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The Importance of the EU Law and the Law of the Member States in the Field of Out-Of-Court Dispute Resolution

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Summary: The out-of-court dispute resolution is an area of law that is coming into focus from EU law, through international treaties to national laws. In recent decades, this dynamic field of law has begun to establish itself as an important alternative to judicial dispute resolution. This is reflected in the adoption of various legal norms, with the Singapore Convention being one of the most recent significant additions to the sources of law. Out-of-court dispute resolution encompasses a wide variety of dispute resolution methods, with arbitration and mediation being the most important, as these are the only two methods of out-of-court dispute resolution that are regulated by a number of generally binding legal regulations (as well as many others). The multitude and diversity of legal regulation of arbitration and mediation, their interrelationships and mutual influence are the subject of this article..

Keywords: arbitration, mediation, UNCITRAL, ICSID, UNCITRAL Model law, New York Convention, Singapore Convention, Mediation Directive, Arbitration Rules, Mediation Rules, ADR, ODR.

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1. Introduction

In recent decades, the need for a fast, efficient dispute resolution method that suits the needs and interests of the parties has become a fundamental driving force for the development of out-of-court dispute resolution, i.e. for the resolution of disputes outside the traditional state court system. However, the search for new alternatives and methods of resolving disputes is not a new concept.

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Especially when the state judiciary is unable to fulfill its role properly and in a timely manner, and particularly concerning interests of the parties,[1] out-of-court ways to enforce the right are sought all the more diligently. Efforts to find a more efficient, effective and easier way outside the system of state courts are generally understood as a fundamental criterion for the historical emergence and development of the system of out-of-court dispute resolution.[2]

The current growing sensitivity to justice, or rather to subjectively perceived justice,[3] has naturally resulted in an increase in various types of disputes which, if not resolved through other means, will ultimately end up in state court. Disputes and the need for their resolution and decisions have become a very common part of our lives, as evidenced by the (still) significant number of disputes adjudicated before the state courts.[4] However, out-of-court dispute resolution could be one of the options to prevent the high burden on the courts.[5]

The term out-of-court dispute resolution is deliberately chosen here as a general term, for which the term Alternative Dispute Resolution (ADR) is commonly used in the legal environment. However, the definition of ADR is not uniform and the inclusion or exclusion of individual dispute resolution methods within or outside ADR is viewed differently.[6] In this regard, the term out-of-court dispute resolution, as opposed to the dispute resolution before state courts, is a superior, more general and entirely appropriate term. In fact, the problematic incorporation

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1 MUSTILL, M. J. Arbitration: History and Background. *Journal of International Arbitration*. 1989, Volume 6, Issue 2, p. 55.

2 Ibid, p. 43.

3 HENKE, W. *Recht und Staat: Grundlagen der Jurisprudenz*. Tübingen: Mohr Siebeck, 1988, p. 218.

4 On the other hand, in some countries it appears that trust in the judiciary is not very high, and the desire to bring disputes to the state court is continuously and significantly decreasing. One example is, perhaps surprisingly, Germany; cf. SCHMIDT, F, H., LAPP, T., MAY, A. *Mediation in der Praxis des Anwalts.* 2nd edition. München: C. H. Beck, 2022, p. 13.

5 People with their own experience have in Germany significantly less confidence in the German judiciary; see Institut für Demoskopie Allensbach: *Roland Rechtsreport 2021*, p. 20; available at: https://www.roland-rechtsschutz.de/media/roland-rechtsschutz/pdf-rr/042-presse-presse mitteilungen/roland-rechtsreport/roland_rechtsreport_2021.pdf (accessed on 30 November 2023).

6 On the relationship between arbitration and ADR, cf. e.g. BLACKABY, N., PARTASIDES, C. et al. *Redfern and Hunter on international arbitration*. 5th edition. New York: Oxford University Press, 2009, p. 44 et seq.; BERGER, K. P. *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration.* 3rd edition. The Hague: Kluwer Law International, 2015, p. 44 et seq.; SCHÜTZE, R. A., THÜMMEL, R. C. *Schiedsgericht und Schiedsverfahren.* 7th edition. München: C. H. Beck, 2021, p. 6 ff.; MENKEL-MEADOW, C. *Mediation, Arbitration, and Alternative Dispute Resolution (ADR)*. In: WRIGHT, J. D. (ed.). *International Encyclopedia of the Social & Behavioral Sciences.* 2nd edition. Amsterdam: Elsevier, 2015, pp. 70–74.

into the ADR system primarily concerns arbitration proceedings, which are also discussed in the context of the chosen topic in this article.[7]

Arbitration, together with mediation, are indeed the most significant and well-known methods of out-of-court dispute resolution, and in the case of mediation it is also increasingly used.[8] The reason may also be the fact that these are the only out-of-court dispute resolution methods that are regulated by a number of generally binding – but also generally non-binding – legal regulations and norms. In particular, mediation has been at the center of interest of various legislators in recent years.[9] The diversity and complexity of the legal regulation of out-of-court dispute resolution, or the two most significant methods – arbitration and mediation – which are sometimes not easily penetrable,[10] are the subject of this article.

2. Arbitration and mediation as central methods of out-of-court dispute resolution

„Arbitration is now the principal method of resolving international disputes involving states, individuals, and corporations“,[11] „Arbitration is power“,[12] „[Es] gibt heute kaum noch Vertragsbeziehungen in der Wirtschaft, die nicht eine Schiedsvereinbarung enthalten…“[13] There are numerous similar examples highlighting the importance and significance of arbitration, its impact and leading role in resolving disputes in commercial relations.[14]

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[7] Arbitration, as an equivalent option for the protection of rights and interests to proceedings before state courts, is in this respect considered one, and according to some also the only one of the so-called alternative dispute resolution methods. At the same time, however, arbitration can also be defined as a method of out-of-court dispute resolution that stands outside the scope of alternative dispute resolution. See also footnote 6.

[8] SCHMIDT/LAPP/MAY: *Mediation…,* p. 14; LACHMANN, J. P. *Handbuch für die Schiedsgerichtspraxis*. 3rd edition. Köln: Verlag Dr. Otto Schmidt, 2008, p. 12 et seq.; RISSE, J. *Wirtschaftsmediation*. 2nd edition. München: C. H. Beck, 2022, p. 1 et seq.; ELSTERMANN, P. *Internationale handelsrechtliche Mediation. Streitbeilegungsalternative mit schleichender Entwicklung zum Schiedsverfahren 2.0?* Baden-Baden: Nomos, 2023, p. 24 et seq.

