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Dr. Herman Verbist (1)

Report on "Roundtable on the Position of the European Union on the Singapore Convention on Mediation" organized on 18 June 2021 by the European Law Institute (ELI) Slovenian hub and the Forum for International Concilation and Arbitration (FICA)

On 18 June 2021, a "Roundtable on the Position of the European Union on the Singapore Convention on Mediation" was organized by the European Law Institute (ELI) Slovenian hub (2) and the Forum for International Concilation and Arbitration (FICA) (3). The roundtable was organized online with the technical assistance of the Institute of Small and Micro States (ISMS) of Victoria University of Wellington.

i) Introduction - Background

The United Nations Convention on International Settlement Agreements resulting from Mediation (the "Singapore Convention") was adopted by the General Assembly of the United

1 Co-chair of the Forum for International Conciliation and Arbitration (FICA); attorney at the Bars of Ghent and Brussels, Belgium; lecturer at Europa-Institut, Saarland University, Germany.The author attended the sessions of UNCITRAL Working Group II on the Singapore Convention on Mediation as a member of the FICA delegation.
2 For information on the European Law Institute Slovenian hub, hosted at the European Centre for Dispute Resolution : see : http://www.ecdr.si/index.php?id=98 (accessed 23 February 2022).

Nations on 20 December 2018 and opened for signature in Singapore on 7 August 2019 (4). Forty-six countries signed the Convention on 7 August 2019 in Singapore, on the day it opened for signatures (5). On the day of the roundtable, 18 June 2021, 54 countries had signed the Convention (6) and 6 countries had ratified the Convention (7). Meanwhile, 55 countries have signed the Convention and 9 countries have ratified the Convention (8). Pursuant to Article 14, the Singapore Convention shall enter into force six months after the deposit of the third instrument of ratification, acceptance, approval, or accession. Following the deposit of the instrument of ratification by Qatar on 12 March 2020, the Singapore Convention has

3 For information on the Forum for International Conciliation and Arbitration, see https://fica-disputeresolution.com/ (accessed 18 February 2022).

4 See : Herman Verbist, "UNCITRAL Instruments on the Enforcement of International Commercial Settlement Agreements Resulting from Mediation", *Nederlands-Vlaams Tijdschrift voor mediation en conflictmanagement*, The Hague, Boom Juridische Uitgevers, 2018, Nr. 4, 6-22; Judith Knieper and Corinne Montineri, "UNCITRAL and a New International Legislative Framework on Mediation", *Nederlands-Vlaams Tijdschrift voor mediation en conflictmanagement*, The Hague, Boom Juridische Uitgevers, 2018, Nr. 4, 23-29; Norel Rosner, "The New UNCITRAL Instruments on International Commercial Settlement Agreements Resulting from Mediation – An Insider's View", *Nederlands-Vlaams Tijdschrift voor mediation en conflictmanagement*, The Hague, Boom Juridische Uitgevers, 2018, Nr. 4, 30-36; Nadja Alexander & Shouyu Chong, "An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore", *Nederlands-Vlaams Tijdschrift voor mediation en conflictmanagement*, The Hague, Boom Juridische Uitgevers, 2018, Nr. 4, 37-56; Herman Verbist, "United Nations Convention on International Settlement Agreements Resulting from Mediation", *b-Arbitra* 2019/1, 53-85; Alan Anderson, Ben Beaumont and Herman Verbist, "The United Nations Convention on International Settlement Agreements Resulting from Mediation : Its Genesis, Negotiation and Future", in *International Mediation, The Comparative Law Yearbook of International Business Volume 41a,* C. Campbell (Editor), Alphen aan den Rijn, Wolters Kluwer, 2020, 35-62.

5 The 46 signatories of the Singapore Convention as of 7 August 2019 are: Afghanistan, Belarus, Belize, Brunei, Chile, China, Colombia, Republic of the Congo, Democratic Republic of the Congo, Kingdom of Eswatini, Fiji, Georgia, Grenada, Haiti, Honduras, India, Iran, Israel, Jamaica, Jordan, Kazakhstan, Laos, Malaysia, Maldives, Mauritius, Montenegro, Nigeria, North Macedonia, Palau, Paraguay, Philippines, Qatar, South Korea, Samoa, Saudi Arabia, Serbia, Sierra Leone, Singapore, Sri Lanka, Timor Leste, Turkey, Uganda, Ukraine, the United States, Uruguay and Venezuela. See: UNCITRAL website: https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status (accessed 23 January 2022).

6 In the period from 7 August 2019 until 18 June 2021, eight countries signed the Singapore Convention: Armenia (26 September 2019), Chad (26 September 2019), Ecuador (25 September 2019), Gabon (25 September 2019), Guinea-Bissau (25 September 2019), Rwanda (28 January 2020), Ghana (22 July 2020) and Brazil (4 June 2021); see: https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status (accessed 23 January 2022).

7 Until 18 June 2021, six countries had ratified the Singapore Convention : Belarus (15 July 2020), Ecuador (9 September 2020), Fiji (25 February 2020), Qatar (12 March 2020), Saudi Arabia (5 May 2020) and Singapore (25 February 2020); see: https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status (accessed 23 January 2022).

8 Since 18 June 2021, the Singapore Convention on Mediation has also been signed by Turkey (11 October 2021) and has been ratified by three countries : Australia (10 September 2021), Georgia (29 December 2021) and Honduras (2 September 2021), see: https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status (accessed 23 January 2022).

entered into force on 12 September 2020 (9). Until now, the Singapore Convention on Mediation has not been signed by any of the Memer States of the European Union.

The Roundtable organized by the ELI Slovenian hub and FICA on 18 June 2021 wished to hear from several experts in the field what keeps the European Union or its member states from signing the Singapore Convention on Mediation.

Moderators of the webinar were Ales Zalar, former Minister of Justice of Slovenia and co-chairman of the Slovenian hub of the European Law Institute, and Herman Verbist, co-chair of the Forum for International Conciliation and Arbitration.

The webinar was attended by 87 persons residing in many different countries in the world.

