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Article

European Perspectives on Enforcement of Med-Arb Clauses and Med-Arb Awards

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1 Introduction

In Europe, mediation has historically taken a facilitative approach.[1] It is therefore no surprise that Med-Arb – a hybrid dispute resolution mechanism combining elements of mediation and arbitration – is not high on the agenda of European politicians, academics and practitioners.[2]

As a result of this (apparent) lack of interest in Med-Arb, it remains unclear to what extent contractual clauses referring parties to Med-Arb ("Med-Arb Clauses") and arbitral awards resulting from a Med-Arb procedure ("Med-Arb Awards") are compliant with European standards on due process of law.

It is this void this article seeks to fill. In the following, I will first investigate the American experiences with Med-Arb and the pros and cons of Med-Arb forwarded in that context (Section 2). Against this background I will in Section 3 assess the feasibility of Med-Arb from the perspective of European standards on due process of law. I will focus on European standards of both a procedural nature (right to be heard, independence and impartiality) and on standards of a more substantive nature (the possibility to agree on Med-Arb, recognition and enforcement).

These analyses lead to the conclusion (in Section 4) that from a European perspective, no overriding concerns of law exist that should call a halt to Med-Arb. Parties must, however, discount certain specific EU standards when agreeing on and conducting a Med-Arb procedure.

2 Med-Arb and Hybrid Dispute Resolution Mechanisms in the American Context

2.1 Introduction

In the United States, experiments with what was later called Med-Arb have taken place since the early 1940s. In particular in (collective) cases where labour disputes were handled formally through arbitrations, mediation

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1. On the historical development of mediation in Europe, *see* Clark B. (2013). *Lawyers and Mediation* (p. 17 *et seq*). Berlin: Springer 2013. The voluntary, nonbinding, nature of mediation seems to be underlined by the definition of mediation in the European Code of Conduct for Mediators, published by the European Commission in 2004. In this Code, described by Gläßer as a "nonbinding set of guidelines which individual mediators or institutions can adapt by way of autonomous self-commitment," mediation is defined as "any structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a third person – hereinafter 'the mediator'." In other words, the mediator is to assist in the parties reaching an agreement on a voluntary basis, implying that decision-making of any sort by the mediator is not considered 'mediation proper'. *See* Gläßer U. (2017). Corporate Mediation in Germany. *European Company Law Journal, 14*, 76-85. The European Code of Conduct for Mediators is available at: http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.
2. This is not to say, however, that the subject has remained unnoticed. Reference may be made to (among others) Goldsmith J.-C. (1993). ICC Working Group Report on ADR. *American Review of International Arbitration, 4*(4); Shilston A. (1996). *Med-Arb? – Why Not Try Arb-Med. Arbitration, 62*(3); and Hill R. (1997). MED-ARB: New Coke or Swatch? *Arbitration International, 13*, 105.

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techniques were deployed.[3] In these proceedings, the arbitrator was "less the judge between the parties than the friend of both of them, partaking largely of the function of mediator."[4]

This early form of Med-Arb has not remained without discussion. In particular, opposition existed against the idea that a person could be both the mediator and, in the instance the mediation would prove unsuccessful, the arbitrator. The prominent Harvard professor Lon Fuller, considered one of the foremost American legal academics,[5] adjudged this combination unacceptable:

> Mediation and arbitration have distinct purposes and hence distinct moralities. The morality of mediation lies in optimum settlement, a settlement in which each party gives up what he values less, in return for what he values more. The morality of arbitration lies in a decision according to the law of the contract.[6]

Fuller's objections,[7] which will be further analysed in the following, have not proved decisive. Various studies have shown that Med-Arb is regularly used in American practice.[8] I discuss the various manifestations of Med-Arb in Section 2.2. The arguments forwarded for and against Med-Arb are discussed in Section 2.3.

2.2 Forms of Med-Arb

In its most far-reaching form, Med-Arb is a hybrid dispute resolution method in which parties aim to resolve their dispute voluntarily, assisted by a neutral third party who acts as the mediator. Should this not result in a settlement of the dispute (even partially), the said third party settles the dispute by acting as the arbitrator.[9] This form of Med-Arb is the central object of discussion in this contribution, as it provides for the most salient questions from an EU perspective.[10]

However, various other forms of Med-Arb are used in practice. For example, parties may agree to a Med-Arb procedure in which the mediator and the arbitrator are different persons. This approach mitigates concerns about the compatibility of the role of the mediator (a true neutral, trusted by the parties, focusing on amicable settlement of the dispute) with the role of the arbitrator (who focuses on resolving the dispute by means of a final and binding solution). As will be elaborated in the following, this concern is particularly relevant in the context of caucus.