[9] See e.g. SCHMIDT/LAPP/MAY: *Mediation in der Praxis…,* p. 11.

[10] BRÖDERMANN, E., ROSENGARTEN, J. *Internationales Privat- und Zivilverfahrensrecht*. 8th edition. München: Vahlen, 2019, p. 214.

[11] BLACKABY/PARTASIDES: *Redfern and Hunter on international arbitration…,* p. 1.

[12] Title of article by KRONSTEIN, H. Arbitration is power. *New York University Law Review*. 1963, Vol. 38, Issue 4, pp. 661–700.

[13] LIONNET, K. Rechtspolitische Bedeutung der Schiedsgerichtsbarkeit. In: BERGER, K. P. et al. (eds.). *Festschrift für Otto Sandrock zum 70. Geburtstag*. Heidelberg: Verlag Recht und Wirtschaft, 2000, p. 603.

[14] For all of them, for example BORN, G. B. *International Commercial Arbitration.* 2nd edition. Alphen aan den Rijn: Kluwer Law International, 2014, p. 1: *„International arbitration warrants*

Arbitration is the most commonly considered method of dispute resolution in international commercial relations, and it is assumed that an arbitration agreement is currently included in the vast majority of all contracts concluded in international trade. In these disputes arbitration has almost completely replaced the state courts proceedings.[15] However, this does not mean that all disputes for which the parties have concluded an arbitration agreement must ultimately end up before an arbitrator. Moreover, statistics (if they are available at all within the arbitration) show that, compared to the number of disputes settled in state courts, arbitration is quantitatively an almost insignificant method of dispute resolution.[16] However, what makes arbitration so significant and important is the average value of a dispute, which ranges in the tens of millions of euros or dollars.[17]

Mediation as one of the basic methods of out-of-court dispute resolution, in which, unlike arbitration, it is not primarily an authoritative decision of a third party – the arbitrator – but a consensual resolution of the dispute through a third party – the mediator –, has come into wider awareness later. In the last twenty years, however, it has become fundamentally established in the legal systems and in the awareness of the professional and lay public.[18] In conjunction with other forms of out-of-court dispute resolution, it has achieved a similar popularity in some jurisdictions as in the case of the arbitration. For example, in the USA, considered the cradle of current out-of-court dispute resolution, up to 90% of disputes are settled out of court and the traditional civil procedure has become a real exception.[19] Awareness of mediation is also huge in the general

attention, if for nothing else, because of its historic, contemporary and future practical importance, particularly in business affairs." Similarly BÖCKSTIEGEL, K. H., KRÖLL, S., NACIMIENTO, P. (eds.). *Arbitration in Germany: The Model Law in Practice*. 2nd edition. Alphen aan den Rijn: Kluwer Law International, 2015, p. 5: *„Today, arbitration is widely used in most areas of business and commerce."*

15 SCHROEDER, H. P. *Die lex mercatoria arbitralis: Strukturelle Transnationalität und transnationale Rechtsstrukturen im Recht der internationalen Schiedsgerichtsbarkeit.* München: Sellier European Law Publisher, 2007*,* p. 23; BERGER, K. P. *Internationale Wirtschaftsschiedsgerichtsbarkeit. Verfahrens- und materiellrechtliche Grundprobleme im Spiegel moderner Schiedsgesetze und Schiedspraxis.* Berlin, New York: Walter de Gruyter, 1992, p. 8, footnote 61.

16 Cf. e.g. RYŠAVÝ, L. *Nezávislost a nestrannost rozhodce*. Praha: C. H. Beck, 2018, p. 22 et seq.

17 See WAGNER, G. *Rechtsstandort Deutschland im Wettbewerb. Impulse für Justiz und Schiedsgerichtsbarkeit.* München: C. H. Beck, 2017, p. 117. On this issue, see also LACHMANN: *Handbuch für die Schiedsgerichtspraxis…,* p. 30 et seq.

18 One of the first areas where mediation was used was family mediation; see DUVE, Ch., EIDENMÜLLER, H., HACKE, A., FRIES, M. *Mediation in der Wirtschaft*. Köln: Verlag Dr. Otto Schmidt KG, 2019, p. 86. Currently, another important area of mediation is commercial disputes.

19 See DANIELS, J. Sonstiges Streitschlichtung in den USA: Das Recht verlässt die Richterbank. *Anwaltsblatt*. 2011/6, p. 453; DUVE/EIDENMÜLLER/HACKE/FRIES: *Mediation in der Wirtschaft…,* p. 75.

population; in Germany, for example, out-of-court dispute resolution is widely regarded as a useful tool for resolving disputes.[20] The EU is also responding to this popularity of out-of-court dispute resolution, and the support and development of alternative dispute resolution methods is also one of the objectives of judicial cooperation in civil matters in accordance with Article 81(2)(g) TFEU (see below).

As a result of globalization, particularly business relations are becoming much more international, which brings with it a number of specific challenges. The different cultural, linguistic and, above all, legal origins of the contracting parties, with often different levels of expected subjective behavior, have led to the search for and the creation of new ways of resolving disputes that would be able to adapt to these conditions and differences in an efficient and flexible manner. Arbitration and mediation are the out-of-court dispute resolution methods that best meet these requirements.[21] However, of all the possible ways of settling disputes out of court, arbitration was until recently practically the only truly equivalent alternative to court proceedings.[22] In the future, mediation could be added to it, especially in view of the Convention on International Settlement Agreements resulting from Mediation (see below).

Arbitration and mediation are modern legal institutes, both in the national and – above all – in the international context, that require thorough consideration. Only if we correctly understand their meaning, their advantages and disadvantages, as well as their differences from proceedings before state courts, can we fully and fearlessly use their potential.

3. EU law and out-of-court dispute resolution

The issue of out-of-court dispute resolution has its current anchorage in the EU by way of primary law in Article 81(1)(g) TFEU, which allows for the adoption of measures, i.e. secondary acts, to develop alternative methods of dispute

[20] See Institut für Demoskopie Allensbach: *Roland Rechtsreport 2021*, p. 20 et seq.

[21] Without an arbitration agreement, for example, claims in international trade relations with countries such as the USA, China, etc. would be practically unenforceable; see e.g. BRÖDERMANN/ROSENGARTEN: *Internationales Privat- und Zivilverfahrensrecht…,* p. 211.

