Commercial mediation agreements and enforcement in South Africa

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Abstract

The article analyses the nature of mediation clauses and agreements to mediate and their enforcement in the context of commercial mediation in South Africa. Recent jurisprudence from England suggests that courts still fail to understand how such agreements operate and there are instances when they are not as certain as parties and their advisors would like. The article analyses issues such as the survival of a mediation clause on the termination of the agreement in which it is contained, the distinction between agreements to mediate and agreements to agree or negotiate, the importance of the certainty of the procedure for the mediation, the relationship between certainty and good faith and the requirement of completeness. The article proceeds to discuss the critical importance that such clauses are presented as conditions precedent to litigation and do not attempt to oust the jurisdiction of the courts under article 34 of the South African Constitution. Remedies for breaching mediation clauses are discussed and recommendations offered as to how parties can enhance contractual certainty. The piece concludes with a legal and regulatory analysis that points to an emerging trend internationally and in South Africa towards obligating lawyers to advise disputing clients on the mediation option.

INTRODUCTION

The ultimate aim of the mediation process is a settlement agreement. When a mediation produces a binding agreement, that agreement will usually supersede the parties' prior rights, and where the agreement is turned into a consent order by a court, it can be enforced regardless of the parties' rights and duties before the mediation. Mediation can affect legal rights and remedies indirectly, for example, mediation does not extend the limitation period for a party to take an action, so that parties should take the necessary

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precautions to protect their legal rights from being directly or indirectly affected.[1] A mediated settlement can also be converted into an arbitral award for enforcement under the New York Convention in appropriate circumstances.[2]

AGREEMENTS TO MEDIATE

Individuals and organisations offering mediation services usually require parties to sign an 'agreement to mediate' dealing with practical mediation issues such as conduct and procedure, confidentiality, the appointment of the mediator, the roles of the parties and mediator, the mediator's fee, and matters of liability and indemnity before commencing work on the mediation. Terms can also be implied into agreements to mediate and, given the potential for ambiguity, it has been suggested that an agreement to mediate should make some reference to the roles and functions of the mediator, the procedures to be followed (or incorporate standard mediation rules), and clarify the status of agreements reached at the mediation.[3]

Where a mediator fails to comply with an agreement to mediate, either party could institute action for breach of contract (although legal proceedings are what the parties were attempting to avoid in the first place and are unlikely to prove helpful in resolving the original dispute).[4] In the context of arbitration, section 13 of the Arbitration Act, 1965, allows a party to apply for an arbitrator to be removed on 'good cause'. While there is no comparable legislation regarding mediators, it has been suggested that grounds and procedures for the removal of a mediator could be included in the agreement to mediate.[5]

MEDIATION CLAUSES

Internationally, mediation clauses appear in many commercial contracts and either require the use of the mediation process where there is a contractual

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1 Boulle & Nesic *Mediation: principles, process, practice* (2001) 467.

2 See Feehily 'The legal status and enforceability of mediated settlement agreements' (2013) 12/1 *HLJ* 1–26. See also Steele 'Enforcing international commercial mediation agreements arbitral awards under the New York Convention' (2007) 54 *UCLA Law Review* 1385–1412.

3 See Boulle & Rycroft *Mediation: principles, process, practice* (1997) 236–237.

4 Astor & Chinkin *Dispute resolution in Australia* (1992) 135–6. See also Boulle & Rycroft n 3 above at 237.

5 Boulle & Rycroft n 3 above at 237. See generally Feehily 'The role of the commercial mediator in the mediation process; a critical analysis of the legal and regulatory issues' (2015) 132/2 *SALJ* 372–410.

dispute, or require the parties to consider mediation in resolving a potential dispute.[6] Several reasons are given for using such clauses.[7] They focus the minds of the parties on the reality that they may have to face future conflicts, they allow the parties to select and fashion their own dispute resolution system, *eg* mediation/arbitration, and to choose in advance a procedure for selecting the mediator when a dispute arises, they assist in avoiding a conflict over how to deal with a dispute, and they go some way towards allaying fears that a party may have about 'showing weakness' by suggesting mediation when a dispute arises.[8]

It has been suggested that complex contracts, such as joint venture agreements, should include mediation clauses where the relationship will last over a long period in changing circumstances, and where the parties will be in an on-going relationship.[9] Research from the United States of America (US) has indicated for some time that parties who participate in mediation under a pre-existing agreement reach a settlement as frequently as those who agree to mediate when a dispute arises.[10]

Mediation service providers have produced standard mediation clauses for use in agreements which generally stipulate that contractual disputes will be referred to mediation, before commencing legal proceedings or resorting to arbitration. Such clauses vary in complexity, some provide for the appointment of a mediator and are silent on how the process will work, while others detail features of the process or refer to a prescribed mediation procedure contained in a separate document, and may also provide for a

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6 Boulle *Mediation: principles, process, practice* (2005) 418.

7 See Astor & Chinkin n 4 above at 193–210; Ahrens & Witcombe *Australian dispute resolution handbook* (1992) 1; Henderson *The dispute resolution manual* (1993) 118–19. See also Boulle and Rycroft n 3 above at 226.

8 Boulle & Rycroft n 3 above at 226.

9 See Pryles 'Dispute resolution clauses in contracts' (1990) 1 *ADRJ* 116–24. See also Boulle & Rycroft n 3 above at 226.

10 See for example Brett, Barsness & Goldberg 'The effectiveness of mediation: an independent analysis of cases handled by four major service providers' (1996) 12 *Negotiation Journal* 259. See also Boulle & Nesic n 1 above at 468. It has been suggested that there should be an international convention to enforce both agreements to mediate and mediated settlement agreements similar to the enforcement protection provided to agreements to arbitrate and arbitral awards under the New York Convention, see Sussman 'A path forward: a convention for the enforcement of mediated settlement agreements' (2015) 6 *Transnational Dispute Management* available at: http://www.sussmanadr.com/docs/UNCITRAL%20Enforcing%20settlement%20agreements%20TDM.pdf (last accessed 1 June 2015).

sequence of dispute resolution methods, eg negotiation, followed by mediation, followed by arbitration.[11]

While mediation clauses can subject all or specific disputes to mediation, in order to determine the most appropriate escalation procedure, the nature of the contract should be considered in order to assess the types of dispute that may arise during the life of the contract, the most appropriate dispute resolution procedure for disputes of that kind should also be considered, and procedures should also be included in the clause. In addition to providing for the costs of the process and a jurisdiction clause, another issue to consider is the method for selecting or appointing the mediator and whether an organisation will administer the process and, if so, which one.[12]

Dispute resolution clauses have evolved over time becoming more complex and responding to judicial direction, and while it is uncommon for their validity to be legally assessed, court decisions have resulted in more careful and detailed drafting.[13] It has been suggested that even if mediation clauses were legally unenforceable, they could still serve useful purposes and there might be advantages in including them in agreements, as they focus attention on the possibility of a non-litigious remedy and go some way to countering the traditional perception that an offer to mediate is a sign of weakness.[14]

ENFORCEABILITY OF MEDIATION CLAUSES AND AGREEMENTS TO MEDIATE

It has been sensibly remarked that when considering enforcement, it is important to remember that compliance is not an issue in many mediation clauses.[15] When investigating the enforceability of mediation clauses where one party refuses to comply, it is likely that the courts will determine their enforceability under general contractual principles as there is currently no legislative basis for enforcing such clauses in South Africa.[16] This is in

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11 Boulle n 6 above at 420.

12 Boulle & Nesic n 1 above at 469.

13 Boulle n 6 above at 420.

14 See Pryles n 9 above at 118; Astor & Chinkin n 4 above at 210. See also Boulle & Rycroft n 3 above at 236. For a discussion on the appropriate approach to be adopted when proposing mediation in a context where it is not a pre-existing contractual obligation, see Bodenheimer 'Difficulties (not only) in Germany of proposing mediation: how and when to bring up mediation if it is not a contractual obligation' in Barclay (ed) 'Mediation techniques' *International Bar Association E-book* (2010) 23–29.

15 Boulle & Nesic n 1 above at 469.

16 Boulle & Rycroft n 3 above at 227.

contrast to the law on the enforceability of arbitration clauses for which legislation has been enacted,[17] which has been interpreted by the courts, and which is well established.[18]

There are numerous reasons why the differences between arbitration and mediation limit the relevance of the law on arbitration clauses to that on mediation clauses.[19] The first is that arbitration is regulated by statute which provides for its enforceability. Second, mediation, and other alternative dispute resolution (ADR) processes, are not as well defined or understood as arbitration. Third, compliance is relatively easy to assess with an arbitration clause, as opposed to a mediation clause. Finally, mediation does not guarantee an outcome while arbitration does in the form of the arbitrator's binding award.

As a result of these differences, the courts originally displayed a reluctance to enforce mediation clauses compared to arbitration clauses, and similar policy considerations influenced the courts' approach to both types of clause, which involved balancing the parties' autonomy to agree on their own dispute resolution method, with the rights of parties to have matters adjudicated by a court.[20] As we shall see from the discussion that follows, the attitude of the judiciary in this area has changed over time. There are primarily six issues relevant to the enforceability of mediation clauses.[21]

Survival of a mediation clause on the termination of an agreement

Contracts can be terminated in various ways, but does an otherwise valid mediation clause survive the termination of the contract?[22] Although further contractual performance is not required from the parties following termination, it has been sensibly suggested that in this context general contractual principles indicate that the contract remains effective for the purposes of enforcement of the dispute resolution clause.[23]

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17 See s 31 of the Arbitration Act 42 of 1965. See also Boulle & Rycroft n 3 above at 227.

18 See the cases discussed in Butler & Finsen *Arbitration in South Africa – law and practice* (1993) 272–275. See also Boulle & Rycroft n 3 above at 227.

19 See Boulle & Rycroft n 3 above at 227.

20 Boulle n 6 above at 422.

21 See Spencer 'Uncertainty and incompleteness in dispute resolution clauses' (1995) 2 *ADRJ* 23. See also Boulle & Rycroft n 3 above at 227.

22 See Boulle & Rycroft n 3 above at 227–8.

23 See Ermine 'The arbitration clause in recognition agreements: can it be terminated by the repudiatory conduct of one of the parties to the agreement?' (1992) 13 *ILJ* 19 for a discussion on the survival of the arbitration clause on the termination of a recognition

Another issue that may arise is where one party wants to enforce a dispute resolution clause and the other party claims that the contract, including the dispute resolution clause, was void *ab initio*.[24] With regard to arbitration, it is well established in England that where a contract is void *ab initio*, the arbitration clause can be severed from the main contract. [25] Despite allegations that the underlying contract is void, the parties are presumed to have wanted their disputes to be resolved by arbitration, and the underlying principle is that the agreement to arbitrate is collateral to the main agreement and therefore stands on its own. [26]

Traditionally, the effectiveness of such a clause in South Africa seemed to be an open question.[27] It was thought that there would be no objection in principle to South African courts following the English approach on the severability of an arbitration clause from a void agreement, except in the case of initial illegality, in which event the arbitration clause would be deemed valid.[28]

Unfortunately, in *Wayland v Everite Group Ltd*[29] the court rejected severability in this context. Although this decision has been criticised,[30] the decision has apparently now been accepted by the Supreme Court of Appeal in *North West Provincial Government v Tswaing Consulting CC*.[31]

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agreement. See also Boulle & Rycroft n 3 above at 228.

24 See Boulle & Rycroft n 3 above at 228.

25 See Boulle & Nesic n 1 above at 470–471; *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* 1993 QB 701 CA; *Paul Smith Ltd v H & S International Holdings Inc* 1991 2 Lloyd's Rep 127 (QB Com Ct) 130–1. The English Court of Appeal reaffirmed its decision in *Harbour Assurance* recognising the severability of an arbitration clause in *Fiona Trust & Holding Corporation v Yuri Privalov* 2007 EWCA Civ 20.

26 *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* 1993 QB 701 CA 759, 763 and 769.

27 In *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk* 1968 1 SA 7 (C) 14E, a dispute as to the validity of the main agreement was, however, held to fall outside the wording of the arbitration clause, making it unnecessary to decide the point.

28 Butler & Finsen n 18 above at 57.

29 1993 3 SA 946 (W) at 951 H–I.

30 See Butler 'Arbitration' in Joubert *The law of South Africa vol 1* (2003) par 558 n 12.

31 2007 4 SA 452 (SCA), citing *Wayland v Everite Group Ltd* as authority, the court declared that 'the arbitration agreement cannot stand' as it was 'embedded in a fraud-tainted agreement' which was rescinded by one party, and 'the clause cannot survive the rescission', see Cameron JA par 13.