In some Med-Arb resolutions, the arbitrator first renders an award, after which he engages with the parties to see whether an amicable settlement may be reached.[11] In case this is unsuccessful, the award is presented to the parties. It seems logical to assume that the rendering of an award seriously decreases the odds of an amicable arrangement.[12]

Last, also final-offer arbitration is considered another form of Med-Arb. Here, both parties make an offer from which the arbitrator must choose. The idea central to this method is that it provides a strong incentive to make a reasonable offer, as the arbitrator is unlikely to opt for any offer he considers unreasonable.[13] Strictly, such a situation is not Med-Arb, as the mediation component is not a requirement for the decision that the arbitrator is forced to take using only the final offer made by the parties to the dispute.

2.3 Med-Arb: Pros and Cons

As discussed, Med-Arb combines the possibility of a final and binding arbitral award with the flexibility of mediation. Proponents of Med-Arb are of the opinion that this combination leads to an efficient and flexible dispute resolution mechanism, which guarantees that a final decision is rendered in case the parties do not come to a settlement in mediation. They furthermore argue that the possibility of such a final decision incentivises parties to come to a fruitful discussion at the mediation

3. For an extensive consideration of the genesis history of Med-Arb *see*: Bartel B.C. (1991). Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential. *Willamette Law Review, 27*, 661, p. 665 et seq.
4. Stein J. (1961). Remedies in Labor Arbitration. In J. McKelvey (Ed.), *Challenges to Arbitration: Proc. of the Thirteenth Ann. Meeting of the Nat'l Acad. of Arb.*, p. 41; referred to by Bartel, *supra* note 3 (footnote 51 on p. 670).
5. Together with Roscoe Pound, Oliver Wendell Holmes and Karl Llewellyn. *See* Summers R. S. (1984). *Lon L. Fuller* (p. 1). London: Edward Arnold.
6. Fuller L.L. (1962). Collective Bargaining and the Arbitrator. In *Proc. of the Fifteenth Ann. Meeting of the Nat'l Acad. of Arb.*, p. 29-30, referred by Bartel, *supra* note 3 (footnote 65 on p. 673).
7. And others, *see* the discussion in Section 2.3 below.
8. *See* Stipanowich T.J. & Ryan Lamare J. (2013). Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations. *The Harvard Negotiation Law Review, 19*(1); McLean D.J. & Wilson S.-P. (2008). Compelling Mediation in the Context of Med-Arb Agreements. *Oct. Disp. Resol. J., 63*(28), 30; Sussman E. (2009). Developing an Effective Med-Arb/Arb-Med Process. *N.Y. Disp. Resol. Law., 2*, 71.
9. Weisman phrases it as follows: "Med-Arb is a hybrid mechanism in which the parties attempt to reach a voluntary agreement with a third-party neutral first through mediation, and if that is not successful, through arbitration." Weisman M.C. (2013). Med-Arb: The Best of Both Worlds. *Dispute Resolution Magazine, 19*(3), 40. *See* for comparable definitions inter alia, Brewer T.J. & Mills L.R. (1999). Combining Mediation & Arbitration. *Disp. Resol. J.*, 54(32), 33; Henry K.L. (1998). Med-Arb: An Alternative to Interest Arbitration in the Resolution of Contract Negotiation Disputes. *Ohio State Journal on Dispute Resolution, 3*, 385-389; Deason E.E. (2013). Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review. *Y.B. Arb. & Mediation, 5*(1), 219 and Phillips G.F. (2005). Same-Neutral Med-Arb: What Does the Future Hold? *Disp. Resol. J.*, *60*(24), 28-32.
10. That is not to say that less far-reaching forms of Med-Arb cannot come across legal obstacles. For example, for *the final offer arbitration* to be discussed in the following, the question is whether or not the single choice of an arbitrator between two proposals meets (local) requirements pertaining to the substantiation of arbitral awards.
11. Bartel, *supra* note 3, p. 668. For the effect, this ruling could then be placed in a closed envelope on the negotiating table as a reminder to the parties that one of them would be wrong if they did not reach a settlement.
12. This is not necessarily the case. For example, consider the situation in which the party in favor of whom a judgment has been pronounced is expected to have difficulty in enforcing that favorable judgment. The beneficiary of the arbitration award may then prefer a settlement to a long and costly enforcement process of the arbitration award.
13. *See* for a recent discussion of this dispute resolution method: Bazerman M.H. & Kahneman D. (2016). How to Make the Other Side Play Fair: The Final-Offer Arbitration Challenge Gives Negotiators a Valuable New Tool. *Harvard Business Review, 94*(9), 76-81.

