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Enforceability of mediation clauses in Belgium and the Netherlands

Ellen van Beukering-Rosmuller & Patrick Van Leynseele

Leading a horse to the water ... and making it drink?

Introduction

Mediation clauses, and more generally clauses calling for the resolution of disputes through non-adjudicative processes, are frequently incorporated in all types of contracts. When negotiating their agreement, the parties promise each other to attempt to first resolve their possible future disputes through various ADR means before stepping it up to an adjudicator, judge or arbitrator. These clauses may be simple (e.g.: 'We undertake to first negotiate in order to try to find a solution') or multi-tiered ('We undertake to first try to negotiate; if it doesn't work we'll appoint a mediator; and if mediation also fails we will then, and then only, request a decision on the basis of legal principles through arbitration or adjudication').¹

The choice for disputes to be resolved through ADR/mediation is usually based upon the possible positive effects, such as significant savings in time and money and the need to achieve more effective dispute resolutions than can be achieved through traditional means.²

For all non-adjudicative parts in ADR-clauses the issue discussed in this article is: are parties really bound to discuss, negotiate or mediate first if they come to the conclusion, once the dispute has arisen, that no meaningful communication with the other party is (believed to be) possible anymore?³ If one wants to talk and the other does not, are there legal mechanisms in place in order to enforce such clauses and, if so, are they meaningful, effective, let alone enforceable? Does it make sense to try to force an unwilling party to come to the negotiation table? And if you bring that unwilling horse to the river, can you really make it drink/honestly discuss possible settlement options in good faith?

- 1 On 'multi-tier' or 'multi-step' clauses see: N. Blackaby & C. Partasides, Redfern & Hunter on International Arbitration, Oxford University Press 2015, 2.88-2.93.
- 2 In cases where business practice requires ADR clauses, this instrument is sometimes a component of a more integrated conflict management system. See in particular A.J.A.J. Eijsbouts, Mediation as management tool in corporate governance, in: A. Ingen-Housz (Ed.), ADR in Business, practice and issues across countries and cultures, Volume II, Alphen aan den Rijn: Kluwer Law International 2011, p. 67-80.
- 3 Obviously, the legal issue of enforceability of an ADR clause only arises in case one party refuses to comply with its obligations whereas the other party demands performance.

Ellen van Beukering-Rosmuller & Patrick Van Leynseele

Translated into more legal terms: can the tension be resolved between the principle *pacta sunt servanda* (the parties have agreed to try to settle their dispute through ADR) and *party autonomy*? In the dynamic of dispute resolution, the legal issues raised by these questions ultimately boil down to the possible enforcement by courts or arbitrators of clauses that, in the end, are nothing other than ‘an agreement to try to agree’.

Obviously, the whole issue of enforceability of the mediation clause may be an awkward one. Starting from the notion that mediation is a voluntary process, why then raise the question of forcing an unwilling party to participate in a ‘voluntary’ process?

One may briefly mention the following reasons to do so nevertheless:

- contractual approach: ‘sticking to one’s word’: an ADR-clause is an undertaking that must be complied with and upheld;⁴
- public policy considerations: social peace will generally be better served by mediated solutions than by protracted litigation;
- statistical reality: in those countries or states where mediation can be imposed on unwilling parties, the success rate, though lower than in purely voluntary mediations, appears to be in excess of 60%. The efforts of ‘pushing the parties to mediation’ are therefore worth the attempt. This is confirmed by the experience in business mediations that even in cases of a highly escalated conflict a forced intervention of a mediator can often still be successful.⁵

This article will focus on (possible) legal means and methods aimed at making mediation clauses effective and/or enforceable. The issues raised herein are far from being unanimously agreed upon. Some authors regard the whole issue of enforcing mediation clauses as an ‘aberration’.⁶ In the Dutch context, one of us, E.J.M. van Beukering-Rosmuller, has argued that an enquiry by the court remains necessary about the significance or continued added value that mediation could bring about, before proposing the parties to comply with an undertaking to try mediation. In the Belgian context, the other author, Patrick Van Leynseele, is more ‘bullish’ in arguing that judges should be given the power to order mediation.

In the first part of this article the various possible ways to render mediation clauses effective will be examined. The second part will highlight the issues to be considered in connection with their enforcement. A particular emphasis will be

4 As for instance underscored in the ground breaking ‘Cable & Wireless’ decision of the UK’s Queen’s Bench division (*Cable & Wireless Plc v. IBM United Kingdom Ltd.*, [2002] E.W.H.C. 2059); see comments by K. Mackie: *The future of ADR Clauses after Cable & Wireless*, *Arbitration International*, Vol. 19 (2002), no. 3.

5 See e.g. E.M.L. Moerel & H.H. Franken, *ICT-mediation bij de SGOA. Een evaluatie in het licht van de Europese en Nederlandse rechtsontwikkelingen*, *Computerrecht* 2013/159 (hereinafter: Moerel & Franken 2013), par. 2 (toegang tot de rechter of arbiter bij overeengekomen mediation).

6 See K.C. Lye & J. Lee, *A persisting aberration: the movement to enforce agreements to mediate*, *IBA Mediation Committee Newsletter*, September 2008, p. 5.

put on the legal and judicial framework in Belgium and the Netherlands, but the situation in some other countries will also be outlined where relevant.

Legal framework

There is an obvious tension with regard to mediation clauses between on the one hand the principle *pacta sunt servanda* and on the other hand the *voluntary nature of mediation*, also from an access to justice perspective (article 6 ECHR). In principle an agreement to mediate is allowed under article 6 ECHR, provided it is parties' own, free and unambiguous choice.⁷ Nevertheless, the balance is delicate and the right to have access to a court weighs heavily. At EU-level, the 2008/52 Mediation Directive⁸ contains no provision on mediation clauses. The Directive's 14th recital underscores that national legislation that would make mediation compulsory or subject to incentives or sanctions, should not prevent the parties from exercising their right of access to courts.

On 26 August 2016 the European Commission's report on the functioning of the Directive (pursuant to article 11 Mediation Directive) was published.⁹ The Commission concluded that at this time there is no need to revise the directive. Therefore new legislation for further harmonisation is not to be expected any time soon. As a consequence there will be no uniform regulation of the legal status of mediation clauses.

It is for the Member States and their courts to determine the enforceability (and validity) of mediation clauses and the legal or jurisdictional consequences attached to them. As a rule this is being done on the basis of general principles of contract law and civil procedural law. International private law can also be of interest when dealing with the legal aspects of mediation clauses.

This article will not focus on the conditions that an ADR clause must comply with in order to be valid. Generally speaking, this ought to be analysed under the legal rules that apply to the contract in which the clause is inserted and possibly also under (international or) national rules that ADR clauses may be subject to in certain countries. These may include: (i) certainty – which ADR mechanism must be applied? – (ii) valid consent – particularly relevant in the business to consumer (B2C) area – (iii) scope of the clause – which type of disputes does the clause apply

7 ECHR 27 February 1980, Application no. 6903/75, *Deweert v. Belgium*.

8 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ EU 2008, L 136/3.

