

## Research Article

# THE RECOGNITION AND ENFORCEMENT OF AGREEMENTS RESULTING FROM MEDIATION: AUSTRIAN AND UKRAINIAN PERSPECTIVES

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of MSAs in Cross-border Disputes: EU and Ukrainian Perspectives. – 4.1 *The Brussels Ia Regulation and the enforcement of MSAs*. – 4.2 *The New York Convention and the enforcement of MSAs approved by the international commercial arbitration*. – 4.3 *The Singapore Convention as a global regulation of the enforcement of MSAs resulting from international commercial mediation*. – 5. Conclusions.

**Keywords:** mediation, settlement agreements resulting from mediation, recognition of settlement agreements resulting from mediation, enforcement of settlement agreements resulting from mediation, Singapore Convention

## ABSTRACT

**Background:** *The recognition and enforcement of settlement agreements resulting from mediation are of key importance for the effectiveness of this alternative dispute resolution method. Austria is considered to be one of the pioneers of mediation practice in Europe, and its developments can be helpful and interesting for other countries, especially for Ukraine, which obtained the EU candidate country status. In Austria, there are three main possibilities for making such settlement agreements enforceable: a notarial deed, approval by the arbitration tribunal, and approval by the court. In cross-border disputes, enforceability can be reached within the Brussel Ia Regulation, the New York Convention, and national procedures for the recognition and enforcement of foreign court judgments and other acts. In Ukraine, there is the possibility of court approval and approval by arbitration of such settlement agreements.*

**Methods:** *The present research is based on a comparative approach. The authors juxtaposed Austrian and Ukrainian national models of recognition and enforcement of agreements resulting from mediation. The comparison allows us to see both models' strengths and drawbacks. The analytical method was used to interpret national legislature and international instruments. Using hypothetical models, the authors make a prognosis about the legal effects of recognition and enforcement of agreements resulting from mediation in cross-border disputes in national legal orders.*

**Results and Conclusions:** *The authors propose amendments to the Ukrainian legislation, in particular, to enshrine in the CPC of Ukraine a new procedure of approval of settlement agreements resulting from out-of-court mediation and the possibility of the enforcement of such agreements as notarial deeds; to provide direct enforcement of arbitration awards; to introduce a new simplified procedure for the enforcement of judgments and other enforceable titles for the implementation of the Brussel Ia Regulation during the adaptation of Ukrainian legislation to the EU law; to adopt the Law on ratification of the Singapore Convention and enshrined simplified procedure for enforcement of the international settlement agreements resulting from mediation.*

## 1 INTRODUCTION

Mediation is defined as a voluntary consensual procedure used for resolving conflicts (disputes), conducted by a third neutral person – a mediator – who has no adjudicative power and facilitates the communication between the parties to help them to reach a settlement of their conflict.<sup>1</sup> Though the decision of whether to use this method is up to the parties, international documents, such as Directive 2008/52/EC of the European Parliament and of

1 KJ Hopt, F Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press 2016) 11-15; M L Moffitt, R C Bordone (eds), *Handbook of Dispute Resolution* (Jossey-Bass 2005) 304.

the Council on certain Aspects of Mediation in Civil and Commercial Matters (EU Mediation Directive, 2008)<sup>2</sup> and UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (UNCITRAL Model Law, 2018),<sup>3</sup> have enshrined that agreements resulting from mediation should be enforceable.

Austria is considered to be a pioneer<sup>4</sup> of the mediation movement in the European region, thanks to the strict regulation of standards for mediators and the mediation process. This also applies to the issue of the diversified national regulation of the enforcement of settlement agreements resulting from mediation (a mediation settlement agreement, or MSA). In Ukraine, the Law 'On Mediation' was only adopted on 16 November 2021.<sup>5</sup> It defines the scope of mediation, its principles, requirements for mediators, and the possibility of its integration into court proceedings and arbitration. This act is more like a framework and leaves open a number of issues that are quite important for the effective functioning of mediation at the national level. One such issue is the enforcement of the agreements resulting from mediation. From this point of view, the experience of Austria can be useful for strengthening mediation in Ukraine and making it an effective method for resolving disputes.

At the same time, the issue of enforcing MSAs has not only a national but also an international dimension. Within the EU, the main act in this regard is 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 Judgments in Civil and Commercial Matters (Recast) (the Brussels Ia Regulation).<sup>6</sup> These provisions are of crucial importance for Ukraine, considering that the latter has obtained the status of an EU candidate country and is now on the way to the adaptation of its legislation to EU law.<sup>7</sup> However, the rash of global attention<sup>8</sup> on the enforcement of MSAs is primarily connected with the adoption of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention, 2018),<sup>9</sup> which aims to introduce an enforcement

2 Art. 6 of the 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 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0052&from=en>> accessed 1 October 2022.

3 Art. 15 of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation <[https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01363\\_mediation\\_guide\\_e\\_ebook\\_rev.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01363_mediation_guide_e_ebook_rev.pdf)> accessed 1 October 2022.

4 K J Hopt, F Steffek (n 3) 247.

5 The Law of Ukraine 'On Mediation', No 1845-IX of 16 November 2021 <<https://zakon.rada.gov.ua/laws/show/1875-20#Text>> accessed 1 October 2022.

6 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 Judgments in Civil and Commercial Matters <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215>> accessed 1 October 2022.

7 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part of the 27 of June 2014 <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0529%2801%29>> accessed 1 October 2022; Commission's Opinion on Ukraine's Application for membership of the EU of the 16 June 2022 <[https://ec.europa.eu/neighbourhood-enlargement/opinion-ukraines-application-membership-european-union\\_en](https://ec.europa.eu/neighbourhood-enlargement/opinion-ukraines-application-membership-european-union_en)> accessed 1 October 2022.

8 N Alexander, S Chong, *The Singapore Convention on Mediation: A Commentary* (Wolters Kluwer 2019); T Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (2018) 19 *Pepperdine Dispute Resolution Law Journal* 1-60; T Schnabel, 'Implementation of the Singapore Convention: Federalism, Self-Execution, and Private Law Treaties' (2020) 30 *The American Review of International Arbitration* 265-289, etc.

9 United Nations Convention on International Settlement Agreements Resulting from Mediation <[https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/EN/Texts/UNCITRAL/Arbitration/mediation\\_convention\\_v1900316\\_eng.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf)> accessed 1 October 2022.

procedure for international MSAs similar to the procedure of recognition and enforcement of international commercial arbitration awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention, 1958).<sup>10</sup> Yet, there are many concerns among lawmakers and scholars about the ratification of the Singapore Convention by the EU. Ukraine, as well as working on the draft law on ratification of the Singapore Convention.<sup>11</sup>

The aim of this article is to examine the existing national and international mechanisms for the enforcement of MSAs in Austria and Ukraine and to offer new legal approaches for Ukraine. The article consists of three parts: the first addresses the enforcement of MSAs with regard to the principle of voluntariness and requirements for such agreements to be enforceable; the second focuses on the national perspective on the issue, in particular court and out-of-court methods for making such agreements enforceable in cases where both parties of the agreement are domiciled in one jurisdiction; the third deals with the international perspective on the issue, i.e., the situations where parties to the agreement are domiciled in different jurisdictions, with special attention to EU law and the Singapore Convention. In the conclusion, perspectives on improving the national and international regulations of the enforcement of the MSAs in Austria and Ukraine will be outlined.