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stage, thereby facilitating settlement. At the same time, it has also been argued that the mediation component adds flexibility to the arbitral process, which is considered to be more procedural, tedious and contentious.[14]
Mediation combining the best of both worlds[15] is subject to a vivid debate in American legal literature. Perhaps the most fundamental argument that is forwarded against Med-Arb in this debate is the view that Med-Arb resolves problems that are not intrinsic to mediation and arbitration as separate dispute resolution mechanisms. In the words of Pappas:

> The Med-Arb 'solution' is not a solution at all because it relies on a false premise that mediation and arbitration as independent processes have inherent problems that need to be corrected.[16]

In this context, opponents of Med-Arb point to the high settlement ratios in various forms of mediation[17] and to the large number of matters in which mediated settlements are complied with voluntarily. In other words, mediation does not require the 'Sword of Damocles' function of arbitration. Against this background, Med-Arb is considered mainly an expression of the legalisation of alternative dispute resolution mechanisms.[18]
Apart from this fundamental point, more practical objections have also been brought against Med-Arb. These objections may be roughly categorised into the following three arguments.

2.3.1 Abuse of Power by the Med-Arbitrator

The first of the referred practical objections concerns abuse by the neutral (Med-Arbitrator) of his jurisdiction to render a decision when the dispute is not resolved in mediation. Opponents of Med-Arb point to the possibility that a Med-Arbitrator may – either explicitly or implicitly – misuse his power to force the parties to agree to a settlement. This, the opponents of Med-Arb argue, is the axe to the root of the core values of mediation: impartiality, self-determination/voluntariness and confidentiality. In a striking one-liner: "in effect, Med-Arb is Arb-Arb," in which the first form of arbitration is nonbinding and the second is.[19]
In response, proponents of Med-Arb have forwarded that judges and arbitrators acting in 'proper' contentious proceedings will also try to facilitate amicable solutions by, among others, sharing their preliminary view of a case adjudicated before them. Moreover, the mediator in a purely facilitating setting may also have a certain influence on parties. It is argued that this influence can also be misused as "any time the authority to decide or help decide a dispute is relinquished to a third party, there is a potential for abuse."[20]
Others have pointed to Med-Arb being an effective means of mitigating unequal procedural positions between the parties. A financially weaker party may in the context of mediation feel forced to agree on a settlement he would not accept if he had had the means to bring the case before an adjudicative body (in any form whatsoever). Where a neutral (facilitative) mediator may be less inclined to compensate the lack of a level-playing field, it is submitted that in Med-Arb the weaker party may enjoy a certain protection against a stronger adversary acting unreasonably. Such adversary will be cognizant of the fact that unreasonable arguments in the mediation phase may lead to unfavourable results in the arbitration. This is argued to incentivise the stronger party to take a reasonable stance in the mediation.[21]

2.3.2 Confidentiality as a Hallmark of Mediation

Above I referred to confidentiality being a core value of mediation. Confidentiality is thought to stimulate dialogue on interests, relation, needs and solutions. Against this background there is, understandably, a concern that Med-Arb parties are less likely to engage in the dialogue mediation seeks to facilitate. After all, other than in mediation, the Med-Arbitrator may at some point be requested to make a final and binding (legal) decision on the parties' positions. Opponents argue this incentivises parties to strategically share information, which is considered not conducive to the mediation process.[22]
A more 'legalistic' issue in this context is that a Med-Arbitrator will likely have access to substantially more information than the arbitrator would in arbitral proceedings. This information may be obtained in the context of a caucus, which invites questions about the due process and the right to be heard.[23]
This problem has been aptly analysed by Blankley in her article entitled "Keeping a Secret from Yourself."[24] Blankley – herself a proponent of Med-Arb – submits that it is humanly impossible for a mediator to ignore information that is obtained in the mediation phase when the arbitration phase commences. However, she doesn't seem to consider this as a fatal flaw of Med-Arb. She points to the fact that parties voluntarily opt for Med-Arb. Moreover, the relevance of confidentiality might be overstated. Against this background, Blankley argues that it is for parties to weigh their interests in this respect and it is not for mediators to discharge Med-Arb on the basis of perceived party preferences.[25]
To this argument, I would add that confidentiality in mediation does not as such prevent a counterparty from obtaining information that may be (mis)used in subse-

14. *See* Weisman, *supra* note 9; Deason, *supra* note 9; Henry, *supra* note 9; and Blankley K.M. (2011). Keeping a Secret from Yourself? Confidentiality When Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case. *Baylor L. Rev., 63*, 317-326.
15. Weisman, *supra* note 9.
16. Pappas B.A. (2015). Med-Arb and the Legalization of Alternative Dispute Resolution. *Harv. Negot. L. Rev., 20*, 157-169.
17. *See* the studies cited by Pappas, *supra* note 16 on pp. 169-170 (footnote 72).
18. Pappas, *supra* note 16, p. 169.
19. *Ibid*., p. 170.
20. Bartel *supra* note 3, p. 680.
21. *Ibid*., p. 683.
22. Pappas, *supra* note 16, p. 186 et seq.
23. *See* Bartel *supra* note 3, p. 683.
24. *See* Blankley, *supra* note 14.
25. About which Pappas states, *supra* note 16, that, because of the unfamiliarity of the parties with the course of mediation – and therefore the impossibility of *informed consent* – there can be no real consideration.

