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Enforcement of mediation settlement agreements in the EU and the need for reform

Haris P. Meidanis*

This article discusses the current status of EU law on cross-border enforcement of Mediated Settlement Agreements (MSAs) focusing mainly on non-family law matters. Directive 2008/52 states the form an MSA may take under the national legislation, as the basis of cross-border enforcement. Given (a) the polyphony of national legislation as to the form an MSA may take for enforcement purposes and (b) the meaning of "judgment" under EU private international law and the *Solo Kleinmotoren* case, it is suggested that a level playing field as to cross-border enforcement of MSAs in the EU is not guaranteed. Further, it is suggested that MSAs constitute the outcome of a third distinct dispute resolution category, next to judgments and awards, and are also distinct to contracts. It is concluded that a reform of EU law seems necessary in order to mitigate the above lack of an equal level playing field and to take into account the special character of MSAs.

Keywords: mediation; mediated settlement agreements; cross-border enforcement; judicial cooperation in civil and commercial law matters; EU Mediation Directive; EU private international law regulations

A. Questions of terminology

Mediation is a worldwide trend in dispute resolution, recently boosted by the finalisation of the text of a new Model Law on Mediation[1] (not applicable to family agreements and other personal civil law questions) and of the Singapore international convention for the enforcement of Mediated Settlement Agreements (the "Singapore Convention"). To date, the Singapore Convention has been signed by 52 countries and is about to enter into force, as it has already been

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[1]UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf, accessed on 10 July 2020. It has not been implemented in any national legislation. The predecessor UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/03-90953_ebook.pdf, accessed on 10 July 2020. Legislation based on or influenced by the 2002 Model Law has been adopted in 33 States in a total of 45 jurisdictions.

ratified by four of the signatories, namely Fiji, Qatar, Singapore and Saudi Arabia[2] (a minimum of three ratifications is needed for its entry into force).[3] Both texts are the outcome of lengthy work by the UNCITRAL Working Group II.

The issue of enforcement may arise in mediation, if despite the consensual character of a Mediated Settlement Agreement ("MSA"), a party to it chooses to disregard it.[4] In the international sphere, enforcement of MSAs can be "direct" or "cross-border". In the former case, an MSA shall be enforced directly at the country where enforcement is sought, irrespective of the place where mediation may have taken place. Such place remains irrelevant for enforcement purposes. This is so, given that the notion of "forum", as conceived in the context of private international law, is not applicable in the context of mediation, to the extent that the mediator does not exercise a judicial role.[5] In this sense, the place of mediation will not be critical, or at least not as important. Enforcement in the case of "direct" international enforcement, shall take place "directly" at the place where enforcement is sought, without necessarily having to grant in advance enforcing power to the MSA in the country of mediation. This is the model of the Singapore Convention.[6]

Cross-border enforcement presupposes the prior granting of enforcement power to an MSA in a country (most probably the one where mediation may have taken place), before it is enforced in another. Therefore, under cross-border enforcement, one has to first arrange for the granting of enforcing power in one country and then have the enforcement instrument enforced in some

[2]https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en accessed on 10 July 2020.

[3]https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-4&chapter=22&clang=_en accessed on 2 May 2020. The Convention will enter into force on 12 September 2020, namely six months after the third ratification.

[4]As mentioned by SI Strong, "The Promise of International Commercial Mediation. Beyond International Commercial Arbitration?" (2014) 45 *Washington University Journal of Law & Policy* 11, 35, often MSAs are not abided by a party to them and post-settlement disputes appear to be on the rise, at least in some sectors. On the other hand, it should be borne in mind that enforcement is on many occasions about moral than about physical coercion. Likewise, Strong, *Ibid*, 35 with reference to arbitration. Similarly, one should keep in mind that enforcement does not necessarily imply real or full execution, although it is the best way of achieving it, although the life of law exists beyond judicial life. See H Batiffol, "Le pluralisme des méthodes en droit international privé" (1973) 139 *Hague Collected Courses* 75, 96.

[5]H. Meidanis, *ICC Dispute Resolution Bulletin*, 2020 Issue 1, 41. It may well be, that certain dimensions of the forum may be present in mediation, particularly to the extent that the mediation process shall have to follow at least some national public policy principles regarding mediation that would be subject to judicial review. On this basis, one can refer to a "sui-generis" or "incomplete" *lex mediationis*.

[6]See in this respect N Alexander and S Chong (eds), *The Singapore Convention on Mediation: A Commentary, Global Trends in Dispute Resolution* (Kluwer Law International, 2019), 14–15.

other country. The EU law on international enforcement of MSAs is about cross-border enforcement and will be the core of the present discussion. At this stage, it should be reiterated that swift and unburdened cross-border enforcement in the EU is an ekphrasis of the EU policy on free circulation of judgments, court settlements and authentic instruments in the EU, with a view to enhancing cooperation in civil and commercial matters and creating a common European Judicial Area.

B. The Mediation Directive

Mediation has been included in the EU policies on cooperation in civil and commercial matters since the beginning of the 2000s.[7] The relevant consultations that flowed thereafter culminated in Directive 52/2008 on certain aspects of mediation in civil and commercial matters (the "Mediation Directive").

With the Mediation Directive, the EU decided to grant an elevated status to mediation and to MSAs. Recital 19 to the Directive states:

> Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable. It should only be possible for a Member State to refuse to make an agreement enforceable, if the content is contrary to its law, including its private international law, or if its law does not provide for the enforceability of the content of the specific agreement. This could be the case if the obligation specified in the agreement was by its nature unenforceable.

For this reason, Article 6 of the Mediation Directive provides:
Enforceability of agreements resulting from mediation

(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.
(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* (emphasis added).

[7] See in this respect, the Green paper on alternative dispute resolution in civil and commercial law (COM/2002/0196 final).

(3) Member States shall inform the Commission of the courts or other authorities competent to receive requests in accordance with paragraphs 1 and 2.
(4) Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with paragraph 1.

The mechanism for granting enforcing power to an MSA in a Member State under Article 6 of the Mediation Directive is as follows: one or (depending on the actual national transposition of the Mediation Directive) all of the parties to an MSA, can ask a court or other competent authority appointed by the relevant Member State to grant enforcing effect to an MSA by a judgment, decision or authentic instrument. The actual instrument to which the MSA shall have been incorporated shall then be enforced. This simple mechanism puts emphasis on the form that the MSA takes for enforcement purposes. It does not create a particular enforcement form unique to MSAs, rather it uses pre-existing tools that appear in the national laws.

Apparently, this elevated status of mediation in the context of judicial cooperation in civil and commercial matters must also have a clear cross-border dimension. The drafters of the Directive did not regulate the matter of cross-border enforcement of MSAs. They simply made, in the Recitals, an indicative reference to two of the Regulations on judicial cooperation in civil and commercial law matters of the EU that were in force at the time of the enactment of the Mediation Directive. Recital 20 states:

> The content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable Community or national law.[8] This could, for example, be on the basis of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters or Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

Evidently and given that these two Regulations are mentioned by way of example only, it becomes clear that all the rest of the EU private international law Regulations ("EU PIL Regulations") will apply, depending on the subject matter of the MSA in question.

Finally, in Recital 22 to the Directive it is mentioned that:

> This Directive should not affect the rules in the Member States concerning enforcement of agreements resulting from mediation.

[8]Given the adoption of more Regulations in this field, the room for applying national law is now very limited.

