 Y.B. Com. Arb. 167–80 (2001) cited in Sarah Leonard and Kanaga Dharmananda, 'Peace Talks before War: The Enforcement of Clauses for Dispute Resolution before Arbitration' (2006) 23(4) JIA, 303.

42 Berger (n 5), 4; see ICC case No.10256, Interim Award of August 12, 2000 cited in Jolles (n 3), 334; See Final Award in ICC Case No. 11490, XXXVII Y.B. Comm. Arb. 32 (2012) ("The provision in the arbitration clause that disputes 'be settled in an amicable way' constituted no condition precedent to referral to arbitration but rather underlined the parties' intent not to litigate disputes in court.") cited in Born (n2), 923; see also ICC Case No. 4230, Final Award 1975 ("all disputes related to the present contract may be settled amicably") cited in Kayalı, Enforceability (n 2), 566; A SA v. B SA 4A_124/2014, para 3.4.3.1 <http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-fidic-pre-arbitration-requirements?search=4A_124%2F2014> Accessed 14.5.2020.

43 ICC Case No. 9977, Final Award, 14(1) ICC Ct. Bull. 84 (2003).

44 Ziya Akıncı, *Milletlerarası Tahkim*, (5th Edition, Vedat 2020), 15-16.

45 Özbek (n 2), 787.

Additional to the mandatory language, the details regarding the ADR procedures may also be determinative on this issue. Specifying the time limits between the tiers,[46] the rules for appointment and the remuneration of third parties, the rules for the ADR process, the requirements under which conditions the pre-arbitral tier is satisfied[47] characterise initial tiers as binding and mandatory.[48] However, the precision of the requirements to name initial tiers as an obligation/condition differs from country to country, and even differs from case to case in the same country.[49] While south-eastern countries are more tolerant about the required details of MTDR clauses for initial tiers[50], western countries appear stricter in terms of requirement lists which MTDR provisions should comply with to be a binding condition.[51]

B. The Difference between Negotiation and Mediation

When compared to negotiation, mediation in MTDR clauses is considered to be enforceable more frequently by courts and tribunals.[52] Concerning mediation, it is stated, "what is enforced is not cooperation and consent but participation in a process from which cooperation and consent might come."[53] It has been suggested that "negotiation in good faith" does not impose an obligation since the concept of "good faith" is too open-ended.[54] Courts in a number of jurisdictions held that agreement to negotiate in good faith, "like an agreement to agree,"[55] is unenforceable on grounds of uncertainty.[56] In ICC Case no 8445, upon the objection of the respondent to the jurisdiction of the tribunal since the claimant commenced arbitration against the respondent without making any effort to negotiate prior to arbitration as stated in MTDR clause between parties, the tribunal rejected the respondent's application on the ground that "*The arbitrators are of the opinion that a clause calling for attempts to settle a dispute amicably are primarily expression of intention, and must be viewed in the light of the circumstances. They should not be applied to oblige the parties to engage in fruitless negotiations or to delay an orderly resolution of the dispute. /Accordingly,*

46 ICC Case No. 6276, Partial Award of January 29, 1990 cited in Jolles (n 3), 333; DFSC, 6.6.2007, 4A_18/2007, c. 4.3.2 cited in Oetike and Walz (n 39), 876

47 Oetike and Walz (n 39), 876.

48 See *Sulamerica v. Enesa*, para 36; *Wah v. Thornton*, paras 59-60; See also BGer. 4A_46/2011 para. 3.1.1, *ASA Bull. 2011*, pp. 643-647cited in Baizeau and Loong (n 38), 1456.

49 For example in England: see *Cable & Wireless Plc v. IBM United Kingdom Ltd.* [2002] EWHC 2059 (COMM.) ("*Cable&Wireless v. IBM*"); *International Research v. Lufthansa*, para 54; *Emirates Trading Agency LLC v. Prime Mineral Exports Private Limited* [2014] EWHC 2104 (Comm) ("*Emirates Trading v. Prime Minaral*"), para 47; Born, 920.

50 For example, *Hyundai Engineering and Construction Co. v. Vigour Ltd.* [2004] H.K.E.C. 444.

51 For example, *Wah v. Grant Thornton*, para 60.

52 Kayalı, Enforceability (n 2), 569; *Hooper Bailie Associated Ltd v. Natcon Group Pty Ltd in Australia* (1992) 28 NSWLR ("*Hooper Baile v. Natcon*"), para 209; *Cable&Wireless v. IBM*.

53 *Hooper Bailie v. Natcon*, para 206.

54 Born (n 2), 917; Kayalı, Enforceability (n 2), 569.

55 *Courtney & Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd.* [1975] 1 W.L.R. 297; *Walford v. Miles* (1992) 2 A.C. 128, para 139 (this case brought 'blanket unenforceability' for negotiation in good faith).

56 *Wah v. Thornton*, para 57.

the arbitrators have determined that there was no obligation on the claimant to carry out further efforts to find an amicable solution, and that the commencement of these arbitration proceedings was neither premature nor improper." [57]

However, in recent cases, this interpretation has changed slightly.[58] It is stated that "the obligation to negotiate in good faith is not analogous to an agreement to agree, nor is it "incomplete." Rather, it is an agreement to conduct negotiations in a particular fashion."[59] Additionally, the content of the phrase "good faith" involves the notions of honesty and genuineness.[60] Hence, it is alleged, "in principle, there is no difference between an agreement to negotiate in good faith and an agreement to submit a dispute to mediation."[61] Therefore, it may be said that the requirement to negotiate in good faith has not, of itself alone, undermined the enforceability of such a clause, provided that the clause is otherwise sufficiently certain and detailed and is not a bare agreement to negotiate in good faith.[62]

C. Legal Characterisation of ADR Clauses

Having decided that the initial ADR tiers are formed as a mandatory process before arbitration, the sanction and result of initiating arbitration without submitting the dispute to former stages of MTDR depends on the characterisation of these stages. The question whether exhausting the pre-arbitral stages is a substantive matter or a procedural one changes the answer for the sanction of breach of MTDR clause: a simple compensation, for which there is no certain criteria to describe the damage, or dismissing the case on the grounds of a lack of jurisdiction or staying the process.

Is non-compliance of pre-arbitral requirements a procedural issue or a matter of substantive law? In most of the cases, the issue was addressed as a procedural matter largely because the tribunal or the judicial institution seizes of the matter and addresses it on factual reasons rather than the validity of the clause.[63] Jolles is of the view that it is in line with the intention of the parties who would want the tribunal not to review the case and order the initial steps to be complied with by the parties. [64]Attributing the

57 ICC Case No. 8445, 26 Y.B. Com. Arb. 167–80 (2001).

58 *Emirates Trading v. Prime Mineral* (n79), para 47; *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v. Toshin Development Singapore Pte Ltd* [2012] SGCA 48 ("*HSCB Trust v. Toshin*"), para 40; *Aiton Australia Pty Ltd v. Transfield Pty Ltd* (1999) 153 FLR 236 ("*Aiton v. Transfield*"), para 103; *United Group Rail Services Ltd v. Rail Corporation New South Wales* [2009] NSWCA 177 ("*United Group Rail v. Rail Corporation*"), para 74.

59 *United Group Rail v. Rail Corporation*, para 81.

60 *United Group Rail v. Rail Corporation*, para 71; *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109, para 132.

61 *HSBC Trust v. Toshin*, para 43.

62 Tevendale and Ambrose and Naish (n 1), 39.

63 Sai Ramani Garimella and Nizamuddin Ahmad Siddiqui, 'The Enforcement Of Multi-Tiered Dispute Resolution Clauses: Contemporary Judicial Opinion', 24 (1) 2016 IIUMLJ, 190; It may also be said that currently the substantive approach is mostly abandoned while procedural approach is widely used as it is seen in below.

64 Jolles (n 3), 336.

substantive law character to the pre-arbitral steps, would in the event of non-compliance, bring in claims for breach of contract and damages, a result likely to be unsatisfactory to the parties, as the party claiming the damages would be unable to establish the quantum of damages, and hence at no specific gain from the decision.[65] If the wording of the clause intends that such agreement is not merely permissive or a non-mandatory provision and the ADR process is detailed in process the tribunal should declare request for arbitration as inadmissible[66] or should decide on its lack of jurisdiction but not a breach of a contract which leads to an indefinite compensation process.

Mostly for arbitral process, the initial tiers may be regarded as mostly a procedural issue rather than substantive and may be accepted as creating a condition precedent to the jurisdiction of the arbitral tribunal (on the basis that the arbitration agreement does not provide an arbitral tribunal with authority until pre-arbitration procedural requirements have been complied with); mostly for court process, as admissibility of the claim (on the basis that the arbitration agreement provides jurisdiction but does not permit assertion of substantive claims until after specified requirements have been satisfied).[67]

The importance of this separation appears mostly in the case of challenging the decision of the tribunal on its own jurisdiction (by relying on *Kompetenz-Kompetenz* principle) upon an objection base on the fact that the initial tiers have not been exhausted. If the fulfilment of pre-arbitral mechanisms is interpreted as a substantive issue, then the decision of the tribunal on non-fulfilment of these tiers may be expected to be final.[68] For example, the court in *Nihon Plast v. Takata-Petri*[69] held that the objection based on the fact that a preliminary conciliation clause is not a base to challenge an arbitral tribunal's jurisdiction but an issue relating to the admissibility of a claim that cannot be reviewed by the court during the challenge procedure.[70] If the initial tiers are evaluated as procedural conditions precedent to the jurisdiction of the arbitral tribunal, courts will review the decision of the tribunal on non-fulfilment of these tiers as a reason to set the award aside.[71] Additionally, deciding the initial tiers as a procedural issue brings the question of "does non-fulfilment of initial ADR tiers render the arbitral tribunal lack of jurisdiction or, without nomination the issue as a matter of jurisdiction, is only a simple stay of the process until these tiers are exhausted satisfactory?"