9 Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, COM (2016) 542 final.

Ellen van Beukering-Rosmuller & Patrick Van Leynseele

to? – etc.¹⁰ For the purpose of this article – except for the consumer area which we will touch upon – we will assume that the mediation clause has been validly agreed to among the parties for the specific dispute(s) at stake.

How to ‘enforce’ a mediation clause?

What sort of legal means and methods can one think of in order to ‘enforce’ a mediation clause? We can distinguish several. Some have a procedural effect, others are of a financial nature. They will be discussed hereinafter.

Procedural methods

- *Inadmissibility of the proceedings*

A lawsuit initiated in disregard of an ADR clause calling for an attempt to settle the matter through ADR prior to filing the matter in court, may be declared inadmissible as long as the settlement has not been attempted. Depending on the applicable rules of civil procedure, this may depend on statutory provisions or on the ‘case management’ power given to the courts. Complying with the clause then becomes a condition for the admissibility of a lawsuit.

An example of this approach is found in France. In 2016, after some hesitation, the Supreme Court declared inadmissible a lawsuit that had been filed in disregard of a clause calling for mediation as a first step in the sequence of dispute resolution means.¹¹ That ruling is remarkable. It appears from the few facts indicated in the decision that a lawsuit had been filed in disrespect of an existing mediation clause in a rental agreement. The defendant had objected to the admissibility of a lawsuit on that basis. The court of first instance declared the case inadmissible. The plaintiff filed an appeal. Pending the proceedings, a mediation took place. It did not yield a solution. The initial plaintiff therefore pursued the appeal it had filed, to which the defendant on appeal again objected on the basis of the notion that, under French Rules of Civil Procedure, a cause for inadmissibility of a lawsuit cannot be made good after the initiation of the proceedings. The court of appeal upheld this exception and confirmed the inadmissibility not-

10 See on the binding effect and validity of mediation clauses, in particular in the context of B2C ADR: M. Piers, *Is Europe skipping a step? Exploring the harmonization of ADR agreements*, Maastricht Journal of European and Comparative Law (MJ) 2013/4, p. 506-520 (hereinafter: Piers 2013). In relation to consumer ADR see also Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

11 Cass. Fr., civ. Ch. Comm. 6 October 2016. See also in relation to a separate mediation clause the preceding decision of the Cour de Cassation 2009, no. 08-10.866 (Cass., Civ. 1ere 8 April 2009). More on this subject: D. Wietek, Chapter 12 France, in: N. Alexander, S. Walsh et al. (Eds.), *EU Mediation Law Handbook*, Alphen aan den Rijn: Kluwer Law International 2017 (hereinafter: *Mediation Law Handbook 2017*), p. 299-348.

withstanding the fact that the mediation had, in the meantime, taken place. The French Supreme Court affirmed.

In a more recent decision, the French Supreme Court did, however, set a limit to such inadmissibility: it did declare that a counterclaim is admissible even if the counterclaimant has not requested a mediation before filing that counterclaim. Once the trial had been correctly initiated (in that case, the claimant had complied with the mandatory mediation under an existing mediation clause), there no longer is a reason for the defendant to do so as well: the Supreme Court indicated that the admissibility of a counterclaim is not subject to the same rules of admissibility as a principal claim, so that a defendant is not barred from filing a counterclaim simply because no request of a mediation relating to that counterclaim had been filed.¹²

- *Suspension of proceedings*

If a lawsuit is filed without first abiding by the process called for under an existing mediation clause, again depending on the applicable rules of civil procedure, the court may bar the continuation of the proceedings as long as a mediation has not been attempted. This is not a cause of inadmissibility of a lawsuit but a cause for suspension of ongoing proceedings.

One example of such ‘enforcement’ of a mediation clause is the Belgian section 1725 § 2 of the Judicial Code. If the defendant in a lawsuit raises the issue of the existence of a mediation clause as a first defence (*‘in limine litis’*), the court must suspend the continuation of the proceedings until the mediation has taken place, unless, with regard to the dispute in question, the mediation clause is invalid or has ceased to exist.¹³

This implies that the plaintiff is prevented from pursuing his lawsuit until the attempt to resolve the dispute through mediation has taken place. The lawsuit will, if necessary, be resumed after it has been indicated by the parties, or one of them, that the mediation process has been terminated.¹⁴

Quite clearly, this procedural mechanism has been enacted as a means to factually enforce mediation clauses. Indeed, upon request of the defendant, it prevents a plaintiff who resorts to litigation before having attempted mediation, from continuing a lawsuit that was initiated in contravention of a mediation clause. This rule was enacted by a statute of 21 February 2005, which came a few years before the Mediation Directive was adopted. The law was not changed when the Media-

12 Arrêt n° 808 du 24 mai 2017 (15-25.457) – Cour de Cassation – Chambre commerciale, financière et économique – ECLI:FR:CCASS:2017:CO00808.

13 The wording of the mediation clause is also important. If mediation is a contractual obligation, mediation is mandatory. If mediation is phrased as an option, it is not.

14 Additionally, the Law provides in article 1725 § 3 that the mediation clause does not prevent requests for provisional or conservatory measures. See also on article 1725 Belgian Judicial Code i.a.: K. Andries, *Het bemiddelingsbeding: geldigheid, effect, inhoud en afdwingbaarheid*, Brussel: Larcier 2007 (hereinafter: Andries 2007) and D. Nigmatullina & J. Billiet, Chapter 3 Belgium, in: *Mediation Law Handbook 2017*, p. 59-92.

Ellen van Beukering-Rosmuller & Patrick Van Leynseele

tion Directive came into force because it already complied with all the mandatory principles contained therein. It even went further than the directive required since, for instance, the rule amounting to a virtual enforcement of mediation clauses is not a mechanism provided for by the Mediation Directive.

A similar rule exists in Italy.¹⁵

- *Court ordered mediation*

Under certain civil procedure systems,¹⁶ the court may have the power to order the parties to participate in a mediation prior to continuing the lawsuit; a 'court ordered mediation'. In such cases courts will refer to mediation if they find that there are clear grounds that mediation might be appropriate.¹⁷ One can imagine that judges might be even more inclined to do so if they realize that the contract which gave rise to the dispute contains a mediation clause, even if none of the parties has raised the existence thereof as a bar to the continuation of the proceedings.¹⁸

Less intrusive on the parties' (un)willingness to attempt a mediation, there exists a line of cases where judges implicitly 'force' the parties to attempt a mediation

15 Art. 5.5 of the Legislative Decree 28/2010 (as amended by the Legislative Decree 69/2013).

16 The most obvious being the United States, notably since the enactment of the Alternative Dispute Resolution Act of 1998 that has required all federal trial courts to establish an ADR program for litigants and further allowed courts to mandate participation in those programs. Individual courts have also enacted local rules or standing orders, which obligate litigants to consider or participating in mediation. Some court orders mandate mediation use as part of pretrial procedure, while other state that participation in mediation is a condition precedent to retaining the case on the trial docket. An obligation to mediate (or participate in another ADR process) is also included in pretrial scheduling orders. See further on this: K.K.Kovach, *Mediation*, West Nutshell Series, Thompson 2003, p. 99 et seq. In Italy, judges may also order the parties, at any stage of the judicial proceedings, to mediate in a vast number of types of (civil) cases, as indicated in art. 1-bis of the Legislative Decree 28/2010 (as amended by the Legislative Decree 69/2013).