This Recital accommodates the need to have as "generous" an enforcement system as possible in the context of mediation and reflects the general pro-mediation attitude of the EU.

The conclusions reached from the above are that: (a) MSAs must have enforcing power and effect in all Member States; (b) the method of granting such national enforcing power and effect to MSAs shall remain in the hands of each Member State, that is supposed to do so, by applying the relevant provisions of its own national law; (c) in this context, the MSA could, at least under a certain reading,[9] take the form of a judgment, decision or authentic instrument in the Member State where such enforcing power is granted; and (d) once rendered enforceable in one Member State by taking any of the above forms under (c) above, an MSA should qualify for cross-border enforcement in the rest of the EU under the existing regulations or national laws (for the latter when applicable in case the subject matter of the MSA in question falls outside the scope of any EU PIL Regulation and international bilateral or multilateral treaties). At this point, it is pertinent to say that certain national laws such as those of Italy, Luxembourg, Spain and Finland, allow for the so-called "direct enforcement" of MSAs reached in other countries, that is enforcement in the territory of any of the above Member States, without having already gone through the granting of enforcing effect in the country where they have been reached.[10] In any event, this is a matter of national legislation and is not related to the cross-border enforcement based on EU PIL Regulations, which is the theme of this article, and is only mentioned in order to make clear that beside cross-border enforcement of MSAs, direct enforcement may also exist in parts of the EU under national law.

[9]Given also the enumeration of certain forms that the MSA can take for enforcement purposes under the applicable national laws, it is submitted that most probably such enumeration is exhaustive and not indicative. In any event, even if one were to accept that the above reference is indicative, this does not seriously affect the argument that cross-border enforcement of MSAs is done on the basis of the form they are "disguised" in, (see later in this article). Even if it were admitted that the Mediation Directive does not contain an exhaustive list of forms the MSA can take under the applicable national law, the parties might indirectly be forced to obtain a judgment, decision or authentic instrument, because this is the only way they can make the content of their agreement readily enforceable abroad with the help of EU PIL Regulations. Perhaps the only exception is the one in Art 46 of the Brussels IIa Regulation which is designed for special purposes, ie the protection of the rights of the child and does not apply to MSAs (only) but to private agreements of the parents in general. The fact that this Article does not define in an explicit manner how such private agreements may acquire enforcing effect, but simply refers the matter to the applicable national law, renders its importance in relation to the discussion on form, rather marginal.

[10]E D'Alessandro, "Results of Mediation and Cross-Border Enforcement of Mediation Agreements" (2013) *ERA Forum* 1, 7. Other Member States, such as Greece, grant 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 4640/2019 Art 8(2)).

In the context of the discussion that follows, it should be kept in mind that the applicable provisions regarding the cross-border enforcement of the MSA are dependent on the actual form the MSA takes for enforcement purposes in the Member State where enforcing power is granted for the first time. Therefore, in an EU cross-border environment, the enforceable instrument is not the MSA itself, but the instrument, the form of which the MSA takes for enforcement purposes, since the MSA lacks a distinct form, particular to it, common to all Member States. Essentially, the MSA is "disguised" as a judgment, a decision or an authentic instrument, depending on the actual options, provided under the applicable national law of the Member State where the MSA shall acquire enforcing power for the first time.[11] This means that in the EU, once an MSA acquires enforcing power in a particular form under the law of a Member State, it shall be further enforced on the basis of this form, both locally and cross-border, on the basis of the applicable EU or national legislation depending on the subject matter of the MSA in question.[12]

The abovementioned method of cross-border enforcement, can be considered to be 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 to some other country (this is under the caveat of the discussion later in this article, on the meaning of "judgment" in EU PIL).[13] The relevant

[11]Interestingly until recently in Greece, the MSA was supposed to take the enforcing effect of a court settlement (Art 184 para 4 of law 4512/2018). (see fn 19 on the form under the new law 4640/2019). The same seems to be the case with Croatia; see B Jukic and A Milanovic in N Alexander, S Walsh and M Svatos (eds) *EU Mediation Law Handbook: Regulatory Robustness Ratings for Mediation Regimes*, 138–39; Poland, see R Morek *Ibid*, 619 and Hungary, see MR Grosu *Ibid*, 429–32. This is again based on the common element of the two, namely that they are both based on party autonomy, which is a question of substance. Presumably, this is an acknowledgment of the fact that from a dogmatic point of view, the MSA should be considered to be a settlement. This however raises the question whether such an MSA will be treated as a "judgment" or a "decision" for the purposes of cross-border enforcement under the EU PIL Regulations.

[12]In the context of arbitration, an arbitral award is always an arbitral award, even if in the meantime it is approved for enforcement reasons by a national court. See KD Kerameus, "Enforcement in the International Context" (1997) 264 *Hague Collected Courses* 197, 210–11.

[13]See P Mayer, "Les méthodes de reconnaissance en droit international privé", in *Melanges P. Lagarde* (Dalloz, 2005), 547–88 and C Pamboukis, "La renaissance – métamorphose de la méthode de reconnaissance" (2008) *Revue Critique de Droit International Privé*, 513. In the context of the Brussels Ia Regulation for example, this is met in the provision of Art 58 (2) where it is stated that: "The authentic instrument produced must satisfy the conditions necessary to establish its authenticity in the Member State of origin". In the same direction, see Recital 58 to Regulation 2016/1103, implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, where it is stated: "Authentic instruments should have the same evidentiary effects in another Member State as they have in the Member State of origin, or the most comparable effects. When determining the evidentiary effects of a

expressions of the application of the recognition method in relation to MSAs are: (a) that enforceability, once granted in one country, leads an existence of its own and is no longer subject to external conditions and (b) that the particular enforceable character and form an MSA acquires in a country, under the procedural law of that country, is the one that marks it also at the country of enforcement.[14]

C. The various forms MSAs can take in EU Member States

As discussed elsewhere,[15] the national laws of the EU Member States regarding enforceability of MSAs, differ substantially. For example in Italy[16] and France straightforward "homologation", non-adversarial proceedings are followed,[17] and MSAs are granted *exequatur* and are declared enforceable under the same conditions as judgments, while the control of the court is limited to the violation of public policy.[18] It should be noted that Article 2052 of the French Code Civil and Article 8 para 2 of the new Greek mediation law 4640/2019 provide that a "transaction" under French law or an MSA filed with the competent court under Greek law, bar the commencement of legal proceedings for the same subject matter. In a previous version of the French article, *res judicata* effect was also granted. The current text of the French provision seems to acknowledge a special status for "transactions" that does not allow the commencement of new proceedings, even if dogmatically this is not tantamount to *res judicata*.

In Greece,[19] an MSA which is signed by the mediator and all parties to it becomes enforceable by a mere application of any party, before the competent

given authentic instrument in another Member State or the most comparable effects, reference should be made to the nature and the scope of the evidentiary effects of the authentic instrument in the Member State of origin. The evidentiary effects which a given authentic instrument should have in another Member State will therefore depend on the law of the Member State of origin".

[14]These were also the comments in relation to judgments by Kerameus, *supra* n 12, 200–201, where he also refers to particular case law examples. In the same direction, his position that the rule that the *lex fori* governs questions of enforcement (as a question of procedure) "is not a principle that does not admit of exceptions or mitigation".

[15]H Meidanis, "International Enforcement of Mediated Settlement Agreements: Two and a Half Models—Why and How to Enforce Internationally Mediated Settlement Agreements" (2019) *Arbitration* 49, 56–61.

