

Felix Wilking

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Master of Dispute Resolution

The enforcement and setting aside of mediation settlement agreements: A comparison between German and international commercial mediation

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**The enforcement and setting aside of mediation settlement agreements:
A comparison between German and international commercial mediation**

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A. Introduction

Historically mediation was developed as a method of conflict resolution in especially political cases, which could not easily be settled by legal instruments or proceedings. During the last century, mediation was rediscovered as a dispute resolution method alternative to litigation in the fields of civil law and business law. In this modern shape mediation is a private and generally state-free way to resolve conflicts focusing on interests instead of positions, solely supported by a mediator, who conducts the negotiation, but who has no authority to decide. Nowadays European and German legislators have established an “in-house-mediation” as part of the court proceeding. Both the relevant EU Directive 2008/52/EG and the transposing German Mediation Code lay down, that during a trial, judges are allowed to play the part of mediators in order to find an amicable solution.¹

The basic idea of mediation is that the parties themselves develop a solution to the existing problems.² The Mediator as a neutral third party merely assists the parties by ensuring a structured negotiation conversation.³ Unlike in litigation and arbitration proceedings the mediator does not possess any power to decide on the issue.⁴ The goal is to provide comprehensive legal peace by making the parties part of the solution.⁵

In 2012 the World Bank published a survey on the use of mediation on a global scale.⁶ The results illustrate the growing acceptance and importance of mediation. 100 economies across seven regions were surveyed.⁷ The survey revealed that 64 out of 100 economies have laws which grant the courts the possibility to refer a commercial dispute to mediation.⁸ 46 economies have enacted laws on out-of-court mediation.⁹ Out of the 100

¹ Kreissl, SchiedsVZ 2012, 230.

² Nistler, JUS 2010, 685.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ All data relating to the survey and the indicators used is available at <http://iab.worldbank.org/data/~media/FPDKM/IAB/Documents/Methodology-2012-Arbitrating-and-Mediating-Disputes.pdf> (last accessed 28.05.2015).

⁷ A/CN.9/WG.II/WP.187, Annex 1, Table 1.

⁸ A/CN.9/WG.II/WP.187, p. 12.

⁹ A/CN.9/WG.II/WP.187, p. 12.

economies in about 80 economies the leading arbitration institutions provide mediation services.¹⁰

The result of a successful mediation is a mediation settlement agreement developed and agreed upon by the parties. The settlement agreement generally comprises obligations for one of the parties or both parties. The amicable character of mediation in the finding of a solution implies that in most cases the obligations emerging from mediation settlement agreements are performed voluntarily and accordingly. The parties themselves worked on finding this solution and proposed the terms finally agreed upon. The interest-based solution finding process normally leads to a broad acceptance of the agreement amongst the parties. Nevertheless, there is always the possibility that in certain circumstances one of the parties does not perform the obligations emerging out of the agreement. The other party is then in need of a way to make the reluctant party act accordingly. On the other hand it is conceivable that the refusing party has reasons for his/her reluctance. The reasons can be numerous - like a change of heart or the discovery of unknown facts, just to name a few. This party is then in need to set aside the agreement.

The first chapter of this thesis deals with the enforcement of a domestic settlement agreement and the setting aside of such an agreement in Germany. The second chapter deals with the same issues in international commercial mediation. The fourth chapter is about the EU Directive 2008/52/EG. The fifth chapter deals with the proposed UNCITRAL Convention on International Commercial Mediation and Conciliation.

¹⁰ A/CN.9/WG.II/WP.187, p. 13.

B. The enforcement or setting aside of a domestic mediation settlement agreement

I. Introduction

It is only since 2012 that Germany has had a mediation code. The reason for the sudden introduction was a directive of the European Union dealing with cross-border mediation inside the EU. The German legislator chose a far-reaching approach by not only transposing the directive but also creating the first code for domestic mediation in Germany. That way the legislator wanted to avoid a fragmentation of law and provide an option to apply the principles of mediation in other areas of law not covered by the directive.¹¹ Additional motivations were the promotion of the extrajudicial mediation and the establishment of an explicit legal foundation.¹² The final compromise between the two legislative chambers did not lead to the expected abolishment or at least limitation of judge-conducted mediation.¹³ What was initially called a milestone towards a new culture of disputing (“Streitkultur”)¹⁴ became a code governing primarily homogenous fundamentals for the newly introduced occupational field of mediation.¹⁵ The code includes a mediator’s contracts by determining central duties for mediators and crucial procedural mechanisms.¹⁶ The code also includes regulations regarding the necessary content of the education of mediators. This led critics to believe that the mediation code primarily serves to acquire customers for the educational institutions and for educating mediators.¹⁷

However, mediation had been practiced in Germany before the introduction of the mediation code. Several federal states initiated pilot projects to test the impact of mediation. Private mediators have offered their services to the public before as well. Through the mediation code a legal framework for mediation was created.

¹¹ BT-Dr 17/5335, p. 11; Leutheusser-Schnarrenberger, ZKM 2012, 72.

¹² Ibid.

¹³ Ahrens, NJW 2012, 2466.

¹⁴ Sensburg, Beck-Blog: <http://blog.beck.de/2012/06/05/mediationsgesetz-ist-ein-meilenstein> (last accessed 28.05.2015).

¹⁵ Ahrens, NJW 2012, 2466.

¹⁶ Ahrens, NJW 2012, 2466.

¹⁷ Geyer, F.A.Z. 2012: <http://www.faz.net/aktuell/feuilleton/neues-mediationsgesetz-ist-schlichten-besser-als-richten-11633089.html> (last accessed 28.05.2015).

1. Two ways to mediation

Nowadays there are two ways to get to mediation in Germany. The differentiation between these two ways is essential and will be explained below. The settlement agreements which are the outcome of a successful mediation possess a different legal nature. This affects the enforceability and the setting aside of the agreements and leads to totally different results depending on the way the mediation was initiated.

a) The first way: certified mediator

The first way is the traditional way. A dispute has arisen and the parties agree on submitting it to mediation. The mediation will in that case take place with the assistance of a certified mediator.

b) The second way: court

The second way to get to mediation is through the courts. When an action is already pending the competent court has the obligation to try to get the parties to an amicable resolution (section 278 I ZPO (German Code of Civil Procedure)).

“Section 278¹⁸

Amicable resolution of the dispute; conciliation hearing; settlement

(1) In all circumstances of the proceedings, the court is to act in the interests of arriving at an amicable resolution of the legal dispute or of the individual points at issue.

(...)”

One option for the court to get the parties to an amicable resolution during the compulsory conciliation hearing (section 278 II ZPO) is to refer the parties to a so-called conciliation judge. The conciliation judge was called “court mediator” before the introduction of the mediation code. The denomination “mediator” is now reserved for certified mediators only (section 9 Mediation Code). Even though the conciliation judge is a normal judge, he has no authority to take a decision in the case (section 278 V ZPO).

¹⁸ All sections of the ZPO in English taken from the official homepage of the Federal Ministry of justice and Consumer Protection: http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html

“Section 278

(...)

(5) The court may refer the parties for the conciliation hearing, as well as for further attempts at resolving the dispute, to a judge delegated for this purpose, who is not authorised to take a decision (Güterichter, conciliation judge). The conciliation judge may avail himself of all methods of conflict resolution, including mediation.

(...)”

The referral lies in the discretion of the competent court. Decisive for the exercise of this discretion is the question whether a reasonable prospect of an amicable settlement exists.¹⁹ As a general rule this can only be affirmed if both parties are willing to participate in such a procedure.²⁰ Nevertheless, the referral can be executed against the will of the parties.²¹

The conciliation judge is allowed to apply any method of conflict resolution, section 278 V ZPO. The explicit reference to mediation underlines the importance of this method. Such mediation is from a formal prospective not regarded as mediation in the sense of the Mediation Code but can be conducted following the same rules.²² Following the new terminology the conciliation judge is an instrument of the consensual dispute resolution and not a mediator in a narrower sense.²³ This means that the conciliation judge can propose settlement proposals to the parties and that he is allowed to make use of his judicial authority.²⁴ According to his freedom of methods granted in section 278 V ZPO the conciliation judge is allowed to evaluate the dispute legally and to study the files.²⁵ These actions contradict a classic mediation.²⁶ The conciliation hearing is not public and the conciliation judge has the right to refuse to give evidence about it in a following litigation (§ 383 I nr. 6 ZPO).

¹⁹ Bacher, BeckOK ZPO s. 278, paragraph 20.

²⁰ BT-Dr 17/8058, 21.

²¹ Foerste, Musielak/Voit ZPO s. 278, paragraph 20.

²² Ahrens NJW 2012, 2469 et seq.

²³ Prütting, MüKo ZPO s. 278, paragraph 24.

²⁴ Prütting, MüKo ZPO s. 278, paragraph 27.

²⁵ BT-Dr 17/8058, 17.

²⁶ Prütting, MüKo ZPO s. 278, paragraph 27.

Section 278a I ZPO contains another option for the court to refer the parties to mediation.

Section 278a

Mediation, alternative conflict resolution

(1) The court may suggest that the parties pursue mediation or other alternative conflict resolution procedures.

(2) Should the parties to the dispute decide to pursue mediation or other alternative conflict resolution procedures, the court shall order the proceedings stayed.

The mediation referred to in this section is a classic mediation in the sense of the Mediation Code. Meanwhile section 278 V ZPO refers the parties to an “in-house-mediation” section 278a ZPO refers them to an extrajudicial mediation. The court is free to make a suggestion to submit the dispute to extrajudicial dispute resolution at any time in the ongoing court procedure.²⁷ It will do so particularly in cases of complex legal relations of longer duration or in cases of ongoing personal or commercial relations of the parties which could be harmed through the lawsuit or its outcome.²⁸ In contrast to section 278 paragraph 5 ZPO the court cannot force the parties to mediate. This is a result of the explicit wording of section 278 paragraph 1 ZPO (“may suggest”). The choice between a referral following section 278 paragraph 5 ZPO and a suggestion following § 278a paragraph 1 ZPO and the choice of the method of alternative dispute resolution lays in the discretion of the courts.²⁹ A suggestion following section 278a paragraph 1 ZPO will normally be considered if court-intern attempts are not sufficiently promising but the enlistment of a person with special training or special knowledge is.³⁰

²⁷ Prütting, MüKo ZPO s. 278a, paragraph 2.

²⁸ Ibid.

²⁹ Bacher, BeckOK ZPO s. 278a, paragraph 2 et. seq.

³⁰ Bacher, BeckOK ZPO s. 278a, paragraph 3.

2. The legal nature of mediation settlement agreements

At the end of a successful mediation the parties agree on certain terms and conditions. The settlement agreement contains these terms and conditions. In Germany the legal nature of a settlement agreement depends on who conducted the mediation. As explained above a mediation in Germany can either be conducted by a certified mediator or a conciliation judge. If the court refers the parties to mediation by making use of section 278a I ZPO the person conducting the mediation is the certified mediator and not the referring judge.³¹ The legal nature of such an agreement is the same as if the parties would have submitted the dispute to a certified mediator in the first place.

a) Legal nature of a settlement agreement through mediation with a certified mediator

A mediation settlement agreement reached with the assistance of a certified mediator takes the legal nature of a private contract.³² The mediation code does not contain any requirements regarding the form of this contract. Therefore an oral agreement is possible and binding according to German law. In practice nearly every mediation settlement agreement is in writing.³³ This is to avoid the inevitable difficulties arising after one party challenges the content of the settlement in the aftermath.³⁴ Only if the settlement agreement itself is about a legal transaction that legally requires a certain form must the settlement agreement meet this form.³⁵ A settlement agreement by which one party agrees to transfer or acquire ownership of a plot of land must be recorded by a notary for example (section 311b BGB³⁶).

³¹ Ibid.

³² Foerste, Musielak/Voit ZPO s. 278a, paragraph 3.

³³ Risse, SchiedsVZ 2012, 248.

³⁴ Ibid.

³⁵ Fischer, BeckOK BGB s. 779, paragraph 32.

³⁶ Bürgerliches Gesetzbuch (BGB) – German Civil Code, All sections of the BGB in English taken from the official homepage of the Federal Ministry of Justice and Consumer Protection: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3367.

b) Legal nature of a settlement agreement through mediation with a conciliation judge

A settlement agreement reached with the assistance of a conciliation judge takes the legal nature of a so called procedural settlement.³⁷ The procedural settlement must be recorded (section 160 paragraph 3 nr. 1 ZPO). The settlement must be read out aloud to the parties and it must be signed by them (sections 162 paragraph 1, 163 paragraph 1 ZPO). The procedural settlement is a contract with a double legal nature. It has a formal effect ending the lawsuit.³⁸ And it has an effect on the substantive law by governing the legal relations between the settling parties relating to the matter in dispute.³⁹

II. The enforceability of mediation settlement agreements in German law

Having explained the different ways of mediation and the correspondingly differing legal nature of mediation settlement agreements in German law this part will deal with the impact of that on the enforceability. The enforceability is regulated in the 8th book of the German Procedural Code (ZPO).

1. Mediation settlement agreement: certified mediator

A private contract in form of a settlement (section 779 BGB) is enforceable as a contract. In order to enforce the rights emerging from such a settlement the respective party is obliged to sue the other party. If the litigation is successful and the judgement is final this judgement is enforceable according to section 704 ZPO. In the course of this lawsuit the mediator has the right to refuse to give evidence (section 4 Mediation Code in connection with section 383 I nr. 6 ZPO). This can lead to major problems for the suing party to prove their claim when the agreement was not concluded in writing.

The initial draft for the Mediation Code contained a provision establishing the immediate enforceability of mediation settlement agreements comparable to court orders.⁴⁰ This provision never became a reality. It is also not required

³⁷ Saenger, HK-ZPO s. 278, paragraph 20.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ BT-Dr 17/5335, p. 7.

by the directive. The German legislative chamber justified the withdrawal of the provision with legal alternatives at the disposal of the parties.⁴¹ In the end they did not see a need for such a provision due to existing possibilities to make private contracts enforceable.⁴² The parties already have two possibilities to choose from in order to make their agreement enforceable.

They can either have the settlement agreement recorded by the courts or a notary according to section 797 ZPO. That way the settlement is enforceable right away according to section 794 paragraph 1 nr. 1 and 5 ZPO.

Or the parties can choose the option of a settlement amongst attorneys according to section 796a ZPO. If the parties make this choice the settlement agreement still needs to be declared enforceable by a court or a notary according to section 796 ZPO. The declaration of enforceability will be executed on application by one of the parties. The court and the notary check the formal requirements and the compatibility with public policy ex officio.⁴³

These additional measures providing the enforceability must be agreed upon between the parties and cause additional costs.

2. Mediation settlement agreement: court

A procedural settlement is enforceable right away according to 794 paragraph 1 nr.1 ZPO.

