

# Enforcement of Mediated Settlement Agreements

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Upon the recent finalization of the Singapore Mediation Convention, a comparative analysis is conducted in the article between the newly prepared instrument and two other international enforcement mechanisms of mediated agreements offered by the EU Mediation Directive and SIAC-SIMC Arb-Med-Arb protocol, both currently in force.

**Keywords:** mediation, mediated settlement agreements, the Singapore Mediation Convention, the EU Mediation Directive, the SIAC-SIMC Arb-Med-Arb protocol.

## Tarptautinių mediacijos būdu pasiektų susitarimų priverstinis vykdymas

Atsižvelgiant į neseniai baigtą rengti Singapūro mediacijos konvencijos tekstą, straipsnyje pateikiama lyginamoji naujosios konvencijos bei šiuo metu galiojančių ES mediacijos direktyvos ir SIAC-SIMC Arb-Med-Arb protokolų analizė, nagrinėjant tarptautinių mediacijos būdu pasiektų susitarimų priverstinio vykdymo galimybes.

**Pagrindiniai žodžiai:** mediacija, mediacijos būdu pasiekti susitarimai, Singapūro mediacijos konvencija, ES mediacijos direktyva, SIAC-SIMC Arb-Med-Arb protokolas.

## Introduction

In mediation, as opposed to arbitration or litigation, disputants come to a consensus, rather than have a decision imposed by a third party. The fact that parties have to agree on every provision of their mediated settlement agreement (hereinafter – MSA) increases the chances of a voluntary implementation. However, not all the disputants are willing to commit to their words. The more cases appear where parties had to spend time, money and effort to settle a dispute and, later on, were exposed to litigation over the same matter, the less reliable mediation becomes. Thus, not only the parties acting in good faith are negatively affected by the circumvented settlement agreements, but also the mediation community in general. In order to avoid such scenario, proper mechanisms for enforcement of mediated settlement agreements have to be introduced.

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Up to this day two main mechanisms to enforce international MSAs<sup>1</sup> could be found. The first one, offered by the Singapore International Arbitration Centre (hereinafter – SIAC) – Singapore International Mediation Centre (hereinafter – SIMC) Arb-Med-Arb<sup>2</sup> Protocol<sup>3</sup> relies on the framework created for enforcement of arbitral awards (i.e. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>4</sup> (hereinafter – the New York Convention)). The second one, offered by the European Union (hereinafter – the EU) Mediation Directive<sup>5</sup>, is based on enforcement mechanisms created by national legislators themselves. As will be discussed further in the article, none of the two can solve the problem of international enforcement of MSAs in its entirety.

In June 2018 UNCITRAL approved<sup>6</sup> two international instruments intended to provide states with consistent standards on cross-border enforcement of international MSAs<sup>7</sup>: The Draft Amended Model Law<sup>8</sup> and The Draft Convention on International Settlement Agreements Resulting from Mediation<sup>9</sup> (hereinafter – the Singapore Mediation Convention<sup>10</sup>). It has been chosen to prepare both to accommodate the different levels of experience with mediation in different jurisdictions. The content of the two documents is relatively similar thus, only the text of the convention will be analysed in detail further in the article.

Upon the finalisation of the article, there was no significant scientific literature analysing the provisions and possible effects of the Singapore Mediation Convention neither in Lithuania nor internationally, as the convention was just adopted. However, national mediation regimes were introduced earlier, and authors such as Klaus J. Hopt, Felix Steffek, Manon and Fred Schonewille have all researched and described these national regulations of mediation in different countries. Their work formed the basis for the overview of the national enforcement regimes covered in chapter 1 of the article.

Since the Singapore Mediation Convention is supposed to offer a universal solution, the goal of this article is to evaluate if its provisions create a mechanism which is capable of outperforming existing enforcement mechanisms provided in the SIAC – SIMC Arb-Med-Arb protocol and the EU Mediation Directive. These three legal acts form the main object of the article. In order to achieve the goal stated above, the following tasks had to be carried out: (1) description of the three procedures mentioned, specifying their differences and similarities; (2) comparing the procedures in order to identify their

<sup>1</sup> QUEK ANDERSON, D. Litigation over Mediation – How Should the Courts Enforce Mediated Settlement Agreements. *Singapore Journal of Legal Studies*, 2015, p. 129.

<sup>2</sup> Arbitration-Mediation-Arbitration.

<sup>3</sup> SIAC – SIMC Arb-Med-Arb Protocol [e-version], 2014 [accessed 2018-03-19]. Available at: <<http://simc.com.sg/siac-simc-arb-med-arb-protocol/>>.

<sup>4</sup> UNCITRAL *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* [e-version]. New York, 1958 [accessed 2018-03-16]. Available at: <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html)>.

<sup>5</sup> European Parliament and the Council of the European Union, Directive 2008/52/EC on certain aspects of mediation in Civil and Commercial matters, *OJ*, L-136, 2008, p. 3–8 (hereinafter – Mediation Directive), art. 6.