[16]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 F 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.

[17]These usually grant to MSAs a status similar to that of a judgment, see P Billiet and E Kurlanda, "The New EU Directive of Mediation, First Insights", in *Association for International Arbitration* (Maklu 2008), 17–18.

[18]E D'Alessandro, "Enforcing Agreements Resulting from Mediation Within the European Judicial Area: A Comparative Overview form an Italian Perspective", 3–6, https://ssrn.com/abstract=1950988 accessed on 1 October 2019.

[19]Law 4640/2019 Art 8 para 3.

court. The court is essentially rubber-stamping the MSA and does not review it and the enforcing title is considered by law to be a decision of a court in the form of an "order" or "judicial act". Notarial deeds are required, if a notarial form is required based on the legal nature of the underlying legal relationship.[20] Germany allows enforcement by virtue of a notarial deed (authentic instrument) of a settlement reached between lawyers, or a settlement reached before a court or a dispute-resolution entity established or recognised by the state.[21] 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,[22] whereas in all other cases, it can only be notarised to become enforceable.[23] In England and Wales, parties can use a consent order (Tomlin order), which if breached by any party, can be enforced by the competent court.[24] This elliptic presentation of various EU jurisdictions (no longer for the UK, to which reference is made at least for historical reasons and given the importance of this jurisdiction in mediation and commerce), demonstrates a clear polyphony in the methods of granting authoritative power to the MSAs, such power even being on some occasions, the one of according it *res judicata* effect.[25]

Given the above picture, it becomes clear that the EU Mediation Directive essentially fits in with the general pattern of judicial cooperation in civil and commercial matters, which is an edifice built on top of the national laws and allows the free circulation of judgments and authentic instruments within the EU, without in principle interfering with national laws of procedure. The Mediation Directive only enumerates in a general way the forms an MSA may take for enforcement purposes, while at the same time it allows national laws to determine the details. In essence, the EU judicial cooperation legal instruments are not meant to question the existence and operation of the underlying national laws, but they aim at coordinating them. Given the above structure, the EU judicial cooperation

[20]Law 4640/2019 Art 8 para 4.

[21]R Dendorfer-Ditges and P Wilhem, "Mediation in a Global Village: Legal Complexity of Cross-Border Mediation in Europe", in M Roth and M Geistlinger (eds), *Yearbook on International Arbitration and ADR Volume V* (NWV, 2017), 242.

[22]Art 25(4) of the 5/2012, Ley de mediación en asuntos civiles y mercantiles and Art 1816 of the Spanish Civil Code.

[23]A Esther Vilalta and R Pérez Martell, "Overview of the New Normative on Mediation in Spain" 17–20, https://www.americanjournalofmediation.com/docs/VILALTA%20-%20MARTELL%20-%20Overview%20of%20The%20New%20Normative%20on%20Mediation.pdf accessed on 1 September 2019. As the writers explain, at 18, the notary public also certifies the facts and verifies that the agreement complies with the requirements of the Law and that its contents are not unlawful, thus granting the notary public the role of guardian of the legality of the MSAs.

[24]Antich, *supra* n 16, 20 and in Roth and Geistlinger, *supra* n 21, 341.

[25]In a wider perspective regarding the legal environment of mediation in the EU and the related divergent national laws, see C Menkel-Meadow, "The Future of Mediation Worldwide. Legal and Cultural Variations in the Uptake of or Resistance to Mediation", in I Macduff (ed) *Essays on Mediation Dealing with Disputes in the 21st Century* (Wolters Kluwer, 2016), 29, 35–38.

in civil and commercial matters instruments can also be used to accommodate the fact that the degree of state control in the process of mediation and in the review of the MSA by a court, differ substantially in the EU. Given that the judicial cooperation instruments guarantee the coordination of national legislation without interfering with their substance, they would *prima facie* seem to be suitable for the cross-border enforcement of the MSA as well. Nevertheless, this submission cannot go unquestioned, particularly because, as said above, under the above instruments, the MSAs are not enforced in other Member States as MSAs, but after they are "disguised" into "decisions", "judgments" or "authentic instruments".

As mentioned above, the EU PIL Regulations make reference to the intra-EU cross-border enforcement of judgments, decisions, or authentic instruments, all of them being forms an MSA may take under the relevant national law. If this is added to the fact that MSAs shall be subject to cross-border enforcement by virtue of the form they acquire in some other Member State, it becomes clear that this national law polyphony may end up as a cacophony at EU level. In order to better demonstrate this, we shall now turn to discussing in more detail the current mechanism of cross-border enforcement of MSAs in the EU.

1. *The MSA taking the form of an authentic instrument*

As is well known, the Brussels Ia Regulation (and the rest of the EU PIL Regulations) contain special provisions on the enforcement of not only judgments but also of authentic instruments.[26] Under the relevant provision of the Brussels Ia Regulation[27]:

[26]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) https://www.europarl.europa.eu/RegData/etudes/STUD/2008/408329/IPOLJURI_ET(2008)408329_EN.pdf accessed on 1 September 2019, executive summary, para 3: "[A]uthentic instruments have been defined by the European Court of Justice in the *Unibank* decision [Case C-260/97, *Unibank* [1999] ECR I-3715], following the Jenard-Möller Report, and by the EC legislator in Article 4(3)(a) of 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". For similar wording with substantially the same approach, see Art 2(c) of the Brussels Ia Regulation.

> An authentic instrument which is enforceable in the Member State of origin shall be enforceable in the other Member States without any declaration of enforceability being required. Enforcement of the authentic instrument may be refused only if such enforcement is manifestly contrary to public policy (ordre public) in the Member State addressed.

It is suggested that the reason why the only defence in relation to authentic instruments is public policy lies with the fact that in this case, the debtor has given prior consent in the drafting of the authentic instrument and the content thereof.[28] This implies that for this reason the question of irreconcilability of an authentic instrument with another, or with a judgment, cannot in principle exist and applies also in relation to MSAs that are "disguised" as authentic instruments. It should be added that some swift is found in similar provisions on authentic instruments in the more recent of the rest of the EU PIL Regulations. In particular, Recital 63 of the most recent EU PIL Regulations (1103/2016 and 1104/2016) states that:

> In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

This implies a need to re-examine the likelihood of authentic instruments and decisions or judgments creating incompatible results in the same Member State and hence their overall relationship. This point shall be addressed again after discussing MSAs in the form of judgments, rather than court settlements.

A point to be kept in mind at this stage is that authentic instruments are, it seems, principally a civil law legal family creation, particularly due to the existence of the *notaires*[29] and are not prevalent in common law or Nordic states,[30] a fact that may create some imbalance within the EU regarding their use for cross-border enforcement of MSAs.[31] Indeed,[32] historically in the civil law family, the enforceable documents by consent, be they notarial or court approved, have no less enforceable power and effect than court judgments.

[27]Art 58(1).
[28]KD Kerameus, G Kremlis and H Tagaras, *The Brussels Convention* (Ant N Sakkoulas, 1989), 280 (in Greek).
[29]Kerameus, *supra* n 12, 200–32 who also points out that the deeper explanation is related to the hostility of common law jurisdictions to procrastination in litigation, which is not in principle avoided if an enforceable ruling is not the outcome of a court judgment on the dispute.
[30]Directorate-General for Internal Policies, *Comparative Report on Authentic Instruments* (European Parliament 2008), executive summary, para 3.
[31]For a comparison of the various Member States regimes, see Meidanis, *supra* n 15, 58–60.
[32]Kerameus, *supra* n 12, 229–31.

