Unwrapping Court-Connected Mediation Agreements

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Contents

Abstract Court-connected mediated agreements seem to both fulfil and fail the ideal of self-determination in mediation theory. In a study of 134 agreements from court-connected mediation, we found that the majority of agreements contain creative elements and display great variation in the provisions they contain. These results indicate that the parties play an important role in crafting the substance of their agreements. However, we also found that the wording of the agreements is characterised by legal and bureaucratic language to the extent that people without legal training find it difficult to read and understand them. The judicial language is well known for the drafters of the agreement but not the parties. Thus, court-

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connected mediation seems to fail aspects of self-determination when it comes to drafting agreements. We draw on new-institutional theory when we explore and explain this apparent contradiction within the court-connected mediation practice.

1 "The Black Box" of Mediated Agreements

The content of agreements reached in mediation is largely a black box. Only a few studies have examined what the agreements are about and none of these have done so on the basis of the agreements themselves (Wall and Dunne 2012; Adrian and Mykland 2014). In this article, we aim to fill this gap by using 134 agreements reached in court-connected mediation as a basis of analysis. We present a content analysis from three different analytical perspectives: we analyse the *content* of the agreements, their *level of creativity* and the *linguistic characteristics* of the agreements.[1] The purpose of our analysis is to examine whether agreements reached in court-connected mediation reflect party self-determination.

Court-connected mediation is becoming an established feature of the civil court system in many countries. The resolution of conflicts through mediation is founded on a philosophical and theoretical basis that is quite different from conflict resolution through litigation (Vindeløv 1997) with party self-determination as an essential feature (Welsh 2001; Kovach 2004).[2] Self-determination in mediation reflects the idea that the parties, so-to-speak, own their own conflict (Christie 1977) and can influence the process of conflict resolution and decide the outcome. In our understanding, self-determination in mediation is the right of the parties to participate actively, as well as an obligation to do so.[3] The core idea of self-determination in a court-connected mediation setting is seeing the parties as the central actors. They make decisions about how to proceed as opposed to litigation where the lawyers act on behalf of the parties and the process is determined by procedural rules. They can also make tailored outcomes in mediation if they wish. In litigation, a ruling is tied by the legal claims and application of the law as expressed in statues, precedent etc. In mediation, the parties can bring other issues than those of the court case to the table—legal as well as non-legal. Moreover, they are not bound by the law in their dispute resolution and can fit their agreements to their particular circumstances.

In this article we focus on the outcome of court-connected mediation. We explore whether mediated agreements reached in a court setting reflect party self-

[1]The results the three analysis have been published in *Negotiation Journal*, *Retten i Sproget* and *Kart og plan*, respectively (Adrian and Mykland 2014; Mykland and Adrian 2015, 2017). This article reworks and combines our previous work with additional analysis and a new discussion.

[2]The understanding and role of self-determination differs in mediation models (e.g. Bush and Folger 2005; Friedman and Himmelstein 2008).

[3]See Adrian (2012) for a more thorough explanation of the concept of self-determination in mediation.

determination. We begin by outlining previous research regarding the content of mediated agreements. We go on to present the context of court-connected mediation in Norway and Denmark and the methodology of our study. The bulk of the article presents the results of our analysis. We conclude with a discussion of our findings.

2 State of The Art

Over the past four decades, a large body of literature, studies and evaluation reports regarding mediation, in general, as well as court-connected mediation, in particular, have emerged (e.g. Eisenberg 2015; Wall and Dunne 2012; Roepstorff and Kyysgaard 2005; Kjelland-Mørdre et al. 2008). Among others, studies consistently show that parties are very satisfied with court-connected mediation (Wall and Dunne 2012; Wissler 2004; Knoff 2001) and that cost and time is saved when cases settle in mediation (Adrian 2016; Pel and Combrink 2011). In addition, we know that compliance with a mediated agreement seems to be higher than with court orders (Charkoudian et al. 2017; Lawrence et al. 2007) and that mediation seems to repair the relationship of the parties less than observers anticipate (Relis 2009; Roepstorff and Kyysgaard 2005; Golann 2002). Mediation seems to fulfil its goal of settling disputes in many instances, although settlement rates vary a great deal (Adrian 2016; Wall and Dunne 2012; Wissler 2004).

Only few studies have looked at the content of mediated agreements (for a review, see Adrian and Mykland 2014). In North America and Canada, these studies have been inconclusive with regard to the extent to which agreements are tailored to the interests and needs of the parties and not limited by the legal claims of the case (Adrian and Mykland 2014). None of the studies have examined the mediated agreements themselves but are based on interviews, questionnaires and observations. In a Finnish study, Ervasti used the same methodology as we did (described below) and found that in about 20% of the mediated cases a solution included elements outside the claims of the court-case (Ervasti 2014). A very preliminary look at the content of Danish court-connected agreements from the present study revealed that elements beyond those of the court cases seemed to cover a broad spectrum of issues (Adrian 2012). In summary, our knowledge of the content of agreements made in court-connected mediation is rudimentary.

3 Court-Connected Mediation and Its Legal Framework

Judicial settlement efforts have been part of civil litigation in Norway and Denmark for centuries.[4] In Denmark, it is known as "forligsmægling" and is regulated in sections 268–270 of the Administration of Justice Act. In Norway, it is known as

[4]For a more thorough description of judicial settlement efforts, see Adrian (2016).