[22] See *Deutscher Bundestag*, Gesetzentwurf: Entwurf eines Gesetzes zur Neuregelung des Schiedsverfahrensrechts (Schiedsverfahrens-Neuregelungsgesetz – SchiedsVfG), Drucksache 13/5274, p. 46; available at: http://dipbt.bundestag.de/doc/btd/13/052/1305274.pdf (accessed on 30 November 2023). Explanatory report to Czech Act No. 19/2012 Coll., which amends Act No. 216/1994 Coll., on arbitration and enforcement of arbitration awards and other related laws, point 1.2. LIONNET, K., LIONNET, A. *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit*. 3rd edition. Stuttgart: Richard Boorberg Verlag, 2005, p. 59.

settlement in the framework of judicial cooperation in civil matters.[23] Out-of-court dispute resolution is thus among the areas that are at the forefront of the EU's interest. However, the EU legislator's approach to the different methods of out-of-court dispute resolution varies.

As will be shown, EU law is the only source of law where arbitration is not comprehensively regulated by a separate legal regulation. However, the European Union does not regulate arbitration in a targeted and pragmatic way, as existing regulation at other levels, typically in international treaties, is sufficient.[24]

Since the Brussels Convention,[25] arbitration has been one of the areas expressly excluded from the scope of the relevant legal norms. Thus, it was also excluded from the Brussels I Regulation[26] and is one of the areas expressly excluded from the current Brussels Ibis Regulation,[27] as the central secondary act governing civil and commercial matters.[28] Although there has been extensive discussion about retaining or modifying this exclusion, and the proposal for the reform of the Brussels I Regulation included a point on „Improvement of the interface between the regulation and arbitration",[29] and the Commission's proposed Article 29 addressed certain problematic issues related to the relationship between judicial proceedings and arbitration, these proposals have failed to gain traction. Thus, Article 1(2)(d) of the Brussels Ibis Regulation remained with the statement that the Regulation does not apply to arbitration. Although this decision by the EU legislator seeks to clarify recital 12 of the Regulation,[30] problematic

[23] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016ME/TXT (accessed on 30 November 2023).

[24] Similarly, e.g. HÜßTEGE, R., MANSEL, H. P. *BGB. Rom-Verordnungen zum Internationalen Privatrecht.* Band 6. 3rd edition. Baden-Baden: Nomos, 2019, p. 54. In detail about the position of arbitration under EU law, for example EICHSTÄDT, J. O. *Der schiedsrechtliche Acquis communautaire: Gleichzeitig ein Beitrag zur Frage von Maßnahmen der Europäischen Union zur Förderung der Schiedsgerichtsbarkeit.* Jena: Jenaer Wissenschaftliche Verlagsgesellschaft, 2013, p. 68, 99.

[25] Article 1(2)(d) of the Brussels Convention, OJ L 299, 31.12.1972, p. 32–42.

[26] Article 1(2)(d) of the Brussels I Regulation, OJ L 351, 20.12.2012, p. 1–32.

[27] *Official Journal of European Commitie*, L 351, 20.12.2012, p. 1–32.

[28] Cf. e.g. BAUMANN, A. *Schiedsgerichtsbarkeit und EuGVVO: Löst die Novelle die problematischen Abgrenzungsfragen?* In: *Rechtsdurchsetzung: Rechtsverwirklichung durch materielles Recht und Verfahrensrecht: Festschrift für Hans-Jürgen Ahrens zum 70. Geburtstag*, Köln: Carl Heymanns Verlag, 2016, p. 467 et seq.

[29] See COM(2010) 748 final, p. 9, point 3.1.4.

[30] This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law. | A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void,

aspects remain, and the debate continues.[31] For example, the incompatibility of the jurisdiction system with arbitration (arbitral tribunals)[32] and „general satisfaction with the operation of the 1958 New York Convention which should not be undermined by any Union action on the matter"[33] are often cited as reasons for excluding arbitration from the Brussels Ibis Regulation. The provisions of the New York Convention remain unaffected in accordance with Article 73(1) of the Brussels Ibis Regulation. However, by deciding not to intervene directly in the issue of arbitration, the EU states have enabled the continued application of the New York Convention, which is applicable throughout the EU, and through its Article VII(1) other relevant legal instruments (see below).

On the other hand, a distinction must be made on this issue as to whether it is an arbitration as such, i.e. a separate area of law to which the exclusion from the Regulation applies, or a proceeding in which it is not an arbitration as such and an exception from the scope of the regulation does not apply.[34] Similarly in the case of determining the applicable law under EU conflict of laws rules; arbitration agreements and choice of court agreements are also exempted from the Rome

inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question. | On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation. | This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

31 See e.g. DICKLER, J. F. Schiedsgerichtsbarkeit und Reform der EuGVVO. Standort Europa zwischen Stagnation und Fortschritt. Tübingen: Mohr Siebeck, 2015; GEIMER, R. Die Reichweite der Bereichsausnahme zu Gunsten der Schiedsgerichtsbarkeit in Art. 1 Abs. 2 lit. d EuGVVO n. F. In: Rechtsdurchsetzung: Rechtsverwirklichung durch materielles Recht und Verfahrensrecht: Festschrift für Hans-Jürgen Ahrens zum 70. Geburtstag. Köln: Carl Heymanns Verlag, 2016, p. 501 et seq.

32 See JUNKER, A. *Internationales Zivilprozessrecht.* 6th edition. München: C. H. Beck, 2023, p. 53.

33 COM(2010) 748 final, p. 5.

34 Cf. e.g. Judgment of the CJEU of 17 November 1998, C-391/95; recital 12(3) of the Brussels Ibis Regulation.

I Regulation,[35] which determines the law applicable to contractual obligations. However, it can be inferred from the wording of this provision that other contracts within the framework of arbitration are covered by this regulation.[36]

In the context of out-of-court dispute resolution, the EU actively focuses its legal acts primarily on mediation or consumer protection within the out-of-court dispute resolution (in this case, both mediation and arbitration).[37] In 2002, the EU adopted the Green Paper on alternative dispute resolution in civil and commercial law.[38] Based on this, the Proposal for a directive on certain aspects of mediation in civil and commercial matters was created in 2004.[39] In the same year, the European Code of Conduct for Mediators was developed by a group of stakeholders with the assistance of the European Commission, setting out a set of principles to which individual mediators can voluntarily decide to commit. After lengthy negotiations, 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 (the Mediation Directive)[40] was finally adopted in 2008.