Welcome words were expressed by Sir Michael Burton, President of FICA, and Ms. Katarina Kresal, co-chair of the ELI hub in Slovenia.

ii) Statement of Portuguese Minister for Justice as President-in-Office of EU Council in area of Justice

Thereupon, a message of the Portuguese Minister for Justice, as President-in-Office of the EU Council in the area of Justice, was read. The Portuguese Minister for Justice had been invited to participate in the roundtable discussion. In the message, with which she declined the invitation, the Portuguese Minister for Justice indicated that the Singapore Convention has not been signed until now by any of the EU Member States and that there have been no discussions at a technical level as to decide whether this is a legal instrument of exclusive competence of the Union or whether there is shared competence of the EU with its Member States. In addition, a discussion should also be promoted in the EU to assess the interest and opportunity of accession to the said Convention. The Portuguese Minister for Justice pointed out, furthermore, that no discussion had so far taken place within the Council at Ministers of Justice level, meaning that she was not in a position to express any official position of the Council at the round table.

The roundtable was divided in two parts of one hour each with the following experts participating :

i) In the first part of the roundtable with the topic “The reflection process of the European Commission”, the following experts participated :

9 Available at: https://unis.unvienna.org/unis/en/pressrels/2020/unisl303.html (accessed 23 January 2022).

- Dr. Norel Rosner, Legal and Policy Officer, Directorate-General for Justice and Consumers, European Commission;
- Ms Corinne Montineri, Legal Officer in the International Trade Law Office of the United Nations Office of Legal Affairs, the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL);
- Ms Natalie Morris-Sharma, former chair of UNCITRAL Working Group II which drafted the Singapore Convention, and Deputy Senior State Counsel, International Affairs Division, Attorney-General's Chambers, Singapore;
- Ms Diana Wallis, Former Vice-President of the European Parliament, Former President of the European Law Institute, senior lecturer at the University of Hull;
- Dr Rimantas Simaitis, Chairman of the CEPEJ-GT-MED of the Council of Europe;

In this first part of the roundtable, the following questions were discussed :

- Is the accession to the Singapore Convention an exclusive jurisdiction of the EU or is it a shared competence of the EU and Member States?
- To what extent would the Singapore Convention benefit EU stakeholders?
- Developing mediation policies and practices in Europe.
- The views of States that signed the Singapore Convention.

ii) In the second part of the roundtable with the topic "What is the impact of the Singapore Convention on the EU laws and policies?", the following experts participated :

- Dr Cathérine Kessedjian, former Deputy Secretary General of the Hague Conference on Private International Law; Professor emerita, University Panthéon-Assas Paris II ;
- Dr Nadja Alexander, Professor at Singapore Management University;
- Dr Dr hc Thomas Pfeiffer, Professor at Heidelberg University, president of the European Law Institute Special Interest Group on Dispute Resolution;
- Mr Gordon Humphreys, Chairperson at the European Union Intellectual Property Office's Board of Appeal, and Mediator in the EUIPO's ADR service;
- Dr. Norel Rosner, Legal and Policy Officer, Directorate-General for Justice and Consumers, European Commission;

In this second part of the roundtable, the following questions were discussed :

- Does the Singapore Convention interfere with the EU internal regulatory framework (as REIO)?
- The role of the Hague Convention on Choice of Court Agreements 2005 or the Hague Judgments Convention 2019.

iii) Dr Norel Rosner on the EU Position on the Singapore Convention on Mediation

Dr. Norel Rosner (Legal and Policy Officer, Directorate-General for Justice and Consumers, European Commission) started the roundtable discussion by pointing out that since the discussion on the Singapore Convention on Mediation had started in 2015, the European Union has been sceptical about the added value of this project. He explained that this was not because the European Union did not believe in ADR but, on the contrary, because the EU believes in ADR. He thereby referred to the Directive on Mediation which the EU had adopted in 2008 (10) and added that other examples could be mentioned, in the area of consumer litgation, showing that the EU is at the forefront of ADR. The reasons why the EU is sceptical about the Singapore Convention is because of the special place which settlement agreements have in many legal systems of the EU Member States. He stressed that in many legal systems of the EU Member States a settlement agreement is regarded as a contract and is enforceable as a contract. It is based on the will of the parties like any contract and a failure to enforce it means that the will of the parties to engage in such a contractual relationship does not exist. Also, in some legal systems of the EU Members States, settlement agreements can ony be enforced after they have been validated by national courts. Because of this specifical situation, the EU thought that an instrument like the Singapore Convention is in fact not needed. However, the EU participated constructively in the discussion on the elaboration of the Convention in UNCITRAL Working Group II. The EU agreed on a dual track approach which consisted in preparing concurrently a Convention on International Settlement Agreements resulting from Mediation and an amendment to the Model Law on International Commercial Conciliation and was intended to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument. This dual track approach was also enshrined in the UN Resolution of 20 December 2018 that adopted the Convention (11).

Now that there is a Convention in place the question has to be answered whether the position taken thus far by the EU has to be changed. The EU therefore intends to engage in discussions with stakeholders to see where they stand on the question whether either the Convention or the Model Law can be beneficial. Moreover, there is the question of competence. As the letter of the Portuguese Minister for Justice has set out, there have been no discussions at a technical level as to decide whether this is a legal instrument of exclusive competence of the Union or whether there is shared competence of the EU with its Member States. The EU Commission has made its internal analysis and believes that it has competence, but it must still be decided whether this competence is exclusive. If necessary, the European Court of

10 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJEU, 24 May 2008, Vol. 51, L 136, see : https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0052&from=EN (accessed 25 January 2022).
11 Resolution A/RES/73/99 of the UN General Assembly adopted at the 73rd Session (text circulated on 3 January 2019); see : https://undocs.org/en/A/RES/73/199 (accessed 25 January 2022).

Justice will have to decide this, if it is asked to do so, as happened already a few times in the past. This is based on Article 3(2) of the Treaty on the Functioning of the European Union (12) and it has to do with the overlap in the scope of application between the EU Directive of 2008 and the Singapore Convention on Mediaton.