<sup>6</sup> UNCITRAL. *Sound recordings of 51<sup>st</sup> session*. New York, 2018 [accessed 2018-07-25]. Available at: <<http://www.uncitral.org/uncitral/audio/meetings.jsp>>.

<sup>7</sup> UNCITRAL General Assembly *Note by the secretariat No. A/CN.9/942* [e-version]. New York, 2018 [accessed 2018-08-20]. Available at: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/012/07/PDF/V1801207.pdf?OpenElement>>.

<sup>8</sup> UNCITRAL General Assembly *Note by the secretariat No. A/CN.9/943* [e-version]. New York, 2018 [accessed 2018-08-20]. Available at: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/012/01/PDF/V1801201.pdf?OpenElement>>.

<sup>9</sup> UNCITRAL General Assembly *Note by the secretariat No. A/CN.9/942* <...>, para. 25.

<sup>10</sup> Singapore suggested to host the signing ceremony and hence, following the model of the New York Convention, abbreviated version of the name was anchored to Singapore Mediation Convention.

advantages and disadvantages; (3) indicating reasons why certain methods might work in one environment but not another. To fulfil these tasks comparative research method was implemented. Teleological and document analysis methods were also widely used while examining *travaux préparatoire* and final texts of the legal acts.

## 1. National MSAs' Enforcement Mechanisms

International MSAs' enforcement mechanisms, which will be discussed further in the article, do not create a uniform enforcement system or an international enforcement body. They oblige contracting states or the Member States (depends on the instrument) to ensure that an international MSA will be enforced in accordance with the rules and procedure of the country where enforcement is sought. Hence, an international mechanism can only be successful if there are functioning enforcement mechanisms on the national level.

Legislators in the EU Member States have tackled the problem of the enforcement of MSAs well – every country has a mechanism how to transform an MSA into a directly enforceable title. In the most of them MSAs are subject to homologation by a public authority<sup>11</sup>. An MSA can be filed in a court for summary proceedings (e. g. in Italy, Latvia, Hungary, Lithuania<sup>12</sup>), enacted in an enforceable notarial deed (e. g. in Austria, Belgium<sup>13</sup>), validated by a mediation body (e. g. Estonia<sup>14</sup>), transferred into an arbitral consent award (e. g. Austria, Germany<sup>15</sup>). Many Member States offer several methods named above for the parties to choose from. In some Member States, MSAs are directly enforceable, if their provisions go in accordance with formal requirements or if an MSA has an enforceability clause included (e. g. Croatia, Portugal<sup>16</sup>).

Outside the EU situation varies significantly. Quite a few jurisdictions also offer to transform an MSA into a judgement on agreed terms for it to become directly enforceable (e. g. Israel<sup>17</sup>, New Zealand, Japan<sup>18</sup>). Others provide this option only for court mediation or in cases where a motion with regards to the dispute in question is filed in a court (e. g. China<sup>19</sup>, Brazil, India, Singapore<sup>20</sup>). In these countries enforcement of out-of-court MSAs, even though possible under certain conditions (such as transforming it into an arbitrary consent award), is burdensome. As well as in the EU countries, instances can be found of rendering MSAs directly enforceable by a notary deed (e. g. Japan<sup>21</sup>), approval of conciliation authority (e. g. Switzerland<sup>22</sup>). However, a notable number of countries (even though, not the leading

<sup>11</sup> The European Parliament. *Resolution of 12 September 2017 on the implementation of 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') (2016/2066(INI))* [e-version. Accessed 2018-04-09]. Available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2017-0238+0+DOC+PDF+V0//EN>>, p. 9.

<sup>12</sup> SCHONEWILLE, M., et. al. *The Variegated Landscape of Mediation*. The Hague: Eleven International Publishing, 2014, p. 230, 243, 205 (accordingly).

<sup>13</sup> SCHONEWILLE, M., et. al. *The Variegated <...>*, p. 55, 67 (accordingly).

<sup>14</sup> SCHONEWILLE, M., et. al. *The Variegated <...>*, p. 134.

<sup>15</sup> SCHONEWILLE, M., et. al. *The Variegated <...>*, p. 55, 175 (accordingly).

<sup>16</sup> SCHONEWILLE, M., et. al. *The Variegated <...>*, p. 94, 310 (accordingly).

<sup>17</sup> SCHONEWILLE, M., et. al. *The Variegated <...>*, p. 642.

<sup>18</sup> HOPT, K. J. et al. *Mediation: Principles and Regulation in Comparative Perspective*. Oxford: Oxford University Press, 2013, p. 1110, 1048 (accordingly).

<sup>19</sup> HOPT, K. J. et al. *Mediation: Principles <...>*, p. 973.

<sup>20</sup> SCHONEWILLE, M., et. al. *The Variegated <...>*, p. 538, 615, 687 (accordingly).

