

The relations between the Singapore Mediation Convention and the European Mediation Directive

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Summary: This paper deals with the Singapore Convention on Mediation from United Nations General Assembly in December 2018 and signed in Singapore on 7 August 2019. Also with the European Union situation, given by the existence of the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. EU States haven't signed the Singapore Convention on Mediation. This paper is trying to analyse the two instruments, the Directive as a harmonisation instrument, maybe opening the field of the possible usage of the convention and not existing Regulation unifying the legal ground in the EU. The Singapore Convention on Mediation enters into force six months after deposit of the third instrument of ratification, acceptance, approval, or accession. EU is now in the position, where a decision about new Directive, or maybe the acceptance of the convention must be decided with accordance to all the dilemmas of the Singapore Convention.

Keywords: mediation, mediated settlement agreements, the Singapore Mediation Convention, the EU Mediation Directive, international trade, dispute settlement, mediation agreements.

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1. Introduction

Mediation and its importance are both reflected by the European Union and its member states by preparing and also implementing the mediation directive from

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the year 2008.¹ Since then, the European Union and also its member states are evaluating the impact of the mediation directive and trying to decide, if there is a need and right time for a new directive, or rather a change to the existing one.² The situation in the European Union and harmonizing the stand of mediation was described as a partial success differing from one member State to the other because of the manner and extend to which member states implemented the mediation directive from the year 2008. Before a new approach in the field of the mediation in member states, the United Nations prepared new frame for alternative and appropriate dispute resolution methods as well as its settlements.³ With this purpose, the group of alternative and appropriate dispute resolution was mentioned. There was a broad academic discussion about the commercial mediation as appropriate, amicable, or alternative dispute resolution method.

Mediation was introduced as appropriate out of all the dispute resolution methods because the absence of a final decision. Comparing arbitration in international businesses and business mediation the mediation settlement agreement was in most of the studies introduced as an agreement between the parties, what have decided to go through the mediation procedure, use the assistance of an independent person to establish new contract and protect the existing relationship. The United Nations prepared a new convention called the United Nations convention on international settlement agreements resulting from mediation, also called the Singapore convention. Inspired by the success of the New York convention, handling the enforceability of arbitration awards internationally, the Singapore convention is also changing the picture of mediation connected to appropriate or amicable dispute resolution and transforming that to the alternative character.

From the European perspective it was naturally a systematic problem of an acceptance of foreign instruments coming from Anglo-American law system. Currently European Union member states are using partial methods of the ADR, European legislative is focusing on the mediation and using this method in civil procedure law, especially in family law matters. The practitioners have accepted the idea of mediation as a part of civil law procedure without analysing or studying the real nature of this method or instrument.⁴

¹ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008. See for details to this [online]. Available at: https://www.europarl.europa.eu/cmsdata/226405/EPRS_ATAG_62_7135_Mediation_Directive-FINAL.pdf

² Follow it online in: [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET\(2014\)493042_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf)

³ See for details to this [online]. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf

⁴ SCHWÄRZLER, H. Schiedsgerichtsverfahren und Mediation als Alternativen zur öffentlichen Gerichtsbarkeit. *Liechtenstein-journal*, 2011, 4, p. 115.

Mediation is voluntary procedure; it should be confidential and aimed at dispute resolution and in an out-of-court way. Mediation involves a third-party in the form of a person called the mediator. A person mediator as an independent third-party, that assists the parties to the dispute in reaching an acceptable settlement. In mediation the parties resolve the dispute on their own they are assisted by the mediator, so the mediation is based on parties' interests and not on the applicable law as a highest imperative. Mediation is much less formal, more flexible, and much more controlled by the parties than the court or arbitration procedure. Why has the mediation been already used for a long time and what are the advantages of mediation?⁵

In mediation both parties win because they reach a mutually acceptable settlement agreement created by them.⁶ This agreement corresponds to the needs and interests of the parties so it could be called a win-win agreement. Mediation also brings benefits to the court and to the civil procedure rules, as it is reducing the workload of the court which gives the time to the court to focus on the more complicated cases. Mediation creates a new kind of culture in personal and business matters or communication if they are becoming a part of the dispute.⁷ Resolution of conflicts in the faster non-aggressive manner is establishing a bright field of conditions for successful interstate and international business activities and also protects legal and social stability.⁸ There, where the states and other actors' guard the autonomy and independence, where the war conflict actually begun, there is a place for mediation.⁹

Mediation in international business disputes is preferred thanks to some significant advantages as party control, length of time, expense, flexible process, confidentiality, possibility of the selection of the mediator, but not finality, also enforcement of international mediation agreements is not comparable with the enforcement of the arbitral awards.¹⁰

Mediation is a created merely on-contract, so the parties can by and thanks to the agreement design the process. The party's autonomy of will is a very

⁵ GOLDBERG, S.B., SHAW, M.L. The Past, Present, and Future of Mediation as Seen through the Eyes of Some of Its Founders. *Negotiation Journal*. 2010, vol. 26, no. 2, pp. 237–253.

⁶ GOLDBERG, S.B., SHAW, M. L. The Past, Present, and Future of Mediation as Seen through the Eyes of Some of Its Founders. *Negotiation Journal*. 2010, vol. 26, no. 2, pp. 237–253.

⁷ HOLÁ, L., MALACKA, M. *Mediace a reflexe jejích aktuálních trendů*. Praha: Leges, 2014, p. 33.

⁸ LEIPNITZ, D. Mediation im deutschen Arbeitsrecht und deren praktische Bedeutung – unter besonderer erücksichtigung der US-amerikanischen Anwendung, *HWR Berlin*, Berlin, 2015, p. 17–20.