17 See for indications pro and contra the suitability of mediation: M. Pel, *Referral to Mediation*, Den Haag: Sdu Uitgevers 2008.

18 Except for the system of 'court ordered mediation' the judge will normally only refer to mediation in case a mediation clause has been provided for and relied upon by a party. This follows from the principle of party autonomy.

because they believe that this would be in the parties' own interest.¹⁹ The extracts quoted in the footnote are good examples of the changing attitude of judges in Belgium towards mediation.²⁰ No doubt that this line of case law would even be more justified in the presence of a mediation clause.

In Belgium, it is expected that a draft bill (currently in its pre-parliamentary phase) will include new powers given to the judges to order mediation, irrespective of the parties' willingness or prior undertaking to do so in a mediation clause. The cabinet of the Minister of Justice Koen Geens – who has repeatedly expressed that he favours mediation as a dispute resolution method – has circulated a note to the regional bar associations in 2016 indicating that the Minister would introduce new legislation aimed at amending the power of judges to order mediations. The draft bill²¹ was not yet officially available at the time of closing the text of this article (24 November 2017).

• *Evaluation of added value of mediation*

The 'enforceability' of mediation clauses might also be 'supported' by legal systems, in particular by court referral to mediation²² in the presence of a mediation clause, provided certain conditions are met. A good example of this can be found in the Dutch legal system. In particular, the Netherlands courts struggle with the problem of the legal status of mediation clauses.²³ This is remarkable for a legal

19 See, for instance, the following cases from Belgian courts:

Court of Appeal Mons 23 February 2016, JT 2016, p. 208: 'The court observes that the dispute among the parties is intense and that it presents certain characteristics which, undoubtedly, allows the court to think that the parties would be well served in attempting to solve it through alternative means. It therefore invites the parties not to terminate the mediation that had been put in place before.'

Court of Commerce Hainaut (div. Mons) 24 December 2015, JT 2016, p. 209: 'The court draws the parties' attention to the fact that this file displays many reasons to attempt a mediation, in particular in view of the fact that the plaintiff might decide to file an appeal.'

Court of Commerce Hainaut (div. Mons) 22 December 2015, JT 2016, p. 209: 'The court realizes that the filing of these proceedings has escalated the conflict and that renewing the dialogue among them at this stage would be difficult. It therefore recommends to the parties to envisage mediation. The intervention of a neutral third party fully aware of conflict resolution techniques in commercial matters might help the parties to overcome their differences.'

Justice of the peace Wavre 12 February 2015, JT 2016, p. 212: 'The judicial truth is not always equivalent to the parties' truth. The court senses that, behind this trial, there are unformulated disagreements which, if unsolved and added to this litigation the solution of which, after a long and costly trial will not satisfy them, will only complicate relationships among the parties. There is another dispute resolution mechanism that allows the parties to elaborate their solution together after having listened to each other: mediation.'

20 See also comments P. Van Leynseele: *La médiation a le vent en poupe!*, JT 2016, 201.

21 See in that respect: *La Tribune* no. 88 of 18 February 2016.

22 By which is meant mediation pursuant to a proposal made by a judge. According to Dutch law such referral is not regarded as an order, but as a proposal and thus the parties are not obliged to accept it.

23 More elaborate on this issue: E.J.M. van Beukering-Rosmuller, *De juridische afdwingbaarheid van een mediationclausule. Een bespreking van de procesrechtelijke invalshoek, aan de hand van recente wetgevingsontwikkelingen*, Tijdschrift voor Arbitrage (TvA) 2017/2.

Ellen van Beukering-Rosmuller & Patrick Van Leynseele

system that is known for its culture of consensual dispute resolution.²⁴ Like the Mediation Directive itself, the Act implementing the directive contains no provision on mediation clauses. The Dutch Implementing Act, which entered into force on 21 November 2012,²⁵ is a separate act. In accordance with the directive, its scope is limited to cross border (civil and commercial) disputes.²⁶ Dutch legislation for domestic mediation has been in the pipeline for a few years now. A private member bill, proposed in September 2013 by the then MP Van der Steur (a member of the VVD, the liberal democratic party) provided that mediation clauses are in principle legally enforceable.²⁷ The regulation was clearly inspired by article 1725 of the Belgian Judicial Code. The aim of the proposal was to depart from the current Dutch case law, according to which mediation clauses are in principle not enforceable (see in particular the Supreme Court's judgement of 20 January 2006, NJ 2006/75).²⁸ The private member bill was withdrawn in June 2015, after MP Van der Steur's departure from Parliament. A new (draft) bill on the promotion of mediation ('Wet bevordering mediation') proposed by the government was published for consultation on 13 July 2016. The draft is based upon the withdrawn private member bill, however with some significant amendments.²⁹ One of these changes concerns the mediation clause.

In the latest proposal the regulation with regard to mediation clauses is narrowed down to the obligation for the court to examine whether mediation could still have an added value in case one party refuses to satisfy her commitment to medi-

- 24 See also M. Pel, Chapter 22: The Netherlands, in: *Mediation Law Handbook 2017*, p. 563-586.
- 25 Wet van 15 november 2012 tot implementatie van de richtlijn betreffende bepaalde aspecten van bemiddeling/mediation in burgerlijke en handelszaken (Wet implementatie richtlijn nr. 2008/52/EG betreffende bepaalde aspecten van bemiddeling/mediation in burgerlijke en handelszaken), Stb. 2012, 570. More elaborate on the Implementation Act: E.J.M. van Beukering-Rosmuller & P.C. van Schelven, *De implementatie van de Europese Mediationrichtlijn in het Nederlandse recht. Juridische gevolgen en betekenis voor de commerciële praktijk*, Den Haag: Boom Lemma uitgevers 2013 (hereinafter: Van Beukering-Rosmuller & Van Schelven 2013).
- 26 The Netherlands is one of the few EU countries that has decided not to apply the Directive's provisions to internal mediation processes as allowed under the directive (see the Directive's 8th recital).
- 27 See for the parliamentary history in particular: Kamerstukken II 2012/13, 33723, 3 (MvT), p. 11, p. 20-21; Kamerstukken II 2013/14, 33723, 6 (Gew. MvT), p. 16, p. 27-28.
- 28 More on this case law : E.J.M. van Beukering-Rosmuller, *TvA 2017/2*, par. 3. According to current Dutch law judges usually require a finding of continued willingness to mediate of all parties to render legal effect to a mediation clause.
- 29 The closing date for responses to the consultation was 30 September 2016. With regard to the proposed bill and the explanatory memorandum, see: www.internetconsultatie.nl (look under closed consultations). The progress in the legislative process is explained in a letter from the Minister of Justice and Security to the chair of the House of Representatives dated 16 January 2017, Kamerstukken II 2016/17, 29528, 11. Expert sessions have been announced aiming at a final proposal that would have a support as broad as possible. The new legislative proposal has been criticised as well. On 26 January 2017 Minister Van der Steur resigned as Minister of Justice and Security. At the closing of the text of this article (24 November 2017) no new developments are known.