2. *The MSA taking the form of a judgment, in distinction to a court settlement*

Things are more complicated in the case an MSA that takes the form of judgment.[33] As is well known, the term "judgment" has acquired a particular autonomous meaning under Article 2(a) of the Brussels Ia Regulation, namely that a "judgment" for the purposes of the Regulation is any decision of a court irrespective of its name and type. Before being included in the Brussels Ia Regulation, this particular meaning was defined for the first time in the judgment in *Solo Kleinmotoren*,[34] a landmark case regarding the meaning of the term "judgment" in the context of enforcement under the Brussels Convention. This is critical in our context, because this judgment predated the Mediation Directive by some 14 years. Given that the Mediation Directive is a judicial cooperation instrument in civil and commercial cases, it can be inferred at first sight that the meaning of the term "judgment" used in this Directive, should in principle have the meaning given in the *Solo Kleinmotoren* case which is essentially repeated (and expanded) in Article 2(a) of the Brussels Ia Regulation. It is also very interesting because the Court in *Solo Kleinmotoren* gave the term "judgment" a particular meaning, by making a clear distinction from the term "court settlement".

In the *Solo Kleinmotoren* case, the Court of Justice was asked to rule on the following facts: An Italian plaintiff (Emilio Boch) filed an action at the Court of Milan against the German company Solo Kleinmotoren. The plaintiff obtained a judgment in his favour and tried to have it enforced in Germany against the defendant, who responded by filing an appeal. At that stage the parties to the dispute reached a court settlement in the German Court of Appeal which compromised the enforcement of the Italian judgment. Later, the plaintiff filed a new action against Solo Kleinmotoren and its Italian subsidiary at the Court of Bologna. The plaintiff tried to have the new judgment enforced in Germany and the German defendant suggested that there already existed a court settlement reached in Germany on the same subject matter between the same parties which precluded the enforcement of the new Italian judgment in Germany. The case

[33]Under Art 2(a) of the Brussels Ia Regulation, for the purposes of that Regulation: "'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court. For the purposes of Chapter III, 'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement".

[34]Case C-414/92 *Solo Kleinmotoren* [1994] ECR I-2237, para 17 which says: " … in order to be a 'judgment' for the purposes of the [Brussels] Convention the decision must emanate from a judicial body of a Contracting State deciding on its own authority on the issues between the parties". See also Case C-39/02 *Maersk Olie* [2004] ECR I-9657, para 45.

reached the ECJ, which found that the court settlement was not a "judgment", given that the Court in Germany, when issuing the court settlement order, was not exercising a judicial role and because court settlements were treated alongside "authentic instruments" rather than judgments in the Brussels Convention (see paras 22-24). The related position expressed in the Jenard Report on the Brussels Convention[35] was that the application of a provision on non-enforcement in order to rule that two judgments are irreconcilable is required to prevent a disturbance of the "rule of law" by their coexistence. As has been commented in this respect,[36] the ECJ ruled under the prism of national interest, while the equally critical issue of the legitimate interests of the parties, seems to have been underplayed, if not neglected.

A leading scholar[37] has suggested that based on the judgment in *Solo Kleinmotoren*, whereby the Court of Justice essentially ruled that a "court settlement" is not a "judgment" in the sense of Articles 25 and 27(3) of the Brussels Convention, the reference of the Mediation Directive to the MSA also taking the form of a "decision" or a "judgment" would rather be substituted by a reference to "court settlements" (and the reference to "authentic instruments" being a different species should be maintained). This is so since an MSA is in nature closer to a court settlement than to a judgment. This position places emphasis primarily on the substantive law nature of the MSA and not on the form it can take for enforcement purposes. This approach can indeed be of use in the present argument, because it shifts the centre of gravity of the relevant discussion from form to substance.

The above remark should be coupled with the comment of another leading expert on the Brussels Convention,[38] who essentially questioned the absolute strictness of the reasoning of the Court of Justice in *Solo Kleinmotoren* at the time of its issuance. The relevant critique being that the "rule of law" in the country of enforcement would not only be disturbed in the case of two irreconcilable judgments (an argument based on the Jenard Report, mentioned above) but also in the case of a judgment and an irreconcilable court settlement.[39] Although

[35][1979] OJ C59/45. Cited by the ECJ at para 21 of *Solo Kleinmotoren*.
[36]H Tagaras, "Chronique de la convention de Bruxelles" (1995) *Cahiers de droit européen* 205, 212.
[37]H Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (LGDJ, 4th edn, 2010), paras 369 (note 50), 420 and 469.
[38]Tagaras, *supra* n 36, 210.
[39]For a different perspective and on a different point, see *Landhurst Leasing Plc v Marcq* [1998] ILPr para 37. In this case, the English Court of Appeal distinguished the consent order which is a "judgment" entered into when a party concedes the relevant issues, from the court settlement, and for this reason, found the *Solo Kleinmotoren* case not applicable. See also Trevor Hartley and Masato Dogauchi, *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention* para 207 https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf accessed on 19 September 2019 who confirm that consent orders are considered to be "judgments" under English law. The

this position does not equate the court settlement with the judgment as regards the jurisdictional status of the involved court, it seems to imply that the legal and practical repercussions of both as regards the rule of law in the country of enforcement, should be the same. It is submitted that a further step in the same logic (although it is uncertain if it would be shared by that scholar given the date of his above comment), is that an MSA taking the form of a court settlement (or a judgment, as the case may be) should have the same legal and practical consequences in the country of enforcement as a judgment (and a court settlement as per the above position).

Both above comments on *Solo Kleinmotoren* and/or the Mediation Directive essentially place emphasis on the substance of the settlement, be it a court settlement or an MSA. Notwithstanding the above, the first opinion does not seem to grant any special status to MSAs and restricts their substantive equation with (court) settlements, while the second seems to grasp the need to also protect the legitimate expectations of the parties and the overall co-existence of the two enforcing titles within the same legal order, if irreconcilable in their effects. It can thus serve as a basis for discussing the special character of the MSAs and to address the matter of the disturbance of a country's legal order in the sense described above. Recital 63 to Regulations 2016/1103 and 2016/1104 discussed under heading 1 above, seems to accord with the same line of thinking and in this respect, it is a welcome evolution. Under this Preamble, an equation of the judicial control of decisions/ judgments and authentic instruments at the stage of enforcement is sought.

It should be emphasised that MSAs are not court settlements, but "settlements" of a special nature, as shall be discussed later in this article. This means that our argumentation based on *Solo Kleinmotoren* and the conclusion to be driven from this argumentation in respect of MSAs, should not be thought to necessarily apply also to court settlements, without further consideration.

Similarly, it is pertinent to note that the Mediation Directive in its Recital 12, explicitly makes a distinction between a settlement in the context of judicial proceedings with one driven by the parties outside court proceedings with the assistance of a neutral third party. It states:

> This Directive should not, however, extend to attempts made by the court or judge seised to settle a dispute in the context of judicial proceedings concerning the dispute in question … [40]

same applies to Mediated Settlement Enforcement Orders (MSEO) as per CPR Art 78.25(5) which implements Art 6 of the Mediation Directive and is limited to cross-border mediations.