## 2 ENFORCEMENT OF MSAS: PRELIMINARY REMARKS

### 2.1. *Voluntariness in mediation and the enforcement of MSA: the effectiveness issue*

Voluntariness is the core principle of mediation, which is designed to ensure the free participation of the parties in the mediation and the implementation of the MSAs resulting from it. Voluntariness is multifaceted and appears at all stages of mediation. It refers to the parties as well as to the mediator and includes such aspects as: a) the parties voluntarily, by mutual consent, decide to participate in mediation; b) the parties choose a mediator; c) the mediator freely agrees to participate in the mediation and defines the methods of conducting the mediation; d) the parties voluntarily stay in the procedure and are free to terminate it at any moment; e) the parties determine the issues that will be considered during the mediation; f) the parties voluntarily sign an MSA and enforce it.<sup>12</sup> In this regard, J. Nolan-Haley highlights the existence of two forms of consent in mediation – ‘front-end participation consent’, which is the consent to begin the mediation and participate in the procedure, and the so-called ‘back-end outcome consent’, which is reflected in the parties’ settlement agreement.<sup>13</sup>

Voluntariness is thus considered to be an important issue in mediation, which largely determines its success. T. Hedeem points out that in literature, we can see the spread of the opinion that ‘voluntary action in mediation is part of the “magic of mediation” that leads

10 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf>> accessed 1 October 2022.

11 More detail is provided in part 4.3 of this article.

12 N Mazaraki, ‘The Scope and the Effect of Voluntariness Principle in Mediation’ (2018) 1 Juridical Scientific Electronic Journal 24-27 <[http://lsej.org.ua/1\\_2018/7.pdf](http://lsej.org.ua/1_2018/7.pdf)> accessed 1 October 2022; M Dewdney, ‘The Partial Loss of Voluntariness and Confidentiality in Mediation’ (2009) 20 Australasian Dispute Resolution Journal 17-18; J Nolan-Haley, ‘Mediation Exceptionality’ (2009) 78 Fordham Law Review 1247; M Malacka, ‘Multi-Door Courthouse established through the European Mediation Directive?’ (2016) 16(1) International and Comparative Law Review 131; KJ Hopt, F Steffek (n 1) 45.

13 J Nolan-Haley (n 14) 1251; See also JM Nolan-Haley, ‘Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking’ (1999) 74 Notre Dame Law Review 775-840.

to better results than those from courts or other forums: higher satisfaction with process and outcomes, higher rates of settlement and greater adherence to settlement terms.<sup>14</sup> It is believed that if the parties have voluntarily participated in mediation and reached an MSA, they should voluntarily execute the latter because it was reached independently based on the parties' real interests. In actual practice, however, we can see examples where one of the parties does not perform the MSA. This can be caused by different reasons. It may seem that one of the parties abused the mediation, that the real interests of the parties were not determined during the mediation, or that the circumstances changed after the conclusion of the MSA, and it is necessary to return to the discussion of the issues, etc.

Therefore, it is important to discuss the possibility of obtaining enforcement of an MSA as a tool to increase the effectiveness of the whole mediation, thereby highlighting the advantages of mediation and influencing the decision of the parties to choose mediation as an effective method of dispute resolution. To avoid this, the state strengthens its efforts to support this ADR method by providing different mechanisms to enforce MSAs. In this case, we can speak about some sort of coercion in connection with mediation.

The problem of coercion in mediation is frequently discussed in the literature.<sup>15</sup> At first glance, coercion in mediation 'seems inconsistent with, and even antithetical to, the fundamental tenets of the consensual mediation process'.<sup>16</sup> Thus, 'any attempts to impose a formal and involuntary process on a party may potentially undermine the *raison d'être* of mediation'.<sup>17</sup> However, the problem of using coercion in mediation is not as simple as it might seem to be. Coercion in mediation is usually connected to two aspects – '*coercion into*' and '*coercion within*' the mediation.<sup>18</sup> The first refers to the different kinds of mandatory mediation, and the latter to the behaviour of mediators during the mediation. In our opinion, nowadays, we can also distinguish some sort of '*coercion after*' mediation, which is coercion during the enforcement procedure of the MSA.

However, more importantly, these types of coercion are different in nature. '*Coercion within*' the mediation is the coercion of the mediator during the mediation procedure; it has a private nature and is connected to the behaviour and skills of a mediator inside the mediation process, taking into account the functions of a mediator and the essence of the mediation procedure. This type of coercion is considered to be contrary to the voluntariness principle, and the mediator should avoid it. At the same time, '*coercion into*' and '*coercion after*' the mediation have a public nature. This is state coercion, which can be prescribed directly by law (in the case of mandatory mediation under the law and after the parties' decision for enforcement of the MSA) or applied by a judge (in case of court-ordered mediation).

But when did the idea of the possibility of applying such public coercion in mediation appear, and how does it influence the voluntariness and self-determination of parties? The answer to this question lies in the evaluation of the mediation and its interaction with the court

14 T Hedeem, 'Coercion and Self-determination in Court-Connected Mediation: All Mediations Are Voluntary, But Some Are More Voluntary than Others' (2005) 26(3) *The Justice System Journal* 275.

15 See: FEA Sander, HW Allen, D Hensler, 'Judicial (Mis)use of ADR? A Debate' (1996) 27 *The University of Toledo Law Review* 886; DQ Anderson 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11(2) *Cardozo Journal of Conflict Resolution* 479-509; T Hedeem (n 16) 273-291; DE Matz, 'Mediators' Pressure and Parties' Autonomy: Are They Consistent with Each Other?' (1994) 10 *Negotiation Journal* 359-365.

16 DQ Anderson (n 17) 484.

17 *Ibid*, 481.

18 FEA Sander, HW Allen, D Hensler (n 17) 886; DQ Anderson (n 17) 485; M Hanks, 'Perspectives on Mandatory Mediation' (2012) 35(3) *UNSW Law Journal* 930; J Nolan-Haley (n 14) 1254.

proceedings. Both directions of public coercion in mediation – the spread of mandatory mediation and the enforcement of MSAs – are connected not only with the mediation itself and the private interests of the parties in a particular case but also with the public interests and the effectiveness of the justice sector as a whole. This is because the introduction of mandatory mediation, as well as the possibility of enforcing the MSA, can decrease the court case-load, improve the effectiveness of the entire justice system, rationalise the use of judicial resources by excluding small claims and other disputes for which mediation fits better than court proceedings, enforce citizens' satisfaction and trust in the courts, etc. From this point of view, the interference of the state in the mediation process, which is private by nature, is determined by the issue of the effectiveness of the whole justice sector. At the same time, we can see the balance between public and private interests in the case of using public coercion in mediation. In the case of mandatory mediation, it is reached through the parties' right to terminate the procedure at any time and, in the case of the enforcement of MSAs, by the fact that only the parties can decide whether they want to make the MSA enforceable. All these circumstances caused the shift in the interpretation of the voluntariness principle in mediation: voluntariness in mediation could no longer be interpreted as absolute in all aspects, as it was at the outset. Nowadays, the principle of voluntariness can be limited and co-exist with public coercion into mediation, taking into account effectiveness concerns – the effectiveness of the justice sector as a whole as well as the effectiveness of mediation as a special method of ADR in particular.

