

The enforcement of mediation agreements and settlement agreements resulting from mediation

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1 Introduction

Disputes are commonplace and when disputes arise parties often try to settle them amicably. In case the parties are unable to settle their dispute amicably, they could request the help of a third party, the mediator, who will try to establish a favourable climate for a settlement in an informal and relatively cost-conscious manner. Compared with many other forms of alternative dispute resolution, mediation allows for flexible solutions and settlements. If a settlement is reached and complied with, mediation may help to preserve the relationship of the parties.

The use of mediation has increased considerably over the last 40 years. During this period, legislation promoting mediation has been enacted in a growing number of jurisdictions within and outside the European Union (EU). In addition, institutes have been founded to facilitate mediation. Moreover, institutes that originally only administered other forms of alternative dispute resolution, such as the ICC and the NAI, have started to offer mediation too.

The popularity of mediation, however, varies greatly among jurisdictions. This is set out in, for example, a

European study from 2014.¹ For the purpose of this study, it was investigated, among other things, how often disputes were referred to mediation annually. Italy reported a number of annual referrals exceeding 200,000. Where Germany, the Netherlands and the United Kingdom still reported more than 10,000 annual referrals, mediation was evidently less popular in the other member states of the EU. Thirteen member states, including the Czech Republic, Portugal and Sweden, reported even less than 500 mediations per year. The aforementioned European study was concluded with recommendations to increase the use of mediation. It was primarily suggested to make mediation compulsory for certain kind of disputes, because evidence showed that such a step could have a positive effect on the use of mediation. In this respect, Italy was highlighted as an example. After mediation became mandatory for certain categories of disputes, the number of mediations, including voluntary mediations, increased dramatically.² In case of compulsory mediation, recourse to mediation is mandatory before legal proceedings may be commenced. Compulsory mediation has many variants. In the least burdensome variant, the parties are obliged to have at least one meeting with a mediator to examine the

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1. European Parliament, Directorate-General for Internal Policies, Policy Department, Citizen's Rights and Constitutional Affairs. (2014). *'Rebooting' the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Number of Mediations in the EU*, Brussel.
2. For the use and perception of mediation in the international legal and business communities, see also Strong S.I. *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation*. Retrieved from <http://ssrn.com/abstract=2526302>.

chances of a successful mediation. In the most burdensome variant, the parties are obliged to go through an extensive mediation procedure. Since compulsory mediation restricts access to justice without being based on a voluntary and unequivocal agreement between the parties, the question has arisen whether mandatory mediation can be reconciled with the right of access to justice. In two judgments – one from 2010³ and one from 2017⁴ – the European Court of Justice (CJEU) found that a statutory provision imposing mediation may be compatible with the right of access to justice, as long as the mediation (1) does not result in a decision that is binding on the parties, (2) does not cause a substantial delay for the purposes of bringing legal proceedings, (3) suspends the period for the time barring of claims, (4) does not give rise to costs – or gives rise to very low costs – for the parties, and only if (5) electronic means are not the only means by which the settlement procedure may be accessed and (6) interim measures are possible in exceptional cases where the urgency of the situation so requires.

In the absence of legislation imposing the prior implementation of mediation, the parties cannot be forced to mediate. In case of voluntary mediation, the mediation agreement lies at the heart of the process. The mediation agreement may be concluded ad hoc, when the dispute has arisen, or prior to the dispute, in the form of a mediation clause. Often the mediation agreement is part of a multi-tier dispute resolution clause. Under such clauses, the dispute resolution is to proceed through a sequence of steps, the final step regularly being court litigation.

When the parties enter into a mediation agreement, the question may arise whether this agreement should be considered as an irrevocable agreement or whether the parties are free to disregard the mediation agreement and commence court proceedings instead, for example, when there is only a small chance that mediation will result in a settlement. This question is relevant, because if the mediation agreement is not irrevocable, there is no system of forcing the parties to pursue mediation.

If mediation has been pursued and a settlement agreement has been reached, the parties generally comply with this agreement. It could happen, however, that the settlement agreement is not complied with voluntarily. In such cases, the question arises whether the settlement agreement can be enforced. This question is relevant, because if mediation simply results in a settlement agreement that is difficult to enforce, engaging in mediation is less attractive.