“Section 794

Further enforceable legal documents

(1) Compulsory enforcement may furthermore be pursued:

1. Based on settlements concluded by the parties, or between one of the parties and a third party, in order to resolve the legal dispute either in its full scope or as regards a part of the subject matter of the litigation, before a German court (...)”

⁴¹ BT-Dr 17/5335, p. 7.

⁴² BT-Dr 17/5335, p. 7.

⁴³ Habersack, MüKo BGB s. 779, paragraph 100.

III. The setting aside of a mediation settlement agreement

1. Introduction

Even though mediation settlement agreements are supposed to solve the dispute for good they can become a matter of dispute themselves. In that case at least one of the parties wants to get rid of the agreement in order to avoid the realization of the claims stated in it. This chapter will deal with the reasons that can lead to setting aside such an agreement and with the measures necessary to adopt.

There is not just one general article on how and when to set aside mediation settlement agreements. Of significance is international commercial arbitration in which article 34 of the UNCITRAL Model Law enumerates the reasons for setting aside an arbitration award. This article was adopted without changes into German law (section 1059 ZPO). In domestic German mediation the setting aside of mediation settlement agreements depends on the procedure of how the agreement was obtained and the legal nature it therefore possesses. The different legal natures lead to different requirements for setting aside the mediation settlement agreement. This chapter will show that the procedure in obtaining the mediation settlement agreement has an immediate effect on the possibility to set a mediation agreement aside.

The more formality involved in obtaining the mediation settlement agreement, the more complicated it becomes to set it aside. The degree of formality is the highest when obtaining the mediation settlement agreement through court. Nevertheless, this chapter will also show that in the end the reasons for setting aside the mediation settlement agreement are the same regardless of how it was obtained. The difference lies rather in the measures adopted to stop the potential enforcement of the claims. Coming back once more to international commercial arbitration, the reasons for setting aside mediation settlement agreements overlap with the reasons to set aside arbitration awards in the area of substantive law. The biggest difference is that there is not only one article enumerating all the reasons for setting aside a mediation settlement agreement. But looking closer at article 34 of the UNCITRAL Model Law it becomes clear that article 34 paragraph 2 a) i)

makes only reference to the substantive law to which the parties have been subjected. The reasons themselves, like fraud for example, are not stated in this article but are scattered all over the applicable substantive law.

2. Mediation settlement agreement: certified mediator

a) Introduction

As mentioned above the legal nature of a mediation settlement agreement obtained with the assistance of a certified mediator is classified as a private contract. A private contract does not need to be set aside by a court to lose its effectiveness. In German law a private contract is ineffective or null and void either automatically or through a unilateral declaration of the entitled party. A private contract contradicting the common decency for example is null and void automatically. The effectiveness of a private contract entered into because of fraud depends on the behaviour of the party-victim of the fraud. It can decide whether to annul the contract through a unilateral declaration or to keep the contract effective.

A private contract is ineffective if it is contrary to mandatory legal provisions, but a cure is still possible and it therefore can become valid in the future. Conversely, transactions can initially be effective, but can become ineffective retrospectively due to the use of the right to influence a legal transaction by unilateral declaration. The underlying shortage to the private contract is marginal so that the law provides a cure.

If private contracts have very serious deficiencies the law does not allow them to have any legal effect. These contracts are null and void. They are null and void from the beginning on (*ex tunc*).

A party to an ineffective private contract does not have many legal means to its disposal to clarify or rectify the situation regarding the ineffective private contract. And due to the automatic ineffectiveness there is not really a need for that. But if a person is subject to an unjustified claim emerging out of such an ineffective private contract it can either wait to be sued and then defend himself at court by referring to the ineffectiveness of the contract. Or he

makes use of the action for acknowledgement according to section 256 paragraph 1 ZPO.

“Section 256

Action for acknowledgment

(1) A complaint may be filed to establish the existence or non-existence of a legal relationship, to recognise a deed or to establish that it is false, if the plaintiff has a legitimate interest in having the legal relationship, or the authenticity or falsity of the deed, established by a judicial ruling at the court's earliest convenience.

(...)”

The required legitimate interest is existent as soon as a person argues that it has a claim against the other person.⁴⁴ The court will determine in its sentence that the contract is ineffective and no claims exist.⁴⁵

Whether private contracts and thereby mediation settlement agreements are ineffective is a question of substantive law. Since the mediation settlement agreement is a private contract the general rules of the German Civil Code (Book 1) regarding the invalidity and the ineffectiveness of contracts are applicable on it as well as the provisions regarding the settlement.

The settlement agreement itself is regulated in section 779 BGB. The provision contains in its paragraph 1 the legal definition of a settlement and one reason which leads to the ineffectiveness of the settlement agreement.

“Section 779

Concept of settlement; mistake as to the basis of the settlement

(1) A contract by which a dispute or uncertainty of the parties with regard to a legal relationship is removed by way of mutual concession (settlement) is ineffective if the fact situation used as a basis according to the contents of the contract does not correspond to reality and the dispute or uncertainty would not have occurred if the facts had been known.

(2) It is equivalent to uncertainty about a legal relationship if the realisation of a claim is uncertain.”

⁴⁴ Bacher, BeckOK ZPO s. 256, paragraph 22.

⁴⁵ Ibid.

b) Violation of provisions of the mediation code

The German mediation code contains a variety of tasks and obligations for the mediator. Here is an overview of the obligations and tasks of the mediator stated in the mediation code:

- To make sure that parties understand procedure and participate voluntarily (section 2 paragraph 2)
- To foster the communication between the parties, be of assistance to both parties in the same degree (section 2 paragraph 3)
- In the case of an agreement, to make sure that parties conclude the agreement on the basis of the circumstances and understand the agreement (section 2 paragraph 6)
- Has to reveal all circumstances proving his/her impartiality (section 3 paragraph 1)
- Has to be impartial; s/he is not allowed to have worked anyhow for a party to the mediation before (section 3 paragraph 2)
- On demand of the parties s/he has to reveal his experience, professional background and her/his education (section 3 paragraph 5)
- Has to be confidential (section 4)
- Has to inform parties about her/his confidentiality (section 4)
- Has to ensure her/his continuing education (section 4)

Now the question is which violations of these tasks and obligations impact on the agreement. Therefore it is necessary to point out the nature of the legal relations between the parties on the one hand and the mediator on the other hand. The parties and the mediator enter into a private service contract.⁴⁶ The mediator has to fulfil his obligations and tasks and the parties are obliged to recompense the mediator. The violation of any of the tasks and obligations on the part of the mediator does not lead to the ineffectiveness or nullity of the mediation settlement agreement.⁴⁷ The mediator can only be held liable for damages caused according to section 280 paragraph 1 BGB. That means that the mediator found to be liable has to compensate the parties for the loss

⁴⁶ Risse, SchiedsVZ 2012, 247.

⁴⁷ Ibid.

suffered due to the mediation settlement agreement.⁴⁸ These damages will normally be compensated in money since restitution in kind – the cancellation of the mediation settlement agreement - is not possible for the mediator.

c) Grounds for ineffectiveness and nullity of mediation settlement agreements

A settlement agreement can be ineffective or null and void out of the following reasons:

aa) Violation of a statutory prohibition

The settlement agreement that violates a statutory prohibition is void (section 134 BGB).

“Section 134

Statutory prohibition

A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion.”

An example for a statutory prohibition is the law against illegal employment (Schwarzarbeitsgesetz). A settlement agreement like any other transaction which somehow deals with illegal employment is void.

bb) Contrary to public policy

Section 138 BGB states that legal transactions contrary to public policy are void.

“Section 138

Legal transaction contrary to public policy; usury

(1) A legal transaction which is contrary to public policy is void.

⁴⁸ Ibid.

(2) In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.”

The clear disproportion between performance and consideration regulated in paragraph 2 of section 138 BGB is to be applied restrictively on settlement agreements.⁴⁹ Because, differently from typical exchange contracts like lease agreements or contracts of sale, the party interest in settlement agreements goes further than just the obtainment of the performance.⁵⁰ Alongside that the parties have an interest in the solution of an existing dispute or the clarification about the uncertain realization of claims.⁵¹ The last mentioned interest is hardly accessible through an objective determination which is however a requirement of section 138 BGB.⁵²

Even if a settlement agreement is reached by applying disallowed methods it cannot be considered void if it provides a proper solution of the dispute from the point of view of the parties.⁵³

An example for a legal transaction against public policy is bribery. On the contrary, contracts dealing with sexual relations in return for money are no longer against public policy due to the introduction of the law on prostitution (Prostitutionsgesetz).

cc) Voidability

aaa) Voidability for mistake

If a party was mistaken about the contents or the scope of engagement of the settlement agreement it is entitled to avoid (nullify) the settlement agreement according to section 119 paragraph 1 BGB.⁵⁴

⁴⁹ Fischer, BeckOK BGB s. 779, paragraph 41.

⁵⁰ Habersack, MÜKO BGB s. 779, paragraph 57.

⁵¹ BGH NJW 1964, 1787.

⁵² Fischer, BeckOK BGB s. 779, paragraph 41.

⁵³ Ibid.

⁵⁴ Habersack, MÜKO BGB s. 779, paragraph 60.

“Section 119

Voidability for mistake

(1) A person who, when making a declaration of intent, was mistaken about its contents or had no intention whatsoever of making a declaration with this content, may avoid the declaration if it is to be assumed that he would not have made the declaration with knowledge of the factual position and with a sensible understanding of the case.

(2) A mistake about such characteristics of a person or a thing as are customarily regarded as essential is also regarded as a mistake about the content of the declaration.”

Misconceptions about attendant circumstances of the dispute resolution are to be qualified as mistakes in motivation and entitle a party to avoid the settlement only if the parties made these circumstances on a common basis to the settlement.⁵⁵

bbb) Voidability on the grounds of deceit or duress

If deceit or duress was applied when reaching the settlement agreement this agreement is void according to section 123 BGB if the agreement would not have the same content without the application of these means.

“Section 123

Voidability on the grounds of deceit or duress

(1) A person who has been induced to make a declaration of intent by deceit or unlawfully by duress may avoid his declaration.

(...)”

The deceit can also refer to the questionable or arguable circumstances regulated and rectified in the settlement agreement.⁵⁶ The deceit can arise both through action or omission and through conscious concealment of facts. The above mentioned is also applicable to unlawful duress.⁵⁷ The duress can also be committed by a third party.⁵⁸

⁵⁵ Ibid.

⁵⁶ Habersack, MÜKO BGB s. 779, paragraph 61.

⁵⁷ Ibid.

⁵⁸ Ibid.

dd) Ineffectiveness according to section 779 BGB

The ineffectiveness of the settlement according to Paragraph one is an exception to the interference with the basis of transaction codified in section 313 BGB.⁵⁹ The requirement for the ineffectiveness is a mistake of the parties regarding the as established considered issue.⁶⁰ The issue is not only understood in an actual way but also comprises the legal situation.⁶¹ Nevertheless, the mistake regarding the legal situation is only considerable when based on the misjudgement of facts.⁶² Mere mistakes in law are unremarkable.⁶³ Established means that both parties consistently consider the issue to be undisputed and given.⁶⁴ The settlement results ineffective if both parties are mistaken in respect thereof. If they had known about the actual situation the dispute or the uncertainty subject to the settlement would not have arisen.⁶⁵

ee) Interference with the basis of transaction

“Section 313

Interference with the basis of the transaction

(1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.

(2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect.

(...)”

In the case in which the settlement is not already ineffective according to section 779 BGB it can be ineffective following the general principle of the

⁵⁹ BGH NJW 2000, 2498.

⁶⁰ Staudinger, BGB-HK s. 779, paragraph 8.

⁶¹ Ibid.

⁶² Ibid.

⁶³ BGH NJW 1961, 1460.

⁶⁴ Staudinger, BGB-HK s. 779, paragraph 8.

⁶⁵ Fischer, BeckOK BGB s. 779, paragraph 42.

lack or omission of the basis of transactions (section 313 BGB).⁶⁶ Meanwhile section 779 BGB covers the initial lack of the basis of the settlement, section 313 paragraph 1 deals amongst others with the subsequent omission of the basis of transactions and can therefore be applied on settlements. Typical examples for this are settlements concerning alimony.⁶⁷

d) Special cases: settlement agreement amongst attorneys, Court recorded settlements (mentioned above in B II 1)

Even though a settlement agreement is ineffective or void it could be declared enforceable. Alternatively it could be recorded by a court and is therefore enforceable right away. In these cases the party trying to avoid the enforcement will be in need of protection.

If the parties concluded a settlement agreement with the assistance of attorneys in order to enable enforceability, and one party obtained according to his application a declaration of enforceability the party trying to avoid the enforcement can raise an objection to the claim being enforced according to section 767 paragraph 1 ZPO on the basis of exceptions in substantive law. In the case of a success the court will rule that the agreement having been declared enforceable cannot be enforced.⁶⁸ The party opposing the enforcement can interfere even earlier. It can prove his/her exceptions in substantive law to the notary or the court as soon as the other party to the settlement agreement applied for the declaration of enforceability⁶⁹.

If the settlement agreement has been recorded by a court, the party opposing the enforcement can raise the action of section 767 ZPO as well.

3. Mediation settlement agreement: court

Due to the double nature of the procedural settlement (see above) it can suffer a deficiency in substantive law and in procedural law. The question is whether a deficiency in substantive law affects the effectiveness on a procedural level or the other way around. As a private-law contract the effectiveness of the procedural agreement depends on its accordance to the

⁶⁶ BGH NJW 2000, 2498.

⁶⁷ Habersack, MÜKO BGB s. 779, paragraph 68.

⁶⁸ Preuß, BeckOK ZPO s. 767, paragraph 52.

⁶⁹ Preuß, BeckOK ZPO s. 767, paragraph 72.

substantive law.⁷⁰ If the agreement is ineffective according to substantive law it neither possesses the effect of ending the lawsuit on a procedural level.⁷¹ That means that the lawsuit is still pending with a court while an effective procedural agreement would end the lawsuit. Shortages on the level of substantive law always affect the effectiveness of the procedural part of the settlement as well.⁷² This corresponds with the supposed will of the parties, which is assumed to be the continuation of the lawsuit.⁷³ Therefore the lawsuit stays pending with a court and can be carried on.⁷⁴

That is the case when due to the deficiency the settlement agreement directly fails to end the dispute. This happens for example in cases of nullity because of the incapacity of a party and in the statutory grounds for revocation of sections 134, 138 BGB (statutory prohibition, legal transaction contrary to public policy).