⁹ FALK, G. *Manuskript zur Ausbildung der Österreichischen Rechtsanwälte*. 2008, p. 3.

¹⁰ SCHLOSSER, P. *Das Recht der internationalen privaten Schiedsgerichtsbarkeit*. 2. Aufl. Tübingen: Mohr Siebeck, 1989.

important aspect of the mediation, not only in the relation to the nature and scope of the conduct of the hearing also for the procedure rules and other basics of mediation.¹¹ The benefit of such a flexible process provides possibilities for the parties to schedule hearings and deadlines to meet their objectives and convenience. The flexibility of mediation allows parties to save time and money.¹² Very important in this procedure is also the benefit of the confidentiality of mediation procedure. Mediation hearings are held in private and are attended only by those designated by the parties and their counsel. This is a strong contrast to the proceedings held at the court because of their public nature. Confidentiality is an important aspect for many of corporations in the cases where their disputes involving intellectual property or trade secrets could be combined with concerns about publicity or damage to reputation. The second very important benefit of mediation is the possibility to select the mediator. The parties can select the mediator with qualifications corresponding to the nature of the case. The qualification of a mediator includes the number of years of experience, number of mediations chaired, reputation of competence, as well as qualification in and knowledge of foreign languages.¹³ A mediation settlement is prepared quickly and with the reflection of the free will of the parties. In international commercial disputes, so-called cross-border disputes, arbitration agreements are enforceable around the world thanks to the New York Convention¹⁴ signed by more than 140 states, in contrast judgments of national courts – not including the European Union. International business mediation and the recognition and enforcement of the settlement agreements resulting from Mediation are covered now by the United Nations Convention on International Settlement Agreements Resulting from Mediation, also called Singapore convention.

2. Singapore Mediation Convention and ADR

Thanks to the Singapore convention the role of mediation in international business disputes, was strengthened. The Singapore convention is dealing with

¹¹ Controlling Time and Costs in Arbitration, ICC Publication 861-1 ENG, p. 10–15, www.iccwbo.org

¹² Österreich, Internationales Schiedsgericht der Wirtschaftskammer: *Handbuch Wiener Regeln: Ein Leitfaden für die Praxis*. 1. Aufl.: Service-GmbH der Wirtschaftskammer Österreich, p. 256–282.

¹³ INGEN-HOUSZ, A. *ADR in Business: Practice and Issues Across Countries and Cultures*. München: Kluwer Law International, 2011 [online]. Available at: https://www.academia.edu/4810877/ADR_in_Business_Practice_and_Issues_across_Countries_and_Cultures_Volume_II

¹⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the „New York Convention“), [online]. Available at: <https://www.newyorkconvention.org/new+york+convention+texts>

mediation through a procedure, that is resulting in the enforcement of the mediation agreement. The European Union mediation directive is dealing with mediations through a less formal and confidential procedure. In this procedure, the neutral person is assisting to help to the disputing parties in a quick, intensive, and inexpensive manner so if they can efficiently resolve disputes and save their business. From the financial point of view, this procedure is less expensive than the procedure before state courts or even arbitration. The most important difference between international business arbitration and international business mediation was bound by the result of the procedures. In the case of international business mediation, the result would be a mediation agreement or settlement in form of a new contract. Enforceability of such a contract is connected to following steps, mostly with the help of notary services. Breach of such a settlement would be handled by another mediation, send to international arbitration, or handled by national courts for the final decision.¹⁵

The situation is in the European Union are globally affected by the problems that are connected to international business practice. After the short procedure, hopes would be placed in the quick resolution and the new contract form. A following court procedure could be endangering the business because of its length and national diversities. The New York convention from the year 1958 has covered the enforceability of arbitration awards and deals with the reasons for recognition of them.¹⁶

The New York convention was partially a unification of long-time used principles and aspects of international business arbitration, following the international conditions and international practice of arbitration institutions. International organizations supporting international business, and other conventions important for international business arbitration were codified in the New York convention into a broadly accepted frame. Together with the Hague convention on choice of court agreements, as well as the Hague judgments convention, both alternatives have had a sufficient legal frame in the field of international business law.¹⁷ The

¹⁵ CARPANETO, L. International and EU Perspective on Mediation: The 2008/52 Directive on Mediation on Civil and Commercial Matters, in: E-Book „*Mediation in Civil and Criminal Cases to Foster European Wide Settlement of Disouter*“, Capter VIII, p. 4 [online]. Available at: https://mediation.turiba.lv/saturs/iepriekseja_lapa/files/Chapter%208.pdf

¹⁶ PETERS, N. The enforcement of mediation agreements and settlement agreements resulting from mediation, *CMJ*. 2019, No. 1–2, p. 16 [online]. Available at: https://assets.contentstack.io/v3/assets/blt3de4d56151f717f2/blt62397fba71994a5f/5fb7dafc65bdd35303e0453f/CMJ_2542-4602_2019_003_102_005.pdf

¹⁷ CARPANETO, L. International and EU Perspective on Mediation: The 2008/52 Directive on Mediation on Civil and Commercial Matters, in: E-Book „*Mediation in Civil and Criminal Cases to Foster European Wide Settlement of Disouter*“, Capter VIII, p. 6 [online]. Available at: https://mediation.turiba.lv/saturs/iepriekseja_lapa/files/Chapter%208.pdf

Singapore convention is changing the balance between appropriate and alternative international business.