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quent (judicial or arbitration) proceedings. Although in such proceedings the parties are barred from informing the court or arbitral tribunal of what has been discussed in the mediation, the information obtained may still be used to fine-tune requests for discovery or depositions. In other words, incentives to share information strategically also exist in mediation. I am not aware of any research that could be used to substantiate the position that this problem is being enlarged within the context of Med-Arb.

2.3.3 The Quality of the Med-Arbitrator

A third concern is the success of Med-Arb being dependent on the quality of the Med-Arbitrator. Mediation and arbitration are vastly different dispute resolution methods and thus require different skill-sets. It is not a given that one person may possess both types of skill-sets.[26]

This third concern seems to follow from the issues discussed previously – that impartiality and an open mind cannot be guaranteed if the mediator and the arbitrator are the same person. Impartiality can be jeopardised in three distinct ways. First, for a mediator who may also have to decide the issue on the merits as arbitrator, it may be a challenge to not be prejudiced by his views of the parties' respective positions at law. Conversely, the information obtained by the arbitrator in his role as mediator – think, for example, of the motives of a party to defend a certain position – may affect his impartiality as an arbitrator. Last, these contradictions may incentivise the Med-Arbitrator to try to settle the case at the mediation stage. After all, and as will be discussed in more detail going forward, given the voluntary nature of mediation, the greatest challenge that a Med-Arbitrator may face during Med-Arb lies in the arbitration part of the procedure. An arbitral award may be subject to setting aside challenges of its recognition and/or enforcement.[27] This is not, or much less so, the case for a mediated settlement agreement, making a settlement in mediation the 'safest' option for the Med-Arbitrator.

3 Challenges to Enforcement of Med-Arb Clauses and Med-Arb Awards

3.1 Introduction

It follows from the foregoing that fundamental objections can be made to the Med-Arb model. This aspect has been comprehensively discussed in the American academia. The question to what extent Med-Arb is compatible to European standards, in particular those laid down in the European Convention on Human Rights (ECHR), has, however, to date received little attention.

26. *See* Bartel *supra* note 3 on pp. 688-689 and (extensive); Pappas, *supra* note 16, on p. 172 et seq.
27. Pappas, *supra* note 16, on p. 178 et seq.

Against this background, I will discuss in the following:

1. the possibility for parties to agree on Med-Arb (Section 3.2),
2. the procedural standards applicable to Med-Arb, and the question to what extent a party may relinquish its (fundamental) rights to compliance with these standards (Section 3.3) and
3. aspects concerning recognition and enforcement of arbitral awards rendered in the context of Med-Arb (Section 3.4).

3.2 The Med-Arb Agreement

3.2.1 Contractual Requirements

Although each jurisdiction may decide which matters may or may not be resolved by arbitration in accordance with its own political, social and economic policy, as a general rule national arbitration acts allow parties to submit to arbitration disputes as to matters the parties may freely avail over.[28] In most jurisdictions, as well as under the international instruments which will be discussed below, an agreement to arbitrate must be in writing. This agreement must pertain to a defined legal relationship.

Arbitration may be agreed upon by the parties as part of a hybrid, multistep or escalation clause, referring to a clause that requires parties to settle their dispute in accordance with method 1 (for instance, negotiations, conciliation or mediation), followed by arbitration or court proceedings, should the first method fail to settle the dispute.

3.2.2 Requirements under International Instruments

As early as 1962, the ECHR ruled that an arbitration agreement is not per se contrary to the right to access to the courts:

> the inclusion of an arbitration clause in an agreement between individuals amounts legally to partial renunciation of the exercise of those rights defined by Article 6(I) whereas nothing in the text of that Article nor any other article of the Convention explicitly prohibits such renunciation, whereas the Commission is not entitled to assume that the Contracting States, in accepting the obligations arising under Article 6(I) intended to prevent persons from coming under their jurisdiction from entrusting the settlement of certain matters to arbitrators.[29]

The ECHR has followed the commission's view that the right to access to the courts may *in principle* be waived.[30] The waiver must in any case be voluntary.[31] Later, the ECHR has clarified that the waiver of the right to access

28. Blackaby N., Redfern A., Partasides C. & Hunter M. (2015). *Redfern and Hunter on International Arbitration* (6th ed., p. 2.01 *et seq*). Oxford: Oxford University Press.
29. ECHR, 5 March 1962, X - BRD (Appl nr 1197/61), published in the Yearbook of the Court vol. 5 (1962), pp. 94-96.
30. ECHR *Deweer* judgment of 27 February 1980, Series A no. 35, p. 25, § 49.
31. *See ibid*., citing the *Golder* judgment of 21 February 1975, Series A no. 18, p. 15, par. 32: "Absence of constraint is at all events on of the con-

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courts must be unequivocal.[32] As a general rule, a waiver, in order for it to be effective in the ambit of the ECHR, requires minimum guarantees commensurate to the importance of the right that is waived.[33]

Against this background, the primary issue in assessing the compliance of a Med-Arb agreement with EU standards is whether the waiver of the right to access courts is made in accordance with the standards set by ECHR. Although this requires an assessment of all the circumstances relevant to the case, it seems safe to assume that a Med-Arb is as such not contradictory to the principles laid down in the ECHR.