ate notwithstanding the existence of a mediation clause invoked by the other party.³⁰

In the Netherlands judges are increasingly skilled in conflict diagnosis and the selection of cases that seem suitable for mediation. Judges seem to be well equipped to induce parties to consider – as far as this is (at that moment in time) still feasible – the possible added value of mediation. If a judge considers mediation to be a better way to resolve a conflict, then his duty to examine whether there is an added value in ‘enforcing’ the clause (in case a mediation clause is invoked by one of the parties) should bring about that he will undertake to explain this to the unwilling party and propose mediation. Thus the ‘enforceability’ of mediation clauses could be supported.³¹ It remains to be seen, however, whether the said provision will truly be enacted and whether courts will be willing to less focus on a completely voluntary nature of mediation.

Financial remedies

- *Penalty clauses*

An elaborated ADR clause may contain wording calling for a contractual/financial penalty to be paid in case one of the parties skips a step in the ADR process that the clause in a commercial contract calls for. This type of clause aims at avoiding the – frequently unsurmountable – difficulty of determining the value of the harm caused by the disregard of a mediation clause: how does one prove that the fact for a lawsuit to be initiated without first attempting to settle the matter amicably, in and by itself, causes harm justifying the payment of damages; and: in what amount? The lump sum penalty, considered as a civil fine in case of breach of contract, may work as a sufficient incentive not to skip a mediation phase in the dispute resolution processes agreed to. According to both Belgian and Dutch law penalties should however be calculated realistically. Moreover, the insertion of penalty clauses in agreements on ADR is not very common, since it could be interpreted as a sign of distrust.³²

- *Apportionment of litigation expenses*

Courts ruling on how to deal with the issue of distribution of the litigation expenses at the end of a trial, may decide to depart from the traditional rule of apportionment of litigation expenses in line with the outcome of the trial on the merits. Since the famous ‘Dunnett v. Railtrack’ English Court of Appeal’s

30 More elaborate on this issue: E.J.M. van Beukering-Rosmuller, TvA 2017/2, par. 4. In the draft bill this new provision is formulated as article 22a, second paragraph of the Code of Civil Procedure, but it will need to be renumbered when the bill is continued. As a consequence of recent legislation (Quality and Innovation Judiciary Programme; KEI) article 22a of the Code of Civil Procedure already exists.

31 This practical approach could be applied similarly to arbitration in case mediation has been agreed as a condition precedent to arbitration (as a part of a multi-step clause). See E.J.M. van Beukering-Rosmuller, TvA 2017/2, p. 14.

32 K. Andries, Bemiddelingsbeding, Nieuw Juridisch Weekblad (NjW) 2011 (hereinafter: Andries 2011), p. 325.

Ellen van Beukering-Rosmuller & Patrick Van Leynseele

decision,³³ which ruled that the defendant, although successful on appeal, should be penalized in costs, some courts and legislators have been thinking about such departure from the traditional ‘The winner takes it all’ rule.

Allowing the courts to apportion judicial expenses not only on the basis of the outcome of the case on the merits but also on the attitude of the parties before and during the trial and on their willingness to attempt to find a negotiated solution, might be a sufficient incentive for the parties to attempt solving the case amicably before filing proceedings; or, in other words, as a sufficient deterrent to initiate proceedings without first attempting to settle the case in order to avoid a possible ‘Pyrrhus victory’ by winning a case but paying gains out in expenses and judicial costs. If they have agreed to an ADR clause in their underlying contract, the parties should even more bear in mind that courts may be more inclined to sanction parties’ later disrespect of their initial undertaking.

In Belgium, the rules of civil procedure – see article 1017 and 1018 of the Judicial Code – provide for the following:

- except if the parties have agreed otherwise or if specific laws provide otherwise, judicial expenses are to be borne by the losing party;
- the court may decide differently if judicial expenses have been incurred through the fault of a party;
- in its wisdom, a court may apportion costs differently if both parties have lost their case on certain issues they have raised (or in family matters);
- costs that the court may award the reimbursement of, include mediator fees to the extent the mediator was appointed by the court (which, in the current state of the law, may only occur with the consent of parties).

Strictly speaking, this wording of the Judicial Code does not allow a judge to award costs to the losing party following the English ‘Dunnett v. Railtrack’ doctrine. Article 1022 of the Code, however, allows the judge to adapt the amount of the fixed indemnity that serves as a partial compensation for legal fees incurred by the winning party, depending on a number of conditions. One of these is the ‘obviously unreasonable nature of the situation’. Arguably, this might include a situation in which the winning party has unreasonably refused to attempt to settle the matter through mediation. If so interpreted, the burden of judicial expenses might be reduced for the losing party. However, there is no published case law in Belgium (yet?) that confirms this line of thinking. In the same vein, it is known to the authors that, when commenting upon the draft bills presented by the Ministry of Justice on certain reforms of the Code of Civil Procedure, the regional bar associations objected against such rule to be included in the code. They expressed a concern that this would give excessive discretionary powers to the courts.

33 EWCA Civ 303, [2002] 1 WLR 2434, [2002]. See for a comment: K. Mackie, *Hurst v. Leeming*, defining ‘unreasonable’ refusal to mediate, CEDR Library, www.cedr.com/articles/?item=Hurst-v-Leeming-defining-UNREASONABLE-refusal-to-mediate. See also: C. App. (civ. Div.) *Halsey v. Milton Keynes General NHS Trust*, May AA, 2004, [2004] EWCA (Civ.) 576.

With regard to the Belgian context Patrick Van Leynseele, one of the authors of this article, is of the opinion that the courts should be given the power to apportion judicial expenses differently because it constitutes an effective tool (i) to encourage the parties to reasonably evaluate their respective positions before refusing to attempt to find a solution through ADR means, and (ii) to sanction them afterwards if they don't. As neutral evaluators, courts should rule not only on the parties' position on the merits, but also on the parties' attitudes in handling their disputes. Similarly to the idea that the courts may already now refuse to award needless litigation expenses, the courts should also be given the power to apportion litigation expenses differently if the entire trial could have been avoided if one of the parties had not behaved unreasonably.³⁴

In the same line, it is worth noting that article 8.4 bis of the Italian Legislative Decree 28/2010³⁵ provides that a judge may order the parties to participate in a mandatory (information) meeting with a mediator, the aim of which is to persuade the parties to try mediation. The decree allows the courts to impose financial sanctions on the parties who would not comply.³⁶

In the Netherlands, according to article 237 of the Code of Civil Procedure, the rule of apportionment of litigation costs is that costs are to be borne by the losing party. There is only limited room to deviate from this rule. In this context in particular the final sentence of article 237, first paragraph is of relevance. The court can leave costs that have needlessly been applied or caused at the expense of the party by whom these costs were applied or caused.³⁷

The latter also applies to the winning party. However, in Dutch law it is assumed (at the moment) that this provision should not play a role in case of an unreasonable refusal to enter into mediation. Doubts exist in particular as to whether courts might not interfere too much into the procedural aspects and (the assessment of) the content of the mediation.³⁸

Issues to be considered in connection with enforcement of mediation clauses

Various legal issues are to be considered when trying to understand how mediation clauses work and may be enforceable.