Mediation is an appropriate dispute resolution mechanism. Distinguishing mediation from other forms of out-of-court conflict resolution brings some problems in the definition. As mentioned above ADR, so-called alternative dispute resolution, represents a non-court system of dispute resolution. In most legal systems ADR is presented as an alternative to the court. From analysing the nature of arbitration mini trial, binding advice, the ombudsman procedure, conciliation, facilitation, and negotiation it becomes clear that there is only one real alternative to the court procedure.¹⁸ With its binding decision it is arbitration which poses the only real alternative to the court procedure. As already mentioned, the other methods, where one party is acting as a neutral element with different intensity level should be called appropriate dispute resolution methods. When distinguishing mediation from arbitration, the distinction is generally seen in the decision-making powers of the independent person. Before the state court it is the judge and in the arbitration the arbitrator, who processes unilateral adjudicatory powers, while a mediator does not. The difference is very important, but not as important as the similarities. Various types of dispute resolution are systematically combined in the practice, so the parties sometimes combine mediation and arbitration in the form of „med arb“, so they can adjust the conflict resolution procedure to their needs. This is actually the point where we can start with the multidoor system implementation into the civil procedure rules. If the method of mediation and arbitration can be combined, there is no obstacle for establishing a system where the state court can decide what dispute must be handled in mediation or in arbitration following his nature before it goes to the court. In a lot of legal systems, the mediation, if it is not successful, switches to the court procedure. It is also used and known practice that the parties are switching the mediation to arbitration if the mediation is not successful, and a binding decision is needed. What is the relationship between mediation and arbitration? It is symbolical that the relationship between mediation and arbitration mirrors the relationship between mediation and the court proceedings.¹⁹

Mediation is and can be the first step of the structure of the dispute resolution and it has been already analysed that if it is not successful it could be transformed to, or followed by, arbitration. In the relationship of mediation and arbitration the

¹⁸ Concerning the the decision-making powers compare with Venzke, I. Die Schiedsgerichtsbarkeit löst die Rechtfertigungsprobleme internationaler Rechtsprechung nicht, <http://voelkerrechtsblog.org/> and Schwärzler, H. Schiedsgerichtsverfahren und Mediation als Alternativen zur öffentlichen Gerichtsbarkeit. *Liechtenstein-journal*, 4/2011, P. 112

¹⁹ SCHWÄRZLER, H. Schiedsgerichtsverfahren und Mediation als Alternativen zur öffentlichen Gerichtsbarkeit, *Liechtenstein-journal*. 2011, 4, p. 112.

sequence can be agreed between the parties. In the relationship of mediation and court proceedings the situation is more difficult. Framework rules on mediation and arbitration often try to combine these two procedures to get the best of both methods. In some institutional arbitration courts, the rule is that the arbitration fee is reduced if the parties reach a settlement in mediation or if a pre-mediation was not successful. Some jurisdictions in Europe have integrated the mediation methods and techniques in the civil procedure rules.²⁰ Moreover, some jurisdictions have established a mixed form of mediation and arbitration, so that they have developed the dispute resolution procedures not in the sense of a combination of both mechanisms but in using the basics of both methods.²¹ So it is possible for the intermediary to render a decision if the parties to the dispute failed to reach a settlement, the decision in this case will be binding only if the parties conclude a respective settlement agreement. Some voices are stating that it is bringing the balance between arbitration and state courts procedures on one side, and appropriate and amicable dispute resolution methods on the other. Cross-border, international issues are targets of the new Singapore convention. This condition is the most important one for the possibility of establishing acceptance for the idea of recognition and enforcement of mediation results.²²

3. European Union, the Singapore Mediation Convention, and the Mediation directive

In the same way it was possible for the European Union to prepare the harmonization of the mediation legislative in the member states of the European Union. Initially by preparing procedures directly but also by preparing supporting regulation with the direct impact on the appropriate dispute resolution method and incorporating it into the legal systems of the European Union member states. The opinions in European Commission and European Parliament have been not identical. What started with the idea of regulation ended with the project of directive harmonizing international or cross-border mediation.²³

²⁰ DAVIS, L. *EU Foreign Policy, Transitional Justice and Mediation: Principle, Policy and Practice*. New York: Routledge, 2014, p. 28–33.

²¹ LEIPNITZ, D. Mediation im deutschen Arbeitsrecht und deren praktische Bedeutung – unter besonderer Berücksichtigung der US-amerikanischen Anwendung. *HWR Berlin*. Berlin, 2015, s. 31–35.

²² ŽUKAUSKAITĖ, M. Enforcement of Mediated Settlement Agreements. *Teisė*. 2019, vol. 111, pp. 205–217, p. 208 [online]. Available at: <https://www.zurnalai.vu.lt/>

²³ CARPANETO, L. International and EU Perspective on Mediation: The 2008/52 Directive on Mediation on Civil and Commercial Matters, in: E-Book *Mediation in Civil and Criminal Cases*

The EU Directive No 2008/52/EC is very important in the European Union civil procedure. The European Union has noticed the importance of mediation combined with concern about court costs and overcrowding, with the necessary steps to overcome the obstacles in cross-border dispute resolution having influence on existence of the single market. The use of alternatives in civil procedure was voluntary, almost without corresponding legislative. In the year 1999 the approach of ADR methods was followed by a call for support of extra juridical dispute resolution process in the member states. The work on the European Union mediation directive started 1999 and ended in 2008.²⁴

The Mediation directive, in the same way as the Singapore convention, states that it applies only to cross-border disputes, but that nothing should prevent member states from applying the provision of the directive also to their internal mediation process. The directive should secure a better access to justice. The idea was to secure access to exegetical dispute resolution methods.²⁵ The directive should also ensure a balanced relationship between mediation and judicial proceedings. Mediation directive had to be implemented in member states by May 2011. Many member states did not wait until the deadline to implement the directive. In several states, the mediation directive had already been included in domestic law for several years. Especially in those states where ADR has had a long tradition.²⁶