<sup>21</sup> HOPT, K. J. et al. *Mediation: Principles <...>*, p. 1048.

<sup>22</sup> HOPT, K. J. et al. *Mediation: Principles <...>*, p. 1217.

players in the mediation community) do not have any mechanism to transform an MSA into a directly enforceable title (e. g. Cambodia, Lebanon, South Africa<sup>23</sup>). Thus, instead of a formal homologation, parties have to go through full-length litigation and enforce an MSA as any other contract.

Federal countries, such as the USA, Australia or Canada have different standards across the states. The USA has abandoned a proposal to introduce a uniform rule for expedited enforcement of an MSA at the final stage<sup>24</sup> of the adoption of the U.S. Uniform Mediation Act<sup>25</sup>. Neither Canada nor Australia had such harmonisation attempts with regards to expedited enforcement of MSAs. While some individual states offer summary proceedings to render MSAs enforceable, it is not true throughout all the federal territories.

As seen from the data above, most of the national jurisdictions that provide a way to transfer an MSA into enforceable title chose to subject it to the scrutiny of an authoritative figure. A homologation before rendering an MSA directly enforceable on the grounds of public order and the mandatory law is encouraged for three reasons. First, parties are free to include in their MSA what they feel fit. Reaching a consensus does not always mean that its particularities go in accordance with the mandatory law. Second, only several jurisdictions<sup>26</sup> have a mandatory requirement for legal representation during mediation. Third, mediators are not required to have a legal background. Some jurisdictions even forbid mediators to give legal advice<sup>27</sup>. However, full-length litigation over a dispute which has already been settled is not a plausible outcome. Even though in most jurisdictions MSA is regarded as a contract, at the same time it is the result of a dispute resolution process, thus should be treated differently. Hence, countries that do not provide any expedited MSAs' enforcement mechanism or countries that offer such procedure only for court mediations have room for improvement.

Summing up, national approaches towards rendering MSAs directly enforceable vary. While some countries offer direct enforceability or at least summary proceedings to transform an MSA into a judgement, others can only suggest filing a motion in court if obligations of an MSA are not fulfilled. The Member States of the EU were obliged to ensure that there exists an enforcement mechanism of cross-border MSAs by the article 6 of the Mediation Directive<sup>28</sup>. However, such an obligation does not exist worldwide. It might impede adoption or successful functioning of an international instrument, which is based on national provisions.

## 2. SIAC-SIMC Arb-Med-Arb Protocol

In 2014 SIAC and SIMC introduced the Arb-Med-Arb protocol<sup>29</sup> seizing an opportunity to benefit from an international instrument already in place – the New York Convention. Many national laws

<sup>23</sup> SCHONEWILLE, M., *et. al. The Variegated <...>*, p. 555, 660, 697 (accordingly).

<sup>24</sup> SUSSMAN, E. The Final Step: Issues in Enforcing the Mediation Settlement Agreement [e-version], from *Fordham Law School Conference on International Arbitration and Mediation*, New York, 2008 [accessed: 2018-08-17]. Available at: <[https://sussmanadr.com/docs/Enforcement\\_Fordham\\_82008.pdf](https://sussmanadr.com/docs/Enforcement_Fordham_82008.pdf)>, p. 5–6.

<sup>25</sup> The National Conference of Commissioners on Uniform State Laws. *Uniform Mediation Act* [e-version]. White Sulphur Springs, West Virginia, 2001 [accessed 2018-08-17]. Available at: <[http://www.uniformlaws.org/shared/docs/mediation/uma\\_final\\_03.pdf](http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf)>.

<sup>26</sup> For example, Italy and Greece.

<sup>27</sup> For example, Bulgaria. See HOPT, K. J. *et al. Mediation: Principles <...>*, p. 356.

<sup>28</sup> Mediation Directive, art. 6.

<sup>29</sup> *SIAC – SIMC Arb-Med-Arb Protocol* [e-version], 2014 [accessed 2018-03-19]. Available at: <<http://simc.com.sg/siac-simc-arb-med-arb-protocol/>>.

on arbitration<sup>30</sup>, as well as UNCITRAL Model Law on International Commercial Arbitration<sup>31</sup>, allow arbitration institutions to issue a consent award recording the terms of the settlement reached by the parties to the dispute<sup>32</sup>. The most prominent arbitration institutions' rules also support the possibility of transforming a settlement agreement into a consent award<sup>33</sup>. Such award acquires the status of a final award and therefore can be enforced under the rules of the New York Convention. The Convention is 60-year-old and has the confidence of more than 150 contracting states<sup>34</sup>. Hence, no further global consensus is needed to render international MSAs enforceable in other countries.

Arb-Med-Arb protocol offers a three-phase procedure. First, the dispute is brought in front of an arbitration institution (SIAC) where a tribunal is constituted. Second, the arbitration proceedings are stayed immediately, and the dispute is then transferred to mediation (SIMC) for an amicable resolution. Third, when the settlement is reached, the process is shifted back to arbitration (SIAC) to be recorded as a consent award or, in case a dispute was not settled, to be arbitrated.