Thus, a common standard has been established among the Member States for certain areas of mediation within the EU; however, the importance of national law of individual Member States remains absolutely essential in the field of mediation, especially because the Directive regulates mediation only in cross-border relations.[41] Nonetheless, the Mediation Directive is, in generally considered a significant step, as it has provided a major impetus for the legal regulation of mediation in some EU Member States.[42] However, Member States have not limited their national mediation laws to mediation in cross-border relationships, but have extended it to purely domestic relationships. In doing so, however, they have contributed, in line with the Directive, to increasing the attractiveness of out-of-court procedures and to the broader use of mediation for the settlement of disputes in civil and commercial matters aiming to simplify and improve access

[35] See Article 1(2)(e) of the Rome I Regulation, *Official Journal of European Commitie*, L 177, 04.07.2008, p. 6–16.

[36] For example, on the contract between the arbitrator and the parties to the dispute, the so-called *receptum arbitrii*; cf. WIECZOREK, B., SCHÜTZE, R. A. *Zivilprozessordnung und Nebengesetze. Elfter Band. §§ 916–1066*. 4th edition. Berlin/Boston: Walter de Gruyter, 2014, p. 447.

[37] Cf. e.g. Article 2(4) of the Directive 2013/11/EU. For more details see EICHSTÄDT: *Der schiedsrechtliche Acquis communautaire…,* p. 56 et seq.

[38] COM(2002) 196 final.

[39] COM(2004) 718 final.

[40] *Official Journal of European Commitie*, L 136, 24.5.2008, p. 3–8.

[41] Article 1(2) of the Mediation Directive.

[42] States were required to transform the Directive by 21 May 2011.

to justice.[43] The approach of each EU Member State to the implementation of the Mediation Directive varied legislatively only in terms of whether member state had already regulated mediation in national law or not. Member States that had to create completely new legislation include, for example, Germany[44] or the Czech Republic[45]; countries that already had mediation regulated include, for example, Slovakia[46] or Austria[47].

With regard to the increasing number of contracts concluded between consumers and traders, the EU has adopted Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)[48] and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)[49]. The aim of the adoption of both instruments is to ensure that consumers also have access to out-of-court methods of resolving domestic or cross-border disputes arising in connection with sales or service contracts concluded in an online or offline environment.[50]

43 See recital 5 et seq. of the Mediation Directive.

44 Mediationsgesetz vom 21. Juli 2012 (BGBl. I S. 1577), das durch Artikel 135 der Verordnung vom 31. August 2015 (BGBl. I S. 1474) geändert worden ist.

45 Czech Act No. 202/2012 Coll., on Mediation.

46 Slovak Act No. 420/2004 Coll., on Mediation.

47 Bundesgesetz über Mediation in Zivilrechtssachen, BGBl. I Nr. 29/2003.

48 OJ L 165, 18.06.2013, p. 63–79. The Directive responds to some extent to the unsatisfactory situation prevailing even after the adoption of the Commission Recommendations 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes and 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes.

49 OJ L 165, 18.06.2013, p. 1–12. In accordance with this Regulation [Article 2(1)], an online platform has been created: https://ec.europa.eu/consumers/odr.

50 See recital 4 et seq. of the Directive on consumer ADR; recital 4 ff of the Regulation on consumer ODR. Cf. also Report on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes of 25 September 2019; COM(2019) 425 final.

4. International treaties in the field of arbitration and mediation

The issue of out-of-court dispute resolution is also addressed in a numerous international treaties, some of which are absolutely crucial for the respective area. Particularly important international treaties can substantially contribute to the popularity of out-of-court dispute resolution (see below). International treaties also significantly influence the legislation of the EU and individual member states.

4.1. New York Convention

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)[51] is one of the most important multilateral international treaties in general and, given its global reach and impact, one of the most important sources of arbitration ever – if not the most important. Although the substantive scope of the New York Convention is primarily focused on the issue of recognition and enforcement of foreign arbitral awards, the importance and impact of this exceptional and unique legal document is much greater, and affects (albeit indirectly) issues beyond the recognition and enforcement of arbitral awards. The New York Convention, to which 172 states have acceded,[52] can be described without exaggeration as one of the most successful international treaties with a global scope, thanks to which arbitration enjoys such great popularity in the international context.

The New York Convention was adopted at the United Nations Conference on International Commercial Arbitration, held from 20 May to 10 June 1958 in New York. In addition to the intergovernmental[53] and non-governmental organizations

[51] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958, entered into force on 7 June 1959.

[52] See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=_en (accessed on 30 November 2023).

[53] E.g. Hague Conference on Private International Law (HCCH), see UNITED NATIONS, Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations, VOL. 330/1959, p. 6; available at: https://treaties.un.org/doc/Publication/UNTS/Volume%20330/v330.pdf (accessed on 30 November 2023). The EU has also become a member of the HCCH. The HCCH has currently 91 Members: 90 States (including all current EU member states) and 1 Regional Economic Integration Organisation, i.e. EU. See https://www.hcch.net/en/instruments/conventions/status-table/?cid=29 (accessed on 30 November 2023). The European Community became a Member of the Hague Conference on 3 April 2007; see also Council decision of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law (2006/719/EC). With the entry into force of the Treaty of Lisbon on 1 December 2009, the European Union replaces and succeeds the European Community as from that date.

and governments represented by observers, 45 governments were represented, including representatives of twelve current EU Member States: Austria, Belgium, Bulgaria, the former Czechoslovakia – i.e. the current successor states Czech Republic and Slovakia –, Finland, France, Germany, Italy, the Netherlands, Poland and Sweden.[54] Currently, all EU Member States are contracting states, with Malta being the last Member State to accede to the New York Convention in 2000.[55]

In accordance with Article I(3) of the New York Convention states had the option to make a reservation to apply the New York Convention only between contracting states or only to commercial disputes. In view of the fact that within the EU the New York Convention applies in all Member States, the territorial reservation – made for example by Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic and Greece – plays no role. In this context, limiting the application of the New York Convention to commercial matters may have more practical significance. Such a reservation has been made within the EU by Croatia, Cyprus, Denmark, Greece, Hungary, Poland and Romania.[56]

With regard to the investigated issue of sources of law in out-of-court dispute resolution, or the importance of EU law and EU Member State law in this area, it is necessary to emphasize in particular the so-called "more-favourable-right".[57,58] Based on the principle regulated in Article VII(1) of the New York Convention,[59] the application of other bilateral or multilateral international treaties, or national law, is allowed if it is more favourable for the given situation.[60] As mentioned above, this does not necessarily concern only the question of the recognition and enforcement of a foreign arbitral award, since that provision, like the entire New York Convention, also applies to other areas, such as the objection of the lack of jurisdiction of the state courts, the form or validity of the arbitration agreement,

[54] See UNITED NATIONS, Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations, VOL. 330/1959, p. 4; available at: https://treaties.un.org/doc/Publication/UNTS/Volume%20330/v330.pdf (accessed on 30 November 2023).