Furthermore, some specific points can be mentioned. Article 6 of the European Mediation Directive speaks about enforcement only with the agreement of both parties (13). So, there is no unilateral enforcement foreseen. But the Singapore Convention goes a step further and allows enforcement at the request of one party alone. Article 5 of the European Mediation Directive deals with applicable law (14). In fact, the freedom of the parties to choose the applicable law in the EU is not unlimited. There are certain limitations for certain types of contracts (15). Finally, it must be observed that the Singapore Convention does not contain a reciprocity reservation. It is unusual for an international instrument in civil justice not to address the issue of reciprocity. It is understandable in the given circumstances that it may be difficult to pinpoint physically to a location where a settlement agreement is coming from. In this way, somehow, the Singapore Convention looks into the future, but it is unusal not to have reciprocity, even as a reservation. Article 8(1) of the Singapore Convention provides the only two reservations which States can make when signing and ratifying the Singapore

12 Article 3(2) TFEU (OJEU 26 October 2012, C 326/47) provides : "*2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope*", see : https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF (accessed 25 January 2022).

13 Article 6 of the Mediation Directive 2008/52/EC of 21 May 2008 provides : "*Article 6 Enforceability of agreements resulting from mediation - 1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability. 2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made. […]*".

14 Article 5 of the Mediation Directive 2008/52/EC of 21 May 2008 provides : "*Article 5 Recourse to mediation - 1. A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available. 2. This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system."*

15 EU Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), Article 6 dealing with Consumer Contracts provides : "*1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional: (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities. […]*"*;* see : https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF (accessed 25 January 2022).

Convention, one of which being that the Convention will only apply on the basis of party autonomy (16).

iv) Corinne Montineri on the motivation of States having signed the Singapore Convention on Mediation

Corinne Montineri (Legal Officer in the International Trade Law Office of the United Nations Office of Legal Affairs, the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL)) explained the motivation of the States having signed the Singapore Convention on Mediation. UNCITRAL observed that the decisions by States to adopt the Convention was motivated by considerations at different levels. The Convention applies to businesses and it has therefore been seen in different parts of the world that business organizations were asking the government to give consideration to adopt the Convention, because enforcement of a settlement agreement was the missing part of using mediation in an efficient manner to solve disputes. As mediation is really a means to solve disputes while also protecting the business relations, it contributes to producing savings in the administration of justice of states. Moreover, mediation is seen as contributing to the sustainable development goals and the UN General Assembly resolution on the Singapore Convention on Mediation expressed the conviction that the Convention will contribute to the development of harmonious international economic relations. In parallel to the Convention, also a new chapter of the Model Law dealing with the enforcement of settement agreements was prepared, because in many States there is legislation needed for implementing the Convention and for avoiding contradictions with existing legislation.

As regards the question of the absence of reciprocity in the Convention, this was discussed during the preparation of the Singapore Convention as the New York Convention does contain a reciprocity reservation (17). In the context of Investor-State Dispute Settlement ("ISDS"), there is no exclusion of settlement agreements unless the States when signing and ratifying the Convention make a reservation pursuant to Article 8(1) excluding the Convention to States or governmental agencies or persons acting on behalf of a governmental agency. Sofar, Belarus, Iran and Saudi Arabia have made this reservation (18). A lot of countries in many

16 Article 8 of the Singapore Convention on Mediation provides: "*Reservations : 1. A Party to the Convention may declare that: (a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration; (b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention*."

17 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), see : https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf (Accessed on 25 January 2022).

18 Georgia meanwhile has also made this reservation, when ratifying the Convention on 29 December 2021; see: https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status (accessed 25 January 2022).

parts of the world have already signed the Convention including the United States of America and China. Many countries which are partners of the European Union already signed the Convention. It could be beneficial for the European businesses in the U.S. if the EU would also join the Convention. The very active role of the EU delegation during the preparation of the Convention has been much appreciated and there are many provisions in the Convention that reflect really the input by the EU and its Member States.

v) Natalie Morris-Sharma on the challenges encoutered during the discussion on the Singapore Convention in UNCITRAL Working Group II

Ms. Natalie Morris-Sharma (former chair of UNCITRAL Working Group II which drafted the Singapore Convention, and Deputy Senior State Counsel, International Affairs Division, Attorney-General's Chambers, Singapore) explains that the Singapore Convention is a product of multilateral negotiations between more than 150 persons in the room with different legal, cultural, linguistic and professional backgrounds, who had to deal with delicate issues. She sets out that five issues were the most difficult, and they were dealt with in an eventual compromise package that allowed the delegations to arrive at an overall agreement.

The first difficulty was that the issue of legal effect of the term recognition is understood differently across various jurisdictions internationally. While the term recognition is familiar in the context of the New York Convention, just like the term enforcement, the question arose how to deal with the term recognition in the context of the Singapore Convention without using the term. In the Singapore Convention a descriptive approach was taken, to capture how the obligations contained in the settlement agreement can be invoked as a shield to prove that the matter has already been resolved (in additon to functioning as a sword in the event of enforcement).
The second issue was the treatment of judgments and arbitral awards. In order to avoid mutiple bites of the cherry, the Singapore Convention excludes from its scope of application the settlements contained in judgments or in arbitral awards that meet certain criteria. As there were concerns that there might be overlaps between the Singapore Convention and the Hague Judgments Convention or the New York Convention, the drafting of the Convention had to avoid overlaps while not creating gaps.
A third issue concerned the misconduct of the mediator (19). The fourth issue concerned a possible reservation that the Convention would only be applicable if the parties consent

19 Article 5 of the Singapore Convention - Grounds for refusing to grant relief : "*1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that: […] (e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or (f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement*."

thereto. And the fifth difficulty concerned the form of the instrument. Accordingly, the Working Group elaborated in parallel a Convention and a new Chapter for the Model Law on Mediation.