The reason why the procedure has to be formally started in arbitration is related to the wording of the New York Convention. Article 1 states that the 'Convention shall apply to the recognition and enforcement of arbitral awards <...> arising out of differences between persons <...>'. With rare exceptions<sup>35</sup> scholars and practitioners<sup>36</sup> agree that if a dispute is started in mediation and settled there, by the time an MSA reaches arbitration to be transformed into a consent award there are no longer any *differences between persons*. Therefore, such consent award falls outside the scope of the New York Convention and cannot be enforced. Starting the procedure in arbitration, even though only formally, solves this problem.

For those, who genuinely intend to continue the resolution process in arbitration if mediation is not successful, such a three-phased approach is convenient. However, not all the parties have an intention to arbitrate even when their attempt to mediate fails<sup>37</sup>. For latter as well as the ones whose sole reason for choosing Arb-Med-Arb is enforcement of an MSA, formal proceedings in arbitration only add costs and consumes more time.

SIAC-SIMC Arb-Med-Arb protocol is an excellent example of a creative approach of rendering MSAs enforceable using the instruments already in force. However, instead of targeting the root cause of the problem, it is merely a way around. Using a convention that was not intended to include mediated

<sup>30</sup> E. g. Republic of Lithuania Law on Commercial Arbitration. *Valstybės žinios*, 2012, no. 76-3932, art. 47; German Code of Civil Procedure (as amended and supplemented to date). *Bundesgesetzblatt*, 2005, I page 3202; art. 1053.

<sup>31</sup> *UNCITRAL Model Law on International Commercial Arbitration 1985*. With amendments as adopted in 2006 [e-version]. New York, 2006 [accessed 2018-03-18]. Available at: <[http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)>, art. 30.

<sup>32</sup> KRYVOI, Y.; DAVYDENKO, D. Consent Awards in International Arbitration: From Settlement to Enforcement, *Brooklyn Journal on International Law*, 2015, vol. 40 (3), p. 832.

<sup>33</sup> See for example: ICC. *Rules of Arbitration* [e-version. Accessed 2018-08-15]. Available at: <<https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>>, art. 32; Arbitration Institute of the Stockholm Chamber of Commerce. *Arbitration Rules* [e-version]. 2017 [accessed 2018-08-15]. Available at: <[https://sccinstitute.com/media/169838/arbitration\\_rules\\_eng\\_17\\_web.pdf](https://sccinstitute.com/media/169838/arbitration_rules_eng_17_web.pdf)>, art. 45; London Court of International Arbitration. *Arbitration Rules* [e-version]. 2014 [accessed 2018-08-15]. Available at: [http://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2014.aspx##](http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx##)>, art. 26.9.

<sup>34</sup> See: <<http://www.newyorkconvention.org/countries>> [accessed 2018-05-28].

<sup>35</sup> Some do not see a problem in such wording – in their eyes the provision does not prohibit in itself to enforce such agreements and therefore it should be possible. See: AMBRASON, H. Mining Mediation Rules for Representation Opportunities and Obstacles, *American Review of International Arbitration*, 2004, vol. 103, p. 108.

<sup>36</sup> For example, see: BOOG, C. The New SIAC/SIMC AMA-Protocol: A Seamless Multi-Tiered Dispute Resolution Process Tailored to the User's Needs. *Asian Dispute Review*, 2015, vol. 2015 (2) p. 92.

<sup>37</sup> KRYVOI, Y.; DAVYDENKO, D. Consent Awards <...> p. 833.

settlement agreements into its scope adds superfluous procedural steps. Therefore, Arb-Med-Arb is considered to be good, however, short-term solution to the problem.

### 3. Enforcement Mechanisms in the European Union

The problem of the enforcement of MSAs is relatively small in the EU<sup>38</sup>. It was tackled by the Article 6 of the Mediation Directive, which obliges the Member States to ensure that written agreements resulting from mediation would be made enforceable under a request of the parties. The Mediation Directive did not create a uniform system. It leaves the choice of the form and the competent authority to the Member States. However, the Article 6 suggests that the content of an MSA *may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument*. As explained above, this advice was followed by the EU Member States. The fact that all of them have introduced some kind of expedited proceedings could have added significantly to the success of the enforcement mechanism of MSAs in the EU.

The wording of the Article 6 is no novelty. The foundation for such model was established together with the Brussels Convention and remained in the regulations that succeeded it<sup>39</sup>. Brussels I bis<sup>40</sup>, Brussels II bis<sup>41</sup> and the European Enforcement Order<sup>42</sup> regulations, in addition to court judgements and decisions, envisage two additional types of enforceable documents, namely court settlements<sup>43</sup>, and authentic instruments<sup>44</sup>. Both of them could have served as means for rendering MSAs enforceable even before implementation of the Directive. The Mediation Directive itself refers to Brussels I and II bis regulations, as a possible basis for rendering MSAs enforceable<sup>45</sup>. Thus, even though mediation is a relatively novel instrument in the EU, the enforcement mechanism of MSAs was built on previous regulations and conventions, and the trust between the Member states was already established.