However the termination of the pending lawsuit is not in question because of subsequent declarations of the parties that have an impact on the legal relationship like a consensual cancellation of the settlement agreement, a cancellation due to breach of duty. These declarations refer to the newly settled legal relation between the parties through the settlement agreement and therefore require its effectiveness.⁷⁵

If procedural shortages - like a violation of the statutory requirement to be represented by a lawyer in front of a district court (section 78 BGB) - lead to the ineffectiveness of the procedural settlement the lawsuit is also still pending with a court and must still be finalised by the court⁷⁶. The procedural settlement is not enforceable in that case. In contrast to deficiencies in substantive law, a deficiency on the procedural level does not necessarily affect the effectiveness in the substantive law of the settlement.⁷⁷ A procedural settlement with procedural deficiencies can still produce the desired effect. It still ends the dispute.⁷⁸ That goes without saying in the case

⁷⁰ Habersack, MÜKO BGB s. 779, paragraph 90.

⁷¹ Staudinger, BGB-HK s. 779, paragraph 12.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Habersack, MÜKO BGB s. 779, paragraph 90.

⁷⁵ Habersack, MÜKO BGB s. 779, paragraph 91.

⁷⁶ Habersack, MÜKO BGB s. 779, paragraph 87.

⁷⁷ Ibid.

⁷⁸ Ibid.

of an extrajudicial settlement only recorded formally in front of the court in order to facilitate the enforceability. But even in other cases the settlement can stay effective if this is wished for by the parties. In the case of doubt however there is a legal presumption derived from section 139 BGB that the procedural shortage of the settlement affects the procedural settlement on its material level as well and is completely ineffective.⁷⁹

“Section 139

Partial invalidity

If a part of a legal transaction is void, then the entire legal transaction is void, unless it is to be assumed that it would have been undertaken even without the void part.”

Besides the deficiency of not being represented by a lawyer the effectiveness can mainly be affected by deficiencies regarding the recording. The recoding of the procedural settlement is mandatory. The recording of the settlement has to fulfil the form requirements regulated in section 160 et sq. ZPO. The settlement agreement and all other attached documents have to be read to the parties and must be authorized by them. The incompetence of the court or the wrong composition of the court has no effect on the effectiveness of the procedural agreement.⁸⁰

Since a procedural settlement is directly enforceable according to section 794 ZPO, a party trying to stop the impending enforcement will think of the actions provided by the German Code of Civil Procedure to avoid enforcement. Raising an objection to the claim being enforced according to section 767 paragraph 1 ZPO could be considered the first choice by the party.

“Section 767

Action raising an objection to the claim being enforced

- (1) *Debtors are to assert objections that concern the claim itself as established by the judgment by filing a corresponding action with the court of first instance hearing the case.
(...)”*

⁷⁹ Ibid.

⁸⁰ Fischer, BeckOK BGB s. 779, paragraph 80a.

If the party was to succeed the court would declare the enforcement illegal. However this action can generally not be applied in the case of procedural settlements. The party that relies on the ineffectiveness is missing the need for legal relief since it had the chance to challenge the procedural settlement in front of the court where it has been concluded.⁸¹ Only if the party has the right to withdraw from the effective procedural settlement and decides to do so, it can use the legal remedy of section 767 ZPO to stop the enforcement.⁸²

If a procedural settlement did not lead to the ending of the lawsuit the court can still rule over the matter. It does not have to set aside the ineffective procedural settlement in any form. It just recognizes the procedural settlement as illegal and therefore ineffective. In order to make the court do so the challenging party only has to apply for continuation of the lawsuit in a written submission to the court in front of which the procedural settlement was concluded. In the case the procedural settlement has indeed been ineffective the lawsuit will end with a sentence deciding on the initial claims. If the party furthermore wishes the explicit declaration of ineffectiveness it has to file an action for acknowledgement of this matter according to section 256 paragraph 2 ZPO.⁸³

In the case of a valid procedural settlement the lawsuit cannot be continued with the initial claims. The court will only declare that the lawsuit is terminated. Once this sentence possesses legal force the substantive ineffectiveness cannot be claimed again.⁸⁴ The procedural settlement can then not be set aside nor is there any remedy that can stop the enforcement.

⁸¹ Schmidt/Brinkmann, MüKo ZPO s. 767, paragraph 13.

⁸² Ibid.

⁸³ Habersack, MÜKO BGB s. 779, paragraph 95.

⁸⁴ Habersack, MÜKO BGB s. 779, paragraph 94.

C. The enforcement or setting aside of an international mediation settlement agreement

I. Introduction

In times of globalization people and companies from all around the world get closer and more connected. Legal relations between people residing in different countries and companies based in different countries have become more frequent over the past decades. But it has not only been in the recent decades that international legal relations have prospered. Since industrialization international trade became routine. The majority of international legal relations are commercial relations between companies based in different countries. For those actors it is understood that disputes will arise. The actors generally wish to deal with these disputes as quickly as possible and as cost efficiently as possible. That is why in the international business world a great number of disputes are submitted to international commercial arbitration in order to reach these goals and to avoid state courts. The biggest advantages of international commercial arbitration are the lack of an appeal and the possibility to enforce the arbitration awards in every signing state of the New York Convention. This is accompanied with the desired cost effectiveness and time saving. This means has long been the preferred method of resolving complex business disputes in the cross-border context.⁸⁵

Due to rising costs, delays and procedural formalities international commercial arbitration has lost its appeal to some members of the business world. On the search for other dispute resolution methods mediation has been discovered as one of the more popular alternatives.⁸⁶ From a historic point of view mediation and conciliation had been the preferred means of resolving international commercial disputes in the first half of the twentieth century. It was after World War II that international commercial arbitration rose thanks to an extensive system of international treaties designed to promote international commercial arbitration. It replaced mediation and conciliation as the favoured method of resolving international commercial

⁸⁵ Strong, 45 Wash. U. J. L. & Pol'y 011 (2014), 11.

⁸⁶ Ibid.

disputes.⁸⁷ Nowadays international commercial mediation seems to be coming back on stage. According to empirical studies the number of commercial actors committing to international commercial mediation or at least other forms of consensual dispute resolution has increased.⁸⁸ For example General Electric and Siemens intend to make use of early dispute resolution strategies including mediation.⁸⁹

International legal relations are not different to domestic legal relations when it comes to disputes arising out of them. And even if those disputes have been settled through mediation the same problems - like in domestic mediation - exist in the aftermath of international mediation. A change of heart by one of the parties due to a new ownership in the company or due to currency fluctuations which have turned a good deal into a bad one overnight can cause the parties to look for a way out. This dispute arises alongside a series of legal questions and problems. Which law is governing the settlement agreement? Is it the law of country A or the law of country B? Which court has jurisdiction? Is it a court from country A or a court from country B?

This chapter will deal with the question which jurisdiction is competent to set aside an international mediation agreement and the basis of which law the competent court will decide on the matter. The enforcement of international mediation agreements will be considered. Finally it will be examined if the grounds for setting aside an international mediation agreement are internationally agreed.

II. Jurisdiction and applicable law

1. Introduction

A general assumption can be made that each party would prefer to go to their own domestic court and to apply their domestic law on the dispute about the mediation settlement agreement. This is, of course, practically impossible. This chapter will show how these issues are handled.

⁸⁷ Strong, 45 Wash. U. J. L. & Pol'y 011 (2014), 12.

⁸⁸ Strong, 45 Wash. U. J. L. & Pol'y 011 (2014), 14.

⁸⁹ Strong, 45 Wash. U. J. L. & Pol'y 011 (2014), 15.

2. Jurisdiction

The question which jurisdiction is competent is not easy to answer. There is no international body of laws with provisions referring to this problem.⁹⁰

Lacking an international law body addressing this issue the jurisdiction can result only out of national law bodies or by determination of the parties. A special case is the European Union. Regulations nr. 1215/2012⁹¹ and nr. 2201/2003⁹² (Brussels Regime) contain provisions on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

a) Determination of the jurisdiction by the parties

The parties are free to determine a jurisdiction. Limits to that freedom are set by the domestic laws. Generally the parties agree on the jurisdiction upfront when concluding the contract. The effect of a valid determination of jurisdiction is that domestic provisions regarding the jurisdiction cannot be applied as long as they are not mandatory. In German Law, for example, a mandatory provision is section 38 ZPO. According to this section a determination of jurisdiction is invalid if one party is a consumer.

“Section 38

Admissible agreement as to the choice of venue

(1) A court of first instance that as such is not competent will become the forum by express or tacit agreement of the parties should the parties to the agreement be merchants, legal persons under public law, or special assets (Sondervermögen) under public law.”

The determination is valid as long as the jurisdiction they chose allows this procedure. In most cases that will not be a problem because normally the parties tend to choose the home jurisdiction of either party. Most countries dispose of provisions referring to the place of residence (see below).

⁹⁰ Patzina, MüKo ZPO s. 12, paragraph 57.

⁹¹ <http://eur-lex.europa.eu/legal-content/DE/TXT/?uri=CELEX:32012R1215> (last accessed 28.05.2015).

⁹² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:DE:PDF> (last accessed 28.05.2015).

Only if the parties agree on a jurisdiction completely unrelated to the parties or the legal transaction the court referred to will declare itself not competent. That however depends again on the domestic law of the court appealed to.

The determination of jurisdiction in legal relations inside the European Union is admissible according to article 25 of the above mentioned regulation.

“Article 25

1. *If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.”*

An attempt is being made by the Hague Conference on Private International Law (HCCH) to ensure the effectiveness of choice of court agreements between commercial parties to cross-border transactions through the Hague Convention of 30 June 2005 on Choice of Court Agreements.

The HCCH is the most important organization in the field of private international law. It was formed in 1968 and 78 countries are members to the organization. Amongst them are the USA, every member state of the EU and the Republic of South Africa. The goal of the organization is to help creating a “world in which individuals, families, companies and other entities whose lives and activities transcend the boundaries between different legal systems, enjoy a high degree of legal security”.⁹³ The HCCH aims to develop and implement common rules of private international law for the coordination of the relationship between different private law systems in international situations.⁹⁴

⁹³ HCCH Website, Vision and Mission: http://www.hcch.net/index_en.php?act=text.display&tid=27(last accessed 28.05.2015).

⁹⁴ Ibid.

The Hague Convention on Choice of Court Agreements has been concluded and is open for ratification. It was signed by the USA, EU and Singapore but has only been ratified by México so far and is therefore not in force yet.⁹⁵

b) Settlement agreements concluded inside the European Union

The European regulation “aims to make the circulation of judgments in civil and commercial cases easier and faster within the EU, in line with the principle of mutual recognition (...)”.⁹⁶ Unlike a directive a regulation applies directly and does not need to be transposed into national law.⁹⁷ The regulations are *lex specialis* to the provisions of national law and replace them.⁹⁸ According to the Brussels Regime there has to be a connection between proceedings falling within the scope of this law and the territory of the EU Member States.⁹⁹ The general rule underlying the EU regulation regulates that a person (legal or natural) may only be sued in the member state in which he or she has its habitual residence or domicile.¹⁰⁰

“Article 4¹⁰¹

- (1) *Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.
(...)”*

So if a party to a settlement agreement concluded inside the European Union wants to bring its claims against the other party to court it has to do so in front of the courts in which the defendant resides. A defendant not domiciled in a member country should be subject to the national rules of jurisdiction applicable in the territory of the member country of the court seized.¹⁰²

“Article 6

⁹⁵ HCCH Website, Status Table: http://www.hcch.net/index_en.php?act=conventions.status&cid=98#nonmem.

⁹⁶ EUR-Lex Access to European Law: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1431094477180&uri=URISERV:230203_1 (last accessed 28.05.2015).

⁹⁷ Heinrich, Musielak/Voit ZPO s. 12, paragraph 17.

⁹⁸ Patzina, MüKo ZPO s. 12, paragraph 85.

⁹⁹ EUR-Lex Access to European Law: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1431094477180&uri=URISERV:230203_1 (last accessed 28.05.2015).

¹⁰⁰ *Ibid.*

¹⁰¹ EUR-Lex Access to European Law: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32012R1215>

¹⁰² EUR-Lex Access to European Law: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1431094477180&uri=URISERV:230203_1 (last accessed 28.05.2015).

(1) If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.

(2) As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, and in particular those of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1), in the same way as nationals of that Member State."

Article 7 provides a special jurisdiction which is of great importance for settlement agreements. The other party can be sued in the courts of the place where the obligation had to be fulfilled.

"Article 7

A person domiciled in a Member State may be sued in another Member State:

(1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,*
- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;"*

Depending on the content of the mediation settlement agreement this provision could provide an extra jurisdiction if the place where the defendant is domiciled and the place of performance of the obligation differs. In that case the plaintiff could do forum shopping, meaning selecting the more favourable jurisdiction.

An exception to the general rule of jurisdiction is made in section 4 articles 17-19 in order to secure consumer protection. The EU regulation provides a special jurisdiction for consumers. The consumer has the right to sue the other party either in the Member State where he resides or in the Member State where the other party resides.

"Article 18

*A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.
(...)”*

Three of the four member states of the European Free Trade Association (EFTA) - Iceland, Norway and Switzerland (not Liechtenstein) - signed the Lugano treaty (now Lugano II) which binds them to the same rules contained in the Brussels Regime.¹⁰³

c) Mediation settlement agreements between international parties

The question is which court is competent if the parties are not members of the European Union and did not determine a jurisdiction in their contract. Again, there is no international law body addressing this issue. However, it would be wrong though to say that there are no rules regarding jurisdiction at all.

The prevailing opinion in international law sets a limit to the jurisdiction of the states by stating that no state can have the jurisdiction over every dispute of the world.¹⁰⁴ Following this opinion the affirmation of the jurisdiction requires at least a minimal reference to the state claiming to have jurisdiction. Nevertheless there is no definition of “minimal reference” in international customary law.¹⁰⁵ International customary law is developed by the practice of states. There simply have not been enough potential violations which could have caused protests by other states. So that until today a definition could not be elaborated.¹⁰⁶ The limits are only crossed if a state intervenes through a judgement into the sovereignty of another state.¹⁰⁷ The remaining states sanction this through the non-acknowledgement of this judgement in their state.¹⁰⁸ This customary international law principle of respect for judicial sovereignty of other states prohibits the individual state to intervene in foreign areas of authority without their consent.¹⁰⁹ On the positive side according to

¹⁰³ Toussaint, BeckOK ZPO s. 12, paragraph 26.3.