"mekling" and is regulated in the Dispute Act, sections 8–1 and 8–2. Such settlement efforts are part of the regular litigation process and rules of procedure apply. Judicial settlement is performed by one or more judges who, so-to-speak, act "in robe", including typically making a ruling if settlement efforts fail.

Agreements made in *court-connected mediation* are the result of a different process. In Norway, court-connected mediators are primarily judges whereas both judges and lawyers act as mediators in Denmark. However, their role is to facilitate a process that enables the parties to come to an amicable agreement of their own and their approach to mediation is largely facilitative (Vindeløv 2012; Kjelland-Mørdre et al. 2008; Riskin 1996). If the case is not settled, it continues in the litigation track. If the mediator is a judge, as is most often the case in Norway and in about one-half of the cases in Denmark, the case is passed on to another judge for continued litigation.[5] In court-connected mediation, the court-case is paused and the general rules of procedure do not apply. Instead, this activity is governed by its own set of rules, which for Norway is the Dispute Act, Chapter 8, sections 8–3 to 8–7, and for Denmark, the Administration of Justice Act sections 271–279.[6]

The purpose of court-connected mediation is to provide more satisfactory results in court cases than is often possible in litigation by assisting disputing parties in finding tailor-made solutions to their disputes based on their interests and needs. In other words, instead of a judge making a ruling or suggesting a settlement, the parties are supposed to find an amicable solution themselves. As stated in the preparatory work for the Norwegian Dispute Act:

> . . . the purpose of judicial mediation is to facilitate a way for the parties to get to a joint agreement before the dispute is handled through a traditional judicial approach. The mediator must seek to get insight in the parties' underlying interests and needs, and stimulate a dialogue that can promote understanding and joint agreement (NOU 2001:32 pt 3.0).

Similarly, the Danish Minister of Justice has stated that court-connected mediation gives parties in civil court-cases:

> . . . an opportunity, if they wish, to settle the dispute in another way than traditional judicial settlement efforts, that are based on the law, or a ruling. Court-connected mediation can pave the way for a negotiated agreement that is experienced as more satisfactory for both parties as the parties can influence the process and the underlying interests, needs and future of the parties can be taken into account (Lovforslag nr. 17 from 28. November 2007).

An agreement reached in court-connected mediation ends the court case and can be entered into the court records at the parties' request. If so, it gets the status of a judicial settlement and becomes enforceable and publicly accessible. If it is not entered into the court records, it is legally binding like any other contract and subject

[5]In Norway, a mediator is technically permitted to serve as judge following a court-connected mediation at the parties' request if the judge finds it unobjectionable (Dispute Act section 8–7). The preparatory work states that the judge cannot serve as a judge if a caucus (separate meeting) has been used during the mediation. To our knowledge mediators very rarely, if at all, go on to act as judges.

[6]For more on the difference between the two types of settlement activities, see Adrian (2016).

to contract law. In Denmark, there are no formal requirements of judicial settlements, see Administration of Justice Act, chapter 26. In Norway, on the other hand, there are formal requirements of settlements in the Dispute Act, section 19–11. The court must ensure that the agreement states exactly what the parties' have agreed to and the parties must sign the settlement. In addition to this very limited legal regulation of agreements reached in court-connected mediation, Nordic mediation literature provides a number of practical suggestions regarding drafting and content of mediated agreements (e.g. Kjelland-Mødre et al. 2008; Vindeløv 2012).

We examine agreements that originate from court-connected mediation in this article. Even though they are a result of a settlement activity tied to the court, they originate from a process that is fundamentally different from regular judicial settlement efforts, as demonstrated in this section. In addition, the parties choose whether the agreement's legal status is that of a judicial settlement or a contract. This choice may affect the content of the agreement in Norway, as there are a few formal requirements that must be fulfilled in order for the agreement to obtain status as a judicial settlement. However, the formal requirements are very limited. We have found that it does not influence the agreement in ways that affect the result of our analysis in this study.

4 Methodology

We have analysed 134 written agreements, as well as complaint and answer reached in court-connected mediation of civil cases: 92 from Norway and 42 from Denmark.[7] We have made a joint rather than a comparative analysis of the settlements based on the following three arguments: Firstly and most importantly, we have run a number of statistical analyses when possible to check for potential differences in the data explained by nationality and none revealed any significant differences (Adrian and Mykland 2014). Secondly, the set-up and regulation of court-connected mediation is very comparable in the two countries, and they are embedded in similar civil justice systems.[8] Lastly, the languages are so similar that we can analyse the data without translation, including conducting linguistic analysis.

There is great variation in mediation activities across courts. Hence, instead of random sampling of participating courts, where we might include courts with hardly any mediation activity at all, in both countries we used "purposive sampling" and thus requested mediated agreements from courts with an extensive mediation practice (Frankfort-Nachmias and Nachmias 1996). We obtained settlements, as well as claim and answer, from four courts of first instance in Norway and four courts of first instance and one appeals court in Denmark. The settlements were randomly chosen

[7]We did not include cases involving child custody and visitation in our sample because these cases have different characteristics, both procedurally and substantively, than other civil cases.