There are only a few requirements foreseen in the Mediation Directive for MSAs to fall inside the scope of the Article 6 and consequently be subject to the enforcement in another Member State. First, an agreement shall be in writing and resulting from mediation in a cross-border dispute. Second, the request for making an MSA enforceable should be made by all the parties to the dispute or by one of them with the explicit consent of others. Third, an MSA should not establish grounds for refusal. Hence,

<sup>38</sup> PAPPAS, B. A. Med-Arb and the Legalization of Alternative Dispute Resolution, *Harvard Negotiation Law Review*, 2015, vol. 20, p. 169.

<sup>39</sup> HILL, J.; CHONG, A. *International Commercial Disputes: Commercial Conflict of Laws in English Courts*. Oxford: Hart Publishing, 2010. Chapter 13.5.

<sup>40</sup> The European Parliament and the Council of the European Union, Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *OJ*, L-351, 2012, p. 1–32. (hereinafter – Brussels I bis).

<sup>41</sup> The Council of the European Union, Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, *OJ*, L-338, 2003, p. 1–29 (hereinafter – Brussels II bis).

<sup>42</sup> The European Parliament and the Council of the European Union, Regulation (EC) 805/2004 creating a European Enforcement Order for uncontested claims, *OJ*, L-143, 2004, p. 15–39 (hereinafter European Enforcement Order regulation).

<sup>43</sup> Brussels I bis, art. 59; European Enforcement Order regulation, art. 24; Brussels II bis, art. 46.

<sup>44</sup> Brussels I bis, art. 2 (c), art. 58; European Enforcement Order regulation, art. 4 (3), art. 25; Brussels II bis art. 46. Authentic instruments were primarily designated to include notarised agreements into the scope of regulations, however, they can be used in a wider capacity. See: HESS, B. *et al. Report on the Application of Regulation Brussels I in the Member States: study JLS/C4/2005/03* [e-version]. Heidelberg: Ruprecht-Karls-Universität, 2007 [accessed 2018-04-07]. Available at: <[http://ec.europa.eu/civiljustice/news/docs/study\\_application\\_brussels\\_1\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf)>, p. 66.

<sup>45</sup> The Mediation Directive, para. 20.



the content of an MSA cannot be contrary to the law of the Member State where the enforcement is sought, and the law of that Member State has to provide for enforceability of such content. According to the Commission's report, the Article 6 of the Mediation Directive was implemented effectively across the Member states<sup>46</sup>. Thus, the requirements for MSAs are sufficient for the EU enforcement mechanism to work. However, some improvements could be made.

First, the Directive does not provide any standards how to prove that an agreement is resulting from mediation (e. g. would a mediator's signature on an MSA suffice; should there be an official statement from the mediation provider). It is not essential if a Member State treats all the settlement agreements in the same manner. However, for parties, seeking enforcement in countries where a particular regime is applied solely to MSAs, some guidance or an example list would be useful.

Second, requiring an additional consent after an MSA was concluded in writing gives the unwilling party an opportunity to back out. The voluntariness of the mediation process shall not be understood as giving the disputants an indefinite amount of time to change their minds after signing an MSA<sup>47</sup>. The practice of some Member States proves that such an additional requirement is not necessary. As stated in the Commission's report, 'Belgium, the Czech Republic, Hungary and Italy do not explicitly require the consent of all parties to the dispute for a request for the enforceability of the mediation agreement. In Greece and Slovakia, an enforceability request can be made by one of the parties without explicit consent from the others<sup>48</sup>'. In Poland, by signing the agreement, parties give their consent to request the court's approval for enforcement<sup>49</sup>. Thus, no additional consent is needed. If consent is still to be required, it would be wiser to include it into an MSA itself.

The Article 6 of the Mediation Directive is a concise, yet effective cross-border MSAs' enforcement mechanism. Even though it could be improved on two bases, it is working for the EU Member States. However, reflecting the exact wording of the Article 6 in an international instrument might not be enough for it to be successful. The relatively recent Mediation Directive was built on a solid foundation of Brussels regulations which were in place for decades and helped establish trust between the Member States. Moreover, all of the Member States have an expedited procedure for enforcement of MSAs, which is not always the case outside the EU. Hence, the Mediation Directive could be used as a good example for international MSAs enforcement mechanism, if possible pitfalls are tackled.

#### 4. UNCITRAL: the Singapore Mediation Convention

The Singapore Mediation Convention is a result of international negotiations that lasted almost four years. Differing levels of national regulation and development of mediation have led to a difficult start of the negotiation. It posed the whole process in danger of being abandoned in its early phase<sup>50</sup>. However,

<sup>46</sup> European Commission. *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters* [e-version]. Brussels, 2016 [accessed: 2018-04-10]. Accessible via the Internet: <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0542&from=EN>>, p. 9.