In deciding whether to invest time and money in the drafting of a mediation agreement and in the process of mediation, it is essential to know whether the parties are obliged to pursue mediation and whether the enforcement of a settlement agreement resulting from mediation will be effective and not costly. In the light hereof,

it is explored hereafter whether the mediation agreement and the settlement agreement resulting from mediation can actually be enforced.

2 The Enforcement of Mediation Agreements

In case a party disregards a mediation agreement and commences court proceedings instead, the other party to the mediation agreement could invoke the mediation agreement and argue, for example, that (1) the court should deny jurisdiction, (2) the claimant be declared inadmissible or (3) the case be referred to mediation (with a stay of the court proceedings). Whether the mediation agreement affects the court proceedings, and if yes, in what manner, is determined by national laws. After all, there are no international instruments that govern this issue.

In a national context – where all the connecting factors point to the same law – it is evident which law should be applied. Suppose the parties are from country X, the mediation agreement is governed by the law of country X and one of the parties commences legal proceedings in violation of the mediation agreement before the courts of country X. In such cases, it is evident that the law of country X applies and determines whether or not (1) jurisdiction should be denied, (2) the claimant should be declared inadmissible, (3) the dispute should be referred to mediation or (4) the disregard of the mediation agreement does not affect the proceedings.

Let us now assume that the dispute harbours an international element. Suppose a French and a Dutch party execute a mediation agreement, the French party commences court proceedings notwithstanding the mediation agreement and the Dutch party invokes the mediation agreement and requests the court to deny jurisdiction, declare the claimant inadmissible or at least refer the dispute to mediation (with a stay of the court proceedings). Then the question of which law should be applied to these requests arises.

The questions whether the court can deny jurisdiction and whether the court can refer the dispute to mediation are procedural questions and in principle governed by the *lex fori processus*. If the admissibility of the claimant should be considered to be a procedural matter too, the *lex fori processus* also applies to the question of admissibility. If, on the other hand, the admissibility of the claimant is deemed to be a matter of substantive law, it seems likely that the question of admissibility will be primarily governed by the law applicable to the mediation agreement.

If the parties make a choice of law for the mediation agreement, it is evident that this law applies to the mediation agreement, but such choices of law are rare. In the absence of a choice of law, the mediation agreement is governed by the law with which it is most closely connected. In this respect, a number of connecting

3. CJEU 18 March 2010, ECLI:EU:C:2010:146 (*Alassini et al v Telecom Italia SpA et al*).

4. CJEU 14 June 2017, ECLI:EU:C:2017:457 (*Menini*).

factors could be taken into consideration. From a factual-geographical point of view, the mediation agreement seems most closely connected with the law of the country where the mediation takes place or is to take place. From this point of view, the connecting factor is the place of mediation. Because mediations do not have a (legal) seat like arbitrations, it is not always evident, however, what the place of mediation is, in particular when the sessions with the mediator are held at more than one place.⁵ Aside from the aforementioned factual-geographical connecting factor, one could also apply other connecting factors, such as the parties' legal relationship. On the basis of this connecting factor, the mediation agreement is governed by the law that governs the relationship of the parties (e.g. contract or tort).⁶

In the Netherlands, the courts cannot deny jurisdiction when a mediation agreement is invoked, because a legal basis for such a decision is missing. Taking account of the case law of the Dutch Supreme Court,⁷ it must, furthermore, be assumed that private persons are not bound to comply with the mediation agreement given the voluntary character of mediation. They may, consequently, disregard the mediation agreement and commence legal proceedings instead. If, however, an international element was missing in the cases that were decided on by the Dutch Supreme Court – which seems likely, but cannot be established with absolute certainty on the basis of the published decisions – it cannot be excluded that the Dutch Supreme Court will rule differently in case of an international dispute where the mediation agreement is governed by foreign law. In any case, one could reasonably doubt whether the same rule should be applied by analogy to professional parties. After all, it is difficult to understand why a carefully and compellingly formulated mediation agreement between professional parties may be completely disregarded, save that a mediation agreement should never prevent the parties from obtaining interim and conservatory measures from the ordinary courts.⁸