It is to be hoped that the South African courts will change their course from such decisions and follow the English approach on the severability of an arbitration clause from the main agreement. If this new course were pursued, the principle could be extended to other dispute resolution clauses, such as mediation clauses on the basis that they derive their authority from the agreement of the parties, can be severed from the main contract, and should be enforced by the courts despite an allegation that the main contract is void.[32]

Certainty

Contract provisions are void where it is difficult to assess the specific rights or obligations of the parties, and the law may decline to enforce them where they are vague on certain matters to be agreed in the future.[33]

Agreements to agree or negotiate

As there is uncertainty regarding the terms and whether an agreement will even be reached, either party could walk away from an 'agreement to agree'. Where a mediation clause makes the occurrence of the mediation dependent on the future wishes of one party, it is effectively an 'agreement to agree' and will not provide sufficient certainty to be enforceable.[34] This principle was extended by the English courts[35] when they refused to enforce agreements to negotiate future matters on the basis that such arrangements are effectively 'agreements to agree'.[36]

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32 Giles 'Severability of dispute resolution clauses in contracts' (1995) 14 *The Arbitrator* 38. See Spencer n 21 above at 28. See also Boulle & Rycroft n 3 above at 228.

33 See Boulle & Nesic n 1 above at 471. See also *Pitout v North Cape Livestock Co-op Ltd* 1977 4 SA 842 (A) 850.

34 *Minister for Main Roads for Tasmania v Leighton Contractors Pty Ltd* 1985 1 BCL 381. See also Boulle & Nesic n 1 above at 471–472.

35 See *Courtney and Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* 1975 1 WLR 297; *Paul Smith Ltd v H & S International Holding Inc.* 1991 2 Lloyd's Report 127; *Walford v Miles* 1992 2 WLR 174. For a more contemporary discussion of these cases, see Olatawura 'Mediation and enforceability: some problems and prospects' (1996) 7/12 *International Company and Commercial Law Review* 437, 441–442.

36 See Boulle & Nesic n 1 above at 472–473. This was also the position in the USA; for a discussion of this issue see Dobbins 'Practice guide: the layered dispute resolution clause: from boilerplate to business opportunity' (2005) 1 *Hastings Business Law Journal* 161 167. See also Weldon & Kelly 'Prelitigation dispute resolution clauses: getting the benefit of your bargain' (2011) 1 *Franchise Law Journal* available at: http://www.swlaw.com/assets/pdf/news/2011/06/01/PrelitigationDisputeResolutionClausesWeldonKelly.pdf (last accessed 2 June 2015).

Lord Ackner in *Walford v Miles,*[37] held that 'the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of [negotiating] parties'. The case concerned a lockout agreement under which the defendants had allegedly agreed not to deal with any third party regarding the sale of their business while they were negotiating with the plaintiffs. In order to justify claiming lost profit on the transaction, the plaintiffs sought unsuccessfully to persuade the court to read into that agreement a positive obligation that the defendants negotiate the terms of the sale agreement in good faith. However, English courts have held that clauses that provide that the parties agree to use their best endeavours do not lack the required certainty for enforcement. This was viewed at the time as having potentially negative implications for the enforceability of mediation clauses. [38] In *Petromec Inc v Petroleo Brasiliero SA*,[39] the court also considered the provisions of an agreement to 'negotiate in good faith', distinguishing it from *Walford v Miles* on the basis that there was a structured agreement drawn up by solicitors and the requirement to negotiate in good faith was contained in it.

The issue arises as to whether mediation is equivalent to negotiation for the purposes of enforcement. As Boulle and Rycroft have pointed out, Australian courts have displayed more 'analytical acumen and common sense' on this issue.[40] The judgment of Kirby P in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Limited*,[41] reflects this approach, where the New South Wales Court of Appeal held that a contract to negotiate in good faith could be enforceable in some circumstances, although a minority judgment followed the English approach. The majority judgment acknowledged that one of the difficult issues is that where negotiations amount to nothing it can be difficult to assess whether there had been a breach of an agreement to negotiate, although, as Boulle concludes, this philosophy has been pursued by the courts with regard to agreements to mediate.[42]

Kirby P identified three situations. The first is where there is a plain promise to negotiate which is intended to be a binding legal obligation. This would

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37 1992 2 AC 128, 181. See also Boulle & Nesic n 1 above at 472 n 21.
38 Boulle & Rycroft n 3 above at 228.
39 2005 EWCA 891.
40 Boulle & Rycroft n 3 above at 229.
41 1991 24 NSWLR 1.
42 See *Computershare Ltd v Perpetual Registrars Ltd (No 2)* 2000 VSC 233. See also Boulle n 6 above at 424.

be clear where an identified third party has been given the power to settle ambiguities and uncertainties. However, if the court regards the failure to reach agreement on a particular term so that the agreement should be classed as illusory or unacceptably uncertain, it will not enforce the agreement. The second refers to a small number of cases where there is a readily ascertainable external standard, and the court may be able to add flesh to a provision which is otherwise unacceptably vague or uncertain or apparently illusory. The third situation is where the promise to negotiate in good faith occurs in the context of an arrangement that is too illusory or too vague and uncertain to be enforced.

The circumstances in which an agreement to negotiate is enforceable would seem to have been settled in South Africa by the Supreme Court of Appeal in *Southernport Development (Pty) Ltd v Transnet Ltd*,[43] where the parties had agreed that in certain circumstances, they would enter into an agreement to negotiate in good faith. Noting that the duty to negotiate in good faith is known in South African law in the field of labour relations, Ponnan AJA concisely reviewed the enforceability or unenforceability of agreements to negotiate in good faith in other countries. He concluded that the principles enunciated by Kirby P in the Australian case of *Coal Cliff Collieries Pty Ltd v Sijehama Pty Limited*[44] were in accordance with South African law.[45]

Agreements to mediate

Agreements to mediate are different from agreements to agree or agreements to negotiate. Boulle points out that there is a conceptual difference between agreements the validity of which depends on the parties agreeing on an essential term, such as the price to be paid, and an otherwise valid contract in which parties agree to resolve issues through a recognised process and the involvement of an outside intervener who facilitates the parties' negotiations when things go wrong. The jurisprudence from the courts in New South Wales builds on these distinctions.[46]

In *Hooper Bailie Associated Ltd v Natcon Group Pty Limited*,[47] the parties agreed that 'conciliation' would conclude before arbitration would proceed.

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43 2005 2 SA 202 (SCA).

44 1991 24 NSWLR 1.

45 See also Christie *The Law of Contract in South Africa* (2006) 38.

46 Boulle n 6 above at 425. See also Evans 'Forget ADR– think A or D' (2003) 22 *Civil Justice Quarterly* 230–234.

47 1992 28 NSWLR 194. See also Boulle & Rycroft n 3 above at 229.

The plaintiff claimed that the defendants had not complied with the conciliation requirement and sought a stay of the arbitration proceedings instituted by the defendants. The court granted the stay, finding that the agreement to conciliate was sufficiently certain about the conduct required of the parties. Giles J held that an agreement to conciliate, or mediate, was more than an agreement to negotiate in good faith. It was a commitment to participate in a process that may result in an agreed settlement which would render further proceedings redundant. Giles J distinguished between reaching agreement and participating in a process which, despite the parties' initial reluctance, may result in an agreement: 'What is enforced is not cooperation and consent but participation in a process from which cooperation and consent might come.'[48] Giles J refused to follow the English authorities as he believed that 'the law in New South Wales in relation to contracts to negotiate is not so uncompromising.'[49] After referring to relevant US cases he concluded that: '[a]n agreement to… mediate is not to be likened … to an agreement to agree … nor is it an agreement to negotiate.' [50]

It was suggested some time ago that this judgment showed a realistic appreciation of the nature of the mediation process and that it was in accordance with contemporary business practice as it is was not unusual for commercial agreements to contain mediation clauses.[51] Time has proved such remarks prophetic.

In the subsequent case of *Con Kallergis v Calshonie*,[52] Hayne J believed that an agreement to negotiate would be enforceable if the process specified has an identifiable end rather than a contractual requirement to negotiate in order to achieve agreement, which would be unenforceable. Hence the focus of the clause should be on the process, with the agreement to negotiate being a stage in that process.[53]

Hooper Baillie was also considered in *Aiton Australia Pty Ltd v Transfield Pty Ltd*[54] where a stay of proceedings was sought on the basis of a mediation

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48 1992 28 NSWLR 194, 206. See also Boulle & Rycroft n 3 above at 229.
49 1992 28 NSWLR 194, 207.
50 1992 28 NSWLR 194, 207. See also Boulle & Nesic n 1 above at 473.
51 Boulle & Rycroft n 3 above at 229.
52 1998 14 BCL 201. See also Boulle & Nesic n 1 above at 473.
53 See Boulle & Nesic n 1 above at 473.
54 1999 NSWSC 996.

clause. While there was no legislative basis for enforcing dispute resolution clauses other than those which provided for arbitration, Einstein J believed that an agreement to conciliate or mediate was enforceable provided that it was expressed as a condition precedent to litigation (or arbitration). Consequently, the clause, similar to the arbitration clause considered in *Scott v Avery,*[55] did not attempt to oust the jurisdiction of the court. As discussed, another condition for enforceability is that the dispute resolution procedure is sufficiently certain and it was this requirement which was to prove critical to the enforceability of the mediation clause in the agreement. The plaintiff submitted that the mediation process set out in the agreement lacked sufficient certainty to be given legal effect because: (i) there were no remuneration provisions dealing with the amount to be paid to the mediator; and (ii) there were no provisions dealing with what was to happen in the event that one or both of the parties disagreed with the fee proposed by a mediator, or what was to happen if the nominated mediator declined appointment. Einstein J adopted the views of Giles J in *Hooper Bailie* and in light of these points held that the mediation clause was unenforceable.[56]

Einstein J referred to a paper written by Boulle and Angyal who detailed the minimum requirements for an enforceable dispute resolution clause:[57]

- It must be in the *Scott v Avery* form, ie it should require that the mediation be completed before court proceedings commence.
- The clause must create a process that is certain, ie stages in the process should not require agreement on some course of action before the process can proceed. If the parties cannot agree then the clause would amount to an agreement to agree and would be unenforceable due to uncertainty.
- The clause should include processes for dealing with administrative issues such as the selection of the mediator and the mediator's remuneration. In the event that agreement is not reached on these issues, the clause should provide for a mechanism for a third party to make the selection.
- The mediation process should also be clear from the clause, alternatively it should incorporate the rules of a mediation organisation.

Einstein J rejected the plaintiff's argument that the dispute resolution clause was unenforceable because it was merely an agreement to negotiate, rather

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55 1856 10 ER 1121.

56 See the discussion by Pryles 'Multi-tiered dispute resolution clauses' (2001) 18/2 *Journal of International Arbitration* 159–176.

57 Australian Law Reform Commission 'Review of the adversarial system of litigation' June 1998 *Issues Paper* chapter 6, par 6.20. See also Pryles n 56 above at 168–169.

than an agreement to conciliate and/or to mediate, and also that it contained a good faith requirement. The contract imposed the requirement of 'good faith' on the parties and it was argued that this concept was too imprecise to give rise to an enforceable obligation.[58] He observed:

> As discussed below, the focus ought properly be on the process provided by the dispute resolution procedure. Provided that no stage of the dispute resolution mechanism is itself an 'agreement to agree' and therefore void for uncertainty, there is no reason why, in principle, an agreement to attempt to negotiate a dispute may not itself constitute a stage in the process.[59]

He held that the sole reason for the unenforceability of the mediation clause was the uncertainty as to the allocation of the mediator's costs. Einstein J also disagreed with the observations of Giles J in *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*[60] who cast doubt on the enforceability of a good faith obligation.[61]

In any event, the English view that agreements to agree or to negotiate are unenforceable for lack of certainty was weakened by the House of Lords in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd.*[62] In this case, a clause provided that disputes should be referred to a panel and if either party was not satisfied, it could have the panel's decision reviewed and revised by arbitration. The court held that such a clause can only operate if it is well defined and if reasonable time limits for the completion of each stage of dispute resolution are set, otherwise the parties may be involved in a process that is too lengthy and uncertain. The court exercised its discretionary power to stay proceedings to give effect to the clause which was 'nearly an immediately effective agreement to arbitrate, albeit not quite.'[63]

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58 See Dreadon 'Mediation, English developments in an international context' April 2005 IBA Legal Practice Division *Mediation Committee Newsletter* 17. See also *Walford v Miles* 1992 2 AC 128.

59 1999 NSWSC 996, Einstein J par 59.

60 Supreme Court of New South Wales, Giles J, 55093/94, 28-03-1995 (unreported). This case is discussed below.

61 See Pryles n 56 above at 169.

62 1993 1 All ER 664, followed in *Cott UK Limited v FE Barber* 1997 3 All ER 540. See Olatawura 'Mediation and enforceability: some problems and prospects' (1996) 7/12 *International Company and Commercial Law Review* 437–444 442. See also Boulle & Nesic n 1 above at 473.