¹⁰⁴ Patzina, MüKo ZPO s. 12, paragraph 82.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Patzina, MüKo ZPO s. 12, paragraph 57.

this principle every State has the right to regulate its competence within its domestic law bearing in mind to respect the sovereignty of the remaining states.¹¹⁰ The jurisdiction for cases with international reference is therefore regulated in autonomous national laws of each state.¹¹¹

On the other hand the international law guarantees a minimum standard by prohibiting the denial of justice.¹¹² The prohibition of denial of justice demands legal protection for aliens which must compare to the standard of the civilized world. Hence the states can refuse their jurisdiction and leave it to another state as long as the refusal does not result in a denial of justice.¹¹³

In practice it depends in the majority of the cases on the national laws addressing the international jurisdiction. The provisions of many states are similar. Most states dispose of provisions referring to the place of residence. This is a consequence of the “Actor sequitur forum rei” maxim (“The plaintiff follows the matter’s forum”¹¹⁴). A claimant must seek redress before a tribunal having competent jurisdiction over the matter or respondent at issue, usually meaning at the domicile or place of business of the respondent.¹¹⁵ In comparative law this maxim is commonly accepted. It favours the protection of the rights of the defendant for whom it is more difficult to mount a defence in the courts of a foreign country.¹¹⁶ Since the plaintiff decides on if and when he brings a matter to court the defendant should be sure about where it is going to happen. The maxim leads to an “equality of arms” between the parties. Germany, for example, affirms the competence of the court in such case in sections 12, 13 ZPO.

“Section 12

General venue; term

The court within the jurisdiction of which a person has his general venue is competent for all actions that may be brought against that person, unless an exclusive venue has been established for court actions.”

“Section 13

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Patzina, MüKo ZPO s. 12, paragraph 83.

¹¹³ Ibid.

¹¹⁴ Fellmeth/Horwitz.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

General venue of the place of residence

The general venue of a person is determined by his place of residence.”

Some jurisdictions like France have provisions making reference to the nationality only. According to article 14 Code Civile every French national has the right to sue the other party in France. Austria and Germany allow claims in front of their courts if the defendant has assets in these countries (Germany: section 23 ZPO).

“Section 23

Specific jurisdiction of assets and of an object

For complaints under property law brought against a person who has no place of residence in Germany, that court shall be competent in the jurisdiction of which assets belonging to that person are located, or in the jurisdiction of which the object being laid claim to under the action is located.(...)”

When more than one state has jurisdiction parties tend to practice “forum shopping” which means they select the more favourable jurisdiction.¹¹⁷ This is widely accepted and admissible. Only if a party gained the competence of a different court by trickery, German courts, for example, refuse to recognize the judgements obtained reasoning that they are contrary to public policy.¹¹⁸

d) Summary

The determination which court is competent for claims out of mediation agreements concluded by parties with different nationalities depends on a series of factors. First it has to be checked if the contract underlying the legal relation comprises of a determination of jurisdiction. If there is a valid determination the jurisdiction is fixed. If there is no determination it depends on whether the parties reside in Member States of the European Union or not. If they do not reside within in European Union the jurisdiction is determined by the autonomous national laws of each state within the limits of

¹¹⁷ Patzina, MüKo ZPO s. 12, paragraph 103.

¹¹⁸ Ibid.

international law. If the parties reside in the European Union the jurisdiction is determined by the Brussels Regime.

3. Applicable Law

The law applicable on the dispute can be of great importance to the parties especially where applicable laws provide contrary outcomes to the dispute. The parties will try to argue for the law which favours them. However, most of the time the parties will have determined the applicable law in advance through the underlying contract. Problems arise when the clause of the contract dealing with the jurisdiction is void. In this section it will be elaborated in which limits it is legally accepted to determine the applicable law and which law has to be applied if the contract is lacking such determination. Are there rules of international law addressing this issue?

The area of law dealing with such issues is referred to as “Conflict of Laws” or “Private International Law”.

a) Determination of the applicable law inside the European Union

The determination of the applicable substantive law in cross-border legal transactions between European parties is regulated consistently through the Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)). With the Rome I Regulation the European Union seeks to create a space of freedom, security and justice.¹¹⁹ The regulation aims to serve a working domestic market.¹²⁰ Even though a uniform contractual law for Europe has been demanded several times over the last years this is far from becoming a reality. Only in the area of consumer law a harmonization of the national laws has taken place through a series of directives addressing the matter.¹²¹

The scope of application of the Rome I Regulation comprises contractual obligations and is therefore applicable on mediation settlement

¹¹⁹ Recitals to Regulation (EC) No 593/2008, paragraph 1.

¹²⁰ Recitals to Regulation (EC) No 593/2008, paragraph 1.

¹²¹ Martiny, MÜKo BGB preliminary remarks to s. 1 Rome I regulation, paragraph 4.

agreements.¹²² According to article 1 obligations relating to certain areas of law - like a natural person's status or legal capacity or family relationships - are excluded from the scope of application of the Rome I Regulation. The enumeration is exhaustive. Only the substantive law is determined by the Rome I Regulation. The procedural law is determined by the principle of "lex fori" which means it follows the national law of the deciding court.¹²³

The Rome Regulations grant the parties the freedom of choice which means that the parties to the contract are to determine the applicable law (article 3).¹²⁴ The parties are free to agree to change the law at any time. The parties can either choose the law of a member state for governing the contract or the law of a state other than that of a member state. Nevertheless this law may not contradict the provisions of Community law.

Article 4 contains in its first paragraph regulations regarding the applicable substantive law in absence of a choice of such. It includes an enumeration of eight specified contract types such as lease contract and sale contract. If the contract in question is not part of the enumeration or the contract would be covered by more than one of the types of paragraph 1 "the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence".¹²⁵ That means that legal transactions in which one party has to perform in another way than by simple payment the law of his country will apply since a money payment can hardly be considered a characteristic performance.¹²⁶ For cases in which "it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2"¹²⁷, paragraph 3 rules that the law of that other country shall apply. Finally paragraph 4 provides for the case that the applicable law cannot be determined pursuant to paragraph 1 or 2. It states that then "the

¹²² Martiny, MüKo BGB preliminary remarks to s. 1 Rome I regulation, paragraph 126.

¹²³ Martiny, MüKo BGB preliminary remarks to s. 1 Rome I regulation, paragraph 77.

¹²⁴ EUR-Lex Access to European Law: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32008R0593> (last accessed 25.05.2015).

¹²⁵ Article 4 paragraph 2 Rome I.

¹²⁶ Martiny, MüKo BGB preliminary remarks to s. 1 Rome I regulation, paragraph 172.

¹²⁷ Article 4 paragraph 3 Rome I.

contract shall be governed by the law of the country with which it is most closely connected".¹²⁸

Once the applicable law is determined by the Rome I Regulation; this law will regulate interpretation, performance, penalties for breaching obligations, assessment of damages, termination of obligations, instructions for actions, and penalties for invalid contracts.¹²⁹

A settlement contract is nowhere mentioned in the Rome I Regulation. It is a contract changing the content of an existing legal transaction. Therefore the settlement must be treated the same way as the underlying legal transaction. If the parties solve a dispute which has arisen from a contract of sale through a settlement for example, this settlement still has characteristics of a contract of sales. The settlement is a modification of the contract of sales. The law governing this settlement must then still be the same law that has governed the sales contract. According to article 4 paragraph 1 lit. a) "a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence". The parties are still free to agree on a different governing law for the settlement of course (see above).

b) Determination of the applicable law worldwide

If at least one of the parties is a non EU national the Rome I Regulation is not applicable and the applicable law has to be determined otherwise. As mentioned above a choice of law clause is very common to international legal transactions. It is widely accepted by courts around the world recognizing party autonomy. Only if in a contract the governing law is not agreed on by the parties each country decides on its own which law is governing the contract by applying their conflict of laws rules.¹³⁰ In Germany the provisions of the conflict of laws (private international law) are located in the Introductory Act to the Civil Code (EGBGB). Article 3 EGBGB is confirmation and reminder of the fact that the rules of German private international law are

¹²⁸ Article 4 paragraph 4 Rome I.

¹²⁹ EUR-Lex Access to European Law: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32008R0593> (last accessed 25.05.2015).

¹³⁰ Chamber of Industry and Commerce Stuttgart: https://www.stuttgart.ihk24.de/international/Internationales_Wirtschaftsrecht/Internationale_Liefergeschaefte/AnwendRecht/676024 (last accessed 25.05.2015).

subsidiary to immediately applicable regulations of the European Union and international conventions ratified by Germany.¹³¹

“Art. 3¹³²

Scope; Relationship with rules of the European Union and with international conventions

(1) *Unless*

1. *immediately applicable rules of the European Union in their respective pertaining version (...)*

2. *rules in international conventions, insofar as they have become directly applicable in national law,*

are relevant, the applicable law is to be determined, where the facts of a case have a connection with a foreign country, by the provisions of this chapter (private international law).”

The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980, CISG) is an example for an international convention referred to in article 3 nr. 2 EGBGB.

The CISG aims to provide “a modern, uniform and fair regime for contracts for the sale of goods”.¹³³ It serves to improve the certainty and predictability of international sales contracts and helps decreasing transactions costs.¹³⁴

Pursuant to article 1 of this convention a contract of sales is international as soon as the parties reside in different countries.¹³⁵ If both states in which the parties reside have ratified the convention the rules of the convention are applicable. Until today 83 countries have ratified the convention.¹³⁶

A series of conventions of the Hague Conference on Private International Law contain rules regarding the applicable law. The majority of these conventions however deal with non-commercial matters like the convention of 1 August 1989 on the Law Applicable to Succession to the Estates of

¹³¹ v. Hein, MüKo BGB, EGBGB s. 3, paragraph 2.

¹³² Introductory Act to the Civil Code: http://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html#p0017.

¹³³ UNCITRAL CISG Explanatory Note: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (last accessed 25.05.2015).

¹³⁴ *Ibid.*

¹³⁵ United Nations Convention on Contracts for the International Sale of Goods: <http://www.cisg.dk/eng-Conventionstekst.htm> (last accessed 25.05.2015).

¹³⁶ UNCITRAL, Status Table: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last accessed 25.05.2015).

Deceased Persons or the Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes. The conventions dealing with commercial matters are often not in force yet or have just been signed by a small number of countries. For example the convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods is not in force yet and has just been ratified by Argentina and the Republic of Moldova.¹³⁷

III. Enforcement of international mediation agreements

1. Introduction

Parties want to ensure that the mediation settlement agreement they concluded is enforceable. As at the domestic level an international mediation settlement agreement is a private contract and therefore only enforceable as such. The parties have to make an extra effort for achieving the immediate enforceability. This effort generally consists in suing the other party who is refusing to perform in order to get an enforceable court judgement. Alternatively it can consist in any other mean at the party's disposal according to the jurisdiction and the governing law.

2. UNCITRAL Model Law on International Commercial Conciliation

The United Nations Commission on International Trade Law (UNCITRAL) developed a model law on conciliation which is available since 2002. The term “conciliation” comprises mediation as well. In the “Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation” UNCITRAL states that “the Commission had in mind a broad notion of conciliation, which could also be referred to as “mediation”, “alternative dispute resolution”, “neutral evaluation” and similar terms”.¹³⁸ The law addresses several issues of conciliation including a provision with regard to the enforcement of settlement agreements (article 14). The provision is open ended and delegates the enforcement procedures to the adopting

¹³⁷ HCCH, Status Table: http://www.hcch.net/index_en.php?act=conventions.status&cid=61 (last accessed 25.05.2015).

¹³⁸ UNCITRAL, Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002), paragraph 20 http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf (last accessed 25.05.2015).

states. Therefore Steele (2007) called the model law a “failed attempt at standardization”.¹³⁹ He is right with regard to enforcement. The model law is not capable of providing uniformity in this area. So far only 14 states have adopted the model law.¹⁴⁰

3. The Hague Convention on Private International Law

The Hague Convention on Private International Law is now busy with its third attempt of reaching a convention on the recognition and enforcement of foreign judgements.¹⁴¹ Similar attempts failed in 1971 and 1991. Such a convention would enable parties to enforce a foreign judgement in every other member state of the convention. This would improve the present situation by far. However according to Schack the convention is likely to fail as well. In his opinion the repeated attempt is just a job creation scheme for the Hague Convention.¹⁴² Even though the project was initiated by the USA they were responsible for the failure of the previous attempts insisting on their excessive jurisdiction and securing their punitive damages judgements. So far the USA has not entered into a single bilateral or multilateral agreement on the recognition and enforcement of foreign judgements due to their strict consideration of the competences of their federal states. They will only be willing to enter into such a convention if they can dictate the terms - which is according to Schack what led to the failure in the past.¹⁴³

4. Convention on the Enforcement of International Commercial Mediation Agreements

The government of the USA proposed a convention on the enforceability of international commercial settlement agreements reached through mediation in 2014 which is not yet in force.

¹³⁹ Steele, 54 UCLA L. Rev. 1385 (2007), p. 3.

¹⁴⁰ UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html (last accessed 25.05.2015). Status:

¹⁴¹ Schack, ZEuP (2014), p. 825.

¹⁴² Ibid.

¹⁴³ Schack, ZEuP (2014), p. 842.

5. Using the New York Convention on International Commercial Arbitration

The lack of a convention on the enforcement of mediation settlement agreements is considered as one of the biggest disadvantages of international commercial mediation compared to international commercial arbitration.¹⁴⁴ Meanwhile arbitration awards can be enforced easily through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention of 1958) a comparable convention for international commercial mediation is still missing. Through the New York Convention the contracting states are obliged to recognize arbitration awards as binding and to enforce them in accordance with their rules of procedure (Article III). The party wishing the enforcement of a foreign award needs to supply to the court the arbitral award and the arbitration agreement (Article IV). The other party facing the enforcement can object by submitting proof of one of the grounds for refusal of enforcement which are enumerated in (Article V). Today 149 countries have signed the New York Convention¹⁴⁵ including all major trading nations.¹⁴⁶ That is why the convention plays an outstanding role in the predictability of international business.¹⁴⁷

However, scholars are beginning to suggest that given the right circumstances it could be possible to make use of the New York Convention for international commercial mediation.¹⁴⁸ They argue that the existing provision's language is sufficiently elastic to relate a cross-border mediation agreement to the Convention.¹⁴⁹ The idea is to benefit from the advantages of the New York Convention by grafting mediated settlement agreements onto arbitration in order to make them enforceable.¹⁵⁰ This way the mediation agreement in form of an arbitral award would be enforceable through the New York Convention. The application of the New York Convention to the amicable process of mediation creates an imperfect fit though.¹⁵¹ The

¹⁴⁴ Strong, 45 Wash. U. J. L. & Pol'y 011 (2014), p. 27.

¹⁴⁵ New York Convention Website, Contracting States: <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states> (last accessed 13.05.2015).

¹⁴⁶ Steele, 54 UCLA L. Rev. 1385 (2007), p. 4.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Weiss/Hodgkinson, 25 Am. Rev. Int'l Arb. 275 (2014), p. 3.

¹⁵⁰ Steele, 54 UCLA L. Rev. 1385 (2007), p. 2.

¹⁵¹ Ibid.

potential for enforcing mediation agreements as arbitral awards under the New York Convention and its challenges will be shown and examined below.

