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Parties' Obligations Under an ADR Agreement – A Systematic Content Analysis of Agreements to Resolve Commercial Disputes

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In the past fifteen years, the European Union has displayed a particular interest in Alternative Dispute Resolution (ADR). Furthermore, a number of recent initiatives have shown that a general, overarching framework relating to both Business-to-Business (B2B) as well as Business-to-Consumer (B2C) ADR would enhance legal certainty in Europe and improve access to justice. Without losing sight of the elaborate work already done by specialized institutions with a global reach, such as the UNCITRAL, one could indeed state that there is a clear need for a more general European framework of *minimum minimorum* requirements applicable to ADR in Europe.

One aspect that is particularly important in this regard is an ADR agreement. The concept of 'ADR agreement' assumes a consent of the parties to resolve their present or future disputes through ADR. So far the ADR agreement has remained under the European radar and European lawmakers expressed no intent to regulate ADR agreements any further than the already are regulated within national legal frameworks. The Consumer ADR Directive (Recital 49, Article 12) and the Mediation Directive (Recital 24, Article 8), for instance, explicitly state that the European legislature does not have the ambition to prescribe the effect of ADR/Mediation agreements. This leaves the Member States with an ample leeway to regulate (or not regulate) the ADR agreement and to determine its legal nature and effect.

Certain jurisdictions have specific ADR legislation governing these agreements, while in others, (significantly varying) general contract law provisions apply. In some countries, they are considered a condition precedent to litigation, while in other countries it is uncertain what the available (procedural or contractual) remedies are in the event of non-compliance. Moreover, there are different rules on the precise moment in time at which ADR begins and ends, and on the **exact obligations** of the parties to an ADR agreement. This uncertainty leads to the following questions: when are the parties bound by their ADR agreement? What are the parties' obligations in an ADR agreement? Are the parties' obligations in an ADR agreement enforceable? Does the non-compliance with an ADR agreement precludes arbitral tribunals' jurisdiction? Can awards be set aside for the tribunal's failure to enforce a step prescribed in a dispute resolution clause?

Now that ADR has become more prominent in the European Union, regulating the European status of the ADR agreement is the next logical (and necessary) step. In that line, my PhD research, which is funded by **BOF (Special Research Fund) and supervised by Professor Piers at the Transnational Law Center (University of Ghent)**, focuses on the ADR agreement. The research

will examine whether and how European law regulating the ADR agreement could advance the use of ADR in a European cross-border context. In addressing the above question, a chapter of the PhD researches the parties' obligations under the ADR agreement. Do parties to an ADR agreement calling for mediation or conciliation have to set up the proceedings? Attend a minimum number of sessions? Cooperate? Act in good faith? Settle? Refrain from commencing litigation/arbitration?

In order to assess the scope of the parties' obligations to an ADR agreement, the research is divided into **two stages**. The **first stage involves a questionnaire**. The questionnaire targets legal professionals – including lawyers and third-party neutrals – who have experience in drafting, inserting or enforcing dispute resolution clauses that provide for non-binding ADR mechanisms such as mediation and conciliation. The aim of the questionnaire is to gather model/standard or previously utilized dispute resolution clauses with a non-binding ADR element. The choice for a questionnaire instead of a general call for clauses was prompted by the fact that many professionals are unwilling to provide such a clause due to various reasons, such as confidentiality.

In the **second stage, the clauses gathered** as well as clauses extracted from other sources will be **content coded using the software NVivo** in order to determine which obligations tend to be reoccurring in the majority of the clauses under analysis. If a “common practice” in terms of obligations is detected, the findings can be relied upon by courts and tribunals to imply terms to an otherwise uncertain ADR agreement. This is essential to promote the conclusion of ADR agreements, as today a simple omission in the ADR agreement might result in its invalidity. For instance, if an ADR agreement fails to address the remuneration of third-party neutral, the courts in certain jurisdictions, such as in England & Wales, will find the clause to be void for uncertainty.

The participation in the short questionnaire will require **minimum effort**, as most questions only require a **simple mouse-click**. Please note that the **information entered in the survey is kept anonymous**, unless indicated to the contrary by participants. Moreover, as the analysis takes place on an aggregated level, the findings will not disclose personally identifiable information. Accordingly, the information provided will only serve scientific purposes.

To **complete the questionnaire**, please click on the following [link](#) (closing date 29 April 2017).

If you wish to provide the model/previously used dispute resolution clauses without completing the questionnaire, please email Maryam Salehijam at maryam.salehijam@ugent.be.

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