34 See also the developments in connection with the ECJ's 'Menini' decision (section 'Accession contracts, consumer protection and access to justice' hereinafter).

35 Of 4 March 2010, as adapted by the Legislative Decree 69/2013.

36 See Report Giuseppe De Palo e.a. to the DG for Internal Policies of the EC: 'Reboot of the Mediation Directive, assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU', p. 39 et seq.

37 In Dutch: 'Ook kan de rechter de kosten die nodeloos werden aangewend of veroorzaakt, voor rekening laten van de partij die deze kosten aanwendde of veroorzaakte.'

38 See in particular M. Brink, 'Verplichtstelling' van mediation?, *Nederlands Juristen Blad (NJB)* 2011/1998.

Ellen van Beukering-Rosmuller & Patrick Van Leynseele

Autonomy of a mediation clause

An agreement to try to resolve an existing dispute through mediation can obviously stand on its own. Two disputants may agree to try to settle an already existing dispute with the assistance of a mediator. One will then talk about an agreement to mediate rather than a mediation clause.

Frequently, however, a mediation clause will be inserted in a commercial (or other) agreement. When entering into that contract, possibly long before any dispute relating to that contract arises, the parties agree to try to resolve their difficulties through mediation. What is the status of such mediation clause if the contract is terminated or cancelled? Can the mediation clause still be relied upon if the contract is no longer in force?

Compare that with an arbitration clause: the parties to a contract may agree that future disputes should be adjudicated through arbitration. For such arbitration clauses, there is a long-standing doctrine that it must be regarded as a provision that is autonomous from the underlying agreement itself. Under that doctrine, the existence of the agreement to arbitrate embodied in the arbitration clause is regarded as separate from the agreement itself and is therefore not invalidated if the contract itself is declared null and void, is rescinded or otherwise terminated. The arbitration clause ‘survives’ the contract itself and may be relied upon for difficulties that find their source in the underlying agreement even after its termination or if its validity is called into question.³⁹

Mutatis mutandis, the same must apply to mediation clauses (or more in general, to any sort of ADR clause).⁴⁰ Section 1725 §1⁴¹ of the Belgian Judicial Code implicitly, but clearly, provides so. Its wording, which refers to disputes that may include those dealing with the validity of the agreement or its termination, implies that the mediation clause may be relied upon even for disputes in which the existence of the contract itself is at stake or for contracts that have already been terminated. The mediation clause simply survives the contract. The wording used in the statute regarding mediation clauses is typically that which, in practice, justifies the autonomous nature of an arbitration clause.

As mentioned before, there is no legal provision on mediation clauses in Dutch law. Nevertheless, the autonomous nature of mediation clauses is assumed in Dutch law too.

39 In Belgian law, the principle is expressed in art. 1690 §1 of the Code of Civil Procedure. See Cass. 22 October 1987, Pqs. 1988, I, 107; see also J. Matray, *L'autonomie de la clause d'arbitrage*, in: *Arbitrage et modes alternatifs de règlement des conflits*, C.U.P. Liège 2002, p. 147 et seq. In Dutch law, the principle of ‘séparabilité’, applied to arbitration, is formulated in article 1053 of the Code of Civil Procedure. See: *Burgerlijke Rechtsvordering* (losbladige editie, Deventer), art. 1053 Rv, aant. 1 (H.J. Snijders); HR 27 december 1935, NJ 1936/442.

40 Andries 2007, p. 10-11; Andries 2011, p. 318-321.

41 § 1. ‘Elke overeenkomst kan een bemiddelingsbeding bevatten, waarbij de partijen zich ertoe verbinden voor eventuele geschillen in verband met de geldigheid, totstandkoming, uitlegging, uitvoering of verbreking van de overeenkomst eerst een beroep te doen op bemiddeling en pas dan op elke andere vorm van geschillenbeslechting.’

In multi-tiered ADR clauses (typically: undertaking to negotiate, then mediate, then initiating arbitration or court proceedings) the autonomous nature of the clause will require the parties to follow the sequence indicated. The validity of each phase of such process must be appraised separately from the other phases: each phase is 'autonomous'.⁴² The validity of the relevant part of the process must therefore be scrutinized on the basis of the rules that apply to that particular phase. For instance, a possible legal dispute about the mediation phase does not imperil the arbitration part of the clause, and vice versa.

Accession contracts, consumer protection and access to justice

An issue about the validity of a mediation clause can easily rise if inserted in an accession contract, especially in agreements with consumers. The latter enjoy special protective measures, including against abuse of power. Typical for the consumer law area are issues of valid consent, protection against unlawful or unconscionable clauses, etc.

Particularly relevant on this topic is Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).⁴³ In relation to the principle of liberty, Article 10, first paragraph provides:

'1. Member States shall ensure that an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute has materialised and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.'

This provision applies to agreements as a consequence of which a consumer is deprived of the right to apply to a court for the resolution of a future conflict. Hence, such agreements are not binding on consumers. It is unclear whether this also includes agreements according to which consumers are *temporarily* deprived from this right, for instance on account of a mediation clause.⁴⁴ This cannot be concluded from the Directive's recitals either. It will be to the European Court of Justice to give a decisive answer.

In the Netherlands the Directive on consumer ADR has been implemented by the Implementing Act on non-judicial settlement of disputes with consumers ('Implementatiewet buitengerechtelijke geschillenbeslechting consumenten'), that

42 In practice, however, parties sometimes agree on the indivisibility of the clause. See Andries 2011, p. 321.

43 OJ EU 2013, L 165/63. In article 2, paragraph 2, certain procedures are excluded from the scope of application of the Directive. The Directive does i.a. not apply to procedures initiated by a trader against a consumer (see article 2, paragraph 2, sub g).

44 After all, a party can request a decision through adjudication (or arbitration) in case a mediation does not result, or only partly results, in a settlement of the conflict.

Ellen van Beukering-Rosmuller & Patrick Van Leynseele

entered into force on 9 July 2015.⁴⁵ Article 10 of the Directive on Consumer ADR, that aims at safeguarding the voluntary nature of ADR, has been implemented in article 9 of the Implementing Act. Article 9 gives rise to the same questions with regard to the validity of mediation clauses as article 10 of the Directive does in relation to consumers.⁴⁶ However, as was noticed before, according to current Dutch law mediation clauses are in principle not enforceable at all.

