International Enforcement of Mediated Settlement Agreements: Two and a Half Models—Why and How to Enforce Internationally Mediated Settlement Agreements

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Abstract

This article discusses the models of international enforcement of mediated settlement agreements (MSAs). The Singapore Mediation Convention has opted for "direct enforcement" which allows any party to an MSA to seek enforcement in any of the future contracting states. Direct enforcement is also possible under the EU Directive 2008/52 on mediation. Cross-border enforcement in the EU is also possible under the existing private international law EU Regulations. The 1958 New York Convention is a "half model" in the mediation context, in the sense that it can be of use to cross-border enforcement of certain MSAs, albeit with a degree of caution.

1. Introduction

As is well known, the UNCITRAL II Working Group has now prepared the final text to be adopted in 2019 as the "Singapore Mediation Convention" that shall regulate the international enforcement of mediated settlement agreements. This development offers an opportunity to discuss the alternative models of international enforcement of agreements reached with the assistance of a third party "facilitator". As shall be discussed in this article, the UNCITRAL Working Group II has opted for a very specific method of international enforcement which is reflected in the Singapore Mediation Convention. As we shall see, this model has followed, to a considerable extent, the 1958 New York Convention on recognition and enforcement of arbitral awards. Apart from the forthcoming Singapore Mediation Convention, one more international model for enforcement of mediated settlement agreements has been in play for 10 years already, under EU Directive 2008/52 on mediation,[1] which regulates primarily the organisation of mediation process in the EU Member States. Indirectly, however, by reference to the system of jurisdiction and enforcement regulations of the EU, it also regulates certain aspects of international enforcement of mediated settlement agreements in the EU. This model shall also be discussed and assessed in this article. A third model to be discussed is that of the 1958 New York Convention, a "half model" in the mediation context, in the sense that although it does not regulate mediation, it can be of use to cross-border enforcement of certain mediated settlement agreements as well.

[1] Directive 2008/52 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3.

2. Terminology issues

Although there is a substantial volume of literature on the differences between mediation and conciliation,[2] the UNCITRAL Working Group II recently chose to switch from the term "conciliation" to the term "mediation"[3] in relation to its work regarding the Model Law and the Enforcement Convention on agreements reached with the assistance of a third party,[4] without considering this as a change of the regulated ADR mechanism.[5] Throughout this article, we shall be using the term Mediated Settlement Agreements (MSAs) as an all-encompassing term of all agreements that are reached following mediation, conciliation or any agreements reached with the assistance of a third party "facilitator". This is done, not only for ease of reference, but also due to the present writer's opinion that the differences in the set-up and procedure between these types of ADR should be underplayed from a legal point of view. It is submitted that conciliation and mediation should not be treated differently from a legal point of view, since both of them lead to negotiated dispute settlements with the assistance of a third person, without such person having a jurisdictional role or competence. The existing (or purported) differences in the actual method of settlement, for example with more energetic intervention of the conciliator than of the mediator, or the point in time of the dispute that the ADR mechanism is applied (earlier as it seems in the case of conciliation), bear no significance on the legal nature of the negotiated outcome. This is contractual in nature in both cases and is not a res judicata, as it does not emanate from a court or tribunal or any other body with jurisdictional authority.[6] This has been reaffirmed in art 1(3) where it is clarified that the Singapore Mediation Convention shall not apply to judgments and awards.[7] It can indeed be suggested that these MSAs are in essence a new "judicial category", suitable for the needs of international commerce.[8]

[2] See, eg Elina Zlatanska and Folake Fawehinmi, "Mediation and Conciliation: In Pursuit of Clarity" (2016) 82 *Arbitration* 146.

[3] UNCITRAL Working Group II, *Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session* (Vienna, 2–6 October 2017), A/CN.9/929, paras 102–103. The following are mentioned in para 103:

> "103. Nonetheless, it was stated that there was merit in considering the replacement, as the terms 'mediation' and 'mediator' were more widely used and it would make it easier to promote the instrument giving it more visibility. It was mentioned that this would not entail any substantive change. To ensure that there was no confusion or misunderstanding about the replacement, it was suggested that the text accompanying the instrument (or a footnote therein) could explain the historical developments of the terminology in UNCITRAL texts and emphasize that the term 'mediation' was intended to cover a broad range of activities that would fall under the definition as provided in article 1(3) of the Model Law regardless of the expressions used. That text would also stress that the replacement was not aimed at promoting a notion known to a specific legal system or tradition. It was also stated that if the replacement were to be made, it should be done consistently throughout UNCITRAL texts along with accompanying explanations as discussed above."

[4] As is mentioned in art 3(4) of the draft Singapore Convention:

> "'Mediation' means a process, regardless of the expression used and irrespective of the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the mediator') lacking the authority to impose a solution upon the parties to the dispute."

[5] Likewise, the UNCITRAL 2018 Model Law is now on mediation and not on conciliation, as was the case with the 2002 Model Law. The rationale of this terminology change is explained in subnote 2 of the Model Law, along the following lines:

> "In its previously adopted texts and relevant documents, UNCITRAL used the term 'conciliation' with the understanding that the terms 'conciliation' and 'mediation' were interchangeable. In preparing this Model Law, the Commission decided to use the term 'mediation' instead, in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the Model Law. *This change in terminology does not have any substantive or conceptual implications*."

[6] The fact that as we shall see later in this article, certain jurisdictions offer a status of res judicata to such agreements following a court intervention, does not change this given, as the res judicata effect is granted ex post and also bears no influence in the actual process and the role of the mediator.

[7] The purpose of excluding from the scope of the instrument settlement agreements that have been approved by a court or concluded before a court was to avoid possible overlap or gap with other existing or future international instruments.

[8] Catherine Kessedjian, "Mediations internationales : un nouvel instrument d'exécution de la CNUDCI" *Recueil Dalloz*, 30 November 2017, No 41, 2416.

3. The rationale for enforcing MSAs internationally

There now seems to exist a consensus on the need to ensure that MSAs are enforced internationally by means of international instruments. It can be said that since, due to globalisation, the need for international enforcement is paramount, it is only natural that this should include MSAs. On the other hand, negotiated parties' settlement agreements do not seem to attract equal attendance of the legislators in relation to their international enforcement.[9] The primary question to be answered in our context, is why this differentiation exists, given that both MSAs and negotiated agreements are based on the will of the parties. It is submitted that the existence in the ADR process of the third-party facilitator, who can be said to take to some extent the full negotiation power from the hands of the parties, by changing the dynamics of negotiation, is not an adequate explanation for this preferential treatment of MSAs. After all, this switch of power relates to the process of mediation only and is anyway limited, since the parties are always free to walk out of such a process. Also, the outcome of the mediation in the form of the MSA remains fully in the hands of the parties, just like in any other negotiated agreement.

Further, on a local level at least, under certain conditions, negotiated agreements without a third-party facilitator can acquire an enforcing power, similar to that of judgments. For example, in most civil law jurisdictions, where the *notaires* are a separate body of independent professionals with certain public powers, a negotiated agreement of any type, may acquire enforcing power, if executed before such a professional, usually with the inclusion of a particular wording that will allow the enforcement in case of non-fulfilment of the obligations of a defined party to it. An alternative to the civil law *notaires*, is the issuance of a payment order on the basis of a carefully drafted negotiated agreement. This is usually a swift method and although not a res judicata, a payment order does have enforcing power.