65 Garimella and Siddiqui (n 63), 190 ; Oetike and Walz (n 39), 879.

66 Garimella and Siddiqui (n 63), 190.

67 *Hochtief AG v. Argentina* ICSID Case No. ARB/07/3, paras 90-94; Born (n 6), 935; Jan Paulsson, 'Jurisdiction and Admissibility' (2005) Global Reflections on International Law, Commerce and Dispute Resolution, 604; Kayalı, Enforceability (n 2), 568; See Oetiker and Walz (n 39), 875.

68 Born (n 2), 935.

69 *Nihon Plast v. Takata-Petri,* 2004:1/2 Gaz. Pal. 24 (Paris Cour d'appel) Judgment of 4 March 2004.

70 Cited in Born (n 2), 939; see also *Howsam v. Dean Witter Reynolds Inc*, 537 US 79, 84 (2002).

71 *Repub. of Argentina v. BG Group plc*, 665 F.3d 1363 (D.C. Cir. 2012).

Characterisation of the initial tiers differs among different law systems. In particular a significant difference between approaches from civil law countries[72] and common law countries[73] can be seen. There are ICC arbitral awards which characterise the initial ADR procedures both as a matter of jurisdiction[74] and as a matter of admissibility.[75]

IV. Effects of non-Fulfilment of Initial ADR Tiers on Arbitral Process

In the case that one of the parties directly commence arbitration without recoursing the ADR procedure, even it does have a mandatory wording or include enough detail regarding the process, or because of the wording is not mandatory and the MTDR clause does not imply enough detail regarding the ADR process, what the result or sanction of non-application of the initial stage to arbitral process would be, shall be answered.

If the initial tiers are not complied with, the arbitration agreement may be deemed to be invalid since a condition precedent is not fulfilled and as a result, the tribunal may not have jurisdiction.[76] Ultimately, the decisions of this tribunal on its own jurisdiction can be challenged at the seat.[77] For example, the court in *White v. Kampner*[78] vacated an arbitration award because of a party's failure to satisfy participation in the mandatory negotiation sessions prior to commencing arbitration as a condition precedent to arbitrate.[79]

Furthermore, the award may not be enforced by the foreign court pursuant to Article V(1)(a) of the NYC, upon the resistance of one of the parties, if the court accepts that the validity of the arbitration clause/jurisdiction of the tribunal depended on the proper implementation of a valid pre-arbitral procedure, which was not implemented.[80] For example, an MTDR contract between *A* from Singapore and *B* from France states that "parties will mediate before arbitration in London, the mediator will be *X*." *B* commences arbitration directly. *A* objects to the tribunal's jurisdiction and seeks for an injunction in a London court for the enforcement of the initial tier. The London

72 See for example *Poiré v. Tripier* Cour de Cassation, 14 February 2003, *Revue de l'arbitrage* (2003); In the case of Zurich Cassation Court, 15.3.1999, ZR 2000, p. 86, c. II.4.c, the court held that agreement to mediate before initiating arbitration as an agreement of substantive nature while in case of Zurich Superior Court, 11.9.2001, ZR 2002, p. 77, c. 3, the court have decided such an agreement to mediate or similar agreements are of a procedural nature. See also Oetike and Walz (n 39), 873.

73 See for example *International Research v. Lufthansa* (n15), para 63; see *HIM Portland, LLC v. DeVito Builders, Inc*., 317 F.3d 41 (1st Cir. 2003) ("*HIM Portland v. DeVito*").

74 ICC Case No. 8462, Final Award of January 27, 1997 cited in Jolles (n 3), 334.

75 ICC Case No. 12739 ("failure to comply with mandatory pre-arbitral stages made the request premature and dismissed arbitration") cited in M. Bühler & T. Webster, *Handbook of ICC Arbitration,* (2008), 67 cited in Born, 929; see also ICC case No. 6276, Partial Award of January 29, 1990 cited in Jolles (n 3), 333.

76 *Hyundai Merchant Marine Company Limited v Americas Bulk Transport Limited* [2013] EWHC 470 (Comm), para 72.

77 For example section 67 of EAA; Article 34(2) (a) (i) of UML on Arbitration; Article 439 of Turkish Code of Civil Procedure (Law no: 6100, Admission date: 12.01.2011, Official Gazette 04.02.2011/27836); Article 15 of Turkish Code of International Arbitration (Law no: 4686, Admission date: 21.06.2001, Official Gazette 05.07.2001/24453).

78 *White v. Kampner*.

79 *White v. Kampner*.

80 Baizeau and Loong (n 38), 1459.

court refuses to enforce mediation because of lack of certainty according to English law.[81] After the award is decided in favour of *B*, *B* seeks to enforce the foreign award in Singapore where *A* has assets. A Singaporean court must enforce but may refuse enforcement of the award under Article V(1)(a) of NYC when *A* resists enforcement and proves that a sufficiently clear condition precedent was not fulfilled, so there was no valid arbitration agreement due to Singaporean law.[82]

Such above mentioned examples bring the following questions in mind: Shall the arbitral tribunal *ex officio* make a decision on the issue or is an objection needed? Does this matter affect the jurisdiction of the arbitral tribunal? What kind of decision shall the arbitral tribunal render? Both national courts from different countries and arbitral tribunals approach the issues whether and when the initial tiers in MTDR clauses bring a binding obligation and a condition to jurisdiction or admissibility and following the aforementioned effect differently and neither of them identified the mentioned issues consistently.[83] These different approaches will be examined in the following heading. Here, different scholarly opinions will be discussed.

According to a scholarly opinion[84], the source of the jurisdiction of arbitrators is the consent, the agreement of the parties. Again with another agreement, an ADR agreement, it should be possible to temporarily delay the jurisdiction of arbitrators. In the case of a breach of this ADR agreement, upon a jurisdictional objection in the procedurally right time, the arbitrators shall decide that they will not have jurisdiction unless the initial ADR process is completed.[85] Even though in the case of that, the ADR clause lacks enough certainty and detail and its validity is also an issue, this, principally, does not change the reality that an ADR agreement has and shall have a dilatory effect on the jurisdiction of the arbitrators.[86] In a slightly similar line another scholar states that, if the parties decide to apply conciliation before arbitration in a mandatory language, nonfulfillment of the conciliation process prevents the parties from initiating arbitration.[87] By disregarding the objection of the respondent regarding the issue, if the arbitral tribunal proceed the process, the arbitral tribunal shall be accepted as it exceeds its jurisdiction.[88] In the same manner another scholar states that in such a case, just like a preliminary objection before the state court for arbitration (Turkish Code of Civil Procedure (Law no: 6100, Admission date: 12.01.2011, Official

81 For example *Sulamerica v. Enesa*.

82 *International Research v. Lufthansa*, para 63.

83 Born (n 2), 916.

84 Yeşilova (n 29), 531.

85 Yeşilova (n 29), 531.

86 Yeşilova (n 29), 531.

87 Tan Dehmen (n 6), 460, 463.

88 Tan Dehmen (n 6), 465; Because of the non-fulfilment of initial mandatory ADR process, the possible reasons to set aside an arbitral award are lack of jurisdiction, exceeding the limit of jurisdiction or the arbitral procedure being not in accordance with the agreement of the parties. Ekşi (n 2), 56.

Gazette 04.02.2011/27836), Article 116/1-b), the respondent can make an objection.[89] Such a preliminary objection (like the one for arbitration) to dismiss the case because of non-fulfilment of the ADR process or to stay of the proceeding until the ADR process is completed shall be inserted in law.[90] A similar clause can be seen in Article 1725 of the Belgium Code of Civil Procedure which provides that before applying the contractual mediation process if one of the parties brings a case before the court, the respondent may hold the preliminary objection regarding the issue and provide dismissal of the case.[91] Regarding the issue of preliminary objection, another scholar states that in the case of initiating arbitration without exhausting the mandatory pre-arbitration tier, with the framework of kompetenz-kompetenz, the arbitrator/arbitral tribunal shall , *ex officio* consider the issue, since non-fulfilment of the pre-arbitration tier prevents the enforceability of the arbitration agreement and this directly affects the jurisdiction of the arbitrator/arbitral tribunal directly.[92]In any case it should be clarified that having the clear intention of parties to attempt to solve their disputes by an ADR mechanism, alleging that since there will not be any final decision at the end of such a procedure, application of such initial steps is not obligatory means disregarding the principle of party autonomy which is also already the legitimization base for arbitration.[93]

The opposing scholarly view states that some dispute resolution procedures, such as negotiation between the parties and mediation are essentially consensual in nature and are therefore not enforceable. It has been contended that the conduct of negotiations or mediation depends on the willing participation of the parties and that such conduct cannot be subject to judicial supervision or enforcement.[94] In the same line, according to another view[95], for the mediation example, mediation does not have a negative effect for parties in preventing them from applying directly to a state

89 Özbek (n 2), 786.

90 Özbek (n 2), 787; Hamid G Gharavi, Effect of Alternative Dispute Resolution on Arbitration, ICC Turkiye Milletlerasrası Tahkim Semineri, 2 Nisan 2010 Ankara, 124; without an abjection the arbitral tribunal does not *ex officio* consider fulfilment of ADR procedure. (Tan Dehmen (n 6), 465). "In case of referring the dispute to arbitration before mediation regarding MTDR clause, before proceeding arbitration, it should be sought to fulfil the mediation stage. As other contract clauses, mediation clause is also binding and cannot be eliminated without consensus. If necessary the arbitrators shall grant a decision of stay of proceeding for parties to initiate mediation and decide this procedure as to be preliminary issue." Akıncı (n 44), 15-16.