[55] See footnote 52.

[56] Ibid.

[57] It is also possible to encounter the term „most-favourable-right-provision"; see BINDER, Peter. *International Commercial Arbitration and Mediation in Uncitral Model Law Jurisdictions.* 4th edition. Alphen aan den Rijn: Kluwer Law International, 2019, p. 104, 627.

[58] See decision of the Czech Supreme Court (Nejvyšší soud) of 16 August 2017, Ref. No. 20 Cdo 5882/2016.

[59] Article VII(1) of the New York Convention: The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

[60] More favourable, of course, in relation to the party seeking the recognition of the award, and not to the party wishing to oppose the award, as the aim is to simplify the movement of arbitration awards.

etc.[61] In the case of recognition and enforcement of a foreign arbitral award, since this is the primary concern of the New York Convention, even an arbitral award which does not comply with the conditions of the New York Convention will be recognized, if he meets the more lenient conditions laid down in another legal instrument, such as another international treaty or national law (Article VII(1) of the New York Convention).

However, only one legal instrument, i.e. either an international treaty or a law, can be applied and it is not possible to combine the provisions of several of them. Thus, either the New York Convention or another international treaty or national regulation is applied.[62] However, even taking into account the most-favourable-right, it is not possible to apply those treaties whose application is expressly excluded by the international treaty. An example of such a provision is Article VII(2) of the New York Convention, under which the 1923 Geneva Protocol on Judgment Clauses and the 1927 Geneva Convention on the Enforceability of Foreign Arbitral Awards ceased to apply between the Parties to the New York Convention.[63] Therefore, even if these treaties were more favourable to the party seeking recognition of the arbitral award in a particular case, they cannot be applied between the Parties to the New York Convention.

4.2. European Convention on International Commercial Arbitration

In order to facilitate trade, or to resolve disputes in trade relations between the political East and West, parallel to the negotiations on the New York Convention, negotiations on the European Convention on International Commercial Arbitration (the European Convention) were conducted, which was finally after lengthy

[61] See e.g. decision of the German Federal Court of Justice (Bundesgerichtshof) of 21 September 2005, Ref. No. III ZB 18/05; Judgment of the German Federal Court of Justice (Bundesgerichtshof) of 8 June 2010, Ref. No. XI ZR 349/08; Judgment of the German Federal Court of Justice (Bundesgerichtshof) of 25 January 2011, Ref. No. XI ZR 350/08.

[62] Similarly ADOLPHSEN, J. In: KRÜGER, W., RAUSCHER, T. (eds.). *Münchener Kommentar zur Zivilprozessordnung*. Band 3. Sections 1025–1109. München: C. H. Beck, 2013, p. 565.

[63] These are one the first international treaties regulating certain aspects of arbitration on a wider territorial scale, which, however, would not stand up to much today in view of the developments that arbitration has undergone in the meantime. Nevertheless, there are still countries where their application comes into consideration. However, these are only a few states, such as Anguilla or the Bahamas, which play an absolutely insignificant role in the arbitration. See e.g. SCHÜTZE/THÜMMEL: *Schiedsgericht und Schiedsverfahren…,* p. 12.

negotiations signed in Geneva on 21 April 1961.[64] The change in the political climate did not affect the validity and applicability of this Convention in any way, and in accordance with Article I(1)(a) the European Convention applies when the parties had their habitual place of residence or their seat in different Contracting States when the arbitration agreement was concluded.

Compared to the New York Convention, however, the European Convention has much less practical (and unifying) impact not only within the European Union. Not all Member States are parties, although most of them have ratified the Convention. At present, the European Convention has 31 contracting parties, of which 17 are EU Member States: Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, France, Germany, Hungary, Italy, Latvia, Luxembourg, Poland, Romania, Slovakia, Slovenia and Spain.[65]

The European Convention allows, in accordance with its Article X(7), the application of the New York Convention and, in conjunction with Article VII(1) of the New York Convention, the application of the most-favourable-right must also be allowed within the framework of the European Convention.[66]

In the context of the European Convention, it is also necessary to mention the (Paris) Agreement relating to Application of the European Convention on International Commercial Arbitration of 17 December 1962, which, in accordance with Article 2(1) of this Agreement, is open for signature only by the member States of the Council of Europe. The purpose of this Agreement is to simplify certain problematic aspects arising from the (political/bipolar) European Convention and takes precedence over the European Convention on certain issues (Article 1 of this Agreement). The contracting parties are 8 countries (Austria, Belgium, Denmark, France, Germany, Italy, Luxembourg and one non-member but candidate EU state – Moldova).[67]

4.3. Singapore Convention

The difficulty of enforcing agreements reached in mediation was considered one of the important reasons hindering the wider use of mediation.[68] UNCITRAL

[64] The Convention was prepared and opened for signature on 21 April 1961 by the Special Meeting held at the European Office of the United Nations in Geneva from 10 to 21 April 1961.

[65] See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en (accessed on 30 November 2023).

[66] Decision of the German Provincial Court of Appeal in Munich (OLG München) of 23 November 2009, Ref. No. 34 Sch 13/09.

[67] See https://www.coe.int/en/web/conventions/full-list//?module=signatures-by-treaty&treatynum=042 (accessed on 30 November 2023).

[68] Proposal by the Government of the United States of America: future work for Working Group II, A/CN.9/822, p. 2; available at: https://undocs.org/en/A/CN.9/822 (accessed on 30 November

sought to address this unsatisfactory situation by creating an instrument that would uniformly regulate the enforcement of agreements reached in mediation. On 20 December 2018, The United Nations Convention on International Settlement Agreements resulting from Mediation (the Singapore Convention)[69] was adopted, which aims to achieve a similar success in the field of mediation as New York Convention achieved regarding the recognition and enforcement of arbitral awards.[70] The Singapore Convention was adopted by the General Assembly on 20 December 2018 in New York and provides a uniform and efficient framework for the enforcement of international settlement agreements resulting from mediation and for allowing parties to invoke such agreements. It ensures that a settlement reached by parties becomes binding and enforceable in accordance with a simplified procedure.