Following a deeper examination of this matter, one can reach the conclusion that the enforcing power of the MSAs primarily emanates from the understanding that ADR is a characteristic expression of the dispute resolution process in the post-modern world. From a practical point of view, ADR has been rediscovered in the recent years,[10] as an answer to the deficiencies of justice systems, such as the length of the process and excessive expense. In its core, the ADR renaissance is an expression of the crisis of the nation state in the post-modern era. The state monopoly is clearly questioned, also in the field of dispute resolution and this gradually gives mediation an all the more important role. Even the fact that the focus passes from "rendering of Justice" which encompasses the satisfaction and enforcement of the "right" of a person, to "dispute resolution", where emphasis is put on the resolution of a dispute,[11] is indicative of this change. The "right" of the party is not gone for good in a mediation context, but it is distilled in the primary right of party autonomy[12]

[9] This point was one of the very first addressed by the UNCITRAL II Working Group in its workings that led to the Singapore Mediation Convention (*Settlement of commercial disputes, International commercial conciliation: enforceability of settlement agreements*, A/CN.9/WG.II/WP.190, para 24). The members of the group decided to focus only on MSAs by arguing that if any negotiated agreement were to be included, this would have added an extra dimension of control regarding whether the agreement had been the outcome of an actual dispute or not. Evidently, this is not needed in the case of mediation, where a dispute is rather unequivocally present. Our submission is that this approach focuses on purely procedural questions and for this reason further reasoning is useful, if not necessary.

[10] Alternative dispute resolution has been practiced since ancient times as an alternative to state justice in different civilisations in many parts of the globe under different names. A Greek example still practiced as a traditional dispute resolution method is the Cretan "sasmos", a word approximatively translated in English as "fixing". The real change in focus is that the traditional methods are mostly aiming at the preservation of peace in a community, whereas modern mediation is mostly about the resolution of a specific dispute. This is not to undermine the prevailing view that mediation also has positive side effects to the well-being of society, but as said this is merely a side effect and does not alter the basic idea just discussed.

[11] eg see Andreas Hacke, "New York Convention II to come?" [2015] *Dispute Resolution* 10, 12.

[12] In the same direction is the current expansion of party autonomy to more fields of law, even in family and succession law. This is obvious, eg in the context of the EU Regulation 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107 and the various Family

and self-determination.[13] This means that the quest is now not so much for the satisfaction of a "right", but mostly for the need to settle a dispute in the context of party autonomy and self-determination.[14]

A final point to be made is that under ADR, dispute resolution is more clearly dissociated from state control, in the sense that certain existing disputes are extracted from the judicial system and are settled by ADR, based on the free will of the parties. Indeed, the first letter of the acronym ADR reflects its alternative character to state justice.[15] On the contrary, an agreement that has been reached without involving a third-party facilitator has in most occasions, *never* been in the ambit of the judicial system or of the dispute resolution process and in this sense, it is not extracted from it.

It can, therefore, be said that in our post-modern world, the idea of free international circulation of judgments, should be extended to MSAs for the above reasons,[16] without such extension being so radical as to include any other negotiated agreements.

4. The first model of international enforcement: UNCITRAL

The workings of the Working Group II of UNICTRAL in the context of its 68th session that took place on 5–9 February 2018 in New York, culminated in the drafting of the Singapore Mediation Convention. This goes part and parcel with the amendment of the 2002 UNCITRAL Model Law on International Commercial Conciliation which has to date been adopted by not less than 33 states worldwide and a number of jurisdictions in the US and Canada.

Two initial points are that the Singapore Mediation Convention applies only to international agreements between or among players supposedly standing on "equal footing"[17] and that the settlement agreement must be in "writing".[18] With respect to enforcement it had been suggested that the parties to an MSA should be allowed to limit it to certain countries or agree to mediate again in case of dispute on enforcement, this being an

Law Regulations that accept a clear role for party autonomy, as a connecting factor for the localisation of the applicable law in a related legal relationship. This is a novelty compared to national and international laws in these fields of law up until few years ago.

[13] Ellen E Deason, "Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?" [2015] *Dispute Resolution Magazine* 32, 36.

[14] The "right" in its traditional sense, appears again ex post at the stage of judicial control, however this may take place, that is in the context of enforcement (local or international) or in the context of an application to render an MSA void.

[15] Alternative does not mean "substitute" however: state justice is bound to remain in place, despite the rise of ADR.

[16] Ellen E Deason, "Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?" [2015] *Dispute Resolution Magazine* 32, 34, makes reference to "philosophical issues" related to limiting the Mediation Convention only to MSAs. She suggests that these are linked to the existence or not of differences in legal treatment of MSAs in relation to the rest of negotiated agreements in many countries. Irrespective of the above, she ends up arguing in favour of a convention on MSAs basically "for pragmatic reasons".

[17] Article 1(2) of the draft Singapore Mediation Convention, which reads as follows:

> "2. This Convention does not apply to settlement agreements:
>
> (a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;
>
> (b) Relating to family, inheritance or employment law."

In this respect see also Catherine Kessedjian, "Mediations internationales : un nouvel instrument d'exécution de la CNUDCI" *Recueil Dalloz*, 30 November 2017, No 41, 2416. In this sense family, consumer and work relationships are excluded from the scope of the Singapore Convention. Ellen E Deason, "Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?" [2015] *Dispute Resolution Magazine* 32, 34, finds this exclusion reasonable in order to ensure a workable international law instrument that would not be full of mandatory legal provisions.

[18] Article 3(3) of the draft Singapore Mediation Convention:

> "A settlement agreement is in 'writing' if its context is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy."

expression of self-determination,[19] a view not followed in the final text. The same applied to the suggestion that the parties to an MSA should be allowed to opt-out from enforcement.[20] A wider exception was finally adopted, allowing countries to reserve the right to allow parties to opt out from the Convention *in toto*.[21]

The method of direct enforcement

The Singapore Mediation Convention generally works as follows in relation to enforcement: once an MSA is reached, any party to it can ask that it acquires enforcing power in any country it chooses to, by filing an application before the national competent authority. This MSA becomes enforceable provided it does not fall within any of the grounds of refusal of enforcement mentioned in the said draft Convention.[22] Under the terminology of the Singapore Convention, this is a scenario of "direct enforcement", that is enforcement that would not go through a review process in the country of origin of the MSA at first, but would be directly enforced in the country of enforcement.[23] Therefore, the enforcement is not a cross-border one, between different states, but still an international one. The international character of such an MSA emanates from the fact that it is negotiated and made as an "international" MSA, as this term is defined in art 3 of the Singapore Mediation Convention[24] and provided the requirements of this provision are indeed met.