[8]For an in depth comparison of the similarities and differences in court-connected mediation in the two countries, Adrian (2012).

in the sense that we got all agreements from a certain starting date until we had a predetermined amount in each court. The Norwegian courts were identified by the Norwegian Council for Court-Connected Mediation, and, in Denmark, courts that had participated in a pilot project of court-connected mediation were chosen. In Norway, the data was collected in 2008 (Mykland et al. 2009) and in Denmark from 2008 to 2009 (Adrian 2012). There has not been any changes in the judicial framework for the court-connected mediation in either country, nor significant changes in practice since our data-collection.[9]

As described in the introduction we have conducted three different analyses:

For our qualitative *content analysis*, we started by identifying elements of agreement in 10 randomly selected agreements individually and gave each element a label. Afterwards, we made a comparison of the elements and agreed on the labels. Subsequently, we each labelled approximately one-half of the agreements.

For our quantitative *creativity analysis,* we developed a five-point scale and coded the agreements accordingly.[10] Initially, we each coded the same 20 randomly selected agreements. After the coding, we compared and discussed our coding and resolved our differences. Subsequently, we each coded half of the remaining agreements. We also categorised the types of parties in the cases, the duration of the mediation, the type of dispute and the monetary amount.[11]

For our qualitative and quantitative *linguistic analysis*, we started inductively by reading all the agreements for linguistic patterns and found frequent use of judicial and bureaucratic language.[12] Subsequently, we developed a coding system and systematically coded our material for legal words and expressions and the different elements of bureaucratic language. We coded about one-half of the agreements each. In addition, we ran a readability test.

In all three analysis, we each kept a logbook in the coding process. When we noted uncertainty about a code, we discussed it and came to a solution. To the extent that it affected previous coding, we went back and re-coded.

In the presentation of our findings regarding content and linguistic characteristics below, we find it important to show how the agreements are written. Consequently, we use a show-and-tell technique where we include many examples of our data (Golden-Biddle and Locke 1997). This makes our research process more transparent and allows us to present our unique data in some detail.

[9]We are both in continuous contact with the court-system and court-connected mediators through trainings, lectures etc. and as part of this, we have seen agreements produced since our data-collection and they are similar to the agreements in our dataset.

[10]This analysis was based on 129 agreements. We had to exclude the rest of the cases, as we did not have both the complaint and answer, which was necessary to conduct this analysis.

[11]For more detailed information regarding research methodology, see Adrian and Mykland (2014).

[12]For more detailed information regarding research methodology, see Mykland and Adrian (2015).

5 The Substance of the Agreements

The first analysis that we present concerns the substance of the agreements. We identified a total of 36 different types of provisions across the agreements such as monetary elements, work elements, payment plans, practicalities etc. Based on our knowledge of litigation and mediation, we organised these elements into three main categories:

1. Substantive issues,
2. Procedures, and
3. Safeguarding

Substantive issues are the core elements of the agreements. This is what the parties agree to pay, deliver, exchange, do etc. These substantive issues are supported by a number of items in the agreements that regulate *procedures* on how the core elements will be accomplished—for example, a plan on how a right will be exercised or an amount of money paid. The last category, *safeguarding*, are elements that in one way or another serves as a kind of "scaffold" supporting that the substantive issues will be met, such as conditions and deadlines. Each of these categories and the elements belonging to it will be presented in turn below.

5.1 Substantive Issues

Unsurprisingly, many of the substantive provisions in the agreements relate to the dispute as it is presented to the court. However, when comparing the claim and answer in a case to the agreement, we see that the matter is often resolved in other ways than they would be in a ruling and, additionally, the agreement often contains elements that were not part of the original claim. The claim in a case may, for example, be for an amount of money or transfer of title to a piece of land, but some of the substantive components of the agreement reflect a resolution of the claim in another way than the demands in the court case suggest or do not stem from the claim altogether. This is explored further in our creativity analysis in Sect. 6.

The vast majority of the agreements (90 %) include provisions about *money* in some way. The most common way is through payment or compensation. This is to be expected, as a great deal of the legal claims in our study—as well as in litigation in general—are monetary claims. What is interesting is the variation in the way money is dealt with. We see many examples of provisions including money that are different from simply passing on an amount from A to B. For example, debt can be waived or assumed, mortgage debt paid for, a loan divided, an amount earmarked for education, or as we see in the agreement below, a property serves as lien for someone else's loan:

> Magnus Larsson assents to the property gnr. 47 bnr. 85 being used as mortgage for a real estate loan that Elisabeth Larsson might need up to kr. 1.000.000 (approximately euro 105 000). (mediation 81)[13]

The substantive elements in the agreements can also pertain to *property* and *things*. Parties in mediation make deals about property that are not solely about property rights and financial compensation. They reach agreements on how to share jointly owned property, agreements on how to divide up property or how to handle inherited property. They also make agreements about things. The latter, for example, occurs in the following manner:

> The property is to be taken over including the chattels and appurtenances therewith on the date of the property transfer, as Helle Hansen is entitled, up until 1.12.2007, to remove whatever chattels she wishes, with the exception of the garden tractor, which is to be taken over by the buyer. (mediation 26)

In about 10% of the cases, parties agree on performing some kind of *work*. The original claim is usually about compensation for work not performed or work performed in an unsatisfactory manner. Instead of resolving the dispute with money, the parties in mediation—sometimes in combination with money—agree to repair a wall, change a door or make a new architectural drawing. The following is an example of a repair on a building:

> However, Ark Building and Housing AS must inspect/repair the house's mouse guard as well as take care of repairing the wall behind the mailbox stand. (mediation 12)

A substantive theme that we find in Norwegian agreements exclusively is that of *letters of recommendation*. In Norway, issuing letters of recommendation is a normal practice when an employment ends, while this is not the case in Denmark. In about one-half of the disputes pertaining to dismissals in Norway, we find provisions regarding this. In some case, the wording of the certificate is worked out in the mediation and included in the settlement in full or part. An example of such a wording in an agreement is the following agreed upon addition to an already worked out recommendation:

> KL draws up a new letter of recommendation before 02.12.09 with the following addition as a new section 3: TH is easy to cooperate with and has had a friendly relationship with the shop's employees. She is committed and eager to work. (mediation 134)

The last theme that we will address concerns *relationships.* One might argue that reaching an agreement in a mediation is in itself a relational expression. The parties choose to end the conflict in a more amicable matter than taking the case through an ordinary court process. We find explicit relational elements in almost 10% of the agreements. These are provisions that directly or indirectly encourage the parties to put the conflict behind them and look forward or expressions of regret:

[13]Names, places etc. have been changed in this and all other examples of text from agreements for confidentiality reasons.

> The parties agree to disregard the statements that have led to a strained relationship. These statements shall be considered forgotten. (mediation 35)

> Machet Kitchenware acknowledges that Marion Tønnesen was wrongfully excluded from her workplace as of 3.11.08 and that she subsequently was wrongfully dismissed effective from 15.12.08... Machet Kitchenware regrets the personal strain this has entailed for Marion Tønnesen. (mediation 60)

The first example shows how the parties want to put the conflict behind them. They acknowledge the effect of their actions on their relationship and want to erase this effect. Provisions like this express the importance of resolving a dispute in a way that removes the strain on the relationship. This seems to be of value to the parties independent of whether the relationship is ongoing or not. In the second example, we see a direct expression of regret concerning the effects of an action on one of the parties. In this case of dismissal the parties were hardly going to have an ongoing relationship but even so repairing the harm done seems important. Interestingly, the word "regret" is used in this and other examples, whereas the words "apologise/apology" do not appear in any of the agreements. The words are synonymous but have different overtones. To apologise for something seems like a more sincere acknowledgement of having made a mistake than to regret something.[14]

In general, parties are probably more likely to address relational matters during a mediation than we see reflected in our sample of agreements. The parties may talk about relational issues and leave such matters out of the drafted agreement. One reason may be that a provision regarding relationship are considered foreign elements in a document with a legal status; another that parties fear that it could be a sign of distrust to formulate this in the agreement and thereby a cause of conflict escalation rather than the opposite.

5.2 Procedures

Over one-half of the agreements include procedural elements that regulate how the central parts of the agreement will be accomplished. The procedure-related aspects include details concerning how something shall be paid (payment plans), how something shall be done or executed (action plans), and, finally, what we might call simple practicalities.

Below is an example of a payment plan:

[14]Professor Erik Hansen, SprogbrevetDR nr. 90, 1994. http://sproget.dk/raad-og-regler/artikler-mv/sprogbrevet-dr/sprogbrevetdr-nr-90/undskyldning.

1. Building Corp AS shall pay the sum of Kr.500, 000,- (approximately euro 56, 000) to Best Invest AS, Peter Eiendom AS and Krp Invest AS represented by legal counsel Anita Hansson.

2. Kr.250,000,- is due for payment by 15 September 2008 at the latest, and the remaining Kr.250,000,- (approximately euro 28, 000) by 26 February 2009 at the latest.

3. A bank guarantee for correct payment of the latter amount is to be provided in SEB no later than 15 September 2008. The guarantee is to be provided as an on-demand guarantee.

4. In the event the first payment and bank guarantee have not been provided by 15 September 2008, Building Corp AS shall transfer the physical half of cadastral number 19, title no. 34 in Bergen that is located closest to building no. 5 to Best Invest AS, Peter Eiendom AS and Krp Invest AS. (mediation 90)

The payment plan lays out instalments and dates they are due as well as the details of a bank guarantee. To top it off, the agreement outlines an alternative in case the bank guarantee is not provided. In about one-third of the agreements, we find these kinds of payment plans. The level of detail varies, but common to all of them is the elaboration concerning how the payment is to be made, such as through instalments, by providing guarantees or setting various deadlines.

In about one-quarter of the agreements, we find plans for how something other than the payment of money must be carried out. We have labelled these "action plans". Common examples of action plans are details regarding how an agreed upon work must be performed, plans regarding real estate use and plans for terminating employment. Below is an example of an agreement on repairing in a building:

Vinterbyg shall conduct the following inspections/improvements in the claimants' residences:

a) The ventilation slot for ventilation above the roof in the rafter framework of all dwellings shall be inspected. The ventilation slot must measure 50 mm. If it is less than this, it shall be repaired. The deadline for completion of the repairs is 1 September 2008. . . .

b) Air leaks in flats 9B and 27B shall be repaired by 15 September 2008. The results shall be documented via conducting air resistance measurement where an air leak factor of up to 4 with a 10% measurement uncertainty is acceptable. Flats 11B and 11B shall be repaired in the same manner, but are not to be inspected

c) Streetlights are to be repaired by 1 November 2008 - cf. report from NTE of 19 May 2008. . . (mediation 103)

Instead of merely agreeing on a repair, the parties set a standard for when repair is necessary and the standards the repair must meet. This agreement also illustrates how action plans can include deadlines, i.e. safeguarding the agreement—a theme we will return to in detail below.