The name „Singapore Convention" derives from the fact that UNCITRAL accepted Singapore's offer to hold the signing ceremony in Singapore and also from the fact that one of the working groups that drafted the Convention was successfully led by a delegate from Singapore.[71] The Convention entered into force pursuant to Article 14(1) on 12 September 2020, consists of a Preamble and 16 Articles, and currently has 13 Parties, with no EU Member State being a Party. No EU Member State is even a signatory of this Convention (the Convention currently has 56 signatories); the UK, for example, is a signatory, as is the USA, China, but neither have ratified yet.[72] Even the EU has not yet acceded to the Singapore Convention, and voices are being heard within the EU as to whether the EU has the competence to accede to the convention or whether individual Member States have it.[73]

Whether the Singapore Convention will be a successful international treaty in the field of mediation cannot be answered yet and it is necessary to await future developments, particularly with regard to the number of contracting parties.

2023).

69 Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf

70 See e.g. RISSE: *Wirtschaftsmediation…,* p. 602.

71 For more details see ELSTERMANN: *Internationale handelsrechtliche Mediation*…, p. 259 et seq.

72 See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en (accessed on 30 November 2023).

73 See https://www.lto.de/recht/hintergruende/h/singapur-konvention-mediationsvergleich-international-vollstreckbar-voraussetzungen-kein-eu-beitritt/ (accessed on 30 November 2023).

4.4. ICSID

Recently, the International Centre for Settlement of Investment Disputes (ICSID), which focuses on the highly specific area of investment disputes, has also played an important role in out-of-court dispute resolution. These disputes, however, have a certain public law character and thus differ to some extent from classical (private) out-of-court dispute resolution. Of particular importance in this respect is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), which was negotiated in Washington on 18 March 1965.[74] This Convention is again one of the very successful international treaties with worldwide scope. As of today, it counts 165 Member States (158 Contracting States and 7 Signatory States). Within the EU, all Member States are Contracting States with the sole exception of Poland.[75] For the purposes of this Convention then, in accordance with its Article 6(1)(c), the ICSID Arbitration Rules have been adopted.[76]

In addition to arbitration, ICSID has recently focused on mediation and has adopted mediation rules for the field of investments. The ICSID Mediation Rules adopted by the Administrative Council of the Centre came into effect on 1 July 2022.[77] In contrast to arbitration proceedings under the ICSID Convention, parties to an ICSID mediation proceeding are not required to be a Contracting State or nationals of another Contracting State. In terms of the conceptual definition of mediation, it is important to point out that there is a strict distinction between mediation and conciliation[78] in the ICSID system of out-of-court dispute resolution, although these terms are commonly confused or are equivalent.[79]

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74 Available at: https://icsid.worldbank.org/sites/default/files/ICSID_Convention_EN.pdf (accessed on 30 November 2023).

75 See https://icsid.worldbank.org/sites/default/files/ICSID%203/ICSID-3--ENG.pdf (accessed on 30 November 2023).

76 Available at: https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf (accessed on 30 November 2023).

77 Available at: https://icsid.worldbank.org/sites/default/files/documents/ICSID_Mediation.pdf (accessed on 30 November 2023).

78 Available at: https://icsid.worldbank.org/sites/default/files/Conciliation_Rules.pdf (accessed on 30 November 2023).

79 See https://icsid.worldbank.org/rules-regulations/mediation/key-differences-between-mediation-and-conciliation (accessed on 30 November 2023); United Nations: UNCITRAL Recommendations to assist mediation centres and other interested bodies with regard to mediation under the UNCITRAL Mediation Rules (2021), Vienna, 2023, p. 3, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2223585e.pdf (accessed on 30 November 2023). LACHMANN: *Handbuch für die Schiedsgerichtspraxis*…, p. 13.

4.5. Other international treaties on out-of-court dispute resolution

In addition to the above-mentioned international documents, there are a number of other, more or less important, or regional international treaties that regulate the issue of out-of-court dispute resolution – traditionally for the area of arbitration – only as one of many procedural issues – typically agreements on legal assistance –, or for a specific area within the unified substantive international treaties.

International treaties on legal assistance impact arbitration exclusively in terms of the recognition and enforcement of foreign arbitral awards.[80] In this respect, it is crucial to compare and contrast the relationship between these traditionally bilateral treaties and the multilateral international treaties that apply to this issue – also with regard to the most-favourable-right under Article VII(1) of the New York Convention (see above).

However, significant unified substantive international treaties, which primarily aim at substantive regulation of a defined area, also very often contain regulation of certain aspects of arbitration. Such provisions can be found, for example, in international treaties governing the field of transport and carriage: Article 33 of the Convention on the Contract for the International Carriage of Goods by Road (CMR), which applies in 58 States and to which all EU Member States are parties;[81] Article 28–32 of the Convention concerning International Carriage by Rail (COTIF), which currently has 50 contracting States, some of which have suspended membership;[82] Article 34 of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) of 1999, to which 139 countries of the world participate, including all EU Member States;[83] Article 32 of the Convention for the Unification of

[80] On the issue of international treaties on legal assistance and arbitration, cf. e.g. RYŠAVÝ, L. Arbitration From the Perspective of Bilateral Agreements on Legal Assistance. In: *Czech (& Central European) Yearbook of Arbitration*. 2020/1, pp. 181–208.

[81] See https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XI-B-11&chapter=11&clang=_en (accessed on 30 November 2023).

[82] See https://otif.org/fileadmin/images/pictures/Table1P_DE.pdf (accessed on 30 November 2023). The EU also acceded to COTIF on 1 July 2011; see Council Decision of 16 June 2011 on the signing and conclusion of the Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999, OJ L 51, 23.02.2013, p. 1–7.

[83] See https://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf (accessed on 30 November 2023).

Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 (the Warsaw Convention),[84] which has 152 contracting states.[85]

In view of the multitude of international treaties in each Member State, it is always necessary to examine which treaty is to be applied. In the absence of an explicit regulation of the relationship, the procedure is based on generally applicable legal principles such as *lex posterior derogat legi priori*, *lex specialis derogat legi generali*, or according to the Vienna Convention on the Law of Treaties,[86] or to the already mentioned principle of most-favourable-right. In relation to national regulation, it should be stressed that international treaties become part of national law and traditionally take precedence (in application) over laws.[87]

5. National rules on out-of-court dispute resolution

If the relevant legal regulation is not contained in an international instrument (EU law or international treaties) – and this is usually the case even if it is a comprehensive regulation such as the New York Convention[88] – the national regulation of arbitration (or mediation) applies. All EU countries now have their own regulations for both arbitration and mediation (see examples above).[89] The national regulation of out-of-court dispute resolution is often not very extensive, as it only regulates the most basic institutes in order not to unnecessarily restrict the development of mediation or to prevent arbitration from becoming another formalized type of civil procedure, which it should not be.[90]

However, even in the existence of international sources, national laws are important sources of law. This is true for national out-of-court dispute resolution; however, they are also justified in cross-border relations where international

[84] This convention was replaced by the Montreal Convention in those states that acceded to the Montreal Convention [Article 55(1)(a) of the Montreal Convention].

[85] See https://www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP_EN.pdf (accessed on 30 November 2023). In a specific case, however, it depends on whether the given state has also acceded to any of the additional protocols [Article 55(1) of the Montreal Convention].

[86] Similarly SCHLOSSER, P. *Das Recht der internationalen privaten Schiedsgerichtsbarkeit*. 2nd edition. Tübingen: Mohr Siebeck, 1989, p. 106.

[87] See e.g. Article 10 of the Constitution of the Czech Republic (Czech Act No. 1/1993 Coll.), Article 7 of the Constitution of the Slovak Republic (Slovak Act No. 460/1992 Coll.), not unequivocally, but in practice with the same result Article 59(2) of the German Basic Law (Grundgesetz) of 23 May 1949.

[88] For example, under the grounds for refusal to recognize and enforce a foreign arbitral award in Article V(2)(a), explicit reference is made to domestic arbitrability.

[89] On the worldwide regulation of arbitration see SCHLOSSER: *Das Recht der internationalen privaten Schiedsgerichtsbarkeit…,* Rn. 143 et seq.

[90] Cf. SCHMIDT/LAPP/MAY: *Mediation in der Praxis…,* p. 16.

legislation does not address specific institutes and issues, or where it needs to be supplemented, to take certain national specificities into account, or to implement the objectives of a directive.[91] The extent to which individual national regulations coincide or differ will significantly depend on whether these states, and to what extent, drew inspiration from significant model instruments, i.e., soft law (see below).[92]

From the perspective of the national legislator, the instruments developed by the United Nations Commission on International Trade Law play a crucial role in the out-of-court settlement of disputes. For arbitration, this is the UNCITRAL Model Law on International Commercial Arbitration from 1985.[93] Member States that have not been influenced or inspired by this Model Law in their arbitration regulation include France and Sweden.[94] The regulation of arbitration in important arbitration centers such as Paris or Stockholm may thus differ significantly in certain aspects from that in many other countries.[95] Within the United Nations Commission on International Trade Law, there is a list of States whose legislation was based on or influenced by the Model Law; currently there are 88 States in a total of 121 jurisdictions.[96] According to that list, the EU countries whose national laws are not influenced to a greater extent by the Model Law include: in addition to France and Sweden, the Czech Republic, Finland, Italy, Latvia, Luxembourg, the Netherlands, Portugal and Romania.

In the area of mediation, the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) is less accepted by individual states. The reason for its lower acceptance is, on the one hand, that it is a relatively new instrument, and on top of that, EU Member States had the obligation to transform the mediation directive, so that their national regulation did not require any interventions. Nevertheless, legislation based on or influenced by this Model Law has been enacted in 33 states in a total of 46 jurisdictions;[97] among the EU Member States, the following

[91] Similarly SCHROEDER: *Die lex mercatoria arbitralis…*, p. 36; ELSTERMANN: *Internationale handelsrechtliche Mediation*…, p. 36 et seq., 212.

[92] See on the issue of differences in legal regulation in the field of mediation ȘUȘTAC, Z., WALKER, J., IGNAT, C., CIUCĂ, A. E., LUNGU, S. *Best practice guide on the use of mediation in cross-border cases*, Bucharest, 2013, p. 129.

[93] Cf. e.g. SCHÜTZE/THÜMMEL: *Schiedsgericht und Schiedsverfahren…,* p. 10.

[94] The same is true of the UK, for example.

[95] For example, on the question of whether a single arbitrator or a three-member arbitral tribunal should *ex lege* decide in the absence of an agreement between the parties.

[96] See https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (accessed on 30 November 2023).

[97] Cf. https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status (accessed on 30 November 2023).

countries have been inspired by the regulation of mediation in their national laws: Belgium, Croatia, France, Hungary, Luxembourg and Slovenia.

6. Soft law and out-of-court dispute resolution

In addition to EU regulations, international treaties and national laws – or simultaneously with them – other instruments, which in the international context are referred to as so-called soft law, play an unmistakable and very important role in out-of-court dispute resolution.

In order to overcome the differences between the individual national legal regulations, but also to overcome the differences between the individual legal systems (Europe, USA, China), various international, professional and interest organizations and chambers have been for decades creating a system of rules, regulations, model laws, etc. In addition to those already mentioned, for example, the International Chamber of Commerce – ICC, the International Bar Association – IBA, the American Bar Association – AAA, the Inter-Pacific Bar Association – IPBA, the International Council for Commercial Arbitration – ICCA, the Chartered Institute of Arbitrators – CIArb, the United Nations Economic Commission for Europe – UNECE, the World Intellectual Property Organization – WIPO, the International Centre for Dispute Resolution – ICDR, the Singapore International Mediation Centre – SIMC, the International Mediation Institute – IMI and others.[98]

The standards created by these bodies are not generally binding, respectively are not in themselves binding without further consideration. Their binding nature does not result from the nature of the given norms, as they are not legal norms in the legislative sense – hence the term soft law – but from the agreement of the parties or from the decision of the national legislator, who adopts the rules and model laws into its own laws (see the UNCITRAL Model Laws referred to above). In addition, if these rules become part of national law and are binding like any other national law, the further objective of convergence and unification of legal orders is fulfilled.

Despite their general non-binding nature, these norms play a significant role in terms of their meaning and prevalence, and the parties may contractually agree on their application, or they may play a role by the passing of laws or in the decision-making practice of the competent authorities.[99] Examples of such

[98] See e.g. RYŠAVÝ: *Nezávislost a nestrannost rozhodce…,* p. 20.