In France, a party may be declared inadmissible if a carefully and compellingly formulated mediation agreement is disregarded.⁹ In Belgium¹⁰ and England¹¹ the court may stay the court proceedings and refer the parties to mediation if one of the parties invokes the mediation agreement. In my view the French approach should be rejected, because this approach is neither efficient

nor cost conscious. Instead, the Belgian and English approach should be preferred. This approach was also adopted by, for example, the preliminary relief judge of the District Court of Gelderland.¹² In this particular case, the preliminary relief judge referred the dispute to mediation. When the mediation did not result in a settlement, he continued the proceedings and rendered a judgment. In case the dispute is referred to mediation, the parties should have at least one session with a mediator to survey the chances of a successful settlement. If a settlement cannot be reached, the legal proceedings may continue.

When the parties do not want to run the risk of the mediation agreement affecting the court proceedings, it should preferably be clarified in the mediation agreement that mediation is optional and not mandatory. The reverse is also true. In case mediation should be mandatory, the parties better clarify this too. In this respect, it is advisable to include a time limit for the mediation and to clarify the effort the parties have to make, for example, one session with a mediator. If these elements are included in the mediation agreement, it seems fair to assume that the parties – and certainly professional parties – are bound to comply with the mediation agreement. In this regard, Article 14 of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation is interesting:

Where the parties have agreed to mediate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to mediate or as a termination of the mediation proceedings.

3 The Enforcement of Settlement Agreements Resulting from Mediation

A settlement agreement is usually executed in written form. In some jurisdictions a settlement agreement may be enforced directly, for example, if the mediator and the parties signed the settlement agreement or after the settlement agreement has been deposited or registered with the court.¹³ In many jurisdictions, however, settlement agreements resulting from mediation are as such not directly enforceable. In some jurisdictions, like

5. In principle, every arbitration has a seat, where the arbitration must be located (for the purposes of the law).

6. See also Peters N. 'De toepasselijkheid van de Herschikte Brussel I-bis Verordening bij mediation, bindend advies en arbitrage', *NIPR* 2019/2, p. 300 e.v., where this is discussed in more detail for the Netherlands.

7. HR 20 January 2006, ECLI:NL:HR:2006:AU3724, *NJ* 2006/75, HR 14 April 2006, ECLI:NL:HR:2006:AV7389, *RvdW* 2006/394, HR 27 June 2008, ECLI:NL:HR:2008:BD2710, *RvdW* 2008/688, and HR 8 May 2009, ECLI:NL:HR:2009:BH7132, *RvdW* 2009/614.

8. See, for example, *Vznr. Rb. Rotterdam* 28 March 2018, ECLI:NL:RBROT:2018:3789 (*Agendum/Egis*).

9. Cour de Cassation 14 February 2003, *Revue de l'Arbitrage* 2003, pp. 403-416.

10. See Article 1725 *et seq.* Belgian Judicial Code.

11. High Court 11 October 2002 [2002] EWHC 2059 (Comm).

12. *Vznr. Rb Gelderland* 19 June 2014, ECLI:NL:RBGEL:2014:3887 (*DA*).

13. A/CN.9/WG.II/WP.187, pp. 6-7.

the Netherlands, the settlement agreement could nonetheless be enforced directly if it is recorded in a notarial deed, court judgment or court record (*proces-verbaal*) that has been issued in the form required for execution.¹⁴ The settlement agreement may also be recorded in an arbitral award, which could be enforced by court action.¹⁵ In some jurisdictions, settlement agreements resulting from mediation are treated as arbitral awards and are enforceable as arbitral awards.¹⁶

If the settlement agreement is recorded in a notarial deed or other authentic document and is enforceable in the EU member state of origin, the settlement agreement can be enforced directly in the other member states of the EU pursuant to Article 58 of the Brussels Ibis Regulation.¹⁷ If the settlement is recorded in a court record or court judgment and such record or judgment is enforceable in the EU member state of origin, the settlement agreement can be enforced directly in the other member states of the EU pursuant to Article 59 of Brussels Ibis Regulation. Pursuant to Article 12 of the Convention on Choice of Court Agreements¹⁸ and Article 11 of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters,¹⁹ settlements that a court of a contracting state has approved, or that have been concluded before that court in the course of the proceedings, and that are enforceable in the same manner as a judgment in the state of origin, shall be enforced in the same manner as a judgment in other contracting states.