In Belgium the Directive on consumer ADR has been implemented by article VI.83 of the Code of Economic Law, which considers abusive any clause in a contract with consumers the effect of which is to deprive the consumer from access to his natural judge. The sanction is nullity. This squares with the general approach of the Belgian statute on market practices, which aims at protecting the consumer against any provisions, or combination of provisions in the contract, which generate an imbalance between consumer and trader. Whether there is imbalance depends on the nature of the contract at stake, with a reference, at the time the contract is entered into, to all circumstances surrounding its conclusion. In addition, the possibly abusive nature of a clause must be judged in light of all of the clauses of the contract.

Hence, neither national system provides an answer to the issue whether the temporary suspension of access to the court through the effect of a mediation clause would be acceptable in relation to consumers in view of the general prohibition to avoid recourses to the judicial system.

In that connection, it is interesting to note that the EU Court of Justice has ruled in the *Menini* decision⁴⁷ (which in essence deals with the issue of access to justice when a statute provides for mandatory mediation prior to filing lawsuits and for certain accompanying measures organized by law), *inter alia* that:

- mandatory mediation, provided it does not prevent a later recourse to the judiciary but consists only of a mandatory first pre-trial step, is, under certain circumstances, compatible with European law;⁴⁸
- failing to participate in the mediation process without a valid reason may be sanctioned financially (contrary to the right to step out of the process, which must remain absolute and must not be justified).

The latter part of that decision may be relevant for the interpretation of the validity or enforceability of a mediation clause. The Court of Justice has ruled that if a refusal to participate in a mandatory mediation process is not justified, this may be sanctioned. In the same line of thinking, it does not seem unduly burdensome to require a party to state its grounds for refusing to participate in a mediation

45 Stb. 2015, 160.

46 See also M.W. Knigge, *Procederen bij een geschillencommissie na implementatie van de ADR-richtlijn*, Tijdschrift voor Consumentenrecht en handelspraktijken 2015-5, p. 253-263. The Implementing Act does not apply to a procedure initiated by a trader against a consumer. In that situation however, the validity of such a clause may be questioned on other grounds.

47 C-75/16 of 14 June 2017: *Menini-Rampanelli/Banco Popolare Società Cooperativa*.

48 See also EU Court of Justice 18 March 2010, C-317/08-320/08: *Alassini/Telecom Italia*.

process when invited to do so. The justification provided might later on be scrutinized, during the adjudication of the ensuing apportionment of litigation costs after a decision on the merits. As the case may be, an unreasonable motive or the absence of a motive to justify a refusal to participate in the mediation that was offered, might then perhaps be sanctioned by the court through an apportionment of litigation expenses that differs from the classical ‘The winner takes it all’ principle; this, of course, where the Rules of Civil Procedure allow for that.

Scope of the mediation clause

Obviously, determining the scope of any mediation clause will depend on its wording. An important distinction can be made depending on the type of conflict that the contract relates to. Some mediation clauses relate to specifically indicated conflicts that can arise between parties.⁴⁹ However, in most cases mediation clauses are formulated generically, covering a broad range of conflicts that may arise.

In practice, many mediation clauses will not be particularly detailed and might therefore generate uncertainty about the true intentions of the parties or about the way they intended to organize the mediation process.⁵⁰ This can be an important reason to prefer mediation clauses that refer to the mediation rules of a mediation Center or Institute, which are incorporated by reference into the contract (hereafter: ‘mediation rules’). These will be much more precise and detailed. They are binding on the parties and will have to be applied.

In the absence thereof, statutory provisions may complete the mediation clause regarding certain aspects of the process. If not, the parties will have to devise and agree on the process itself, certainly until a mediator is appointed. When that happens, the mediator may be – will be – instrumental in organizing the process from then on, in all logic always with the approval of the parties and with a particular attention to creating a well-balanced process.

Typically, what is there that should be dealt with when designing a mediation process? In that respect, we consider certain consequences of mediation clauses to be in the nature of a ‘duty to achieve’ (*resultaatsverbintenis*), others as a mere ‘duty to attempt’ (*middelen- of inspanningsverbintenis*).

Request for mediation

A proposal of mediation to the party with whom the dispute has arisen may be governed by provisions in the clause or in the mediation rules. If so, these will have to be followed unless the parties agree otherwise. An offer to attempt to solve a dispute through mediation may also have some statutory consequences attached to it.

49 E.g. conflicts with regard to additional costs in construction or IT-projects.

50 See also Andries 2011, p. 321-324.

Ellen van Beukering-Rosmuller & Patrick Van Leynseele

In Belgium, for instance, a simple request for mediation (sent by registered letter), referring to a specific dispute and affirming one's rights:

- temporarily suspends the statute of limitation (for a period of one month, which will be extended to one month after the termination of the mediation process (if one is started)),⁵¹
- triggers the running of interests in favour of the creditor. This rule allows a creditor not to have to write a demand letter in aggressive wording as he normally would do in order to start the running of interests. This allows the use of a more gentle tone in his communication with his opponent, an attitude more favourable to an attempted start of a mediation process.⁵²

It is to be noted that such consequences attached to a request for mediation are not dependent on the prior existence of a mediation clause.

In the presence of a mediation clause, that can be legally enforced, a proposal to mediate the case should also be regarded as a mandatory step. In light of the possible ensuing litigation, it may be important to show compliance with the prior undertaking to attempt to settle the dispute through mediation. At that point, it will be up to the person to whom the request is addressed to take attitude by either refusing to initiate the mediation (thereby violating its undertaking embodied in the mediation clause) or to accept the proposal and cooperate in setting up the mediation process.

Choosing the mediator

A mediation is always off to a better start if the parties can agree on the person of the mediator. Since the parties must have confidence in the mediator, any mediation will be better served by a common choice rather than by one imposed upon the parties by an authority (mediation Institute, judge, etc.). The mediation clause, or the mediation rules, may determine certain parameters for making that choice. The parties may also express specific wishes.

A possible area of tension may arise if a party, voluntarily or through unreasonable requests, disrupts the process. Clearly one may wonder whether it makes sense to believe that parties will be able to agree on a settlement, if they cannot even agree on the appointment of a mediator ...? Notwithstanding these apparently realistic doubts, we are of the opinion that a mediation clause, assuming that it can be enforced, does create a duty for the parties to reach an agreement either on the appointment of a mediator or on a process for having one ap-

51 Article 1730 § 3 and 1731 §§ 3-4 of the Judicial Code; in consumer contracts, a similar suspension rule applies by virtue of article XVI.18 §1 of the Code of Economic Law. In the Netherlands article 6 of the said Implementing Act stipulates that in case of cross border (civil and commercial) disputes limitation periods attached to legal proceedings shall be interrupted by the commencement of mediation. The new limitation period is equal to the original limitation period but will not exceed three years. Nevertheless, the limitation period shall in no case expire at an earlier time than it would have initially without the interruption. More elaborate on this issue: Van Beukering-Rosmuller & Van Schelven 2013, p. 65-70.