The model of the Singapore Mediation Convention essentially delocalises from the enforcement process the place where the MSA may have been reached. This is done by allowing enforcement in the country of choice of the enforcing party. This has the extra value that it can be of use to the existing and increasing electronic mediation proceedings and the freedom that parties in mediation expect to have, so as to design solutions not tied to a specific legal system.[25] This simple mechanism is, to our mind, a recognition of the following givens: (a) the *situs* of mediation is irrelevant, or at least not as relevant, contrarily to the *situs* of litigation or arbitration[26]; (b) the MSA does not need to produce a res judicata or have enforcing power in the country where it has been concluded in order for it to be enforced internationally. This also exerts substantial influence on the enforcement process: one can try direct enforcement in any country, irrespective of the country where the MSA may have been reached. Actually, the Working Group discussed the matter in detail prior to agreeing on the direct enforcement model.[27] The basic idea is that given the nature of

[19] Ellen E Deason, "Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?" [2015] *Dispute Resolution Magazine* 32, 36.

[20] Ellen E Deason, "Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?" [2015] *Dispute Resolution Magazine* 32, 36. This is also an expression of self-determination.

[21] Singapore Mediation Convention art 8(2).

[22] Singapore Mediation Convention arts 4 and 5, respectively.

[23] UNCITRAL Working Group II, *Settlement of commercial disputes, International commercial conciliation: enforceability of settlement agreements*, A/CN.9/WG.II/WP.190, paras 43–45.

[24]

> "1. For the purposes of this Convention:
> A settlement agreement is 'international' if, at the time of the conclusion of that agreement:
> (a) At least two parties to the settlement agreement have their places of business in different States; or
> (b) The State in which the parties to the settlement agreement have their places of business is different from either:
> (i) The State in which a substantial part of the obligations under the settlement agreement is to be performed; or
> (ii) The State with which the subject matter of the settlement agreement is most closely connected.""

[25] Ellen E Deason, "Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?" [2015] *Dispute Resolution Magazine* 32, 35.

[26] In this sense see UNCITRAL Working Group II, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session* (Vienna, 7–11 September 2015), A/CN.9/861, para 81: "[U]nlike court judgements and arbitral awards, it could be very difficult to determine the originating state of settlement agreements as the connecting factor might be subject to different determinations".

[27] See UNCITRAL Working Group II, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session* (Vienna, 7–11 September 2015), A/CN.9/861, para 80.

mediation, the difficulty in localising the emanating state of the MSA and in order to avoid a double *exequatur* process that this would entail,[28] direct enforcement would be the suitable model for MSAs. This process would not deprive courts in the originating state of the competency to review the validity of the settlement agreement,[29] but would not go so far as to accept even a limited review *prior* to direct enforcement, such limited review to be left to the enforcing state.[30] Coming to this point, one needs to discuss the relevant process in the state of enforcement, the related notion of "relief" and the available defences to direct enforcement.

Procedure for granting relief

The procedure for granting relief is regulated in art 4 of the Singapore Mediation Convention.

Under this[31] the applying party shall supply the competent authority where the relief is sought with:

> "(a) The settlement agreement signed by the parties;
> (b) Evidence that the settlement agreement resulted from mediation, such as:
> (i) The mediator's signature on the settlement agreement;
> (ii) A document signed by the mediator indicating that the mediation was carried out;
> (iii) An attestation by the institution that administered the mediation; or
> (iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority."

This last requirement aims at ensuring proper court control of the MSA.

The notion of "relief"

The Singapore Mediation Convention uses the term "relief" in relation to the legal effect that the MSA will acquire in the country of enforcement. It avoids the term "enforcement" and the term "recognition"[32] although both were discussed in earlier drafts. The term "relief"

[28] See UNCITRAL Working Group II, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session* (Vienna, 7–11 September 2015), A/CN.9/861, para 81:

> "It was also mentioned that a review mechanism was likely to result in double exequatur, which would be at odds with the purpose of the instrument to provide an efficient and simplified enforcement mechanism. Furthermore, it was stated that any defences to enforcement could be raised at the court where enforcement was sought, making any review by a court at the originating state superfluous."

[29] UNCITRAL Working Group II, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session* (Vienna, 7–11 September 2015), A/CN.9/861, para 82.

[30] See UNCITRAL Working Group II, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session* (Vienna, 7–11 September 2015), A/CN.9/861, paras 83 and 84:

> "83. The view was expressed that providing for a simple review mechanism at the originating State could facilitate the overall enforcement procedure. It was noted that courts at the originating state would be better placed to determine prima facie certain questions, such as the validity of the settlement agreement and fulfilment of procedural requirements pertaining to the conciliation process. It was suggested that such a simple review mechanism would not amount to double exequatur, as it would only ascertain matters such as the validity of the settlement agreement before such an agreement could be enforced in other jurisdictions. Under that approach, the grounds for refusing enforcement would be limited.
> 84. After discussion, it was generally agreed that the instrument should provide a mechanism where a party to a settlement agreement would be able to seek direct enforcement (at the place of enforcement) without imposing a requirement for a review of the settlement agreement at the originating state. It was further noted that the concerns raised about such an approach could be further considered in the context of defences to enforcement and reference was made to article V(1)(e) of the New York Convention as a possible model."

[31] Singapore Mediation Convention art 4(1). The same authority can ask for translation in its official language (art 4(3)), as well as any other document it deems necessary.

[32] As was said in the Working Group the term "recognition" in certain jurisdictions, might be understood to confer res judicata or preclusive effect and should thus be avoided. UNCITRAL Working Group II, *Settlement of commercial disputes, International commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation*, A/CN.9/WG.II/WP.200 UNCITRAL, para 4.

is not a novelty in an UNCITRAL environment and was used in the UNCITRAL Model Law on Cross-Border Insolvency (1997).[33] Essentially the term "relief" is intended to encompass both the right of a party to seek enforcement and to invoke a settlement agreement.[34] This means that the relief is used both as a "sword" in the context of enforcement and a "shield", in the context of recognition only by rendering legal effect to such MSAs.[35] It is to be used, for example, in homologation as a first step of enforcement or as a defence in other proceedings.[36] Also, the underlying idea is to avoid providing details on the recognition procedure, leaving that matter to domestic regimes which, in any case, could not be easily harmonised.[37]

The grounds of refusal to "grant relief"

Given that the method of direct enforcement was chosen by the drafters of the Singapore Mediation Convention, it is no wonder that the list of the grounds available to the competent state authority of the state of enforcement to actually refuse to "grant relief" to the applicant, contains 10 different grounds for such refusal.[38] This is a rational approach, since control takes place only in the country of enforcement. However, from those, the grounds under art 5(1)(d) (non-observance of the general standards applicable to the mediator) and art 5(1)(e) (failure of the mediator to disclose incidents that question the mediator's impartiality

[33] See UNCITRAL Working Group II, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session* (Vienna, 7–11 September 2015), A/CN.9/861, para 79, for the related discussion in the present context.

[34] UNCITRAL Working Group II, *Report of Working Group II (Dispute Settlement) on the work of its sixty-sixth session* (New York, 6–10 February 2017), A/CN.9/901, para 57.

[35] UNCITRAL Working Group II, *Settlement of commercial disputes, International commercial conciliation: enforceability of settlement agreements*, A/CN.9/WG.II/WP.195, para 49.

[36] This is provided explicitly in art 2 of the draft Singapore Mediation Convention. Paragraph (1) refers to enforcement and para (2) to recognition. See also UNCITRAL Working Group II, *Settlement of commercial disputes, International commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation*, A/CN.9/WG.II/WP.200, para 30.

[37] UNCITRAL Working Group II, *Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session* (Vienna, 7–11 September 2015), A/CN.9/861, para 79.