## 2.2. *The recognition and enforcement of MSAs: a general understanding*

As already mentioned, the idea of making an MSA enforceable is widely supported by international institutions and has been repeatedly stated in international documents. The EU Mediation Directive emphasises the importance of ensuring the enforcement of MSAs, based on the provision that national legislation should provide mechanisms for the enforcement of such agreements upon the consent of the parties unless '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'.<sup>19</sup> According to the UNCITRAL Model Law, 'if the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable'.<sup>20</sup> Moreover, with the implementation of the Singapore Convention, the idea of enforceability of such agreements has expanded beyond the boundaries of the national legal orders and divided the issue into two dimensions – national and international.

MSAs can vary depending on their form (oral or written), content (provisions of a legal and non-legal nature, for example, moral or ethical issues, etc.), and the method of making them enforceable (with the consent of one or both parties). All these factors are decisive for the issue of the enforceability of MSAs. The Austrian Mediation Act does not prescribe any particular form of MSA, leaving the choice of an oral or written form to the discretion of the parties.<sup>21</sup> The Ukrainian Law 'On Mediation' provides for the same approach.<sup>22</sup> This means that it is up to the parties to decide whether they want to make some sort of oral or a written statement, as well as whether they want to make such an agreement enforceable by using some special procedures enshrined in national law. At the same time, the EU Mediation Directive provides for the possibility of enforcing only written agreements.<sup>23</sup> The

19 Art. 6 of the EU Mediation Directive.

20 Art. 15 of the UNCITRAL Model Law.

21 C Lenz, M Risak, 'Austria' in N Alexander, S Walsh, M Svatos (eds), *EU Mediation Law Handbook: Regulatory Robustness Ratings for Mediation Regimes* (Walters Kluver 2017) 53; KJ Hopt, F Steffek (n 3) 44.

22 Subpart 9 Part 9 Art. 1 of the Law of Ukraine 'On Mediation'.

23 Art. 6 of the EU Mediation Directive.

same approach is used in Austrian and Ukrainian legislation, which only recognise written documents as enforceable titles.<sup>24</sup>

According to the EU Mediation Directive, the enforcement of such agreements is permissible only if they contain provisions of legal nature not contrary to the law of the state where the enforcement is requested. Such provisions should also be recognised as enforceable according to national legislation.<sup>25</sup> Therefore, all the provisions which have no legal basis could not be compulsorily enforced. Taking into account the fact that such agreements are considered to be contracts and have a civil law nature, they should also meet some other requirements. For example, in Ukraine, such agreements should not affect the rights of third parties who are not a party to the contract and did not participate in the mediation, as well as public or state interests.<sup>26</sup>

Last but not least, MSAs can become enforceable in different national jurisdictions at the request of at least one party or by the consent of both parties.<sup>27</sup> However, the EU Mediation Directive states that both parties or one alone with the express consent of the other may apply for enforcement.<sup>28</sup> The latter approach is user-oriented and gives the parties the opportunity to decide whether they want to make an MSA enforceable as well as whether they want to choose out-of-court or court methods for this purpose, which are enshrined in national legislation.

Within the international dimension of this issue, an important question arises regarding whether we should talk about both the recognition and enforcement of such MSAs or only about their enforcement. Special attention was paid to this issue during the drafting of the Singapore Convention. H. Abramson emphasised the different meanings of the ‘recognition’ concept in civil and common law traditions, arguing that in order to avoid confusion, the proposed solution was ‘to omit the term “recognition” and design a separate article.’<sup>29</sup> In two parts of Art. 3 of the Singapore Convention, the sense of these concepts was separated: part one refers to the enforcement, whereas part two deals with the recognition, though without using this term. The latter term was ‘replaced with a functional definition that uses other words to address key aspects of recognition such as the ability to assert a mediated settlement as a complete defense if another party tries to raise the underlying settled claims.’<sup>30</sup> In other articles, the term ‘relief’, covering both concepts, is used in the text of the Singapore Convention.

The term ‘recognition’, as understood in many countries, means the possibility for the party to invoke the title preventing the reopening of the proceedings if another party tries to bring the dispute previously settled in mediation to court.<sup>31</sup> Para. 2 Art. 3 of the Singapore Convention provides the same meaning. Taking into account the interpretation of both paragraphs of the Art. 3 of the Singapore Convention, T. Schnabel pointed out that it ‘provides for the use

24 Art. 433a of the Civil Procedure Code of Austria () <<https://www.jusline.at/gesetz/zpo>> accessed 1 October 2022; Art. 1 of the Execution Act of Austria (Exekutionsordnung) <[https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001700&fbclid=IwAR23j\\_IIDEWxl53XXGP8NknoyMgjhAkc9COz2ww\\_6ZF9Ifww06TQCRJxqjC](https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001700&fbclid=IwAR23j_IIDEWxl53XXGP8NknoyMgjhAkc9COz2ww_6ZF9Ifww06TQCRJxqjC)> accessed 1 October 2022; Art. 3 of the Law of Ukraine, No 1404-VIII of 02 June 2016 ‘On Enforcement Proceedings’ <<https://zakon.rada.gov.ua/laws/show/1404-19#Text>> accessed 1 October 2022.

25 Para 1 Art. 6 EU Mediation Directive.

26 Part 3 Art. 21 of the Law of Ukraine ‘On Mediation’.

27 K J Hopt, F Steffek (n 3) 47.

28 Art. 6 of the EU Mediation Directive.

29 H Abramson, ‘The New Singapore Mediation Convention: The Process and Key Choices’ (2019) 20 *Cardozo Journal of Conflict Resolution* 1057.

30 *Ibid*, 1057.

31 T Schnabel, ‘Recognition by any other Name: Article 3 of the Singapore Convention on Mediation’ (2019) 20 *Cardozo Journal of Conflict Resolution* 1185.

of settlement agreements as both a “sword” (the offensive use of a settlement agreement via a request for enforcement, to compel compliance with the obligations in the settlement agreement) and as a “shield” (the ability to use a settlement agreement as a complete defense).<sup>32</sup> In this sense, the recognition is granted ‘prima facie [...] by the courts, unless the requirements in relation to scope, form and/or evidence are not fulfilled, or if a party successfully proves that one or more of the Article 5 grounds for refusal exist’.<sup>33</sup>

The approach used in the Singapore Convention is vital because it obliges the states not only to enforce MSAs but also to consider them ‘conclusive proof that a dispute had been resolved’,<sup>34</sup> which is important in the context of the more general principle *pacta sunt servanda*. This approach is consonant with the provisions of the New York Convention, in which the words ‘recognition and enforcement’ are used in the title and in the text. It is important because in many countries, ‘recognition is a prerequisite to enforcement’,<sup>35</sup> which is why the Singapore Convention should provide ‘a complete defense’,<sup>36</sup> e.g., ‘both a “sword” and a “shield”’.<sup>37</sup> Such a functional approach<sup>38</sup> and complete defence, as provided by the Singapore Convention, are important from the users’ perspective, e.g., parties rely not only on enforcement but also on the exclusion of such a dispute from the jurisdiction of other organs, thus avoiding procedural abuses of other parties to the dispute.<sup>39</sup> Besides this, complete defence positively influences the popularisation of mediation and increases the level of trust in such an ADR method, providing the same set of safeguards as the New York Convention for arbitration.