According to Article V(1)(e) New York Convention a court can refuse to enforce an arbitration award if the requesting party proves that the award “has not yet become binding”. The application of the term “binding” still fuels debate.¹⁵² From an international point of view the requirement of binding becomes relevant when considering procedures similar to arbitration. These procedures follow a general arbitral framework, but are not recognized as formal arbitration in their country of origin.¹⁵³ Meanwhile the Italian Supreme Court interpreted binding including a binding contract¹⁵⁴, the highest German court interpreted binding to mean “no longer subject to ordinary means of appeal on the merits”.¹⁵⁵ Following the Italian approach a mediation settlement agreement could be enforceable under the New York Convention. Nevertheless consensus formed that procedures only similar to arbitration are not enforceable under the New York Convention.¹⁵⁶ That suggests that courts will also refuse to enforce mediation settlement agreements under the convention when they are only enforceable as contracts.¹⁵⁷

That is how the award on agreed terms (also known as consent award) was developed. It is a legal fiction.¹⁵⁸ In order to convert the mediated settlement agreement into an arbitral award the parties appoint the mediator as arbitrator who thereafter adopts the parties’ agreement as his or her award.¹⁵⁹ According to article 30 of the 1985 UNCITRAL Model Law on International Commercial Arbitration the arbitral tribunal shall, if the parties settle the dispute during arbitral proceedings, record the settlement in the form of an arbitral award on agreed terms.¹⁶⁰ This way the self-determination by the parties to the mediation is retained and by sleight of hand they get an arbitration award.¹⁶¹ This practice is endorsed by a number of arbitration

¹⁵² Steele, 54 UCLA L. Rev. 1385 (2007), p. 4.

¹⁵³ Ibid.

¹⁵⁴ In Italy the parties can choose between formal arbitration and informal arbitration. In the latter case the award has just contractual force and must be enforced through the courts.

¹⁵⁵ BGH NJW 1982, 1224.

¹⁵⁶ Di Pietro/Platte, (2001), p. 15-17.

¹⁵⁷ Steele, 54 UCLA L. Rev. 1385 (2007), p. 4.

¹⁵⁸ Steele, 54 UCLA L. Rev. 1385 (2007), p. 5.

¹⁵⁹ Sharp, Kluwer Mediation Blog: <http://kluwermediationblog.com/2012/08/31/the-handbrake-on-global-mediation/> (last accessed 13.05.2015).

¹⁶⁰ Li, <http://www.zhonglun.com/blog/en/articles.aspx?article=135> (last accessed 13.05.2015).

¹⁶¹ Steele, 54 UCLA L. Rev. 1385 (2007), p. 5.

rules but the legal effectiveness is still uncertain since it has not been challenged yet.

A crucial question is how the standards elaborated for arbitration apply on mediation. The two approaches to dispute resolution are very different. These differences become obvious where parties to a mediation are lacking a pre-existing arbitration agreement.¹⁶² A valid arbitration clause to resolve differences is required for the enforcement of an arbitral award under the New York Convention (Article IV (1) (b)). Whereas a mediation clause becomes irrelevant once mediation has started.

In order to become enforceable under the New York Convention mediation agreements must become an arbitral award. Furthermore a valid arbitration agreement is required.¹⁶³ To avoid procedural challenges an arbitration agreement has to be concluded or the underlying contract has to contain an arbitration clause. In the case of a successful mediation the agreement could be enforceable under the New York Convention since there is a valid arbitration agreement. Problems arise if the mediation is not successful and no agreement is reached. In that case the arbitration clause requires the parties to arbitrate.¹⁶⁴ They will be bound to the outcome of the arbitration even if they did not really want to submit the dispute to arbitration.¹⁶⁵ They just did so to ensure the enforcement under the convention.

However this problem seems to become irrelevant because of several decisions of Spanish and German Courts.¹⁶⁶ In these decisions the courts interpreted the arbitration agreement requirement widely. The German court reasoned that "the prohibition of contradictory behaviour is a legal principle implied in the Convention."¹⁶⁷ Thus, the defendant is estopped from relying on a formal defect where he participated in the arbitration without objecting. The Spanish court reasoned that the proof of common intent required by the

¹⁶² Ibid.

¹⁶³ Steele, 54 UCLA L. Rev. 1385 (2007), p. 6.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ BayObLG (Bavarian High Court), Beschluss vom 23.09.2004 - 4Z Sch 5/04, excerpted in Y.B. Com. Arb. XXX p. 571.

convention (article IV (1) (b)) was established by the behaviour of the parties in the arbitration process.¹⁶⁸

Another problem lies in the wording of the New York Convention which requires the parties subject to the arbitration to "submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship."¹⁶⁹ When arbitration is only used to ensure the enforceability of a mediated settlement agreement all differences are already removed by the time the parties change to arbitration. This weakness may be overcome by another trick "classifying the call for arbitration to record the award as a renewal of the original procedure".¹⁷⁰

A disadvantage of using arbitration in order to enforce a mediated settlement could be the composition of the arbitral tribunal. It is common that three arbitrators constitute an arbitral tribunal.¹⁷¹ Thus the parties will have to hire arbitrators they intend never to use. This is why the convening process must be determined individually by the parties and not by institutional rules like the ICC rules in order to save money.¹⁷²

Thanks to the different characters of arbitration and mediation due process violations in form of an inability to present the case might be assumed by courts when side sessions were held during the mediation.¹⁷³ In these side sessions a mediator meets privately with a party to discover common ground for a settlement agreement. This basic tool of a mediator cannot be used by an arbitrator since the New York Convention has been interpreted to disallow private communications as the other party is "unable to present his case" (article V (1) (b)).¹⁷⁴ Even though it is a different situation because the mediator does not decide on the case but the parties do, the mediator should not hold side sessions in order to avoid a due process violation because it cannot be expected that the courts interpret the New York Convention

¹⁶⁸ Shaanxi Provincial Medical Health Products I/E Corporation v. Olpesa, Tribunal Supremo (Supreme Court), 7 October 2003, No. 112/2002, excerpted in Y.B. Com. Arb. XXX p. 619.

¹⁶⁹ Steele, 54 UCLA L. Rev. 1385 (2007), p. 6.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² Steele, 54 UCLA L. Rev. 1385 (2007), p. 6.

¹⁷³ Steele, 54 UCLA L. Rev. 1385 (2007), p. 7.

¹⁷⁴ James, 8 Am. Rev. Int'l Arb. 83 (1997), p. 94.

differently when the arbitration award is a result of mediation. This would be a contradiction to the Conventions efforts towards uniformity.¹⁷⁵

However without side sessions an effective tool of the mediator for facilitating the solution finding is taken away.¹⁷⁶

Mediation can lead to creative results since the parties are not limited in finding a solution to their dispute.¹⁷⁷ This can involve agreements to create business relationships the parties had not thought of before. When such a solution is found there could arise problems regarding the scope of the arbitrators' decision because "the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration" (article V (1) (c)). New and unanticipated relationships will hardly be included within the scope of any initial arbitration clause.¹⁷⁸ This problem might be solved by an approach of some courts which allows parties to extent the mandate beyond the scope of the clause.¹⁷⁹ The allowance requires an explicit agreement on the extension.¹⁸⁰

Procedural challenges might be avoided by party signatures. Because in Commercial arbitration it is accepted that most procedural challenges can be waived.¹⁸¹ This is a display of party autonomy which can be found throughout the New York Convention and Commercial Arbitration as a whole.

6. Domestic approaches to enforcement of settlement agreements

Around the globe states differ when it comes to enforcement of settlement agreements. Examples will show the broad variety of enforcement procedures.

In addition to Germany some legal systems provide for enforcement in a summary fashion if the parties are represented by lawyers and they determine that the agreement should be subject to summary enforcement.¹⁸² In the USA a judge can record an agreement as a consent decree if he

¹⁷⁵ Steele, 54 UCLA L. Rev. 1385 (2007), p. 6.

¹⁷⁶ Steele, 54 UCLA L. Rev. 1385 (2007), p. 7.

¹⁷⁷ Steele, 54 UCLA L. Rev. 1385 (2007), p. 8.

¹⁷⁸ *Ibid.*

¹⁷⁹ Y.B. Com. Arb. XXVIII p. 657.

¹⁸⁰ Steele, 54 UCLA L. Rev. 1385 (2007), p. 8.

¹⁸¹ *Ibid.*

¹⁸² UNCITRAL, Guide to Enactment of the Model Law on International Conciliation, paragraph 91.

considers the judgement to be "fair, adequate and reasonable".¹⁸³ The recorded settlement agreement can then be subject to summary enforcement.¹⁸⁴ Consent decrees have the same effect as court decisions. In Hungary and the Republic of Korea parties who have reached a settlement agreement through conciliation¹⁸⁵ are allowed to convert the agreement in an arbitral award by appointing an arbitrator.¹⁸⁶ In China conciliation can be conducted by an arbitral tribunal. As soon as an agreement is reached the arbitral tribunal can either issue an arbitral award with the content of the agreement or make a written conciliation statement. Both the award and the statement have the same validity and effect.¹⁸⁷ In Australia it depends if agreements are reached in court-connected conciliation or outside the sphere of court-connected conciliation. Agreements resulting of the latter system cannot be registered with the court, while an agreement resulting of court-connected conciliation can be made a court order and will be enforceable as such.¹⁸⁸

7. Summary

If the parties decide to convert a mediation agreement into an award they will have to consider the potential pitfalls. The arbitration clause has to be drafted carefully so that the parties desiring mediation do not end up in arbitration if the mediation is not successful. A lot of the procedural challenges can be waived by signing the award. However, in order to ensure the enforceability under the New York Convention and to avoid arbitration-based procedural challenges the parties must sacrifice some of the advantages of the mediation procedure like side sessions.

¹⁸³ Georgevich v. Strauss, Steele, 54 UCLA L. Rev. 1385, p. 3.

¹⁸⁴ Steele, 54 UCLA L. Rev. 1385 (2007), p. 3.

¹⁸⁵ In the Guide to Enactment of the Model Law on International Conciliation conciliation is understood in a broad way and comprises mediation.

¹⁸⁶ UNCITRAL, Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002), paragraph 90.

¹⁸⁷ http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf (last accessed 13.05.2015).

¹⁸⁸ Ibid.

¹⁸⁸ Ibid.

IV. Setting aside an international mediation settlement agreement

The answer to the question of how to set aside an international mediation settlement agreement lies within the domestic law governing the contract since there is no uniform international body of law dealing with mediation.

1. Award on agreed terms

Nevertheless, in cases of an arbitration award on agreed terms described above the situation is different. Since the award on agreed terms is an arbitral award the mechanisms of international commercial arbitration for setting aside arbitral awards apply. In international commercial arbitration there is a body of law unifying the matter. The UNCITRAL Model Law on International Commercial Arbitration “was developed to address considerable disparities in national laws on arbitration.”¹⁸⁹ Pursuant to the name the model law is not self-executing. It has to be adopted into national law. A harmonization was necessary because national laws were often particularly inappropriate for international cases.¹⁹⁰ Until today the model law has been adopted by 67 states.¹⁹¹ The model law is either adopted completely or partly. Germany adopted the Model Law in 1998 by incorporating it partly into the Code of Civil Procedure. Article 34 of the Model Law addresses the issue of how to set aside an arbitral award enumerating the grounds for such action exhaustively. So at least in the countries which adopted the model law the setting aside of awards on agreed terms is uniform. The reasons for setting aside an award are the following:

- incapacity
- agreement is not valid under the law to which the parties have subjected
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
- award beyond scope of arbitration agreement
- wrong composition of the arbitral tribunal

¹⁸⁹ Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006.

¹⁹⁰ Steele, 54 UCLA L. Rev. 1385 (2007), p. 8.

¹⁹¹ UNCITRAL, Status http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last accessed 15.05.2015).

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- the arbitral procedure was not in accordance with the agreement of the parties
- the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State
- the award is in conflict with the public policy of this State

These grounds also serve to stop the enforcement of an arbitral award. This is regulated in article 36 of the Model Law.

2. Internationally agreed grounds for setting aside a mediation settlement agreement

The grounds for setting aside a mediation settlement agreement are determined by each country's contract law. Due to this fact the grounds are not the same in each country but vary. Nevertheless, research has shown that some grounds exist in many jurisdictions so that it might be possible to speak of internationally agreed grounds for setting aside mediation settlement agreements.

In common law the required meeting of the minds is destroyed by actions as fraud, misrepresentation, duress and undue influence.¹⁹² Each affects the voluntariness of the mediation settlement agreement. If one of these grounds is available the mediation settlement agreement can be set aside.¹⁹³

a) Duress

Duress is given if "force or threats of force are used by one party to an agreement to induce another party to enter into the agreement against her free will."¹⁹⁴ The party to whom the pressure is directed must find himself in a situation where he does not have another alternative but to enter into the agreement.

However, if the party is represented by a lawyer at the mediation and had an opportunity to reflect, the agreement cannot be set aside because of duress or coercion.¹⁹⁵ The reasoning of the American case *Advantage Properties,*

¹⁹² Giordano Ciancio, *Mediation at the intersection with contract law*, p. 2.

¹⁹³ Leasure, <http://blog.edom-adr.com/?p=554> (last accessed 3.06.2015).

¹⁹⁴ *Ibid.*

¹⁹⁵ Sussman, *The Final Step*, p. 11 on the case *Advantage Properties, Inc. v. Commerce Bank N.A.*

Inc. v. Commerce Bank N.A. is likely to be applicable to other jurisdictions as well. A German court would decide the same way if the duress or coercion is not directed at the representing lawyer as well.

- In the following American cases duress was assumed to be present:¹⁹⁶
- When the mediation takes place at an unusual or inappropriate time or in an unusual venue.¹⁹⁷
- Insistent demands that the business must be finished at once and a consequent extreme stressing of the negative consequences of delay also generally constitute duress.¹⁹⁸
- The same applies if a number of persuaders are used by a dominant party to convince a servient party or the absence of advisors to the servient party.¹⁹⁹
- Finally the statement that there is no time to consult a lawyer also constitutes duress.²⁰⁰

Economic duress cannot be a basis for setting aside a mediation settlement agreement since “economic duress is present in many settlements. But the judicial decision must draw the line between economic compulsion exercised by the other party and the normal operation of economic forces.”²⁰¹ In this particular case the settlement agreement was set aside anyway because of armed interference during the negotiation in combination with the recommendation “to better take this deal”.²⁰² This American view is not shared by Cianco who considers economic duress under certain circumstances a basis for setting aside a mediation settlement agreement in common law.²⁰³ She names the following descriptive examples which may give rise to a claim for economic duress:

1. “making threats without any legal justification
2. threatening to commit some unlawful act

¹⁹⁶ Compiled by Sussman, *The Final Step*, p. 9 et seq.

¹⁹⁷ Sussman, *The Final Step*, p. 10.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Desert Line Projects LLC v. The Republic of Yemen.*

²⁰² *Ibid.*

²⁰³ Giordano Cianco, *Mediation at the intersection with contract law*, p. 3.