63 1993 1 All ER 664, 678, Mustill LJ

It has been suggested that careful drafting would make such a multi-step dispute resolution clause effective and enforceable.[64] However, despite the prudence employed at contract drafting stage, the 'good faith negotiations' aspect of such a clause gave rise to difficulties in England, where the court took a very different approach to Einstein J in *Aiton*. In *Halifax Financial Services Ltd v Intuitive Systems Ltd*,[65] the contract included a provision that in the event of a dispute arising, the parties 'would meet in good faith and attempt to resolve the dispute without recourse to legal proceedings.'[66] The clause also provided for structured negotiations with the assistance of a neutral or a mediator. McKinnon J, using the expression from *Channel Tunnel,*[67] considered that the clause was 'not in any sense close to being "nearly an immediately effective agreement to arbitrate"'. [68]

The decision in *Halifax Financial Services* has been correctly criticised as unduly traditional and dated and inconsistent with the accepted approach of the English courts and the courts in other jurisdictions such as Australia, of giving effect to dispute resolution mechanisms agreed by the parties.[69] As discussed below, it should also be noted that the changes to the Civil Procedure Rules (CPR) in England subsequent to Lord Woolf's access to Justice Reports has radically overhauled the English courts' approach to the enforceability of mediation clauses.

The absence of a sufficient degree of certainty has also proved fatal to the enforcement of mediation clauses in the USA. In *Cumberland & York Distributors v Coors Brewing Company,*[70] a distributorship agreement provided that mediation was a condition precedent to binding arbitration, but it did not give any time limit for the duration of mediation. The court consequently refused to stay the proceedings, believing that the absence of a time limit on mediation could mean a delay in the final resolution of the dispute.

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64 Mistelis 'ADR in England and Wales: a successful case of public private partnership' in Alexander (ed) *Global trends in mediation* (2003) 162.

65 1999 1 All ER 303. See also Olatawura 'Managing multi-layered dispute resolution under the Arbitration Act 1996, smashing bricks of intention' (2001) 4/3 *International Arbitration Law Review* 70–73.

66 *Halifax Financial Services Ltd v Intuitive Systems Ltd* 1999 1 All ER 303 305.

67 1993 1 All ER 664 678 Mustill LJ.

68 *Halifax Financial Services Ltd v Intuitive Systems Ltd* 1999 1 All ER 303, 311.

69 Brown & Marriott *ADR Principles and Practice* (2ed 1999) 60–64.

70 2002 US Dist LEXIS 1962 (D. Me. 2002). See also Weldon & Kelly n 36 above.

In *Fluor Enterprises, Inc v Solutia Inc,*[71] the court held that the plaintiff had fulfilled a prelitigation mediation requirement by simply selecting a mediator, consequently filing an action after that was appropriate despite the mediation not having commenced. The contract provided that the parties should attempt to resolve the dispute in accordance with the Centre for Public Resources Model Procedure for Mediation in Business Disputes. If the matter was not resolved within 30 days of the commencement of the procedure, then either party could initiate litigation. The court held that mediation 'procedure' rather than mediation 'proceeding' referred to the first step of the procedure, which was selecting a mediator.[72] Similarly, in *Kemiron Atlantic, Inc. v Aguakem International, Inc,*[73] the district court denied the motion to stay because the pre-litigation dispute resolution provisions were not followed as neither party gave notice to mediate or arbitrate. The court of appeals affirmed this decision, finding that the agreement called for conditions precedent to arbitration, including mediation and that, in the court's view, the parties clearly intended to make arbitration a dispute resolution mechanism of last resort. Despite a dispute resolution provision calling for negotiation and mediation, the court's focus was not on requiring those efforts.

Kemiron Atlantic was referred to in *HIM Portland, LLC v DeVito Builders, Inc*,[74] by the US Court of Appeals for the First Circuit in a very similar factual scenario. The contract provided for negotiation, then mediation, and finally arbitration for all disputes arising out of the contract. Without submitting the matter to mediation, HIM filed an action and subsequently filed a motion to compel arbitration and stay the proceedings pending arbitration. Denying the motion, the District Court allowed the action to proceed on the basis that mediation was a condition precedent to arbitration under the contract and that mediation had not occurred. The court of appeals affirmed the decision. The agreement was clear that claims, disputes, and other matters arising out of or relating to the contract would go to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings. Again, the decision was not enforcement of an ADR clause, but keeping the matter in litigation.

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71 147 F Supp 2d 648 SD Tex 2001. See also Weldon & Kelly n 36 above.
72 147 F Supp. 2d 650 (SD Tex 2001). See also Weldon & Kelly n 36 above.
73 290 F 3d 1287 (11th Cir 2002). See also Weldon & Kelly n 36 above.
74 317 F 3d 41 (1st Cir. 2003).

Decisions such as *Kemiron Atlantic* and *HIM Portland* enforce the letter of the clause as the parties did not attempt to negotiate or mediate before the action or before attempting to compel arbitration. In *Kemiron Atlantic*, the court relied on the parties' intention to make arbitration a resolution provision of last resort, but the decision appears to have lost some of this reasoning by permitting the matter to continue down the path of litigation despite the dispute resolution provision. *HIM Portland* sidestepped this issue, finding that the parties only asked the court to determine whether mediation was a condition precedent to arbitration, and not the broader and more difficult question of whether the agreement also established a valid condition precedent to taking court action. Parties dealing with enforcement of a pre-litigation dispute resolution provision, whether opposing or supporting the enforcement, should be prepared to focus the court on both the letter of the clause as well as on its overarching intent.[75]

Some US courts have taken a more supportive interpretation of mediation clauses. In *Brosnan v Dry Cleaning Station Inc*,[76] a franchise agreement required that disputes be mediated for a minimum of four hours prior to initiating any legal action. Enforcing the mediation provision, the court ordered a dismissal without prejudice of the court action. The court adopted an even stricter approach in *Tattoo Art Inc v TAT International LLC*[77] where mediation appeared as a condition precedent to court action in the contract. While Tattoo Art sought to negotiate the dispute, it did not seek mediation prior to filing the action. The court granted the motion to dismiss as the plaintiff had failed to seek mediation before filing litigation, albeit that the plaintiff had requested mediation after filing the action but it did not happen as the defendant did not respond to the request to mediate.

In *DeValk Lincoln Mercury Inc v Ford Motor Co,*[78] the defendants requested summary judgment, in part due to the plaintiffs' failure to comply with the pre-litigation mediation clause. The district court granted summary judgment, and this was affirmed by the Seventh Circuit. The appellate court held that this mediation clause was straightforward and required the parties to appeal any protest, controversy, or claim to mediation, and further stated that mediation was a condition precedent to any other remedy available at

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75 See Weldon & Kelly n 36 above.
76 2008 US Dist LEXIS 44678 (ND Cal 2008). See Weldon & Kelly n 36 above.
77 711 F Supp 2d 645 (ED Va 2010). See Weldon & Kelly n 36 above.
78 811 F 2d 326 (7th Cir. 1986). See Weldon & Kelly n 36 above.

law. It also rejected the plaintiffs' argument that they substantially complied with the mediation clause because the clause specifically stated that it was a condition precedent to litigation and although plaintiffs fulfilled some of the purposes of mediation, such as making Ford aware of their claims by sending four separate letters to Ford and spending several months negotiating with Ford, they did not actually mediate and, therefore, did not fulfil the condition precedent.

While some US courts have gone so far as to dismiss actions for failure to comply with a condition precedent, other courts have taken more of a middle-ground approach, such as staying the action or enforcing the clause in a delayed manner by barring lawyers' fees. In *N-Tron Corp v Rockwell Automation Inc*,[79] the contract required disputes relating to a cooperative marketing programme to be mediated prior to court action. When a dispute arose N-Tron filed a court action without attempting to mediate the dispute first. The court agreed that compliance with the provision was a condition precedent but believed that dismissal would unfairly prejudice the plaintiff and effectively enforced the dispute resolution provision but protected the plaintiff's right to have its claims ultimately heard in court.

An alternative middle ground may be provided in the dispute resolution provision itself. For example, some courts have enforced provisions that deny an ultimate award of lawyers' fees if the party fails to comply with an alternative dispute resolution provision. In *Frei v Davey,*[80] the court considered a residential purchase agreement that contained a pre-litigation mediation provision that provided if a party commenced an action without first attempting to resolve the matter through mediation, or refused to mediate after a request had been made, then that party would not be entitled to recover lawyers' fees, even if they would otherwise be available to that party in any such action. The Daveys succeeded on appeal in the matter and sought lawyers' fees. The trial court granted the lawyers' fees motions, but the appellate court reversed on the ground that the Daveys had not complied with the pre-litigation mediation provision. Although mediation was not actually enforced in this case, it demonstrates the willingness of US courts to give teeth to the mediation requirement contained in commercial contracts.[81]

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79 2010 US Dist LEXIS 14130 (SD Ala 2010). See Weldon & Kelly n 36 above.
80 124 Cal App 4th 1506 1508 (2004). See Weldon & Kelly n 36 above.
81 See Weldon & Kelly n 36 above.

Procedure for the mediation

Mediation clauses should be carefully drafted and, in particular, should address the procedural aspects of the mediation process in order to ensure certainty and enforceability. The *Hooper Bailie* decision in Australia is a watershed case for the enforcement of mediation clauses where the clause provides a sufficiently certain procedural framework within which the parties can operate. The requirements in that case included the procedure for the appointment of the conciliator, procedural matters, the possibility of legal representation, information exchange, evidential matters and the court held that a solicitor's letter setting out the procedure established a 'clear structure' for the mediation.[82]

Inconsistent approach

Despite the guidance provided by the *Hooper Bailie* decision, the enforceability of mediation clauses featured again in the Australian case *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*,[83] where Giles J found that the mediation clause in question lacked sufficient certainty to be enforceable as it provided that the parties should attempt to settle disputes by mediation 'administered by' a particular ADR organisation, but neither set out the procedure for the mediation in the clause nor clearly incorporated the rules or guidelines for mediation issued by that organisation. The clause also failed to identify the agreement that the parties were required to sign when a dispute arose.[84]

Giles J found that the procedure to be followed in the mediation contained in the clause lacked certainty as it required the parties to sign an unknown

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[82] *Hooper Bailie Associated Ltd v Natcon Group Pty Limited* 1992 28 NSWLR 194 209. See also by Boulle & Nesic n 1 above at 473. This was followed in England in *Holloway v Chancery Mead Ltd* 2007 EWHC 2495 (TCC) where Ramsay J held that three elements were necessary for an ADR clause to be enforceable, first a sufficiently certain process *ie* there should not be a need for agreement at any stage before matters can proceed, second a defined administrative process for selecting and remunerating the mediator and third the detail of the mediation process should be sufficiently certain e.g. a model to be followed. See also *Mann v Mann* EWCA 537 (Fam). See Suter 'Enforcing mediation agreements: where are we now? Mann v Mann' *Arbitration* (2014) 80/3 336 340–341.

[83] Supreme Court of New South Wales, Giles J, 55093/94, 28 March 1995, unreported, discussed in Spencer 'Enforceability of dispute resolution clauses' (1995) 33 *Law Society Journal* 17. See also 'American Arbitration Association's National Construction ADR Task Force makes recommendations for upgrading and enhancing dispute resolution services' (1995) 6 *ADRJ* 225. See also Boulle & Rycroft n 3 above at 229.

[84] See Boulle & Nesic n 1 above at 473.

mediation agreement, not referred to in the clauses, which could conflict with the mediation guidelines of the ADR organisation. Despite both parties conceding that they believed that the dispute resolution clause impliedly incorporated the guidelines of the ADR organisation, which provided a detailed procedure for mediation, the judge held that the clause could not be saved by the guidelines as they required the signing of an unidentified mediation agreement, and the clause itself did not set out a procedure for the mediation.[85]

It has been correctly remarked that this case is inconsistent with broader contractual principles regarding the use of extrinsic evidence to establish certainty in agreements; as such evidence can be used to incorporate terms and conditions contained in separate documents into an agreement by courts to remove uncertainty. It does seem sensible that this principle should apply to mediation clauses where procedures exist in external documents that can provide the required certainty.[86]

The incongruity between this judgment and that in *Hooper Bailie*,[87] both of which were given by the same judge, has evoked comment.[88] On its own the clause was uncertain in *Hooper Bailie*[89] but was found to be enforceable because of a letter from the plaintiff's solicitor detailing the procedural features of the proposed conciliation. However, a six-page mediation appointment agreement and four pages of guidelines, were not sufficient to provide the required certainty in *Elizabeth Bay Developments*.[90] The evidence in the facts of this case suggests that the certainty requirement had been satisfied and it is to be hoped that in similar circumstances in future courts will find mediation clauses enforceable.[91]

This would certainly appear to be the case in what is arguably the most ground-breaking judgment encouraging the use of mediation in England following the changes to the CPR discussed below. In *Cable & Wireless v IBM United Kingdom Limited*,[92] an ADR clause that specifically referred

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85 *Id* at 473–474.