52 Article 1730 § 2 of the Judicial Code.

pointed.⁵³ A party who would deliberately torpedo the process so that no mediator can be appointed should be held in breach of a ‘duty to attempt to mediate’.

In practice, if the parties cannot agree on the person of the mediator, they should at least agree on a process of appointment by a third party. If nothing else (e.g. an appointment-procedure of a mediation Institute) is agreed upon, a judge may appoint a mediator and may by such appointment ‘enforce’ the mediation clause the refusing party is bound by.

Initiation of the mediation process

In our view, a further consequence of an existing mediation clause is that the parties must agree to meet together with the mediator (or separately with the mediator if that is what the chosen process calls for) at least once.

Because mediation is a dynamic process – things do ‘happen’ during mediation sessions – one must give the process a fair chance. We therefore consider it a duty for the parties to attend such first meeting in the presence of a mediation clause that can be legally enforced.⁵⁴ Typically, at that meeting, they will be given a true chance to ‘buy into’ the process by listening to, and cooperating with, the mediator who will assist them in determining how the mediation should be organized. Professional mediators are usually able to generate sufficient confidence in the process for the parties to realize that it is better for them to seize the opportunity to have the matter resolved through their active participation rather than to passively attend the meeting until enough time has passed to decide to walk away. Giving the process that chance is what the duty to participate in that first meeting is all about.⁵⁵

We believe that, from then on, the parties are free to withdraw from the process, a right they may not be deprived of and that is essential to guarantee the voluntary nature of mediation.⁵⁶ Although some have described the whole notion of forcing the parties to attend the first mediation session as ‘futile’, we believe

53 Unless parties as yet mutually agree to abandon mediation or the clause should be left aside due to standards of reasonableness and fairness or could otherwise be contractually affected. See also Andries 2011, p. 323; Piers 2013, p. 516 et seq.

54 See also i.a.: E. van Ginkel, *Afdwingbaarheid van de mediationclausule in Californië en Nederland*, Forum voor Conflictmanagement 2008/1, p. 10-16 ; Andries 2007, p. 77-78; Andries 2011, p. 326; Piers 2013, p. 516 et seq. Also in the context of this duty it should be noted that this only follows if parties do not mutually agree to abandon mediation and the clause should not be left aside due to standards of reasonableness and fairness and cannot otherwise be contractually affected. The duty to attend a first meeting is also the rule in Italy for quite a number of types of disputes (see above at footnote 16).

55 However, should the mediator together with the parties conclude that further cooperation to the procedure does not make sense, then the mediation can be terminated quickly and the loss of time and money will remain limited.

56 Art. 1729 of the Belgian Judicial Code: ‘Elke partij kan te allen tijde een einde maken aan de bemiddeling, zonder dat dit tot haar nadeel kan strekken.’ Also under Dutch law, due to the voluntary nature of mediation, the entitlement to prematurely end the mediation exists for parties (and the mediator). See also: consideration 13 of the 2008/52 EU Directive on certain aspects of mediation in civil and commercial matters.

Ellen van Beukering-Rosmuller & Patrick Van Leynseele

practice shows that mediation successes can be achieved – and in a significant number of cases are achieved – even with *a priori* unwilling parties. That is the experience in the countries and states where court ordered mediation exists or when mediation is mandatory prior to initiating a lawsuit. As noticed before, this is also the experience in business mediations.⁵⁷

In other words: withdrawing from the mediation is a right but, as any right, it must be exercised with due care and without abuse. In our view, it would be abusive to withdraw from the process before it has been given a chance to develop as intended in the reasonable interpretation of any mediation clause.

Attempt to settle – good faith considerations

Once the process has been fully explained to the parties and organized by the mediator in cooperation with the parties (after what mediators frequently refer to as ‘phase 1’ or ‘installation phase’ of the process), the parties’ duties can only be described as a duty to participate in good faith in the process of attempting to settle the matter. Obviously, there isn’t any sort of duty to achieve a settlement.

‘Participation in good faith’ or, in other words, a duty to reasonable endeavour, may sound like a rather hollow concept, in particular in light of the fact that everything occurring during the mediation process will be covered by the rules of confidentiality. From a theoretical point of view, however, it covers exactly what the parties have undertaken towards each other in their mediation clause or agreement, i.e. a promise to attempt to settle. As any undertaking or duty, it must be complied with and be exercised in good faith. This principle of participation in good faith can in particular be found in Belgian literature and case law.⁵⁸ The Court of Appeal of Liège, for instance⁵⁹ (though in a situation of a mandatory ‘conciliation’ which occurs in front of a judge) indicated about a forced sale of a mortgaged house, that such process ‘may not amount to a dialogue among deaf persons but must serve to, in good faith, try to see whether the sale of the debtor’s principal abode is truly necessary. Refusing any discussion thereon constitutes an abuse of rights by the creditor.’ The same reasoning holds true for mediations that have either been ordered or proposed by a judge or should be held on the basis of a mediation clause.

US case law sheds some light on what the concept may involve.⁶⁰ An example is to be found in: *In re A.T. Reynolds & Sons* and the references cited therein, which

57 In particular with regard to mediation in IT-conflicts, see Moerel & Franken 2013.

58 Art. 1134 of the Belgian Civil Code. See i.a. B. Allemeersch & P. Schollen, ‘Mediation’ naar nieuw Belgisch en komend Europees recht, TCR 2005/2, p. 43; P. Taelman, Bemiddeling – een nieuw wettelijk kader, in: A.W. Jongbloed & F. Schonewille (red.), *De implementatie van de Europese Mediationrichtlijn: kans voor de Nederlandse wetgever?*, Apeldoorn: Maklu 2009, p. 60-61; Piers 2013, p. 516 et seq.

59 C. App. Liège 23 June 2003, J.L.M.B. 2004/24, p. 1050.

60 See P.T. Thompson, Good faith mediation in the federal courts, Ohio St. J. Disp. Res. [26:2-3], 2011; D.S. Winston, Participation standards in mandatory mediation statutes: ‘You can lead a horse to water...’, Ohio St. J. Disp. Res. [11:1], 1996.

sanctioned a party in litigation for not having participated in good faith in a mediation process, i.a. on the basis of the following findings:

- ‘Availability by telephone is insufficient because the absent decision-maker does not have the full benefit of the ADR proceedings, the opposing party’s arguments, and the neutral’s input’;
- ‘Mediation is a process in which the parties must work together, with the assistance of a trained facilitator, to devise a solution to their dispute’;
- ‘Passive attendance at mediation cannot be found to satisfy the meaning of participation in mediation ...’;
- ‘Adherence to a predetermined resolution, without further discussion or other participation, is irreconcilable with risk analysis, a fundamental practice in mediation’;
- ‘The court finds that the counsel to Wells Fargo sought to control the procedural aspects of the mediation by resisting filing a mediation statement and demanding to know the identities of the other party representatives’;
- ‘The party representative who was sent into the mediation does not appear to have had the authority to enter into creative solutions that might have been brokered by the mediator.’⁶¹

A lot can be said, and has already been written, about a duty of participation in good faith in the mediation process. For the limited purpose of this article, it may be sufficient to note that the standards of such ‘good faith participation’ in essence refer to organizational, procedural or behavioural aspects of the process (including the possible lack of openness towards differences and diverging opinions). It does not relate to the outcome or final solution. That is, and must remain, the domain of the liberty of the parties.