The Convention also addressed the specific interests of regional economic integration organizations (REIOs). The inclusion of Article 12 in the Singapore Convention will facilitate the EU and its Member States to become a party to the Convention. It expressly permits REIOs signing and ratifying the Convention to make a declaration specifying the matters of competence that have been transferred. Subsequent changes to the distribution of competence must also be promptly notified. Crucially, there is one paragraph in this provision for two scenarios in case there are conflicting rules of the REIO. A first scenario concerns a situation where relief is sought under the Singapore Convention in a state of an REIO, and where in that context there are no factors qualifying the mediated settlement agreement as "international", as there is no connection to a state outside the REIO. If the REIO has conflicting rules that would apply in such scenario, then the Singapore Convention will not apply. A second scenario concerns the recognition of foreign judgments between Member States of an REIO and so, for instance, if a Court of an EU Member State renders a judgment granting or denying relief, then other Member States would be obliged to recognize the judgment, rather than applying the regime of the Singapore Convention (20).

Regarding the need for the Singapore Convention, prior to the Singapore Convention there were problems with respect to enforcement of international settlement agreements in some jurisdictions. For example, within the EU there were problems with having notary deeds enforced using normal procedures. To enable the enforcement of mediated settlement agreements, sometimes execution proceedings were used. The systems are different across jurisdictions and this makes it very complex, particularly in today's complicated world of

20 Article 12 of the Singapore Convention : Participation by regional economic integration organizations : "*1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over matters governed by this Convention. Where the number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention. 2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph. 3. Any reference to a "Party to the Convention", "Parties to the Convention", a "State" or "States" in this Convention applies equally to a regional economic integration organization where the context so requires. 4. This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention: (a) if, under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1, paragraph 1, are members of such an organization; or (b) as concerns the recognition or enforcement of judgments between member States of such an organization.*"

cross border commercial relationship. For European companies it is not just important to consider enforcement within the EU, but also enforcement outside the EU. Difficulties with cross border enforcement have been cited in many surveys as a primary reason for reticence over the use of mediation to resolve disputes in the first place. There is still a pre-existing desire to have international settlement agreements enforced in a crossborder context and even without the Singapore Convention. Parties have relied on multiple vehicles, including vehicles such as an award by consent so that they can rely on the network provided by the New York Convention on the enforcement and recognition of foreign arbitral awards. But there are inherent uncertainties with this approach. Some of the major economies in the world have meanwhile signed the Singapore Convention. With the signature of the Convention by Brazil, a total number of 54 states have thus far signed the Convention (21). Ms. Morris-Sharma concluded by expressing the hope that the European Union as a major capital exporter would sign on to the Convention in the interest of promoting certainty for the use of mediation on the international stage.

vi) Diana Wallis on the challenge to put the Singapore Convention on the political agenda in the European Union

Ms Diana Wallis (Former Vice-President of the European Parliament, Former President of the European Law Institute, senior lecturer at the University of Hull) explained how members of the European Parliament can put the Singapore Convention on Mediation on the political agenda. First of all, as was set out by Norel Rosner, the initiative to sign on to an international Convention must be taken by the European Commission. But, since the Lisbon Treaty, the European Parliament has the right to be informed during negotiatons and to be consulted or to consent on international agreements. The whole area of mediation is one that is very attractive to the European Parliament and very attractive to individual Members of Parliament given all the issues that will need to be addressed post-pandemic. Moreover, mediation helps to increase international trade sustainability. There is no reason why this should not find resonance with the European Parliament. The Legal Affairs Committee of the European Parliament has always shown readiness to hold hearings and to push the idea of mediation. Looking at the study made by Giuseppe de Palo and his team (22), the European Parliament

21 Brazil signed the Singapore Convention on 4 June 2021. Since the roundtable of 18 June 2021, the Singapore Convention on Mediation has also been signed by Turkey (11 October 2021), see: https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status (accessed 26 January 2022).

22 Study by the European Parliament, Directorate General for Internal Studies, Policy Department C : Citizens' Rights and Constutional Affairs, Legal and Parliamentary Affairs, on "'Rebooting' the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU", 2014, authored by : Giuseppe de Palo, Leonardo D'Urso, Mary Trevor, Bryan Branon, Romina Canessa, Beverly Cawyer and L. Reagan Florence, See: https://www.europarl.europa.eu/thinktank/en/document/IPOL-JURI_ET(2014)493042 (accessed 26 January 2022).

has always been very active in wanting to hear about how mediation is fairing following on the Mediation Directive itself and seeing what might come next. A hearing could be organized so that the matter is discussed within the Parliament. It is also possible for a Committee to decide to make a so called own initiative report on a subject. This can result in a Committee report, which then goes to the Plenary session of the Parliament, where it is voted, and which could in theory ask the Commission to act. The European Commission would then have to respond and take action or give reasons why it would not take action. The European Parliament does not have a right of initiative technically, but this own initiative report is a very strong "weapon" nevertheless. There also ways and means of tabling written questions to the European Commission, and indeed to the Council. Also oral questions can be asked at the Question Time, which likewise require an answer. So there are plenty of opportunities to have the issue discussed within the European Parliament.

vii) Dr Rimantas Simaitis on the perspective of the Council of Europe on the Singapore Convention on Mediation

Dr Rimantas Simaitis (Chairman of the Council of Europe European Commission for the Efficiency of Justice Working Group on Mediation (CEPEJ-GT-MED)) gave some personal insights from the perspective of the Council of Europe on the Singapore Convention on mediation. The Council of Europe has three main pilllars: human rights, democracy and rule of law. Mediation is mainly related to the efficiency of human rights into the protection and efficiency of the rule of law. For this reason, the subject of mediation is mainly addresses by the Commission for the Efficiency of Justice. The Council of Europe has no plan to launch and design a hard law instrument in the field of mediation, such as a Convention. In the last 20 years, however, the Council of Europe has developed soft law instruments in the field of mediation. In 2002, the Committee of Ministers issued a recommendation to the Member States in order to facilitate mediation in civil matters whenever appropriate (23). Guiding principles concerning mediation in civil matters were published in order to promote mediation in civil and commercial matters (24). One of the last instruments of CEPEJ, which directly refers to the Singapore Convention on Mediation, is an instrument on lawmaking issues called European Handbook for Mediation Lawmaking, which was adopted by CEPEJ on 14 June

23 Council of Europe Recommendation Rec (2002)10 of the Committee of Ministers to member States on mediation in civil matters, 18 September 2002, see : https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e1f76 (accessed 26 January 2022).
24 European Commission for the Efficiency of Justice (CEPEJ) Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters, 7 December 2007, see : https://rm.coe.int/16807475b6; Council of Europe European Commission of the Efficiency of Justice Working Group on Mediation (CEPEJ-GT-MED) Road Map on the CEPEJ-GT-MED report on "The Impact of CEPEJ Guidelines on Civil, Family, Penal and Administrative Mediation", 27 June 2018, see : https://rm.coe.int/road-map-for-mediation-based-on-the-cepej-gt-med-report-on-the-impact-/16808c3fd5 (accessed 26 January 2022).