[40]See however the recent Hague Judgments Convention, Art 11 https://www.hcch.net/en/instruments/conventions/full-text/?cid=137 accessed on 19 September 2019 and the related *Preliminary Explanatory Report* by FJ Garcimartín Alférez and G Saumier, https://assets.hcch.net/docs/7cd8bc44-e2e5-46c2-8865-a151ce55e1b2.pdf accessed on 19

This means that the Mediation Directive shall not apply in relation to court settlements,[41] unless mediation takes place alongside court proceedings and the parties come to an agreement, in which case the Directive would apply to the mediation and the agreement could be rendered enforceable in a court settlement. From a practical point of view, this does not seem to be critical in an EU environment, since court settlements shall then be enforced as such under the same EU PIL Regulations.[42] On the other hand, the finding in *Solo Kleinmotoren*, namely that it is common ground that a court settlement is not a "judgment" could (wrongly for the above discussed reasons) claim application to MSAs as well, given that MSAs are not court settlements but rather are only "disguised" to be decisions, judgments or authentic instruments for enforcement purposes. This explains the emphasis given to *Solo Kleinmotoren* in this article, although its ruling is not on MSAs.

D. Theoretical underpinnings

At this point, it makes sense to widen the scope of the discussion, using the analysis of another leading scholar, Arthur T Von Mehren in his lectures at the Hague Academy in 1980.[43] He presented two major principles in international adjudication, correctness and repose,[44] the former aiming at ensuring a just solution and the latter aiming at ensuring that the judicial systems are not overburdened unjustifiably. Or, where he presented the distinction between ideal and practical justice, the former seeking rules and principles that are correct in some ultimate philosophical or ethical sense and the latter emphasising good administration and reduced transaction costs, sometimes having the result of accepting solutions based on incomplete or misapprehended facts.[45] Also, the remarks of K D Kerameus in his Hague

September 2019, where it is mentioned (para 307) " … settlements concluded as a result of mediation are covered by Article 12 [NB: Art 11 of the final text of the Convention] if they are subsequently approved by a court. This is articulated in the text by the distinction drawn between settlements 'approved by a court' and settlements 'concluded in the course of the proceedings before a court'. In both cases, the judicial settlement must be enforceable, in the same manner as a judgment, in the State of origin". On the contrary, as explained, under the Mediation Directive, there exists a clear distinction between MSAs and Court Settlements.

[41] That the court settlement is not to be regulated by the Mediation Directive is due to the fact that the Mediation Directive regulates mediation only and is not about any type of settlement. Actually, this Preamble reiterates our position that the judgment in *Solo Kleinmotoren* is of interest also for MSAs. Since the ECJ at that time ruled that the court settlement is not a judgment, one can imagine that MSA would be found to be much less of a "judgment" since the role of the court in an MSA is even less important.

[42] Outside the EU, things operate differently. For MSAs there now exists the Singapore Convention and for court settlements (and for court rubberstamped MSAs) the Hague Convention on Choice of Court 2005 and the recent Hague Judgments Convention.

[43] AT Von Mehren, "Recognition and Enforcement of Foreign Judgments: General Theory and the Role of Jurisdictional Requirements" (1980) 167 *Hague Collected Courses* 9.

[44] *Ibid*, 20–24.

[45] *Ibid*, 20–21.

Academy lectures, where he says that modern justice is in pursuit mostly of limiting time spent on adjudication, rather than on the correctness of the results, were in a similar direction.[46]

Clearly, mediation is not adjudication and the mediator does not perform any judicial role. Nevertheless, it is a dispute resolution mechanism with some "finality", not in relation to the satisfaction of a certain right, but in relation to the final and conclusive resolution of a dispute. As discussed above, in the EU, the MSAs are also granted cross-border enforcing power, not based on a common EU pattern created especially for them, but based on the various national solutions that are centred around the form that an MSA can take in the Member State where enforcement effect is granted for the first time. Essentially, as already discussed, cross-border enforcement shall take place by virtue of the applicable *in casu* PIL Regulation, based on the form and not on the substance of the MSAs. The fact that for enforcement purposes under the Mediation Directive, MSAs are supposed to take the form of a "judgment", "decision" or "authentic instrument" does not mean that their consensual character and substantive nature is somehow altered. Actually, if one were to follow the above spectrum outlined by *Von Mehren*, mediation rests on the side of repose, or, in a way, even beyond repose, in the sense that the role of the courts is usually peripheral (with differing degrees of intervention which is more apparent in court-annexed mediation) and sometimes is only limited to rubber-stamping of the MSAs. This means that the MSAs are not related with court adjudication and they only "meet" courts (or other competent bodies) at the stage of their being granted enforceability. In this sense, it is hard to see why they should take the form of "judgments" or "decisions" or any other "alien" form for enforcement purposes only. The fact that, as said above, the cross-border enforcement in the EU is primarily based on the form of the instrument in question, be it judgment, decision or authentic instrument, needs to be examined alongside the so-called autonomous interpretation of the term "judgment" in the EU PIL Regulations. The autonomous interpretation of the term "judgment" has gone well beyond the form and has been linked to the actual substance of the matter, as a judgment is required to be the product of the judicial role exercised by a court of law, so as to qualify as such. This leads us to think (as discussed above in the context of the relevance of the "recognition theory") that the term "judgment" in the Mediation Directive may have not the meaning described under *Solo Kleinmotoren* or if it does, it creates further complexity. A further point is that the judgment in *Solo Kleinmotoren* has clearly been the first and most fundamental expression of the above autonomous interpretation of the term,[47] made only in 1994, well before the Mediation Directive (2008) and the "big bang" of mediation that we are currently experiencing. Therefore, mediation was most probably

[46]Kerameus, *supra* n 14, 219–20.
[47]Autonomous interpretation has also been chosen in relation to authentic instruments, see Art 2(c) of the Brussels Ia Regulation.

outside the scope of the considerations of the Court of Justice at the time of *Solo Kleinmotoren*.

Given the above discussion, one might further question the current status of law on EU cross-border enforcement of MSAs, as it appears in the Mediation Directive, the EU PIL Regulations and the judgment in *Solo Kleinmotoren*. The critical point is that MSAs aim at the final and conclusive resolution of a dispute by settlement and this happens outside the judicial system, with the only exception of granting of enforceability (and in some countries also *res judicata* effect).

E. The special character of mediation – a new dispute resolution category

As discussed elsewhere,[48] mediation and MSAs should be treated as an expression of the dispute resolution in the post-modern era, where one can experience a certain swift form of "rendering of justice" by the "satisfaction of a right" to "dispute resolution" in the context of party autonomy and self-determination. In a way, MSAs stand somewhere between contracts on the one hand and judgments/awards on the other.

As is well documented by many writers, mediation is an obvious expression of party autonomy and of self-determination.[49] In mediation:

> the concept of self-determination is much wider than that of mutual assent in the contractual framework. While the focus in contract law is on finding consent in relation to the meeting of minds, mediation emphasises *the individual exercise of each party's autonomy* in arriving at the agreement.[50]

In mediation, party autonomy is expressed by the self-limiting right to participate in it and reach a self-binding agreement. Further, as has been mentioned in a wider scope and perspective:[51] "Fundamentally, the jurisprudential underpinnings of contract law are not fully aligned with mediation values".