[38]

"1. The competent authority of the Contracting State where the application under article 4 is made may refuse to grant relief at the request of the party against whom the application is made, only if that party furnishes to the competent authority proof that:
   (a) A party to the settlement agreement was under some incapacity; or
   (b) The settlement agreement is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Contracting State where the application under article 4 is made; or the obligations in the settlement agreement have been performed; or
   (c) The settlement agreement:
      (i) Is not binding, or is not final, according to its terms;
      (ii) Has been subsequently modified;
      (iii) Is conditional so that the obligations in the settlement agreement of the party against whom the settlement agreement is invoked have not yet arisen; or
      (iv) Is not capable of being enforced because it is not clear and comprehensible; or
   (d) There was a serious breach by the mediator of standards applicable to the mediator or the mediation, without which breach that party would not have entered into the settlement agreement; or
   (e) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party, without which failure that party would not have entered into the settlement agreement.

2. The competent authority of the Contracting State where the application under article 4 is made may also refuse to grant relief if it finds that:
   (a) Granting relief would be contrary to the public policy of that State; or
   (b) The subject matter of the dispute is not capable of settlement by mediation under the law of that State."

and independence) have been criticised for dangerously extending the control of the MSA by the state of enforcement.[39]

The 10 defences to the granting of relief follow the pattern of the New York Convention by adjusting it to the needs of mediation. In particular, paras (a) and (b) are adjustments to mediation of art V(1)(a) of the New York Convention. In this sense, the relevant defence is related to the validity of the settlement agreement and not of the agreement to mediate (agreement to arbitrate in the New York Convention). Paragraph (c) is an adjustment with additions of art V(1)(e) of the New York Convention. Paragraphs (d) and (e) only have some "flavour" of art V(1)(d) of the New York Convention, but they generally differ in a substantial manner. Finally, art 5(2) of the Singapore Mediation Convention is very close to art V(2) of the New York Convention, presumably given that these grounds for refusal to grant relief (enforcement in the case of the New York Convention) do not need to be put forward by the defending party, but the court can apply them on its own motion and are fundamental in international enforcement.

5. The second model: the EU

Directive 2008/52 has been designed to regulate the procedure and certain legal aspects of cross-border mediations within the EU, that is mediations in which at least one of the parties to it resides in a different Member State.[40] It also applies to civil and commercial matters, except as regards rights and obligations which are not freely disposable by the parties under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the state for acts and omissions in the exercise of state authority (*acta iure imperii*).[41] However, it has been open for application also to local mediations by virtue of national implementation and presumably to mediations with non-EU Member States involved. The basic obligation of the Member States as to enforcement under the EU model, as per art 6 of Directive 2008/52, is to ensure that the parties to an MSA (in their implementing laws certain Member States accept unilateral application) shall be able to have an MSA declared enforceable, unless this is against the law of the Member State of enforcement or is not enforceable under the same law. Such a declaration is made by a court or any other competent authority on the basis of the related provisions of the national law in question. The relevant enforcing title to be granted to an MSA under this process, shall be an authentic instrument, a judgment or another decision. It is not necessary for the competent court or authority granting enforcement to be placed in the place of the mediation, but it must of course, be at the place of enforcement.[42] Further, preamble 20 of the Directive refers to the right of using the available armament of EU Regulations for the enforcement of judgments and authentic instruments within the EU, as well as the European Enforcement Order Regulation.

[39] Catherine Kessedjian, "Mediations internationales : un nouvel instrument d'exécution de la CNUDCI" *Recueil Dalloz*, 30 November 2017, No 41, 2416.

[40] The political aim is to strike a balance between litigation and mediation in the Member States. See Guiseppe De Palo and Mary B Trevor, *EU Mediation Law and Practice* (OUP 2012) 1.22–1.24.

[41] Directive 2008/52 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3 art 1(2).

[42] Directive 2008/52 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3 art 6(2), where it is provided that: "2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made." This has been criticised as being a "weak" wording, leaving room to national divergences: S I Strong, "Beyond International Commercial Arbitration? The Promise of International Commercial Mediation" (2014) 45 Wash U J L & Pol'y 11, 37–38. The reason behind these divergences was that the EU obviously opted for a Directive and not a Regulation and has left national laws on enforcement intact.

The two alternatives under the EU model

Therefore, one can essentially trace two alternatives for enforcement. One is to try direct enforcement. This can happen in the Member State where enforcement is sought,[43] provided this is allowed by the law of that Member State, since this is not regulated at EU level and is left to the Member States to regulate. A number of Member States such as Italy, Luxembourg, Spain and Finland seem to allow direct enforcement of an MSA emanating from other Member States.[44] Obviously, the Member State of enforcement can always coincide with the Member State where the mediation took place.

The second alternative of the EU model of international enforcement is to use the armament of EU Regulations regarding the enforcement of judgments and authentic instruments. This is special to the EU, it is generally not transferable to other parts of the world,[45] and is the more striking distinguishing characteristic of the EU model discussed herein. Under this alternative, for an MSA to become enforceable internationally, it must first become enforceable in some Member State under the first alternative. In most jurisdictions, this means going through some formal process.

Clearly, the applicable procedure in all the Member States is not the same, since as said above, the matter is not regulated at EU level.[46] In this sense, although the MSAs are not judgments as such, a Member State is free to actually grant them such power.[47]

The cross-border transfer to other Member States of the legal nature granted to an MSA by a national competent authority, is an expression of the so-called "recognition method" in the field of private international law, whereby a certain legal situation created in one country, is transferred as such in some other.[48] This legislative solution makes sense to the extent that the degree of state control in the process of the mediation and in the actual review of the MSA by a court, differ substantially in the EU.[49] As discussed above, certain countries have adopted a very liberal regime, whereas others have opted for an interventionist approach and some of them even grant a res judicata effect to the MSA. This alternative of the EU

[43] Federico Antich, "Enforcing the mediated settlement and the appropriate legal framework: Some Reflections from Within the EU and Beyond" in Marianne Roth and Michael Geistlinger (eds), *Yearbook on International Arbitration and ADR Volume V* (NWV 2017) 325–346. After some initial hesitation in his earlier article with the same title in "Enforcing the Mediated Settlement and the Need for an Appropriate Legal Framework: Some Reflections from Within the EU and Beyond" [2015] *Transnational Dispute Management* 1, 12. With the exception of Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000 [2003] OJ L338/1 (see art 46 of the said Regulation and preamble 21 of the Mediation Directive) according to which parties' agreements shall first have to be declared enforceable at the place of conclusion.

[44] Elena D'Alessandro, "Results of Mediation and Cross-Border Enforcement of Mediation Agreements" ERA Forum, 2013, 1, 7. Greece on the contrary, grants exclusive jurisdiction for granting enforcing power to an MSA to the court that would have been competent to hear the case that was settled under an MSA, under the applicable rules of jurisdiction (Law 4512/2018 art 184(2)).

[45] Elena D'Alessandro, "Results of Mediation and Cross-Border Enforcement of Mediation Agreements" ERA Forum, 2013, refers to one more alternative, that is the possibility of having enforcement in the place where mediation has been concluded. Given that the Directive does not offer particular status or importance to the place of mediation, this alternative is merged in one common "direct enforcement" model.