86 See Spencer n 83 above at 31. See *Trustees Executors and Agency Co Ltd v Peters* 1960 102 CLR 537. See also Boulle & Rycroft n 3 above at 230.

87 1992 28 NSWLR 194. See also Boulle & Nesic n 1 above at 474.

88 Spencer n 21 above at 33. See also Boulle & Nesic n 1 above at 474.

89 1992 28 NSWLR 194. See also Boulle & Nesic n 1 above at 474.

90 1995 36 NSWLR 709. See also Boulle & Nesic n 1 above at 474.

91 See Boulle & Nesic n 1 above at 474.

92 2002 2 All ER (Comm) 1041. See also Evans n 6 above at 230 234.

disputes to mediation was vague in terms of the nature of the procedure that should be used, other than referring broadly to CEDR rules. The claimant argued that the ADR clause was unenforceable because it lacked certainty, imposing no more than an agreement to negotiate. The court believed that the dispute resolution structure contained in the agreement left no doubt that it was the mutual intention of the parties that litigation should be pursued as a last resort. It concluded that the mere issuing of proceedings was not inconsistent with the simultaneous conduct of an ADR procedure, nor a mutual intention to have the issue ultimately decided by the courts in the event that the ADR procedure failed to resolve the dispute.

The clause was held to be contractually enforceable and a stay of the proceedings was granted while the parties complied with the ADR clause. Colman J stated:

> I would wish to add that contractual references to ADR which did not include provision for an identifiable procedure would not necessarily fail to be enforceable by reason of uncertainty. An important consideration would be whether the obligation to mediate was expressed in unqualified and mandatory terms .... In principle however, where there is an unqualified reference to ADR, a sufficiently certain and definable minimum duty of participation should not be hard to find .... The reference to [mediation] is analogous to an agreement to arbitrate. As such, it represents a free standing agreement ancillary to the main contract and capable of being enforced by a stay of the proceedings or by injunction absent any pending proceedings.[93]

Cable and Wireless emphasises the relevance of ADR to commercial disputes. Colman J insisted that this was a reasonable case to mediate and said that parties entering into an ADR agreement must recognise that mediation as a tool for dispute resolution is not designed to achieve solutions which reflect the precise legal rights and obligations of the parties, but solutions that are mutually commercially acceptable at the time of the mediation. Colman J reasoned that if the court declined to enforce contractual references to ADR on the grounds of intrinsic uncertainty, it would fly in the face of public policy as expressed in the CPR and as reflected in *Dunnett v Railtrack PLC*.[94]

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[93] 2002 2 All ER (Comm) 1041 1051.
[94] 2002 2 All ER 850.

Dunnett involved the grant of permission to appeal. It had been strongly suggested that the parties should attempt to resolve the dispute by arbitration or mediation, but it appeared that Railtrack had refused to pursue such a route. The Court of Appeal said that skilled mediators could achieve results that went far beyond the court's powers, and that lawyers who dismissed the opportunity for arbitration or mediation out of hand, would suffer uncomfortable consequences. The consequence was that the party that refused to take advantage of the option of mediation or arbitration would be refused costs, despite being successful in the appeal.[95] Consequently, the court declined to award costs against Dunnett, due to Railtrack's refusal to consider arbitration or mediation in the face of a recommendation to do so by the court.

As one commentator points out,[96] the *Cable and Wireless* judgment reinforces the decisions made in *Dunnett* and *Hurst v Leeming*.[97] In *Hurst v Leeming*,[98] the English courts clarified the circumstances in which costs sanctions would be justified. The case involved a dispute between Hurst and his former partners in a solicitors' practice. Having initially represented himself, Hurst eventually hired solicitors and through them instructed Mr Leeming QC. As his claims failed at first instance, the Court of Appeal, and the House of Lords, a costs order was made against him and he was declared bankrupt. Having subsequently failed in his efforts to sue his solicitors for negligence, he finally pursued an action against Leeming.[99]

Hurst withdrew his claim following the intervention of Lightman J, the presiding judge, who convinced him that the claim was hopeless. Hurst then claimed that Leeming was not entitled to his costs as he had asked Leeming to proceed to mediation over their dispute and Leeming had refused, and that if Leeming had agreed to mediate, a mediator could have convinced Hurst to withdraw his claim and consequently avoid the costs of the court action.

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95 See also Kallipetis 'Mediation: a talk for the Irish Bar' (29 November 2003) *The Bar Council* Dublin 3.

96 *Id* at 5.

97 2002 LLPN 508.

98 *Ibid*.

99 This was subsequent to the House of Lords decision in *Arthur JS Hall & Co v Simons* 2000 3 AER 673, which removed the immunity from suit for negligence from counsel. For a more detailed discussion of this case, see Mackie 'Hurst v Leeming: defining unreasonable refusal to mediate' (1 June 2002) *CEDR Articles 1* available at: http://www.cedr.com/articles/?item=Hurst-v-Leeming-defining-UNREASONABLE-refusal-to-mediate (last accessed 1 June 2015).

When Hurst suggested mediation, Leeming had written a response citing a number of reasons for refusing mediation. Lightman J looked at each of these reasons which were based on the following:

- the legal costs already incurred in dealing with the allegations and the threat of proceedings;
- the serious nature of the professional negligence allegations;
- the lack of substance in the claims made;
- the lack of any real prospect of a successful outcome to the mediation, particularly in light of Hurst's objective of obtaining a large financial payment from Leeming on the back of a meritless claim; and
- the character of Hurst, as revealed by his numerous prior claims and his actions, as a man obsessed with the belief that he was the victim of injustice.

Lightman J did not agree that the first three arguments should raise any barrier to considering mediation, and that the critical factor was whether, objectively viewed, a mediation had any real prospect of success, but he added that there is a high risk accompanying the refusal. He commented that in making the objective assessment of the prospects of mediation, the starting point must be the fact that the mediation process can and often does result in a more sensible and more conciliatory attitude on the part of the parties than might otherwise be expected to prevail before the mediation. It follows that this may cause each party to recognise the strengths and weaknesses of its case and its opponent's case, and to develop a willingness to accept the compromise essential to a successful mediation. He concluded that a dispute may appear incapable of mediation before the mediation process begins, but may ultimately prove capable of satisfactory resolution. Leeming's decision to refuse to mediate was, in his view, the correct one as there was no real prospect of success in pursuing mediation, and Leeming should not suffer any cost consequences.

This case highlights the importance the court places on parties considering mediation while also providing lawyers in England with valuable clarification on the objective criteria that should be considered when analysing the suitability of the process in a particular context. It has also been suggested that disputing parties should be aware, however, that if a refusal to mediate is decided on the wrong criteria, or if the objective test is

applied but the court reaches a different conclusion, adverse cost consequences may follow.[100]

Agreement to agree on procedure

When considering the process to be followed by the parties, Australian courts have reflected the view that there should be no stage in that process that requires the parties to come to an agreement regarding a course of action before the process can continue. In *State of New South Wales v Banabelle Electrical Pty Ltd*,[101] a dispute resolution clause providing for an expert to be appointed by agreement between the parties was held void for uncertainty. The court commented that if there had been an implied duty to cooperate, it would have had more scope to address the issue of good faith within mediation. While this case dealt with expert determination, Boulle suggests that the rationale behind it could be extended to mediation.[102] For example, where the parties cannot agree on how the mediator is to be selected, the mediation clause, or the mediation rules or guidelines to be incorporated by reference into the clause, they should specify a nominated third party to make the appointment. It is important to ensure that the third party specified offers the service required.[103]

In *Elizabeth Bay*, the court considered the mediation process to be 'open-ended, indeed unworkable, because the process… would come to an early stop when, prior to the mediation it was asked what the parties had to sign and the question could not be answered.'[104] *Elizabeth Bay* was also referred to in *Heart Research Institute Ltd v Psiron Ltd*,[105] where a dispute resolution clause was void for uncertainty because it was not clear what procedures would apply in the dispute resolution process.

As discussed, in *Aiton Australia Pty Ltd v Transfield Pty Ltd*,[106] the court considered a dispute resolution clause too uncertain to be enforced for failing to refer to the apportionment between the mediator's fees and other expenses, believing such apportionment was neither obvious nor implied,

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100 See also *Halsey v Milton Keynes NHS Trust* 2004 EWCA (Civ) 576.
101 54 NSWLR 503.
102 See also Boulle n 6 above at 428.
103 See *Cott UK Ltd v FE Barber Ltd* 1997 3 All ER 540. See Boulle & Nesic n 1 above at 474.
104 1995 36 NSWLR 709, 715. See also Boulle & Nesic n 1 above at 474.
105 2002 NSWSC 646. See Boulle n 6 above at 428.
106 1999 NSWSC 996. See Boulle & Nesic n 1 above at 474.

and while it was usual for these costs to be divided equally between the parties, there were too many options that the parties could have intended.

Boulle remarks that such cases reflect an arcane approach to the certainty issue, imposing a heavy burden on the drafters of dispute resolution clauses.[107] A more flexible approach was displayed by the Victoria Supreme Court in *Computershare Ltd v Perpetual Registrars Ltd (No 2)*.[108] The agreement in this case contained a complex ADR clause that included a provision for mediation. The defendant successfully sought a stay of proceedings in order to comply with the clause before litigation proceeded, despite the fact that the actual ADR process was left to be agreed upon by the parties when a dispute arose.

It has been suggested that this approach is more consistent with the flexibility of the mediation philosophy than the stern approach taken in alternate judgments that require a strict application of the certainty requirement.[109] As Boulle remarks, 'the compromise between certainty and flexibility allows the former to be acquired not only in terms of a set of rules laid out in advance, but also from the intervention of third parties or by applying ascertainable external standards'.[110] The court granted a limited stay so that the clause could be performed as the parties could impose an obligation in an attempt to reach an agreement, and if they did not act in good faith they would be abandoning the obligation.[111]

It has been pointed out that if this approach had been taken in *Aiton*[112] and *Elizabeth Bay*,[113] the clauses are likely to have been held enforceable.[114] As Spencer[115] remarks, in *Elizabeth Bay* the court held that a term was uncertain because it was inconsistent with an external document conceded to be part of the contract, while in *Computershare*[116] such an arrangement would be

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107 Boulle n 6 above at 429.

108 2000 VSC 233; see also the commentary of Spencer 'Uncertainty and ADR clauses: the Victorian view' (2001) 12 *ADRJ* 214. See Boulle n 6 above at 429.

109 Boulle n 6 above at 429.

110 *Ibid*.

111 *Computershare Ltd v Perpetual Registrars Ltd* (No 2) 2000 VSC 233 [14]. See Boulle n 6 above at 429.

112 1999 NSWSC 996.

113 1995 36 NSWLR 709.

114 Boulle n 6 above at 430.

115 Spencer n TEREF108) 217. See Boulle n 6 above at 430.

116 2000 VSC 233. See Boulle n 6 above at 430.

sufficiently certain to be enforceable as a court does not need to see a set of rules in order to find a term certain. It has been sensibly suggested that the approach taken in the latter case is consistent with the assumptions of both mediation and commercial practice and provides a useful guide for future developments in this area.[117]

In the more recent English case of *Sulamerica CIA Nacional de Seugros SA v Enesa Enenharia SA*,[118] the mediation clause was contained in an insurance policy, directly before an arbitration clause, and required the parties to mediate before proceeding to arbitration. The insurer instituted arbitral proceedings without attempting mediation, and the insured submitted that the mediation and arbitration clauses were part of a single dispute resolution regime, and that mediation was a condition precedent to arbitration. The English Lord Justices of Appeal concurred with Cooke J, the trial judge, that the provisions did not give rise to a binding obligation to mediate. Consequently there was no requirement to comply with the mediation clause in order to be permitted to commence arbitration as the relevant condition did not set out any defined mediation process, nor did it refer to the procedure of a specific mediation provider. The court found that it merely contained an undertaking to seek to have the dispute resolved amicably by mediation and no provision was made for the process by which that was to be undertaken. The court concluded that, at most, it may impose on a party who is contemplating referring a dispute to arbitration an obligation to invite the other to join in an *ad hoc* mediation, but even this obligation was so uncertain as to render it impossible to enforce.[119]

As noted above, in *Cable & Wireless plc v IBM United Kingdom*,[120] the court held that the ADR clause contained an enforceable obligation to participate in ADR procedures recommended by CEDR, believing that it was the mutual intention of the parties when negotiating the agreement that litigation was a last resort, and the clause was more than an agreement to negotiate as it had identified a speific procedure. The court added that ADR clauses that do not include an identifiable procedure would not necessarily fail to be

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117 See Boulle n 6 above at 430.

118 2012 EWCA Civ 638.

119 For a discussion of this case see Oddy 'Court of Appeal finds mediation clause in insurance contract did not give rise to a binding obligation' available at: http://hsfnotes.com/adr/2012/06/14/court-of-appeal-finds-mediation-clause-in-insurance-contract-did-not-give-rise-to-a-binding-obligation/ (last accessed 1 June 2015).