At the same time, we should point out that in some jurisdictions, MSAs do not have the *res judicata* effect, and there is no ‘necessary link between *res judicata* and enforcement’.<sup>40</sup> For example, in Austria, the notarial deed has no *res judicata* effect. Nevertheless, as we shall see, it is recognised as an enforceable title.<sup>41</sup> For other settlement agreements, especially those approved within the meaning of the international commercial arbitration award or judgments of foreign courts, recognition is the precondition for enforcement.

### 3 ENFORCEMENT AGREEMENTS RESULTING FROM MEDIATION AT THE NATIONAL LEVEL: THE EXPERIENCE OF AUSTRIA AND UKRAINE

In order to encourage parties to use mediation and increase its effectiveness, states implement different methods of making MSAs enforceable. In Austria, the following methods can be distinguished: a) approval of the MSA by a notarial deed; b) approval of the MSA by arbitration; c) approval of the MSA by the court.

The Ukrainian legislation does not contain any special provisions devoted to the possibility of the enforcement of MSAs resulting from out-of-court mediation. If the MSA is reached in an

32 Ibid, 1185.

33 N Alexander (n 10) 70.

34 T Schnabel (n 33) 1193.

35 Ibid, 1187.

36 Ibid, 1185, 1191; M Kallipetis, ‘Singapore Convention Defenses Based on Mediator’s Misconduct: Articles 5.1(E) & (F)’ (2019) 20 *Cardozo Journal of Conflict Resolution* 1209.

37 T Schnabel (n 33) 1187.

38 N Alexander (n 10) 71.

39 T Schnabel (n 33) 1193.

40 M Kallipetis (n 38) 1209.

41 M Trenker, ‘Der Vollstreckbare Notariatsakt als Alternative zur einvernehmlich Streitbeilegung’ (2021) 191 *Österreichische Notariatszeitung* 709.



out-of-court mediation, it has the power of a contract, and, in the case of the non-enforcement of such an agreement, the parties can only lodge a claim to the court in order to protect their rights and interests. If the MSA is reached during a trial, it can be approved by the court as a court settlement agreement.<sup>42</sup> Taking into account the first steps in the development of legal regulations of mediation in Ukraine, there are no draft laws connected to the enforceability of MSA. This is why the Austrian approach to this issue can be useful for further implementation.

### 3.1. Notarial deed

In Austria, the mechanisms to make MSAs resulting from out-of-court mediation enforceable are regulated in Art. 3, 54 (1) of the Notarial Act of Austria (*Notariatsordnung*)<sup>43</sup> and Art. 1 (17) of the Execution Act of Austria (*Exekutionsordnung*).<sup>44</sup> A notarial deed, like a court settlement agreement, can be enforceable if: a) an obligation to perform or to refrain from performing is stated therein; the obligation to vacate a dwelling or individual parts of a dwelling is excepted unless it is a question of the owner or co-owner of the property vacating the dwelling; b) the entitled person and the obligor, the legal title, the object, the nature, the extent and the time of the performance or omission are defined; c) extinction of obligation under lit. a is admissible; d) the obligor has agreed in this or a separate notarial deed that the notarial deed shall be immediately enforceable.<sup>45</sup> At the same time, if the parties to a deed want to confirm notarially a private deed that has already been drawn up, a corresponding notarial deed must be drawn up to that effect.<sup>46</sup> In this case, the obligor's declaration of submission to enforcement is also compulsory.

The Ukrainian legislation does not directly provide for the possibility of bringing agreements resulting from mediation to enforcement by means of a notarial deed. According to the Ukrainian Law 'On Enforcement Proceedings', the only notary document recognised as an enforcement title is the notary writ (*vykonavchi napys notariusa*),<sup>47</sup> which can only be used for certain types of deeds certifying arrears of debt payment.<sup>48</sup> The list of such documents is established by the Cabinet of Ministers. For example, these can be notary certified: contracts providing for the payment of sums of money, the transfer or return of the property, and the right to foreclose on the pledged property; mortgage agreements that provide for the right to foreclose on the mortgaged property if payments on the principal obligation are overdue before the maturity of the principal obligation expires; leasing contracts that provide for the undisputed return of the leased asset, etc.<sup>49</sup> In such a situation, the notarial writ is issued at the creditor's motion without any previous or later consent of the debtor. There is no possibility of automatic enforcement of any notarial deed, as well as no special notions about notarial approval of MSAs in Ukrainian legislation.

42 Art. 21 of the Law of Ukraine 'On Mediation', Art. 207 of the CPC of Ukraine.

43 The Notarial Act of Austria (Notariatsordnung) <<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001677&FassungVom=2004-12-31&fbclid=IwAR3YKe69GaAofKbGqz1bCcFiso-q3mctCWsek-udmbvuY9g4K-5fqyKMO>> accessed 1 October 2022.

44 The Execution Act of Austria (Exekutionsordnung) <[https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001700&fbclid=IwAR23j\\_IIDEWxl53XXGP8NknoyMgjhAkc9COz2ww\\_6ZF9Ifww06TQCRJxqJc](https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001700&fbclid=IwAR23j_IIDEWxl53XXGP8NknoyMgjhAkc9COz2ww_6ZF9Ifww06TQCRJxqJc)> accessed 1 October 2022.

45 Para 3 of the Notarial Act of Austria.

46 Para. 54(1) of the Notarial Act of Austria.

47 Subpart 3 Part 1 Art. 3 of the Law of Ukraine 'On Enforcement Proceedings'.

48 Art. 87 of the Law of Ukraine 'On Notariat' <<https://zakon.rada.gov.ua/laws/show/3425-12#Text>> accessed 1 October 2022.

49 The Resolution of the Cabinet of the Ministers of Ukraine No 1172 of 29 June 1999 'On the Approval of the List of Documents, According to which Debt Collection is Carried out in an Undisputed Manner on the Basis of Executive Inscriptions of Notaries' <<https://zakon.rada.gov.ua/laws/show/1172-99-п#n10>> accessed 1 October 2022.

A refusal to fulfil an MSA, which should be understood as a civil law contract according to Ukrainian legislation, constitutes a waiver to execute the contract. So, there are two options to protect the rights of the creditor in this situation – to ask for a notarial writ if the MSA is in the form of one of the documents included in the list of the Cabinet of Ministers of notarial writs, or to lodge a suit with the court to force the party to fulfil the obligation. In such a situation, the advantages of out-of-court mediation become illusory because in order to force the party to the MSA to fulfil its obligation, even if it was certified by the notary, another party almost always must go to court.