2019 (25). The Handbook expresses a very optimistic and positive view on the Singapore Convention and on the UNCITRAL Model law on Mediation and took this position in order to promote a high degree of harmonization among the domestic laws on mediation.

There is a problem, however, with regard to of the European Union and its Member States in the field of mediation. The European Union has the Mediation Directive, which is not a regulatory instrument. The European Union is in discussion about what to do in that context. Some Member States show that they retain their individual competencies. They accept that the European Union makes recommendations and provides a soft law approach, but these States wish their own decisions. Dr. Simaitis is of the opinion that this discussion is more of a technical nature and about sharing competencies, but he has not heard any bad remarks about the content of the Singapore Convention on Mediation. He hopes and believes that in a couple of years all the European Member States will ratify the Convention or that the European Union will do so.

viii) Questions from the audience

The persons attending the webinar could make comments or raise questions in the chat. A first comment was made by a person having participated in the work of UNCITRAL Working Group II who said that the text of the Convention, including Article 5, had been drafted very carefully, sometimes intentionally using ambiguous terms to allow for diverse interpretations by domestic courts, similar to what happens today in practice with the New York Convention. The question was raised whether this should not address potential concerns, as Article 5 would allow flexibility for courts in EU Member States in applying the Singapore Convention. Another comment in the chat was that the Convention does not provide for reciprocity.

Dr. Norel Rosner of the European Commission did not wish to add anything to what he had said about the issue of reciprocity. As regards the comment made on Article 5 of the Convention, Dr. Rosner responded that the discussions in UNCITRAL Working Group II were in the beginning much more fundamental before they became more technical on Article 5 (26). It is basically a fundamental question of policy, whether Article 5 is something beneficial. He thinks in this context that the language of Article 5 is indeed a bit ambiguous and that this is, as it is called in Europe, constructive and greedy. This means that it can be used either way by either camp, meaning by those opposing the Convention and by those who are in favour of the Convention. Some would say you get more legal certainty with this

25 European Commission for the Efficiency of Justice (CEPEJ) European Handbook for Mediation Lawmaking, adopted at the 32th plenary meeting of the CEPEJ Strasbourg, 13 and 14 June 2019, see: https://rm.coe.int/cepej-2019-9-en-handbook/1680951928 (accessed 26 January 2022).
26 Article 5 Grounds for refusing to grant relief ; *supra* Fn. 19.

Convention and some would say the opposite. This provision would allow different interpretations.

ix) Prof. Cathérine Kessedjian on the Hague Convention on Choice of Court Agreements and the Hague Judgments Convention

Prof. Cathérine Kessedjian (former Deputy Secretary General of the Hague Conference on Private International Law; Professor emerita, University Panthéon-Assas Paris II) started the second part of the roundtable by pointing out that there is absolutely no overlap between the Singapore Convention on Mediation and the Hague Convention on Choice of Court Agreements of 2005 (27) or the Hague Judgments Convention of 2019 (28). As she had attended the session of UNCITRAL Working Group II as an observer, she stressed that the negotiators of the Singapore Convention on Mediation have been very careful in order not to encroach into the scope of the Hague Conventions. During the negotiation of the Singapore Convention, the Hague Judgments Convention 2019 was still a work in progress, but there was already experience with the Hague Convention on Choice of Court Agreements 2005. The provisions on mediation in the Hague Convention of Choice of Court Agreements 2005 (29) and in the Hague Judgments Convention 2019 (30) are similar. The Hague Conventions are only interested in what is going on in courts and are not interested in what conventional mediation is doing. Conventional mediation is a completely different animal. The Hague Conventions do not provide any rule for conventional mediation. The Singapore Convention deals with this type of mediation. Judicial settlements which are dealt with in the Hague Conventions are settlements obtained while the proceedings were pending before a court. Such settlements are embodied in judgments rendered by courts. This is not at all what the Singapore Convention is looking at. Therefore, there is no overlap. Another situation is where

27 Hague Convention of 30 June 2005 on Choice of Court Agreements, see : https://www.hcch.net/en/instruments/conventions/full-text/?cid=98 (accessed on 13 February 2022). Number of Contracting Parties, incl. REIOs and States bound as a result of approval by an REIO: 32. The European Union is a Contracting Party since it signed the Convention on 1 April 2009. The Convention entered into force on 1 October 2015.

28 Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, see : https://www.hcch.net/en/instruments/conventions/full-text/?cid=137 (accessed on 13 February 2022). The Convention has been signed by Costa Rica, Israel, Russian Federation, Ukraine and Uruguay, but it has not yet entered into force.

29 Article 12 of the Convention provides: "*Article 12 Judicial settlements (transactions judiciaires) - Judicial settlements (transactions judiciaires) which a court of a Contracting State designated in an exclusive choice of court agreement has approved, or which have been concluded before that court in the course of proceedings, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment.*"

30 Article 11 of the Convention provides : "*Article 11 Judicial settlements (transactions judiciaires) - Judicial settlements (transactions judiciaires) which a court of a Contracting State has approved, or which have been concluded in the course of proceedings before a court of a Contracting State, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment.* "

the parties reached a settlement in a conventional mediation and ask the court to transform it into a judgment. In such case, because it is the will of the parties, it is not a settlement, but a judgment. It does not really matter thereby whether the judgment was actually based on the settlement. Article 12 of the Hague Convention on Choice of Court Agreements 2005 and Article 11 of the Hague Judgments Convention 2019 provide a confirmation thereof, because both these provisions on judicial settlements must have the effect akin to a judgment.

