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# International Mediation and Private International Law

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**The international regulation of mediation, which is a consensual and flexible process, raises questions in relation to the conflict of laws and whether – and to what extent – unified procedural rules are needed. While issues of applicable laws usually remain at the background of the mediation, in light of UNCITRAL texts and European regulations, parties and mediators should note the impact that national relevant applicable procedural laws may have, in particular at the stage of the judicial review and enforcement of the 'agreement to mediate' or the 'mediated settlement agreement'.**

## Introduction

Mediation is a very popular alternative dispute resolution ('ADR') method. One of the reasons for its popularity is that in mediation, the law usually remains at the background of the mediated dispute and at the periphery of the mediation process. This is critical for disputing parties who wish to have an out-of-court amicable solution to their dispute. In this context, the mediator does not issue any judgment and does not apply any law either – with the exception of certain principles/rules of procedure that aim to guarantee the equal level playing field for the parties to the mediation. In light of the above, one may wonder about the title of this article and may ask in what practical and 'hands-on' way, would private international law indeed be relevant in international mediation.

As is well known, private international law covers issues of applicable law on the one hand and procedure and international enforcement on the other. In relation to mediation and in order to set a common and workable legal framework, the international community[1] has taken initiatives to draft common rules of procedure in the form of model laws (e.g. the UNCITRAL Mediation Model Law)[2] or rules that provide for guidelines in respect of the mediation procedure (e.g. the EU mediation directive 2008/52),[3] as well as rules for the international enforcement of Mediated Settlement Agreements ('MSAs') (in particular the recent Singapore Mediation Convention).[4] Clearly, such initiatives focus on questions of procedural law

1 The view expressed by S.I. Strong in 'Clash of Cultures: Epistemic Communities, Negotiation Theory, and International Law Making at UNCITRAL', *Akron Law Review*, 2016, 495-535, 525 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2739789) that an 'international community of mediators' with common values and objectives does not yet exist, should not go unnoticed in the context of our discussion, irrespective of the reservations one may express.

2 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002), A/73/17, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html.

3 EU Directive 2008/52 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3, available at https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32008L0052.

4 United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the 'Singapore Convention on Mediation'), signed to date by 51 countries, available at https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements.

(enforcement being also a question of procedure), whereas questions of applicable law draw less attention. This is for good reason: the principles and rules of procedure in mediation constitute a clear footprint of law in an ADR non 'legal' procedure (1) and the question of (local and international) enforcement of an MSA to which a party fails to abide by, calls for the intervention of a court or other competent authority that shall ensure the enforceability of the MSA (2). Questions of applicable law with regard to the formal and material validity of the agreements – and substance will appear in a limited number of mediations and only under certain scenarios, remaining usually at the background of the mediation process (3).

## 1. Jurisdiction and venue

### a) The mediation venue as a 'non-forum'

It should be reminded at the outset, that the mediator does not exercise a juridical role. It is submitted that this means that the mediator is not a 'forum' in the way that a court is, or an arbitral tribunal can be in a restricted manner.[5]

Also, the choice of a particular venue of mediation is based mostly on practical considerations,[6] such as the neutrality of the place and the overall facilities,[7] and possibly other considerations related to the friendliness of the venue in respect of cross-border enforcement.[8]

A comparison with arbitration makes sense at this point, so as to better understand the nature and content of the procedural rules of mediation. Although there is no universal consent on the definition of the term *lex arbitri*, it can be said that it consists of internal and external rules of procedure. The former refer to the procedure of the arbitration itself (i.e. commencement of the arbitration, appointment of arbitrators, pleadings, provisional measures, evidence, hearings, and awards) and may also include arbitration rules of institutions, or as the case may be, *ad hoc* arbitration rules chosen by the parties (e.g. the UNCITRAL Arbitration Rules).[9] The latter refer to the external intervention of national courts in the arbitral process, which can be supportive of arbitration or supervisory.[10]

In the case of mediation, the relevant procedural law is limited to internal rules (or rather directions) of procedure only. The UNCITRAL Mediation Model Law,[11] as amended in 2018, is a good example of such rules as it includes provisions about the process of the mediation, in particular:

- the commencement of the mediation (Article 5);
- the appointment of the mediator(s) (Article 6);
- the conduct of the mediation and the communication between the mediator and the parties during the mediation (Articles 7 and 8);
- the principles that should transcend the mediation, such as confidentiality (Article 10), disclosure of information (Article 9), and admissibility of evidence in other proceedings (Article 11).

The (external) role of the courts is limited to the review of, or granting enforceability to, the mediated settlement agreement as a mere contract.[12] Such external control can, on many occasions, be conducted by courts other than the ones of the place of mediation.[13] The UNCITRAL Model International Mediation Law also address the enforceability of the

5 The mediator is not appointed by way of jurisdiction rules (like a judge) or does not have any authority on the parties (like a judge or an arbitrator) who are free to walk out from the mediation at any time. Finally, the mediator does not issue any judgment or award, but simply assists the parties to tailor their own solution to their dispute, which in principle is not subject to any type of review by the courts of the place of mediation, in the way an arbitral award is, save for the right of any of the parties to question any MSA for reasons of duress or similar (although jurisdiction for such legal measure is not necessarily limited to courts of the place of mediation). In the same direction and a somehow different perception, see S.Y. Chong, N. Alexander, 'Singapore Convention Series: Why is there no "seat" of mediation?', http://mediationblog.kluwerarbitration.com/2019/02/01/singapore-convention-series-why-is-there-no-seat-of-mediation/ (1 Feb. 2019).

6 In the case of international arbitration though, as is mentioned by G. Petrochilos, *Procedural Law in International Arbitration* (Oxford University Press 2004), p. 65 'the seat of an arbitration is an entirely legal concept'. One may add, even if practicality is also an issue in arbitration, it is under the understanding that most of the times, choosing a seat, means also choosing a *lex arbitri*. For reason discussed herein, this is not the case in mediation.

7 R. Dendorfer-Ditges, P. Whilheim, 'Mediation in a global village: Legal complexity and cross-border mediation in Europe', *Yearbook on International Arbitration and ADR*, Vol. V (M. Roth, M. Geistlinger, eds.) (Dike, 2017), 236-245, 239.

8 This is the case in the EU, where one can use the various EU Private International Law regulations to have an MSA enforced in other member states.