What we labelled simple practicalities are found in three-quarters of the agreements. This category encompasses a wide variety of elements that coordinate mundane practicalities after the mediation meeting has ended. In this category, we find a myriad of different items, e.g. account numbers into which a payment is to be deposited, who informs the court of the agreement, who informs the land registry of

ownership changes, who cancels guarantee commitments, printing and photocopying tasks and so forth. Here are two examples:

> Mohammad Salid takes over the property and the encumbrances. He obtains the bank's acceptance that Helen Soderman is no longer co-responsible for the loan. (mediation 37)

> When the amount is paid, the case is dismissed by plaintiff's laywer, who receives a copy of this letter which at the is signed by both parties. (mediation 23)

We include two procedure-like elements in our procedures category. They directly relate to overcoming obstacles that can occur when the parties try to reach an agreement: objective criteria and delimitation of substantial elements (in 4 % and 7 % of the agreements). Objective criteria help parties get to an agreement by getting assistance from an external standard, for example:

> The plaintiff shall see to it that the dishwasher is adjusted/inspected so that it works in a manner that can be approved by the Veterinary and Food Administration. (mediation 23)

Using objective criteria is a well-known instrument in the negotiation literature (Fisher et al. 1991) and it facilitates agreement on content in a roundabout way by agreeing on a criterion for resolution that is independent of the parties and hence objective, such as approval by an authority, as we see in the example.

Parties may also reach agreements in mediation by postponing resolution of parts of the dispute. They may decide to resolve certain issues after the mediation or they may refer the unsettled part of the dispute for the court to decide:

> The parties shall before [an agreed upon] remodeling begin agree in writing on how the costs for materials and labour are to be distributed. (mediation 111)

> The parties disagree on whether the marital agreement signed on 17 April 2002 is valid. The trial for hearing the issue is scheduled for 1 November 2008. (mediation 57)

Some of the agreements combine postponing parts of the negotiation until after the mediation with the option of referring the matter to the courts if they do not reach agreement, such as in the following example:

> The question of a possible price rebate for reduced water pressure shall be further clarified between the parties. If agreement is reached, the case shall be settled on this point, too, and thereby in its entirety. In the event agreement is not reached, this point of contention will become the object a hearing at the trial set for 14 March 2008. (mediation 66)

5.3 Safeguarding

The settlements have different kinds of safeguarding mechanisms. The purpose of these are at least twofold: (1) to make sure the settlement is complied with and (2) to prevent future conflict in the case. A majority of the settlements are entered into the courts records (86 %), which automatically serves as a form of safety mechanism, as it makes the agreement enforceable. However, in addition to this we see a rich

variety of other the forms of safety mechanisms that the parties incorporate in their agreements.

One kind of safeguarding mechanisms is the uses of deadlines. As appears in the examples from agreements in the section above, the use of deadlines is widespread (in 82 % of the agreements). We see how lumps of money must be paid in full or in instalments within certain deadlines, how work must be performed before a certain day and other types of obligations that must be met within set deadlines.

Another kind of safeguard mechanism is the use of conditions (in about 1/3 of the agreements). A typical example is that either the agreement, as such, or parts of it is contingent on something else, see:

> Payment is dependent on Pernille and Mogens Grandahl and family vacating the cabin before 1.10.2008. (mediation 2)

> The settlement is contingent on effective payment. (mediation 13)

A third kind of safeguarding are phrases indicating that settlement constitutes "full and final decision". In over 2/3 of the agreements, we find variants of this—either as a general "full and final" provision or as a "full and final" provision relating either to the court case or to all aspects of the dispute. See examples of all three types:

> As full and final settlement... (mediation 133)

> The parties have no further claims against one another in conjunction with the case. (mediation 118)

> For full and final decision regarding all claims between the parties. (mediation 30)

A final safeguarding mechanism are the "what ifs." "What ifs" are decisions about what is going to happen if the agreement or parts of it are not fulfilled. We find them in just under one-fifth of the agreements. These decisions do not assure compliance, but they safeguard that the parties know what is going to happen in such a situation.

6 Creativity in Court-Connected Mediation

Another way of approaching the content of the agreements is to explore their level of creativity. In the previous section we laid out what types of elements the agreements contain through a qualitative and quantitative analysis. In this section, we use quantitative measures to capture the potential added value in mediated solutions. We consider added value a sign of creativity and apply a "creative product perspective" (Carnevale 2006). We define a product as creative when it has interest, novelty and value (Simon 2001, p. 208). With this understanding of creativity, we categorised agreements as creative when they contained one or more substantial element that was not part of the claims in the court case, nor would automatically be included in a ruling (like, for example, payment of interests at standard rates, usual division of legal costs, usual deadlines for fulfilment and the various "full and final"

provisions). We developed the following five categories and placed the agreements accordingly:

1. Only one party's claim was met in the agreement.
2. The parties' agreement fulfilled neither party's claim, but was somewhere in between.
3. The agreement contained one element outside the claims in the case.
4. The agreement contained two to four elements outside the claims in the case.
5. The agreement contained five elements or more outside the claims in the case.