Despite this, notaries have the possibility to conduct mediation if they pass the basic mediation training.<sup>50</sup> Moreover, the Notarial Chamber of Ukraine conducts mediation training for notaries and maintains and publishes registers of notaries who have completed mediation training.<sup>51</sup> On the one hand, this shows the efforts to promote mediation among the notarial community and to integrate it into notarial practice. On the other hand, the inefficiency of legislation in regard to the enforcement of the MSAs resulting from out-of-court mediation slows down such attempts. In our opinion, amendments in the Ukrainian legislature, connected to the possibility of making MSAs enforceable by a notarial deed with the consent of both parties, would promote out-of-court mediation and increase the number of cases because it can bring the parties the same results as a court settlement without going to court, saving time and recourses of the parties. Therefore, it is useful to prescribe by law that the MSAs carried out without referring a dispute to a court or arbitration can be recognised as valid enforcement titles within the parties' consent if it is certified as a notarial deed and contains an obligation to perform or to refrain from performing.

### 3.2. Approval of the agreement by arbitration

In recent decades, arbitral institutions have maintained the common practice of using mediation during arbitration in various types of med-arb, arb-med, and arb-med-arb procedures.<sup>52</sup> In case of a wise choice of procedural sequence – the appropriate one would be the latter option – the MSA can be made enforceable as a part of the arbitration decision at the end of the arbitration procedure. In Austria, rules of arbitration are regulated by the Fourth Chapter of the Austrian CPC. The parties have the right to settle their dispute and conclude the agreement. There are two options for such an agreement – the arbitral award with agreed wording (*den Schiedsspruch mit vereinbartem Wortlaut*) and the arbitral settlement (recording of an arbitral settlement, *den Schiedsvergleich*).<sup>53</sup> In both options, the subject matter of the dispute must be able to be a subject of a settlement, and the content of the settlement should not violate fundamental values of the Austrian legal system (order public).<sup>54</sup> The arbitral settlement presupposes the registration of the settlement, signed by the parties and the arbiter, at the arbitration.<sup>55</sup> At the same time, an arbitral award with agreed wording must meet the requirements for the arbitral award and have the same

50 Art. 1 of the Law of Ukraine 'On Notariat'.

51 Art. 16 of the Law of Ukraine 'On Notariat'.

52 D Nigmattulina, 'The Combined Use of Mediation and Arbitration in Commercial Dispute Resolution: Results from an International Studies' (2016) 33(1) *Journal of International Arbitration* 37-82; B A Pappas, 'Med-Arb and the Legalization of Alternative Dispute Resolution' (2015) 20 *Harvard Negotiation Law Review* 157-203; D. Ruckteschler, A. Wendelstein 'Efficient Arb-Med-Arb Proceedings: Should the Arbitrator also be the Mediator?' (2021) 38(6) *Journal of International Arbitration* 761-774, etc.

53 Art. 605 of the CPC of Austria.

54 Art. 605 of the CPC of Austria.

55 Art. 605 (1) of the CPC of Austria.

effect.<sup>56</sup> At the national level, both types of agreements are recognised as an enforcement title,<sup>57</sup> whereas at the international level, only an arbitral award with agreed wording can be compulsory enforced under the New York Convention. The parties also can reach an out-of-arbitration settlement, which means the end of an arbitral hearing without any special act of settlement.<sup>58</sup> The awards of national arbitration become enforceable automatically,<sup>59</sup> whereas foreign arbitral awards are subject to the special recognition and enforcement procedure prescribed by the Execution Act of Austria.<sup>60</sup>

In Ukraine, two types of arbitration exist – arbitration tribunals (*treteyski sudy*), which deal with domestic disputes,<sup>61</sup> and international commercial arbitration.<sup>62</sup> In arbitration tribunals, the trial ends with an arbitral award.<sup>63</sup> Even if the parties reach a settlement, the arbitral tribunal may, at the request of the parties, approve the settlement and record the contents of the settlement directly in the award.<sup>64</sup> In international commercial arbitration, there are two options for terminating the trial – an arbitral award<sup>65</sup> and an arbitral award with agreed wording.<sup>66</sup> Both the awards of the arbitration tribunal and the international commercial arbitration can be enforced only after obtaining an enforcement order at the state court under a special procedure of giving the writ for execution, regulated in the CPC of Ukraine.<sup>67</sup> During this procedure, the state court can deny the request for enforcement only on procedural grounds, for example, if the arbitration tribunal has no jurisdiction to hear the case, if the enforcement of such an award is contrary to the public order, etc.

### 3.3 Approval of the agreement by the court

The most widespread mechanism to make MSAs enforceable is their approval by the court. Here, we can distinguish two situations – court approval of MSAs resulting from court-connected or out-of-court mediation.

The Ukrainian legislation provides for the possibility of only making enforceable the MSAs in disputes which are already tried before the court by their approval as court settlement agreements (Part 7 Art. 49 of the CPC of Ukraine). According to the provisions of procedural legislation, a court settlement agreement can be concluded at any stage of the civil procedure, including the trial at courts of appeal and Supreme Court and enforcement proceedings.<sup>68</sup> There is a possibility only in pending cases to get approval by the court.

However, in Austrian civil procedure, we can see a different approach. Art. 433a of the Austrian CPC provides for the possibility of obtaining a court settlement before a district

56 Art. 605 (2), 606 of the CPC of Austria.

57 Art. 1 (16) of the Execution Act of Austria.

58 VIAC (eds.), Handbook on the Vienna Rules and the Vienna Mediation Rules 2018 (WKÖ Service GmbH 2019) 294.

59 Art. 606 (6) and 607 of the CPC of Austria.

60 Art. 614 of the CPC of Austria, Art. 406-416 of the Execution Act of Austria.

61 The Law of Ukraine 'On Arbitration Tribunal' <URL: <https://zakon.rada.gov.ua/laws/show/1701-15#Text>> accessed 1 October 2022.

62 The Law of Ukraine 'On International Commercial Arbitration' <<https://zakon.rada.gov.ua/laws/show/4002-12#Text>> accessed 1 October 2022.

63 Art. 33, 45 of the Law of Ukraine 'On Arbitration Tribunal'.

64 Art. 33 of the Law of Ukraine 'On Arbitration Tribunal'.

65 Art. 31 of the Law of Ukraine 'On International Commercial Arbitration'.

66 Part 1 Art. 30 of the Law of Ukraine 'On International Commercial Arbitration'.

67 Section X of the CPC of Ukraine.

68 Art. 207, Part 2 Art. 373, Part 2 Art. 408 of the CPC of Ukraine, Part 2 Art. 19 of the Law 'On Executive Proceedings'

court on the content of the written agreement reached in mediation. To use such a procedure, several requirements must be met: a) the agreement should be on civil or commercial matters falling within the jurisdiction of the district court; b) such agreement should be written and result from mediation; c) the rights and the obligations contained in the agreement should be at the disposal of the parties; d) the parties should have the right to conclude a court settlement agreement in such a category of cases; e) the content of the agreement must include the obligations, which are enforceable by their nature.<sup>69</sup> This procedure can be used for all MSAs, whether conducted by registered or unregistered mediators in domestic or cross-border disputes.<sup>70</sup> MSAs approved by the court have the power of an enforcement title like the other judicial acts.