The Singapore convention deals with mediation agreements resulting cross-border commercial disputes, with the same impact as by the mediation directive of the European Union, but it also established a framework for enforcement.²⁷ Enforcement within the signature states is set the same way like the New York convention has handled the awarding of arbitration courts in international business or cross-border business dispute resolutions.²⁸ The Singapore convention is establishing a new paradigm in the field of mediation. The recognition and enforceability of the mediation agreement is something, that was mentioned

to *Foster European Wide Settlement of Disouter*, Capter VIII, p. 1 [online]. Available at: https://mediation.turiba.lv/saturs/iepriekseja_lapa/files/Chapter%208.pdf

²⁴ 1999 European Council of Tampere foreshadowed a significant effort to change its 'laissez-faire' approach, when it called for the creation of alternative extrajudicial dispute resolution procedures by the Member States

²⁵ <https://www.mediationaktuell.de/news/adr-richtlinie-und-odr-verordnung-eu-im-ueberblick>

²⁶ LEUTHEUSSER-SCHNARRENBARGER, S. Die Mediations-Richtlinie und deren Implementierung. *Zeitschrift für Konfliktmanagement*. 2012, vol. 15, no. 3, pp. 72–74 [online]. Available at: <https://www.degruyter.com/document/doi/10.9785/ovs-zkm-2012-72/html>

²⁷ CARPANETO, L. International and EU Perspective on Mediation: The 2008/52 Directive on Mediation on Civil and Commercial Matters, in: E-Book *Mediation in Civil and Criminal Cases to Foster European Wide Settlement of Disouter*. Capter VIII, p. 1–3 [online]. Available at: https://mediation.turiba.lv/saturs/iepriekseja_lapa/files/Chapter%208.pdf

²⁸ ŽUKAUSKAITĖ, M. Enforcement of Mediated Settlement Agreements, *Teisė*, vol. 111, pp. 205–217, p. 209 [online]. Available at: <https://www.zurnalai.vu.lt/>

as possible but not yet established in the European Union to the extent to which the Singapore convention established it.²⁹ The Singapore convention is working with necessary criteria, if fulfilled, the recognition and enforceability would be granted in the state signing the convention.

The nature of the settlement agreement is to be international. Following that at least two or more parties of the mediation agreement must have their places of business in different countries, or that the country with close connection to the performance resulting from the mediation agreement is differing from the place of business of both disputing parties.³⁰ Both criteria are connected to international business nature. The international commercial and cross-border nature is mentioned also in the European directive from the year 2008.³¹

Formal aspects, that are important because of the mediation procedure are the signature by the parties on the agreement that is resulting from mediation. The definition of mediation is explaining another important aspect handling balance between arbitration and mediation. The definition of mediation is describing mediation as: *„a process, irrespective of the expression used or the basis upon which the process was carried out, whereby the parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (the „mediator“) lacking the authority to impose a solution upon the parties to the dispute“*.³² This is another important point of the Singapore mediation convention, following the nature of mediation and not changing the position of the independent person-mediator in this case. Differing from the position of the arbitrator, the mediator has no powers to decide. Differing from the European union mediation directive, the field of application is connected to cross-border business disputes only. If a settlement agreement meets these criteria, each signatory state to the Convention (and its courts) should recognise and enforce the agreement in accordance with its own rules.³³

The national codifications of the member states of the European Union implemented the mediation directive with different intensity and in most of the cases

²⁹ Ibid, pp. 212–214.

³⁰ Ibid, p. 212.

³¹ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, art. 2 [online]. Available at: <https://eur-lex.europa.eu/eli/dir/2008/52/oj>

³² United Nations Commission On International Trade Law, United Nations Convention on International Settlement Agreements Resulting from Mediation [online]. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf, p. 4.

³³ PETERS, N. The enforcement of mediation agreements and settlement agreements resulting from mediation, *CMJ* 2019, No. 1–2, p. 16 [online]. Available at: https://assets.contentstack.io/v3/assets/blt3de4d56151f717f2/blt62397fba71994a5f/5fb7dafc65bdd35303e0453f/CMJ_2542-4602_2019_003_102_005.pdf

without the possibility to have to mediation agreement enforceable. It is still connected to the secondary evaluation, arbitration, court procedure or to a hybrid procedure such as „med arb“, for example.³⁴ After introducing the position of the European Union and participation in the negotiations of the Singapore treaty, it is necessary to mention an interesting part of the European Union mediation directive.

Although the European Union was represented in the negotiations of the Singapore treaty, the acceptance of it, signing and in the end ratification is far-away. The current state is probably connected to the objection that contractual agreements cannot be granted by executorial strength. Also, the aspect of unification in the field of mediation could be a problematic point. European tradition and the principles of the European legal system are probably not ready for the new approach presented by the Singapore convention and the mediators are not qualified in the same way, globally reflected by the legal orders. The problems mentioned as examples are mostly connected to the national legislative aspects. International, cross-border, commercial, free will of the parties and their private autonomy are the most important principles we must focus on.³⁵

In most of the member states of the European Union, after the mediation and signing the mediation agreement, the parties must organize another procedure, if the obligations coming out from the mediation settlement agreement are not fulfilled. They would have to claim for court judgment, or they would have to claim for arbitration awards. For an executorial title the parties must seek notarial help, must ask for court judgments if the mediation was court annexed one. Those are general rules and situations in European Union member states following the principles of national legislative.³⁶

Is this new aspect, brought by the convention, presenting the private settlement agreement of international commercial mediation as an enforceable title against the national acts and European mediation directive? Following the free will of the parties, today they can seek the assistance of a notarial office or use the instruments coming out of national procedural law.³⁷ Under the Singapore convention only a specific category of disputes can be addressed, namely

³⁴ CARPANETO, L. International and EU Perspective on Mediation: The 2008/52 Directive on Mediation on Civil and Commercial Matters, in: E-Book *Mediation in Civil and Criminal Cases to Foster European Wide Settlement of Disouter*. Capter VIII, p. 7, [online]. Available at: https://mediation.turiba.lv/saturs/iepriekseja_lapa/files/Chapter%208.pdf

³⁵ MIMOSO, M. J. The Singapore Convention and the European Reality, 15th Economic, Social, and Environmental Sustainability in the Post Covid-19 World, 2022, Istanbul/Turkiye, p. 183 [online]. Available at: <http://repositorio.uportu.pt:8080/bitstream/11328/4609/1/pp.181.192.pdf>

³⁶ Ibid, p. 185.