However, there is a problem or a gap, namely one aspect that has not been dealt with neither in the Singapore Convention nor in the Hague Convention, and which has not been seen or, if it was seen, may have been put under the carpet. This concerns a situation where, in spite of a mediation agreement between the parties, one of the parties or both parties have gone to a court and the court has rendered the "judgment" in violation of the mediation agreement. Prof. Kessedjian considers that in such case the parties have changed their agreement and the later will of the parties has substituted their earlier will and, therefore, the judgment can be enforced. Prof. Kessedjian still sees a gap, if one of the parties in such case would raise a plea before the court invoking the agreement to mediate and if the court would render a judgment in such case. She would have preferred that the Hague Judgments Convention 2019 would have provided that the party who wanted to go to mediation and who was not successful in the court procedure could file an opposition and that this would be a ground for the enforcing court not to enforce the judgment that was rendered in violation of the mediation agreement. This problem also exists with the New York Convention on Arbitration and European Law. This is a very difficult problem, and she therefore understands why this was not really raised.

x) Prof. Nadja Alexander on the use of mediation in international dispute resolution and the differences between the Singapore Convention on Mediation and the New York Convention on Arbitration

Prof. Nadja Alexander (Singapore Management University) pointed out that it results from surveys on international commercial dispute resolution (31) she has done with SIDRA (32) that arbitration remains the dispute resolution mechanism of choice among the respondent users (87%), followed by litigation (58%), hybrid dispute resolution (30%), mediation (27%) and others (neutral evaluation, adjudication)(14%). She explained that when hybrid dispute resolution, which includes mediation, is added together with mediation as dispute resolution method, mediation is used about as much as litigation by companies in order to settle disputes. It therefore matters to focus not only on mediation as a stand alone method but also on mixed mode dispute resolution in order to assess the importance of mediation in the international space with respect to the Singapore Convention. There is a group of users who

31 International Dispute Resolution Survey, see : https://sidra.smu.edu.sg/research-program/international-dispute-resolution-survey/sidra-survey-2020 (accessed 13 February 2022).

currently use primarily arbitration or a mixed mode dispute resolution method because of the lack of a mechanism like the Singapore Convention. It will be interesting to see in the coming years whether there will be a shift in the use of stand alone mediation as a consequence of the Singapore Convention.

The Singapore Convention contains no provision on the enforcement of mediation agreements or agreements to mediate, whereas the New York Convention on the recognition and enforcement of foreign arbitral awards deals with arbitration agreements as well. This is not surprising because there is no concept of seat of mediation in the sense as there is a seat of the arbitration. It is not always easy to pinpoint where the mediation takes place. It can take place in a number of jurisdictions and it can also take place online. Also the place where the mediation is signed off may have implications for reciprocity. As a result, there is no single court having exclusive jurisdiction to set aside, for example, or invalidate an international mediated settlement agreement. So, a mediated settlement agreement under the Convention can be enforced in a state that is a contracting party to the Convention, irrespective of where it was signed. There is no concept of state of origin in that sense, which is quite different from the New York Convention. The Singapore Convention provides under Article 5(1)(d) that a ground for refusal can relate to the terms of the mediated settlement agreement in the sense that enforcement would be inconsisent with the terms of the agreement (33). This allows parties to opt out and this enhances party autonomy. An opt out regime is not foreseen under the New York Convention. Under the Singpore Convention two reservations can be made by contracting Parties(34) and can be withdrawn at any time. One of the reservations allows contracting Parties when adhering to the Convention to declare that the Convention will operate as an opt in regime. This means that parties to a mediation would have to write in their mediated settlement agreement that they want the Singapore Convention to apply. If that would have been the default regime, one would get lost. Therefore, the direct enforcement regime has been foreseen in the Convention. The EU Directive on Mediation does not offer a direct enforcement mechanism and does not harmonize the enforcement of mediated settlement agreements. The Singapore Convention can offer this. The EU Medation Directive deals with a couple of other points, such as confidentiality to some extent.

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32 Singapore International Dispute Resolution Academy, see : https://sidra.smu.edu.sg/ (accessed 13 February 2022)

33 Article 5 of the Singapore Convention - Grounds for refusing to grant relief : "*1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that: […] (d) Granting relief would be contrary to the terms of the settlement agreement."*

34 Article 8 of the Singapore Convention - Reservations : "*1. A Party to the Convention may declare that:*
(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration; (b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention."

xi) Prof. Thomas Pfeiffer on the compentence of the EU in the field of mediation and on the relationship between the EU Mediation Directive and the Singapore Convention

Prof. Thomas Pfeiffer (Heidelberg University; president of the European Law Institute Special Interest Group on Dispute Resolution) points out that the competence of the European Union in the field of mediation is based on Article 81(2) of the Treaty on the Functioning of the European Union (35). However, this provision almost seems to indicate that there is no alternative dispute resolution in the European Union. This could be broadened and the Europe Union should take more action to promote ADR.

The EU Mediation Directive 2008 contains in Article 6 a provision on the recogniton of the negotiated settlement (36). However, this is a Directive and not a Regulation of the European Union, and that makes a big difference. The question is what the relationship is between Article 6 of the EU Mediation Directive, on the one hand, and the Singapore Convention if the EU would acceed to it, on the other hand. From a conflicts of law perspective, in case there are different jurisdictional regimes, it is broadly recognized – and that is a matter of legal logic – that it is possible to have either this regime or the other. If two regimes apply at the same time, this raises conflict difficulties of all kinds. However, this is very different when it comes to mutual recognition, because in mutual recognition there are usually many conquering regimes and usually all instruments contain a clause stating that there must be recognition if the requirements are met under one regime and that there is no objection against recognition under another instrumental regime. The same applies to both instruments here. Article 7 of the Singapore Convention provides that it does not want to interfere with any

35 Article 81 TFEU (OJEU 26 October 2012, C 326/47) provides : "*Judicial Cooperation in Civil Matters - Article 81 (ex Article 65 TEC) 1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: […] (g) the development of alternative methods of dispute settlement."*