[46] By way of indication, see Guiseppe De Palo and Mary B Trevor, *EU Mediation Law and Practice* (OUP 2012) 1.20–1.21.

[47] Likewise Chiara Besso, "Implementation of the EU Directive 52/2008: A Comparative Survey" p 6, <*http://www.mediation-in-europe.eu/study_on_implementation.asp?ln=&idtema=1&idtemacat=2&page=informazioni&idcategoria=1120*> accessed 22 November 2018, without any further details. Also Felix Steffek, "Mediation in the European Union: An Introduction" p 11, <*https://www.scribd.com/document/325007987/Introduction-to-Mediation-in-the-European-Union-EU-En*> accessed 22 November 2018. The same writer however refers to the enforcement of MSAs as court settlements or authentic instruments only; a detailed comparative reference to various Member States by Elena D'Alessandro, "Enforcing Agreements Resulting from Mediation Within the European Judicial Area: A Comparative Overview from an Italian Perspective" <*http://ssrn.com/abstract=1950988*> accessed 22 November 2018.

[48] See, by way of indication, P Mayer, "Les méthodes de reconnaissance en droit international privé" in *Mélanges en l'honneur de Paul Lagarde. Le droit international privé : Esprit et méthodes* (Dalloz 2005) 547–588 and C Pamboukis, "La renaissance—métamorphose de la méthode de reconnaissance" [2008] Rev Crit Dip 513.

[49] See Felix Steffek, "Mediation in the European Union: An Introduction" pp 14–15, <*https://www.scribd.com/document/325007987/Introduction-to-Mediation-in-the-European-Union-EU-En*> accessed 22 November 2018.

model departs substantially from the direct enforcement model, since it also allows the cross-border enforcement of all types of judicial decisions that ratify MSAs.

National laws examples

A basic comparative search demonstrates clear national differences in relation to the method followed to grant an MSA enforcing power. For example, in Italy,[50] France[51] and Portugal[52] there are quite straightforward "homologation", non-adversarial proceedings,[53] whereby the MSAs are granted the *exequatur* and are declared enforceable under the same conditions as judgments, while the control of the court is limited to the violation of national public policy.[54]

By the same token in Greece,[55] an MSA which is signed by all parties to it and the mediator becomes enforceable by a mere application of any party to it before the competent court. The court is essentially rubber-stamping the MSA and does not review it. Notarial deeds are required, if a notarial form is required based on the legal nature of the underlying legal relationship.[56] However, any MSA is open to legal scrutiny by courts at the stage of enforcement and by an application of any of the parties to it by specific reasons of law, especially violation of public policy and duress, undue influence or fraud,[57] under the reservations of confidentiality. The contractual nature of MSAs would leave the same path open in most countries.[58]

Germany allows enforcement by virtue of notarial deed, of a settlement reached between lawyers, or a settlement reached before a court or a dispute-resolution entity established or recognised by the state.[59] In Spain, the MSA can acquire the status of res judicata and, at the same time, become enforceable by court order if it was reached following litigation,[60] and in all other cases, it can be notarised to become enforceable only.[61] In England, parties can use the consent order (Tomlin order), which if breached by any party, the competent

[50] In Italy, there is also the route of the per se enforceability of the MSA, provided it is signed by all parties to it and the mediator. See, Federico Antich, "Enforcing the Mediated Settlement and the Need for an Appropriate Legal Framework. Some Reflections from Within the EU and Beyond" [2015] *Transnational Dispute Management* 1, 19.

[51] D Wietek, "France" in Nadja Alexander, Sabine Walsh and Martin Svatos (eds), *EU Mediation Law Handbook. Regulatory Robustness Ratings for Mediation Regimes* (Wolters Kluwer 2017) 299, 341–344.

[52] M Cancella d' Abreu and S Walsh, "Portugal" in Nadja Alexander, Sabine Walsh and Martin Svatos (eds), *EU Mediation Law Handbook. Regulatory Robustness Ratings for Mediation Regimes* (Wolters Kluwer 2017) 623, 632–634.

[53] These usually grant to MSAs a status similar to that of a judgment. P Billiet and E Kurlanda, "An Introduction to the Directive on Certain Aspects of Mediation in Civil and Commercial Matters" in Maklu (ed), *The New EU Directive of Mediation—First Insights* (Association for International Arbitration 2008) 9, 17–18.

[54] Elena D'Alessandro, "Enforcing Agreements Resulting from Mediation Within the European Judicial Area: A Comparative Overview from an Italian Perspective" pp 3–6, <*http://ssrn.com/abstract=1950988*> accessed 22 November 2018.

[55] Law 4512/2018 art 184(4). A Anthimos, "Greece" in Nadja Alexander, Sabine Walsh and Martin Svatos (eds), *EU Mediation Law Handbook. Regulatory Robustness Ratings for Mediation Regimes* (Wolters Kluwer 2017) 383–402, discusses the position under the previous regime, which was not substantially different.

[56] Law 4512/2016 art 184(5).

[57] This is the case in most, if not all jurisdictions. For a US example, see James Coben and Peter Thompson, "Disputing Irony: A Systematic Look at Litigation About Mediation" (2006) 11 *Harvard Negotiation Law Review* 43, 80–84.

[58] See, eg on Italy: Federico Antich, "Enforcing the Mediated Settlement and the Need for an Appropriate Legal Framework. Some Reflections from Within the EU and Beyond" [2015] *Transnational Dispute Management* 1, 19 and in Mariane Roth and Michael Geistlinger (eds), *Yearbook on International Arbitration and ADR Volume V* (NWV 2017) 338–341. But not for England where it is suggested by the same writer (at 20 and 341, respectively) that for an MSA to have enforcing power it only needs to be a valid contract.

[59] Renate Dendorfer-Ditges and Philipp Wilhem, "Mediation in a global village: Legal Complexity of cross-border mediation in Europe" in Mariane Roth and Michael Geistlinger (eds), *Yearbook on International Arbitration and ADR Volume V* (NWV 2017) 242; K Osswald and G Flecke-Giammarco, "Germany" in Nadja Alexander, Sabine Walsh and Martin Svatos (eds), *EU Mediation Law Handbook. Regulatory Robustness Ratings for Mediation Regimes* (Wolters Kluwer 2017) 349, 376–377.

[60] Article 26(4) of the "5/2012, Ley de mediación en asuntos civiles y mercantiles".