³⁷ Compare that with CHUA, E. The future of international mediated settlement agreements: Of conventions, challenges and choices, 2015, *Tan PanOnline: A Chinese-English Journal on*

those having a commercial character, mainly concerning financial problems, particularly in states that would sing the Convention opting for its reservation provision,³⁸ because in this case only the parties can declare their agreement as subject to the Singapore convention, as privileged for recognition and enforceability. Is this not the same as if the parties would decide to use notarial help? Would it be against the principles of the mediation directive from the year 2008? Following the text of the mediation directive, not modified by new European Union's legal instrument, the member states of the union shall ensure that it is possible for the parties of mediation, 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.³⁹

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. The article 6.1 of the mediation directive is presenting with its sentence *the member states of the union shall ensure that it is possible for the parties of mediation, of 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 possibility to think about the Singapore convention as an instrument for ensuring this if the mediation was handling an international business dispute. Imagine that the member states signed and ratified the convention, after that the European Union would present another, or different options because of the new directive for mediation.⁴⁰ This would be also one of the most important aspects worth to be reflected.

It is clear, that we will not face the situation where the globalized system will change drastically. But in international business the instruments, distances, and legal regulations have changed significantly. The planet is smaller, the business conflicts are multinational. In the relations of business-to-business partners the

Negotiation, pp. 6–8. Research Collection School Of Law. Online. Available at: https://ink.library.smu.edu.sg/sol_research/2502

³⁸ CHUA, E. The future of international mediated settlement agreements: Of conventions, challenges and choices, 2015, *Tan PanOnline: A Chinese-English Journal on Negotiation*, pp. 6. Research Collection School Of Law. Online. Available at: https://ink.library.smu.edu.sg/sol_research/2502

³⁹ See to this Rec.point 19, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, art. 2 [online]. Available at: <https://eur-lex.europa.eu/eli/dir/2008/52/oj>

⁴⁰ D'URSO, L. A New European Parliament Mediation Resolution Calls On Member States and the EC to Promote More Use, Alternatives, p. 20, Vol. 36, No. 2 [online]. Available at: https://www.adrcenterfordevelopment.com/wp-content/uploads/2020/04/DUrso-2018-Alternatives_to_the_High_Cost_of_Litigation-1.pdf

free will and the same position of both partners are the most important differences from family disputes, or consumer aspects. International business mediation is a supportive instrument. For a long time, it supports small and medium companies and businessmen.⁴¹ The question not answered yet, is the compatibility of the mediation directive and Singapore treaty in the form of a procedure supporting the mechanisms of out-of-court settlements, by respect of national laws, international conventions, and European Union legal acts.

The basic aspects connected to the international commercial mediation in cross-border relations have been already mentioned. Following not only the directive text, but also the Recital of the mediation directive, it is possible to open a few new views, how to handle the relationship between the convention and the directive. The mediation directive supports the functionality of the internal market of the European Union, harmonizing the mediation procedure regulation is helping and also enabling a better access to justice.⁴² The mediation directive is handling cross-border dispute resolutions, paying special attention to the cross-border disputes in civil in commercial matters where the parties, of which at least one has its seat in a member State other than the Member State of all the other parties on the date on which they decide, by agreement, to have recourse to the mediation or where mediation is court ordered.⁴³

As above-mentioned, the mediation directive is allowing the parties because of their will expression, being in a similar position as before the arbitration court, but only if the member states ensure the procedures such as for example the notarial help or „med-arb“. The recital of the mediation directive is handling the member states position and preventing such possibility only in the situation, where the content of the mediation agreement would be contrary to domestic law, reflecting also private international law.⁴⁴ If there is the possibility, given to the parties that their agreement can be enforceable, could it be granted procedurally because of the Singapore treaty? In general, the mediation directive does not reject that.

Evaluating the Singapore convention and the current state of the national legislative acts handling mediation in European Union, where only some states

⁴¹ CAI, W. Diversity of Mediation and Its Impact on the Singapore Mediation Convention. *Hong Kong Law Journal* 2021, p. 2 [online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3972983

⁴² See to this Rec.point 7, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, art. 2 [online]. Available at: <https://eur-lex.europa.eu/eli/dir/2008/52/oj>

⁴³ Ibid Rec.point 8.

⁴⁴ See to this Rec. point 19, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, art. 2 [online]. Available at: <https://eur-lex.europa.eu/eli/dir/2008/52/oj>

are enabling the direct enforcement, a unified regime granted by Singapore convention would be an interesting solution for the sum of commercial disputes settled in international business mediation.⁴⁵ The above-mentioned Article 6 of the mediation directive, is handling in paragraph 2 the enforceability, be it by a court, competent authority, in the way that 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. Here is the definition of a competent authority, mentioned in the article 6 paragraph two important. Would it include also non-judicial authority, imagine the regime of the Singapore convention applicable after the ratification of the agreement? Would such a situation fulfil the conditions for recognition of a mediation agreement, declared enforceable in one member state also in other member states? Would be such a solution in accordance with national laws and European Union law? The directive is enabling to think about such a solution. mediation settlements could be made enforceable by a new type of order. Article 6 of the Directive requires the explicit consent of all parties for enforceability to be recognised by a court. The enforceability clause would to be drafted in the mediation settlement agreement.