9 UNCITRAL Arbitration Rules (last revised in 2013), available at https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.

10 *Dicey, Morris and Collins on The Conflict of Laws*, L. Collins (ed.) (Sweet & Maxwell, 15th ed. 2012), 16-029. The external intervention includes the judicial review of at least some jurisdictional disputes (competence-competence issues), judicial support for arbitrations conducted on national territory (regardless of the procedural law of the arbitration) and judicial review of awards made on national territory (again, regardless of the procedural law of the arbitration), see G. Born, *International Commercial Arbitration* (Wolters Kluwer 2nd ed., 2014), 1588-1589.

11 See supra note 2.

12 It is submitted though that a better approach would be to treat the MSA as a 'distinct judicial category'. See C. Kessedjian, 'Médiations internationales: un nouvel instrument d'exécution de la CNUDCI', *Recueil Dalloz*, 30 Nov. 2017, No 41, 2416.

13 This is the example of the UNCITRAL Singapore Mediation Convention, which provides for direct enforcement in any contracting state, where the relevant court control is carried out.

MSA (Article 15) and – to some extent – a regulation of international MSAs (Articles 16 to 20), i.e. what constitutes an MSA, how it is enforced and can be relied upon, the grounds for a court for not granting the requested relief to an MSA,[14] or the issue of parallel proceedings which appear where a relief in relation to an MSA is sought and, at the same time, a claim relating to a settlement agreement has been made to a court or an arbitral tribunal.

From a simple comparison with the UNCITRAL Arbitration Model Law,[15] one can easily understand that the UNCITRAL Mediation Model Law does not contain standard rules of procedure, in the fashion of the *lex arbitri* rules (not to mention the *lex fori* rules of court procedure). Moreover, some of the rules of procedure in mediation take the form of directions rather than strict rules, mostly due to the fact that the mediator does not undertake a juridical role. Such rules of procedure do not have the legal binding effect of the *lex arbitri* which regulates the arbitral procedure.[16]

Article 4 of the UNCITRAL Mediation Model Law is an indication of this approach, since it empowers the parties to the mediation to exclude or amend any and/or all of the above rules governing the mediation procedure,[17] with the exception of the mandatory principle of fair treatment of the parties by the mediator, which is crystallised in Article 7 para. 3 of the UNCITRAL Mediation Model Law:[18]

> In any case, in conducting the proceedings, the mediator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.

Outside the scope of the UNCITRAL Mediation Model Law, it is also admitted that parties to a mediation are by and large free to arrange the procedure of mediation as they deem fit and proper for them,[19] provided they ensure fair treatment, a *sine qua non* principle which applies in any dispute resolution method, and perhaps other fundamental mediation principles discussed herein. As is pointed out,[20] in mediation, parties often choose to opt out from co-existing regulatory instruments, such as mediation codes of conduct, approval standards and legislation, in order to tailor terms and conditions of mediation to their individual needs.[21] It should be added that this right is subject to the above-mentioned limitations imposed by fundamental principles.[22]

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14 This 'relief' is not a judgment, decision or authentic instrument, but it has a distinct character, in the sense that its can be used both as a 'sword' and a 'shield', it is used in order to avoid the term 'recognition' and 'enforcement' and is expected to gradually acquire a specific meaning. It is submitted that this legislative choice depicts quite successfully the special character of the MSA.

15 Such a comparison makes sense not only because both instruments are creations of UNCITRAL, but also because as it pointed out: G. Born, supra note 10, at 1566: 'The Model Law adopts an essentially territorial approach to the legal framework for international arbitrations, providing generally that the law of the "place of arbitration" governs a range of highly important issues arising in the arbitral process'. This however does not prohibit parties to an arbitration from departing from non-mandatory provisions of the said Model Law (at 1607-1608).

16 Same approach by N. Alexander, 'Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulatory Reform', *Mediation, Principles and Regulation in Comparative Perspective* (K.J. Hopt, F. Steffek (eds.), Oxford University Press, 2013), at 154:'These provisions are non-mandatory in nature so that parties can contractually agree to manage procedural points in a manner different from the MLICC [UNCITRAL Model Law on International Commercial Conciliation]. However, more frequently procedural mediation laws are found in the mediation rules of dispute resolution organisations, such as the ICC, law societies, bar associations and other professional bodies. These rules are regularly incorporated into agreements to mediate and mediation clauses and are therefore binding on the parties to those agreements. A global review of mediation regulatory practice has shown that most jurisdictions prefer to use collective self-regulatory (i.e. non-legislative) forms in relation to procedural aspects of mediation. In other words, there appears to be a harmonising trend towards regulating procedural aspects of mediation by contractual provisions based on standards set by major private sector dispute resolution bodies'.

17 This can be a mediation parallel of the obligation of the arbitrators to act judicially, but without the various procedural rules akin to arbitration. As mentioned in *Redfern and Hunter on International Arbitration* (6th ed. Oxford University Press, 2015), 5.73: 'The duty to act judicially is not simply a matter of ensuring equality between the parties and giving each the right to respond to the other party's position; it also arises where the arbitral tribunal decides to base its decision on an issue not specifically raised by the parties. It is an accepted principle that the tribunal is free to apply any element of applicable law (even where not commented or argued by the parties) under the maxim *juris novit curia* ('the court knows the law')'.

18 It is submitted that the fair treatment principle primarily applies only to the external behaviour of the mediator who shall make sure that all parties to mediation shall have the same opportunity to present their case and shall generally have equal time in this respect. It is hard to see how this principle could be applied successfully in relation to the behaviour of the mediator at the caucuses, where the application of the principle cannot be cross-checked other than in relation to the time element.

19 Obviously, this is also the case in arbitration, but as mentioned in *Redfern and Hunter on International Arbitration*, supra note 17, at 1.93: 'The modern arbitral process has lost its early simplicity. It has become more complex, more legalistic, more institutionalised, and more expensive'. This fact perhaps moderates the overall flexibility of the procedure, contrarily to mediation that is least legalistic or formalistic and remains ultra-flexible.

20 N. Alexander, supra note 16, at 154, who further suggests that: 'Generally, this practice is associated with high-end commercial mediation where the stakes are high, and parties have the power and resources to invest in creating their own mediation rules. In mediation speak, they are exercising party autonomy by engaging in an individualised form of self-regulation (private contract) to resolve their dispute'.