One could question whether it is meaningful to consider an agreement creative with only one extra element. However, the scale intends to capture all levels of creativity and designing the scale the way we have chosen to do, creativity can both be present or absent, and, more importantly, creativity can be graduated in that it can be present to a smaller or larger extent.

The level of creativity in our study varied a great deal, and it is interesting to take a closer look at the distribution (Table 1). Applying our scale of creativity, we found that 65% of the agreements were creative. However, there is quite a range. In about 13% of the cases, there was only one creative element, whereas in about 50% of the cases there were two or more creative elements. About 25% qualify as very creative in that the parties agreed to five or more elements outside the claims in the case.

In 35% of the cases in our study, we found no creativity in the outcomes. The agreements constituted a compromise between the parties' claims (31%) or, rarely, one of the parties' claims was met (3.9%). Since this is a document analysis and we were not present in the mediations resulting in these agreements, we do not know whether this is caused by the absence of creative potential in the case or whether the mediator and the parties have been unsuccessful in releasing potential creativity. Nor do we know whether the parties agreed to creative elements but omitted these from the written agreements. However, we consider the latter very unlikely, as we did not see this happen in any of the court-connected mediation processes that we have observed in two other studies of court-connected mediation (Adrian 2012; Mykland 2011).

This analysis of our agreements reflect our interest in exploring whether creativity in court-connected mediation is a myth or a reality. In academic, as well as promotional literature, the potential for creating solutions that meet the parties'

Table 1 Distribution of creativity within the five categories

	Frequency	Percent
One party's claim is met	5	3.9
Between claims	40	31.0
One extra element	17	13.2
2–4 Extra elements	34	26.3
5+ Elements	33	25.6
Total	129	100.0

needs instead of focusing on rights is often highlighted as an asset in connection with court-connected mediation. Based on our results we can conclude that creativity in court-connected mediation is both a reality and a myth. As demonstrated, some agreements display a lot of creativity and some no creativity at all. With one-third of the cases without creative outcomes there seems to be a potential for creativity in more cases, as well as for a higher level of creativity in the cases with very minor or more moderate creative outcomes.

To explain and understand these findings we need to know more about the process and other factors that affect creativity. The factors that were available for our analysis were limited to the type of disputant, the amount of time spent in mediation, the type of case and the amount in dispute. We refer interested readers to *Creativity in Court-Connected Mediation: Myth or Reality?* (Adrian and Mykland 2014) for our findings with regard to these variables.

7 Linguistic Analysis

As we conducted our analysis of substance and creativity, we found the agreements strikingly similar in structure and language. This motivated us to do a third analysis of our material: an examination of the "verbal wrapping" of the mediated agreements. We focused our investigation on examining whether the agreements reflect a standard linguistic practice and, if so, what the characteristics of this standard practice are. In the tradition of critical discourse analysis and among others Fairclough, we understand language as not just a neutral tool that depict a reality (Fairclough 1992). Rather, we understand language as a social practice that plays a role in shaping our perception of identities, roles, social relations etc. (Jørgensen and Phillips 1999; Tønnesson 2008). Hence, we can learn something about a practice by studying the discourse used in that practice.

Nordic mediation literature has different approaches as to who should write the agreement. Some find that agreements are naturally written up by the court-connected mediator (e.g. Kjelland-Mødre et al. 2008), while others find that the parties and their advisors should do the writing (e.g. Jørgensen and Lavesen 2016). In all of the mediations in our observational studies of court-connected mediations meetings mentioned above (Adrian 2012; Mykland 2011), either the mediator or the parties' lawyers authored the agreement. Based on these observations combined with the linguistic appearance of the agreements in our dataset laid out below, it seems safe to assume that either the mediator or the lawyer drafted the mediated agreements that we analyse.

7.1 Framing and Stereotyped Expressions

Many of the agreements in the study are "framed" by similar opening and closing linguistic phrases. Typical opening phrases are "as an amicable settlement", or "in full and final settlement", or "Mr. Grey pays Mrs. Grey in full and final settlement". Recurring patterns found in closing phrases are, for example, "each party pays their own costs" and "the parties demand that the case is dismissed as settled in full and waive the announcement of the dismissal decision."

Repeated use of phrases are referred to as stereotyped expressions (in German "Routineformeln") in linguistic theory (Kopaczyk 2013; Kjær 1997) and when stereotyped expressions appear in the same position in different texts, they are so-to-speak fixed (Kjær 1997). Many recognise this phenomenon from fairy tales that start with *once upon a time* and often end with *they lived happily ever after*. Fixed stereotypical expressions serve as rules for a particular genre. They homogenise texts and make them immediately recognisable. Our finding of consistent use of fixed stereotyped expressions suggests that the wording in the mediated agreements is not individual and random but rather the result of unwritten rules that the drafters follow. Our findings also suggest that mediated agreements constitute a genre with its own rules, the so-called genre conventions (Bhatia 2004). Interestingly, this is the case despite the fact that the agreements are not public, they do not follow predefined templates and are not outlined in textbooks or books of mediation practice.