<sup>47</sup> HOPT, K. J. *et al. Mediation: Principles* <...>, p. 45.

<sup>48</sup> European Commission. *Report from the Commission* <...> p. 9.

<sup>49</sup> Code of Civil Procedure of the Republic of Poland (as amended and supplemented to date). *Dziennik Ustaw*, 1964, No 43-296, art. 183<sup>12</sup> (2).

<sup>50</sup> SCHNABEL, T. *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements* [e-version. Not yet published], 2018 [Accessed 2018-09-01]. Available at: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3239527](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3239527)>, p. 4.

negotiators managed to come to a consensus. Such consensus also meant that some provisions had to be adapted in order to get a green light from certain countries or organisations for other provisions to be included in the text of the Convention. It allowed having the Convention finalised, however, caused a few potential flaws of the document. The regulation model agreed in the Convention is described below together with a brief explanation on what could have been improved.

The regulation model provided in the Convention is based on national provisions and is therefore relatively similar to the one stipulated in the Mediation Directive. The general principles of the Singapore Mediation Convention are twofold: ensuring that contracting states (1) enforce MSAs according to their rules of procedure and (2) allow parties to invoke an MSA proving that a matter was already resolved in case a dispute over the same issue arises<sup>51</sup>. To be subject to the enforcement under the Singapore Mediation Convention, an agreement has to be international, concluded in writing, signed by the parties and resulting from mediation. Unlike the Mediation Directive, the Convention obliges parties to provide evidence that this is indeed true. The evidence could be a mediator's signature on the agreement; a separate attestation from the mediator or the institution that administered the mediation or other evidence, if the ones mentioned above are not available. Allowing one of the parties to request for the enforcement of an MSA without the explicit consent of the other is subject to the national procedure of the contracting state. However, contracting states can choose to apply the Singapore Mediation Convention only if the parties to the dispute have agreed on that<sup>52</sup>.

The scope of the Convention is limited to the MSAs arising out of international commercial disputes. However, it could have been wider. Disputes regarding consumers or relating to family, inheritance, and employment law were excluded from the scope. This decision was made to ensure that possible power imbalance between the parties to these kinds of disputes will not deter states from becoming parties to the Convention<sup>53</sup>. Moreover, MSAs (1) approved by a court or concluded in the course of court proceedings, and enforceable as a judgment in the state of that court; or (2) recorded and enforceable as an arbitral award; were also excluded from the scope. The latter exclusion was inserted to avoid creating an overlap with existing and foreseen enforcement frameworks for arbitral awards<sup>54</sup> and judgements<sup>55</sup>. However, trying to avoid situations when a party to an MSA can choose from several instruments capable of accommodating the need for international enforcement of an MSA, parties might be left without any possibilities at all.

Allowing settlement agreements approved by a court or recorded as arbitral awards to fall inside the scope of the instruments would have been a better choice. First, some rightly emphasize that such overlap might be beneficial to the parties<sup>56</sup> as they could choose an instrument which is more convenient in a given situation. Second, a competent authority (which is not necessarily a court<sup>57</sup>) of the state where enforcement is sought has to define if an MSA is enforceable in the state where it was approved by a court. Municipal settlement bodies<sup>58</sup> or other national non-court institutions responsible

<sup>51</sup> UNCITRAL General Assembly *Note by the secretariat No. A/CN.9/942* <...>, p. 4., art 3.

<sup>52</sup> UNCITRAL General Assembly *Note by the secretariat No. A/CN.9/942* <...>, p. 6., art 8. (1) b.

<sup>53</sup> SCHNABEL, T. *The Singapore* <...>, p. 19.

<sup>54</sup> I. e. The New York Convention.

<sup>55</sup> I. e. Hague Conference on International Private Law: Special Commission on the Recognition and Enforcement of Foreign Judgments. Draft Convention [e-version]. Hague, 2017 [accessed 2018-04-29]. Available at: <<https://assets.hchc.net/docs/2f0e08f1-c498-4d15-9dd4-b902ec3902fc.pdf>>.

<sup>56</sup> UNCITRAL General Assembly. *Report of Working Group II (Dispute Settlement) No. A/CN.9/901* [e-version]. New York, 2017 [accessed: 2018-04-29]. Available at: <<http://undocs.org/A/CN.9/901>> para. 64.

<sup>57</sup> See chapter 1 of the article.

<sup>58</sup> HOPT, K. J. *et al. Mediation: Principles* <...>, p. 46.



for enforcement of MSA are not necessarily experts in the international civil procedure. Thus, the risk of mistake is higher. Third, an MSA can be enforceable in the state of court proceedings and not in the state of enforcement. Hence, it would not be enforced at all. Fourth, some states might choose to become parties to the Singapore Mediation Convention and disregard the instruments of, for example, the Hague. Thus, an MSA could not be enforced either. Fifth, the instruments for enforcement of judgements, arbitral awards or MSAs are not conflicting with each other<sup>59</sup>. Therefore, the overlap would not have caused harm or implementational problems. Such decision seems to be the result of an international compromise<sup>60</sup>, however, in this case, it can cause a potential drawback of the Convention.