3.2.3 Challenges to Med-Arb: When Does the Mediation End?

A point of attention in the context of the following is that the arbitration clause embodied in the Med-Arb agreement comes into effect only if the mediation has proven unsuccessful. This raises the question of when and by whom it can be established that this is the case. After all, only when the mediation has ended will the arbitration agreement be held as a valid waiver of access to the courts. It is submitted that there are three ways to address this issue. I discuss these in the following.

3.2.3.1 Any Party May End the Mediation

As a first solution, it can be agreed that any of the parties may declare the mediation unsuccessful. In other words, if one of the parties takes the view that mediation is unsuccessful, the mediator becomes an arbitrator and the Med-Arb continues with the arbitration phase.

This approach raises the question of the extent to which a party is obliged to participate in the mediation. In certain jurisdictions, breaking off a mediation is considered an act of bad faith that may even lead to penalties for contempt of court.[34] In all Med-Arb agreements stating that the parties may end the mediation, it must be made clear under which circumstances the right to break off the mediation may be invoked. Parties could take a liberal approach, allowing for the breaking off of the mediation at any time or for any reason or agree on a specific number of mediation sessions of a certain time, thereby committing to attend those sessions in good faith (or appear properly represented at a minimum).

Another option would be to subject the Med-Arb agreement to the laws of a jurisdiction where parties are in principle free to break off a mediation, such as the Netherlands.[35] This also resolves the inverse problem, whereby one of the parties improperly provokes the mediation. In this case, the party seeking arbitration may trigger such procedure by calling for an end to the mediation. This effectively makes the Med-Arb agreement an option arbitration clause, allowing one of the parties to decide to bring the dispute before an arbitral panel or a mediator.[36] The ECHR case law discussed previously does not give rise to any concerns about the validity of such clause.[37]

3.2.3.2 The Mediator Decides on the Conclusion of the Mediation Phase

A second option would be for parties to contractually provide the Med-Arbitrator with the right to decide when the mediation would become arbitration. This brings with it the risk that the Med-Arbitrator is insufficiently sensitive to the (possibly slow) progress in the mediation. This way, a potentially successful mediation may be terminated prematurely.

It can be argued that, albeit contractually, handing the right to decide on the commencement of arbitration proceedings to a third party does not meet the (treaty-based) requirements discussed in the earlier sections. I do not second this view. First, particularly in this context, it should be noted that there is nothing in the ECHR case law that prohibits parties agreeing on a unilateral option in the dispute resolution process. The approach where a mediator uses a specific contractual arrangement to decide on the termination of the mediation does not fundamentally differ from the situation where one of the parties has the right to make such a decision. Second, given that an arbitral tribunal under the internationally accepted principle of *Kompetenz-Kompetenz* has the right to assess its own competence, it does *prima facie* not seem problematic that the Med-Arbitrator at some point finds that the (contractual) criteria for commencement of the arbitration have been met and proceeds with the arbitration. Last, in various standard mediation agreements the mediator is granted the right to declare the mediation terminated.

Notwithstanding the above, it is clear that the Med-Arbitrator should utilise this right prudently. When a Med-Arbitrator would find, against the will of one or more parties in the mediation, that mediation cannot go on and the dispute needs to be settled by arbitration, it cannot be excluded that this may lead to discussions in the context of setting aside proceedings.

ditions to be satisfied, this much is dictated by an international instrument founded on freedom and the rule of law."

32. *See* the *Neumeister* judgment of 7 May 1974, Series A no. 17, p. 16, § 36; the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, pp. 25-26, § 59; the Albert and Le Compte judgment of 10 February 1983, Series A no. 58, p. 19, § 35. Although this case law mainly concerns criminal cases, Lawson refrains from using the general wording used by the ECHR ("waiver of the exercise of a right guaranteed by the Convention must be established in an unequivocal manner") that it is also applicable in civil cases. *See* Lawson R.A. (1996). Arbitrage en Artikel 6 ECHR: vrijheid in gebondenheid. *TvA* 1996/4, p. 157 et seq.
33. Pfeifer *and* Plankl *v*. Austria, ECHR 25 February 1992, NJ 1994, 117 § 38.
34. Van Beukering-Rosmuller E. & van Leynseele P. (2017). Enforceability of mediation clauses in Belgium and the Netherlands. *Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement, 21*(3).
35. *See ibid*. and van Beukering-Rosmuller E.J.M. (2017). De juridische afdwingbaarheid van een mediationclausule. *TvA* 2017/2, para. 3.3 in fine.
36. About which in the American context: Smit H. (2010). The Unilateral Arbitration Clause: A Comparative Analysis. *American Revue of International Arbitration, 20*, pp. 391-393; Niddam L. (1996). Unilateral Arbitration Clauses in Commercial Arbitration. *Arbitration and Dispute Resolution Law Journal*, p. 147.
37. For a discussion: van Zelst B. (2018). Unilateral Option Arbitration Clauses; an Unequivocal Choice for Arbitration under the ECHR? *Maastricht Journal of European and Comparative Law*, (1). doi: 10.1177/1023263X18755968