91 Mert Namlı, 'Belçika Hukuk Sisteminde Arabuluculuk Kurumunun Temel Esasları', Arabuluculuk Yasa Tasarısı, Eleştirileri ve Öneriler, (İstanbul 2008), 103; However, the law does not provide for a similar sanction in the event of the violation of a commitment to negotiate or any type of ADR method (other than mediation) agreed upon between the parties. IBA Litigation Committee, *Handbook Multi-Tiered Dispute Resolution Clauses*, October 1, 2015 ("*IBA Handbook*"), 31.

92 Ekşi (n 2), 46; In *Tulip Hotels Pvt. Ltd. v. Trade Wings Ltd* MANU/MH/1748/2008 the court while upholding the enforceability of the MTDRCs opined that when the parties agree for a specific procedure and mode for settlement of their dispute by way of arbitration and also prescribes certain pre-condition to be complied with for referring the matter to arbitration, the parties are required to comply with those pre-conditions and only then refer the matter to the arbitration. (Cited in Garimella and Siddiqui (n 63), 188) In *Sushil Kumar Sharma v. Union of India* (2005) 6 SCC 281, the Supreme Court observed discussing the enforceability of the pre-arbitration processes held that where the contracting parties agreed that the dispute resolution clause is mandatory with regard to the steps preceding arbitration that procedure ought to be followed. Without having followed the steps, the arbitral tribunal did not have jurisdiction to entertain the dispute. (Cited in Garimella and Siddiqui (n 63), 189).

93 Tan Dehmen (n 6), 464; Ekşi (n 2), 55.

94 Pryles (n 1), 161.

95 Melis Taşpolat Tuğsavul, *Türk Hukukunda Arabuluculuk*, (1st Edition, Yetkin 2012), 103, 106.

court or arbitration. If parties directly initiate arbitration or court process, this may be interpreted as parties implicitly invalidating the mediation agreement. Additionally, in contradiction to arbitration, in Turkish law, since mediation is based on party consent is in the foreground and not mandatory, inserting a preliminary objection for mediation in Mediation Code on Civil Disputes is not suitable.[96]

According to the third opinion, the best solution is reconciling the non-binding character of mediation or conciliation with the principle of party autonomy and staying the arbitration and fixing a time limit for the parties to attempt to resolve the dispute by way of the agreed pre-arbitral method.[97] For such a sanction, the respondent must object to the claimant's failure to comply with a pre-arbitral procedure in a timely manner. Otherwise, it waives its right to such procedure by conduct. Otherwise, it becomes an abuse of rights for a party to invoke a failure to exhaust preliminary steps as grounds to set aside the award where that same party had not invited the other to proceed with the agreed ADR process and not requested a stay of arbitration.[98]

Regarding the issue, a recent Swiss case may be a good example to facilitate a solution. In the Swiss First Civil Law Court decision from March 2016,[99] two companies, *X* and *Y*, entered into a contract which contains an MTDR clause requiring conciliation proceedings prior to arbitration. Following the emergence of a dispute, before the conciliation was formally completed, Y commenced arbitration proceedings. X objected to the arbitral tribunal's jurisdiction referring Y's failure to comply with the pre-arbitral steps. The arbitral tribunal rendered a partial award and confirmed its jurisdiction. X challenged the tribunal's decision at the Swiss Court. The Swiss Court held that terminating the tribunal's jurisdiction '*is certainly not the most appropriate solution'* as doing so would require that another tribunal be constituted following fruitless conciliation proceedings, with the result of the prolonged procedure and additional costs. Further, such a finding could lead to unduly punitive results, particularly in circumstances where a limitation period had expired following the commencement of an arbitration. Accordingly, the Swiss Court found that the most convenient solution was simply to stay the arbitration so that the conciliation proceedings could take place, after which the arbitration could resume before the originally constituted tribunal. The Court effectively ruled that a pre-arbitral step in an MTDR clause did not constitute a jurisdictional condition precedent, and that a failure to comply with such a pre-arbitral step would not deprive a tribunal of jurisdiction.

96 Taşpolat Tuğsavul (n 94), 108.

97 Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *International Arbitration, Law and Practice in Switzerland* (Oxford Press 2015), para 5.23, 245; Özbek, 786-787; Gharavi (n 89), 124; See Oetike and Walz (n 39), 882.

98 Supreme Court decision 4P.67/2003 of 8 July 2003, para 4, 22 ASA Bulletin (2004), 353, 361; Supreme Court decision 4A_18/2007 of 6 June 2007, para 4.3.3.2, 26 ASA Bulletin (2008), 99-100 cited in Kaufmann-Kohler, Rigozzi, para 5.24, 245.

99 4A_628/2015 of March 16, 2016. English translation available through Swiss International Arbitration Decisions <http://www.swissarbitrationdecisions.com/no-breach-of-pre-arbitral-procedures-failure-to-deal-with-an-arg> (accessed 17.4.2020); see also Vlavianos and Pappas and Jones (n 2), between fn 30-34.

However, it did make clear that parties to MTDR clauses should be required to abide by pre-arbitral steps in multi-tier dispute resolution clauses.[100]

Consequently, as a practical solution rather than theoretical disputes, we agree with the thought that an ADR clause written with a mandatory wording shall be enforced upon an objection at the beginning of the arbitral process by (only) staying the arbitration and fixing a time limit for the parties to attempt to resolve the dispute by way of the agreed pre-arbitral method (but not dismissing on the grounds of a lack of jurisdiction or inadmissibility) in the light of the principle of party autonomy which is valid even for dispute resolution mechanisms despite the inherent non-binding character of ADR clauses.

V. Reported Cases in Various Jurisdictions with Respect to the Initial Tiers

The question whether the initial tiers impose a binding pre-arbitral obligation to fulfil and affect the jurisdiction of arbitral tribunal has been one of the controversial issues in the opinions of scholars, courts, and arbitral tribunals.[101] There is no consensus about the wording of MTDR clauses: the question of "What kind of wording is required for a binding MTDR clause?" is answered with different standards in different jurisdictions. Furthermore, different jurisdictions decide the effect of initial tiers on arbitration differently. Also, the interpretation of courts and tribunals on initial stages changes due to whether the initial stage is negotiation or mediation.[102] The key point of all these discussions is, generally, the interpretation of the legal intention of parties on MTDR agreements.[103] Therefore, it will be useful to analyse the approaches of several national jurisdictions that have significant importance in international business and dispute resolution.

A. Reported Cases in the United Kingdom with respect to the Initial Tiers

The UK, which is a common law country, is a leading nation in every aspect of international commerce in the world. Its approach supposedly has great influence not only on common law countries but also on others. Accordingly, the English approach should be examined regarding the initial ADR tiers.

100 Ibid, paras 2.4.4.1, 2.4.4.2; The Court also discussed whether the issue in dispute may be subject to a substantive sanction (damages to be paid to the other party) or the procedural sanction (inadmissibility or dismissal of the claim as it stands or stay of the proceedings). The Court stated that sanctioning the party refusing to comply with its obligation to engage in a mandatory prerequisite with damages is not a satisfactory solution since the sanction will come too late, depriving the obligation to resort to mediation before initiating an arbitration of any meaning and secondly, it will be difficult, if not impossible, for the party that claims to be a victim of a breach of the mediation clause to justify the quantum of the damages. Indeed, it should not be easy to prove that failing to follow a mediation process all the way through to its end creates damage, as one of the principles of mediation is that there is no obligation to reach an agreement.

101 Born (n 2), 917; Dyalá Jiménez-Figueres, 'Amicable Means to Resolve Disputes: How the ICC ADR Rules Work' (2004) 21(1) JIA, 93.

102 Born (n 2), 917.

103 Berger (n 5), 3.

In the UK, courts used to refuse to enforce the pre-arbitral stages with reference to their nature being voluntary since they did not create enforceable legal obligations. [104] This idea changed with *Channel Tunnel*[105] in which Lord Mustill interpreted the requirement for expert determination before arbitration as an agreement "which is nearly an immediately effective agreement to arbitrate, albeit not quite."[106] Accordingly, he stated that it was appropriate to apply section 1 of the Arbitration Act 1975[107] to stay formal proceedings in favour of expert determination requirement.[108]

However, *Channel Tunnel* did not provide any grounds for enforceability of mediation and negotiation as initial tiers. Additionally, in *Halifax Financial Services Ltd. v. Intuitive Systems Ltd.*,[109] the judge emphasized that since negotiation and mediation are non-determinative mechanisms, not like a "panel of experts" in *Channel Tunnel* but merely good faith clauses, these pre-arbitral stages did not impose an obligation to parties and were not condition precedent to court proceedings.[110] This decision can be criticised in that distinguishing negotiation and mediation as non-determinative was a weak conclusion, since the parties can reach a contractually binding solution at the end of these procedures.[111]

The benchmark improvement came with the broad interpretation in *Cable&Wireless v. IBM* for enforceability of mediation as a separate procedure.[112] Colman J brought the standard that when the "obligation to mediate" is expressed in "*unqualified and mandatory terms*", the mediation clause must be invoked even if it does not refer to a set of mediation rules as the clause in the case did.[113] By adjourning the court proceeding, the court brought an end to the discussion whether the initial mediation tier was permissive or obligatory and supported that fulfilment of mediation is a condition precedent to the jurisdiction of the tribunal.[114] On the other side, the weakness of this decision is the discrimination against negotiation with the allegation that it was difficult to determine whether a party had complied with the requirements of negotiation that originated from *Walford v. Miles*.[115]

104 *Paul Smith Ltd. v. H & S International Holding Inc* [1991] 2 Lloyd's Rep, paras 127-131 (The court decided on the MTDR clause which stated that "A dispute shall, in the first place, be submitted for conciliation in accordance with the ICC Conciliation Rules" and ruled that this clause did not create enforceable legal obligations.); Özbek (n 2), 765.

105 *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd* 1993 AC 334.

106 Ibid, 354.

107 Predecessor of section 9(2) of EAA.

108 *Channel Tunnel*, 351.

109 [1999] 1 All ER 664.