Another critical point that distinguishes the agreements following mediation (MSAs) from all other contracts which are also an expression of party autonomy is the special role of the mediator. The mediator is a catalyst,[52] who even if he/she

[48]Meidanis, *supra* n 15, 51–52.
[49]By way of example see, E Deason, "Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?" (2015) *Dispute Resolution Magazine* 32, 36.
[50]D Quek Anderson, "Supporting Party Autonomy in the Enforcement of Cross-Border Mediated Settlement Agreements: A Brave New World or Unchartered Territory?" Draft paper for IAPL-MPI Summer School, 1–4 July 2018, paras 1–72, para 34, https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=4867&context=sol_research accessed on 22 August 2019.
[51]*Ibid*, para 34.
[52]*Ibid*, "The hallmark of a well-conducted mediation is each party feeling satisfied that they have been assisted to make their own decision".

is not acting like a judge, still plays a pivotal role in the process. Most agreements reached after mediation would have been impossible without the active participation of the mediator.[53]

At the same time, MSAs, at least in the EU, acquire a binding effect not as contracts, but rather after they are granted enforcing power by a court or other competent body. One can say that the inherently coercive character that one can detect in a judgment or in an award is lacking in the case of mediation, where coerciveness is granted *ex post* on the basis of the mutual consent of the parties to the mediation and the MSA. One could refer in that sense to a "quasi-coercive" nature of the MSAs, to the extent that such coercive nature is fundamentally triggered by the will of the parties.[54]

These three points, namely (a) the special expression of party autonomy in the context of mediation; (b) the role of the mediator as a catalyst of the process; and (c) the party-attributed quasi-coercive nature of the MSA clearly distinguish MSAs both from contracts and judgments (and awards) as well as from court settlements (the latter, in terms of the procedure that is followed). Indeed, the MSA in its substance is not a "judgment", "decision" or "authentic instrument". Also, it is not a "court settlement" or any "private settlement". It is a settlement, but a very special one, in the above described way.

Ultimately, the MSA is what it is. As has been said by Kessedjian,[55] the MSA is a distinct judicial category, separate from a judgment or an award. Essentially, the existence of MSAs and the special status they start to gain internationally, also under the UNCITRAL initiatives, is an ekphrasis of the recent trend to place emphasis on dispute resolution, an expression of self-determination, rather than on the satisfaction of the legal right. Therefore, it can be said more accurately that mediation is a distinct dispute resolution category that merits special treatment. If the MSA, being the product of mediation, is disguised as something else, as is the current law in the EU, we run the risk of undermining its (and mediation's) importance and use and causing a number of difficult legal problems to resolve. It is submitted that the EU should reconsider the "disguising" of the MSA in other forms and acknowledge its distinct legal nature.

[53] *Ibid*, para 37: "There is yet another significant difference between contract law and the mediation context. Contract law is premised on a *bilateral framework*, focusing on finding a meeting of minds only between the parties who are negotiating. The actions of other external parties are seldom taken into account, save perhaps in relation to events that may have frustrated a contract. This bilateral framework does not take into account the potential impact of the third-party mediator".

[54] In arbitration the consent of the parties is limited to the attribution to the arbitrators of the power to issue a binding award. In mediation the role of the parties is much more extensive as they become part of the solution and are bound by their own joint decision reflected in the MSA which can thereafter acquire enforcing power.

[55] C Kessedjian, "Médiations internationales: un nouvel instrument d'exécution la CNDCI" (2017) 41 *Recueil Dalloz* 2416.

The Singapore Convention has moved towards the direction of granting MSAs special status, by allowing anyone who wants to enforce an MSA, to ask for a "relief" to this effect in the country where such relief is to be used.[56] This "relief" is not a judgment, decision or authentic instrument, but it has a distinct character, in the sense that it can be used both as a "sword" and a "shield", it is used in order to avoid the term "recognition" and "enforcement"[57] and is expected gradually to acquire a specific meaning. By using this term, emphasis seems to be put on the substance of the MSA, not on form, or, if it is on form, it is on a special one, used only for MSAs.

One might respond to the above argumentation that the judgment in *Solo Kleinmotoren* was clear: court settlements are not products of the judicial role of a judge and cannot qualify as "judgments". MSAs, being settlements as well and not judicial products, cannot qualify as "judgments" in the above sense. This position places primary emphasis on the special role of the judge in dispute resolution. It is submitted that this cannot be good law, at least for MSAs, for the reasons discussed above and, in particular, on the basis of the current universal reality regarding mediation.

The depiction of the above, by presenting certain examples of cross-border enforcement where an MSA (in various forms) would "meet" a judgment in the sense and meaning of *Solo Kleinmotoren* explains why a legislative solution is needed.

F. Addressing various scenarios

Greece and Spain were selected, as they give to MSAs partially different form for enforcement purposes as well as status. Greece currently grants the form of a "decision" to MSAs that are to be enforced, without however offering a *res judicata* effect and also allows the granting of enforcing power to an MSA in the form of authentic instruments (notarial deeds). Spain on the other hand, not only grants enforcing power to an MSA by virtue of a notarial deed, but it also grants *res judicata* effect, at least to those MSAs that are reached after the commencement of a judicial process. In this case, the MSAs acquire enforcing power by virtue of homologation.

[56] Art 4 Singapore Convention. See Alexander and Chong, *supra* n 6, 78.

[57] As was said in the UNCITRAL Working Group II, 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. This concern about granting *res judicata* effect essentially addresses the special character of the MSA and has led to the adoption of the word "relief". The fact that, in the EU, certain Member States grant such effect to MSAs whereas others do not needs to be remedied, especially with a view to creating a common European Judicial Area.

(a) Assume in the above context that an MSA in a commercial dispute which has been declared enforceable in Greece as an authentic instrument is to be enforced in Spain where there exists an irreconcilable judgment between the same parties or an earlier enforceable judgment from a third country, be it an EU Member State or not, involving the same parties and same cause of action. Should this Greek MSA be enforced in Spain under the Brussels Ia Regulation?
(b) Assume now the opposite scenario, namely a Spanish judgment on the same dispute, enforcement of which is now sought in Greece, where there exists an MSA declared enforceable in Greece as a decision without *res judicata* effect (which is the Greek law position) between the same parties on the same cause of action. Should this judgment be enforced in Greece under the Brussels Ia Regulation?
(c) Assume a different scenario whereby the Greek MSA (having the form of decision as discussed above) is to be enforced in Spain, where there also exists an MSA following a judicial process which, as said, produces a *res judicata* effect under Spanish law. Would the Greek MSA be enforced in Spain under the Brussels Ia Regulation?
(d) Assume the reverse scenario where the Spanish MSA (with the *res judicata* effect) is to be enforced in Greece, where there exists an MSA with enforcing power only. Would the Spanish MSA be enforced in Greece under the Brussels Ia Regulation?

Under the current text of the Brussels Ia Regulation and *Solo Kleinmotoren,* the answer to (a) and (b) is clear. In (a), if the MSA is to be enforced as an authentic instrument under the Brussels Ia Regulation, the existence of an irreconcilable judgment is not relevant.[58] This means that the MSA is to be enforced unless it may be held that the existence of an irreconcilable judgment in the Member State of enforcement is a public policy defence in the meaning of Article 45, which is hard to suggest *de lege lata.*[59] In (b) the judgment shall easily be enforced, given that the Greek MSA shall not constitute a judgment. The common element in the two first scenarios is that a "judgment" in the meaning of the term in *Solo Kleinmotoren "*meets" an MSA, to which the national applicable law does not grant *res judicata* effect. Under the provisions of the Brussels

[58]Art 58 of the Brussels Ia Regulation.
[59]Note in the same context the provision of the Brussels IIa Regulation (Art 46) "Documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments". The fact that they shall be enforced "under the same conditions as judgments" does not grant them the legal nature of judgments. In any event, the relevant provision under the new Brussels IIb Regulation (Art 65) has deleted all reference to "judgments" and places emphasis on the binding and enforcing effect of the private agreement in the Member State of origin.