The Singapore Mediation Convention offers a wide range of grounds for refusal to enforce an MSA. On the one hand, adding more safeguards can prevent unlawful agreements from being enforced. Hence, more states will be willing to become parties to the Convention. On the other hand, the Convention sets several grounds for refusal that require an in-depth analysis of the facts of the mediation. If these grounds were to be invoked frequently, it could render the Convention dysfunctional in practice. Therefore, they should have been omitted. There are several reasons for that.

First, analysing if an agreement is null and void, inoperative, incapable of being performed or if a party was under some incapacity<sup>61</sup> can amount to enforcing an MSA as a simple contract through litigation in terms of time and effort. Second, the grounds related to the conduct of a mediator<sup>62</sup> are repetitive and unnecessary. If the parties were indeed affected by the conduct of a mediator to such an extent that there was no *consensus ad idem*, an MSA would be null and void as a contract. Moreover, mediator, unlike a judge or an arbitrator, does not have a decisive power on the outcome. This reduces the need for such grounds to the minimum. Third, the actual control over the validity of an MSA and assessment of evidence is delegated to competent authorities, which, yet again, are not necessarily courts. Fourth, such grounds give the parties, who participated in the mediation and had an absolute right to leave when they felt mistreated, a way to abuse the process and, most importantly, try to escape or postpone their obligations<sup>63</sup>.

All the grounds for refusal mentioned above could be substituted to one recognizing that the process of granting relief should be stayed upon presentation of a proof that the fairness of the process of mediation or validity of its outcome is challenged in front of a judicial authority having the jurisdiction over the substance of the matter. Relief should not be granted if the judicial authority in question renders a final decision that the mediation process was not fair, or the settlement agreement is not valid. This will incentivize parties to take active steps if they feel mistreated during mediation. It is likely that such wording could decrease the number of these claims, as it would deter parties who are merely trying to delay enforcement. At the same time, it could ensure that legal terms will be interpreted in courts in accordance with the rules of international jurisdiction and not in the institutions having a different function.

It is not being argued that grounds for refusal to grant relief should be abolished entirely from the text. However, an excessive amount of them might render UNCITRAL instruments practically unworkable as almost every attempt of speedy international enforcement would result in time-consuming

<sup>59</sup> SCHNABEL, T. *The Singapore <...>*, p. 20.

<sup>60</sup> The negotiators on behalf of the EU were strictly against such overlap and would not agree on other provisions. A compromise led to finalisation of the Convention as a whole. See: SCHNABEL, T. *The Singapore <...>*, p. 20.

<sup>61</sup> UNCITRAL General Assembly *Note by the secretariat No. A/CN.9/942 <...>*, p. 5., art 5. (1) a and b (i).

<sup>62</sup> UNCITRAL General Assembly *Note by the secretariat No. A/CN.9/942 <...>*, p. 5., art 5. (1) e and f.

<sup>63</sup> KESSEDIJAN, C. *Médiations internationales: un nouvel instrument d'exécution de la CNUDCI. Recueil Dalloz*, 2017, no. 41, p. 2416.

disagreements. After all, the purpose of the contract concluded by the parties is to end the uncertainty and bring the end to the dispute<sup>64</sup>, not *vice versa*.

Hence, the Singapore Mediation Convention should have kept only three types of grounds for refusal. (1) That are primarily related to the compliance with the national law of the state where enforcement is sought as is the model in the Mediation Directive, namely concerns of public policy and the subject matter of the dispute not being capable of settlement by mediation under the law of the state where enforcement is sought<sup>65</sup>. (2) Those, that are clear from the text of an MSA without analysis of the facts, such as an MSA not being binding or final or being incomprehensible<sup>66</sup>. (3) Those, proving that the MSA is not relevant either because it was subsequently modified and parties can submit a proof of the same legal value as the initial mediated settlement agreement, or because the validity of the settlement agreement or fairness of the mediation process was subsequently challenged before a judicial authority in accordance with the rules of international jurisdiction.

To sum up, despite its scope of application limited to commercial disputes, the entry into force of the Singapore Mediation Convention will enshrine that mediation is completely voluntary up to the point of an MSA, however, once such agreement is reached parties are bound by their obligations and have to fulfill them. If not in good faith, then with an incentive from a public authority. This could, therefore, raise the overall credibility of the mediation process in the eyes of the general public and, subsequently, its popularity. Moreover, it could encourage states that do not yet have a national enforcement mechanism for MSAs in place to take steps in order to implement one. The Singapore Mediation Convention has the potential to work as successfully as the Mediation Directive in the EU, however, for such scenario to become more likely the provisions regulating the scope of application and grounds for refusal to grant relief could have been improved.