7.2 Legal Language

The agreements are typically titled *settlements* instead of agreements. The parties are often referred to as *plaintiff* and *defendant* instead of by their names and their disagreement is often referred to as *the case*. If more persons are responsible for a payment, they are to pay *in solidum*. The parties often *pay their own costs in the proceedings* and the agreements are at times *submitted to the court record*. The agreements are full of these and other legal expressions.

These legal expressions are foreign for many laypersons and constitute a form of coded language that carries meaning for the professionals in the room but not necessarily for the parties. *In solidum*, for example, means each person is responsible for the payment in full and has to pay for the other person, too, if he or she does not honour the payment. And when the parties *pay their own costs in the proceedings* they have to pay for all expenses that they have incurred, such as court filing fees, lawyer fees, expert appraisals, lost earnings etc. The parties may have difficulty subtracting this meaning from the agreements and may, at times, enter into agreements where they do not fully understand the consequences depending on what kind of explanations they get from the mediator and/or their lawyers, if they bring one.

7.3 Bureaucratic Language: "Kancillisprog"

The language of the Danish and Norwegian public administration is influenced by a merger of Danish, Latin and German traditions that evolved in the public administration during the absolute monarchy (1660–1848) (Andersen 2015). This "language" has its own name *kancillisprog* (often translated into English *legalese or officalese*). It is not legal lingo but rather a way of writing that is widespread in all areas of public administration, including the courts in both countries to this day. "*Kancillisprog*" consist of a number of features that in combination makes a text difficult to read and understand: verbal nouns (gerunds), passive voice, "paper words", inversed word order, long words and long sentences. We find all of these features in the agreements.

Firstly, the texts contain many verbal nouns. Verbal nouns are verbs that are made into nouns, for example, pay and treat transformed to payment and treatment. Secondly, the passive voice is prevalent. An amount is paid or a house is put up for sale instead of the active form where a subject pays or puts a house up for sale. Thirdly, words and expressions that are used in written language only, so-called paper words, appear often in the agreements: Parties have to "clarify" instead of find out, "receive" instead of get, and this becomes "the present". A fourth feature is a complicated sentence structure with inverse word order, interposed sentences, and central ideas that are put at the end of a sentence instead of up front. The following is an example:

> As full and final settlement of the case, with the exclusion of a potential rebate for reduced water pressure, Mai and Mons Haugen and MaksiVanngruppen Ldt. pay one for all and all for one, kr. 93.000 – ninety three thousand (approximately euro 10 000). (mediation 66)

The central point of the sentence is that Mai and Mons Haugen together with MaksiVanngruppen Ltd. pay an amount of money, but this point is placed at the end of the sentence instead of in the beginning. Also, there is an interposed sentence "with the exclusion of a potential rebate for reduced water pressure".[15]

The features described combined with long words and long sentences make these agreements difficult to read—at least for a layperson. We measured this quantitatively by running a readability index. We used the LIKS test (Björnsson 1968), which is based on number of words per sentence and the share of words over seven letters. The agreements had on average a LIKS of 53, which puts them in the category of "difficult texts" for the normal adult reader (Hansen 1993).

One might think that the difficult language is used with regard to legal elements of the agreement only, but this is not the case. Also interpersonal utterances and everyday activities are formulated in this stilted language. For example, in a case where the parties agreed that those who did not own land in a particular area could borrow a

[15]In Norwegian the verb "pay" is placed before the subjects, Mai and Mons Haugen etc. but this is lost in the translation into English.

key from the landowner in order to access a certain road. This was expressed as follows in the agreement:

> Loan of a key for those without right of using the road according to this agreement must take place after agreement of the landowner. (mediation 3)

7.4 Hidden Subjects

The widespread use of passive voice contributes to a last linguistic feature of our analysis: the hidden subjects. When "an amount is paid" or "a tractor delivered" the agent becomes obscure. This happens in other ways, too. Personal pronouns are very rare and the parties are typically referred to by their names only once, if at all. Instead, they are referred to by their legal status such as plaintiff, defendant, a rights owner or land owner. Also, the recipient of something is often absent in the wording. The parties to the agreements probably know who is doing what, but action and the responsibility is obscured by this wording. According to Jørgensen and Phillips (1999), the passive sentences deprives the "agent responsibility by emphasising the result and ignoring the actions and processes leading to them".

In sum, our linguistic analysis demonstrates how these agreements mimic legal writing. They are written in a professional language that is difficult to understand for others than legal professionals.

8 Discussion

In our study, we have explored the content of mediated agreements, the creativity in the agreements, and, finally, the language in which the agreements are written. In this section, we discuss how the results of the analysis relate to party self-determination. Our linguistic results are contradictory to what we could expect when drawing on mediation theory only. Hence, we discuss in some detail how new-institutional theory might shed some light over these findings.