More complicated could be the situation if we would consider the regulation of the Brussels I bis as applicable on mere mediation agreements, leaving the extraction of arbitral decisions from its regulation not reflected. As most of the reflections on the Brussels I bis are stating, the exclusion of arbitral decisions from the applicability of the regulation is not regulated ideally. Disputes connected to the enforceable mediation agreements do not need to be handled now, because the regulation is handling decisions or statements from an authority, deciding disputes excluding the arbitration awards and the mere mediation agreement declared by the parties as enforceable will have another character and not fulfil the conditions of applicability of the regulation. Mediation is accepting and promoting the party autonomy and the self-determination. Analysing the alternative dispute resolution as the arbitration or as judgments and mediation, mediation is supposed to handle its result somewhere between a new contract, and arbitration or judgment on the other side. The self-determination concept as we know it from the contractual procedures, is reflected in mediation more intensively because mediation emphasises the exercise of each mediation party's autonomy during the procedure of building the agreement.⁴⁶

⁴⁵ BRINK, H. *The Singapore Convention on Mediation – Where's Europe?* [online]. Available at: <https://mediate.com/the-singapore-convention-on-mediation-wheres-europe/>

⁴⁶ PETERS, N. The enforcement of mediation agreements and settlement agreements resulting from mediation, *CMJ*. 2019, No. 1–2, p. 17 [online]. Available at: <https://assets.contentstack.io>

The mediation dispute resolution results in a settlement agreement are differing from a simple new contract, also because of the role of the mediator. The mediator is acting in a specific position. He's not acting as a judge or arbitrator, even if he's using some methods used also in arbitration. Assisting, helping go through the impasses, analysing the settlement agreement from the sustainability point of view, all that is describing the special role of the mediator and also the most probable impossibility reaching the dispute agreement without the exact procedural assistance of the mediator.⁴⁷

It is clear, that the mediation settlement agreement has a specific nature. It is also clear that the mediation agreement is not of the same nature as judgments, decisions, or other authentic instruments. Following the European Union directive, the binding effect is not given to the new form of contract.⁴⁸ It is granted after the specific court procedure or because of the supporting role of another competent body. In mediation we missed the inherently coercive character of judgment or international business arbitration awards. Especially in international or cross-border business mediation the character of the mediation settlement agreement represents a special category bound to the self-determination principle. Analysing the mentioned aspects, stating that the mediation agreement is a *sui generis* instrument, differing from a judgment, decision or any other authentic instrument mentioned by the mediation directive, we must focus on the European Union legal instruments handling the enforceability question, before deciding about the appropriateness of the Singapore mediation convention.

The above-mentioned mediation directive is dealing with the enforceability of the mediation settlement agreements in the traditional form, reflecting the European legal tradition and the nature of appropriate dispute resolution methods. Article 6 of the mediation directive is prescribing the obligatory role of the member states of the European Union, where they must ensure, that the written agreements resulting from mediation would be made enforceable under request of the parties. Again, the mediation directive is a harmonization instrument, and creates no unified system of recognition and enforceability for the dispute settlements in mediation.⁴⁹

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⁴⁷ Ibid, p. 13.

⁴⁸ See to this Rec. point 11, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, art. 2 [online]. Available at: <https://eur-lex.europa.eu/eli/dir/2008/52/oj>

⁴⁹ See to this Art. 6, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, art. 2 [online]. Available at: <https://eur-lex.europa.eu/eli/dir/2008/52/oj>

The most important difference between the Singapore convention and the mediation directive presents the article 6, under which the mediation settlement agreements may be made enforceable by a court or other competent authority in a judgment or decision, or in an authentic instrument. Understanding the sentence, putting it together with the nature of the mediation settlement agreement mentioned above, the mediation directive is enabling the enforceability based on an incorporation of the results of the mediation and/or on secondary authentication of a special authority.⁵⁰

The harmonization procedure also follows the unification and European Union and the field of European justice area. The regime of the Brussels convention followed by the Brussels regulations, namely the Brussels I bis and the Brussels II bis, also reflects the European enforcement order regulations, the mediation settlement agreement,⁵¹ to be recognized and enforceable following the Brussels regime and regulation, in general necessarily pairs the court judgments and decisions, enforceable documents, court settlements and another authentic instruments. Let's say it clearly. The important point is the recognition and enforcement of the settlement agreement resulting from mediation without the necessary secondary traditional civil procedure or notarial instruments assistance. Following the mediation directive some of the member states of the European Union have established national legal regulation that is dealing settlement agreements resulting from mediation in traditional way.⁵² Even if there are some jurisdictions where the settlement agreements resulting from mediation could be treated as arbitral awards and are enforceable as such, the situation is not unified in the European Union member states yet.⁵³ Resulting from all the aspects mentioned above, with the help of a notarial deed or other authentic agreement, enforceable in the EU state of origin, the settlement agreement resulting from mediation can be enforced in other member states of the European Union following the article 58 of the Brussels I bis regulation.⁵⁴

⁵⁰ Ibid.

⁵¹ PETERS, N. The enforcement of mediation agreements and settlement agreements resulting from mediation, *CMJ*. 2019, No. 1–2, p. 17 [online]. Available at: https://assets.contentstack.io/v3/assets/blt3de4d56151f717f2/blt62397fba71994a5f/5fb7dafc65bdd35303e0453f/CMJ_2542-4602_2019_003_102_005.pdf

⁵² HOLÁ, L., MALACKA, M. *Mediace a reflexe jejích aktuálních trendů*. Praha: Leges, 2014, p. 33.