21 See for example the ICC Mediation Rules, Art. 1, paras. 3 and 4, that allow parties to deviate from these rules prior to the commencement of the mediation or even with the agreement of the mediator, without violating the spirit of the Rules, the ICC International ADR Centre being the guardian in this respect (https://iccwbo.org/dispute-resolution-services/mediation/).

22 E.g. Art. 7(3) of the ICC Mediation Rules provides: 'In establishing and conducting the mediation, the Mediator shall be guided by the wishes of the parties and shall treat them with fairness and impartiality'.

Another model law of mediation, the US Uniform Mediation Act (2001) focuses primarily on mediation confidentiality and privilege,[23] which again are treated as fundamental principles of mediation that cannot be contracted out.

Given that the international legislative framework of mediation is still is its early steps, it is not easy to draft a conclusive catalog of mediation public policy principles. In light of the above, it can be said with certainty that the mediator is expected to abide by the principle of fair treatment, which is the unequivocal public policy principle and one might also consider that the confidentiality of procedure, the limited admissibility of evidence and the independence/ impartiality of the mediator to be potentially public policy principles. Further, it may well be that national laws will not always agree on such catalog as even such internationally acceptable principles of mediation are not embodied in the same manner in various laws, which is a further challenge for international mediation and a convincing reason for an international regulation, along the lines of the UNCITRAL initiative. National legislations (and international model laws) differ for instance in relation to:

- the question of confidentiality and its waiver or limitation,[24]
- the scope the liability of the mediator,[25] and his/her obligation to inform the parties of a potential conflict of interest,[26]
- the extent of the intervention of the mediator in the process and to his/her right to put forward suggestions to the parties for the resolution of the dispute.[27]

This been said, it needs to be reminded that the Model Law is designed to become 'national law', which means that it shall be regulating international mediations, taking place in countries that will have implemented the UNCITRAL Mediation Model Law,[28] following the territorial approach[29] of its 'sister' Model Arbitration Law.[30]

On the basis of the above and given that the (i) mediation venue is not a 'forum' and (ii) the choice of the place of mediation is mostly governed by practical considerations, it can be said that the choice of a mediation venue does not carry with it a choice of the law that shall govern the procedure (*lex mediationis*), contrarily to arbitration where the choice of the seat usually defines the *lex arbitri*.[31]

Suggesting that a *lex mediationis* exists in the fashion of the *lex fori proceduralis* or the *lex arbitri*, cannot be a persuasive position.

It can however be suggested that, a *sui generis* or incomplete *lex mediationis* does exist in international mediation and consists primarily of principles that are crystallised in certain procedural rules that must be followed at the place of the mediation.[32] The right of the parties to exclude most of the procedural provisions with the exception of 'fundamental' (*ordre public*) ones (with the caveat that a definite catalog of such principles does not exist at the moment), can be treated as a confirmation of our thesis.[33] In that sense, the *lex mediationis* differs from *lex arbitri* from a qualitative and quantitative point of view.

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23 See in more detail N. Alexander, supra note 16, at 142, where she states that the 'Uniform Mediation Act' permits little divergence for those states adopting its provisions that the for this reason and also since it is intra-US only.

24 C. Esplugues, 'General Report', *New developments in civil and commercial mediation, Global comparative perspectives*, Ius Comparatum – Global Studies in Comparative Law, Vol. 6, C. Esplugues, L. Marquis (eds.) (Springer International Publishing, 2015), 1-88, 51-53; in particular 53, which addresses the width of the scope of confidentiality in different jurisdictions.

25 Ibid. 54-55.

26 Ibid. 50-51.

27 Ibid. 49-50 with a distinction of countries with a facilitative role of the mediator, from others who grant a more interventionist role, with suggestions of settlement and a third group of countries who allow the mediator to refer parties to their counsels for legal advice. For more on the difference in styles, see T. Gaultier, 'Cross-Border Mediation: A New Solution for International Commercial Dispute Settlement?', *NYSBA International Law Practicum*, Spring 2013, Vol. 26, No. 1, 39-40.

28 Legislation based on, or influenced by, the Model Law has been adopted in 33 States in a total of 45 jurisdictions, but this applies to the 2002 Model Law on International Commercial Conciliation, the predecessor of the Model Law, **https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status**.

29 This means that in the case of absence of any agreement as to the procedural law, the relevant law of the place of the mediation (or the arbitration as the case may be) shall apply.

30 See e.g. *Dicey, Morris and Collins on The Conflict of Laws*, supra note 10, para. 16-009): 'it is still always necessary to connect the conduct of the arbitral proceedings to a national legal system, which will regulate, for example, the extent of autonomy which the parties are permitted to exercise in selecting the arbitral procedure (and any mandatory rules from which the parties cannot derogate); the assistance which the national courts will provide to the arbitration in the grant of provisional measures, collection of evidence etc.; and procedures for the review of awards'.

31 The likelihood of agreeing on a different applicable *lex arbitri* is not completely ruled out but as mentioned in G. Born, supra note 10, at 1597: 'the application of a foreign procedural law to an arbitration can have significant consequences, altering the legal standards applicable to the internal and external aspects of the arbitral process on matters such as the standards (and judicial forum) for annulment of an award, challenge of arbitrators and mandatory rules regarding the "internal" procedural conduct of the arbitration. It bears emphasis that the choice of a foreign procedural law is extremely unusual (and often ill-advised), as well as subject to doubts as to its validity'.

32 This is the case if the mediation takes place in one country. This point is not valid in more complex venue arrangements, or in the case of use of electronic means in a mediation.

33 See also T. Gaultier, supra note 27, who suggests at 55-56 that ensuring minimum standards in a cross-border mediation is

### b) The review of the agreement to mediate by a court

The relevant issue here is *whether the agreement to mediate shall be a binding obligation* that a court or a tribunal shall have to enforce. There is no international consensus on this point. Given that party autonomy is the basis of both arbitration and mediation, when the parties enter into an agreement to mediate it is expected from an arbitral tribunal to actually find itself bound by a mediation clause when not complied with voluntarily.[34] This is even more obvious in the case of a med-arb clause, in which case arbitration shall start only in case of failure of mediation.

On the other hand, the state courts' position and national practices in relation to upholding an agreement to mediate vary.