Another procedure that should be mentioned in this context is the so-called 'pretoric settlement'. Art. 433 of the Austrian CPC gives any person intending to file an action the right to approach the district court at the opponent's domicile to reach a settlement before filing a lawsuit. Such a settlement is provided for by the judge and can end with the court settlement agreement. The Rules of Procedure for the Courts of I and II instances state that the purpose of Art. 433 of the Austrian CPC is to settle disputes in the simplest way. On the other hand, 'the courts are neither obliged nor entitled to authenticate and make enforceable agreements reached between the parties out of court. Rather, the establishment of the enforceable notarial deed (Art. 3 of the Notarial Act) must serve this purpose.'<sup>71</sup>

The difference between the procedures enshrined in Arts. 433 and 433a of the CPC of Austria lies in the purpose of these procedures: Art. 433 regulates the pretoric settlement, which is a special settlement procedure conducted by a judge prior to the lodging of a claim by the claimant, whereas Art. 433a concerns the procedure of approving the MSAs resulting from out-of-court mediation. At the same time, if parties concluded the MSA with the help of a private mediator after filing a suit, it could be approved by the court as a court settlement agreement (Art. 204 of the Austrian CPC).

A wide range of possibilities for court approval of MSAs resulting from different types of mediation is important for the popularisation of mediation. The possibility of enforcement of both court-related and out-of-court MSAs is included in Recital 19 of the EU Mediation Directive, which states that mediation should not be understood as a lesser alternative to the court trial. If there is no opportunity to enforce out-of-court MSAs, it cannot be said that the aim of Art. 1 of the EU Mediation Directive, namely, to promote the use of mediation, could be achieved.<sup>72</sup> Besides this, the possibility of judicial approval of MSAs is vital for mandatory mediation and court-connected mediation, which can be used without formally filing the claim with the court. For such types of mediation, the state should introduce the possibility of making agreements enforceable; otherwise, it makes no sense to use them in practice.

The Constitution of Ukraine states that in cases prescribed by law, the pre-trial methods of dispute settlement can be mandatory (Art. 124). In spite of the fact that for civil cases, such

69 C Lenz, 'The EU Directive on Mediation – The Implementation in Austria and the Preparations in Germany' (2012) 2 Yearbook on International Arbitration 389-390; S Ferz 'Sehnsucht nach Anerkennung – Der Exekutionstitel als Türöffner für die Mediation?' (2021) 21 Graz Law Working Paper 6-7 <<https://ssrn.com/abstract=3972411>> accessed 1 October 2022; S Ferz, Ch Matti, 'Implementation of directive 2008/52/EC ('Mediation Directive') in *Mediation in Cross-Border Succession Conflicts and the effect of the EU Succession regulation – Research report* (Stuttgart, Steinbeis-Edition 2019) 26-27.

70 S Ferz (n 71) 6-7; S Ferz, Ch Matti (n 71) 26.

71 Art. 547 (3) of the Rules of Procedure for the Courts of I. and II. Instance of Austria (Geschäftsordnung für die Gerichte I. und II. Instanz) <<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000240>> accessed 1 October 2022.

72 C Lenz (n 71) 382.

mechanisms have not yet been established, it is supposed that in a few years, mandatory mediation in some types of cases may be introduced.<sup>73</sup> For this purpose, both out-of-court and court-connected mediation schemes can be used in practice. All these circumstances show that there should be special provisions in civil procedure for the enforcement of MSAs for both types of mediation. This can be done by providing a special procedure for the approval of such MSAs by the court in a simplified procedure.

## 4 THE ENFORCEMENT OF MSAs IN CROSS-BORDER DISPUTES: EU AND UKRAINIAN PERSPECTIVES

The EU Mediation Directive emphasises not only the national but also the international aspect of the enforcement of MSAs. It states that ‘agreements which have been made enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable Community or national law.’<sup>74</sup> Such a notion opens the discussion on the enforcement proceedings applicable to MSAs in cross-border disputes. The method of making the MSAs enforceable at the national level (by court judgment, arbitration award, or notarial deed) is a decisive factor when choosing the particular recognition procedure for foreign MSAs. Below, we will examine the main legal provisions in this regard.

### 4.1 *The Brussels Ia Regulation and the enforcement of MSAs*

The main regulation for the EU countries is 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 Judgments in Civil and Commercial Matters (the Brussels Ia Regulation).<sup>75</sup> The main aim of the Brussels Ia Regulation is to ‘maintain and develop an area of freedom, security and justice, inter alia, by facilitating access to justice, in particular through the principle of mutual recognition of judicial and extra-judicial decisions in civil matters.’<sup>76</sup> This regulation is a binding and directly applicable document which provides for the recognition and enforcement of judgments and extra-judicial decisions within the EU area. This document reflects the desire of the EU Member States to recognise judgments of other member states as their own and to ensure their free circulation, based on the principle that ‘the judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed.’<sup>77</sup> At the same time, the Brussels Ia Regulation is not applicable for arbitral awards,<sup>78</sup> which can be enforced under the New York Convention.

The main purpose of the Brussels Ia Regulation is to provide for the recognition and enforcement of judgments given in one of the EU member states in another of the EU member states without any special procedure or any declaration of enforceability being required.<sup>79</sup> Such foreign judgments are prescribed to be enforceable under the same conditions as their own

73 In connection to mandatory mediation in Ukraine, see T Tsvina, T Vakhonjeva ‘Law of Ukraine “On Mediation”: Main Achievements and Further Steps of Developing Mediation in Ukraine’ (2022) 1(13) *Access to Justice in Eastern Europe* 142-153; N Mazaraki (n 14) 24-27.

74 Recital 20 of the EU Mediation Directive.

75 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 Judgments in Civil and Commercial Matters <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215>> accessed 1 October 2022.

76 Recital 3 of the Brussels Ia Regulation.

77 Recital 26 of the Brussels Ia Regulation.

78 Recital 12, Para 2(a) Art 1 of the Brussels Ia Regulation.

79 Para 1 Art. 36, Art. 39 of the Brussels Ia Regulation.

judgments, and 'the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed'.<sup>80</sup> The same provisions apply to authentic instruments<sup>81</sup> and court settlements.<sup>82</sup> The core change of the Brussels Ia Regulation compared to the previous regulations in this matter is the abolition of the exequatur procedure, the essence of which is the obtaining of a court order before the enforcement of a foreign judgment.<sup>83</sup> Currently, in order to start an enforcement procedure, the creditor should only provide the national authority with a copy of the judgment and the standard certificate.<sup>84</sup>

We can distinguish several situations with regard to the recognition and enforcement of MSAs for the purposes of our survey: a) the recognition and enforcement of MSAs originating in Austria in other EU countries, and vice versa; b) the recognition and enforcement of MSAs originating in a non-EU country in Austria; c) the recognition and enforcement of MSAs originating in foreign countries in Ukraine.