## Conclusions

1. SIAC – SIMC Arb-Med-Arb Protocol is a wise choice to those who are not only looking for an enforceable outcome to their dispute but as well are keen to transfer their disagreement to arbitration in case mediation is not successful. The New York Convention that Arb-Med-Arb is based on is widely recognized, hence mediated settlement agreements transformed into consent awards can be easily enforced. However, it is not the best choice for those who are genuinely willing to solve their dispute in mediation as method proposed by SIAC-SIMC adds superfluous procedural steps, is costlier and obliges parties to resort to arbitration if mediation does not produce a satisfactory outcome.
2. Enforcement mechanism for mediated settlement agreements offered by the EU Mediation directive is, with rare exceptions, based on different national models of homologation. Even though it could be improved by waiving the additional requirement for subsequent consent from both parties upon the time of enforcement, it is working effectively throughout the member states. However, it is a regional solution, which is built on a number of prior regulations and mutual trust between the member states. Hence, it is unlikely that such model could work unchanged outside the borders of the EU.
3. UNCITRAL's Singapore Mediation Convention has the potential to offer a universal solution to the problem of enforcement of MSAs arising out of commercial disputes. However, trying to ac-

<sup>64</sup> HOPT, K. J. *et al. Mediation: Principles* <...>, p. 45.

<sup>65</sup> UNCITRAL General Assembly Note by the secretariat No. A/CN.9/942 <...>, p. 5., art 5. (1) e and f.

<sup>66</sup> UNCITRAL General Assembly Note by the secretariat No. A/CN.9/942 <...>, p. 5., art 5. (1) b (ii) and c (ii).

commodate needs of different legal systems and assure that the instruments are credible enough to attract contracting states, some provisions were drafted too rigidly or too extensively. Not excluding from the scope of the convention MSAs reached in the scope of judicial proceedings or arbitration and reducing the number of grounds for refusal to grant relief could improve the quality of the instruments and increase the probability that they will be widely used after entering into force.

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## Tarptautinių mediacijos būdu pasiektų susitarimų priverstinis vykdymas

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### S a n t r a u k a

Mediacija pagrįsta laisva šalių valia, todėl dažniausiai šiuo ginčų sprendimo būdu pasiektų susitarimų yra laikomasi. Vis dėlto ne visos šalys elgiasi sąžiningai ir gera valia vykdo priimtus įsipareigojimus. Rizika, kad mediacijos būdu pasiekus susitarimą teks teismo keliu siekti šio susitarimo vykdymo, mažina mediacijos patikimumą ir populiarumą. Dėl to tarptautinė bendruomenė pradėjo ieškoti būdų užtikrinti, kad tarptautiniai mediacijos būdu pasiekti susitarimai galėtų būti privalomai vykdomi. Šiuo metu galima rasti du tarptautinius dokumentus: SIAC-SIMC Arb-Med-Arb protokolą bei ES mediacijos direktyvą. Pirmasis siūlo inovatyvų sprendimą, paremtą Niujorko konvencija ir arbitro sprendimu patvirtinta taikos sutartimi. Vis dėlto šalims, norinčioms išskirtinai mediacijos būdu siekti susitarimo, šis metodas tik prideda bereikalingų procedūrinių žingsnių. Antrasis, numatytas ES mediacijos direktyvoje, yra grindžiamas nacionaliniais taikos sutarčių priverstinio vykdymo modeliais. Tačiau šis teisės aktas veikia tik ES. Be to, šis modelis yra pagrįstas ilgamečiais ES teisės aktais bei per sąjungos gyvavimo istoriją užtikrintu pasitikėjimu tarp jos narių, todėl pritaikytas tarptautiniu mastu gali nepasiekti to paties rezultato.

UNCITRAL priėmė iššūkį parengti universalų tarptautinių mediacijos būdu pasiektų susitarimų priverstinio vykdymo mechanizmą, tačiau tik komercinių ginčų ribose. Šis siekis materializavosi į Singapūro mediacijos konvenciją. Šia konvencija pasirinktas modelis panašus į siūlomą ES mediacijos direktyvoje: jis remiasi nacionaliniais proceso įstatymais ir nesukuria unifikuoto sprendimo. Jei konvencija bus pakankamai populiari, ji gali išspręsti mediacijos būdu pasiektų susitarimų priverstinio vykdymo problemą tarptautiniu mastu. Vis dėlto būtinybė pasiekti sutarimą rengiant konvencijos tekstą bei siekis pritraukti kuo daugiau šalių lėmė keletą potencialių trūkumų. Be to, skirtingai nei ES, ne visų pasaulio valstybių nacionaliniai teisės aktai numato priverstinio vykdymo galimybes mediacija pasiektiems susitarimams. Tai gali sumažinti Singapūro mediacijos konvencijos veiksmingumą praktikoje.