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3.2.3.3 Termination of the Mediation Must Be Agreed upon by all the Parties

A third solution would be for the parties to agree that the mediation may only be terminated by means of an explicit agreement to that effect. This approach has as an evident drawback; one of the parties may for strategic or other reasons hold the other party or parties 'hostage' in the mediation, thereby prohibiting the arbitration element in the Med-Arb agreement to take effect. And although a party unreasonably withholding can be considered an act of bad faith and/or a violation of the Med-Arb agreement, the Med-Arbitrator proceeding with the arbitration on that basis may be in breach of the unequivocal requirement under the ECHR.

3.3 Principles of Due Process

3.3.1 Requirements

As the Swiss Federal Supreme Court has convincingly found in its 2001 decision in *Abel Xavier v. UEFA* that,[38] although an arbitral tribunal is not to be considered a "tribunal established by law" under Article 6 of the ECHR, an arbitral tribunal must nevertheless respect fundamental rules of due process. Violation of these principles – the principle of fair and equal treatment and that of the right to be heard more particularly – may give rise to the setting aside of an arbitral award and/or refusal of recognition and/or enforcement thereof under national law and the New York Convention, where applicable.

As was already stressed by the ECHR in *Bramelid & Malmstrom*: "there must be a rigorous guarantee of equality between the parties in regard to the influence they exercise on the composition of the court."[39] Although this concerned mandatory arbitration, the ECHR makes clear that the principle of equality – in any case in the context of the appointment of the arbitral tribunal – is of pivotal importance.

After having considered – in *Pfeifer & Plankl*[40] – that the right to an impartial and independent tribunal is "of essential importance" and that "its exercise cannot depend on the parties alone," in *Osmo Suovaniemi v. Finland* the ECHR found that

> the waiver made during the arbitration proceedings was unequivocal within the meaning of the case law cited. Not only was the submission to arbitration voluntary but, in addition, during the proceedings before the arbitrators the applicants clearly abstained from pursuing their challenge against the arbitrator.[41]

It is relevant to stress that the latter matter concerned a waiver in a pending arbitral proceedings, in which Suovaniemi "had approved [the] arbitrator despite being aware of the grounds for challenging him" and while being advised by counsel. It is unclear whether the ECHR would come to a similar conclusion in a case where the waiver was made *before* the commencement of the (Med-)Arbitration.

3.3.2 Challenges to Med-Arb: Dealing with Confidential Information

The case law by the ECHR discussed previously questions the compatibility of Med-Arb with requirements set out in the ECHR. A particular issue seems to be how, in the context of arbitration, the phenomenon of the caucus, the private discussions between a party and the mediator, should be embedded.

The issue works in two ways. On the one hand, parties will be fully aware that in Med-Arb the final decision may come in the form of an arbitral award. This may lead a party to either share or not share certain information with the Med-Arbitrator that he would be inclined to share in a 'normal' mediation.[42] On the other hand, the choice to not share information may prove disadvantageous, as the Med-Arbitrator cannot take into account possibly relevant (unshared) information in making an arbitral award. Conversely, a party may choose to share certain information he would not normally share in mediation for the purpose of influencing an arbitral decision by the Med-Arbitrator.[43] This may give rise to the 'keeping a secret to yourself' issue discussed earlier.[44]

This problem, which is inherent to Med-Arb, can be addressed in several ways. The first option for a party would be to accept the risk of asymmetric information and to trust the Med-Arbitrator. An example of this approach is a provision in the Med-Arb agreement, where the Med-Arbitrator agrees to provide the parties with the opportunity to respond to any (even privately shared) information that may be considered relevant for the arbitral award. This is more complicated than it seems. After all, the information that the Med-Arbitrator would choose to convey to the parties may have been shared with him in strict confidence and, thus, expected to be treated as 'confidential'.

Against this background, a more feasible solution seems an agreement by which the parties agree to share all information relevant to an arbitral decision with the other party and with the arbitrator. Such an arrangement provides the Med-Arbitrator with a basis for requesting a party to share information with its counterparty so that the other party can respond to it, whether or not in the context of a caucus.