### ***a) Recognition and enforcement of MSAs originating in Austria in other EU countries***

MSAs approved by the Austrian court should be recognised as enforcement orders according to the Brussels Ia Regulation in other EU states. At the same time, MSAs approved as notarial deeds should also be enforceable since the Brussels Ia Regulation covers not only judgments but also extra-judicial documents, which can be recognised as enforcement titles in the national system of a member state.<sup>85</sup> To obtain the enforcement writ for MSAs approved by the court or a notarial deed, a copy of the judgment and a standard form certificate should be submitted to the national authority.<sup>86</sup> The same rules should be applicable for the recognition, and enforcement of MSAs originated in other EU countries, for instance, in Austria, according to the Brussels Ia Regulation. At the same time, all kinds of arbitral awards originating in Austria or other EU states are not covered by the Brussels Ia Regulation but can be enforced under the New York Convention.

### ***b) Recognition and enforcement of MSAs originating in a non-EU country in Austria***

The recognition and enforcement of court judgments of non-EU countries are regulated by the Austrian Enforcement Act (Art. 406-416) and international bilateral and multilateral agreements. In general, there is a two-step procedure for the recognition and enforcement of foreign judgments – the declaration of enforceability and the enforcement itself. The application for the declaration of enforceability and the motion of enforcement can be lodged at the same time in the same court, but these can be different courts.<sup>87</sup> The competent court for the declaration of enforceability is the district court in whose district the opposing party is domiciled.<sup>88</sup>

The procedure is the same for the court acts and deeds.<sup>89</sup> The main requirements for enforcement can be summarised as follows: a) the act or deed is enforceable according to the legislature of the state of origin; b) the principle of reciprocity is guaranteed by state treaties

80 Para 1 Art. 41 of the Brussels Ia Regulation.

81 Art. 58 of the Brussels Ia Regulation.

82 Art. 59 of the Brussels Ia Regulation.

83 K Kitzberger, S Weber 'Austria' in O Browne, T Wartner, G Blears (eds), *Enforcement of Foreign Judgments* (Lexology 2022) 24 <[https://weber.co.at/wp-content/uploads/2021/11/2022\\_enforcement\\_of\\_foreign\\_judgements\\_austria.pdf](https://weber.co.at/wp-content/uploads/2021/11/2022_enforcement_of_foreign_judgements_austria.pdf)> accessed 1 October 2022.

84 Art. 37 of the Brussels Ia Regulation.

85 Art. 58 of the Brussels Ia Regulation.

86 Art. 37 of the Brussels Ia Regulation.

87 Art. 412 (1) of the Executive Act of Austria; for more detail, see K Kitzberger, S Weber (n 85) 5-6.

88 Art. 409 of the Executive Act of Austria.

89 Art. 406 of the Executive Act of Austria.

or regulations;<sup>90</sup> c) the case fell within the jurisdiction of a foreign state court or authority according to the domestic state legislation;<sup>91</sup> d) the requirements of the due notification of the person were fulfilled, and the defendant participated in the proceedings or at least had an opportunity to do so;<sup>92</sup> e) the judgment is no longer a subject to a trial or another process and has the status *res judicata*;<sup>93</sup> f) the act should not be wholly unlawful or unenforceable under the Austrian legislation, and its execution should not be contrary to the public policy or morality.<sup>94</sup> The application of a declaration of enforceability is decided by order without prior oral hearings and without hearing the opposing party.<sup>95</sup> The debtor has the possibility to appeal against this order.<sup>96</sup> As soon as the proceedings for the recognition of the foreign judicial act or deeds have ended, the latter has the power to be enforced as an enforceable domestic title.<sup>97</sup> The district court is responsible for the pending enforcement proceedings, and the process is conducted by bailiffs who act as judicial staff.

### ***c) Recognition and enforcement of MSAs originating in foreign countries in Ukraine***

As Ukraine is not an EU member state, the Brussels Ia Regulation is not applicable on its territory; therefore, there is no difference whether the country in which the judgement originated was an EU or non-EU state. However, as was previously mentioned for the recognition and enforcement of MSAs originating in a non-EU country in Austria, the more important point is whether there is a bilateral or multilateral international agreement between Ukraine and the state from which the judgment originated.

The main provisions connected to the enforcement of foreign judgments are contained in Art. 462-470 of the CPC of Ukraine. The main rule is that the judgments of a foreign court (court of a foreign state, other competent bodies of foreign states whose competence includes the consideration of civil cases) are recognised and enforced in Ukraine if their recognition and enforcement are provided for by an international treaty whose consent to be bound is granted by the Verkhovna Rada of Ukraine<sup>98</sup> or on the principle of reciprocity. The latter shall be presumed to exist unless it is proved otherwise.<sup>99</sup>

The main requirements for the enforcement can be summarised as follows: a) the judgments of a foreign court should be *res judicata* according to the legislature of the state of origin; b) the recognition and enforcement is provided for by an international treaty whose consent to be bound is granted by the Verkhovna Rada of Ukraine, or on the principle of reciprocity; c) requirements of the due notification of the person were fulfilled; d) the case is not within the exceptional jurisdiction of the Ukrainian court; e) there is neither a judgment nor a pending trial in the Ukrainian court on the same case; f) the term for submitting such an application have not been expired; g) the subject matter of the dispute should can be the subject of proceedings under the Ukrainian legislature; h) the enforcement of the judgment is not contrary to the interests of Ukraine; i) there is no other enforcement title on this judgment given by the Ukrainian court (Part 1 Art. 462, Art. 468 of the CPC of the Ukraine).

90 Art. 406 of the Executive Act of Austria.

91 Art. 407(1) of the Executive Act of Austria.

92 Art. 407(2), Art. 408 (1) of the Executive Act of Austria

93 Art. 407 (3) of the Executive Act of Austria.

94 Art. 408 (2), Art. 408 (3) of the Executive Act of Austria.

95 Art. 410 of the Executive Act of Austria.

96 Art. 411 of the Executive Act of Austria.

97 Art. 413 of the Executive Act of Austria.

98 The Verkhovna Rada of Ukraine is the official name of the Ukrainian Parliament.

99 Art. 462 of the CPC of Ukraine.

In order to obtain compulsory enforcement, the creditor should make an application to the court at the place of residence or location of the debtor, if the debtor has no such place in Ukraine – to the court according to the location of the debtor's property in Ukraine (Art. 464 of the CPC of Ukraine). Such a motion can be submitted for compulsory enforcement in Ukraine within three years from the date of obtaining *res judicata* status or, if the enforcement is connected with the periodic payments, during the entire period of such payments (Art. 463 of the CPC Ukraine). The creditor should provide the court with the documents stipulated by international treaties and, if such a treaty does not exist or determine the list of such documents, the following documents shall be attached to the application: a certified copy of the judgment, an official document that the judgment of the foreign court has entered into force; a document certifying that the party against whom the decision of the foreign court was issued and who did not participate in the proceedings was duly notified of the date, time and place of the proceedings; a document stating in which part or from which time the decision of the foreign court is enforceable (if it has been enforced previously); document certifying the authorisation of a representative (if the application is submitted by a representative); a statutorily certified translation of the above documents into the Ukrainian language or a language stipulated by international treaties of Ukraine (Parts 2, 3 Art. 466 of the CPC Ukraine). After obtaining the application with all the necessary documents, the court should notify the debtors about the proceedings and give them one month to provide the objections. The examination of the motion must be carried out by a judge in an open court hearing (Part 1, 4 Art. 467 of the CPC Ukraine.). Thereupon, the court can decide whether to grant permission to enforce the judgment of a foreign court or refuse to satisfy the motion (Part 6 Art. 467, Part 1 Art. 468 of the CPC Ukraine). On the basis of the judgment of a foreign court and the decision to grant permission for its enforcement, the court shall issue an enforcement writ (Art. 470 of the CPC Ukraine), which should be submitted to the Public Executive Service or to the private bailiffs for enforcement.