Ia Regulation which, as said above, applies also in relation to cross-border enforcement of MSAs falling within its scope of application and having the *Solo Kleinmotoren* judgment in mind, one ends up having an MSA and an irreconcilable judgment coexisting in the same Member State.

Scenarios (c) and (d) where *res judicata* is granted to the MSAs under the applicable national law (Spanish) add further complexity. The reason behind this is that the Spanish MSAs having a *res judicata* effect will, on a certain reading, be closer to "judgments" in the *Solo Kleinmotoren* sense. Although the judicial role of a court which is required under *Solo Kleinmotoren* is still missing, the fact that national law also grants *res judicata* effect cannot go unnoticed, especially under the recognition theory mentioned above. In these scenarios, the Greek MSA in the form of decision judgments and the Spanish MSAs with *res judicata* effect will most probably be treated as irreconcilable if the former is to be enforced in Spain (scenario c) but not if the latter is to be enforced in Greece (scenario d). Indeed, it can be submitted that by acquiring *res judicata* effect, the Spanish MSA should most probably qualify as judgment under the recognition theory discussed above. Of course, the requirement of *Solo Kleinmotoren* on the exercise of a judicial role by the court may be *prima facie* missing in this case, but this will largely depend on the degree of intervention of the national court in question. The above can indeed be the source of creating a different level playing field in the EU in favour of MSAs from Member States with such legislation. As discussed above, some Member States wish to grant *res judicata* effect to at least some MSAs. Also, some Member States accept a rather extended court review of an MSA in order for it to be granted enforcing power, while the competent court is not simply rubberstamping the MSA. If the term "judgment" continues to be interpreted autonomously in the direction of *Solo Kleinmotoren,* the above special character of mediation shall be undermined, the disturbance in Member States' legal orders shall be possible in the sense above discussed, and the policy of the EU to elevate mediation as a serious and fully-fledged alternative to litigation shall be undermined at a cross-border level.

The key conclusion to be derived, based on the above scenarios, is that one needs to revisit the coexistence of cross-border enforcement of an MSA (in any form) with a judgment by taking into account the fact that different national laws may grant different status to MSAs at the enforcement stage, as well as the special character of the MSA discussed above.

A comment that must be made here is that the above scenarios do not address the question of parallel proceedings, since they are steps prior to the judgment or the conclusion of the MSA. However, a short comment in this respect seems necessary. Although mediation is not a judicial process, it can be interrelated with court process or arbitration, as the case may be, earlier in time and while both may be pending. To a considerable extent, the relevant discussion will focus on the compulsory nature (or otherwise) of the agreement to mediate. There is no international consensus on this point. As far as we know, the Member State courts' position and national practices in relation to upholding an

agreement to mediate vary. For example, in England and Wales (which, of course, is not part of an EU Member State anymore) the hearing is adjourned until mediation is concluded; in Germany the action is temporally inadmissible;[60] while in France an action in breach of an agreement to mediate is "irrecevable".[61] In Greece, the written mediation agreement is deemed compulsory and must lead to at least an initial mediation meeting.[62] Other Member States grant damages in case of non-observance of such agreement to mediate (Austria[63] and Luxembourg[64] among them). It is self-evident that also at an earlier time, the interrelation of mediation with court adjudication can be an equally difficult problem to handle and creates further imbalances.[65] The solution given by the UNCITRAL Model Mediation Law refers to the point after the entry to the MSA. According to this, in case a request for relief has been filed and the same case is pending before a court or tribunal, the court or authority before which the request for the relief has been filed may decide to adjourn its decision, asking the payment of suitable security.[66] The above presentation adds further complexity to the matter of the interrelation of MSAs and judgments in the EU.

G. A different reading

The correct approach is to use as the basis of the relevant discussion the fact that MSAs are, as said, the products of a third, distinct judicial category.[67] Once made,

[60]See the reference to the position in England and Germany by R Dendorfer-Ditges and P Whilheim, "Mediation in a Global Village: Legal Complexity and Cross-Border Mediation in Europe" in Roth and Geistlinger, *supra* n 21, 236, 237.

[61]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.

[62]Law 4640/2019 Art 6 par. 1γ.

[63]U Frauenberger-Pfeiler, "Austria", in C Esplugues, JL Iglesias and G Palo (eds) *Civil and Commercial Mediation in Europe, National Mediation Rules and Procedures, Vol. I* (Intersentia, 2014), 14–15.

[64]S Menétrey, "Luxembourg", in Esplugues et al., *Ibid*, 13–14.

[65]The relevant provision of the UNCITRAL Model Law on Mediation reads as follows: "Article 20. Parallel applications or claims If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 18, the competent authority of this State where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security".

[66]*Ibid*.

[67]Art 8 of law 4640/2019, Greek law on mediation, the MSA will be treated as "an order or an act that is recognised under law as a title of enforcement" (reference to Art 904 para 2 ζ) of the Code of Civil Procedure. Given the explanatory report, according to which the previous provision was erroneous, this amendment seems to acknowledge the special character of the MSA. It is to be noted that under the old law, the MSA used to be equated to a court settlement for enforcement purposes.

they can easily be declared enforceable. As such, they cannot be equated to simple settlements. If so, one needs to ensure that after they are declared enforceable, they shall not be considered to be less (or more) "powerful" (to use the Mediation Directive terminology) than a judgment in a cross-border enforcement environment. As described under the above scenarios, an MSA in the form of an authentic instrument will be enforced even if there exists a judgment to the contrary in the country of enforcement (obviously not where the judgment is from a Member State with jurisdiction to overturn the content of the authentic instrument). By the same token, a judgment shall always be enforced in the country where there exists an enforceable MSA, unless this has a *res judicata* effect, at least upon a certain reading. Therefore, one experiences an imbalance and a "limping" coordination of MSAs, primarily because they are "disguised" in the way described above. The form that they take is decisive for cross-border intra-EU enforcement. The problem is that *de lege lata* it is not possible to have MSAs enforced in a way other than by virtue of the EU PIL Regulations that follow the "form approach" outlined above.

It is therefore submitted that it is time to consider granting the MSAs a special legal status within the EU. This should be done by taking into account the substantive character of the MSA, namely that it is a private out-of-court settlement with the assistance of a third party (the mediator) and that it produces enforceability.[68] Under the MSA, the parties to it do not merely enter into an agreement. They do so by exercising their party autonomy towards settling a dispute and by undertaking certain obligations, knowing that such MSA would be enforceable much more easily than a simple contract. Further, when a dispute is mediated, it is extracted from the judicial system.[69] Disguising the MSA as a "judgment" or "decision" or "authentic instrument" (with all the problems this has, considering also the Member States' legislative polyphony discussed above) as is the current EU law, merely downplays its nature and special character. Evidently, the exercise of granting the MSA a special legal status would be burdensome, and it would require an in-depth amendment of the various EU PIL Regulations or perhaps (better) a new Mediation Regulation.[70] It would also require a detailed cartography of the various national laws in relation to local enforcement of MSAs, in order to

[68]The Singapore Convention excludes private agreements reached outside mediation. See Meidanis *supra* n 10, 51–52.

[69]See Meidanis *supra* n 15, 52.