A third solution could be for the parties to (in the Med-Arb agreement or specific arrangements with the Med-Arbitrator) exclude the possibility of a caucus altogether. Whether this is feasible in a specific case cannot be assessed in general. It may be said, however, that the caucus is generally considered a pivotal aspect of mediation. Excluding the possibility of a caucus deprives the

38. Swiss Federal Supreme Court, 11 June 2001 [2001] Bull ASA 566.
39. ECHR 12 December 1983 Bramelid & Malmstrom, p. 40
40. *See the Pfeiffer & Plankl* judgment *supra* note 33, § 37.
41. *See* the *Suovaniemi and others v. Finland* judgment of 23 February 1999, no. 31737/96.
42. *See, e.g.*, certain information about a party's financial and economic position.
43. *See, e.g.*, think of information about the other party's actions in an earlier dispute or in discussions with third parties.
44. *See* para. 2.3(ii) above.

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Med-Arbitrator of an important instrument to help settle a case amicably.

3.3.3 Waiver of Fundamental Rights as a Solution?

It follows from the foregoing that asymmetric information, or making concessions to the right to be heard, may prove to be a ground for setting aside or the refusal of recognition and enforcement of an arbitral award rendered in Med-Arb. When parties agree to waive this (fundamental) right to be heard for the benefit of facilitating a solution in Med-Arb, this may take away the risk of setting aside (and/or refusal of recognition and enforcement). This brings the question whether the parties may give up fundamental rights under the ECHR.

In the foregoing it was addressed that a waiver of the fundamental right to an impartial and independent tribunal may be valid under the ECHR. Such waiver may be made in specific circumstances and requires in all instances minimum guarantees commensurate to the importance of the right waived.[45]

Whether rights as those at issue may be waived under applicable local (arbitration) law is a question that cannot be answered in general. The Dutch courts are generally open to the possibility, again under the requirement of an 'unmistakable' waiver.[46] It seems advisable that parties assess the possibilities under local arbitration law applicable to the Med-Arb to establish whether a waiver (of fundamental rights) is possible. Local laws may provide for the possibility to relinquish the right to file for setting aside an arbitral award, as is the case in Switzerland.[47]

3.3.4 Interim Conclusion

The case laws of the ECHR do not seem to pose a hindrance to the waiver of fundamental rights. Local laws may also provide for the opportunity for parties to waive their right to access to the state court in the context of a request for setting aside the arbitration.

Any agreement to this effect does not entail that the Med-Arbitrator is free to disregard the fundamental principles of impartiality and independence, as well as the right to be heard. To the contrary, any such violation may lead to a claim for nonperformance of the contract between the (Med-)Arbitrator and (one of) the parties. After all, under such agreement the (Med-)Arbitrator is under an obligation to properly perform his contractual duties, notwithstanding an agreement in the Med-Arb agreement that waives the right to annulment of an award rendered in arbitration.

3.4 Recognition and enforcement

A last aspect relevant to the analysis at issue is the question (i) whether a Med-Arb agreement should be recognised as a valid agreement to arbitrate, and (ii) whether an arbitral award rendered in Med-Arb is enforceable in a cross-border setting.

3.4.1 Recognition of the Agreement to (Med-)Arbitrate

The validity of an agreement to (Med-)Arbitrate must be assessed on the basis of applicable laws. In international matters, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention') – which, contrary to what its name suggests, also applies to recognition of agreements to arbitrate – generally is the applicable instrument.[48] Article V of the New York Convention provides that the (Med-)Arb agreement must be assessed "under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."[49]

Article V concerns the recognition (and enforcement) of foreign arbitral awards. It does not concern recognition of arbitration agreements; this is governed by Article II(3) of the New York Convention. Earlier, I submitted that in the assessment of an agreement to arbitrate under Article II(3) of the New York Convention, the choice of law rule, provided in Article V should be applied by analogy. In this context, I have noted that Article II(3) of the New York Convention does not provide for refusal of enforcement of an arbitration agreement for public policy reasons. Only Article V(2)(b) refers to public policy as one of the grounds for refusing recognition and enforcement. Consequently, a (European) court seized of an action in a matter in respect of which an arbitration clause is deemed applicable cannot, under the New York Convention, refuse to enforce an arbitration agreement for being in violation of the public policy of the forum.[50]

3.4.2 Enforcement of a (Med-)Arb Award

Enforcement of a (foreign) arbitral award generally requires the court seized of a request for recognition and enforcement to grant exequatur. Where the New York Convention applies to such request, the exequatur may be refused (among others) where no valid agreement to arbitrate exists (Art. V(1)(a) New York Convention) and when recognition and enforcement of the award would be contrary to the public policy of the country in which recognition and enforcement is requested.