At one end, stands the 'inherent power of the court to stay proceedings' that may apply in some mediation related judgments in the US,[35] the adjournment of a hearing until mediation is concluded as in English judgments or the German approach of temporal inadmissibility of the action where there is an agreement to mediate,[36] the Belgian alternative of suspension of proceedings,[37] the largely similar Italian rule,[38] the French scenario of 'irrecevabilité' of an action filed in breach of an agreement to mediate,[39] and the recent Greek law according to which, the written mediation agreement is deemed compulsory and must lead to at least an initial mediation meeting.[40]

At the other end, stands a claim for damages in case of non-observance of such agreement to mediate, as seen in Greece until recently,[41] Austria,[42] Germany,[43] Quebec,[44] Luxembourg,[45] and Russia.[46] It has been suggested that the existence of only a few precedents on this issue, makes it impossible to predict the outcome of such claims;[47] to our knowledge, it is unclear how drastic such legal stance can be for the enforcement of the agreement to mediate.

Generally, the existence of a mediation agreement brought by the defendant before a national court, will not necessarily be a reason for such court to not proceed with the main claim. Consequently, the safest approach is to have an explicit provision of law obliging the court to stay proceedings in such case.[48] As the agreement to mediate is of a procedural nature,[49] at least to the extent that it extracts the relevant case from the national courts' jurisdiction, it is to be regulated (like all procedural matters) by the *lex fori*, and differing solutions are bound to appear.

In order to mitigate this situation, the drafters of the UNCITRAL Mediation Model Law have established that national courts are bound by a mediation agreement, unless the recourse to a court is necessary for the preservation of a party's rights:

> Article 14: Resort to arbitral or judicial proceedings

crucial for the success of this ADR method in an international level. Essentially, even under the UNCITRAL Arbitration Model Law, parties are free to deviate from it, providing they observe the Model Law mandatory provisions, see G. Born, supra note 10, at 1569-1570.

34 R. Dendorfer-Ditges, P. Whilheim, supra note 7, at 238.

35 Although much depends on the drafting and wording of the agreement to mediate which may result in differing outcomes, see J. Coben, P. Thompson, 'Disputing Irony: A Systematic Look at Litigation about Mediation', *Harvard Negotiation Law Review* (2006) 11, 45-146, 125-126.

36 Reference to all US, England and Germany in R. Dendorfer-Ditges, P. Whilheim, supra note 7, at 237.

37 E. van Beukering-Rosmuller, P. Van Leynseele, 'Enforceability of mediation clauses in Belgium and the Netherlands', *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement* 2017 (21) 3, 37-58, 41.

38 Art. 5.5 of the Legislative Decree 28/2010 (as amended by the Legislative Decree 69/2013).

39 Cass., ch mixte, 14 fév. 2003, pourvois n° 00-19.423 et 00-19.424; Cass. com. 29 avril 2014, pourvoi n° 12-27.004; Cass. 1ère civ., 12 juil. 2012, pourvoi n° 10-19.476; Cass. com. 3 mai 2011, pourvoi n° 10-12.18; Cass., ch. mixte, 12 déc. 2014, pourvoi n° 13-19.684. However, 'irrecevabilité' does not extend also in the case of a counterclaim filed in violation of an agreement to mediate, see Arrêt n° 808 Cass. com. 24 mai 2017, pourvoi 15-25.457. For a more detailed discussion on the French law position, see E. van Beukering-Rosmuller, P. van Leynseele, supra note 37, at 40-41.

40 Law 4640/2019 art. 6 para. 1γ.

41 G. Diamantopoulos, V. Koumpli, 'On mediation Law in Greece', *Revue hellénique de droit international* 2014, 361-394, 374-376.

42 U. Frauenberger-Pfeiler (Austria), *op. cit.* supra note 24, at 14–15.

43 I. Bach, U.P. Gruber (Germany), *op. cit.* supra note 24, at 159, 166.

44 S. Guillemard (Québec), Report presented at the XIXth International Congress of Comparative Law (Vienna, 20–26 July 2014), International Academy of Comparative Law, 2014, 24.

45 S. Menétrey (Luxembourg), *op. cit.* supra note 24, at 457.

46 A. Argunov, A. Akhmetbekov (Russia), *op. cit.* supra note 24, at p. 633 who also note that in case that the Agreement on mediation is executed after initiation of the court proceedings, the court may (as per the motion of any party) postpone the court proceeding for up to 60 days for the purposes of settlement of the dispute via the mediation procedure (Clause 169 of the Russian Civil Procedural Code, Clause 158 of the Russian Arbitration Procedural Code).

47 C. Bühring-Uhle, L. Kirchhoff, M. Scherer, 'The Legal Framework for (International) ADR', *Arbitration and Mediation in International Business*, C. Bühring-Uhle, L. Kirchhoff et al. (eds.) (Kluwer Law International, 2006), Chap. 8, 223-245, 230.

48 C. Bühring-Uhle, L. Kirchhoff, M. Scherer, *op. cit.* supra note 47, at 230. This is the approach adopted also by OHADA in its recent (2017) 'Acte uniforme relatif à la médiation' at Art. 4 para. 3 : 'Une juridiction étatique ou arbitrale peut, en accord avec les parties, suspendre la procédure et les renvoyer à la médiation. Dans les deux cas, la juridiction étatique ou arbitrale fixe le délai de suspension de la procédure'.

49 C. Bühring-Uhle, L. Kirchhoff, M. Scherer, *op. cit.* supra note 47, at 229.

> Where the parties have agreed to mediate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to mediate or as a termination of the mediation proceedings.

Essentially, this provision, if enacted in the states that will adopt the UNCITRAL Mediation Model Law, grants almost full binding effect to the mediation clauses.