3. threats to terminate a contract, where the threat is properly regarded as illegitimate pressure
4. applying pressure in bad faith
5. making threats that are calculated to seriously damage another, such as blackmail
6. threats to prosecute where the charge is known to be false
7. requirements for extra payments to be made over and above the original contract price
8. using knowledge of the affairs of the person suffering the duress to apply illegitimate pressure".²⁰⁴

In practice the party trying to set the agreement aside struggles to prove duress. Often there is one person's word against another's. Generally the mediator will also not help establishing duress since her/his duty is to prevent this from happening. The two American cases *Peacock v. Spivey* and *Vela v. Hope Lumber & Supply Company* illustrate this problem dealing with extreme allegations.

In the first case the affected person claimed that he was forced to sign the mediation agreement as a result of physical duress.²⁰⁵ He testified that he was diabetic and his blood sugar went up, that he was in pain but was not permitted to go home and terminate the mediation. His lawyer insisted on him signing the agreement before he could go. The settlement agreement was enforced anyway because duress could not be proofed due to contradicting testimonies.

In the second case the claimant alleged that she was under economic duress due to medical bills, that the lawyer just wanted money and that she cried for an hour but all the mediator did was to warn her of committing insurance fraud. The agreement was enforced due to a lack of proof.

The mediator himself can threaten one of the parties to the mediation. There are an increasing number of cases in the USA in which the mediator is alleged to be the source of duress and coercion.²⁰⁶ The threat with potential

²⁰⁴ Ibid.

²⁰⁵ Schein, Irvin, Can a Mediated Settlement Agreement Be Set Aside?.

²⁰⁶ Sussman, The Final Step, p. 11.

legal fees by the mediator was not considered duress nor was it the statement “you have no case” and telling the party that if he ever wants to get paid he needs to agree to the mediated settlement.²⁰⁷ Duress is not available when the mediator evaluates a claim and his evaluation is based on facts that can be verified.²⁰⁸

b) Fraud

Fraud is generally defined as “a false representation of a matter of fact—whether by words or by conduct, by false or misleading allegations, or by concealment of what should have been disclosed—that deceives and is intended to deceive another so that the individual will act upon it to her or his legal injury”.²⁰⁹

In the USA the courts pointed out that they only set aside settlement agreements in the clearest of cases and in exceptional circumstances.²¹⁰ They apply the contract rules quite strictly and require a knowing and material misrepresentation. The underlying intention of such behaviour must be the establishment of facts on which a party justifiably relied on.²¹¹

c) Undue influence

Undue influence is a common law term.²¹² It has been developed by courts in order to deal with cases where a person is subject to improper pressure which cannot yet be considered duress. Undue influence is an elusive term.²¹³ It is understood as “improper pressure” but also as “unfair persuasion”.²¹⁴ It arises as a result of a special relationship between two parties.²¹⁵

The reason for this concept lies in the reprehensibility of the behaviour. It is not known under this term in German and Austrian law but is treated the same way for being contrary to “common decency”. This is a very broad term

²⁰⁷ Chitkara v. New York Telephone Company.

²⁰⁸ Sussman, *The Final Step*, p. 11.

²⁰⁹ Giordano Ciancio, *Mediation at the intersection with contract law*, p. 2.

²¹⁰ Schein, Irvin, *Can a Mediated Settlement Agreement Be Set Aside?*.

²¹¹ Sussman, *The Final Step*, p. 14.

²¹² Cf. Giordano Ciancio, *Mediation at the intersection with contract law*, p. 6 et seq.

²¹³ Giordano Ciancio, *Mediation at the intersection with contract law*, p. 3.

²¹⁴ Giordano Ciancio, *Mediation at the intersection with contract law*, p. 6.

²¹⁵ Giordano Ciancio, *Mediation at the intersection with contract law*, p. 3.

open to court interpretation covering all kinds of unwanted behaviour. Undue influence describes the situation where too much influence on one side leads to insufficient autonomy on the other side.²¹⁶

According to English law, undue influence covers cases “where an agreement has been obtained by certain kinds of improper pressure which were thought not to amount to duress at common law because no element of violence to the person was involved”.²¹⁷ The pressure referred to in the concept of undue influence does not consist in an illegitimate threat or any threat at all. It is the exploitation of a position of power through the mere aura of having power which can influence people.²¹⁸

d) Incapacity

Incapacity describes a condition of a person in which he is not able to enter into legally binding contracts. The capacity to enter into binding contract is a principle underlying the majority of jurisdictions. However, the exact interpretation of the term by the courts can vary from jurisdiction to jurisdiction.

US courts generally seem to treat the recognition of incapacity very strictly. In consequence they did not affirm incapacity in cases of side effects of medication that included severe depression, memory loss, brain fog and that one party was crying during the mediation and continually stated that she was confused and did not understand.²¹⁹ A claim of incapacity was also rejected where a party claimed that “she suffered physical pain during the mediation from a recent surgery, had taken higher than prescribed narcotic pain and antidepressant medication and developed a migraine headache that required her to administer a medicinal injection during the mediation.”²²⁰

e) Misrepresentation

US courts tend to apply the contract rules strictly. The misrepresentation has to be knowing and material “with the intention of causing reliance on which a

²¹⁶ Ibid.

²¹⁷ Giordano Ciancio, Mediation at the intersection with contract law, p.4.

²¹⁸ Ibid.

²¹⁹ Domangue v. Domangue.

²²⁰ Sussman, The Final Step, p. 13, Mc Mahon v. Mc Mahon.

party justifiably relied even in the mediation context with its unique negotiating framework and relationships”.²²¹

f) Mistake

Mistake is often alleged by the parties but this claim is frequently rejected by US courts because the mistake is not relevant.²²² Nevertheless in cases of fundamental mistake the setting aside of a mediation settlement agreement is justified.²²³ Mistake is undoubtedly basis for setting aside a mediation settlement agreement in almost every jurisdiction.

g) Mediator

aa) Introduction

Can a settlement agreement be set aside if the appointed mediator committed malpractice?

In 2000 Schulz stated that mediation is a “relatively low risk activity” and that just a few claims have ever been made and pursued against English mediators.²²⁴ Until the year 2000 no Canadian mediator had committed malpractice that led to a trial and even in the USA there have been only a few suits against mediators. The increasing significance of mediation goes along with an increasing number of mediators, and the numbers of law suits were expected to rise. And they did. Only three years later in 2003 Thompson expressed his concern about the increase in the number of litigated cases which reflect more aggressive tactics by mediators including duress, coercion and undue influence.²²⁵ Between 1999 and 2003 U.S. state and federal judges had been forced to rule on disputed mediation issues 1 223 times.²²⁶ Coercion is observed to be one of the main problems in recent years and was found in three stages of the process. There is the coercion into mediation, the coercion to continue mediation and the coercion to settle.²²⁷

²²¹ Sussman/Weiner, *Bulletproof Mediation Settlement Agreement*, p. 23.

²²² Sussman, *The Final Step*, p. 15 et seq.

²²³ For Great Britain: Manning Cox, *They think it's all over - it isn't now: mediated settlement agreements and mediators in the firing line*; For USA: Sussman, *The Final Step*, p. 15 et. seq.

²²⁴ Schulz, 32 *Ottawa L. Rev.* 269 2000-2001, p. 272

²²⁵ Thompson, 19 *Ohio St. J. on Disp. Resol.* 509 2003-2004, p. 526

²²⁶ Coben/Thompson, *Harv. Negot. L. Rev.* 43 (2006), p. 143.

²²⁷ Hedeem, 26 *Just. Sys. J.* 273 (2005), p. 276 et. seq.

Mediators have certain duties and obligations which they can infringe in the course of a mediation. In the Anglo-American area mediator misbehaviour consists mainly of unauthorized practice of law breach of contract, negligence and fraud.²²⁸

bb) Unauthorized practice of law:

When a mediation draws to a successful end a settlement agreement has to be drafted. It constitutes the practice of law if a mediator when drafting the agreement does not just memorialize the parties' agreement but "surpasses this secretarial role and makes editorial suggestions."²²⁹ So if a non-lawyer mediator drafts a mediation agreement he is likely to cross the line to practicing law which he is not authorized to do.²³⁰ A lawyer mediator is deemed to be practicing law as soon as "he reviews a drafted agreement with an eye toward their legal sufficiency."²³¹ Laymen giving legal advice may also constitute unauthorized legal practice.²³² In the USA a psychologist offered divorce mediation and in his brochure he described the provided services which included "impartial assisting in reaching agreement upon division of property, support and child custody".²³³ This was considered to be unauthorized practice of law. In Germany the new Rechtsdienstleistungsgesetz explicitly allows mediators to give legal advice outside of court.

cc) Negligence

A mediator can be held liable for a negligent act or from a negligent misrepresentation which led to economic loss.²³⁴ In terms of neutrality and impartiality a mediator has to disclose conflicts of interest during mediation. This duty is derived from the responsibility of attorneys who must check for conflicts. If a mediator should have known of a conflict the behaviour may be considered negligent.

²²⁸ Schulz, 32 Ottawa L. Rev. 269 2000-2001, p. 279

²²⁹ Schwartz, 20 Cardozo L. Rev. 1715 at 1746 (1999), p. 1752.

²³⁰ Schulz, 32 Ottawa L. Rev. 269 2000-2001, p. 280

²³¹ Ibid.

²³² Coben/Thompson, Harv. Negot. L. Rev. 43 (2006), p. 143

²³³ Werle v. Rhode Island Bar Association

²³⁴ Esquibel, 31 Rutgers L.J. 131 (1999-2000), p. 169

dd) Breach of contract

A typical case for breach of contract would be a mediator who is not impartial and neutral. Even if it is not an explicit term of the contract, parties opting for mediation are seeking assistance from a neutral and impartial third party.²³⁵

ee) Duress, Coercion, Undue influence

Misbehaviour in the form of duress, coercion and undue influence may be classified as a breach of contract as well. It should be presumed that a mediator has the contractual obligation to abstain from such behaviour. In practice this misconduct seem to be the most frequent ones²³⁶ and are therefore appropriate to reflect their importance listed separately. These actions are a violation of the free will and hence a direct contradiction to the voluntariness being the main principle of mediation.

ff) Fraud

If a mediator acts in the face of a known conflict this may constitute fraud. The affected party would have assumed the impartiality of the mediator and would have relied on this misrepresentation. If the mediator had the intent needed and caused harm to the affected party the requirements of fraud could be fulfilled.

gg) Ground to set aside or just basis for mediator liability

The violation cannot always be a basis to set aside a mediation agreement. Quite the contrary, only in a very few cases is a setting aside possible. This is due to the fact that the settlement agreement is a contract just between the disputing parties. These parties usually have entered into a mediation contract with the mediator. Only in special forms of court-ordered mediation the legal situation is different. In the residing cases of a violation the mediator might be held liable for the violation. The latter is only possible if the mediator is not covered by immunity. He or she can be immune due to an immunity clause in the underlying mediation contract or thanks to the law.

²³⁵ Esquibel, 31 Rutgers L.J. 131 (1999-2000), p. 168

²³⁶ Coben/Thompson, Harv. Negot. L. Rev. 43 (2006), p. 273

There are three categories of immunity from civil actions in common law countries.²³⁷

1. The absolute or quasi-judicial immunity
2. Qualified immunity from civil actions
3. Absence of statutes on the subject, leaving the common law to operate.

In Florida for example the statute grants absolute judicial immunity to court appointed mediators.²³⁸ The purpose of these regulations is to treat a mediator like a judge who is also free from civil liability. In Canada only the jurisdiction of Saskatchewan grants immunity to court connected mediators.²³⁹ Jurisdictions seem to favour mediators related to court when granting immunity. In Germany immunity is not granted even to court appointed mediators. The conciliation judge who can adopt the role of a mediator is of course covered by immunity like a judge.

The above mentioned violations on the part of mediators may serve to set aside a settlement agreement. There is increasing jurisprudence in the USA dealing with this issue. The USA has a court-connected mediation system with which settlement agreements frequently become part of a court order or judgment.²⁴⁰ In the USA a settlement agreement emerging out of a court-connected mediation can be set aside by a court in a case of mediator misconduct under certain circumstances. The situation is treated the same way as if it were a judicial conflict of interest that involves the disqualification of a judge. In *Schlesinger v. Chemical Bank*, the court ruled that a final judgment entered by the disqualified judge can be vacated by the successor judge.²⁴¹ The same must apply to mediation agreements mediated by a later disqualified judge. Due to the special relationship between the parties to a mediation and the mediator, traditional contract defences of duress or undue influence are unavailable to the plaintiff because these actions must come from the adverse party which is not the mediator.²⁴² If a state has an

²³⁷ Esquibel, 31 Rutgers L.J. 131 (1999-2000), p. 142.

²³⁸ Schulz, 32 Ottawa L. Rev. 269 2000-2001, p. 272.

²³⁹ Ibid.

²⁴⁰ Thompson, 19 Ohio St. J. on Disp. Resol. 509 2003-2004, p. 523.

²⁴¹ <http://www.nadn.org/articles/RobertHoyle-Nov2012-MediationConflicts.pdf> (last accessed 25.05.2015).

²⁴² Coben/Thompson, Harv. Negot. L. Rev. 43 (2006), p. 96.

elaborate set of rules governing the conduct of mediators protecting the parties' right to self-determination by limiting mediator coercion and the practice of some mediators to provide opinions about the expected outcome of the case the agreements can be set aside when a mediator behaved contrary to the rules.²⁴³

In *Randle v. Mid Gulf*, the plaintiff was on heart medicine and suffered of chest pain and fatigue during the mediation.²⁴⁴ He called for a break but was told that he had to continue until he is willing to settle. The settlement was set aside by court.

In *Cooper v. Austin*, the mediator threatened one party with criminal prosecution to get him to settle a one-sided deal.²⁴⁵

In the case *Olam v. Congress Mortgage Co.*, the mediation session lasted for 16 hours and ended only at 1:00 AM. The plaintiff in this case was a 65 year old woman who suffered from high blood pressure, headaches, and intestinal pains. The mediator predicted that she will lose the case when litigating and will lose her house with no chance to get it back. She could not prove undue influence and therefore the agreement could not be set aside.²⁴⁶

In *Vitakis-Valchine v. Valchine*, the plaintiff complained about a threat of the mediator during an eight hour mediation. The mediator threatened the plaintiff that he would tell the judge that it was because of the plaintiff that the mediation failed. Besides that the mediator stated his legal opinion that in case of litigation the court will rule against her. The Fourth District Court of Appeal set the court ordered settlement agreement aside reasoning that the misconduct by the mediator is a violation and abuse of the judicially prescribed mediation procedures.²⁴⁷ The court noted that “during a court ordered mediation, the mediator is no ordinary third party, but is, for all intent

²⁴³ Theory elaborated in the case *Vitakis-Valchine v. Valchine* by Coben/Thompson, Harv. Negot. L. Rev. 43 (2006), p. 97.