When parties have agreed to subject the Med-Arb agreement to the laws of a jurisdiction where Med-Arb is accepted, the New York Convention does not, in principle, allow for refusal of a request for recognition and enforcement for lack of a valid arbitration agreement (Art. V(1)(a) New York Convention). After all, the court seized of an action for exequatur is bound to the parties' choice of law. And although it may be argued that a request for recognition and enforcement of an

45. *See the* Pfeifer *and* Plankl *v. Austria* judgement, *supra* note 33, § 38.
46. Dutch Supreme Court 18 June 1993, *NJ* 1994, 449 with commentary from HJS (*Van der Lely/VDH*), para. 3.3 in fine; Dutch Supreme Court 12 May 1989, *NJ* 1989, 647, para. 3.3.
47. *See* the *Tabane v. Switzerland* judgment of 1 March 2016, § 27.
48. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, made at New York 1958, 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).
49. Art. V(1)(a) New York Convention
50. Van Zelst B. (2016). UACs in the EU: A Comparative Assessment of the Operation of Unilateral Option Arbitration Clauses in the European Context. *Journal of International Arbitration, 33*(4), 365-378.

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arbitral award under Med-Arb can be made, it follows from the case law discussed previously that the Med-Arb procedure in a specific case (i) meets standards of due process or (ii) that parties may waive the right to the applicability of such standards.

3.4.3 Future Developments

To conclude, I refer to the United Nations Commission on International Trade Law's (UNCITRAL) Working Group II which agreed in its 68th session (5-9 February 2018) on a revised draft text for a *Convention on Enforcement of Conciliated Settlement Agreements* that will be submitted to UNCITRAL for approval.[51]

The background of these efforts lies in the fact that instruments are in existence for the recognition and enforcement of decisions obtained in arbitration and court proceedings. Court awards rendered under the Brussels I bis Regulation[52] may be enforced in other Member-States of the European Union, whereas the Hague Convention on Choice of Court Agreements[53] provides for such possibility in a wider international context. Arbitral awards are enforceable under the New York Convention discussed earlier, to which over 145 States are a party.

A *Convention on Enforcement of Conciliated Settlement Agreements* would add to this body of instruments a mechanism for the enforcement of settlement agreements agreed in the context of Med(-Arb). As this would in principle lead to the enforceability of settlement agreements mediated in the context of Med-Arb similarly to the enforceability of arbitral awards under the New York Convention, UNCITRAL's efforts provide for an interesting perspective for Med-Arb.

4 Analysis and Conclusion: How to Deal with Med-Arb in the European Context?

The purpose of this article is not to either promote or discourage the use of Med-Arb. Rather, it aims at initiating and facilitating a discussion on (the desirability and permissibility of) Med-Arb in the European context.

I have taken as a starting point the notion that it is for the disputing parties themselves to assess whether Med-Arb is suitable for resolving their specific (or potential) dispute in situations where they are free to avail over their rights and obligations. Against this background, to me it seems to be of lesser importance whether Med-Arb facilitates more traditional notions of the conduct of mediation.

It is of great relevance that instruments of EU law do not seem to be prohibitive for Med-Arb. This does not alter the fact that vigilance is required when agreeing the Med-Arb agreement and conducting the Med-Arb procedure. In particular, I see the following issues.

1. A Med-Arb agreement can be agreed upon both before (Med-Arb clause) and after (submission agreement) a dispute arises. It is preferable to lay down in such agreement that the parties where possible waive the right to appeal the award and the right to request for setting aside any arbitration award made under the agreement.
2. The waiver does not alter the fact that it is advisable to make clear agreements on the structure and conduct of the Med-Arb procedure. Insofar as these agreements have already been laid down in advance in the Med-Arb agreement (clause), it is preferable to make the mediator party to that agreement.
3. As no institutional rules focusing on Med-Arb exist, it is not advisable to refer to rules (either for mediation or for arbitration) of an institute when drafting a Med-Arb agreement. Rather, parties (whether or not together with the mediator[s]) are best advised to tailor the agreement to their specific case.
4. Part of the arrangements for facilitating mediation must preferably include the following:
    a. Who has the right to label the mediation as terminated (after which the arbitration agreement comes into effect and the dispute is settled by means of arbitration)? In my opinion, the option that 'both parties can' is the most workable.
    b. How is confidentiality handled? It applies here that discussion can be prevented when the mediator is given the right to request the parties to share relevant information (obtained within the context of a caucus) for the possible arbitration procedure with the other party.
    c. Parties agree that the mediator and the arbitrator will be the same person and that they understand that the role of the Med-Arbitrator in the mediation phase is to be clearly distinguished from his role in the arbitration phase.

The essence of my argument is that when sufficient attention is paid to these aspects, a Med-Arb procedure – if a solution is not already reached in the mediation phase – leads to a final (arbitral) decision that is in principle enforceable. It is up to the parties to weigh up (and agree) whether Med-Arb is the preferred method for solving a specific dispute.

51. Available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/083/22/PDF/V1708322.pdf?OpenElement.
52. Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *PbEU* 2012, L 351/1.
53. Convention on Choice of Court Agreements, made at The Hague 2005, 44 I.L.M. 1294 (2005).

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