It should be noted however that it is doubtful to what extent the issue of the binding nature of a mediation agreement makes sense from a practical point of view, since the party that may not wish to mediate, cannot be forced to. An unwilling party can simply start mediation and walk out from it at any time. Therefore, a mediation clause inserted in a contract prior to the emergence of the dispute, needs to be reaffirmed in practice by parties willing to proceed.[50] It is submitted that the most 'convincing' way for a party to proceed to the pre-agreed mediation shall be for the court or arbitral tribunal to impose on the non-compliant party the relevant expenses incurred by the other party,[51] or even the insertion of a penalty clause in the agreement to mediate, which is rather a disputable choice in the context of mediation, given its consensual character and the requirement of good faith participation.[52]

It is further submitted that an agreement to mediate is more powerful when it embodies not only an obligation to submit the dispute to mediation but also a prohibition to start a procedure or arbitration while the mediation is pending. In this scenario, we would have another contractual obligation whose final enforceability seems to be, at least in principle, easier to ensure.[53]

One further issue concerns the legal effects of the commencement of the mediation in relation to the *suspension of the prescription or limitation period*. In this respect, the existence of more than one potential fora and, therefore, different laws related to the matter should be taken into account by the parties to a mediation.[54] The relevant civil-common law dichotomy as regards prescription, namely *substance vs. procedure*, is also relevant to the *suspension* of the prescription period and may cause a further complexity.[55]

As mentioned in the Green Paper on ADR in the EU,[56] cross-border disputes that the parties are mediating in a Member State, while the courts of other Member States are competent, raise the need for a unified regulation of the suspension of the prescription period.[57] Although this may be attainable in the EU, albeit not under the current directive 2008/52,[58] it is a much more complex issue on a global scale. Essentially the stakeholders will have to agree:

- on the exact effects of the commencement of mediation on the right to submit the case to court;

50 Although one should not downplay the 'eye-opening' effect mediation may have to the non-willing party. See in this respect C. Bühring-Uhle, L. Kirchhoff, M. Scherer, *op. cit.* supra note 47, at 229.

51 On the use of fees in mediation on a wider context, see J. Coben, P. Thompson, supra note 35, at 115-123.

52 See E. van Beukering-Rosmuller, P. van Leynseele, supra note 37, at 45. As admitted by these authors, a penalty clause is a rather far-fetched choice that demonstrates a lack of trust.

53 C. Esplugues, 'General Report', *in op. cit.* supra note 24, at 33, with reference to the relevant solution adopted under Croatian law.

54 In the EU, this scenario is marginal, given that the same conflict of laws rules (Rome I regulation) shall be applied by all competent courts which will end up in the same substantive law to apply (in the case of the Brussels I regulation for example, both the country of domicile of the defendant under art. 4 and the country of performance of an obligation under art. 7.1 can be equally competent and will both apply Rome I regulation.)

55 A suggestion that has been put forward is that it should be for the parties to agree themselves on the suspension of a limitation period (see C. Bühring-Uhle, L. Kirchhoff, M. Scherer, supra note 47, at 237). It should however be noted that, in many countries, limitation and suspension provisions are *jus cogens*.

56 Green Paper on alternative dispute resolution in civil and commercial law, COM (2002) 196 final, paras. 69-71 and question 9, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52002DC0196. Art 8 para. 1. of the Mediation Directive reads as follows: 'Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process'. The Mediation Directive clearly did not use all the potential expressed under than the Green Paper in this respect, given the overall wish of the drafters not to interfere with national substantive laws, all the more since in the case of suspension of a limitation period, an intervention in core civil law issues would be demanded.

57 An example of such regional regulation is found in Art. 21(2) of the OHADA 'Acte uniforme portant sur le droit commercial général', which states that the prescription is suspended from the date of the agreement to mediate or in case that no such agreement exists, from the commencement of the mediation and for six months as of its termination. The same provision exists in the subsequently adopted OHADA 'Acte uniforme relatif à la médiation' at Art. 4, para. 4.

58 Under the EU Directive 2008/52, see supra note 3, the Member States are free to arrange the effect of mediation with regard to limitation and prescription periods (Art. 8).

- on the required evidence to prove the commencement of a mediation; and
- on the way that the mediation is organised and conducted in every state and especially whether it is court annexed, *ad hoc*, institutional or even 'wild',[59] and whether such differences would have an impact on the issue of suspension of prescription before another jurisdiction's court.

Obviously, finding consensus on the impact of a mediation on the suspension of prescription is an enormous challenge for international regulation.[60]

### c) The review of the MSA by a court

In the context of arbitration, there exists a right to formally challenge an award before a court of law, for reasons explicitly provided for in the *lex arbitri*. In a mediation context and in most jurisdictions, it is purely a matter of challenge of a contract – the MSA. Therefore, once an MSA has been concluded, it is always open to court review, just like any other contract.

Further, at least in the EU, in the event that the parties do not voluntarily comply with a settlement reached in a cross-border mediation (carried out within or outside the EU), any of the parties may, at any time, lodge a claim for breach of contract before the competent court of any EU member state and ask for its compulsory enforcement.[61]

Another course of action refers to granting enforcement to an MSA following a limited review. This is the case under the Singapore Mediation Convention (Article 5) and the UNICTRAL Mediation Model Law (Article 19), only in relation to international enforcement. In this context, a court may deny granting the requested 'relief' under the MSA for specific enumerated grounds related to:

i) the capacity of the parties;
ii) the formal or material validity of the MSA;
iii) a serious breach of fundamental obligation(s) of the mediator;
iv) the violation of public policy of the country where the relief is requested; or
v) the fact that the particular dispute is not suitable for settlement under the law of that country.

In this respect, much shall depend on the compliance with the principles and rules of the mediation process, especially with regard to equal and fair treatment of the parties, and the solutions/sanctions provided by the relevant case law, in case the procedural rules of the place of mediation are violated.[62] The choice of some institutional mediation rules is definitely a way to minimise, if not extinguish, such risk, given that such rules and the monitoring of their application by an institution shall, most of the times, guarantee the right of the parties and the whole mediation process.[63]

## 2. Enforcement of the mediated settlement agreement

### a) Cross-border enforcement

The enforcement of an MSA (whether it is intrastate or cross-border) presupposes the intervention of a state court which applies its own rules on enforcement of MSAs. It should be first noted that cross-border enforcement does not require the international

59 This term is primarily used for mediation conducted by a non-accredited mediator and is possible is some jurisdictions. As reported by C. Esplugues ('General Report' in *op. cit* supra note 24, at 19): 'The possibility of 'wild' mediation is discussed in a very small number of States, and no single solution exists'. C. Esplugues singles out Belgium where the possibility to start fully private mediations outside the scope of the CPC is accepted. This 'wild' mediation solely stands on the will of the parties; according to Belgian law, settlements reached in the course of such mediations are not enforceable when the parties do not voluntarily honour it. In Italy where mediation is conducted within the framework of mediation centres registered with the Ministry of Justice, where parties refer their disputes to a non-registered mediator, this will be considered to be outside the legal framework on mediation and so will the prospective settlement. In Austria, the possibility of a mediation being conducted by a non-registered mediator is possible; the mediation is however presumed to lack standards of quality ensured by the Act although its enforceability is not excluded from the beginning.

