Kluwer Mediation Blog

Singapore Convention Series: A Plea For The Adoption Of The Singapore Mediation Convention By The EU

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The forthcoming Singapore Mediation Convention aims at ensuring the international "direct" enforcement of Mediated Settlement Agreements ("MSAs") worldwide (see the post by Nadja Alexander, on a short description of the Convention). This means that an MSA shall be enforced directly in any Singapore Mediation Convention contracting state, without a prior review or granting of enforcing effect at the country where it is reached.

(a) The EU legislative framework on mediation and cross-border enforcement of MSAs

In the EU, next to the Mediation Directive 2008/52/EC which regulates questions of procedure of the mediation in the member states, we are having a very developed system of Private International Law regulations (starting with regulation 1215/2019 – the Brussels Ia on the civil and commercial matters and continuing, literally, with most fields of law, such as succession with regulation 650/2012 and most family law matters with regulations 2201/2003 – Brussels IIa). These regulations apply to cross-border enforcement, namely enforcement from a member state to another, and they presuppose the enforceability of the MSA in some member state. In this context, the MSAs must first have to acquire the form of a "judgment, decision or authentic instrument" in a member state, in order to qualify for cross-border intra-EU enforcement. This position derives from art. 6 paras. 2 and 4 and from preamble 20 of the EU Mediation Directive.

This means that (a) these regulations are used for the creation of a closed intra-EU system in relation to the cross-border enforcement of MSAs and (b) the form that each MSA takes in the place where it is reached shall define the route of enforcement and in particular the EU instrument that shall be used (on the basis of the subject matter of each MSA) and the actual provision of the applicable instrument. This last point shall also define the reasons for non-enforcement in the country where cross-border enforcement is envisaged (wider in the case of judgments in comparison to authentic instruments, where only the usual ordre public/ public policy defence applies).

Further, under art. 6 of the EU Mediation Directive, an MSA shall be granted enforcing effect in a member state, unless it violates the law of the country where the

application is made, or the same law does not allow enforcing effect to a certain MSA. Therefore, much depends on the law of the initial country, usually the one where the MSA shall have been reached. This situation may create different assessments and diverting approaches as regards MSAs and their cross-border enforcement, since national laws shall intervene decisively in the relevant process. It should be noted that art. 6 of the EU Mediation Directive does not preclude the local law of a member state from allowing "direct" enforcement of an MSA reached in any country, even outside the EU, but this is not a matter regulated by the above EU instruments and is, for this reason, a recipe for further divergences among the laws of the member states.

(b) Changes that the Singapore Mediation Convention would bring in the EU

Under the direct enforcement scheme of the Singapore Convection on the other hand, the initial control at the country where the MSA is reached, is altogether skipped. Emphasis is put only at the stage of enforcement, which is guaranteed if none of the reasons of non-granting the relevant "relief" (a wider notion including enforcement) mentioned in art. 5 of the Singapore Mediation Convention exists. Therefore, the relevant control moves only at the stage of enforcement at the country where actual enforcement is sought. (More on the comparison of the two systems and of the use of the 1958 New York Convention also in respect of enforcing MSAs, in my recent article, International Enforcement of Mediated Settlement Agreements: Two and a Half Models—Why and How to Enforce Internationally Mediated Settlement Agreements, Arbitration 2019, 49-64.) To be noted though that the scope of the Singapore Mediation Convention is narrower than the one of the relevant EU regulations in conjunction. It applies only to civil and commercial MSAs, with the exclusion of family, consumer, employment and inheritance cases. It is in this respect open to debate which cases are permissible under law to be resolved by mediation.

It is suggested that the adoption of the Singapore Mediation Convention by the EU on behalf of all its member states is a sensible thing to happen. Clearly, the adoption of the Singapore Mediation Convention by the EU shall create a common level playing field in mediation in the EU. After such adoption, the international MSAs falling within the scope of the Convention, shall be easily enforced directly in any member state, since the Convention shall replace the differing national laws on this point. Cross-border enforcement on the basis of the EU regulations shall always be possible and applicable, in case that an MSA shall have already been granted enforcing effect somewhere else in the EU. Obviously, the frequency of cross-border enforcement shall be reduced, since in most cases direct enforcement shall be preferred for practical reasons. It will however remain for use mostly in mediations that are excluded from the Singapore Mediation Convention and always to the extent allowed under law.

In the EU there has been extensive discussion as to whether a special instrument only for MSAs should exist, given that for the moment an MSA can take only one of the forms mentioned in the various EU Private International Law regulations. (See for example Carlos Esplugues/ José Luis Iglesias, Mediation and private international law: improving free circulation of mediation agreements across the EU European Parliament, Directorate General for Internal Policies. Policy Department C., Citizens's Rights and Constitutional Affairs, The Implementation of the Mediation Directive 29 November 2016, Brussels, 2016, pp. 70-95). Once the EU adopts the Singapore

Mediation Convention, this debate shall become marginal in respect of the types of MSAs that fall in its scope as, for the majority of MSAs, direct enforcement shall be chosen and the adoption of a special instrument for the cross-border enforcement of MSAs shall not be as necessary, or in any event, it shall have a limited importance.

Clearly, the EU has the competence to ratify the Singapore Convention on behalf of its members, since the adoption of an international convention on mediation falls into its relevant competence (Art. 3 para. 2 TFEU where it is mentioned that: "The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope." See also Opinion 1/2003 on the relevant competence of the EC in relation to the Lugano Convention which is, just like mediation, part of the "judicial cooperation in civil and commercial matters").

As a last remark, it should be mentioned that the EU has abstained from any legislation on arbitration, particularly due to the existence of the 1958 New York Convention. The Singapore Mediation Convention is, by and large, following the New York Convention paradigm. Allowing room for the pan-EU application of the Singapore Mediation Convention would be a consistent policy, also in this respect.

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