[70]See in this respect, C Esplugues and JL Iglesias, "Mediation and Private International Law: Improving Free Circulation of Mediation Agreements Across the EU", in The Implementation of the Mediation Directive Workshop 29 November 2016, edited by G De Palo and L D'Urso, 74, who in relation to a special Mediation Regulation, also refer to an EU Mediation Settlement Certificate granted by public authorities in the country of origin in the fashion of Regulation 805/2004 creating a European Enforcement Order for uncontested claims, and of Regulation (EU) No 650/2012 on Succession in relation to the creation of a European Certificate of Succession.

understand better the existing loopholes and the consequent problems of EU coordination. This does not mean that the correct approach is to equate fully judgments and MSAs, which is anyway difficult to achieve from a dogmatic point of view. It is submitted that the existence of an MSA in a Member State should bar the enforcement of an irreconcilable judgment emanating from another Member State and vice versa.[71] Should this happen under a future legislative initiative at EU level, the importance of mediation and MSAs will be reassured and the legal order of Member States will not risk disturbance. This bar would only be related to enforcement without interfering with whether and to what extent an MSA would indeed have a *res judicata* effect and what this would mean.[72] If this suggestion were adopted, it would grant MSAs a status largely similar to judgments in the context of international enforcement and would guarantee the elevated status of mediation that is pursued under the Mediation Directive. In the EU there has been extensive discussion as to whether a special instrument only for MSAs should exist, given that for the moment an MSA can take only one of the forms mentioned in the various EU PIL Regulations.[73]

An alternative (or rather a parallel bold step) would be for the EU to sign and ratify the Singapore Convention.[74] It should be pointed out in this respect that in its Article 12, the Singapore Convention expressly allows regional economic integration organisations to join the Convention. Clearly, the EU has the competence to ratify the Singapore Convention on behalf of its members, since the adoption of an international convention on mediation falls into its exclusive competence.[75] Once the EU adopts the Singapore Mediation Convention, the present debate regarding the adoption of a special instrument for the cross-border enforcement of MSAs will still have importance, albeit a more limited one. This is so since the scope of the Singapore Mediation Convention is narrower than the relevant EU Regulations. It applies only to civil and commercial MSAs, with the exclusion of family, consumer, employment and inheritance cases. By adopting the

[71]Whether this approach should also apply in relation to court settlements is outside the scope of this article and requires different considerations relating to the nature of court settlements in the various Member States.

[72]As said above, this applies already under the national laws of France and Greece.

[73]See for example Esplugues and Iglesias, *supra* n 70, 70–95.

[74]H Meidanis, "A Plea for the Adoption of the Singapore Mediation Convention by the EU" (2019) https://mediationblog.kluwerarbitration.com/2019/03/20/singapore-convention-series-a-plea-for-the-adoption-of-the-singapore-mediation-convention-by-the-eu/ accessed on 10 July 2020.

[75]Art 3(2) TFEU where it is stated that: "The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope". See also Opinion 1/2003, EU:C:2006:81, on the exclusive competence of the EC in relation to the Lugano Convention which is, like mediation, part of the "judicial cooperation in civil and commercial matters".

Singapore Convention, the EU would allow for the "direct enforcement" of MSAs in any Member State of the EU, without the need actually to use any of the EU PIL Regulations to some extent.[76] This would also circumvent most problems of characterisation discussed in this article and the questions relating to the form an MSA may take in a Member State.

Under the direct enforcement scheme of the Singapore Convection on the other hand, the initial control at the country where the MSA is reached is skipped altogether. Emphasis is put only at the stage of enforcement, which is guaranteed if none of the reasons for not granting the relevant "relief" (a wider notion including enforcement) mentioned in Article 5 of the Singapore Mediation Convention exists.[77] Therefore, the relevant control exists only at the stage of enforcement at the country where actual enforcement is sought. Clearly, the adoption of the Singapore Mediation Convention by the EU would create a common level playing field for mediation having international effects in the EU. After such adoption, the international MSAs falling within the scope of the Convention should be easily enforced directly in any Member State, since the Convention would replace the differing national laws on this point. Cross-border enforcement on the basis of the EU PIL Regulations shall always be possible and applicable, in case an MSA shall have already been granted enforcing effect somewhere else in the EU. Obviously, the frequency of cross-border enforcement shall be reduced, since in most cases direct enforcement shall be preferred for practical reasons. It

[76]The scope of application of the Singapore Convention is limited to civil and commercial matters, whereas the EU PIL Regulations cover more issues, such as family and succession. Also, the detailed provisions on scope of the various instruments demonstrate the existence of more gaps, even within the civil and commercial spectrum.

[77]Article 5 "Grounds for refusing to grant relief 1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that: (a) A party to the settlement agreement was under some incapacity; (b) The settlement agreement sought to be relied upon: (i) 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 Party to the Convention where relief is sought under article 4; (ii) Is not binding, or is not final, according to its terms; or (iii) Has been subsequently modified; (c) The obligations in the settlement agreement: (i) Have been performed; or (ii) Are not clear or comprehensible; (d) Granting relief would be contrary to the terms of the settlement agreement; (e) 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 (f) 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 Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that: (a) Granting relief would be contrary to the public policy of that Party; or (b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party".

will, however, remain for use mostly in mediations that are excluded from the Singapore Mediation Convention.

Given that the judge whose role is to guarantee the rule of law is absent from the mediation process, it is further submitted that Member States and the EU should be induced to take proper initiatives to ensure the proper standards of mediation are observed.[78] In this context, it is noted that mediation is less formally rule and procedure based than litigation or arbitration and for that reason less homogenisation of the rules and processes is required.[79] As discussed elsewhere,[80] there exist certain public policy principles regarding due process in mediation that must be always followed, as a "sui-generis" or "incomplete" *lex mediationis*. Judicial control of all MSAs, also in terms of substantive public policy, will always be open, as is the case *de lega lata* at the moment within the EU.[81] This would apply also in relation to the country where enforcement is envisaged.[82] Given also the legal polyphony in the Member States also at the time prior to the conclusion of the MSA or the issuance of the judgment, the safest approach is to have an explicit provision of law obliging the court to stay proceedings in such a case.

In any event, it is submitted that the correct approach is to accept the different and special nature of the MSA, by placing emphasis on its substance. The importance the form plays at the moment in the EU should be reduced, if not extinguished altogether. Should the EU wish to abstain fully from regulating cross-border enforcement of mediation by ratifying the Singapore Convention, as is the case for arbitration via the New York Convention, or if the choice would be in favour of a Mediation Regulation on cross-border enforcement, or a combination of the two, is essentially a political decision, that shall have to be taken with the view to avoiding the existing loopholes discussed above. Nevertheless, the problem is (at least conceptually) present and calls for a viable solution.

Disclosure statement

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[78]In this context, the conditions of accreditation and of disciplinary control of the mediators is of paramount importance and the Mediation Directive addresses these issues in the wider context of quality (Art 4). This is even more acute given that the mediation process is not legal, but the background of the mediation is definitely legal and the MSA is legally binding and enforceable.

[79]Menkel-Meadow, *supra* n 25, 40.

[80]Meidanis, *supra* n 5, 42–44.

[81]Art 6 (1) of the Mediation Directive. See also Meidanis, *supra* n 10, 61.

[82]T Gaultier, "Cross-Border Mediation: A New Solution for International Commercial Dispute Settlement?" (2013) 26 *New York State Bar Association International Law Practicum* 38, 43.