60 It is no surprise that the UNCITRAL Model Law under Art. 5 'Commencement of mediation' does not regulate the matter compulsorily but only suggest the following provision on an opt-in basis: 'Article [X]. Suspension of limitation period: 1. When the mediation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the mediation is suspended. 2. Where the mediation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the mediation ended without a settlement agreement'.

61 C. Esplugues, J.L. Iglesias, 'Mediation and private international law: improving free circulation of mediation agreements across the EU', p. 17, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2874952.

62 In most occasions, duress, undue influence or fraud are the grounds raised for cancellation of an MSA by a court of law. For the US position, see J. Coben and P. Thompson, supra note 35, at 80–84.

63 See N. Alexander, supra note 16, at 154: '[h]owever, more frequently, procedural mediation laws are found in the mediation rules of dispute resolution organisations such as the ICC, law societies, bar associations and other professional bodies. These rules are regularly incorporated into agreements to mediate and mediation clauses and are therefore binding on the parties to those agreements'. For the ICC Mediation Rules, see supra note 21, 22.

alignment of the rules of mediation,[64] which is however advisable in order to create a common understanding and level the playing field of mediation worldwide.[65]

The term of 'cross-border' enforcement is used to label enforcement of an MSA that has already been granted enforcing effect in one country and such effect is transferred to some other country. As an MSA results from a settlement between parties to a dispute, it is a challenge to ensure its enforcement using the existing international conventions or other international legislative instruments, which are targeted to the enforcement of judgments or awards. This means that for a settlement to be enforced from one country to another, it shall have to take any of the two above-mentioned forms, a judgment or an award. It is generally admitted that the 1958 New York Convention can be used in the case of *genuine* consent awards,[66] that is awards that are not a mere rubberstamping of a prior agreement which is followed by the subsequent constitution of the arbitral tribunal with the sole purpose to issue a pre-agreed award.

In the EU, there also exists the likelihood of an MSA taking the form of an authentic instrument of any type, including a notarial deed.[67] This is so because in the EU, there exists a developed system for cross-border enforcement which is based on the armament of the Private International Law regulations of the EU, such as the Brussels Regulation 1215/2012.[68] The subject matter of the dispute and the document in which this mediation settlement has been embodied (i.e. a judgment, a court settlement in the form of a decision or a judgment, or an authentic instrument)[69] shall further define the applicable regulation and the form of the enforcement instrument. An MSA is therefore enforceable in the EU, in accordance with the law of the country where the instrument incorporating the MSA has been rendered/issued. Clearly, the form that the MSA takes in the country of origin is decisive with respect to its cross-border enforcement, which invariably causes issues of differential treatment and the MSA's enforceability from country to country.

### b) Direct enforcement

Next to cross-border enforcement, there also exists the potential for an international direct enforcement. In order to regulate the question of international enforcement in a unified way, UNCITRAL embarked into the negotiation and conclusion of the recent Singapore Mediation Convention on international enforcement of MSAs.[70] In a 'direct enforcement' context, the prior enforceability of an MSA in the country of origin is not a precondition for the enforcement of such MSA in another country and is skipped under the Singapore Mediation Convention. This also means that the form that the MSA may take in the country of origin is irrelevant in this context. On the contrary, 'direct enforcement' of international MSAs[71] in any country worldwide is provided for under this Convention, essentially by filing an application of a 'relief' to this end,[72] *directly* at the country of enforcement.

The Singapore Mediation Convention can create a common level playing field in this respect, which is of paramount importance for the international enforcement of MSAs. The 'direct enforcement', irrespective of the place of the mediation, affirms the

64 See S.I. Strong, supra note 1, at 527: 'the adoption of a convention on enforcement of mediated settlements does not require consensus on the shape of the proceedings themselves'.

65 As said in a different context by E. Sussman, 'The Final Step: Issues in Enforcing the Mediation Settlement Agreement', in Arthur W Rovine (ed), *The Fordham Papers 2008*, Vol. 2 (Martinus Nijhoff 2008) 343-362, 345: 'The UNCITRAL failure to arrive at a definitive single enforcement mechanism has been criticized by some scholars as the major failing of this model law' [Reference to the UNCITRAL 2002 Conciliation Model Law].

66 H. Meidanis, 'International Enforcement of Mediated Settlement Agreements: Two and a Half Models: Why and How to Enforce Internationally Mediated Settlement Agreements', *The International Journal of Arbitration, Mediation and Dispute Management*, CIArb 2019, 49-64, 61-63; Brette L. Steele, 'Enforcing International Commercial Mediation Agreements as Arbitral Awards under the New York Convention', 54 *UCLA Law Review* 1385 (2007), 1397, available at https://www.uclalawreview.org/enforcing-international-commercial-mediation-agreements-as-arbital-awards-under-the-new-york-convention/.

67 In the EU, the problem is even more striking, given that the various Private International Law instruments end up to the application of differing defences to cross-border enforcement, depending on the form an MSA may take for enforcement purposes.

68 Official Journal of the European Union, L 351, 20 Dec. 2012, 1. Under the EU PIL Regulations, the free movement of judgments and authentic instruments that fall within the scope of the relevant applicable Regulation, is ensured. As is mentioned in preamble 20 of Directive 2008/52 which regulates mediation in the EU, cross-border enforcement in the EU shall take place by applying these regulations. Therefore, an MSA reached in a member state shall acquire enforcing effect under a certain form (judgment, decision or authentic instrument) in that state and shall then be allowed to 'travel' to all other member states on the basis of the enforcement form is shall have acquired in that first member state.

69 C. Esplugues, J.L. Iglesias, supra note 61, at p. 5.

70 See supra note 4. For a commentary on the Convention, see Edna Sussman, 'The Singapore Convention: Promoting the Enforcement and Recognition of International Mediated Settlement Agreements', *ICC Dispute Resolution Bulletin*, issue 2018/3 (https://library.iccwbo.org/).

71 The term 'international' in defined in Art. 1 of the Singapore Mediation Convention, which provides for the following criteria: '(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 performed; or (ii) The State with which the subject matter of the settlement agreement is most closely connected'.