Such standards would certainly apply for mediations that take place on the basis of an initial mediation clause in a commercial contract.

Evidence

Providing for rights and duties is fine; proving they have been exercised or breached may be necessary. Because of the specific confidentiality in which mediation is (and should be) enshrined, proof of how the respective duties have been discharged will not necessarily be easy. One may distinguish between the following.

• *Preliminary steps*

What we call here – rightly or wrongly – the preliminary steps are those occurring until the mediation meetings have started. They include:

- the request for mediation and the answer given to that request. Good practice commands that they be made in writing. The party who might become the claimant in a lawsuit will want to be able to prove that it has attempted to comply with the mediation clause by offering to the other side to initiate a

61 US Bankruptcy Ct, S.D. New York, Poughkeepsie Div. 5 February 2010, 424 BR 76 Bankr. Court.

mediation process. The possible future defendant will want to preserve evidence of its positive reply or of the reasons given for refusing to participate in the mediation process. Both parties should be careful to record their positions in writing in order to preserve their rights to show to the court that they have discharged the duties correctly;

- discussions among the parties in connection with the choice of the mediator and/or the organization of the mediation process. Such discussions fall in the scope of the parties' common duty to organize the process. We do not believe such steps are covered by the rules of confidentiality of a mediation process. Because of the existence of a mediation clause, the parties, in case of a mediation clause that can be enforced, may be held accountable for their eventual refusal to genuinely cooperate in setting up the process. The parties therefore have an interest in preserving their ability to demonstrate that they have fully cooperated, in good faith, in these attempts to set up the process and, conversely, that if the organization of the mediation has failed, that is due to the unreasonable attitude of the other side. This rule will certainly show its importance if the courts are given the power to sanction the parties' unreasonableness in refusing to participate in a mediation process or attitudes that derail the process;
- in our view, an agreement reached among the parties and the mediator on the practical aspects of the organization of the first mediation session should not be covered either by the general confidentiality that attaches to the mediation process. Indeed, the parties have an interest in showing that they have dutifully cooperated in the organization thereof. Communications among the mediator and the parties about such practical aspects – and only those – should be discoverable. In our view, this does not extend to discussions prior to the mediation meeting by a party with the mediator that touches upon the merits of the case or the underlying needs and interests of that party. Distinctions in that respect will not always be easy to make. They relate to 'process issues' (which should be discoverable) versus 'merit issues' (which should not be discoverable);
- if a party fails to appear at the first mediation session, we believe the other party should be able to bring evidence of that party's failure to appear. This is justified by the duty to participate in the mediation process.

- *Proof of participation in good faith?*

And there, it stops! From then on, the content of the mediation sessions is and should remain confidential. The effect of the mediation clause may not be extended beyond the closed-door of the mediation room.

For sure, the parties' duty to participate in the mediation process in good faith remains. Their respective duty is to genuinely attempt to try to resolve the matter, with the assistance of the mediator, in order to achieve a settlement. However they may not expect to be allowed to bring evidence about what they believe to be the other side's refusal to participate in good faith in the process.

The overriding need to preserve the confidentiality of the mediation process supersedes the parties' possible wish to blame the other side for the failure of the attempted mediation. If one party is unhappy with the attitude, position or stance of the other side, the only remedy is to interrupt the mediation and to resort to other dispute resolution mechanisms. We believe the social need for mediation, for which preserving confidentiality is an essential tool, trumps a party's right, as respectful as it may be, to bring evidence about the behaviour of the other side during the mediation process.

In our view, a decision such as 'In re A.T. Reynolds' cited above is therefore surprising in as much as the court has received explanations and evidence about the entire mediation process. Though interesting for academic purposes and for setting appropriate standards of practice,⁶² we find that this flies in the face of the need to preserve confidentiality.

In the end, this only underscores the limits of effectiveness of a mediation clause and of its eventual 'enforcement' since it will not always be doable, in practice, to prove the reasons why the mediation attempt, once initiated, was not genuine or has failed.

Conclusion

The starting point for this article has been the absence of a uniform regulation at EU-level on the legal status of mediation clauses. Possible legal means and methods aimed at making mediation clauses effective and/or enforceable have been discussed, with a focus on Belgian and Dutch law. In part attention is also paid to English, French and Italian law. Against the background of recent EU-legislation the validity of mediation clauses is discussed as well, with a focus on consumer related disputes. By reviewing US case law on the duty to participate in good faith in the mediation process, the authors also highlight the limits of this concept in their evaluation of the effectiveness of mediation clauses.

The central theme of the enforceability of mediation clauses has been looked at both from a procedural as from a financial angle. Substantial differences can be noted between the Belgian and the Dutch approach towards what courts should do when dealing with a dispute in which parties have previously agreed to mediation. Belgian law ensures enforceability of mediation clauses by providing in article 1725 § 2 of the Judicial Code that the court, if so requested by the defendant, must in principle suspend the examination of the case until the mediation has taken place.

According to current case law, the situation in the Netherlands is that mediation clauses are in principle not enforceable (Supreme Court 2006). Under the most

62 E.g. the American Bar Association's 'Resolution on good faith requirements for mediators and mediation advocates in court mandated mediation programs', available at www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/draftres2.authcheckdam.pdf.

Ellen van Beukering-Rosmuller & Patrick Van Leynseele

recent legislative proposal regarding mediation (July 2016) the court would be obliged to examine whether mediation can still have an added value in case one party refuses to take part in mediation in accordance with a clause invoked by the other party, prior to (possibly) proposing mediation. This approach could (to some extent) address the criticism towards the Dutch jurisprudence that (over)emphasizes the voluntary nature of mediation. It remains to be seen whether such provision will be truly enacted. Further study of the implications of such rule will probably be necessary.

The Belgian approach is likely to go much further. Based on the plans repeatedly announced by the Belgian Minister of Justice, it is likely that there will soon be an amendment to the mediation provisions in the Judicial Code that will allow courts to 'force' mediation upon the parties, even in the absence of a mediation clause, if the court believes mediation should be attempted. If this becomes the rule, judges would be well advised to exercise this power with due care. It should not become a way to delay the handling of the case, a risk that has been underlined by the regional bar associations when commenting upon the draft bills. In the authors' opinion the Dutch approach (as suggested in the most recent legislative proposal) in connection with mediation clauses, consisting in having the court examine whether mediation may (still) have an added value for the parties, could serve as a good guideline for the Belgian judges to use.