²⁴⁴ Thompson, 19 Ohio St. J. on Disp. Resol. 509 2003-2004, p. 530.

²⁴⁵ *Ibid.*

²⁴⁶ Thompson, 19 Ohio St. J. on Disp. Resol. 509 2003-2004, p. 529.

²⁴⁷ Hoyle, Rescission of Mediated Settlement Agreement for Discovery Violations and Hoyle, Mediation Conflict of Interest, p. 3.

and purposes, an agent of the court carrying out an official court-ordered function”.²⁴⁸

hh) Practical problems

A problem which arises when measures to set aside a mediation settlement agreement are initiated is to prove the alleged behaviour. Due to the confidentiality as a basic principle to most mediations the party in need for proof will struggle to obtain such. Courts of jurisdictions with strict confidentiality of mediation communications especially in the US do not take evidence into consideration which became known during the mediation.²⁴⁹ The courts can only rely on those facts which are extracted of the confidential part by the parties or which are represented in the settlement agreement itself.²⁵⁰ It is therefore recommended to state the facts the parties rely on in the settlement agreement. This way the parties might be forced to consider more carefully the veracity of the facts since these can be revised afterwards by courts.

Nevertheless in many other common law countries this kind of evidence can be admitted under certain circumstances depending also on how strict confidentiality is handled. The rule governing the admissibility of evidence is called the *without prejudice* rule.²⁵¹ This rule forbids the use of particular communication of a negotiation as evidence in court.²⁵² The purpose is to encourage disputing parties to try to settle peacefully without litigation.²⁵³ The parties trust that their communication in the course of a negotiation of a settlement stays confidential.²⁵⁴ Everything else would discourage the parties to seriously try to get to a settlement fearing the communication might be used to their prejudice in case the mediation fails.²⁵⁵ The rule is applicable on all attempts to settle a dispute peacefully and does not need to be agreed.²⁵⁶

²⁴⁸ Ibid.

²⁴⁹ Sussman, *The Final Step*, p. 15, Princeton Insurance Co. v. Vergano.

²⁵⁰ Sussman, *The Final Step*, p. 15, Delaware Chancery Court.

²⁵¹ *Rush & Tompkins v Greater London Council*.

²⁵² Giordano Ciancio, *Mediation at the intersection with contract law*, p. 15 et seq.

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

However, the without prejudice rule has limits. In 1999 Lord Justice Robert Walker set out a list of "the most important instances" where "without prejudice communications" are admissible as evidence in court.²⁵⁷ Stating that "evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence (...)." In the particular case the court declared a letter containing a threat as admissible.

ii) Conclusion

It has been shown that regarding the grounds there is no complete consistency in international mediation due to the lack of an international law body. Nevertheless the grounds for setting aside an agreement are more or less the same. Having the German part of this thesis in mind and recalling the above mentioned, it is safe to say that in the majority of jurisdictions the grounds on which a settlement agreement can be set aside overlap. Common grounds in international contract law for the setting aside of a mediation settlement agreement are incapacity, mistake (under certain circumstances), duress, undue influence, coercion, misrepresentation and public policy. Another unifying factor could be the UNCITRAL Model Law on international commercial arbitration and the New York Convention if the practice of converting mediation settlement agreements into arbitral awards develops in practice. The grounds for setting aside would then reach the same consistency as in international commercial arbitration.

Misconduct on part of the mediators can also constitute such a reason. In the USA mediation settlement agreements may be set aside when emerging of court connected mediations. In Germany the misconduct of a mediator like partiality cannot result in the setting aside of a mediation settlement agreement. Only the misconduct of a conciliation judge can be reason for setting aside a mediated procedural settlement agreement. That is due to his status. He is still a judge and therefore if biased cannot pass an effective judgement.

²⁵⁷ Unilever Plc v Proctor & Gamble.

D. 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 matters²⁵⁸

I. Introduction

In recent years the European legislator in addition to the national legislators considered mediation as an appropriate mean for dispute resolution.²⁵⁹ One reason for this development at a European level is in particular that consensual dispute resolution mechanisms, unlike national court proceedings, are less bound to national rules of procedure.²⁶⁰ That is why the existing national rules of procedure can influence a European regulation to a lesser extent.²⁶¹ The European legislator considers the presumed lower costs and the short lead times an advantage of mediation which in its opinion makes mediation especially in consumer contracts an attractive alternative to ordinary court proceedings in state courts.²⁶²

On May the 21st, 2008, the European legislator has adopted the European Directive on certain aspects of mediation (2008/52/EC). The purpose of Directive 2008/52/EC is the promotion of mediation as mean of extrajudicial dispute resolution. Furthermore the directive should assist in creating a balanced relationship between mediation and state court proceedings.²⁶³ It applies to all member states of the European Union except Denmark.²⁶⁴

II. Goals

With the introduction of directive 2008/52/EC the European legislator intends to facilitate the access to extrajudicial dispute resolution and to promote the amicable settlement of disputes.²⁶⁵ Mediation is supposed to be an equivalent alternative to litigation. That means that the parties to mediation should not suffer any disadvantage compared to those who litigate. This requires that the parties can rely on a predictable legal framework to a

²⁵⁸EUR-Lex Access to European Law: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF> (last accessed 25.05.2015).

²⁵⁹ Sujecki, EuZW 2010, p. 7.

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

mediation process. A first step towards this goal is directive 2008/52/EC. However, the directive does not regulate the procedure of the mediation process. It is rather limited to certain aspects of the mediation process, which are located at the interface to Civil Procedure Law. The purpose of introducing the directive was to establish a minimum level of harmonization.²⁶⁶ So it is up to the Member States to introduce further reaching regulations.

III. Scope of application

According to article 1 paragraph two the directive is limited to cross-border disputes. Originally the directive should apply on domestic mediation as well but the legal basis for the European Commission was limited.²⁶⁷ However, the limitation to cross-border disputes does not exclude that Member States expand the regulatory model of the Directive to internal national situations.

According to article 2 paragraph 1 a cross-border dispute is classified as such when the parties reside in different Member States.

In addition, article 2 determines the time in which the cross-border nature of the dispute has to be given. The relevant time is the date on which the parties had agreed to submit the dispute to mediation, the date the mediation was ordered by court, the date on which according to national law an obligation to mediate arises or the date the parties were asked to participate in a mediation initiated by court.²⁶⁸ Pursuant to article 2 paragraph 2 the spatial scope of application is extended with regard to the rules of confidentiality and prescription that way that a cross-border dispute also exists when after the mediation is terminated a court proceeding is initiated in a different Member State.

The term “mediation” is determined quite differently in the laws of the various Member States. Due to these discrepancies a definition was introduced in article 3:

²⁶⁶ Ibid.

²⁶⁷ Sujecki, EuZW 2010, p. 8.

²⁶⁸ Ibid.

“Mediation’ means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.”

In addition recital No. 13²⁶⁹ stresses the voluntary nature as a characterizing element of mediation. Therefore the parties are responsible for the implementation and organization of mediation and have the right to terminate the mediation at any time. The directive is not applicable to procedures in which the neutral person is not only assisting in the proceedings but is actively shaping the procedure and is proposing solutions.²⁷⁰

The term "civil and commercial matters" must be interpreted independently in the interest of a uniform application in all Member States.²⁷¹ The directive shall not apply to revenue, customs or administrative matters or to the liability of the state for acts and omissions in the exercise of State authority.²⁷² The applicability is further limited to disputes concerning rights and obligations over which the parties are by law allowed to dispose.

IV. Court ordered mediation

According to article 5 national courts have the possibility to inform the parties about the implementation of a mediation and under certain circumstances request the participation in such. The court may also order the parties to attend a briefing on the use of mediation. These measures should ensure that mediation is still possible even when a trial over the dispute has already been initiated.²⁷³

Nevertheless the directive does not go so far that it grants the courts the right to issue a binding referral. The right can rather be qualified as a right to propose mediation. Member states are free to make mediation mandatory as long as such regulations do not deny the access to the judicial system.

²⁶⁹ Attached to the directive: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF> (last accessed 25.05.2015).

²⁷⁰ Sujecki, EuZW 2010, p. 8.

²⁷¹ EuGH NJW (1977), p. 489.

²⁷² Article 1 paragraph 2.

²⁷³ Sujecki, EuZW 2010, p. 9.

V. Key provisions

The key provisions of the directive govern the relation of mediation to civil proceedings and the prescription of the claim underlying the dispute. These provisions are article 6 (enforcement of settlement agreements), article 7 (confidentiality of mediation) and article 8 (effect of mediation on prescription periods).

1. Enforcement of mediation settlement agreements

Simplifying the enforcement of mediation settlement agreements is one of the core concerns of the directive.²⁷⁴ Therefore the European legislator obliges the member states to ensure that settlement agreements in writing resulting from mediation can be made enforceable at the request of the parties. The application should only be granted with the others party's consent at the time of the application.²⁷⁵ Thus, the debtor of the mediation settlement has a very effective mean to prevent enforcement in the event of an unfavourable outcome.

The mediation settlement agreement is according to article 6 paragraph 2 not enforceable when its content is contrary to the national law of the Member State in which the enforcement is sought or when the national law of the Member State does not provide for the enforceability of an agreement of that content.²⁷⁶ The procedure and the form of declaration of enforceability are not regulated in detail by the directive. The declaration of enforceability may be issued by a court or another competent authority in the form of a judgement, a decision or an authentic instrument. The member states decide on the competent authority and the form.

2. Confidentiality

Another concern of the European legislator was to protect the confidentiality of mediation²⁷⁷, because the success of mediation depends on the parties willingness to share their interests. For this reason it must be ensured that information obtained in a mediation process cannot be used in a subsequent

²⁷⁴ Recital 19 to directive 2008/52/EC.

²⁷⁵ Wagner/Thole, Die richtige Ordnung, p. 926.

²⁷⁶ Sujecki, EuZW 2010, p. 9.

²⁷⁷ Recital 23 to directive 2008/52/EC.

court proceeding. Article 7 therefore grants the mediator and those involved in the administration of the mediation process the right to refuse to give evidence. Such persons may not be forced to give evidence in court. However article 7 does not establish a prohibition to give evidence to this circle of persons. The right to refuse to give evidence is not absolute and may be limited by the parties. In addition, the right to refuse to give evidence can be limited for reasons of public policy of the particular Member State or for the performance or enforcement of the contract. According to article 7 paragraph 2 the member states are free to introduce stricter regulations with regard to the protection of confidentiality in the mediation process.

The prescribed confidentiality of the mediation process is not as far reaching that it includes preventing the parties from giving evidence obtained in the course of mediation. Although party statements in court proceedings are of less importance than the testimony of a witness, the statement of a party, however, might as well affect the decision of the judge. The parties are free to agree on stricter confidentiality terms in their contract.

3. Prescription

Mediation proceedings only represent an attractive alternative to court proceedings if creditors do not have to worry about the expiration of the prescription period during the mediation.²⁷⁸ Therefore, member states are obliged to ensure that parties who have unsuccessfully tried to resolve a dispute by means of mediation, are then not hindered by prescription to litigate.²⁷⁹

VI. Additional Provisions

In addition to the core mandatory regulations the directive contains a number of provisions of a more programmatic nature aiming to promote the quality of mediation and to improve public relations with regard to mediation. Pursuant to article 4

“Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and

²⁷⁸ Sujecki, EuZW 2010, p. 9.

²⁷⁹ Article 8.

organizations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.”

In this context recital 17 refers to the Code of Conduct for Mediators which was adopted in 2004 in order to establish uniform standards regarding the qualification of mediators in Europe. However, the Code is not legally binding. This order was one of the reasons which led to the introduction of the German Mediation Code.

VII. The directive in practice

The directive granted the Member States three years “to bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive.”²⁸⁰

The German legislator introduced the German Mediation Code in 2012. The introduction was accompanied by major changes to the German Code of Civil Procedure and other laws. It has already been explained that the German legislator chose a further reaching approach when regulating mediation. Some of the requirements of the directive were already fulfilled before the introduction of the directive, for example the suspension of the prescription of the claim during mediation. It was also not necessary to introduce new regulations regarding the enforceability of settlement agreements. With the help of courts, notaries or lawyers it has always been possible to apply for the immediate enforceability of contracts (see above). The principle regulations of the German Mediation Code have also been explained above.

In 2011 the Commission of the European Union initiated infringement proceedings against nine Member States because they have not made any announcement on the measures to implement the directive.²⁸¹ These member states were the Czech Republic, Spain, France, Cyprus, Luxembourg, the Netherlands, Finland, Slovakia and the United Kingdom.

Belgium did not change anything and no infringement proceedings have been initiated because their national law (“Code judiciaire”) has already dealt with everything addressed by the directive accordingly.²⁸² France considered

²⁸⁰ Article 12

²⁸¹ Editors, EuZW 2011, p. 611

²⁸² Hakenberg, Die Mediationsrichtlinie und ihre Umsetzung in der Europäischen Union

that they as well have regulated everything addressed by the directive. The commission initiated proceedings anyway expressing this way that the regulations of the “Code de Procédure Civile“ are not enough.²⁸³ Croatia was one of the first countries to harmonize their domestic law with the directive 2008/52/EC.²⁸⁴ Croatia has promoted mediation since the beginnings of the 21st century. In 2003 Croatia was one of the first countries in the world to enact a law on mediation which was largely based on the 2002 UNCITRAL Model Law on international commercial conciliation. Austria has a mediation code since 2004.²⁸⁵ Only slight changes were necessary in order to harmonize the mediation code with the directive.²⁸⁶ These changes were enacted on 25th May 2011.

Today every Member State has transformed the directive into national law.

²⁸³ Editors, EuZW 2011, p. 611.

²⁸⁴ Here and in the following: Babić, SchiedsVZ 2013, p. 215.

²⁸⁵ Fucik, ÖJZ 2011/97, p. 1.

²⁸⁶ Bundesgesetz über bestimmte Aspekte der grenzüberschreitenden Mediation in Zivil und Handelssachen in der Europäischen Union.

E. The proposed UNCITRAL Convention on International Commercial Mediation and Conciliation

I. Proposal

In preparation for the 47th session of the United Nations Commission on International Trade Law the USA put forward a proposal of future work for Working Group II dealing with the enforcement of settlement agreements resulting of conciliation.²⁸⁷ Working Group II deals with arbitration and conciliation.

So far UNCITRAL has developed two instruments which serve to harmonize international commercial conciliation.²⁸⁸ In 1980 UNCITRAL established the Conciliation Rules and in 2002 the Model Law on International Commercial Conciliation which is supposed to form the basis of an international framework for conciliation. In the Model law the issue of the enforcement is addressed in article 14 but left open ended because the drafters failed to find sufficient common ground to extract a uniform model provision.²⁸⁹ The question of how to enforce such agreements is delegated to each adopting state.