[61] Aura Esther Vilalta and Rosa Pérez Martell, "Overview of the New Normative on Mediation In Spain", pp 17–20, <*http://www.americanjournalofmediation.com/docs/VILALTA%20-%20MARTELL%20-%20Overview%20of%20The%20New%20Normative%20on%20Mediation.pdf*> accessed 22 November 2018.

court can enforce it.[62] In Cyprus, a "Declaration of enforceability" is issued and it has the status of a judgment.[63]

Switzerland although not a Member State, is of interest in this context as it is a party to the 2007 Lugano Convention, the "sister" of Regulation 1215/2012[64] for the EFTA countries. In Switzerland, in the case of court-annexed mediations, the MSA is certified by a court and acquires a res judicata effect, following a common request of the parties to this effect.[65] This means that it can be suggested that such MSAs reached in Switzerland can be enforced under the 2007 Lugano Convention as judgments.[66]

In Lithuania, a written form settlement agreement is treated as res judicata/final judgment and its execution is possible after approval by a court. Especially in the case of judicial mediation, a signed agreement that is approved by the mediating judge is treated as final judgment.[67]

The above elliptic presentation of Member States' legislation demonstrates diverging practices in the EU. Some of them accept a certain review of the MSA by a third (neutral) party, usually a court,[68] while others render the court's or other third party's intervention a mere formality. In any event, the MSA can take the form of authentic instrument,[69] court

[62] Federico Antich, "Enforcing the Mediated Settlement and the Need for an Appropriate Legal Framework. Some Reflections from Within the EU and Beyond" [2015] *Transnational Dispute Management* 1, 20 and in Mariane Roth and Michael Geistlinger (eds), *Yearbook on International Arbitration and ADR Volume V* (NWV 2017) 341. The position in Ireland is similar, Sabine Walsh, "Ireland" in Nadja Alexander, Sabine Walsh and Martin Svatos (eds), *EU Mediation Law Handbook. Regulatory Robustness Ratings for Mediation Regimes* (Wolters Kluwer 2017) 435, 461–462.

[63] V-Z Papagiannis and G Mountis, "Cyprus" in Nadja Alexander, Sabine Walsh and Martin Svatos (eds), *EU Mediation Law Handbook. Regulatory Robustness Ratings for Mediation Regimes* (Wolters Kluwer 2017) 141, 158.

[64] Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.

[65] Article 217 of the Swiss Code of Civil Procedure. In this relation Makridou (in Greek), *Mediation of private law cases in Switzerland under the New Federal Code of Civil Procedure* (Helleniki Dikaiosini 2015) 325 and Meier (in Greek), *The new Federal Code of Civil Procedure, Communication Methods in the Adjudication and the Dispute Resolution by Mediation* (Epitheorissi Politikis Dikonomias 2016) 118. It appears that the res judicata effect is granted on the basis of the restrictive review of the MSA.

[66] Articles 32, 57 and 58 respectively.

[67] V Valancius, "Lithuania" in Nadja Alexander, Sabine Walsh and Martin Svatos (eds), *EU Mediation Law Handbook. Regulatory Robustness Ratings for Mediation Regimes* (Wolters Kluwer 2017) 509, 524–525.

[68] See, eg, Andreas Hacke, "A New York Convention to come?" [2015] *Dispute Resolution* 10, 11, who would expect such a third-party control, be that a court, a tribunal or a notary or even the parties' lawyers by joint action.

[69] An authentic instrument is a document recording a legal act or fact whose authenticity is certified by a public authority. It confers authenticity on the legal instruments and contracts notaries draw up for their clients. Notaries perform this task on behalf of the state, which grants them the status of a state office-holder. Like court decisions, authentic instruments are enforceable, enabling the contracting parties to have obligations enforced directly without having to address the court. Moreover, unlike private agreements, authentic instruments have a superior evidentiary value which is binding on the courts, the administration and third parties. As is pointed out in the Directorate-General for Internal Policies, *Comparative Report on Authentic Instruments* (European Parliament 2008) <*http://www.europarl.europa.eu/RegData/etudes/STUD/2008/408329/IPOL-JURI_ET(2008)408329_EN.pdf*> accessed 22 November 2018, executive summary, para 3:

> "[A]uthentic instruments have been defined by the European Court of Justice in the *Unibank decision* [European Court of Justice (ECJ), Judgement of 17 June 1999 - C-260/97, *Unibank*, ECR 1999, p. I-3715], following the Jenard-Möller Report, and by the EC legislator in Article 4 (3) (a) Regulation (EC) No 805/2004 on the European Enforcement Order:
>
> - An authentic instrument is an instrument which has been established by a *public authority* or other authority empowered for that purpose by the Member State in which it originates;
> - in the required *form*;
> - and the authenticity must relate not only to the signatures, but also to the and [sic] *content* of the instrument.
>
> Thus, EC law looks to national laws concerning authenticating authorities and authentication procedures."

settlement or even a court decision,[70] and this is a matter of national legislation,[71] or it can simply be enforced as a contract.[72] Authentic instruments are, as it seems, a civil legal family creation and are not met in common law or Nordic System Member States,[73] a fact that may create some imbalance within the EU regarding their use for cross-border enforcement of MSAs.

Applicable EU Regulations under the second alternative of the EU model

With the above caveat in mind, one can refer to some EU Regulations that can be used for cross-border enforcement of MSAs in the EU.[74] These are Regulation 1215/2012 which regulates the intra-EU enforcement in civil and commercial matters,[75] Regulation 2201/2003 which regulates enforcement in the field of matrimonial matters and matters of parental responsibility,[76] Regulation 4/2009[77] relating to maintenance obligations, Regulation 650/2012 in matters of succession,[78] and Regulations 1103/2016 and 1104/2016 on property relationships of spouses and registered partners respectively.[79] A different mechanism, very particular to the EU, is Regulation 805/2004[80] introducing the so-called European Enforcement Order for uncontested claims. Under the above Regulations, the basic control is the one related to the possibility of violation of public policy (*ordre public international*)[81] of the Member State of enforcement.[82] In a case where a judgment following an MSA is under international enforcement, the relevant control of the enforcing court shall be wider, by including also the existence of irreconcilable judgments in the Member State of enforcement.

[70] Article 6(2). One wonders if the judgment in *Solo Kleinmotoren GmbH v Emilio Boch* (C-414/92) EU:C:1994:221, [1994] ECR I-2237 should also apply in the context of mediation. In *Solo Kleinmotoren* the ECJ had found that a court settlement cannot be treated as a judgment in the sense of the then art 25 of the Brussels Convention, now art 2(a) of the Brussels Ibis Regulation 1215/2012. Should this ruling be extended to an MSA that takes the form of a judgment under some national law? Our submission is that it should not, primarily because an MSA should be treated as a distinct judicial category, irrespective of form, and its cross-border effectiveness should be ensured, but this perhaps merits a more elaborate discussion.

[71] This is an acknowledgment of the fact that national practices vary to such a considerable degree that it would be superfluous to try to create a common regulatory system as it appears also in this article. In this respect one can come across a mere filing before the court, a notarial deed or even a direct enforcement of an MSA without the need for a state authority review or verification of any type.

[72] Federico Antich, "Enforcing the mediated settlement and the appropriate legal framework: Some Reflections from Within the EU and Beyond" in Mariane Roth and Michael Geistlinger (eds), *Yearbook on International Arbitration and ADR Volume V* (NWV 2017) 331–334, with certain national examples.

[73] Directorate-General for Internal Policies, *Comparative Report on Authentic Instruments* (European Parliament 2008), executive summary, para 3.

[74] It should be noted that the possibility of applying the provisions of these Regulations relating to "enforcement of judgments" presupposes that the suggested reading of *Solo Kleinmotoren GmbH v Emilio Boch* (C-414/92) EU:C:1994:221, [1994] ECR I-2237 (see above) shall prevail. If not, only the provisions on authentic instruments and court settlement of the said Regulations shall apply.

[75] Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1 Chs III and IV.

[76] Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000 [2003] OJ L338/1 Ch III.

[77] Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1 Chs IV and VI.

[78] Regulation 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107 Chs IV and V.