120 2002 EWHC 2059 (Comm).

enforceable due to uncertainty. The issue largely turns on whether or not the obligation to mediate is expressed in unqualified and mandatory terms, with the court stating that, in principle, where there is an unqualified reference to ADR, a sufficiently certain and definable minimum duty of participation should not be hard to find.[121]

In *Sulamerica*, however, an unqualified reference to mediation was not sufficient to constitute a legally effective pre-condition to mediation, with the court declining to prescribe the ingredients required to make such an agreement to mediate enforceable believing that each case must be considered on its own terms. While the dispute resolution clause in the case contained thirty-one lines and dealt with issues such as confidentiality and termination of the mediation, as well as costs, it failed to set out any defined mediation process or refer to any specific mediation provider's procedure and consequently did not create an obligation to commence or participate in a mediation process.[122]

In order to be sufficiently certain, a mediation clause will have to refer the mediation to an ADR provider or institution such as CEDR, or contain detailed provisions regarding mediator appointment and the procedure for the mediation. Simple agreements to engage in *ad hoc* mediation are likely to be very difficult to enforce. Special care must be taken when drafting escalation dispute resolution clauses, in order to ensure that each stage is effective and enforceable. At the very least a mediation provision should refer to a defined mediation process. A mechanism for the appointment of the mediator, in addition to the process to be followed, will be required. [123]

Certainty and good faith

As an agreement to negotiate 'in good faith' can prove unenforceable, similarly an agreement to mediate 'in good faith' may not be enforced by the courts, and the Australian jurisprudence has proved inconsistent.[124] The court in *Elizabeth Bay*[125] held that a mediation clause that required an attempt at 'good faith' negotiations was too uncertain to be enforceable.

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121 The Court of Appeal's decision in *Sulamerica* is more famous for confirming the severability of the arbitration agreement from the main agreement, see Oddy n 119 above.

122 For a discussion of this case see Oddy n 119 above.

123 See Oddy n 119 above.

124 Boulle & Nesic n 1 above at 475.

125 1995 36 NSWLR 709. See also Boulle & Nesic n 1 above at 475.

Conversely, Hayden J in *Con Kallergis v Calshonie*[126] believed that the obligation to act in good faith or reasonably in mediation is certain. Einstein J adopted an alternate approach in *Aiton Australia Pty Ltd v Transfield Pty Ltd*,[127] believing that as the concept of good faith depends on the wording of the agreement and the circumstances of each case, and notwithstanding that criteria to determine compliance would be undesirable, the provision of a framework would ensure sufficient certainty in the use of the phrase, *eg*:

- to agree to mediate, mediation being a defined process; and
- to agree to be open-minded in the mediation, particularly in the exchange of proposals with other parties and the mediator in an effort to resolve the dispute.

Einstein J concluded that an obligation to mediate in good faith is enforceable provided it is not an agreement to reach agreement. He believed that good faith mediation does not require that concessions be made by the parties that are inconsistent with their interests and does not ultimately require that the parties reach an agreement. [128] The inconsistency of the approach of the judiciary to good faith emerged again in the subsequent case of *Laing O'Rourke v Transport Infrastructure,*[129] which dealt with good faith negotiations rather than mediation, where Hammerschlag J referred to the approach of Einstein J in *Aiton*, but stated that he preferred the analysis of Hadley JA in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Limited*,[130] that 'a promise to negotiate in good faith is illusory and therefore cannot be binding'.[131] It has been sensibly suggested that the approach in *Aiton* should be the preferred guide for future developments in this area.[132]

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126 *Con Kallergis v Calshonie* 1998 14 BCL 201, 211–12. See also Boulle & Nesic n 1 above at 475.

127 1999 NSWSC 996. See also Boulle & Nesic n 1 above at 475.

128 There is no independent requirement of good faith in South African contract law, but this does not mean that bad faith will be condoned. See Hutchison 'Agreements to agree: can there ever be an enforceable duty to negotiate in good faith?' (2011) 128/2 *SALJ* 273, 281. See also *Barkhuizen v Napier* 2007 5 SA 323 (CC) pars 69–70. In South Africa, damages for bad faith negotiation have not yet been established. The Supreme Court of Appeal has ruled that a contractual clause requiring that parties negotiate in good faith is enforceable, provided that it is accompanied by a deadlock breaking provision, such as an arbitration clause, see *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 2 SA 202 (SCA), par 17. See Hutchison *supra*. See also Rycroft 'The duty to bargain in good faith' (1988) 9 *Indus LJ* 202 204.

129 2007 NSWSC 723.

130 1991 24 NSWLR 1 41–42.

131 Hammerschlag J at par 45.

132 See Boulle n 6 above at 433. In US states such as Oregon, courts will not probe whether a party has participated in a mediation in good faith; harmonising the policies reflected

Confusing collateral certainty

While the evolution of jurisprudence regarding the enforcement of agreements to mediate would seem to be well established and largely understood by the judiciary, recent jurisprudence from England suggests that courts can still fail to understand how such agreements operate, and one must remain mindful that there are instances when such agreements are not as certain as parties and advisors would like. The result is that legal advisors must remain mindful of the organic nature of agreements to mediate and the need to revise their drafting of such agreements as new jurisprudence emerges.[133]

This point was demonstrated by the recent English case of *Universal Satspace (North America) LLC v Government of the Republic of Kenya.*[134] Neither the facts nor the settlement terms that resulted from the mediation were in dispute. The dispute resulted from an agreement whereby Satspace agreed to provide satellite-based internet installation services to Kenya which were, they claimed, not paid for and Satspace sued for $19 million. Kenya defended the claim and pleaded want of authority on the part of their signatory, corrupt payments, and that the contract was *ultra vires* Kenya's legislative powers. The mediation resulted in an agreement whereby Kenya agreed to pay Setspace $7,6 million. However, Kenya requested a delay in signing for up to twenty-one days and the parties promised each other to sign the agreement within that period. Setspace signed the settlement agreement but Kenya did not.

Consequently, the claimants sought to strike out Kenya's defence and counter-claim on the basis that the proceedings would be an abuse of process as they had been effectively settled, requiring only Kenya's promised signature to the settlement agreement, and Teare J agreed. This was despite the fact that the agreement to mediate had provided in clause 17 that no settlement would be binding unless in writing and signed by the parties. Teare J concluded that an oral collateral agreement between the parties to

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in the state's mediation statutes with the contract law approach. See Crown 'Are mandatory mediation clauses enforceable?' (2010) 29/2 *Litigation Journal* 3 4.

133 See Allen 'A binding settlement (or not)?: the mediator's dilemma' 21 February 2014, available at: http://www.cedr.com/articles/?item=A-Binding-Settlement-or-Not-The-Mediator-s-Dilemma (last accessed 3 June 2015).

134 20 December 2013, Teare J, Queen's Bench Division, (unreported). For an interesting discussion of this case see Allen n 133 above.

the effect that Kenya was contractually bound to sign what was already a binding agreement negotiated at the mediation. He took the view that clause 17 was concerned with the settlement of the underlying dispute and was not a collateral agreement to sign the agreed form of settlement agreement within a period of time. As a result, clause 17 did not prevent the court from considering the agreement to execute the settlement agreement. [135]

It has been suggested that some might see 'justice' in this decision; Kenya had clearly indicated its willingness to be bound by agreed terms, and for whatever reason, failed to sign up to those terms at the mediation or subsequently. It follows that if they were under a contractual obligation to sign a concluded agreement, then they failed to do so and they should not be allowed to proceed with their defence as all they had to do was sign the agreement. However, such an approach undermines the legal framework of mediation. [136]

The court enforced a settlement agreement that was contrary to the express provisions of clause 17 of the agreement to mediate. As there were no written terms signed by the parties as required, it is difficult to see how any collateral agreement, with sufficient certainty, could take effect. Teare J held that the provision in clause 17 related to the settlement of the underlying dispute and not to a collateral agreement to sign the agreed form of settlement agreement within a period of time. The difficulty with this approach is that it is difficult to have a collateral contract in the absence of a main contract to which it is collateral, the existence of which was made impossible as an agreed required formality was not complied with. [137]

It is unfortunate that even a first-instance decision would seemingly subvert the safety of the mediation process. The decision was no doubt due in part to Kenya's misguided submissions that attempted to justify its substantive defence based on corruption allegations, and failed meaningfully to address the enforcement of clause 17 of the mediation agreement or any persuasive points about the mediation process and its protection. The judge consequently did not have the benefit of persuasive argument on these points apart from that of the party who wanted to enforce the apparent settlement. [138]

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135 See Allen n 133 above.
136 *Ibid*.
137 *Ibid.*
138 *Ibid*.

The critical point to glean is the importance of re-education regarding the background rationale for agreements to mediate and the jurisprudence that supports this rationale and which offers certainty to parties reaching settlements under them. If the lawyers representing Kenya had provided this information in their pleadings, the case may have been decided differently. While such understanding is central to protect parties who settle disputes under an agreement to mediate that may be challenged, viewing agreements to mediate as organic and reflecting this reality in careful drafting will also be key in light of such decisions. It has been suggested that the language of provisions such as clause 17 of the agreement to mediate in the above case should be widened to require signature to confer validity on any collateral contract or effective waiver of the mediation agreement's requirements as to formality. An example of such expanded language as a result of this case might read:

> No terms of settlement reached at the Mediation will be legally binding until set out in writing and signed by or on behalf of each of the Parties. The Parties furthermore agree that no variation waiver or collateral contract extending or amending the effect of this provision shall be of any force whatsoever unless the same is itself in writing and signed by the parties.[139]

The decision is surprising in light of the changes to the CPR introduced following Lord Woolf's Access to Justice Report, which have been in effect since April 1999.[140] The rules encourage the use of mediation with the support of various measures including costs sanctions for parties who win at trial but who unreasonably refused an offer to mediate a dispute that could have been settled.[141] It has been suggested for some time that the culture

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[139] This is an amendment to the CEDR Model clause the CEDR Model document are available at: http://www.cedr.com/aboutus/modeldocs/ (last accessed 3 June 2015). See also Allen n 133 above.

[140] For a full text of the Civil Procedure Rules and Practice Directions for civil litigation in England see www.justice.gov.uk/civil/procrulesfin/index.htm (last accessed 3 June 2015).

[141] CPR 1.1(1) provides that 'These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.' This was later amended to include 'justly and at proportionate cost' with the added explanation that includes 'enforcing compliance with rules, practice directions and orders'. See Jackson LJ 'Review of Civil Litigation Costs Final Report', 14 January 2010, at 31, available at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf (last accessed 3 June 2015). The CPR was amended in light of the Jackson report, for an overview of the main changes to the CPR introduced by the Jackson report, see Allen 'The Jackson Report amendments to the CPR – what do they

change desired by Lord Woolf that was reflected in the CPR is ostensibly well embedded in the civil justice system in England.[142] The changes to the CPR have been joined by an initiative to train and educate all judges in the mediation process and how and why it can achieve workable settlements for many commercial disputants.[143] Indeed, commentators have remarked that the growth of commercial mediation in England over the last two decades has been marked by appreciable support for mediation development from the senior judiciary, and the training and educational initiatives are in no small part responsible factors.[144] It seems then that even in a jurisdiction that has made significant endeavours to ensure that mediation is both used and understood, both judges and parties can sometimes misunderstand the nature of the process and the agreement that supports and protects it.

Completeness

The issue of completeness is closely aligned to the issue of certainty, but it has been of less practical significance, and the question of the invalidity of a mediation clause due to incompleteness has not yet been raised in a case. Consistent under general contractual principles, an agreement will be void for incompleteness where it does not refer to an important part of the transaction.[145] In *Triarno Pty Ltd v Triden Contractors Ltd*,[146] an Australian court held that it had no jurisdiction to create procedures to be followed where a dispute resolution clause provided for binding expert determination, but failed to refer to procedures to follow or the rights that the parties were

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do to encourage settlement (if anything?)' 26 March 2013, available at http://www.cedr.com/articles/?item=The-Jackson-Report-Amendments-to-the-CPR-What-do-they-do-to-encourage-settlement-if-anything (last accessed 3 June 2015).

142 See for example Kallipetis n 95 above at 2.

143 See Carroll 'The future belongs to mediation and its clients' in Newmark & Monaghan (eds) *Mediators on meditation: leading mediator perspectives on the practice of commercial mediation* (2005) 401.

144 See Mr Justice Lightman 'In my opinion...CEDR mediation training for a judge' available at www.cedr.com/index.php?location=/library/articles/20071127225.htm (last accessed 3 June 2015), where the English High Court judge remarks that the more he learned about mediation, the more enthusiastic an advocate he became of the process. See Allen 'Judiciary, Government and ADR Justice' 24 January 2011 available at: http://www.cedr.com/articles/?item=Judiciary-Government-and-ADR-Justice (last accessed 3 June 2015). The Jackson review has also focused on continuing education efforts for judges on mediation. See Jackson 'Review of civil litigation costs final report' 14 January 2010, 363 available at: https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf (last accessed 3 June 2015). See also Koo 'Ten years after Halsey' 2015 34/1 *Civil Justice Quarterly* 77, 81.