72 Art. 4 of the Singapore Convention.

detachment of the mediation from the place where it takes place and assures easy worldwide enforcement. The review of the MSA by a court or other designated authority of the state of enforcement is limited to the specific reasons for non-enforcement provided for in the Convention.[73] This Convention characteristically simplifies the enforcement process of MSAs and, if ratified by a good number of countries worldwide, can set a perfectly workable legal environment for the international enforcement of MSAs; the added value of the Singapore Convention is that is extends and ensures direct enforcement internationally in a unified method, by its adoption on a national level. As a last comment, it needs to be noted that direct enforcement in the above sense is not precluded outside the Singapore Mediation Convention. Essentially, this can be possible if allowed under the national legislation of the country where enforcement is sought.[74] If this is not allowed, the MSA shall only be enforced internationally as a contract.

## 3. The law applicable to the mediation agreement and the MSA

In the context of mediation, an issue of applicable law applies to:

- the agreement to mediate between the parties and the mediator;[75]
- the applicable law to the resulting MSA.

During mediation, the issue of the applicable law to the dispute is not directly addressed; it remains at the background, 'casting its shadow' on the process. This is so, since in the course of the mediation, the mediator or the parties do not apply any law as such. The choice of the law applicable to the substance of the dispute, be it contractual or tortious, is simply acknowledged and considered by the parties during the negotiation process in the course of mediation.

Since mediation is consensual, if a party to it questions the validity of the agreement to mediate under the applicable law, or the agreement with the mediator as the case may be, such party will simply not participate in the mediation. This matter shall arise only in case one party questions the validity of such agreement before a court, by filing an action in violation of such agreement(s), a scenario discussed under 1(c) above ('The review of the MSA by a court'). The question of applicable law in an MSA may also arise before a court at the (i) enforcement stage of the MSA, or (ii) if such MSA is questioned before a court by a party filing a 'negative declaratory action' or similar reliefs focusing on the question of validity (one obvious scenario is a party to the MSA filing a court claim contenting that the MSA is the product of duress or coercion).[76]

### a) Questions of formal and material validity

As is well known, a recent trend in the private international law worldwide is the expansion of the principle of *favor negotii.*[77] This principle tries to ensure the validity of a contractual arrangement or other juridical acts, in most of the cases by the enactment of alternative connecting factors. This method usually 'saves' the validity of an agreement, simply by applying the most favourable law to its form.[78]

For example, Article 11(2) of the EU Rome I Regulation on 'formal validity' provides:

> A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.

In the case of an agreement to mediate, an agreement with a mediator, or an MSA, the formal validity of the agreement will be ensured if the form provided for in any of the above laws is observed.

Given that the EU Mediation Directive does not provide for any form for the agreement to mediate and the national legislations vary in this respect and change from time to time, [79] the most probable scenario in an

73 Art. 5 of the Singapore Convention.

74 H. Meidanis, supra note 66, at 56-57.

75 Usually two distinct contracts. In case of institutional mediation, a separate contract with the mediator is not needed.

76 See in detail, E. Sussman (with extensive reference to US case law), 'The Final Step: Issues in Enforcing the Mediation Settlement Agreement', in Arthur W Rovine (ed), *The Fordham Papers 2008*, Vol. 2 (Martinus Nijhoff 2008) 343, 349–351.

77 See S. Symeonides, *Codifying Choice of Law Around the World: An international Comparative Analysis* (Oxford University Press 2014), 256-259, which includes an enumeration of various solutions that result in more than one alternative connecting factors for the localization of the applicable law in a given contract.

78 The paradigm of the Paraguayan Civil Code (art. 22.2) mentioned by S. Symeonides, supra note 77, at 256, is the widest possible favor negotii provision that promotes the application of a law other than the law of Paraguay only in case that other law is more favourable in relation to the validity of the juridical act (contracts included) in question. This piece of legislation incorporates in the purest way, the *favor negotii* approach. For the same writer, this is an example of a 'result selectivism' approach in private international law.

79 EU Directive 2008/52, supra note 3, Art. 3 'Definitions'. Greece for example asks for a written form under law 4512/2018

intra EU mediation is that there shall be no need for a written agreement to mediate. The same applies in relation to the agreement with the mediator, since the EU Mediation (Article 3(b)) only contains a general reference, according to which the mediator may undertake mediation in any possible way;

> (b) 'Mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

On the formal validity of the MSA though, the position is different, since a written form is required, at least as a formal requirement for its enforceability, both local and cross-border (Article 6(1)):

> 1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.

In the EU again, Article 10 of the Rome I Regulation addresses the question of 'consent and material validity':

> 1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.
>
> 2. Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.

In this sense, issues of material validity shall be regulated by the same law that will apply in relation to the substance of the agreement, but the question of consent may be treated in a manner that would eventually end up rendering the agreement void.

Essentially, a party to (i) an agreement to mediate and (ii) an agreement with the mediator may raise issues of consent by using an argument based on its local law. It is easily conceived that this point may raise a number of problems with respect to the validity of such agreement(s) before a court of law or an arbitral tribunal facing a med-arb clause.

With regard to the MSA, similar considerations shall arise which also call for very careful preparation of the mediation. As law is always at the background of the mediation, it is crucial to ensure that one is aware of the potential challenges – including those grounded in the applicable law – that the other party to the mediation may bring after the conclusion of an MSA. In a way, it resembles to the work of the arbitrator who wishes to ensure the international enforceability of his/her award. In a mediation context, at the moment, the international legal environment is much more fluid;[80] the Singapore Convention is just emerging, while the New York Convention has been implemented for just over 60 years.[81]

### b) Questions of applicable law to the substance

In most jurisdictions, the law applicable to the agreement to mediate, to the agreement with the mediator and to the MSA can be chosen by the parties.[82] This right of choice is all the more relevant in a mediation context which is based on party consent and autonomy; it is only natural that the law that shall regulate the said agreements shall be a matter for the parties to decide. The mediator may also take on the role of explaining to the parties the importance of inserting a choice of law clause in the MSA but based on careful considerations of law and not as a 'midnight clause'.