110 Ibid.

111 Kayalı, Enforceability (n 2), 571.

112 [2002] EWHC 2059 (COMM.); Identically, in Australia, a 'sufficiently certain conciliation clause' is enforceable since "what is enforced is not co-operation and consent but participation in a process from which co-operation and consent might come." (*Hooper Bailie v. Natcon*, paras 206-214).

113 *Cable&Wireless v. IBM*, para 34; In the same line, the Australian court in *Computershare Ltd v. Perpetual Registrars Ltd (No 2)* ([2000] VSC 233) held that the flexibility of the mediation process meant that it would be very difficult for the parties to provide for all the details of the mediation procedure in advance.

114 *Cable&Wireless v. IBM* , para 40.

115 Ibid, para 31; see *Walford v Miles*: ("The reason why an agreement to negotiate, like an agreement to agree, is unenforceable is simply because it lacks the necessary certainty.").

In cases related to the effectiveness of pre-arbitral procedures after *Cable&Wireless v. IBM,* the courts have discussed the requirements for an enforceable ADR clause as a condition precedent to arbitrate. *Holloway and another v. Chancery Mead Ltd.* ("*Holloway v. Chancery*")[116] is the first decision that brought three requirements for a valid conciliation clause.[117] This case emphasized the details and rules about how to proceed with the ADR process and the appointment of a mediator.[118]

However, Moore-Bick LJ in *Sulamerica v. Enesa*[119] stated that describing minimum ingredients is not helpful; "each case must be considered on its own terms."[120] The clause in this case required mediation before arbitration and it set forth certain details such as time limits and the remuneration of a mediator.[121] Nevertheless, Moore-Bick LJ refused to enforce the mediation clause because the rights and obligations of the parties were not sufficiently clear.[122]

Hildyard J in *Wah v. Thornton*[123] emphasized again that "agreements to negotiate in good faith must be taken to be unenforceable: good faith is a too open-ended concept."[124] Additionally, the court brought a minimum requirements list[125] to enforce an "obligation to attempt to resolve disputes amicably before arbitration".[126] Like *Holloway v. Chancery*, this case also emphasized the importance of the details of the process, additionally, it stated the need for a "sufficiently clear commitment to commence ADR procedure."[127]

Nevertheless, the judge in *Emirates Trading v. Prime Mineral*[128] approached more favourably negotiation before arbitration, by stating that "an obligation to seek to resolve a dispute by friendly discussions in good faith has an identifiable standard, namely, fair, honest and genuine discussions aimed at resolving a dispute."[129] Accordingly, the judge accepted that "negotiation in good faith within four weeks" is

116 [2007] EWHC 2495 (TCC).

117 Ibid, para 81.

118 Ibid; Similarly, in Australia, a minimum requirements list for an enforceable mediation stage before arbitration has been brought. This list needs details in how and pursuant to which rules to follow the process and clear statement that mediation is "condition precedent" to arbitrate. (*Aiton v. Transfield*, para 69).

119 [2012] EWCA Civ 638.

120 Ibid, para 35.

121 Ibid, para 5.

122 Ibid, paras 35-36.

123 [2012] EWHC 3198 (Ch).

124 Ibid, para 57.

125 Ibid, paras 53, 60.

126 Ibid, para 59.

127 Ibid, para 60.

128 [2014] EWHC 2104 (Comm).

129 Ibid, para 64.

a sufficiently certain condition precedent to arbitrate.[130]

Furthermore, Mr Justice Edwards-Stuart in *Peterborough City Council v Enterprise Managed Services Ltd*[131] emphasised the over-riding principle of party autonomy by giving effect to an MTDR clause which sets out the procedure for dispute resolution by a Dispute Adjudication Board ("DAB") to be appointed on an *ad hoc* basis after any dispute had arisen before litigation and staying litigation and leaving *the parties to resolve their dispute in accordance with the contractual machinery.*[132]

In light of these cases, it appears that a 'sufficiently clear' ADR clause is accepted by English law as creating a condition precedent to the jurisdiction of the arbitral tribunal. There are soft interpretations to validate initial tiers in some of these cases. However, the long requirement lists for "sufficiently clear" ADR procedures for both negotiation and mediation show that English law is generally not willing to name such initial tiers as condition precedent to the jurisdiction of arbitration. Furthermore, the conflicting descriptions for a "sufficiently clear" MTDR clause by different courts in England reveal that even one single country may not have a consistent approach to the enforceability of MTDR clauses. Consequently, we can say that it is extraordinary that England, which is an arbitration-friendly country and a global dispute resolution centre, has an unstable approach to this issue.[133]

B. Reported Cases in South-eastern Asian Countries with respect to the Initial Tiers

Having examined a leading western country, we should also consider the approaches of certain south-eastern countries such as Hong Kong and Singapore that have a significant share of international commerce and are becoming important dispute resolution centres.

We can see the approach in Hong Kong from the case of *Hyundai Engineering and Construction Co. v. Vigour Ltd*.,[134] which cited *Cable&Wireless v. IBM.* In this case, a

130 Ibid, paras 47, 73; See almost identical Australian decisions: *United Group Rail v. Rail Corporation*, paras 64, 81; *Aiton v. Transfield*, paras, 98,124. In a more recent Australian case of *WTE Co-Generation v RCR Energy Pty Ltd* [2013] VSC 314, paras 42-46, a dispute resolution clause which states once the operation of the provision was triggered, the parties were required to do one of two things, either meet to resolve the dispute, or agree on methods of doing so was found to be unenforceable due to uncertainty. In the clause neither a process was prescribed to determine which option was to be pursued nor was the method of resolving the dispute specified. In *WTE Co-Generation v RCR Energy Pty Ltd*, Vickery J stated that it was a well-accepted construction technique for a court to strive to give commercial effect to an imperfectly drafted clause, but the clause must set out a process or model to be employed rather than leaving that to further agreement. (IBA Handbook, 11-12).

131 [2014] EWHC 3193 (TCC).

132 Ibid, para 43.

133 There are even more strict interpretations in the UK regarding ADR procedures. For example, the Court of Appeal held in *Halsey v Milton Keynes General NHS* [2004] EWCA Civ 576 that English courts do not have the power of forcing parties to go to mediation against their will, as this would, in the view of the Court, the right of access to justice contained in article 6 of the European Convention of Human Rights. (Cortes, 14).

134 *Hyundai Engineering and Construction Co. v. Vigour Ltd.* [2004] H.K.E.C. 444 cited in Leonard and Dharmananda (n 41), 310.

broad concept on the enforceability of initial ADR procedures for both negotiation and mediation is adopted.[135] The clause in the case required mediation before arbitration. However, the parties had selected no mediation procedure, nor had they referred to a mediator who would determine the procedure.[136] The judge adopted a liberal interpretation for enforceability of ADR procedures by stating that interpreting the initial tier of MTDR clauses ought to "be no more or less difficult than determining a procedure where the parties simply agree to arbitrate all disputes."[137] The court held that the failure to specify a mediation procedure was not fatal so long as the parties knew their duty to mediate before arbitration.[138] The court concluded that the minimum requirement would be the appointment of a mediator in contrast to the long requirement lists in England.[139]

Similar to Hong Kong, Singaporean law also adopts a more open-minded approach to the enforceability of initial ADR tiers compared to England. For example, in *International Research v. Lufthansa*,[140] the MTDR clause referred that ". . . disputes *shall* be referred to 'specified' mediators before arbitration."[141] Although the only detail in the clause was who the mediators would be and even if there was no time frame, no reference to procedural rules, the court accepted that the mediation clause "were set out in significant detail"[142] with a "mandatory fashion" and accepted that it was a condition precedent to arbitrate.[143] Therefore, the court annulled the award of the tribunal on jurisdiction and ruled that because of non-compliance with initial tiers, the tribunal did not have jurisdiction.[144]

Similarly, negotiation in good faith is also enforceable[145] in Singapore, since "there is no good reason why an express agreement between contracting parties that they must negotiate in good faith should not be upheld"; besides, enforcing negotiation is in the public interest.[146] In contrast to Western understanding, "from a traditional Asian perspective negotiation in good faith clause represents an executory contractual promise no less than substantive in content than a price, payment, or delivery term."[147] Therefore, non-enforcement of "negotiation in good faith" on the grounds of a lack

135 Leonard and Dharmananda (n 41), 310.

136 Ibid.

137 *Hyundai v. Vigour*, paras 89, 96.

138 Ibid, para. 100.

139 Ibid.

140 *International Research v. Lufthansa*.

141 Ibid, para 7.

142 Ibid, para 51.

143 Ibid, para 54.

144 Ibid, para 71.

145 *HSCB Trust v. Toshin*.

146 Ibid, para 40.

147 Ibid, para 40; However, this approach may lead the above mentioned discussion here, whether the pre-litigation/pre-arbitral stages are a condition precedent to jurisdiction or a matter of admissibility.

of certainty of the clause and uncertainty to reach a settlement defeats the reasonable expectations of honest men.[148]

C. Reported Cases in the United States with respect to the Initial Tiers

When we turn to the US, we can see that since mediation has matured in the US over the last three decades and is now a widely accepted dispute resolution mechanism, it is generally enforced.[149] There are two different approaches to the question of "on what ground mediation is enforceable".

The first approach was shaped before the 2000s on the ground of the Federal Arbitration Act 1925 ("FAA"). Section 2 of the FAA regulates the enforceability of arbitration agreements and section 3 of the FAA invokes that if one of the parties applies for a stay of proceedings in favour of an arbitration agreement, the court has to grant it. Since arbitration is an ADR mechanism like mediation in the US, these sections were also applied in favour of mediation.[150] In *CB Richard Ellis, Inc. v. American Environmental Waste Management, No. 98-CV-4183 (JG)*,[151] the court stated that FAA defined arbitration as a procedure to "settle" conflicts, and mediation agreements would also come within its ambit.