145 Boulle & Nesic n 1 above at 476.

146 1992 10 BCL 305. See also Boulle & Nesic n 1 above at 476.

to have in the process. The traditional view seems to be that courts are not inclined to imply terms into contracts in relation to procedures to be followed.[147] While this logic could be extended to mediation clauses, it has been sensibly suggested that increased use of and familiarity with mediation should result in courts being less concerned with the issue of incompleteness.[148]

Attempts to oust the jurisdiction of the courts

It is a basic constitutional principle in most jurisdictions that courts are accessible to people where a dispute is appropriate for adjudication by a court and it is not possible to contract out of this right. This would result where a contract provision declares that mediation is the exclusive alternative to litigation, and such a clause would be unenforceable as it is against public policy to oust the jurisdiction of the courts.[149]

In South Africa, article 34 of the Constitution[150] reads:

> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing in a court or, where appropriate, another independent and impartial forum.

It was pointed out some time ago that this clause is intended to protect the arbitration process, in particular the processes conducted under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA), from a constitutional challenge that a disputant had been deprived of a right of access to the courts.[151] The position is less clear where there is an obligation in a contract to resolve a dispute by mediation and it has been suggested that the use of the word 'resolved' in article 34 implies a final resolution of a dispute by mediation, adjudication or arbitration.[152] It follows that a contractual obligation to attempt mediation to resolve the dispute

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147 Spencer n 21 above. See also Boulle & Nesic n 1 above at 476.

148 Spencer n 21 above at 24. See also Boulle & Nesic n 1 above at 476.

149 Boulle & Nesic n 1 above at 477.

150 Act 108 of 1996. See also Boulle & Rycroft n 3 above at 231.

151 Boulle & Rycroft n 3 above at 231. This was confirmed by the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd* (Case no CCT 85/06) which overturned the decision of the Supreme Court of Appeal in *Rustenburg Platinum Mines Ltd v CCMA* 2007 1 SA 576 (SCA) and confirmed that s 34 of the Constitution applies to CCMA arbitrations.

152 *Cf* Christie in Du Toit *et al The Labour Relations Act of 1995* 327; Van Kerken 'Arbitrasie en die howe' (1993) 13 *ILJ* 17. See also Boulle & Rycroft n 3 above at 231.

would consequently not be an attempt to oust the jurisdiction of the courts.[153] It is important in this context that mediation clauses are drafted so that mediation is reflected as a condition precedent to and not an alternative to litigation,[154] so that if mediation fails, the parties are free to go to court.[155] However, section 34 refers to the dispute being decided 'in' not 'by' a court, or where appropriate, another independent tribunal or forum. Mediators unlike arbitrators do not decide the dispute, but the use of the word 'in' apparently leaves the door open to argue that section 34 could apply to mediation.

A recurring theme in some of the jurisprudence that has emanated from England, and an issue that South African practitioners and the judiciary should remain mindful of, is the concern expressed that the more vigilant the judiciary becomes in encouraging mediation, the more it appears that mediation is becoming compulsory. The more mandatory mediation appears to be, the more likely it will be to run into allegations that it violates the rights guaranteed by section 34 of the Constitution.[156] Experience of mediation when recommended in other jurisdictions such as the UK, would seem to indicate that voluntary mediation is preferable to compulsory mediation as it is more likely to lead to a successful outcome.[157]

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153 See Boulle & Rycroft n 3 above at 231. It has also been accepted that an arbitration clause does not oust the jurisdiction of the courts, partly it would seem in view of the court's existing discretion not to enforce the arbitration agreement, on good cause shown; see *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 1 SA 301 (D) 305 F–H.

154 This principle has foundations in the law of arbitration, see *Scott v Avery* 1856 5 HLCas 81 10 ER 1121. The parties effectively covenant that no right of court action will accrue until mediation is attempted. See Boulle & Nesic n 1 above at 477.

155 Similarly, by analogy with labour law, where mediation failed to completely resolve the dismissal of strikers, the employees were not deprived of the normal disciplinary procedure to finally resolve the matter, see *MAWU & Others v Siemens Ltd* 1986 7 *ILJ*553 (IC) 557H. See also Boulle & Rycroft n 3 above at 231.

156 This is an issue that many countries in the EU are also dealing with. Ireland, for example has constitutional provisions protecting the right to litigate, and is subject to art 6 of the European Convention on Human Rights that protects the right of access to the courts. See generally O'Donnell 'A Comparison of Article 6 of European Convention on Human Rights and the Due Process Requirements of The Constitution of Ireland' *Judicial Studies Institute Journal* (2004) 4/2 37–67, available at: http://www.jsijournal.ie/html/volume%204%20no.%202/4%5B2%5Do%27donnella%20comparison%20of%20article%206%20echr.pdf (last accessed 3 June 2015). For an extensive discussion on the doctrine of waiver in the case law of the European Court of Human Rights, relating specifically to an individual's right of access to court under art 6(1) ECHR, see Shipman 'Waiver: Canute against the tide?' (2013) 32/4 *Civil Justice Quarterly* 470–492.

157 Kelly 'Alternative dispute resolution and the Commercial Court' 2010 *Arbitration and ADR Review* 92 93.

Dyson LJ, in delivering the *Halsey* judgment, remarked 'to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the courts… and, therefore, a violation of article 6 of the European Convention of Human Rights.[158] He subsequently regretted making the remarks on the issue of compulsion. He conceded that 'in and of itself compulsory mediation does not breach article 6', based on the judgment of the European Court of Justice in *Rosalba Alassini v Telecom Italia SpA*.[159] In this case, the European Court of Justice[160] decided that a provision in Italian law which required parties to submit to mediation, failing which they forfeited their right to bring proceedings before the courts, was not in contravention of article 6 of the European Convention on Human Rights.[161]

Other leading English jurists, such as Lightman J, Lord Phillips CJ, and Sir Anthony Clarke MR, have also commented that the basis that an order for mediation does not interfere with the right to trial, as it does not propose mediation in lieu of a trial, but merely imposes a delay. Lord Phillips, for example, a former head of the judiciary in England and Wales and founding President of the UK's Supreme Court, who referred specifically to Dyson LJ's judgment in *Halsey*[162] and proceeded to say that 'Parties should be given strong encouragement to attempt mediation before resorting to litigation. And if they commence litigation, there should be built into the process a stage at which the court can require them to attempt mediation.'[163] Sir Anthony Clarke supports this view by pointing to the fact that compulsory mediation occurs in other jurisdictions, such as Germany, Italy and Greece with no successful article 6 challenges.[164]

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158 *Halsey v Milton Keynes NHS Trust* 2004 EWCA Civ 576; 2004 1 WLR 3002.

159 See Lord Dyson 'A word on Halsey v Milton Keynes' (2011) 77/3 *Arbitration* 337 339, keynote speech, Third Annual Mediation Symposium of the Chartered Institute of Arbitration, London, October 2010. See also Lord Dyson 'Halsey 10 years on—the decision revisited' 6 10, Keynote speech, Belfast Mediation Conference, Belfast, May 2014.

160 (C-317-320/08) 2010 3 CMLR 17.

161 See Meggitt 'PGF II SA v OMFS Co and compulsory mediation' (2014) 33/3 *Civil Justice Quarterly* 335–348 335 and 348.

162 2004 EWCA (Civ) 576

163 See Speech by Lord Phillips of Worth Matraves, Lord Chief Justice of England and Wales 'Alternative Dispute Resolution: An English Viewpoint' India, 29 March 2008, available at www.judiciary.gov.uk/docs/speeches/lcjadrindia290308.pdf (last accessed 3 June 2015).

164 See Lightman 'Mediation: an approximation to justice', SJ Berwin Lecture, London, 28 June 2007, available at: http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/berwinsmediation.pdf

Jackson LJ rejected compulsory mediation in his *Review of Civil Litigation Costs Final Report*, although, consistent with the rationale in *Halsey,* he supported sanctions against those who unreasonably refused to mediate.[165] Despite such judicial clarification, some contend that the courts in England do in fact compel mediation surreptitiously, through the use of what is termed 'implied compulsory mediation'. The contention is that while the official position is that mediation is England is not and should not be made compulsory, implied compulsory mediation exists and will continue to form part of the civil justice landscape through a process where judges, supported by the CPR, are making it clear to parties that they expect that they will engage in ADR, and parties, mindful of the potential adverse cost consequences, feel compelled to engage in an ADR process. This issue has been exacerbated it seems, by austerity and the pressure on court resources.[166]

A contractual obligation to attempt mediation to resolve the dispute would consequently not be an attempt to oust the jurisdiction of the courts. It is important in this context that mediation clauses are drafted so that mediation is reflected as a condition precedent to and not an alternative to, litigation[167] so that if mediation fails, the parties are free to go to court.[168]

(last accessed 3 June 2015); Lord Phillips CJ 'Alternative dispute resolution : an English viewpoint' March 29th 2008, available at: www.judiciary.gov.uk/docs/speeches/lcjadrindia290308.pdf (last accessed 3 June 2015); Clarke 'The future of civil mediation' 8 May 2008, available at: www.civilmediation.org/downloads-get?id=128 (last accessed 3 June 2015); Clarke 'Mediation – an integral part of our litigation culture' *Littleton Chambers Annual Mediation Meeting*, Gray's Inn, 8 June 2009, available at: http://www.judiciary.gov.uk/docs/speeches/mr-littleton-chambers-080609.pdf (last accessed 3 June 2015). See also Ryan 'Promoting ADR through the imposition of costs sanctions – is it the right approach?' *International Bar Notes,* February 2013 13 14.

165 See Jackson 'Review of Civil Litigation Costs Final Report' 14 January 2010, at xxiii, available at: https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf (last accessed 3 June 2015).

166 See Ahmed 'Implied compulsory mediation' (2012) 31 *CJQ* 151, see specifically 164–170.

167 This principle has foundations in the law of arbitration, see *Scott v Avery* 1856 5 HLCas 81; 10 ER 1121, discussed above. The parties effectively covenant that no right of court action will accrue until mediation is attempted. See Boulle & Nesic n 1 above at 477. See also Weldon & Kelly n 36 above.

168 Similarly, by analogy with labour law, where mediation failed to completely resolve the dismissal of strikers, the employees were not deprived of the normal disciplinary procedure to finally resolve the matter, see *MAWU & Others v Siemens Ltd* 1986 7 *ILJ*553 (IC) 557H. See also Boulle & Rycroft n 3 above at 231.

Other policy considerations affecting the enforceability of mediation clauses

There are policy considerations other than legal factors that favour the enforceability of mediation clauses that could prove influential when courts consider enforcement. For example, a dispute resolution clause is unlikely to be unenforceable because it does not uphold the requirements of procedural fairness. [169] In the Australian case *Aztec Mining Co Ltd v Leighton Contractors Pty Ltd*,[170] the clause provided that disputes be referred to an independent expert who was required to follow certain expedited procedures prior to giving a binding decision. The procedures provided for the parties to make submissions to the expert for consultation on matters of procedure and legal representation. The plaintiff submitted that the prescribed procedure was not appropriate given the complex nature of the dispute and should be deemed unenforceable as offending the fundamental requirements of fairness. The court held that there was nothing preventing a party from going to court where there are allegations of error or impropriety by the expert and declined to strike it down.[171]

A mediation clause could potentially be challenged on similar grounds, for example, where the parties are unable to prepare or access essential information or where the nominated mediator is not impartial. It seems that in circumstances where mediation is combined with arbitration and the same person acts in both (med-arb), the possibility of a successful challenge would be greater.[172]

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169 Boulle n 6 above at 439–440.

170 Supreme Court of Western Australia, Murray J, 1109 of 1990, 23 February 1990, (unreported). See Boulle n 6 above at 440.

171 See Boulle n 6 above at 440.

172 Boulle n 6 above at 440–441. See Scanlon and Bryan 'Will the next generation of dispute resolution clause drafting include model arb-med clauses?' in (2009) *Contemporary issues in international arbitration and mediation the Fordham Papers* at 429–436. As mediation and arbitration are very different processes they each require very different skills sets and approaches. See Sussman 'Developing an effective med-arb/arb-med' (2009) 2/1 *New York Dispute Resolution Lawyer*; Sussman 'Med-arb: an argument for favouring ex-parte communications in the mediation phase' (2013) 7/2 *World Arbitration and Mediation Review*; Sussman 'Combinations and permutations of arbitration and mediation: issues and solutions' in Ingen-Housz *ADR in business: practice and issues across countries and cultures volume II* (2011) 381–398, available at: http://www.sussmanadr.com/articles.htm (last accessed 3 June 2015). For a detailed discussion and interesting overview of a case study dealing with the process of mediating a transnational dispute in the context of arbitral proceedings, see Mironi 'From mediation to settlement and from settlement to final offer arbitration: an analysis of transnational business dispute mediation' (2007) 73/1 *Arbitration* 52–59.