While the aforementioned instruments are only applicable in a limited number of states, this is not true for the New York Convention;²⁰ 161 states are presently party to this convention. Even though the New York Convention is silent on the question of its applicability to decisions that record the terms of a settlement between parties, it should be assumed that consent awards also fall under the scope of the New York Convention. Thus, if the settlement agreement is recorded in an arbitral award, the settlement agreement may be enforceable in another jurisdiction pursuant to the New York Convention.

When the settlement agreement is not recorded in one of the aforementioned instruments, court assistance is usually required for the enforcement of the settlement agreement. In many jurisdictions the most diligent party

should claim specific performance. Such proceedings may, however, consume time and resources. In addition, such proceedings may be frustrating for the party seeking the enforcement of the settlement agreement.

In an international context, jurisdiction of the court may be an issue too. Suppose an Argentine party and another party enter into a settlement agreement, the mediation was conducted in Bolivia and the other party does not comply with the settlement agreement resulting from mediation. In such cases, it is evident that the Argentine party, absent a valid forum selection clause, may commence proceedings before the courts of the country of the other party. Suppose, however, this party has assets in the Netherlands and the Argentine party wishes to take recourse on those assets. Could the Argentine party then pursue court proceedings in the Netherlands? Unless the Argentine party levies pre-judgment attachments on these assets and the requirements of Article 767 DCCP are fulfilled, this is open for discussion.²¹

The United States recognised in 2014 that it is not always easy to enforce a settlement agreement resulting from mediation in another state in an efficient, effective and cost-conscious manner. Subsequently, the United States proposed that UNCITRAL would develop a multilateral treaty on the enforceability of international settlement agreements resulting from mediation, reducing the obstacles for the enforcement of international settlement agreements resulting from mediation.²² In the light of this, one could say that the United States laid the foundation for what ultimately developed into the Singapore Convention on Mediation.²³

After four years of negotiations within the United Nations and, more particularly, UNCITRAL, the Singapore Convention on Mediation was finalised by UNCITRAL in July 2018 and adopted by the General Assembly of the United Nations on 20 December 2018. The signing ceremony was held in Singapore on 7 August 2019. During the opening ceremony – which was attended by delegations from more than 70 states – 46 states signed the convention. The original signatories are Afghanistan, Belarus, Benin, Brunei Darussalam, Chile, People's Republic of China, Colombia, Congo, Democratic Republic of the Congo, Eswatini, Fiji, Georgia, Grenada, Haiti, Honduras, India, Iran, Israel, Jamaica, Jordan, Kazakhstan, Laos, Malaysia, Maldives, Mauritius, Montenegro, Nigeria, North Macedonia, Palau, Paraguay, Philippines, Qatar, Republic of Korea, Samoa, Saudi Arabia, Serbia, Sierra Leone, Singapore, Sri Lanka, Timor-Leste, Turkey, Uganda, Ukraine, the United States, Uruguay and Venezuela. Subsequently, Armenia, Chad, Ecuador, Gabon and Guinea-Bissau

14. See Article 430 Dutch Code of Civil Procedure (DCCP).

15. See Article 1069 *juncto* Article 1062 DCCP.

16. See, for example, A/CN.9/822, p. 4, where a number of jurisdictions are mentioned where settlement agreements resulting from mediation are treated equivalently to arbitral awards.

17. Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast).

18. Convention on Choice of Court Agreements, adopted at The Hague on 30 June 2005. The parties to this convention are Denmark, the EU, Mexico, Montenegro, Singapore and the United Kingdom.

19. Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, adopted at The Hague on 2 July 2019. Until now, only Uruguay has signed this convention, and it is unclear whether and, if yes, when this convention will enter into force.

20. Convention for the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958.

21. In the absence of an attachment and depending on the relevant facts and the law applicable to the mediation agreement, the question of whether jurisdiction could be established on the basis of Article 6(a), Article 6(e) or Article 9(c) DCCP arises. In case the settlement-debtor is from a member state of the EU, jurisdiction should in principle be determined on the basis of the Brussels Ibis Regulation.

22. A/CN.9/822, p. 3.

23. Convention on International Settlement Agreements Resulting from Mediation, done at Singapore on 7 August 2019.

signed the convention. The Singapore Convention on Mediation shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval or accession.²⁴

The Singapore Convention on Mediation applies to settlement agreements resulting from mediation and concluded in writing by parties to resolve commercial disputes that, at the time of their conclusion, are international.²⁵ A settlement agreement is ‘in writing’ if its content is recorded in any form. The ‘in writing’ requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.²⁶ During the drafting of the convention it was discussed whether the convention should also apply to ‘non-international settlement agreements’. It was widely felt, however, that the scope of the convention should be limited to ‘international settlement agreements’ and that the convention should provide a clear and simple definition for ‘international’.²⁷ After extensive discussions it was agreed that a settlement agreement qualifies as ‘international’ if:

- a. at least two parties to the settlement agreement have their place of business in different states, or
- b. the state in which the parties to the settlement agreement have their places of business is different from either
 - i. the state in which a substantial part of the obligations under the settlement agreement is performed, or
 - ii. the state with which the subject matter of the settlement agreement is most closely connected.

In this sense, the Singapore Convention on Mediation applies a broad definition of the term ‘international’. Many settlement agreements harbouring an international element will, therefore, qualify as international.

The Singapore Convention on Mediation does not, however, apply to every international settlement agreement resulting from mediation. Excluded from its scope of application are settlement agreements

- a. concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;²⁸
- b. related to family, inheritance or employment law;²⁹
- c. that have been approved by a court or concluded in the course of proceedings before a court and that are enforceable as a judgement in the state of that court;³⁰ and
- d. that have been recorded and are enforceable as an arbitral award.³¹

Exceptions (a) and (b) have been included in the Singapore Convention on Mediation, to clarify the general

feeling of UNCITRAL’s Working Group responsible for this convention, that this convention should apply only to the enforcement of commercial settlement agreements. In the light of this, it was generally felt that consumer, family, inheritance and employment law matters should be expressly excluded.³²

Exceptions (c) and (d) have been included in the Singapore Convention on Mediation to prevent an overlap or conflict with the Convention on Choice of Court Agreement, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters and the New York Convention.³³ There could be a direct overlap and possible conflict with the Brussels Ibis Regulation, however, if a settlement agreement resulting from mediation is recorded in a notarial deed or other authentic instrument and is directly enforceable in the EU member state of origin. In such cases, the question arises whether the settlement agreement could be directly enforced in the other member states of the EU pursuant to Article 58 of the Brussels Ibis Regulation or whether the Singapore Mediation Agreement should be complied with. Considering that the Singapore Convention on Mediation was drafted to enhance the direct enforceability of settlement agreements resulting from mediation and taking into account Article 7 of that convention – which allows the application of a more favourable law or treaty³⁴ – it seems likely that notarial deeds and other authentic documents remain directly enforceable under Article 58 of the Brussels Ibis Regulation.³⁵

As regards the applicability of the Singapore Convention on Mediation, it is furthermore interesting that the contracting states may declare that the Singapore Convention on Mediation shall apply only to the extent that the parties to the settlement agreement have agreed to the application of the Singapore Convention on Mediation.³⁶ Iran made such declaration. So, if parties want to avoid enforcement problems due to such declaration, they should include in the settlement agreement a provision that they agree to the application of the Singapore Convention on Mediation.³⁷

Within UNCITRAL it was also discussed whether the parties to the settlement agreement should have the autonomy to exclude the application of the Singapore Convention on Mediation.³⁸ In this respect, various approaches were suggested.³⁹ Since none of these approaches have been followed and the Singapore Convention on Mediation does not expressly allow the par-