⁵³ ŽUKAUSKAITĖ, M. Enforcement of Mediated Settlement Agreements. *Teisė*, vol. 111, pp. 205–217, p. 207, [online]. Available at: <https://www.zurnalai.vu.lt/>

⁵⁴ PETERS, N. The enforcement of mediation agreements and settlement agreements resulting from mediation, *CMJ*. 2019, No. 1–2, p. 17 [online]. Available at: https://assets.contentstack.io/v3/assets/blt3de4d56151f717f2/blt62397fba71994a5f/5fb7dafc65bdd35303e0453f/CMJ_2542-4602_2019_003_102_005.pdf

Under the article 59 of the same regulation, settlements resulting from mediation recorded in a court record or judgment, enforceable in the European member State can be also enforced directly.⁵⁵ About the false wording of the term directly – depending on the nature of the judgments, decisions, awards, are the „directly“ organized ways non direct in the end. It is dependent on a special or specific performance. This performance or proceedings relate to more time and financial resources. Also, a possible secondary decision of a party to seek a binding dispute resolution after the mediation settlement agreement was fulfilled, because of the necessity to go through another proceedings is undermining the purpose of the mediation. Analysing the Hague convention on choice of court agreements⁵⁶ and its article 12 and the convention of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters⁵⁷ and its article 11, the same situation is granted. Only settlements that a court of a contracting State has approved or concluded before the court are enforceable if they are enforceable in the same manner as a judgment in the state of origin. The New York convention handling the arbitral awards from cross-border disputes is silent on the question of the settlement agreements resulting from the mediation.⁵⁸

The Singapore convention could be accepted as an instrument for the problems mentioned in the study and its economic relevance and as support of mediation. All that points are not only important, but also interesting because of the following aspects.

The article 3 of the convention is dealing to terms of recognition and enforcement. The terms recognition and enforcement of the settlement agreement were confiscated with the text of the New York convention, dealing with aspects of recognition and enforcement of arbitral awards. The Singapore convention reflects in this article the difference between the civil law system, the common law system and the different understanding of recognition and enforcement.⁵⁹ Because

⁵⁵ Ibid, p. 17.

⁵⁶ See to this art. 12, Convention of 30 June 2005 on Choice of Court Agreements, [online]. Available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> and also Proposal for a COUNCIL DECISION on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements [online]. Available at: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52014PC0046>

⁵⁷ Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, text [online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A22022A0714%2801%29>

⁵⁸ See closer to this Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the „New York Convention“), [online]. Available at: <https://www.newyorkconvention.org/new+york+convention+texts>

⁵⁹ SILVESTRI, E. The Singapore convention on mediated settlement agreements: A new string to the bow of international mediation? *Revista Eletrônica de Direito Processual – REDP*. 2019,

of the compromise solution, article 3 is handling the question of enforcement in the 3.1. and the term of recognition is described as a procedure but not used in article 3. The text of the convention is not working with the word recognition. Article 3 is describing the procedure without using the word recognition but tries to establish a functional definition acceptable for both systems of law. So, the key aspects of the procedure dealing with recognition and defensive parts by initiating claims are described but not connected to the word recognition. That's why the following articles of the convention are using the word „relief“ when referring to the enforcement procedure. Article three became important because of the originations, that are possible for the states that have ratified the convention. The states are obliged to enforce the settlement agreement following the terms stated by the convention.⁶⁰

The Singapore convention is working with the reliance on settlement agreements. Following the text of the agreement and article 4, the parties must prove, that the presented settlement is resulting from mediation. This concept is dealing with the nature of the instrument as the Singapore convention is. This is preventing the non-legitimate use of the convention, also preventing money laundering or other illegal behaviour. The mediation procedure is iteratively free and without this construction, it would be possible to ask for enforcement of an agreement outstanding from simple agreements.⁶¹

The Singapore convention follows the standard requirements for mediation agreements. The mediation agreement is not only to be signed by the parties but also proved with evidence that it is resulting from mediation. This evidence

vol. 20, no. 2, *Periódico Quadrimestral da Pós-Graduação Stricto Sensu em Direito Processual da UERJ*, p. 195 [online]. Available at: www.redp.uerj.br

⁶⁰ Article 3. SMC General principles.

1. Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.
2. If a dispute arises concerning a matter that a party claim was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down.

ABRAMSON, H. *Singapore Mediation Convention Reference Book* (2019). Scholarly Works. 653, p. 185–189, [online] at: <https://digitalcommons.tourolaw.edu/scholarlyworks/653>

⁶¹ Article 4. Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought:
 - (a) The settlement agreement signed by the parties.
 - (b) Evidence that the settlement agreement resulted from mediation, such as:
 - (i) The mediator's signature on the settlement agreement.
 - (ii) A document signed by the mediator indicating that the mediation was carried out....