After the works on the Revised Uniform Arbitration Act 2000 and Uniform Mediation Act 2001, courts have decided enforceability of mediation pursuant to principles of contract law.[152] In *Kemiron v. Aguakem,*[153] and *HIM Portland v. Devito,*[154] the judges determined that the "precise" mediation clauses were enforceable and a "condition precedent" to arbitration. [155] While mediation was referred to as a "condition precedent" in *HIM Portland v. Devito*,[156] the clause in *Kemiron v. Aguakem* [157] did not specify this. While the clause in *Kemiron v. Aguakem* referred the time limit and default rule for the appointment of a mediator, the one in *HIM Portland v. Devito* referred only to the mediation rules of an institution. Nevertheless, in both cases the mediation clauses were seen as being sufficiently "precise."

148 Ibid, para 41; In a survey made in 2014 the questionnaire data revealed that the participants practising in Common Law Asia Pacific experienced the combined use of mediation and arbitration more often (35.7%) than their colleagues from Continental Europe (25%).Compared to the overall proportion of the participants depending on their country of practice, those who had experience with the combined use of mediation and arbitration constituted 37% of the overall number of Common Law Asia Pacific and 25.9% of Continental European participants. (Nigmatullina (n 2), 52).

149 Peter Tochtermann, 'Agreements to Negotiate in the Transnational Context — Issues of Contract Law and Effective Dispute Resolution' (2008) Unif. L. Rev. 13(3), 694.

150 *Cecala v. Moore* 982 F.Supp. 609 (N.D. III. 1997).

151 (1998) WL 903495 (E.D.N.Y. Dec. 4, 1998).

152 Tochtermann (n 148), 701.

153 *Kemiron Atlantic v. Aguakem International* 290 F. 3d 1287, 1291 (11th Cir. 2002) ("*Kemiron v. Aguakem*").

154 *HIM Portland v. Devito*.

155 *Kemiron v. Aguakem*, para 20; *HIM Portland v. Devito*, paras 11-13; Tochtermann, 703.

156 *HIM Portland v. DeVito*, para 3-4.

157 *Kemiron v. Aguakem,* para 5.

Furthermore, the US approach to negotiation can be seen in *White v. Kampner*[158] in which the judge enforced a negotiation clause, which stated, "the parties *shall* negotiate in good faith" before arbitration. The judge held that this clause was a "mandatory negotiation clause as a condition precedent to arbitration".[159]

D. Reported Cases in the Continental Legal Systems with respect to the Initial Tiers

Having examined several leading common law countries, it is important to analyse leading civil law countries, which occupy a significant position in international dispute resolution.

The standing of France for this topic becomes clear with the decision of the *Cour de Cassation* in *Poiré v. Tripier.*[160] The court suggested the approach: if the language of mediation as an initial tier is "sufficiently clear," it becomes a condition for admissibility of the claim upon an objection by the respondent under Article 122 of the French Code of Civil Procedure.[161] The clause in the case stated, "prior to commencement of proceedings, any potential dispute has to be submitted to mediators designated by each of the parties, except if the parties can agree on a sole mediator." The court considered this language to be binding and a basis for dismissal of litigation due to peremptory inadmissibility.[162] It is seen that France does not need a more detailed provision, which includes time limits, appointment procedures, and further details like the UK. Later in 2005, the Commercial Chamber of *Cour de Cassation* affirmed the *Poiré v. Tripier* ruling, and held that such a claim on admissibility may be raised at every stage of the proceedings.[163]

However, according to scholars, for a valid mandatory mediation clause which lead the case before court inadmissible, certain details about the process, for example how to choose the mediator, the time duration to mediate shall be specified.[164] In the same line according to a relatively new decision of French *Cour de Cassation* in *Medissimo v. Logica,* the MTDR clause which leads parties to amicably resolve (amicably negotiation) the disputes before the court procedure but does not include enough procedural detail is not assessed as a mandatory negotiation clause which shall be considered by the court to decide the case inadmissible under article 122 of

158 *White v. Kampner* .

159 Ibid, 229 Conn 473.

160 Cour de Cassation, 14 February 2003, *Revue de l'arbitrage* (2003) cited in in Tochtermann (n 148), 705.

161 Ibid ; In Article 122 of French Code of Civil Procedure, the reasons of objection to the court to dismiss the case on the ground of lack of admissibility.

162 Carter (n 14), 459.

163 Cour de Cassation, Chambre comm., N° 02-11519 v. 22.2.2005 cited in Tochtermann (n 148), 705.

164 See Ebru Ay Chelli, 'Fransız Yargıtay'ının Zorunlu Olmayan Uzlaşma Şartı Tüketilmeden Dava Açılabileceğine İlişkin 29 Nisan 2014 Tarihli Kararının Tercümesi', 2015 (2) UTTDER, 235, fn 4.

French Code of Civil Procedure.[165] The French *Cour de Cassation* held that a mere mutual agreement to attempt to resolve a dispute without any particular conditions as to its implementation, is not a mandatory condition precedent to the right to refer the claim to a judge, which thus does not render the claims inadmissible if disregarded.[166]

Courts in Germany[167] have dealt with the issue by finding that claims brought to the court before the fulfilment of initial tiers, for example a settlement negotiation, are inadmissible.[168] Therefore, if the parties agreed on such a clause, both parties were obliged to co-operate in carrying out the initial ADR procedures.[169] In other words, the court confirmed that if the parties agreed on a mandatory settlement clause, both parties were obliged to co-operate in carrying out the settlement negotiations. An action brought before the courts prior to the completion of an agreed settlement procedure was inadmissible.[170]

In Switzerland, having decided that the ADR process is a mandatory condition precedent before arbitration, the discussion has initially focused on whether the agreement between the parties to first negotiate and/or mediate before arbitrate constitutes an agreement of a procedural or substantive nature which is important in designating the sanction to failure to comply with the initial step.[171] Additionally scholars state that in Swiss law, whether the initial ADR methods, especially, before arbitration is a preliminary mandatory condition precedent is another disputed issue and the answer depends on the wording and process details of such a clause.[172]

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165 Cassation chambre commerciale, 29 avril 2014, n^{0} 12-27.004, Bulletin civil, n^{0} 76 (Chelli (n 163), 234; The clause in the contract was " If any disputes which will arise regarding execution or interpretation of this signed contract between the parties cannot resolved by amicably negotiations, the dispute shall be submitted to Paris Commercial Court." (Chelli (n 163), fn 2, 234).

166 Cited in Gregory Travaini and Herbert Smith Freehills, Multi-Tiered Dispute Resolution Clauses, A Friendly Miranda Warning, <http://arbitrationblog.kluwerarbitration.com/2014/09/30/multi-tiered-dispute-resolution-clauses-a-friendly-miranda-warning/> (Accessed 21.04.2020); The court explained that the inadmissibility of the claims would therefore be dependent upon the wording of the multi-tiered clause in relation to the following questions: (a) Is the amicable dispute resolution clause mandatory? (b) Is the amicable dispute resolution clause a condition precedent to the right to refer a claim to litigation or arbitration? (c) Is the amicable dispute resolution clause procedure sufficiently detailed? Only in situations where all the above requirements were fulfilled, could the clause be considered to be enforceable. (Cited in Garimella and Siddiqui (n 63), 178); In the same vein, in a recent decision of January 29, 2014 (*Knappe Composites v. Art Métal*, 3rd Civil Section of the Court of cassation, n°13-10833), the Court of Cassation denied the enforcement of an escalation clause which in its view did not provide for a mandatory duty to engage into conciliation. The clause, which derived from a professional standard rule for constructors, provided that for the settlement of disputes likely to arise in relation to the performance or the payment of the construction contract, the contracting parties ***have to consult each other*** in order to submit their dispute to arbitration or to reject arbitration. (IBA Handbook 2015, 81).

167 Decision German BGH, 23 November 1983, NJW 1984, 669-670; Decision German BGH 18 November 1998, NJW 1999 Heft 9, 647-648 cited in Jolles, 332.

168 C Boog, 'How to Deal with Multi-tiered Dispute Resolution Clauses - Note - 6 June 2007 - Swiss Federal Supreme Court' (2008) 26(1) ASA Bulletin, 107.

169 Decision German BGH 18 November 1998 BGH, (1999) NJW, Heft 9, 647-648 cited in Jolles (n 3), 332.

170 Alexander J. Bělohlavek, Arbitration Agreement, MDR Clauses and Relation Thereof to Nature of

Jurisdictional Decisions on the Break of Legal Cultures, Część IV. Z problematyki międzynarodowej i prawa obcego, 412.

171 Jolles (n 3), 329; Kaufmann-Kohler and Rigozzi (n 96), para 5.23, 244.

172 Kaufmann-Kohler and Rigozzi (n 96), para 5.22, 244.

The view which alleges that mediating before arbitral proceedings is an agreement of substantive nature argues that failure to comply with initial tiers is to be treated like any other breach of contract, with the standard remedies provided for under contract law.[173] Supporters of this view argue that if such agreements for initial tiers were treated as a condition precedent to litigation or arbitration; they could result in a party being entirely excluded from access to an adjudicatory body depending on the parties' will.[174] A Swiss decision given in 1999[175] supported this idea and stated that a conciliation agreement was not a bar to litigation since it was a matter of substantive law rather than procedural law.[176]

Some courts and commentators have taken the view that mediation or a similar agreement constitutes an agreement of a rather procedural nature. Failure to comply with such an agreement results in the request for arbitration being inadmissible only upon an objection by one of the parties.[177] This view holds that a violation of initial ADR procedures does not exclude an arbitral tribunal's jurisdiction.[178]

Furthermore, *Y v. X* emphasized the importance of the wording of the clause of enforceability.[179] The court in this case showed its willingness to enforce the mediation clause, where the wording of the clause stated mediation as a mandatory intermediary step.[180] Additionally, the court referred to the certainty of the period in which mediation proceedings would have to be initiated or terminated as a requirement for enforceability of such clauses.[181] In a 2011 decision, for an enforceable mediation clause, the Swiss Supreme Court had confirmed the need for the parties to use very clear language by specifying the requirement for time limits, provisions on appointment of mediator and procedural framework similar to the lists in *Holloway v. Chancery*.[182] Additionally, this decision is an indication that most of the scholars appear to favour to evaluate complying with the pre-arbitral stages as a procedural matter.[183]

In 2014, the First Civil Law Court of the Swiss Federal Tribunal decided that the dispute resolution procedure before the FIDIC Dispute Adjudication Board ("DAB") as a pre-arbitration ADR procedure is mandatory. An arbitration may not be initiated

173 Decision 15 March 1999, ZR 99 (2000) no. 29 c II.4c cited in Boog (n 167), 106.

174 Heiner Eiholzer, *Die Streitbeilegungsabrede* (Universität Fribourg, 1998), N.673, 176,183, 185 cited in Jolles (n 3), 332.