24. Article 14(1) Singapore Convention on Mediation.

25. Article 1(1) Singapore Convention on Mediation.

26. Article 2(2) Singapore Convention on Mediation.

27. A/CN.9/867, p. 16.

28. Article 1(2)(a) Singapore Convention on Mediation.

29. Article 1(2)(b) Singapore Convention on Mediation.

30. Article 1(3)(i) Singapore Convention on Mediation.

31. Article 1(3)(ii) Singapore Convention on Mediation.

32. See A/CN.9/867, p. 17 and A/CN.9/896, p. 11.

33. See A/CN.9/867, p. 19, A/CN.9/896, pp. 9-10, A/CN.9/901, pp. 6-7.

34. See A/CN.9/942, p. 12.

35. It is questionable whether this issue will come up soon since neither the EU nor any member state of the EU has signed the Singapore Convention on Mediation so far.

36. Article 8(1)(b) Singapore Convention on Mediation.

37. Pursuant to Article 8(1)(a) of the Singapore Convention on Mediation, the contracting states may also declare that this convention shall not apply to them, governmental agencies and any person acting on behalf of such a governmental agency.

38. A/CN.9/895, pp. 22-23.

39. A/CN.9/WG.II/WP.198, pp. 14-15.

ties to a settlement agreement to exclude its applicability, it seems that this convention applies generally and automatically.

Pursuant to Article 3(1) of the Singapore Convention on Mediation each contracting state shall enforce a settlement agreement, falling within the scope of the convention, in accordance with its rules of procedure and under the conditions laid down in the convention. For this purpose, a competent authority should be designated to grant leave for enforcement. In these proceedings the validity of the settlement agreement is to be assumed. With regard to the scope of Article 3(1) of the Singapore Convention on Mediation, three elements are highlighted hereafter.

First, the Singapore Convention on Mediation is not expressly limited to the enforcement of settlement agreements originating from another state than where the enforcement is sought. Hence, the Singapore Convention on Mediation may also apply to settlement agreements that originated in the state where enforcement is sought. The competent authority mentioned in Article 3(1) may thus also have the power to grant leave for enforcement of domestic settlement agreements. The scope of the convention was not limited to foreign settlement agreements because, according to UNCITRAL's Working Group that prepared the Singapore Convention on Mediation, it is not always easy to determine the place of mediation and the place of origin of the settlement agreement. It was, therefore, considered best to distinguish between 'international' and 'non-international' settlement agreements and to treat 'international settlement agreements' irrespective of their place of origin in a uniform manner.⁴⁰ At the same time, the Singapore Convention on Mediation does not exclude the direct enforceability of international settlement agreements resulting from mediation further to national laws.⁴¹ If the Netherlands, for example, becomes a party to the Singapore Convention on Mediation, such settlement agreements can still be recorded in, for instance, notarial deeds and be enforced directly on the basis of Dutch law.

Second, reciprocity is not required, meaning that a foreign settlement agreement does not have to originate from another contracting state. Within the Working Group of UNCITRAL responsible for the drafting of the Singapore Convention on Mediation, it was discussed whether contracting states should be allowed to formulate a reciprocity reservation, but in the end it was decided against this, because parties to a settlement agreement would then not be certain whether the Singapore Convention on Mediation would be applicable as it would not necessarily be feasible to identify the country of origin of the settlement agreement.⁴²

Third, when UNCITRAL prepared Article 3(1), it was discussed whether it would make sense, in the event the settlement agreement originated from another state, to

incorporate a review mechanism in the state where the settlement agreement originated. In the end, it was decided against this option, because (a) it could be difficult to determine the originating state, (b) a review mechanism would likely result in a system of 'double exequatur' and (c) such a system would be at odds with the purpose to provide an efficient and simplified enforcement mechanism. A system of 'direct enforcement', where a party to a settlement agreement would be able to seek enforcement directly at the place of enforcement, was, hence, preferred.⁴³