There are numerous policy arguments that favour the enforcement of mediation clauses that do not undermine the principle against ousting the courts' jurisdiction.[173] For example, where it is clearly the intention of the parties to postpone litigation until another dispute resolution process has been attempted, it has been suggested for some time that the courts should give effect to that intention by enforcing the contract.[174]

It has been suggested that the rationale behind the enforcement of arbitration clauses can to an extent be applied to other dispute resolution clauses.[175] However, Astor and Chinkin[176] point out that it is not as easy to assess compliance with a mediation clause when compared to an arbitration clause. Arbitration has a well-established procedure and there is a binding outcome in the form of the arbitrator's award. It is not as easy to assess compliance with a mediation clause, given the flexibility of the process and the difficulties in assessing whether the parties engaged in the process in good faith. Similarly, according to Astor and Chinkin, courts can ensure compliance with arbitration clauses by appointing arbitrators with binding authority, while there is no legislative basis permitting courts to appoint mediators where the parties do not. However, it is some time since this analysis by Astor and Chinkin and there have been many changes and it has been suggested that there are now many situations where mediators are appointed for the parties.[177] For example, mediators must sometimes evaluate if a mediation was satisfactorily conducted. Parties may also be sanctioned in mediation where they do not act reasonably and in good faith and in light of the progressive principal of contractual freedom it has become more difficult for courts to refuse to enforce clauses requiring private mediation.

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173 Foreign courts have for some time enforced clauses providing for dispute resolution processes other than arbitration, see the cases from the US from over twenty years ago analysed in Astor & Chinkin n 4 above at 209–10. See also Boulle & Rycroft n 3 above at 232.

174 See *Public Authorities Superannuation Board v Southern International Developments Corporation Pty Ltd,* New South Wales Supreme Court, No 17896 of 1987, 19 October 1987, (unreported), analysed in Astor & Chinkin n 4 198–202. See also Boulle & Rycroft n 3 above at 232.

175 Boulle & Rycroft n 3 above at 233.

176 Astor & Chinkin n 4 above at 209. See also Boulle & Rycroft n 3 above at 233.

177 Boulle & Rycroft n 3 above at 233.

The recent case of *Beauty Star Ltd v Janmohamed*[178] reinforced the English court's support for the enforcement of agreements to mediate. The court ordered the parties to appoint an accountant pursuant to an agreement to mediate they had entered into. The court held that the appointment of an accountant was under the agreement and not a court-appointed expert. Consequently, the court was not entitled to re-examine the accountant's approach. Even if the accountant's report contained mistakes, it was binding, because that is what the parties had agreed. [179] The decision supports the now well established premise that contractual freedom is the basis of all mediation.[180]

Providing the required certainty

On the certainty issue, the *Hooper Bailie* rationale, upholding a mediation clause reflects the nature of the mediation process and is preferable.[181] It would also seem to be supported by the approach of some judges in foreign jurisdictions that they will, where possible, do everything they can to enforce the intention of the parties.[182] As previously noted, it would also seem to be consistent with modern business practice, as it is usual for commercial agreements to contain clauses that require parties to negotiate and/or mediate and endeavour to settle when a dispute arises.[183]

From the jurisprudence discussed, a number of factors can be gleaned that should be borne in mind when considering the certainty of mediation clauses and agreements to mediate.[184] Parties should not leave any element to be

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178 2014 EWCA Civ 451. See also *Mann v Mann* 2014 EWHC 537 Fam Law 795 (Fam Div) and the discussion of the case contained in Suter 'Enforcing mediation agreements: where are we now? Mann v Mann' (2014) 80/3 *Arbitration* 336–343.

179 2014 EWCA Civ 451, see pars 32–35 39. For a discussion of the courts' powers in England to order parties to enter mediation and the enforceability of agreements to mediate and the types of disputes that are not suited to mediation, see Suter 'Discussion Required? Part 1' (2008) 158 *New Law Journal* 1525.

180 Timsit 'Mediation: an alternative to judgment, not an alternative judgement' (2003) 69/3 *Arbitration* 159.

181 See Boulle & Nesic n 1 above at 476.

182 For example, *Aztec Mining Co Ltd v Leighton Contractors Pty Ltd* 14 February 1990, Supreme Court of Western Australia, Murray J, (unreported); and R Charlton 'Case Note: *Aztec Mining Co Ltd v Leighton Contractors Pty Ltd* 1990 1 *ADRJ* 104–6. See also Boulle & Nesic n 1 above at 476.

183 Boulle & Nesic n 1 above at 476.

184 See Spencer 'Mediation practice notes – around the grounds!' (2000) 15 *ADRJ* 149, 156–7. See also Boulle n 6 above at 435. For an overview of the issues to consider in sector specific commercial mediation clauses, see American Arbitration Association 'Drafting Dispute Resolution Clauses – a practical guide' 15–21, available at

agreed on in the future unless there is a fall-back arrangement, as this will amount to 'an agreement to agree'. If parties, for example, agree that their mediator will be selected when the situation requires, they should allow for the possibility that they may not agree by providing that someone else, *eg* a professional association, will make the appointment. Where terms are imported by the parties into the contract from an external document it should be annexed to the agreement or a specified document should be referenced, and there should be no inconsistency between this document and the mediation clause.[185] Clarity and certainty should be apparent or should be readily derived from such extrinsic documents expressly referred to in the mediation clause and the contractual provisions should be comprehensive and complete. For example, there should be no ambiguity regarding the scope of application such as the types of claim covered or those that may be carved out such as disputes over fees or intellectual property disputes, as often appear in franchise contracts. The timings of the mediation efforts such as the minimum or maximum time that parties should attempt to mediate the dispute should be elucidated.[186]

The procedures to be followed by the parties when setting up and undertaking the mediation should be specified, the identity of the mediator, the responsibility for payment of the mediator's fees and the timetables to be followed should also be referred to in the agreement,[187] with an inbuilt degree of flexibility to provide for mediator discretion where the mediator believes that variations to such a structure may prove useful as the mediation progresses, such as the use of caucus sessions, where the mediator meets each of the parties privately in an effort to move the process along. As an alternative to detailing how the process will work in the agreement, the

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https://www.adr.org/aaa/ShowPDF?doc=ADRSTG002540 (last accessed 1 June 2015). See Hood 'Commercial contracts, lawyers and alternative dispute resolution: a proactive habit' (1998) 9 *ADRJ* 129; Angyal 'Enforceability of agreements to mediate' in Raftesath & Thaler (eds) *Cases for mediation* (1999). See also Boulle & Nesic n 1 above at 479. See also De Berti 'The model mediation agreement of the Chartered Institute of Arbitrators' (2010) 76/1 *Arbitration* 136–144.

185 Spencer n 184 above at 160–1. See also Boulle n 6 above at 435.

186 See also Graham 'Issues for mediation clauses' in Barclay (ed) *Mediation techniques* (*International Bar Association E-book*) (2010) 11–14. For a discussion on drafting international mediation clauses see Moloo & Jacinto 'Drafting international mediation clauses' in Barclay (ed) *Mediation techniques* (International Bar Association E-book (2010) 15–22. See also See also Weldon & Kelly n 36 above.

187 See Jarrosson 'Legal issues raised by ADR' in Ingen-Housz (ed) *ADR in business; practice and issues across countries and cultures vol 2* (2011) 163–178.

mediation procedure of an organisation providing mediation services could be incorporated by reference.

The non-ouster principle should be observed by requiring that the parties first submit their dispute to mediation before instituting court proceedings. The provision should refer explicitly and unambiguously to mediation as a condition precedent to litigation or arbitration. This will help to ensure that the mediation clause cannot be perceived as ousting the jurisdiction of the courts and it also makes it clear and certain that the parties have agreed that they will attempt mediation before court proceedings or arbitration.[188] If mediation is to be a condition precedent to obtaining relief in court, issues such as the possible need for emergency provisional relief and the possible suspension of the statute of limitations during mediation should be considered.[189] The provisions requiring participation in 'good faith' should be viewed cautiously, particularly to avoid suggestions that it is an agreement to reach agreement.

In addition to providing that settlement terms reached will only be binding until set out in writing and signed by the parties, the agreement should provide that any variations, waivers or collateral agreements extending or amending this requirement must also be in writing and signed by the parties in order to be enforceable. The contract could also include a penalty such as the forfeiture of lawyers' fees and costs for not engaging in mediation in order to serve as a deterrent to a party who may opt to litigate rather than mediate first. In addition to being expressed as a condition precedent, the provision would contain the details of enforcement discussed above and the consequences for failing to comply.[190]

The Model Law on International Commercial Conciliation

Article 4 of the UNCITRAL Model Law on International Commercial Conciliation (the Model Law) provides that where a dispute arises, a party will invite the other party to mediate and that only in circumstances where the invitation is accepted will the mediation commence. This is clearly unacceptable in situations where there is a pre-existing agreement to mediate

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188 See Weldon & Kelly n 36 above.
189 See Crown n 132 above at 5.
190 See also Weldon & Kelly n 36 above.

as it would deprive the agreement of any real meaning if a party could refuse to engage in mediation when a dispute arises. [191]

The author has argued elsewhere that the Model Law should act as a template for the introduction of a mediation statute in South Africa. In the event that the Model Law is to act as a framework for a mediation statute in South Africa then this article would clearly require revision.[192] The revision should reflect the jurisprudence detailed above in cases such as *Hooper Bailie*, in support of enforcing agreements to mediate in order to give effect to the intentions of the parties.

The Certainty of Compliance

No firm authority exists as to what is required from parties in a mediation to comply with the obligations in an enforceable mediation clause. In the analogous case of *SAAWU & others v Nampark Products Ltd,* [193] the fact that workers did not comply with an agreement to mediate reached by their union with management was a factor in the court finding that subsequent dismissals were not unfair. It has been suggested that criteria could include attendance at the mediation, disclosure of information to the other side, compliance with the procedural directions of the mediator, engagement in constructive negotiations until there is good reason to conclude them and participation at every stage with reason and in a spirit of good faith.[194] However, assessing compliance with such requirements would involve difficult subjective judgments by outsiders to the mediation and there would also be difficulties in defining the obligations of the parties clearly.[195]

It has been suggested that it may sometimes be easier to deduce that parties had acted in bad faith or unreasonably, for example, by sitting silent throughout the mediation, than that they had acted in good faith and reasonably, and there are also practical difficulties in establishing proper compliance with mediation clauses given the private and confidential nature

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191 See also Sanders 'UNCITRAL's Model Law on International Commercial Conciliation' (2007) 23 *Arbitration International* 106.

192 See Feehily *The development of commercial mediation in South Africa in view of the experience in Europe, North America and Australia* (Phd thesis UCT) (2008), available at: http://uctscholar.uct.ac.za/R/?func=dbin-jump-full&objectid=91302&localbase=GEN01 (last accessed 6 June 2016). See also Feehily n 2 above.

193 1987 8 ILJ 452 (IC). See also Boulle & Rycroft n 3 above at 234.

194 Boulle & Rycroft n 3 above at 234.

195 See Boulle & Nesic n 1 above at 483.

of the process.[196] Nevertheless, it has been suggested that there is no reason in principle why courts could not, in appropriate cases, decide if a party has complied with its obligations under a mediation clause.[197] Each case would turn on its own facts.[198]

In *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*,[199] Giles J expressed difficulties with the 'good faith' requirement in a mediation clause, believing that the presence or absence of good faith was not the main difficulty, rather the tension between negotiation, where a party is self-interested (rather than having regard to the interest of the other party), and the maintenance of good faith. It has been correctly pointed out that this approach overlooks the differences between unassisted, adversarial negotiations and mediated negotiations where a trained mediator can assist the parties in moving towards collaborative, interest-based bargaining.[200] Australian and English courts have been willing for some time to enforce clauses that require parties to exercise their 'best endeavours',[201] which term has been held to not impose an infinite obligation, but merely conscientious and reasonable action. As mentioned above, in light of the increasing use of mediation clauses in other jurisdictions, should a dispute arise about a party's obligations under a mediation clause, the courts may be able to develop criteria for the satisfactory compliance with obligations arising from them, which in practice will be determined from the available evidence.[202] For example, in an Australian case based on a provision in the Native Title Act[203] that requires good faith negotiations, the Tribunal found that it would consider the totality of the circumstances when determining whether the parties approached the negotiations with an open mind and a genuine desire to reach a settlement.[204]

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196 Boulle & Nesic n 1 above at 483.

197 Boulle & Nesic n 1 above at 483.

198 See Feehily 'Costs sanctions; the critical instrument in the development of commercial mediation in South Africa' (2009) 26/2 *SALJ* 26/2 291. See also Carroll & Mackie *International mediation– the art of business diplomacy* (2006) 3–17.