175 Kassationsgericht Zürich, Decision of 15 March 1999, (2002) *ASA Bull.* 373 at p. 374 cited in Berger (n 5), 6.

176 Tochtermann (n 148), 706.

177 Decision Zurich Court of Appeals, 11 September 2001, ZR 101 (2002) no. 21; Decision Court of Appeals Canton of Thurgau, 23 April 2001, RBOG (2001) no. 18 and reported in ASA Bulletin 2003, 418-420 cited in Boog (n 167), 106.

178 Werner Wenger, Kommentar zu Artikel 186 IPRG N 20(e), in *Kommentar zum Schweizerischen Privatrecht,* Basel, (1996) cited in Jolles (n 3), 331.

179 Swiss Federal Supreme Court — Arret du 6 juin 2007 I^{ere} Cour de droit civil, 4A_18/2007 cited in Tochtermann (n 148), 706.

180 Ibid.

181 Boog (n 167), 104.

182 BGer. 4A_46/2011 para. 3.1.1, 3.4, ASA Bull. 2011, pp. 643-647cited in Baizeau and Loong (n 38), 1456.

183 Kaufmann-Kohler and Rigozzi (n 96), para 5.23, 244.

without going first to the DAB if the contract so provides but an, as it was in the case, *ad hoc* DAB which has not been constituted during a significant time (18 months) after it was requested creates a situation in which the Respondent in an arbitration can no longer rely on the mandatory nature of the DAB procedure and the arbitral tribunal established without consuming DAB procedure has jurisdiction to hear the case.[184]

In a recent Swiss First Civil Law Court decision in March 2016, the Swiss Court accepted that the multi-tier clause required the parties to engage in conciliation prior to commencing arbitration and found that the most proper solution was to stay the arbitration until the conciliation proceedings could take place instead of dismissing the case due to a lack of jurisdiction; after in the case of a fruitless conciliation procedure, the arbitration could resume before the originally constituted tribunal. Therefore, the Court effectively ruled that a pre-arbitral process in an MTDR clause does not constitute a jurisdictional condition precedent, however, parties to these clauses shall be required to abide by pre-arbitral steps. Lastly, the court also made it clear that sanctioning the party refusing to comply with its obligation to engage in a mandatory prerequisite with damages is not a satisfactory solution in comparison to the procedural sanction above explained.[185]

VI. International Incentives: UML on Mediation and Singapore Convention

In the last thirty years especially, the governmental and non-governmental regulations to encourage the resolution of commercial disputes through ADR processes other than arbitration, that is, to include MTDR clauses in commercial contracts, have increased in both national and international platforms.[186] However, in many jurisdictions, ADR methods are not subject to specific rules and ADR proceedings are largely conducted in the "shadow" of the law.[187] There have been significant judicial differences between countries over the enforceability of ADR clauses before formal proceedings having commenced.[188] It is certain that uniformity of such rules would help to provide greater integrity and certainty in the ADR process.[189]

In the current situation, mediation is taken as the centre of ADR mechanisms and, therefore discussions focus on internationally harmonized legal solutions designed to

184 A SA v. B SA, 4A_124/2014, paras 3.4 and 3.5 <http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-fidic-pre-arbitration-requirements?search=4A_124%2F2014> Accessed 14.5.2020.

185 X Ltd. v. Y S.p.A, 4A_628/2015 of March 16, 2016, paras 2.4.4.1, 2.4.4.2. English translation available through Swiss International Arbitration Decisions <http://www.swissarbitrationdecisions.com/no-breach-of-pre-arbitral-procedures-failure-to-deal-with-an-arg> (accessed 17.4.2020)

186 Baizeau and Loong (n 38), 1452.

187 Petsche (n 23), 258.

188 Carter (n 14), 456.

189 UNCITRAL Model Law on International Commercial Conciliation with guide to Enactment and Use 2002 ("Guide"), para 17 <http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf > Accessed 27.04.2020.

facilitate mediation.[190] There are two significant examples as international commercial law instruments for such a goal: UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018 ("UML on Mediation") whose aim is to provide uniform rules for consistent practice for mediation and the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention") whose purpose is to provide global recognition and enforcement of the mediated settlement agreement on commercial matters and consequently to facilitate international trade and promote mediation as an alternative and effective method of resolving trade disputes. Being a binding international instrument, the Singapore Convention is expected to bring certainty and stability to the international framework on mediation.[191]

A. UML on Mediation

UML on Mediation which amends UNCIRAL Model Law on International Commercial Conciliation 2002 (UML on Conciliation) and which provides uniform rules for mediation process to encourage the use of mediation and has been considered by several countries when they enact mediation laws.[192] Many states in the US and Canada, and several countries such as France have adopted the former version of UML on Mediation, and Switzerland has been influenced when they were enacting or amending their mediation acts.[193] Therefore, UML on Mediation, even maybe by going further, may have the potential to provide international uniformity for conciliation/mediation practice as its analogue for arbitration, UML on Arbitration.

The scope of UML on Mediation is limited to non-binding types of dispute resolution, particularly, international commercial mediation.[194] UML on Mediation amends the UML on Conciliation (2002) in 2018 with the addition of a new section on international settlement agreements and their enforcement.[195] UML on Mediation brings an important emphasis to the enforceability of the settlement agreements which have been reached after a mediation procedure and provide a system for the enforceability of settlement agreements similar to arbitral award.[196]

The enforceability of a mediation clause in an MTDR agreement is referred to in

190 Guide (n 189), para 8.

191 <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements> (accessed at 29.09.2020).

192 See Status < https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status> Accessed 26.03.2020; Garimella and Siddiqui (n 63), 168.

193 Legislation based on or influenced by the Model Law has been adopted in 33 States in a total of 45 jurisdictions. Status <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status> Accessed 30.03.2020.

194 Guide (n 189), paras 7, 28; Article 1 of UML on Mediation.

195 <https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation> Accessed 30.03.2020.

196 "If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable." Article 15 of UML on Mediation; "A settlement agreement shall be enforced in accordance with the rules of procedure of this State, and under the conditions laid down in this section." Article 18/1 of UML on Mediation; see also Articles 18 and 19 of UML on Mediation.

Article 14 of UML on Mediation which is the successor of Article 13 of UML on Conciliation. This article which favours the enforceability of agreements to mediate[197] appears to require arbitrators and courts, by using the word "shall," to "give effect" to "express" agreements not to initiate arbitration or litigation "during a specified period of time" or "until a specified event has occurred."[198] Exceptionally, arbitrators or courts shall not give effect to a mediation agreement, if a party considers it necessary to "preserve its rights."[199] The exception in Article 14 should be formed narrowly, for example, by providing that the party is authorized to commence formal proceedings "to the extent they are *reasonably* necessary to preserve its rights". Such a phrase may introduce an objective test rather than leaving it up to the discretion of the party.[200]

The article emphasizes that initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to mediate or as a termination of the mediation proceedings. The drafters were not in favour of having a general rule that prohibited parties from recourse to litigation or arbitration pending a mediation procedure. The reason for such a formulation is that limiting the parties' right strictly to initiate arbitral or court proceedings might discourage parties from entering into mediation agreements. Moreover, preventing access to courts/tribunals may bring constitutional law issues that access to courts is regarded as an inalienable right.[201]

After UML on Conciliation, although scholars stated that it may be necessary to provide that Article 13 would include the enforcement of other ADR processes, such as negotiation requirements in an MTDR structure, at least to the extent of the sanction that may be entailed by failure to comply with the initial tier[202], negotiation is not inserted in UML on Mediation. Nevertheless, according to scholars, the Article's drafting allows an analogy to be derived in the terms that this provision could be construed as supporting the enforcement of ADR procedures like negotiation, at least to the extent of staying arbitral or judicial proceedings until the specified event has occurred.[203]

Although UML on Mediation is an important step for the harmonisation of mediation practice, this instrument may still not eliminate the uncertainties regarding the conditions for a valid mediation agreement and its enforcement. Neither Article 1 nor Article 14 regulates the formal or substantive conditions for a valid and enforceable mediation agreement. Even though following the adoption of UML on Conciliation

197 Garimella, Siddiqui (n 63), 168 ; Erkan (n 27), 55.

198 Carter (n 14), 456.

199 Guide (n 189), para 84.

200 Eric van Ginkel, 'The UNCITRAL Model on International Commercial Conciliation: A Critical Appraisal' (2004) JIA 21(1), 55.