36 Directive 2008/52/EC of the European Parliament and of the Councilof 21 May 2008 on certain aspects of mediation in civil and commercial matter, OJEU 24 May 2008, L 136/3, see : https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0052&from=EN (accessed 13 February 2022). Article 6 - Enforceability of agreements resulting from mediation: "*1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability. 2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made. […]."*

other recognition regime (37) and the same is true for Article 6(4) of the EU Mediation Directive (38). The EU Mediation Directive does not bar any recognition under any other regime. So, technically it would very well be possible to have both. Prof. Pfeiffer submits that changing the EU Mediation Directive might be a good idea, but he does not see technically that this is a must. Moreover, there is an interplay with other aspects of European law, such as the Rome I Regulation on the choice of law regime (39). The European Union made no reservation on the Hague Convention on Choice of Court Agreements. This was so in the old regime. It is not appropriate to go back to this. He observes that the solutions may be different with respect to the Rome I Regulation, but he thinks that Article 5 of the Singapore Convention provides an appropriate answer. More importantly, even if there would be a difference as regards the standards applied so far, this would not bar the European Union from acceding to the Singapore Convention on Mediation. As regards the question of competence for signing the Singapore Convention, Prof. Pfeiffer considers that it is still an open question whether the competence of the European Union is an exclusive competence under Article 3(2) of the Treaty on the Functioning of the European Union (40) or a shared competence under Article 4 of the Treaty (41).

xii) Mr. Gordon Humphreys on mediations conducted by the European Union Intellectual Property Office and the significance of the Singapore Convention

Mr. Gordon Humphreys (Chairperson at the European Union Intellectual Property Office's Board of Appeal, and Mediator in the EUIPO's ADR service) set out that the European Union

37 Article 7 of the Singapore Convention – Other laws of treaties: "*This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon."*

38 Article 6(4) of EU Directive 2008/52/EC : "*4. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with paragraph 1."*

39 EU Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), *supra* Fn. 15.

40 *Supra*, Fn. 12.

41 Article 4 TFEU (OJEU 26 October 2012, C 326/47) provides : "*1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6. 2. Shared competence between the Union and the Member States applies in the following principal areas: (a) internal market; (b) social policy, for the aspects defined in this Treaty; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) energy;* (j) *area of freedom, security and justice; (k) common safety concerns in public health matters, for the aspects defined in this Treaty. 3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs. 4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs."*, see: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF (accessed 13 February 2022).

Intellectual Property office is based in Alicante, Spain and that it is the largest of the 34 decentralized agencies of the European Union. Under the umbrella of the World Intellectual Property Office, it is part of the international registration system both for trademarks and for designs as well as the sole entity responsible for the registration of EU trademarks and designs. Stakeholders are, purely speaking, the European Commission, the European Parliament and the intellectual property offices of all the EU Member States, all of which sit in the management board of the European Union Intellectual Property Office. The users are individuals or companies from the European Union or from anywhere else in the world. In 2020, the EUIPO received a total of 177.000 trademark applications and 116.000 design applications (42). Most applications were filed by China (with nearly 29.000 trade mark applications), followed by Germany, then the United States (with 13.000 applications), the United Kingdom (11.000 applications) and Switzerland (4.000 applications). These figures alone indicate that nearly 40% of all applications came from outside the European Union, without even accounting for applications from countries like Brazil. There is a similar picture for applications for designs. The conclusion is therefore that China and the United States of Amercia are major users of the EUIPO system in the field of trademarks and designs. This will still increase with all the Free Trade Agreements that the EU has been signing with third countries, including the United States and China and which contain important intellectual property provisions.

Since 2011, the EUIPO has been offering mediation to parties engaging in appeal proceedings, because of the large volume of disputes it has to handle. With a combined figure of nearly 300.000 trademark and design applications per annum at the EUIPO, it is inevitable that some of these applications will conflict with earlier similar intellectual property rights – be they earlier trademarks, designs or copyrights that exist in the European Union. As regards designs, the earlier right can even be an earlier design disclosed anywhere in the world, provided that it would be known to the trade circles based in the European Union. In reality, the EU trade circles are deemed to know everything that goes on worldwide if prior art is published in the official publication of an IP office somewhere in the world. So, arguing that publication made, for example, in the Mongolian trademark and design bulletin of a particular design of a toothbrush would not be known to the relevant EU trade circles, is unlikely to be accepted as an argument for non disclosure of an earlier design. There are a lot of cases that are decided at the first instance by the EUIPO from the conflicts that are generated by all these applications and these decisions can be appealed to the Board of Appeal, where Mr. Humphreys is working. The decisions of the EUIPO Board of Appeal can in turn be appealed to the General Court of the European Union. Such appeals constitute about one third of all

42 EUIPO Statistics for European Union Trade Marks, see : https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_euipo/the_office/statistics-of-european-union-trade-marks_en.pdf (accessed 13 February 2022)

cases now handled by the General Court (43). In exceptional cases, the appeals can even be submitted to the Court of Justice of the European Union. Such proceedings can take a long time. In 2020, more than 22.000 trademark disputes were initiated. Many of them were solved by negotiations conducted between the lawyers. However, there were 8.000 trademark disputes going through the EUIPO first instance, and then 2.500 disputes were submitted to the EUIPO Board of Appeal and more than 320 were submitted to the General Court of the European Union. That means that there are potentially three levels of decision-making and demonstrates that there is thus an enormous volume of work that has not yet gone to mediation. The EUIPO has been really working on making mediation as attractive as possible as, commercially-speaking, it is not acceptable to spend about three to four years going through all these proceedings. In the worst case scenario, there have been cases ongoing for 25 years. This is not beneficial for business. The advantage of mediation is that it can combine all disputes between the same parties wheresoever they occur into one process, provided at least one of the disputed rights is the subject matter of proceedings before the EUIPO. This can even include infringement proceedings between the same parties before national courts or intellectual property offices anywhere in the world and involving any IP right that can all be brought together and solved through a mediated settlement at the offices of the EUIPO or elsewhere. The legal certainty and the huge saving of time and costs brought by a mediated settlement agreement is phenomenal. The more enforcement of the mediated settlement agreement is facilitated, the more attractive it becomes, as there is still a perception problem. Users are concerned that it will be very complicated to enforce a mediated agreement against a Chinese party or against an American party. Given that the United States and China are both signatories to the Singapore Convention and major users of the EU trademark and design systems, it makes a lot of sense for the European Union to join, because in the proceedings before the EUIPO there will be very often a EU based company on the one side and a Chinese or American one on the other side. Enforcement will be an issue, in particular, if the third country party's assets are situated outside the European Union. The EU Mediation Directive is great, but it is only helpful on a regional level. Moreover, there are neighbouring countries like Georgia, Montenegro, North Macedonia, Serbia, Ukraine and Turkey, where business is also done by EU-based companies and from where applications are filed before the EUIPO. IP and other commercial disputes can and will inevitably arise in this context. Direct enforcement as foreseen in the Singapore Convention is obviously a benefit. The EUIPO has organized a conference on mediation earlier this year in order to promote mediation (44) and intends to do so every other year. Mediation is extremely beneficial to SMEs in the EU. Those SMEs engage in import and export all over the world and will have disputes with their trading partners involving IP and other commercial matters. To encourage settlement by mediation,