[79] Regulation 1103/2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L183/1 Chs IV and V; Regulation 1104/2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L183/30 Chs IV and V.

[80] Regulation 805/2004 creating a European Enforcement Order for uncontested claims [2004] OJ L143/15.

[81] As is well known this denotes a much narrower public policy to the national one (*jus cogens)*.

[82] For a more detailed analysis of the application of certain EU Regulations, see Federico Antich, "Enforcing the mediated settlement and the appropriate legal framework: Some Reflections from Within the EU and Beyond" in Mariane Roth and Michael Geistlinger (eds), *Yearbook on International Arbitration and ADR Volume V* (NWV 2017) 334–338.

Ordre public international in mediation in an EU context

On the basis of the current ECJ case law, one can think of at least some scenarios whereby violation of the *ordre public international* (private international law public policy) of a Member State may exist. One example is the violation of the prevailing competition rules of the EU[83] and another the violation of arts 17 and 18 of the well-known Directive 653/1986 which provides for the compensation of an agent in case of undue termination of the agency agreement by the principal.[84] One can also think of the scenario of coercion of a party to an MSA,[85] which is by definition a question, not only of public policy in the field of international enforcement, but also a question of *jus cogens*. A final example is the one of an MSA relating to a non-freely disposable right in the Member State of enforcement,[86] although this position seems to be broadening excessively the actual content of the public policy in the field of intra-EU enforcement. By definition, public policy is primarily a national "wild animal". However, given the gradual convergence in the EU in a number of social, political and especially economical aspects, it is not hard to see it acquiring a greater EU dimension.[87] On the other hand, the differences in judicial control of MSAs in the EU at the stage of granting enforcing power may raise more public policy issues at the later stage of cross-border enforcement.[88]

Intermediate conclusions

In conclusion, (a) the legal nature granted to an MSA by national legislation and (b) the EU Regulation to be followed for cross-border enforcement shall be critical. Clearly under the EU legislation an MSA can qualify for cross-border enforcement if it has already taken a certain form in the Member State of origin, the one of judgment included.[89] Given this, the presence in the mediation of a lawyer of the Member State where enforcement is anticipated, shall be advisable. The EU model based on Directive 2008/52 allows for (a) direct enforcement in any Member State, provided its national law allows this, and (b) cross-border enforcement of MSAs within the EU, provided they have acquired prior enforcing power in a Member State. Under (b) an MSA first becomes enforceable in a Member State, provided it does not violate its national law and is then enforced elsewhere in the EU under the Private International Law Regulations. The fact that, as said, the EU model implicitly allows also direct enforcement is an effort to have the best of both worlds. On the other hand, the diverging legislation in the Member States in respect of granting enforcing effect to an MSA can be a recipe for some disorder at the enforcement stage.

6. And the "half model": the 1958 New York Convention

The Singapore Mediation Convention does not apply to "Settlement agreements that have been recorded and are enforceable as an arbitral award".[90] This provision aims at ensuring that there shall be no overlap of the New York Convention with the Singapore Mediation

[83] *Eco Swiss China Time Ltd v Benetton International NV* (C126/97) EU:C:1999:269, [1999] ECR I-3055.

[84] Directive 653/1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] OJ L382/17; *Ingmar GB Ltd v Eaton Leonard Technologies Inc* (C-381/98) EU:C:2000:605, [2000] E.C.R. I-9305.

[85] Along these line in the US, Edna Sussman, "The Final Step: Issues in Enforcing the Mediation Settlement Agreement" in Arthur W Rovine (ed), *The Fordham Papers 2008, Volume 2* (Martinus Nijhoff 2008) 343, 349–351.

[86] A. Anthimos "Greece" in Nadja Alexander, Sabine Walsh and Martin Svatos (eds), *EU Mediation Law Handbook, Regulatory Robustness Rating for Mediation Regimes* (Wolters Kluwer 2017) 401.

[87] In this respect see, Haris Meidanis, "Public Policy and Ordre Public in the Private International Law of the EC/EU: Traditional positions and modern trends" (2005) 30(1) E L Rev 95, 108–110.

[88] Along these lines T Gaultier, "Cross-Border Mediation: A New Solution for International Commercial Dispute Settlement" [2013] *NYSBA International Law Practicum* 38, 43.

[89] The likelihood of having an MSA in the form of a judgment does not seem to be present in the Singapore Mediation Convention as discussed above.

[90] Singapore Convention art 1(3)(b).

Convention.[91] Therefore, the question that needs to be addressed is when an MSA is "recorded" and "enforceable as an arbitral award" under the New York Convention, since when it is not, the Singapore Mediation Convention shall apply.[92]

As is well known, a consent award is still an award that prima facie can be enforced internationally under the 1958 New York Convention.[93] Actually, the reference to a "difference" in art I(1) of the New York Convention does not specify when that "difference" had to exist in time in relation to the appointment of the arbitrator.[94] However, this position is not unquestioned, as the same writer accepts.[95] Indeed it has been suggested,[96] that when parties appoint an arbitral tribunal merely to record a settlement in a consent award, there is no "difference" between the parties to resolve. From the text of the New York Convention it follows that a "difference" is a necessary precondition of an "award" in the sense of the Convention.[97] As is further mentioned,[98] the New York Convention applies to arbitrations arising out of "differences" and arguably if such "differences" have been settled by mediation prior to the commencement of the arbitration, the New York Convention should not apply to them. Therefore, according to this view, any award to be enforced must be resolving a dispute present at the time of the appointment of the tribunal.

On the other hand, the Singapore Mediation Convention does not make any reference to the existence of a "difference" as such, but only refers to settlements "recorded" and "enforceable" as awards. Therefore, consent awards must be enforceable in order for them to be excluded from the Singapore Mediation Convention. Despite the disagreement as to the enforceability of consent awards in cases where a genuine "difference" is absent under the New York Convention, the Singapore Mediation Convention seems to opt for the restrictive view. This can be seen in the reference to the likelihood that a consent award *may* fall outside the scope of the New York Convention (or other enforcing instrument) at the place of enforcement, in which case the Singapore Mediation Convention shall apply.[99] Most probably this does not refer to awards that are non-enforceable because one of the relevant grounds for non-enforcement (art V) is observed, but because they are not

[91] UNICTRAL Working Group II, *Settlement of commercial disputes, International commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation*, A/CN.9/WG.II/WP.202, para 17.

[92] UNICTRAL Working Group II, *Settlement of commercial disputes, International commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation*, A/CN.9/WG.II/WP.202, para 18.

[93] Provided it does not violate third parties' rights. Gary Born, *International Commercial Arbitration*, (Kluwer 2009) Vol II 2438–2439. As mentioned in art 1(1) of the New York Convention, it applies to the recognition and enforcement of awards "arising out of differences between persons". This lacks a special temporal element. See recently Ava Borrassso, "U.S. District Courts Rule Consent Awards Fall Within New York Convention" *Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2018/04/06/u-s-district-courts-rule-consent-awards-fall-within-new-york-convention/>* accessed 22 November 2018.