201 Guide (n 189), para 83; Ginkel (n 199), 54; Garimella and Siddiqui (n 63), 168.

202 Carter (n 14), 456.

203 Garimella and Siddiqui (n 63), 168; Kayalı, MTDRC (n 24), 510; Carter (n 14), 457.

scholars suggested that Article 13 should be drafted in a clearer way to make certain that agreements to mediate are enforceable contracts under the law of the enacting state, and failure to fulfil the obligation to participate in the process is sanctioned by the courts or arbitral tribunals by refusing the claims to initiate proceedings until the mediation process has been completed[204], there is no clarity in Article 14 to the matter whether the state court or arbitral tribunal shall ex officio take into consideration the non-fulfilment of initial ADR tiers.[205] Additionally, Article 14 does not deal with the sanctions that may be entailed for the failure to comply with the initial mediation tier. Whether the arbitrators or courts stay or close the formal proceedings when parties do not complete mediation is not clear, in other words the question of whether non-fulfilling a mediation stage has an effect on the jurisdiction of the arbitral tribunal or the court has been ambiguous. Provisions on these matters still depend on national approaches[206] since this issue has a close connection to the constitutional right of access to court. In any case, even though such a clause would be added to UML on Mediation, it is most likely that states who get influenced by UML on Mediation could disregard this clause during adoption. Therefore, UML on Mediation does not have enough teeth to provide a legal basis for the enforcement of initial ADR procedures as a condition precedent.

B. Singapore Convention

While discussing alternative dispute resolution systems to arbitration and litigation, one of the most popular topics was the enforcement issue of the mediated settlement agreements besides the issue of enforcement ADR-MTDR agreements. As it is afore mentioned, UML on Conciliation 2002 did not provide any tool for such a need. In addition to the European Parliament's study in which it was 'suggested that if enforcement were uniform, mediation would become more attractive, in particular, in the international business sector', several surveys underlined the importance of enforcement of settlement agreements and the importance of and need for an international instrument to provide a global enforcement mechanism for settlement agreements resulting from mediation to encourage the use of mediation.[207]

204 Ginkel (n 199), 56.

205 Ekşi (n 2), 33.

206 Guide (n 189), para 36.

207 Directorate-General for Internal Affairs, '"Rebooting" the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU' (2014), <http://www.europarl.europa.eu/thinktank/fr/document.html?reference=IPOL-JURI_ET(2014)493042> (accessed at 30.07.2020); IBA Mediation Committee, Sub-Committee on the UNCITRAL Model Law on International Commercial Conciliation, IBA (Oct. 2007), <https://www.ibanet.org/ENews_Archive/IBA_November_2007_ENews_MediationSummary.aspx> (accessed at 30.07.2020); S. I. Strong, 'Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation' (Nov. 17, 2014), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302> (accessed at 03.08.2020); Queen Mary University of London School of Int'l Arb. And White & Case, 'International Arbitration Survey: Improvements and Innovations in International Arbitration' (2015), < http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf> (accessed at 04.08.2020); see also Erkan (n 27), 83 fn 22.

For such an instrument, after laborious discussions on the issue since 2014 following a proposal made by the USA to develop a multilateral convention similar to NYC, on 20 December 2018, UNCITRAL Working Group II adopted the final drafts of the Singapore Convention. On 7 August 2019, the Singapore Convention became open for signature and came into force on 12 September 2020 after it was ratified by three member states (article 14 of the Singapore Convention). Turkey, as one of the first 46 signatories of the Singapore Convention, ratified the Convention on 11 March 2021 by way of enacting Law Regarding the Approval of the United Nations Convention on International Settlement Agreements Resulting from Mediation numbered 7282, which entered into force on its publication date in Official Gazette, 11 March 2021. According to Article 14 of the Singapore Convention, the Convention shall enter into force in Turkey six months from 11 March 2021.

In order to mirror the provisions of the Singapore Convention, the UML on Conciliation of 2002 was amended and renamed as UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (UML on Mediation) which is mentioned above.

In the preamble of the Singapore Convention, it is stated that the adoption of a Convention on international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would complement the existing legal framework on international mediation and contribute to the development of harmonious international economic relations.[208] The Singapore Convention consists of sixteen articles. Article 1 of the Convention describes the scope of application by differing the settlement agreements which stay within and without the scope. With the heading of "definitions" Article 2 defines certain important terms for the Convention like "mediation". The definition of "mediation" in Article 2(3) is broad and could include mediation, conciliation and almost any form of alternative dispute resolution.[209] Article 3 provides both enforcement of the settlement agreements within the scope of the Convention and the right to invoke the settlement agreement as a defence before, for example, court to indicate the conflict has already been settled. Unlike NYC, which does not contain form requirements for arbitral awards, the Singapore Convention needs to specify form requirements because settlement

208 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf >(accessed at 28.09.2020).

209 Lucy Reed, 'Ultima Thule: Prospects for International Commercial Mediation' National University of Singapore Centre for International Law Working Paper 19/03 Schiefelbein Global Dispute Resolution Conference 2019, 15; Banu Şit Köseoğlu, Milletlerarası Ticarî Uyuşmazlıklarda Arabuluculuk Sonunda Varılan Anlaşmaların Singapur Konvansiyonu Çerçevesinde Taraf Devletlerde İcra Edilebilirliği, (Adalet 2020), 39; Ersin Erdoğan, 'Milletlerarası Arabuluculuk Anlaşma Belgelerinin İcrasına İlişkin BM Sözleşmesinin (Singapur Sözleşmesi) Değerlendirilmesi', International Symposium On Enhancing Mediation, Ankara 2018 https://aybu.edu.tr/hukuk/contents/files/ARABULUCULUK%20SEMPOZYUM%20KI%CC%87TABI.pdf (accessed at 19.04.2021), 191; Talat Kaya, 'Singapur Sözleşmesi ve Uluslararası Ticari Arabuluculuk Sonucunda Ortaya Çıkan Sulh Anlaşmalarının Tanınması ve İcrası Meselesi', 2019) 25(2) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, Prof. Dr. Ferit Hakan Baykal Armağanı, 989; For further information Erkan (n 27), 102-109.

agreements can be arrived at after mediation, negotiation, or other means of informal discussion (see Articles 2(2) and 4(1)(a), 4(2) of the Convention).[210] Article 4 defines the requirements for reliance on settlement agreements. Article 5 defines the grounds, the defences for refusing to grant relief to the settlement agreements. These defences in article 5 of the Singapore Convention were formulated by the Working Group II to be limited, exhaustive, stated in general terms, and not cumbersome to implement. Most have been drawn from Article V of the NYC with appropriate modifications to suit the context of mediation and are relatively uncontroversial.[211]

As certain examples have been given above, several similarities between the Singapore Convention and the NYC can be observed. However, there are some important differences between the Singapore Convention and the NYC. One of the most significant ones, which is the essential topic in this paper, is that the Singapore Convention covers only the enforcement of successful mediated agreements and not agreements to mediate, unlike the NYC which covers both arbitration awards and agreements to arbitrate.[212] It is important to emphasize that the Singapore Convention does not take any stand on the source of mediation. During the courses of UNCITRAL Working Group II the issue whether the convention should include the enforcement of agreements to mediate, just as the NYC provides for the enforcement of agreements to arbitrate discussed: are agreements to mediate enforceable and are they considered conditions precedent that precludes the progression to employing other dispute resolution modalities varies across jurisdictions? It was claimed that mediations are not always employed by parties pursuant to an agreement and therefore, it was considered too difficult to achieve consensus on including enforcement of agreements to mediate.[213] Thus, the consensus view was that the Convention should be limited to only mediated

210 Eunice Chua, 'The Singapore Convention on Mediation—A Brighter Future for Asian Dispute Resolution'Asian Journal of International Law, 9 (2019), 199; In Article 3, the term "recognition" was intentionally not used since this term is used for final and binding court judgments and arbitral awards. Şit Köseoğlu (n 209), 32-35, 62-63, 66; Sibel Özel, 'United Nations Convention on International Settlements Agreements Resulting From Mediation: Singapore Convention', (2019) 25(2) Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, Prof. Dr. Ferit Hakan Baykal Armağanı, 1199; Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-border Recognition and Enforcement of Mediated Settlement' 19 (1) (2019) 7, Pepp. Disp. Resolve. L. J., 35-36; regarding the requirement of being "writing", "It was also widely felt that the principle of functional equivalence embodied in UNCITRAL texts on electronic commerce could be reflected in the instrument, allowing for the use of electronic and other means of communication to meet the form requirements therein." Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fourth session (New York, 1-5 February 2016), para. 133 <https://undocs.org/en/A/CN.9/867> (accessed at 19.04.2021); For example, even exchange of e-mails between parties may meet the "writing" requirement. Erdoğan (n 209), 195; Kaya (n 209), 992; regarding the requirement of signed settlement agreement reached via electronic communication see Erkan (n 27), 157-162.

211 Report of Working Group II (Arbitration and Conciliation) on the Work of its Sixty-third Session, UNCITRAL, UN Doc. A/CN.9/861 (2015), at para. 93; Chua (n 210), 201; James E. Castillo, Singapur Sözleşmesi'nin Arabuluculuk Üzerine Yansımaları Sempozyumu, Turkey 2019, <https://adb.adalet.gov.tr/ekitap/sngprarbsempozyum.pdf> (accessed at 01.10.2020), 42; Erdoğan (n 209), 198; for similarities and differences between the two mentioned articles see Şit Köşgeroğlu (n 209), 75-83; Kaya (n 209), 997.

212 Reed (n 209), 13; Özel (n 210), 1195; Schnabel (n 210), 14; Since settlement agreement is not judicial, whether the parties agree to mediate or whether the dispute between parties is within the content of mediation agreement does not have impact on enforcement of mediated settlement agreement according to the Convention. Şit Köşgeroğlu (n 209), 34; Since parties' will on mediated settlement agreement covers and indicates automatically their intention to mediate, the mentioned preference is suitable. Kaya (n 209), 984.