43 Court of Justice of the European Union, *The Year in Review, Annual Report 2020*, p. 60, see : https://curia.europa.eu/panorama/2020/en/index.html (accessed 13 February 2022).
44 On 22-23 March 2021, the EUIPO organized the Third IP Mediation Conference, see : https://euipo.europa.eu/ohimportal/nl/ip-mediation-conference-2021 (accessed 13 February 2022)

enforceability outside the EU must be addressed. Without it, long drawn-out proceedings and considerable legal uncertainty are likely to be the norm.

xiii) Dr Norel Rosner on further plans of the European Commission on the Singapore Convention on Mediation

Dr. Norel Rosner (Legal and Policy Officer, Directorate-General for Justice and Consumers, European Commission) was given the opportunity to react to the different presentations made by the members of the second panel and to give an indication as to how the European Commission plans the reflection process. Dr. Rosner replied that he was very impressed about the numbers of cases of the EUIPO in Alicante. As regards the internal regulatory framework, he underscored that the Singapore Convention addresses this issue in Article 12(4). It contains what is called a disconnection clause, in the sense that it allows an unhindered application of conflicting European rules, but there are two conditions (45), namely that the competent authority is in the EU and that both parties to the settlement agreement are within the EU. Moreover, there is the question whether internal EU law should be revisited, in case the EU would take action with regard to the Singapore Convention. This is a political question. Dr. Rosner pointed out that the EU Mediation Directive that was adopted in 2008 was the smallest common denominator among the EU Member States and this explains why Article 6 of the Directive speaks about the agreement of both parties to ask for enforcement. The entry into force of the Singapore Convention brings us one step further. What the Singapore Convention will do in many Member States is that it will make it easier to enforce settlement agreements coming from outside the EU than the enforcement of settlement agreements coming from within the EU. Basically, the situation will then be that, on the one hand, in case there is a settlement agreement between a party from within the EU and a party from outside the EU, the disconnection clause will not apply and, therefore, the Singapore Convention will apply and there will be a unilateral recognition. On the other hand, when the mediated settlement agreement is between parties from the EU, the disconnection clause applies and thus the EU Directive on Mediation will apply and it will be more difficult to enforce the mediated settlement agreement.

In response to the observations made by Professor Pfeiffer on applicable law, Dr. Rosner clarified that nobody is talking about a choice of law clause as a ground of refusal, as this is outdated. When a foreign settlement agreement is submitted for enforcement to a court in the EU, many courts in the EU consider it as a contract and hold that they cannot look at it

45 Article 12(4) of the Singapore Convention : "*4. This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention: (a) if, under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1, paragraph 1, are members of such an organization; or (b) as concerns the recognition or enforcement of judgments between member States of such an organization*."; see also *supra*, Fn 20.

because it does not come from another EU court and because it was a choice made by the parties. This is wrong without looking at the Rome I Regulation, because arbitration agreements and agreements on the choice of court are excluded from the Rome I Regulation (46). There is not a big problem as regards the direct enforcement. The EU participated in the negotiations of the Singapore Convention and, whatever is agreed, there is something that the EU could live with and the Convention does not speak of courts but of competent auhority (47).

The European Commission has started consultation activities on the Singapore Convention on Mediation, not only with stakeholders but also with the EU Member States. The Commission had several technical discussions with the Member States in this respect. But the Commission wishes to have a full picture and therefore intends to engage ideally before the end of the year 2021 into consultation activities with the broader stakeholders community. This will of course include the mediation community but also, beyond that, the lawyers community, the judges, the business community and possibly also other types of stakholders.

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On 16 December 2021, the European Commission (Directorate General for Justice and Consumers, Civil Justice Unit) organized an online workshop with experts from EU Member States, the European Parliament and stakeholders from the mediation and legal sectors, the business world as well as the academia. During this workshop, the EU Commission wished to hear the views of the experts and stakeholders on the following questions : i) whether the EU should take action in regard to the Singapore Convention; ii) whether they favour the accession to the Singapore Convention by the European Union; iii) whether they favour an authorisation to be given by the Council following a proposal from the Commission for individual Member States to sign/ratify/accede to the Singapore Convention; iv) whether the adoption of the UNCITRAL model law on mediation by the interested Member States can be an appopriate way forward in this respect. The EU Member States do not all share the same view on acceding to the Singapore Convention. Therefore, the EU Commission will conduct further consultations before deciding whether or not to take further steps.

The United Kingdom launched an open consultation on the Singapore Convention on mediation on 2 February 2022 and seeks comments until 1 April 2022 (48).

46 EU Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), Art. 1(2)(e), *supra* Fn. 15).

47 Articles 4 and 5 of the Singapore Convention on Mediation.

48 See : https://www.gov.uk/government/consultations/the-singapore-convention-on-mediation/consultation-on-the-united-nations-convention-on-international-settlement-agreements-resulting-from-mediation-new-york-2018

(accessed 6 February 2022); see also : “Mediation Convention ‘aligns with UK’s post-EU role’ ”, The Law Society Gazette, 2 February 2022, https://www.lawgazette.co.uk/practice/mediation-convention-aligns-with-uks-post-eu-role/5111377.article (accessed 18 February 2022)

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