[94] Edna Sussman, "The Final Step: Issues in Enforcing the Mediation Settlement Agreement" in Arthur W Rovine (ed), *The Fordham Papers 2008, Volume 2* (Martinus Nijhoff 2008) 343, 358. See, on the contrary, the definition of the arbitration agreement found in the English Arbitration Act 1996 s 6(1) or in the NY CPLR § 7501 (2012), where a "present or future" dispute or a "controversy thereafter arising or existing" are, respectively, required.

[95] In this respect, see Edna Sussman, "The Final Step: Issues in Enforcing the Mediation Settlement Agreement" in Arthur W Rovine (ed), *The Fordham Papers 2008, Volume 2* (Martinus Nijhoff 2008) 343, 358, who suggests that:

> "Most would agree that such agreed awards rendered by an arbitrator appointed before the settlement of the dispute are governed by the New York Convention and enforceable under the Convention. Whether the same result obtains if the arbitrator is appointed after the settlement of the dispute as a result of mediation, such as can be achieved in Korea, California and under the Stockholm rules, is less certain."

[96] Yarik Kryvoi and Dmitry Davydenko, "Consent Awards in International Arbitration: From Settlement to Enforcement" (2015) 40 Brook J Int'l L 827, 866.

[97] Yarik Kryvoi and Dmity Davydenko, "Consent Awards in International Arbitration: From Settlement to Enforcement" (2015) 40 Brook J Int'l L 827, 866.

[98] Ellen E Deason, "Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?" [2015] *Dispute Resolution Magazine* 32, 33. For the same writer, this position, along with the fact that it can be very hard from a practical point of view to actually start an arbitration and undertake the related costs, only with the view to "rubberstamp" an agreement, has rendered the Mediation Convention necessary.

[99] UNICTRAL Working Group II, *Settlement of commercial disputes, International commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation*, A/CN.9/WG.II/WP.202, para 18.

enforceable as such due to their legal nature. Otherwise any consent award that would not be enforced under art V of the New York Convention for any of the above grounds would be accepted for enforcement under the Singapore Mediation Convention, a scenario that is not convincing and lacks a stable legal basis.

This means that an MSA may take the form of an award and have the 1958 New York Convention used for its international enforcement, if the award had been issued following a real dispute. This is so, definitely in cases where the MSA is reached following an arbitrated case that parties at some point choose to settle with the assistance of a mediator and then agree to render the mediator the power to issue an award. As things stand now, few ADR centres, such as the Singapore centres for mediation and arbitration, are proposing to treat mediated settlements as arbitral awards for the sole purpose of their enforcement by using the so-called arb-med-arb clause.[100]

Further, as is mentioned, in certain countries such as Slovenia, Sweden[101] and Korea, or jurisdictions like California,[102] parties are allowed to ask that the MSA takes the form of an arbitral award. This creates a further incentive for ensuring the international enforcement of such awards.

From a conceptual, if not philosophical, point of view, using the New York Convention for enforcing MSAs seems to be an acceptable approach, as both arbitration and mediation are suitable for the containment of a dispute.[103] In cases where the New York Convention applies, obviously enforcement of the MSA having the form of an award shall take place on the basis of its provisions and defences to enforcement. The abnormality in relation to these defences is that they are designed for awards not for MSAs but are called to be used for MSAs in the form of consent awards.[104] In this case, form (award) will take precedence over substance (MSA) and this will have to be mitigated by the proper adjustment of the relevant defences, but this matter merits separate discussion. At the moment, it suffices to keep in mind that using the New York Convention in this context is not free from problems related to adjusting an MSA to a consent award. At the same time though, as is pointed out above,[105] if an award falls outside the scope the New York Convention (obviously because it is a mere rubber-stamping of an MSA) it can still be enforced as an MSA under the Singapore Mediation Convention.

7. Conclusions

A point to be made in relation to the successful enforcement of MSAs is that this can to a large extent be linked to the process thereof. Therefore, the applicable legal instrument is critical.

[100] By use of an arb-med-arb clause, an arbitration of a dispute can at any time be continued as mediation and eventually take the form of an award. Since the whole process shall have started as a genuine dispute it can qualify for enforcement as an award under the New York Convention. In this relation, see T Gaultier, "Cross-Border Mediation: A New Solution for International Commercial Dispute Settlement" [2013] *NYSBA International Law Practicum* 38, 48 and B Steele, "Enforcing International Commercial Mediation Agreements as Arbitral Awards under the New York Convention" (2007) 54 UCLA L Rev 1385, 1403, who thinks that this is the best practical advice.

[101] Federico Antich, "Enforcing the Mediated Settlement and the Need for an Appropriate Legal Framework. Some Reflections from Within the EU and Beyond" [2015] *Transnational Dispute Management* 1, 13.

[102] Edna Sussman, "The Final Step: Issues in Enforcing the Mediation Settlement Agreement" in Arthur W Rovine (ed), *The Fordham Papers 2008, Volume 2* (Martinus Nijhoff 2008) 343, 355.

[103] See on this point with respect to arbitration, Loukas Mistelis, "The Settlement-Enforcement Dynamic in International Arbitration" (2009) 19 Am Rev Int'l Arb 377, 382. This can be suggested, notwithstanding the findings of the SIA/RwC survey on arbitration related settlement, that med-arb does not necessarily increase the likelihood of settlement and that it is not so much the process that counts but the parties' motivation to settle (at 383).

[104] eg the case of art V(1)(b) of the New York Convention on the right to present one's case and the question whether separate meetings in mediation violate this provision. See B Steele, "Enforcing International Commercial Mediation Agreements as Arbitral Awards under the New York Convention" (2007) 54 UCLA L Rev 1385, 1403–1405.

[105] UNICTRAL Working Group, *Settlement of commercial disputes, International commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation*, A/CN.9/WG.II/WP.202, para 18.

With the future addition of the Singapore Mediation Convention a number of instruments shall be available to parties. For the Singapore Mediation Convention, the process is more straightforward, since application shall be made at the country of enforcement with a limited control based on the grounds for refusal mentioned therein.

The EU system is more complex. Its effectiveness depends to a large extent on national laws[106] and to their approach to mediation. What should be kept in mind though, is that once an MSA is granted enforcing power in a Member State, the free circulation thereof in the rest of the EU is relatively easy, thanks to the relevant EU Regulations. This is the added value of the second alternative of the EU model, discussed above.

The New York Convention can be used, with caution, for the enforcement of MSAs that have become consent awards and the Singapore Mediation Convention can ensure that those MSAs that cannot be enforced as consent awards, can still be enforced as MSAs due to their legal nature. The exact balance between the two remains uncertain for the moment due to the difficulty in characterising with sufficient certainty, all MSAs that are suitable for enforcement under the New York Convention.

A last observation is that once all the EU Member States (or the EU independently) adopt the Singapore Mediation Convention, the international enforcement of MSAs in the EU will be based on the same legislation throughout and the various imbalances discussed in this article, coming from divergent national laws, shall be diminished, if not extinguished. Given that in the EU there shall continue to exist the right of free circulation of MSAs as judicial decisions or authentic instruments under the Private International Law Regulations, one can say that mediation can indeed find a very welcome environment in the EU, at a future point in time at least.

[106] This is also an observation made by Loukas Mistelis, "The Settlement-Enforcement Dynamic in International Arbitration" (2009) 19 Am Rev Int'l Arb 377, 387, in relation to enforcement of awards under the New York Convention and is indeed transferable to MSAs.