213 See above the similar discussions for UML on Mediation regarding constitutional rights to access court.

settlement agreements[214] and the fact that the parties may have decided voluntarily to resort to mediation instead of commencing litigation, or an attempt at mediation may have been mandatory because it was ordered either by a legal rule or by a court or an arbitral tribunal was not accepted by the Working Group II as an issue which shall be regulated in the Convention.[215]

Among scholars it is emphasized for settlement agreements that the Singapore Convention converts what would otherwise be seen as purely a private contractual act into an instrument that can circulate under a legally binding international framework.[216] This new *sui generis* status[217] granted to international settlement agreements is "likely to boost mediation as a method of resolving cross-border commercial disputes, overcoming the concern – widespread in the business community – that if a party to a successful mediation procedure later has a change of heart, the company interested in compliance with the terms of the agreement will be forced to start over, commencing either litigation or arbitration".[218] Therefore a convention for enforcement of the mediated settlement agreements instead of a softer instrument is an achievement in itself[219], and in any event, by virtue of the Singapore Convention, the party willing to enforce an international settlement agreement resulting from mediation in a State that is a party to the Singapore Convention itself will be able to turn to the courts (or any other 'competent authority') of that State and request relief. It is also claimed that the Singapore Convention goes further than the EU Mediation Directive, which has not produced the impact hoped-for of growing the use of mediation in the EU.[220] The Singapore Convention has the potential to address the concerns with enforceability and

214 Report of Working Group II (Dispute Settlement) on the Work of its Sixty-Sixth Session, 51-53, A/CN.9/901 (Feb. 16, 2017).

215 Elisabetta Silvestri, 'The Singapore Convention On Mediated Settlement Agreements: A New String To The Bow Of International Mediation?' Revista Eletrônica de Direito Processual – REDP. Rio de Janeiro. Ano 13. Volume 20. Número 2. Maio a Agosto de 2019, 192.

216 Silvestri (n 215), 192; Schnabel (n 210), 11; Şit Köşgeroğlu (n 209), 30-31; In the same line Leed also states that the framework for *direct enforcement* by national courts (in ratifying states) of mediated settlement agreements of international commercial disputes which is established by the Singapore Convention makes settlement agreements a new *sui generis* legal instrument. Reed, 12; On the other side, Zeller and Trakman opposing the view which evaluated mediated settlement agreements as a special kind of contract by alleging that a mediated agreement is no more than a contract between the parties; the fact that a mediation agreement is concluded between the parties, and not with the mediator, confirms that it is no more nor less than a contract in the ordinary course. Bruno Zeller and Leon Trakman 'Mediation and Arbitration: The Process of Enforcement' (2019) *Uniform Law Review* 1 [2019] *UNSWLRS* 43, 10; in the same line Özel (n 210), 1191.

217 See Schnabel (n 210), 9-11.

218 Silvestri (n 215), 191

219 Chua (n 210), 196; Erkan (n 27), 300-302.

220 Chua (n 210), 198; for the reasons of why the Directive could not meet the expectations regarding enhancing use of mediation see also Directorate-General for Internal Affairs, '"Rebooting" the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU' (2014), <http://www.europarl.europa.eu/thinktank/fr/document.html?reference=IPOL-JURI_ET(2014)493042> (accessed at 30.07.2020); "Ten years since its adoption, the EU Mediation Directive remains very far from reaching its stated goals of encouraging the use of mediation and especially achieving a "balanced relationship between mediation and judicial proceedings" (Article 1)." A Ten-Year-Long "EU Mediation Paradox" When an EU Directive Needs To Be More …Directive <https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf> (accessed 1at 19.04.2021); see also Ali Khaled Ali Qtaishat, Hiyam Mah'd Harb Alshawabkeh, Hanadimahamoud Tawfek Saleh, 'European Union Directive on Mediation: Assessing the Developments and Challenges', European Journal of Scientific Research 148(3) (2018), 387, 393.

allow the positive attitudes towards mediation to lead to growth in the actual use of mediation and international mediation will undoubtedly become a fierce competitor of arbitration.[221] Consequently, adoption of the Singapore Convention is exactly an answer to the critics that the absence of a unified enforcement mechanism for international mediated settlement agreements is often seen as an obstacle to its greater use as a stand-alone method of international commercial dispute resolution.[222]

However, currently, it may still be said for global harmonisation, unlike NYC for arbitral award, there is no internationally accepted instrument for the recognition and enforcement of a settlement agreement reached after ADR process since the Singapore Convention has been signed by fifty-three countries[223], entered into force in three countries, Fiji, Qatar and Singapore yet and will enter into force at the end of 2020 in Saudi Arabia, at the beginning of 2021 in Belarus and Ecuador.[224] One of the most salient signatories of the Singapore Convention, the USA has not ratified the Convention yet. None of the EU states have even signed the Convention. It may, of course, be understandable, since the only strong opposition to authorizing work on the topic came from the EU and some of its member States who stated that there is no evident need for harmonization on the topic and opined that finding agreement on a harmonized approach beyond the model law's decision to leave the issue of enforcement to domestic law was unrealistic.[225]

221 Chua (n 210), 204-205; Silvestri (n 215), 198; Zeller and Trakman (n 216), 16; It has already been seen in the area of international dispute resolution. For example, the proposed changes to the ICSID rules on conciliation specifically suggests that the parties sign a settlement agreement embodied in the report so that parties in ICSID conciliation proceedings can benefit from the enforcement regime for mediated settlements contemplated by the Singapore Convention. 'ICSID, Proposals for Amendment of the ICSID Rules — Synopsis', para. 95 (Aug. 2, 2018),<https://icsid.worldbank.org/en/Documents/Amendments_Vol_One.pdf> (accessed at 29.09.2020); On the other hand, Reed claims that "*the New York Convention model [for mediation] is not a miracle-maker. Galileo's theory of the Earth orbiting around the Sun changed the field of astronomy forever, but the Singapore Convention on Mediation by itself will likely not have that kind of outsize impact. Recall the causation question of whether (a) it was the 1958 New York Convention and its prospect of direct enforcement of arbitral awards internationally that brought about the growth of international commercial arbitration; or (b) it was the expansion of global commerce post-World War II that naturally led to more international arbitration, which then necessitated a New York Convention. In all likelihood, it was some of both. Regardless, the streamlined and elegant New York Convention certainly improved the prospects and reality of international commercial arbitration. The Singapore Convention has the potential to do the same for international commercial mediation*." Reed (209), 22.

222 Zeller and Trakman (n 216), 3; It may be also suggested that the current problem with enforcement can be overcome if a mediated settlement agreement is incorporated into an arbitral award enforceable all over the world pursuant to the NYC. The combined use of mediation and arbitration offers parties the possibility of converting their settlement agreement into a consent arbitral award, which is often regarded as one of the key advantages of this dispute resolution approach. This may be the reason why parties use the combined process. Nigmatullina (n 2), 69-70; Özel (n 210), 1193; Sussman (n 28), 46-47.

223 Turkey is one of the signatories and Turkish scholars state that the Singapore Convention is in line with the Turkish Law. After ratification, the Singapore Convention is applied to enforce the settlement agreement which is mediated outside Turkey since within Turkey enforcement of settlement agreements is provided by the Turkish Code of Mediation for Civil Disputes (Law no: 6325, Admission date:07.06.2012, Official Gazette 22.06.2012/28331). Nuray Ekşi, 'United Nations Convention On International Settlement Agreements Resulting From Mediation (Singapore Convention)' UTTDER 9(1) 2020, 83-84; Ergun Özsunay, 'Arabuluculuk Sonucunda Yapılan Uluslararasi Sulh Anlaşmaları Hakkında Birleşmiş Milletler Sözleşmesi: Singapur Arabuluculuk Sözleşmesi Türk Hukukuyla Uyumu Bakimindan Bir Değerlendirme', (2019) 93(3), İstanbul Barosu Dergisi, 48.

224 Status<https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status> Accessed 29.09.2020.

225 Schnabel (n 210), 5; Zeller and Trakman (n 216), 8; Castillo (n 211), 43; Erkan (n 27), 300.

Hopefully, among the entry into force of the Singapore Convention in more countries in the long run, the Convention will "give more 'teeth' to mediation outcomes," and "providing for enforcement of settlement agreements" may also improve the use of this dispute resolution method".[226] Will the Singapore Convention be ratified by a significant number of leading trading States? Only time will provide an answer to this question. Even though it may enhance use of mediation, it should be underlined as a fact that this Convention itself does not provide enforceability of the pre-court or pre-arbitral ADR procedures since it focuses on the settlement agreement. Maybe by time and with the help of the Singapore Convention the parties will be more willing to refer to these ADR stages voluntarily.

VII. Conclusion

In an international environment where arbitration is becoming more and more judicially regulated, MTDR clauses are becoming commonplace and the support for the utilisation of ADR methods is also increasing. Nonetheless, a number of questions and potential difficulties with respect to the validity and legal effect of such clauses still remain to be answered.

Furthermore, national laws appear to have different legal approaches on a range from strict ones to more friendly ones regarding the requirements for a "sufficiently clear" MTDR clause linked to the enforceability of the initial tiers. Even court decisions regarding the issue in the same countries contradict each other. However, the pleasing fact should certainly be highlighted that the international courts that have been the most preferred and effective states as seats for dispute resolution, such as Singapore and Switzerland, have given judgments in favour of the enforcement of initial ADR tiers in MTDR clauses.

Although there are international attempts to promote the use of ADR methods by providing uniform rules for especially mediation procedure and enforcement of mediated settlement agreement, the two most important of them are UML on Mediation and the Singapore Convention, these instruments still remain incapable to obligate parties initiating pre-arbitral ADR stages due to certain concerns such as the right of access to court or the boundaries of national law systems. However, still these international instruments create the chance to push parties to fulfil the initial ADR steps with the hope of a globally enforceable settlement agreement.

226 S. I. Strong, Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation, < http://ssrn.com/abstract=2526302> (Accessed 22.4.2020), 47; Nadja Alexander, Singapur Sözleşmesi'nin Arabuluculuk Üzerine Yansımaları Sempozyumu, Turkey 2019, <https://adb.adalet.gov.tr/ekitap/sngprarbsempozyum.pdf> (accessed at 01.10.2020), 44; Erdoğan (n 209), 202; TKaya (n 209), 1006.

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