First of all, we have found an extraordinarily variation of different themes in the content of the agreements. The provisions of each agreement seem to relate specifically to the circumstances of that particular case. This variation in substance can be interpreted as an expression of self-determination. The disputing parties are the ones that know the specific circumstances the best, and it is most likely that they brought the variations to the table rather than any of the other actors present (e.g. the lawyers or mediators). This is also our experience based on observations of court-connected mediation processes (Adrian 2012; Mykland 2011). The variation demonstrates that the parties are probably encouraged to bring items to the discussion, and they are included in designing the content of the outcome. We see that both the substantive elements, procedural elements and safeguarding elements seem to be tailored to the

parties dispute. In the substantive elements, for example, we see many elements besides the monetary issues that are at the core of the civil case, such as performance of work exchange of things, divisions of property etc. We also see this in the procedural elements where there is a bulk of practical descriptions regarding how to fulfil the agreement.

Secondly, we find traces of creativity in about 65% of the agreements studied. Hence, it is safe to conclude that many court-connected mediations result in creative agreements. However, we believe that there were more creative potential in the cases. About one-quarter of the agreements studied were highly creative, but the rest of the agreements had a lesser and more marginal degree of creativity. Nevertheless, the creative touch, independent of amount, can be interpreted as a sign of self-determination in the agreements. In order to reach creative solutions, interests and needs have probably been brought to the mediation and, in some cases, also other issues than the legal claims. This is probably based on knowledge that only the parties possess and occurs based on the involvement of the parties in the resolution of their own conflict.

Results from these first two analyses are, therefore, in line with what one could expect from mediated settlements based on mediation theory regarding self-determination. They appear tailored to the case and reflect the involvement of the parties in the outcome of the conflict. The result of our linguistic analysis is different.

The principle of self-determination relates to process and outcome. Our understanding of self-determination includes influencing the way the agreement is formulated and includes being able to read and understand one's own agreement. Our linguistic analysis shows that the latter is hardly the case and one can seriously question whether the parties have influenced the way the agreement is drawn up. The wording of the agreements is so highly judicial and bureaucratic that they are hard to read and understand, at least for laypersons who are not educated within the judicial domain. Also, the agreements exhibit extensive use of standard phases and appear quite scripted in their set-up. This, in combination, suggests that when it comes to formulating agreements, self-determination of the parties' seemingly ends. Rather, the professionals take over and the tailor-made aspects of the agreements seem to stop at the formulation of these.

Court-connected mediation is a curious practice because it happens within the court system—a well-established institution with a well-known practice regarding both the process and the outcome. The judicial practices are institutionalised during literally hundreds of years. When court-connected mediation was introduced in the 1990s in Norway and 2000s in Denmark, an interesting situation arose: legal professionals should offer and carry out a new process, namely court-connected mediation, but do so within the well-established judicial system. They were supposed to act differently and do so based on a new ideology of conflict resolution. The professionals needed new practices to fulfil their new role and scope.

To explain and understand how practices in an organisation develop, the new-institutional theory from organisational theory might be helpful. Since the 1970s this theoretical perspective has been widely used to understand the mechanisms that works in and within organisations (e.g. DiMaggio and Powell 1983; Gooderham

et al. 2011; Marano et al. 2017). This perspective explains, among others, how organisations develop practices (Meyer and Rowan 1977), and how they mimic one another to be viewed as legitimate (Di Maggio and Powell 1991). Organisations "borrow" the legitimacy of others by, for instance, using procedures that the others already perform more or less unconsciously without evaluating the efficiency or how suitable they are in the new domain (Meyer and Rowan 1977).

What we find in the mediated agreements are visible (and large) "footprints" of the judicial language including standard phrases that mimic legal documents. The professionals probably draw on well-known practices with regard to this part of the mediation process instead of developing new practices. The use of legal and bureaucratic language may serve other purposes as well. It may lend legitimacy to agreements reached through this rather new and different process. Additionally, it may lend legitimacy to the process itself. Mediation is often referred to as a form of alternative dispute resolution giving associations to alternative medicine and other alternatives that are performed on a questionable basis, at least seen from the perspective of the established. Using bureaucratic and legal language may contribute to portray this alternative as an acceptable practice.

When the judicial footprints becomes too visible in the mediation outcome, it may challenge the parties' self-determination and, of course, also the tailor-made ideal of the agreements. The judicial concepts and phrases are typically not familiar to the parties and they may alienate the parties from their own agreements. When we find many standard phrases across different agreements, it seems unlikely they have been negotiated and decided on by the parties in each case. Rather, it seems as if they have been added to gain value or legitimacy by mimicking other legal genres.

From a mediation as well as a judicial perspective, agreements need to be clear and understandable. In mediation, this is necessary so that the parties can use the agreement to be reminded of their solutions and control that they are fulfilled. In court, this is necessary so that the agreement can be subject to enforcement. The latter is met by judicially written agreements, but not the former.

We question parts of the current practice based on our findings. It seems that the court-connected mediation process enables the parties to be creative and come forward with a great variety of themes to end their conflict. It also seems that agreements are tailored to and by the parties. Nevertheless, the judicial language of the mediated agreements challenge self-determination in court-connected mediation in at least three ways: Firstly, the parties are not the central agents in drafting the agreements. Secondly, they probably do not understand their own agreement in full, and, thirdly, some elements of the agreement are probably added by the professionals (the lawyers and the mediator), without the parties fully understanding the implications.

We argue that there should be more focus on the implications of these practices. The main goal in mediation is to develop robust agreements that are based on the interests and needs of the parties. Our analysis suggest that the agreements are robust with regard to their content, but not with regard to wording. We call for critical reflections on this practice.

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