199 Supreme Court of New South Wales, 1995 36 NSWLR 709 (Giles J). See also Boulle & Nesic n 1 above at 483.

200 Boulle & Nesic n 1 above at 483.

201 Boulle & Nesic give an example in relation to obtaining building approvals see *Hawkins v Pender Bros Pty Ltd* 1990 1 Qd R 135, Boulle & Nesic n 1 above at 483.

202 Boulle & Nesic n 1 above at 483.

203 *Western Australia v Taylor* 1996 134 FLR 211. See also Boulle & Nesic n 1 above at 484.

204 Spencer 'Case note: complying with a requirement to negotiate in good faith' (1998) 9 *ADRJ* 226; and Mead 'ADR agreements: good faith and enforceability' (1999) 10 *ADRJ*

Remedies for breach of mediation clauses

In circumstances where a mediation clause is not properly complied with, the issue of breach of contract arises, as well as the possible remedies that are available where a breach occurs.[205] There are primarily three potential remedies in such circumstances.[206]

Stay of proceedings

A stay of proceedings occurs where a court declines to accept a matter for trial because the defendant has raised special circumstances. In South Africa a defendant can apply to the High Court under the court's inherent jurisdiction to grant a stay of proceedings, and while this power is exercised sparingly, stays can be granted where the proceedings are vexatious or frivolous, where they amount to an abuse of process, or where they lack a probable cause of action.[207]

It has been suggested that these general principles could possibly be applied where a plaintiff commences legal proceedings without first complying with an enforceable mediation clause. The defendant would have to establish grounds for the stay and the court would have to decide whether the plaintiff's actions constituted an abuse of process, and in determining whether to grant the stay it would consider the likelihood that mediation would have led to a resolution of the dispute.[208] While a stay of proceedings in the context of arbitration is specifically legislated for by section 6 of the Arbitration Act 42 of 1965, there is no statutory basis for the order relative to an enforceable mediation clause, but it seems that it could be granted in terms of the High Court's inherent jurisdiction.[209]

The Australian courts' acceptance of the policy of granting stays of proceedings in *Hooper Bailie*[210] and *Elizabeth Bay*,[211] where one party had not complied with a mediation clause, has been adopted by English courts, where it has been suggested that as the needs of the legal system change and

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226. See also Boulle & Nesic n 1 above at 484.

205 See Shirley 'Breach of an ADR clause – a wrong without a remedy?' (1991) 2 *ADRJ* 117. See also Boulle & Rycroft n 3 above at 234.

206 Boulle & Rycroft n 3 above at 234.

207 Boulle & Rycroft n 3 above at 234.

208 *Id* at 235.

209 *Ibid*.

210 1992 28 NSWLR 194. See also Boulle n 6 above at 444.

211 1995 36 NSWLR 709. See also Boulle n 6 above at 444.

where parties have chosen some form of ADR, there is a need for courts to stay proceedings.[212]

In *Cable & Wireless v IBM United Kingdom Limited*,[213] the judge concluded that the reference to ADR in the agreement was analogous to an agreement to arbitrate. As such it was a free-standing agreement ancillary to the main contract which, subject to the discretion of the court, was capable of being enforced by a stay of proceedings, or an injunction where no proceedings were pending. He believed that strong cause would have to be shown before a court could be justified in declining to enforce such an agreement.

The courts in the USA have also shown a willingness to stay proceedings to compel performance of a mediation clause. In *CB Richard Ellis, Inc v American Environmental Waste Management & Ors*,[214] the US District Court for the Eastern District of New York held that it was appropriate to stay the proceedings and compel the mediation because the mediation clause in the disputed agreement was sufficient to manifest the parties' intention to attempt to settle any dispute by reference to mediation.

In the Australian case of *Hyslop v Liverpool Hospital*,[215] the court declined to exercise its discretion in favour of the defendant because the apparent unwillingness of the parties to make the process work meant that it had no confidence that a stay would result in a successful resolution of the dispute through the alternative procedure.[216] In the subsequent case of *Allco Steel (Queensland) Pty v Torres Strait Gold Pty Ltd*,[217] one of the reasons a stay was refused was because the court believed that it would be a futile exercise to attempt conciliation.

In *Townsend and Townsend v Coyne*, [218] Young J believed that a stay could be granted in three exceptional situations. The first is where the case is

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212 See Lee 'Enforcing an ADR clause: *Cott Ltd v Barber Ltd*' 1999 *Singapore Journal of Legal Studies* 257. See also Boulle n 6 above at 444.

213 2002 2 All ER (Comm) 1041.

214 1998 US Dist LEXIS 20064.

215 Supreme Court of New South Wales, 3905 of 1987, Hodgson J, 14 October 1987, (unreported). See also Boulle & Nesic n 1 above at 485.

216 Boulle & Nesic n 1 above at 485.

217 Supreme Court of QLD, 2742 of 1989, Master Horton, 12 March 1990 (unreported). See also Boulle & Nesic n 1 above at 485.

218 Supreme Court of NSW Equity Division, 002023/95, Young J, 26 April 1995, (unreported). See also Boulle & Nesic n 1 above at 485.

presented inadequately, the second is where it is provided by statute; and the third is where there is an abuse of process. In the case, the court believed that there was no abuse of process to justify a stay being granted where the owners of a property sought to remove pre-existing caveats from land title at the 'eleventh hour' and an injunction was required to allow settlement to take place.[219]

Of the three remedies discussed, a stay would seem to be the most feasible option where one party is in breach of a valid mediation clause, which is perhaps the most practical reason as to why courts should be willing to give this relief where appropriate. The granting of stays would also seem to be supported by policy considerations where parties have freely consented to a mediation clause and where there are no overriding considerations of public interest or private harm. Courts will no doubt have to strike a difficult balance between obliging participants to engage in a process that could result in, but cannot guarantee, a resolution more cheaply and quickly than through the courts (effectively enforcing mediation provisions), and facilitating the parties' entitlement to a court hearing that would guarantee an outcome but at a potentially higher cost and with greater delay.[220]

Specific performance

Specific performance is an order to perform a contractual obligation under a contract. [221] This could include performing an act or acts, rendering services, making delivery or paying money. Under South African law a claimant is always entitled to claim specific performance, and the claim will be granted provided the case is made, subject to the discretion of the court.[222] In the context of a mediation clause, the issue arises as to whether a court could compel participation in a mediation.[223] There are difficulties in granting this remedy, as it will not be ordered in circumstances where a close personal relationship exists between the parties, where it would be difficult for the court to supervise performance,[224] and equitable principles also

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219 Boulle & Nesic n 1 above at 485.

220 See Boulle & Rycroft n 3 above at 235.

221 See Christie n 45 above at 522.

222 See Innes J in *Farmers' Co-op Society (Reg) v Berry* 1912 AD 343 350. See also Christie n 45 above at 523.

223 This has featured in US cases such as *Martin v Howard* 784 A2d 291 (RI 2001). See Crown n 132 above at 3.

224 *Benson v SA Mutual Life Assurance Society* 1986 1 SA 776 (A); *cf* Gibson *South African mercantile and company law* (2003) 103; Christie n 45 above at 523–529.

require that courts not issue futile orders or orders which they cannot enforce.[225]

Damages

Another possible remedy for the breach of a mediation clause is an award of damages, which is usually designed to put plaintiffs back into the position they would have been in had the defendants complied with their contractual obligations. [226] In a mediation context it can only be estimated what position the plaintiff would have been in had there been compliance with the mediation clause, as it is uncertain whether there would have been a successful outcome, and in the event that there was, what the terms would have been.[227] The injury resulting from the breach could also be so unique that damages would not constitute an adequate remedy.[228] It has also been suggested that a mediation clause could include a genuine pre-estimate of damages that would be suffered by either party if a breach occurred,[229] however, despite such hypothetical endeavours, there are likely to be difficulties in acquiring damages from a court for breach of a mediation clause.[230]

AN OBLIGATION TO ADVISE ON THE MEDIATION OPTION

As noted above, the changes to the CPR introduced following Lord Woolf's Access to Justice Report,[231] encouraged the use of mediation with the support of various measures including costs sanctions for parties who win at trial but who unreasonably refused an offer to mediate a dispute that could have settled. [232] The culture change desired by Lord Woolf that was reflected

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225 Boulle & Rycroft n 3 above at 235.

226 Boulle & Rycroft n 3 above at 236. See also Christie n 45 above at 543.

227 This is also the experience in the USA, see Crown n 132 above at 3.

228 See Shirley n 205 above at 118. See also Boulle & Rycroft n 3 above at 236.

229 A penalty stipulation in a contract would also be enforceable in South Africa, subject to the court's right to reduce it to a reasonable amount. See the comments of Snyman J in *Van Staden v Central SA Lands and Mines* 1969 4 SA 349 (W) 351 on the aim of the Conventional Penalties Act 1962.

230 See Boulle & Rycroft n 3 above at 236.

231 For a full text of the Civil Procedure Rules and Practice Directions for Civil Litigation in England see www.justice.gov.uk/civil/procrulesfin/index.htm (last accessed 3 June 2015).

232 CPR 1.1(1) provides that 'These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.' This was later amended to include 'justly and at proportionate cost' with the added explanation that includes 'enforcing compliance with rules, practice directions and orders'. See Jackson LJ 'Review of Civil Litigation Costs Final Report', 14 January 2010, 31, available at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-

in the changes to the CPR has become embedded in the civil justice system in England.[233] This is reflected by the Court of Appeal when stressing that the legal profession in England must now take note of the judicial direction contained in *Halsey v Milton Keynes NHS Trust* [234] and can no longer dismiss reasonable requests to mediate with impunity:

> Halsey has made plain not only the high rate of a successful outcome being achieved by mediation but it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate. The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued. With court fees escalating, it may be folly to do so …. These defendants have escaped the imposition of a costs sanction in this case but defendants in a like position in the future can expect little sympathy if they blithely battle on regardless of the alternatives.[235]

The court also stated that it 'is entitled to take an unreasonable refusal into account, even when it occurs before the start of formal proceedings; see rule 44.3(5) (a) of the Civil Procedure Rules 1998'.[236] In light of such judicial comments, it has been suggested that all members of the legal profession who conduct litigation should now routinely discuss with their clients whether their disputes are suitable for mediation.[237]

Such a duty to advise of the mediation option has proponents of mediation in South Africa greeting the decision of Acting Judge Brassey in the South Gauteng High Court trial of *Brownlee v Brownlee*[238] in Johannesburg as a

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final-report-140110.pdf (last accessed 3 June 2015). The CPR was amended in light of the Jackson report, for an overview of the main changes to the CPR introduced by the Jackson report, see Allen 'The Jackson Report amendments to the CPR – what do they do to encourage settlement (if anything?)' 26 March 2013, available at: http://www.cedr.com/articles/?item=The-Jackson-Report-Amendments-to-the-CPR-What-do-they-do-to-encourage-settlement-if-anything (last accessed 3 June 2015).

233 See for example Kallipetis n 95 above at 2. See also Shipman 'Waiver: Canute against the tide?' (2013) 32/4 *Civil Justice Quarterly* 470 470–476.

234 2004 EWCA (Civ) 576.

235 2005 EWCA Civ 358, Ward LJ par 43.

236 Rix LJ par 50. Rule 44.3(5) states that the conduct of the parties includes conduct before, as well as during, the proceedings (and in particular the extent to which the parties followed any relevant pre-action protocol).

237 See Clarke 'Mediation in the post-Halsey era' August 2005 *IBA Legal Practice Division Mediation Committee Newsletter* 19.

238 Case number 2008/25274. See Allen 'Dunnett principles emerge in South Africa: a review of *Brownlee v Brownlee*' 25 September 2009, available at: http://www.cedr.com/articles/?item=Dunnett-principles-emerge-in-South-Africa-a-

landmark. For the first time, a judge has imposed a costs sanction as a direct consequence of a failure to mediate, with the sanction imposed not on the parties, who had endured the adverse impact of the advice they were given, but on their lawyers, in a way that has not yet happened in England. The lawyers effectively agreed not to advise mediation in a case which the judge believed would have benefited from it, and he consequently limited what the lawyers could charge their own clients as a result and made no order between the parties. Echoing the Court of Appeal in *Halsey,*[239] it has been suggested that the approach adopted by the court in *Brownlee* presents a fresh warning to the legal profession, regarding what judges might do if they fail to advise their clients about mediation.[240]

review-of-Brownlee-v-Brownlee (last accessed 3 June 2015).

239 2004 EWCA (Civ) 576.

240 Another way to promote mediation clauses proposed by commentators in the US is to give greater weight to dispute resolution efforts in the award of lawyers' fees. In the Oregon statute ORS 20.075 'the diligence of the parties in pursuing settlement of the dispute' is one of the factors that the court should consider in awarding attorney fees. As discussed above, drafters of contracts could provide that the prevailing party may recover its lawyers' fees only if it made reasonable efforts to use the mediation process provided in the contract to resolve the dispute. See Crown n 132 above at 5.