ABRAMSON, H. *Singapore Mediation Convention Reference Book 2019*. Scholarly Works. 653, p. 1162 [online]. Available at: <https://digitalcommons.tourolaw.edu/scholarlyworks/653>

is presented by the mediator's signature, it could be a mediator's signature on a separate document, it could be also at the stamp from the mediation institution or other evidence from the competent authority. The settlement agreement must comply with article 4 and must be in written form. The term „written“ is to be understood as recorded in any form. So, the parties can use electronic devices, emails, and other evidence that could be used later. This is also to be reflected in the relation to the signatures.⁶²

Article 5 of the convention is dealing with grounds for refusing to grant *relief*. It is important to note, that article 5 is connected to article 8 and the opt-in system of the convention. Generally, we can say that the permissive character of article 5 is strongly dependent on the will of the states that can use article 8 and are used as reasons for refusing. From another point of view, there are no other reasons for refusing the „recognition-relief“ than those listed in article 5.⁶³

The Singapore convention follows different categories or grounds. It is the incapacity of a party or invalidity of the settlement agreement; the Singapore convention is deferring between the validity of the settlement and the grounds depending on the content of the settlement. Refusing to grant relief is possible in the situation when the settlement was not final, is not binding the obligations arising out of the settlement agreement have been complied with or are unclear, the terms have been modified after the settlement was reached, or the granting relief would be at odds with the terms of the settlement.⁶⁴

Outstanding of the aspects connected to the parties and the formal and material conditions of the settlement agreement are the reasons in article 5, that are concerning the behaviour of the mediator. If the mediator was responsible for a serious breach of mediation standards, and this behaviour was the main reason

⁶² 2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator is met in relation to an electronic communication if:

- (a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and
- (b) The method used is either:
 - (i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
 - (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

ABRAMSON, H. *Singapore Mediation Convention Reference Book 2019*. Scholarly Works. 653, p. 1162 [online]. Available at: <https://digitalcommons.tourolaw.edu/scholarlyworks/653>

⁶³ ABRAMSON, H. *Singapore Mediation Convention Reference Book 2019*. Scholarly Works. 653, p. 1162 [online]. Available at: <https://digitalcommons.tourolaw.edu/scholarlyworks/653>

⁶⁴ SILVESTRI, E. The Singapore convention on mediated settlement agreements: A new string to the bow of international mediation? *Revista Eletrônica de Direito Processual – REDP*. 2019, vol. 20, no. 2, *Periódico Quadrimestral da Pós-Graduação Stricto Sensu em Direito Processual da UERJ*, p. 190 [online]. Available at: www.redp.uerj.br

harming the settlement of the dispute and the party can prove so, the relief could be denied. Behind the serious breach are in most cases the breach of impartiality and Independence but article 5 is stating another reason for the rejection of the relief. Additionally, connected with private international law principles, the competent authorities must follow the public policy and protect it, so a relief, if it would be contrary to the public order of the obliged party, it would be rejected, and the lack of possibility to mediate the dispute on the law of obliged party is also a reason for rejection.⁶⁵

Article 6 deals with the discretion of the „competent authority“ of the convention State where enforcement is sought to adjourn the proceeding and order security if the judgment of another court or an arbitral award would affect its decision to grant or deny relief.⁶⁶

The relationship between articles 5 and 8 is important. The Singapore convention is working with opt-in and opt-out for two types of subjects. Article 8 authorizes the state as a party to the convention to opt-out of the outcome of the application of the Singapore convention. The states can declare that they are opting out on the grounds of refusing. It is also an option for the parties of the mediation agreement following their autonomy of will and excluding the convention. There is also a possibility for the parties, there where the states have opted out for opt in by private agreement in the form of mediation agreement or in the clause in the settlement that was mediated.⁶⁷

The Brussels convention system and the regulation Brussels I bis was mentioned above. Because of the possible overlap of the Singapore convention and the Brussels regulations it is necessary to state, that the Singapore mediation convention is handling the direct enforceability of the mediation settlement agreements and considering the article 7 of the mediation convention. It further considers the application of more favourable laws or treaties, the direct enforceability of notarial deeds, and all other non-separated forms of the reflection of arbitration settlement agreements will stay under article 58 of the Brussels I bis regulation. The reflection of the autonomy of the will of the parties is important

⁶⁵ ABRAMSON, H. *Singapore Mediation Convention Reference Book 2019*. Scholarly Works. 653, p. 1162 [online]. Available at: <https://digitalcommons.tourolaw.edu/scholarlyworks/653>

⁶⁶ Article 6. 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 4, the competent authority of the Party to the Convention 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.

⁶⁷ SILVESTRI, E. The Singapore convention on mediated settlement agreements: A new string to the bow of international mediation? *Revista Eletrônica de Direito Processual – REDP*. 2019, vol. 20, no. 2, *Periódico Quadrimestral da Pós-Graduação Stricto Sensu em Direito Processual da UERJ* p. 190 [online]. Available at: www.redp.uerj.br

also for the aspect, that the contracting states may declare, that the Singapore Convention on Mediation shall apply only to the extent that the parties to the settlement agreement have agreed to the application of the Singapore Convention on Mediation.

4. Conclusions

Dealing also with advantages of the economic aspects, legal unification, and harmonization in a global point of view, also influencing the regional integration platform of the European Union, the Singapore convention on mediation is an important convention and answer for the question of the enforceability of international commercial settlement agreements resulting from mediation. It is not only important because of the reflections on the New York convention, which was not only a successful instrument for the arbitral awards, but also because of its role in reducing the unclear points and aspects caused by the harmonization procedures and differences in the member states of the European Union, that would arise if it would be globally accepted in the same way as the New York convention.

Let's discuss the importance of the Singapore convention and its possible acceptance because of the needs of the platform of international business mediation. The cross-border and business mediation aspects and the relations between entrepreneurs, supported by the convention, might be subject to the future regime accepted by the European Union member states. A longer post discussion could be held after on the reform of the European mediation directive, because of the mediation procedure connected to family, administrative or school mediation disputes.

For international business, for the aspects of the correspondent quick and „appropriate – alternative“ dispute resolution, the acceptance of the Singapore convention could be supportive. The connection between the way of harmonization, reflection of national legal systems and acceptance of the Singapore convention in those national legal systems could be an interesting solution for the future.

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