(Art. 180), amending previous law 3898/2010, Art. 2, which did not impose a particular form. See, on the previous law, A. Anthimos (Greece), in G. De Palo, M. Trevor (eds.), *EU Mediation Law and Practice* (Oxford University Press 2012) 159; V. Kourtis (Greece) in *Civil and Commercial Mediation in Europe. National Mediation Rules and Procedures*, supra note 42, at 193, 203,

80 See C. Bühring-Uhle, L. Kirchhoff, M. Scherer, supra note 47, at 223.

81 Challenges against an MSA could virtually take place on more occasions and on more grounds than challenges against awards. For a comparison of the relevant enforcement objections under the New York and the Singapore Convention, see H. Meidanis, supra note 66, at 55-56.

82 This is the case of Art. 3(1) of EU Rome I Regulation: 'A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract'. See also R. Dendorfer-Ditges, P. Whilheim, supra note 7, at 239, 241.

In case the parties to any of the above agreements fail to choose the applicable law (which one expects to be the rule rather than the exception, at least in the early years of the expansion of mediation), things can be much more complex, as there does not exist a default rule worldwide in case of a lack of choice. Obviously, the issue of the applicable law will be solved under the conflict of laws rules of a forum. Therefore, such questions shall be addressed by a court that may be called to hear a case challenging any of the above-mentioned agreements and that would act under its own rules of international jurisdiction. This fact demonstrates the need for a very thorough preparation of the parties and the mediator to the mediation.

It should be noted that under most legal regimes, it will be determined whether the parties have made a tacit choice with regard to applicable law. The principle of autonomy of the agreement to mediate (in the same fashion as the agreement to arbitrate)[83] leads to the conclusion that most probably, the choice of law in the substance of the main agreement shall not be relevant. The same applies to the law of the place of mediation,[84] especially as mediation is not a process of adjudication and the mediator does not exercise a juridical role.

In the EU, if there is no explicit choice as to the place and a tacit choice is not apparent, the agreement to mediate shall be regulated by the law of the country that has the closest connection with such agreement.[85] The ascertainment of the applicable law shall be made on the basis of the 'circumstances of the case', such as (i) the language, (ii) the place of mediation, and (iii) the chosen law in the main contract (as mentioned above, this last criteria is not relevant in determining a tacit choice).[86]

- With regard to the parties' agreement with the mediator, the presumption of Article 4(1)(b) of the Rome Regulation shall apply and the law of the place of residence of the mediator shall prevail.[87] The International Mediation Institute's ('IMI') Professional Conduct Assessment Process provides a choice of law clause in the same direction.[88]
- With regard to the MSA, if the parties have failed to choose an applicable law, despite the advice of a knowledgeable mediator, the presumption of Article 4(2) of the Rome Regulation will apply and the 'law of the country where the party required to effect the characteristic performance of the contract has his habitual residence' will apply. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, or where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the Rome Regulation leaves room for wider considerations by resorting to the 'escape clauses',[89] which are used as an exception to the presumptions and provide that the law of that other country shall apply.[90]

In the US, if there is no explicit choice as to the place and a tacit choice is not possible to detect, the applicable law with the closest connection shall be the law of the place having the '*most significant relationship*' with the agreement.[91] This criteria can lead to a less rigid approach than that applied in the EU, given that the US uses the so-called 'choice of-law-principles' to pinpoint the most significant relationship',[92] and refers to broader considerations relating to the applicable law at an earlier stage,[93]

83 R. Dendorfer-Ditges, P. Whilheim, supra note 7, at 238.

84 R. Dendorfer-Ditges, P. Whilheim, supra note 7, at 239.

85 Art. 4(4) of Regulation (EC) No 593/2008 (Rome I) provides: 'A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract'. This is so since the presumptions of paragraph 2 cannot apply to the extent that they presuppose the execution of a 'characteristic performance' by one party; in an agreement to mediate both parties undertake to mediate.

86 R. Dendorfer-Ditges, P. Whilheim, supra note 7, at 239-240.

87 Art. 4(1)(b) of Regulation (EC) No 593/2008 (Rome I) provides: 'a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence'; R. Dendorfer-Ditges, P. Whilheim, supra note 7, at 241.

88 See IMI website, **https://www.imimediation.org/practitioners/code-professional-conduct/**:'This Professional Conduct Assessment Process will be exclusively governed by the law of any applicable mediation agreement between the parties, but in the absence of such agreement will be governed by the law of the place where the IMI Certified Mediator who is the subject of the complaint maintains his or her principal place of business ('the Governing Law')'.

89 Regulation 593/2008. Art. 4, paras. 3 and 4.

90 On the escape clauses, see S. Symeonides, *op. cit.* supra note 77, at 190-204.

91 Restatement 2nd, § 188. 'Law Governing in Absence of Effective Choice by the Parties'.

92 Restatement 2nd, § 188 6. 'Choice-Of-Law Principles': '(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law. (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations,(e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied'.

93 See S. Symeonides, *op. cit.* supra note 77. At 164-165, who explains that the Restatement Second is characterised by flexibility and trust to the interpretation of 'approaches' by the judges.

i.e. as soon as it becomes clear that the parties to the agreement in question have not chosen the applicable law. It remains to be seen what the impact of this difference on the applicable law in mediation will be.

## Conclusion

Clearly, mediation and private international law are not 'perfect strangers'. Issues of international and cross-border enforcement of mediated settlement agreements (MSAs) illustrate that questions of private international law are central, and will be raised, before courts or other authorities involved in such enforcement.

In light of the consensual character of mediation and the flexibility if offers to parties, it is submitted that only the relevant *ordre public* principles should apply and remaining aspects of the mediation procedure shall be for the parties to decide, and they will most probably do so.

It can be considered that mediation is not a forum, to the extent that the mediator does not exercise a juridical role. Issues of applicable law arise primarily before a court where the validity of an agreement to mediate, an agreement with the mediator or an MSA is challenged. In the course of a judicial control, an MSA in violation of *ordre public* can be nullified by a court or be denied enforcement.

International regulation of the mediation process should preserve and guarantee international principles of mediation (party autonomy, confidentiality, impartiality and most importantly equal and fair treatment). The UNCITRAL Mediation Model Law (2002, revised in 2018) and the Singapore Convention (2018) are an attempt to regulate the mediation process and establish 'direct enforcement' of MSAs, in countries that will respectively adopt the Model law and/or ratify the Convention.

Questions of private international law though, including issues of substantive law, are at the background of international mediations and are crucial in the drafting of enforceable MSAs. In this respect, the role of the parties' lawyers and of a mediator with good knowledge of private international law and with ability to grasp comparative law aspects can be of importance.