

# Mediation

Session 2 – Mediation and Mediator Agreement

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# 1. Mediation agreements

## A. Overview

- One can distinguish two types of mediation agreements:
  - *Ad hoc* mediation agreements and
  - Mediation clauses

# 1. Mediation agreements

## B. Ad hoc mediation agreements

- When parties agree to mediate an *existing* dispute, one speaks of an *ad hoc* mediation agreement

# 1. Mediation agreements

## c. Mediation clause

- The parties to a contract may agree to mediate disputes that may arise in connection with their contract (i.e. *future* disputes) by including a mediation clause into their contract

## 2. Mediation clauses: types

### A. Overview

- Two distinctions can be drawn:
  - According to the nature of the obligation undertaken
  - According to the effect on arbitral/court proceedings

## 2. Mediation clauses: types

### B. Nature of obligation

- One can distinguish between three types of mediation clauses (see the ICC model mediation clauses):
  - Optional mediation
  - Obligation to consider mediation
  - Mandatory mediation (in the following, we will focus on this type of clause)

## 2. Mediation clauses: types

### B. Nature of obligation

- What kind of obligations are created by these three types of clauses, if any?

## 2. Mediation clauses: types

### c. Effect on arbitration/litigation

- One can distinguish between:
  - Pre-arbitral/pre-litigation mediation (court/arbitral proceedings are excluded during mediation)
  - Mediation with the possibility to initiate parallel court/arbitral proceedings

# 3. Mediation clauses: enforceability

## A. Concept

- What does it mean to “enforce” a mediation clause? In what circumstances may a court or tribunal hear such enforcement requests?

# 3. Mediation clauses: enforceability

## A. Concept

- There are two types of obligations that may be enforced:
  - The obligation to mediate
  - The obligation not to initiate court or arbitral proceedings (pre-trial or pre-arbitral mediation)

# 3. Mediation clauses: enforceability

## A. Concept

- Example: A and B have agreed to resolve any disputes arising in connection with their contract by mediation. They have further agreed that each party may initiate arbitration proceedings after expiry of a two-month time period from the initiation of the mediation proceedings (by way of a request to mediate made by any of the parties). A dispute arises between A and B and A initiates arbitration proceedings. Is this claim admissible? The answer will depend on whether or not the mediation clause is enforceable...

# 3. Mediation clauses: enforceability

## B. Problem

- The enforcement of mediation clauses is a controversial issue. A number of courts (in various countries) have refused to enforce such clauses, both for policy and legal reasons

# 3. Mediation clauses: enforceability

## B. Problem

- The primary *policy* reason against enforcing mediation clauses is the perceived unreasonableness of forcing parties to seek to settle their dispute through mediation when one party has already initiated court or arbitration proceedings (that party is presumably no longer willing to mediate)

# 3. Mediation clauses: enforceability

## B. Problem

- What is your assessment of this policy reason? Is it compelling?

# 3. Mediation clauses: enforceability

## B. Problem

- The main *legal* basis for holding mediation clauses unenforceable consists of the possible failure of such clauses to meet the contract law requirement of “certainty” (see the decision of the English Court of Appeal in the *Sulamerica* case)

# 3. Mediation clauses: enforceability

## C. Sulamerica v. Enesa Engenharia

- This case arises from an insurance contract entered into in connection with the construction of a hydroelectric power plant in Brazil (the insurers are Sulamerica and others; the insured is Enesa)

# 3. Mediation clauses: enforceability

## C. Sulamerica v. Enesa Engenharia

- The general conditions of contract contain three relevant provisions:
  - Exclusive jurisdiction of the courts of Brazil (condition No. 7)
  - Mediation (condition No. 11)
  - Arbitration under the rules of ARIAS in London (condition No. 12)

# 3. Mediation clauses: enforceability

## C. Sulamerica v. Enesa Engenharia

- Note that there is a contradiction between conditions No. 7 and 12

# 3. Mediation clauses: enforceability

## C. Sulamerica v. Enesa Engelharia

- The mediation clause provides for mandatory pre-arbitral mediation and arbitration proceedings may be initiated if:
  - 90 days have passed since the serving of the notice of mediation
  - One party fails or refuses to participate in the mediation
  - One party terminates the mediation proceedings by written notice

# 3. Mediation clauses: enforceability

## C. Sulamerica v. Enesa Engelharia

- When a dispute arose between the parties,
  - The insurers (Sulamerica and others) initiated arbitration proceedings in London seeking a declaration of non-liability
  - The insured (Enesa) sought and obtained an injunction from a Brazilian court enjoining arbitration
  - The insurers sought and obtained an injunction from an English court restraining the insured from pursuing the proceedings initiated in Brazil

# 3. Mediation clauses: enforceability

## C. Sulamerica v. Enesa Engelharia

- The insured appeals from this decision of the English court on three grounds:
  - The arbitration agreement is only optional under Brazilian law
  - The dispute submitted to arbitration does not fall within the scope of the arbitration agreement
  - The insurers failed to initiate mediation under condition No. 11 (we will only examine this issue here)

# 3. Mediation clauses: enforceability

## C. Sulamerica v. Enesa Engenharia

- The issue is whether condition No. 11 gave rise to an obligation to refer disputes to mediation. What is the Court's analysis?

# 3. Mediation clauses: enforceability

## C. Sulamerica v. Enesa Engelharia

- The Court applied the certainty rule, i.e. the requirement that the parties' respective rights and obligations be defined with sufficient certainty

# 3. Mediation clauses: enforceability

## C. Sulamerica v. Enesa Engelharia

- The Court held that this requirement was not met because:
  - The clause did not set out a defined mediation process
  - The clause did not refer to any mediation service provider

# 3. Mediation clauses: enforceability

## C. Sulamerica v. Enesa Engenharia

- What are your thoughts on this decision?

# 4. Mediator agreements

## A. Concept

- A mediator agreement is an agreement entered into between the parties to a dispute and a mediator (see the CEDR Model Mediation Agreement). It notably sets forth the role and obligations of the mediator

# 4. Mediator agreements

## B. Main obligations of mediators

- One can distinguish between obligations of *care* and obligations of *loyalty*

# 4. Mediator agreements

## B. Main obligations of mediators

- There are three types of obligations of care:
  - Various obligations to *inform* the parties (e.g. in relation to the process, the parties' rights and obligations, etc.)
  - The obligation to *conduct the mediation* with care and diligence (note that the mediator owes a duty of best efforts only)
  - A *confidentiality* obligation

# 4. Mediator agreements

## B. Main obligations of mediators

- There are two main duties of loyalty:
  - The duty of *neutrality* (independence, impartiality)
  - The duty to *disclose* facts that may call into question the mediator's neutrality

# 4. Mediator agreements

## B. Main obligations of mediators

- The mediator's duty of neutrality is notably defined in Art. 2(2) of the European Code of Conduct for Mediators:
  - *"Mediators must at all times act, and endeavour to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation."*

# 4. Mediator agreements

## B. Main obligations of mediators

- The mediator's duty to disclose is provided for, for example, in Art. 5(5) of the Model Law:
  - *"When a person is approached in connection with his or her possible appointment as conciliator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence."*