[99] See decision of the Austrian Supreme Court (Oberster Gerichtshof) of 5 August 2014, Ref. No. 18 ONc 1/14p, point 4.1.

soft law include the IBA Guidelines on Conflicts of Interest in International Arbitration[100] or The Code of Ethics for Arbitrators in Commercial Disputes issued by the American Arbitration Association[101] and the American Bar Association.[102] These and similar regulations are generally very detailed, well ordered and with many concrete examples that may arise in practice.[103] On the other hand, it is necessary to realize that such rules are often the result of certain professional groups taking into account their interests above all, and not always the interests of arbitration as such, and should therefore be approached in this way.[104] This does not, of course, diminish their contribution, importance and general acceptance.[105]

As mentioned above, one of the most important and globally widespread examples of soft law is the UNCITRAL Model Law on International Commercial Arbitration. In addition to this, UNCITRAL has adopted the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation. The Model Law on Mediation was initially adopted in 2002. It was known as the "Model Law on International Commercial Conciliation", and it covered the conciliation procedure. The Model Law has been amended in 2018 with the addition of a new section on international settlement agreements and their enforcement. The Model Law has been renamed "Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation". And like the other soft law instruments, it was adopted to assist States in reforming and modernizing their laws on mediation procedure. It provides uniform rules in respect of the mediation process and aims at encouraging the use of mediation and ensuring greater predictability and certainty in its use.[106]

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[100] *International Bar Association.* IBA Guidelines on Conflicts of Interest in International Arbitration of 23 October 2014; available at: https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918 (accessed on 30 November 2023).

[101] *American Arbitration Association*. The Code of Ethics for Arbitrators in Commercial Disputes, available at: https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf (accessed on 30 November 2023).

[102] See https://www.americanbar.org/groups/dispute_resolution/resources/ethics/code-of-ethics-for-arbitrators-commercial-disputes (accessed on 30 November 2023).

[103] Other examples of similar regulations give WIECZOREK/SCHÜTZE: *Zivilprozessordnung und Nebengesetze…,* p. 451.

[104] For more details e.g. LACHMANN: *Handbuch für die Schiedsgerichtspraxis…,* p. 257.

[105] PFEIFFER, T. Schiedsrichterbefangenheit und anwaltliche Versicherungsmandate. In: GEIMER, R., SCHÜTZE, R. A. (eds.). *Recht ohne Grenzen. Festschrift für Athanassios Kaissis zum 65. Geburtstag*. München: Sellier European Law Publisher, 2012, p. 750; decision of the German Provincial Court of Appeal in Frankfurt am Main (OLG Frankfurt am Main) of 10 January 2008 Ref. No. 26 Sch 21/07.

[106] Cf. https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation (accessed on 30 November 2023).

In addition to these Model Laws, UNCITRAL has adopted the UNCITRAL Mediation Rules[107] and UNCITRAL Arbitration Rules,[108] as well as, for example, rules on online dispute resolution.[109] In the case of such rules, it is often a comprehensive set of rules covering all relevant aspects of mediation or arbitration proceedings (commencement and termination of proceedings, appointment and role of arbitrators or mediators, conduct of mediation or arbitration proceedings, etc.), the application of which can be agreed by the parties and thus avoid complications in the event that a particular issue in the context of out-of-court proceedings is not contractually settled between the parties.

7. Conclusion

In conclusion, it can be stated that, from the perspective of arbitration as well as from the perspective of mediation, the importance of EU law is fundamental, albeit in a very different way in the two central methods of out-of-court dispute resolution. In the regulation of arbitration, the EU ultimately decided not to directly intervene through its legislation, even though this may not have been its initial intention. However, in doing so, it has enabled the continued applicability of the highly successful unification instrument that is the New York Convention. The fact that all the existing EU Member States are parties to the New York Convention may have played a role in this, and any modification by means of a secondary act would only duplicate the existing legal situation or make the EU an island that would differentiate itself from the rest of the world. However, such a situation would not be desirable in view of the highly international or global nature of arbitration and would break down the degree of uniformity that has been achieved.

From the perspective of mediation, the importance of the EU is crucial in that the adoption of the Mediation Directive and the resulting obligation for Member States to implement it in their legal systems has been the basic (or

[107] Mediation Rules of the United Nations Commission on International Trade Law of 9 December 2001, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01369_mediation_rules_ebook_1.pdf (accessed on 30 November 2023). The Rules are the result of a revision of the 1980 UNCITRAL Conciliation Rules.

[108] Arbitration Rules of the United Nations Commission on International Trade Law originally dated 15 December 1976 (with article 1, paragraph 4, as adopted in 2013 and article 1, paragraph 5, as adopted in 2021), available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf (accessed on 30 November 2023).

[109] UNCITRAL Technical Notes on Online Dispute Resolution, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf (accessed on 30 November 2023).

the last) impetus for some Member States to regulate mediation by law. In this context, Member States have taken the opportunity offered and did not limit the mediation regulated by the directive in cross-border relations only to relations with an international element, but also extended it to purely domestic relations. This contributed to its wide application and to enlightenment among the lay and professional public.

EU law as well as the law of individual member states are also fundamentally determined by international treaties – the EU itself has become a contracting party to many of them, and within their scope they take precedence over national laws and sometimes even over EU regulations. From the perspective of arbitration, it is the already mentioned New York Convention, as an example of a successful international agreement behind the worldwide popularity of arbitration. In the case of mediation, it is especially the Singapore Convention, which, however, will have to earn its place in the spotlight.

However, the importance of national law is also quite crucial for the field of out-of-court dispute resolution, because while international and EU sources establish the basic principles and framework of the given out-of-court dispute resolution methods, national law regulates specific institutes, rules and procedures for their use. In sports terminology, it could be said that EU law and international treaties define the territory on which the game is to be played, whereas national law lays down the specific and core rules of the game.

From the perspective of the national legislator and the parties to the out-of-court dispute resolution, the importance of so-called soft law cannot be overlooked. It provides states with a lot of high quality instruments and models law worthy of emulation and parties with comprehensive rules that take into account all relevant circumstances that parties should/must otherwise have to consider. The most famous model laws and rules come from UNCITRAL.

Considering the importance of out-of-court dispute resolution in the international and national context, with regard to the rich variety of different sources in terms of types and origin, it is necessary to stress the importance of a uniform, respectively not contradictory approach in the application, interpretation of concepts or in the decision-making activity of state courts in the field of arbitration and mediation – especially when it is not EU law.[110]

[110] On the interconnectedness of case law in different countries, cf. decision of the Austrian Supreme Court (Oberster Gerichtshof) of 5 August 2014, Ref. No. 18 ONc 1/14p, point 5.1.

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