The government of the USA proposed that Working Group II should “develop a multilateral convention on the enforceability of international commercial settlement agreements reached through conciliation²⁹⁰, with the goal of encouraging conciliation in the same way that the New York Convention facilitated the growth of arbitration”.²⁹¹ The proposed convention should be formulated as simple and as brief as the New York Convention.

The USA justified their proposal with the need to promote conciliation.²⁹² A promotion is considered to be necessary because the significant benefits of conciliation, such as “reducing the instances where a dispute leads to the

²⁸⁷ A/CN.9/822.

²⁸⁸ A/CN.9/832, paragraph 14.

²⁸⁹ Steele, 54 UCLA L. Rev. 1385 (2007), p. 3.

²⁹⁰ The proposal does not want to differentiate between mediation and conciliation: “the term “conciliation” is used to refer to “a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (‘the conciliator’) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship.” Taken from: Proposal of the government of the USA: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V14/035/93/PDF/V1403593.pdf?OpenElement> (last accessed 26.05.2015).

²⁹¹ A/CN.9/822.

²⁹² Ibid.

termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States”.²⁹³ In their proposal the USA identified the enforcement of settlement agreements reached through conciliation as the main impediment for this mechanism of dispute resolution. Enforcement under contract law is considered to be burdensome and time-consuming. If even a successful conciliation results in a contract again the parties face the same problems regarding enforcement all over again as they did with the underlying contract that gave rise to the dispute. It is never said that conciliation is successful anyway and even if it is the party agreeing to the settlement can always fail to comply afterwards. If enforcement of settlement agreements is doubtful parties tend to choose arbitration over conciliation which provides greater certainty and cost and time effectiveness regarding the enforcement.²⁹⁴

In the US opinion the scope of application of the proposed convention should be determined as follows:

- “the convention applies to “international” settlement agreements, such as when the parties have their principal places of business in different states;
- the convention applies to settlement agreements resolving “commercial” disputes, not other types of disputes (such as employment law or family law matters);
- agreements involving consumers are excluded from the scope of the convention;
- certainty regarding the form of covered settlement agreements, for example, agreements in writing, signed by the parties and the conciliator; and
- flexibility for each party to the convention to declare to what extent the convention would apply to settlement agreements involving a government.”²⁹⁵

²⁹³ A/CN.9/822

²⁹⁴ A/CN.9/822

²⁹⁵ A/CN.9/822

The proposal provides that the agreements applicable to this convention should then be binding and enforceable. Furthermore the USA argues that a convention would address the enforceability of settlement agreements directly and that way abolish working with the legal fiction of some jurisdictions of deeming settlement agreements to be arbitral awards.²⁹⁶

II. Discussion

At its 47th session the Commission agreed that Working Group II should consider the issue of enforcement of settlement agreements resulting from international commercial conciliation and to report on the feasibility and possible form of work in that area.²⁹⁷

In 2014 the states were already asked to comment on the proposal until the next session. Only Germany, Canada and the USA did so.²⁹⁸ In its comment Germany doubts the need of such a convention and points out a number of challenges the convention would likely have to face.²⁹⁹ They criticize, for example, that the convention would treat settlements resulting from mere negotiation different to settlements resulting from conciliation without a logic justification. They stress that settlements are still contracts which may be subject to subsequent changes. This is in their opinion one of several issues which has to be addressed. Canada is in favour of the convention and suggests “to build the convention on principles found in the Model Law and promote an approach consistent with the Model Law.”³⁰⁰ The USA are still in favour of their proposal and specified their ideas of the new convention to ensure the feasibility.³⁰¹ In their comment they stress the need for a convention relying on surveys.³⁰²

Working Group II (Arbitration and Conciliation) discussed the proposal of the government of the USA at the sixty-second session in New York (2-6 February 2015).

²⁹⁶ A/CN.9/822.

²⁹⁷ A/CN.9/WG.II/WP.188, p. 1.

²⁹⁸ *Ibid.*

²⁹⁹ A/CN.9/WG.II/WP.188, p 1 et seq.

³⁰⁰ A/CN.9/WG.II/WP.188, p 5 et seq.

³⁰¹ *Ibid.*

³⁰² The information was gathered to assist Working Group II. The survey is therefore shown two paragraphs below when dealing with Working Group II: Strong, survey on mediation and conciliation <http://ssrn.com/abstract=2526302> (last accessed 27.05.2015).

The working group shares the opinion of the USA that providing an enforcement mechanism for settlement agreements would make conciliation a more popular and efficient mean for resolving commercial disputes. This is supported by a recently-conducted international survey.³⁰³ According to that survey only 14 per cent of respondents believed that it would be easy to enforce an international commercial settlement agreement in their home jurisdiction when the conciliation took place in a foreign country. Furthermore the survey revealed that approximately 75 per cent of the respondents believed that a convention like the proposed would encourage the use of conciliation. In another survey 93 per cent of respondents stated that they would be more likely to mediate a dispute with international parties if this party is from a country which has also ratified a convention on the enforcement of mediation settlement agreements.³⁰⁴

The working group also found that greater certainty will be reached when any settlement resulting of conciliation could be relied on and easily enforced. The mere preparation of a convention is considered to boost the use of conciliation.³⁰⁵

It was stated that drafting a convention would be a lengthy process.³⁰⁶ Different to arbitration which is built upon years of experience, the processes of conciliation are highly diverse and some states lack any experience with conciliation. A more gradual approach was suggested in order to harmonize the domestic legislations first. It was also pointed out that all the problems which arose when drafting article 14 of the model law will arise again.³⁰⁷

It was mentioned that a convention may not have to address the recognition of agreements to mediate. Arbitration unlike conciliation has an exclusive nature of referring a dispute to arbitration.³⁰⁸

It was also mentioned that the convention could lead to the bizarre situation that a settlement agreement which is a contract without formalities or control

³⁰³ Ibid.

³⁰⁴ Survey of the International Mediation Institute, How Users View the Proposal for a UN Convention on the Enforcement of Mediated Settlements: <https://imimediation.org/un-convention-on-mediation> (last accessed 26.05.2015).

³⁰⁵ A/CN.9/832, paragraph 18.

³⁰⁶ A/CN.9/832, paragraph 19.

³⁰⁷ A/CN.9/832, paragraph 20.

³⁰⁸ A/CN.9/832, paragraph 25.

is enforceable in any state; meanwhile a foreign judgement cannot be enforced.³⁰⁹

The session of Working Group II has shown that the exact wording has to be elaborated. The question is for example if the convention should refer to “foreign” or to “international” agreements.³¹⁰

According to Working Group II the convention should be a simple mechanism to enforce settlement agreements. The flexibility of conciliation should be untouched. Nevertheless the distinction between arbitration and conciliation may be blurred due to increasing formal requirements to conciliation.³¹¹

In their opinion Working Group II will have to elaborate if grounds for refusal of enforcement similar to article V New York Convention should be implemented into the convention.³¹²

It was mentioned that they have to discuss how the enforcement will take place. The question is if the settlement agreement will be enforced or will an instrument give force to the settlement agreement.³¹³

Some members of the working group stressed that not all States had developed legislation to address enforcement of settlement agreements. Therefore the preparation of a convention is considered premature by these members.³¹⁴ A more cautious approach was suggested. Nevertheless at the end of the 62nd session of Working Group II it has been agreed to suggest to the commission to give Working Group II a mandate to work on the topic of enforcement of settlement agreements.³¹⁵ The mandate should cover the identification of relevant issues and the development of possible solutions and finally the preparation of a convention, including the drafting of model provisions. This mandate has not yet been granted. A decision is expected for the 10th of July 2015.³¹⁶

³⁰⁹ A/CN.9/832, paragraph 21.

³¹⁰ A/CN.9/832, paragraph 26.

³¹¹ A/CN.9/832, paragraph 30.

³¹² A/CN.9/832, paragraph 31.

³¹³ A/CN.9/832, paragraph 51.

³¹⁴ A/CN.9/832, paragraph 56.

³¹⁵ A/CN.9/832, paragraph 59.

³¹⁶ UNCITRAL's reply to the authors e-mail on the schedule regarding the mandate:
Dear Felix,

F. Conclusion/Recommendations

As we have seen the usage of mediation as a mean of dispute resolution is rising nearly everywhere around the world. Nevertheless this has not led to any uniformity with regard to the enforcement and the setting aside of mediation settlement agreements amongst the different domestic legislations. Quite the contrary, it seems that the different approaches to these matters around the globe are almost as numerous as the number of countries in which mediation is used.

This is a result of the flexibility of mediation on the one hand and a result of the different approaches to mediation on the other hand. A private mediation is almost everywhere an available tool for dispute resolution between private parties. In addition many countries offer court ordered mediation. In some countries judges can be mediators. In other countries like Germany judges cannot be mediators but are allowed to use the techniques of mediation under certain circumstances. Some courts can refer a case to mediation. Thanks to these different approaches to mediation the outcome in a case of success in form of a settlement agreement differs with regard to the legal character. It can be noticed that the more formal the mediation process is organized and implemented into the domestic legislation the more certain becomes the enforcement and the harder the setting aside of the agreement. In a number of countries the agreements following court ordered mediation are issued in form of court orders being enforceable right away. In Germany the settlement in a case in which a judge uses the technique of mediation is not a court order but a procedural settlement agreement being as easily enforceable as a court order. A lack of formalization can be compensated in

The Commission will consider the issue of future work of Working Group II at the upcoming session in Vienna, which will begin on 29 June. Whether to mandate the Working Group with work relating the enforcement of settlement agreements will be considered and decided at that session (the formal decision will be adopted most likely on 10 July). Please let me know if you have any other questions.

Kind regards,
Jae

International Trade Law Division
(UNCITRAL Secretariat)
United Nations Office of Legal Affairs
Vienna International Centre
A-1400 Vienna, Austria
Tel.: (+43-1) 26060-4060
Fax: (+43-1) 26060-5813
e-mail: uncitral@uncitral.org.

Germany and some other countries by recording the agreement. After the parties reached an agreement they have it recorded by a notary or their lawyers in order to make it enforceable right away. In many countries plain private mediations cannot provide immediate enforceability. The agreements are just enforceable as contracts. As this paper has shown in Germany this even counts for court appointed mediation.

The uniformity in comparative international mediation is higher with regard to setting aside mediation settlement agreements. This is due to the fact that contract law is applicable on most mediation settlement agreements. As was shown the grounds for setting aside contracts overlap from country to country. When UNCITRAL Working Group II examined current legislative trends in order to determine potential common ground as a basis for the proposed convention they discovered that in most jurisdictions the grounds for challenging the validity of a settlement agreement would “include considerations of capacity of the parties, and whether the agreement was procured by misrepresentation, duress or undue influence”.³¹⁷ These grounds serve to set aside a mediation settlement agreement in Germany as well.

Where the agreement is given the status of a court judgement Working Group II found out that public policy, a jurisdictional test and lack of due process are typical reasons to refuse enforcement throughout most jurisdictions.³¹⁸

On an international level a movement towards more uniformity cannot be denied. As noted above three main projects which aim at establishing common international standards in cross-border mediation haven been initiated in the last 13 years. The first is the UNCITRAL Model Law on international Commercial Conciliation. This 2002 UNCITRAL clone of the Model Law on International Commercial Arbitration has not yet been able to follow in the footsteps of its successful role model since it has not been adopted by many countries so far. The Model Law delegates it to the adopting state to regulate the enforcement of settlement agreements which can be assumed to be one of the main reasons for its failure. Directive

³¹⁷ A/CN.9/WG.II/WP.187, paragraph 28

³¹⁸ Ibid.

2008/52/EC of the year 2008 regulates cross border mediation within the EU. The directive addresses the issue of cross-border enforcement and on a first glance it looks like a breakthrough for the enforcement of cross-border settlement agreements (at least inside the EU). But the article addressing the enforcement regulates not much more than the Model Law on International Commercial Conciliation. The mediator has not the power to make the agreement immediately enforceable comparable to a court order. The Member States when transposing the directive were free to appoint competent authorities. Germany as was shown did not change anything with regard to this matter in the domestic legislation. The parties wishing to enforce the settlement have to have the agreement recorded by a notary or their lawyers, an expensive way. And this way is not without risk to the enforceability either. Usually at least some days will go by between the mediation session and the appointment at the notary. It is not unlikely that in time of the appointment one of the parties had a change of heart and does not agree to the enforcement anymore. The other party than will have to litigate what should have been avoided in the first place.

This might be disappointing for mediation enthusiasts. In my opinion the solution is comprehensible. Due to its process including confidentiality and the potential strong position of a mediator I consider mediation susceptible for undue influence and duress by part of the mediator or in collaboration with the opposing party. In a perfect world that would not be a problem and even in the real world in Europe this problem is addressed by the European and the domestic legislators with the establishment of a certification system for mediators. However, I cannot see that there is a way to achieve the same quality as offered by court litigation. Maybe only if the whole certification and mediation system would be organized in a way similar to courts meaning making mediators clerks and so on. This, of course would consume, some of the main advantages of mediation like lower costs and procedural freedom. I therefore prefer the way mediation is handled now which means that immediate enforceability is only possible when a court is involved. That does not mean that I am against mediation, I only think that a real mediation will lead to a just agreement everybody can live with. If that is the case no tools for enforcement are necessary. If one party does not comply with an

agreement in the aftermath of mediation the agreement was apparently not satisfying to both parties. Then it is not worth having it enforced immediately either. The courts will have to decide on that matter.

The third approach to uniform international commercial mediation is the proposal of the government of the USA for a Convention on International Commercial Mediation and Conciliation. Reviewing the documents of Working Group II referring to this topic has shown how many problems are coming along with such a convention. The amount of problems and the apparent unwillingness of countries to contribute to this topic (only three countries commented on the proposal being one of them the proposing USA) make it unlikely that it will become a reality soon. Countries will insist on structuring and formalizing the procedure of mediation in order to reach comparability. I share the concern that such measures are likely to jeopardize the flexible nature of mediation. Nevertheless, in my opinion this is the only way such a convention may be as successful as the New York Convention. My opinion is based on the same grounds as stated above. In order to ensure high quality it is crucial to structure and formalize the procedure. Therefore I consider it necessary to include grounds for the refusal of enforcement into the convention. These grounds should comprise at least the common grounds for setting aside an agreement discovered by Working Group II and here in this paper. I doubt the success of the convention because even the proponent who initially wanted a simple convention starts suggesting allowing the states to make reservations.³¹⁹ Once reservations are made the whole convention may likely become confusing and therefore unattractive.

I share the view that international commercial mediation will boost once a convention on the enforcement is agreed upon, nevertheless I doubt that the problems can be overcome on an international scale. But maybe I would have assumed the same when the New York Convention was proposed for the first time. The success of the New York Convention would have proved me wrong.

³¹⁹ A/CN.9/WG.II/WP.188, paragraph 8 et seq.

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