Article 4 of the Singapore Convention on Mediation lists the requirements for reliance on the settlement agreement. Under this provision, the party relying on the settlement agreement must supply to the competent authority where relief is sought (a) the settlement agreement signed by the parties and (b) evidence that the settlement agreement resulted from mediation. In order to show that the settlement resulted from mediation any evidence is acceptable.⁴⁴ If the settlement is not in an official language of the country where enforcement is sought, the competent authority may request a translation into such language. In some jurisdictions this will be the standard, while in other jurisdictions a translation will not always be necessary. If the Netherlands becomes a party to the Singapore Convention on Mediation, it may be expected that a translation in the Dutch language is in any case not required if the settlement agreement is executed (or translated) in the English, French or German language.

Article 5 of the Singapore Convention on Mediation lists the grounds on the basis of which the granting of relief may be refused. Upon proof of the party against whom enforcement is sought, the competent authority may refuse to grant relief if one of the following six conditions has been fulfilled:

- a. a party to the settlement agreement was under some incapacity;
- b. the settlement agreement sought to be relied upon
 - i. is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority where relief is sought,
 - ii. is not binding, or is not final, according to its terms, or
 - iii. has been subsequently modified;
- c. the obligations in the settlement agreement
 - i. have been performed, or
 - ii. are not clear or comprehensible;
- d. granting relief would be contrary to the terms of the settlement agreement;
- e. there was a serious breach by the mediator of standards applicable to the mediator or the mediation

43. A/CN.9/861, p. 15.

44. Article 4(1)(b) of the Singapore Convention on Mediation lists some examples of evidence that may be provided to show that the settlement agreement results from mediation.

40. A/CN.9/861, pp. 7-8.

41. See Article 7 of the Singapore Convention on Mediation.

42. A/CN.9/934, p. 13.

- 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.

The party against whom enforcement is sought needs to invoke the aforementioned grounds. Or, in other words, the competent authority may not apply these grounds *ex officio*. The same is not true if (a) the granting of relief would be contrary to the public policy of the state where enforcement is sought or (b) the subject matter of the dispute is not capable of settlement by mediation under the law of the state where enforcement is sought. These grounds for refusal may be applied by the competent authority *motu proprio*.

In the light of the foregoing, it may be expected that leave to enforce the settlement agreement will, in general, be granted under the Singapore Convention on Mediation. Thus, on the basis of this convention, the enforcement of settlement agreements resulting from mediation will become easier, and parties may reasonably expect that they will, in principle, be granted leave to enforce such settlement agreements.

4 Conclusion

It is not always evident whether the mediation agreement can be enforced. As a consequence, it may be unclear whether the parties can be compelled to mediate. For the harmonisation of approaches and the advancement of legal certainty, international instruments should ideally address this issue. In this respect, it would have been relatively easy to enhance the enforceability of mediation agreements by including an additional provision in the Singapore Convention on Mediation. Analogous to the New York Convention, this convention could have provided that contracting states recognise agreements under which the parties expressly undertake not to initiate legal proceedings during a specified period, but to submit to mediation first all or any differences that have arisen or that may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by mediation. If such provision had been included in the Singapore Convention on Mediation, this convention could also have determined that the court of a contracting state when seized of an action in a matter in respect of which the parties have made such a mediation agreement should, at the request of one of the parties, stay the proceedings and refer the parties to mediation, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. The absence of such provisions in the Sin-

gapore Convention on Mediation, is a missed opportunity.

The Singapore Convention on Mediation is, however, a potential game changer when it comes to the enforceability of international commercial settlement agreements resulting from mediation, since it reduces the obstacles for enforcement. But, as long as this convention has not entered into force and does not have a global application, the parties should realise that it may not always be easy to enforce a settlement agreement resulting from mediation (in another state) and the parties should utilise the measures available under national laws and other international instruments. In the Netherlands, the parties can opt to record the settlement agreement, for example, in a notarial deed, which is directly enforceable in the Netherlands and in other EU member states. If the settlement agreement is reached pending court or arbitration proceedings, the settlement agreement can also be recorded in a court record, court judgment or arbitral award.