The above-mentioned procedure is applicable only to the MSAs approved by foreign courts. There is no special procedure for the enforcement of MSAs that have been certified as a notarial deeds abroad. At the same time, the MSAs that were approved by arbitration of a foreign country can be enforceable in Ukraine under the New York Convention. Therefore, taking into account the Ukrainian obligations on the adaptation of the Ukrainian legislature to the EU legislation, two steps should be made with regard to the enforcement of MSAs: providing the special simplified mechanisms for the enforcement of judgments and court settlements (including the MSAs, approved by a court) originated in the EU states, as well as extra-judicial documents, such as the enforcement of MSAs, certified as a notarial deed.

#### **4.2 The New York Convention and the enforcement of MSAs approved by the international commercial arbitration**

As the Brussels Ia Regulation excludes arbitration awards, the MSAs that are approved by a foreign arbitration tribunal can be recognised and enforced under the New York Convention, whose main purpose is to 'provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards.'<sup>100</sup> Today, the New York Convention is one of the most effective international treaties in the civil justice sector, signed by 170 states.<sup>101</sup> Austria and Ukraine are also participants of the New York Convention.

100 United Nations Commission on International Trade Law, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 1 <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf>> accessed 1 October 2022.

101 Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the 'New York Convention') <[https://uncitral.un.org/en/texts/arbitration/conventions/foreign\\_arbitral\\_awards/status2](https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2)> accessed 1 October 2022.



The New York Convention prescribes to its member states to provide for a special procedure at the national level for the recognition and enforcement of foreign and non-domestic arbitral awards on commercial matters.<sup>102</sup> In order to obtain an enforcement writ, the party applying for recognition and enforcement shall submit the application to the competent court with the duly authenticated original of the award or a duly certified copy thereof and the original of the arbitration agreement or a duly certified copy thereof and the translation of these documents.<sup>103</sup> The grounds for refusing the enforcement of arbitration awards include the parties' incapacity, the arbitration agreement's invalidity, improper notification or impossibility to present the case for the debtor, the scope of the arbitration agreement, the jurisdiction of the arbitration tribunal, the setting aside or suspension of an award in a country in which or under the law of which that award was made, or the arbitrability of the dispute and grounds of public policy.<sup>104</sup>

Austria provides regulation in this regard in Art. 614 of the CPC of Austria, which states that the procedure of the recognition and enforcement of arbitration awards is regulated by the Execution Act 'unless otherwise provided in international law or in legal instruments of the EU'.<sup>105</sup> This procedure is actually the same as the procedure of the recognition and enforcement of foreign judgments (Art. 406-416 of the Execution Act).

In Ukraine, the regulation of this issue is quite similar, with the special procedure for the recognition and enforcement of the foreign arbitration awards enshrined in Art. 474-482 of the CPC of Ukraine. This procedure conforms to the provisions of the New York Convention. The application for recognition and permission to enforce the international commercial arbitration award must be submitted to the Court of Appeal, whose jurisdiction extends to the city of Kyiv, within three years from the date of the arbitral award.<sup>106</sup> The case is considered by a judge within two months at an open court hearing with notification of the parties.<sup>107</sup> The debtors are notified by the court about the application and can submit their objections to it within a month.<sup>108</sup> The grounds for the rejection of the application are exactly the same as those set out in the New York Convention.<sup>109</sup>

#### **4.3 The Singapore Convention as a global regulation of the enforcement of MSAs resulting from international commercial mediation**

The Singapore Convention was developed by the UNCITRAL Working Group II (Arbitration and Conciliation/Dispute Settlement) and entered into force on 12 September 2020. The purpose of the Singapore Convention is to provide the simplest and most effective mechanism for the enforcement of cross-border MSAs while retaining the inherent flexibility of the procedure. The act seeks to introduce an international regime for the enforcement of MSAs in commercial disputes, similar to that provided for arbitral awards by the New York Convention, as the absence of cross-border enforcement mechanisms to international MSAs in commercial matters is considered to be one of the main obstacles for choosing the mediation as an effective dispute resolution method among users in this category of

102 Arts. I and III of the New-York Convention.

103 Art. IV of the New-York Convention.

104 Art. V of the New-York Convention.

105 Art. 614(1) of the CPC of Austria.

106 Part 3 Art. 475 of the CPC of Ukraine.

107 Part 1 Art. 477 of the CPC of Ukraine.

108 Part 4 Art. 477 of the CPC of Ukraine.

109 Art. V of the New York Convention, Art. 478 of the CPC of Ukraine.

cases.<sup>110</sup> T. Schnabel noticed that MSAs within the meaning of the Singapore Convention would 'be able to circulate across borders in their own right, without the need to rely on domestic contract law or being transformed into an arbitral award on agreed terms'.<sup>111</sup> The Singapore Convention is considered to be 'the missing third piece in the international dispute resolution enforcement framework'<sup>112</sup> within the procedure of enforcement for MSAs, approved by a foreign court and arbitration tribunal. At the moment of publication of this article, 55 countries signed the Singapore Convention, and ten of them have already ratified it.<sup>113</sup>

The Singapore Convention does not prescribe that the courts refer cases to a mediator if there is a mediation clause as it is prescribed in the New York Convention.<sup>114</sup> This means that the Singapore Convention chooses a softer approach to the mediation clause, as the New York Convention does to the arbitration clause. At the same time, the Singapore Convention and the New York Convention provide quite similar mechanisms.<sup>115</sup> Thus, we can see a clear tendency towards the approximation and unification of the regulations of both procedures.

The Singapore Convention applies to (a) mediated (b) international (c) written (d) commercial (e) settlement agreements.<sup>116</sup> This means that:

1) *the agreement has to be concluded solely as a result of mediation*

2) *the agreement should be international* – this means that: a) at the time of signing, at least two parties to the mediation agreement are doing business in different states; b) if the parties are doing business in one state, that state is i) neither the state in which a substantial part of the obligations under the mediation agreement is to be performed; ii) nor the state with which the subject matter of the mediation agreement has the closest connection.<sup>117</sup>

3) *the agreement should be in writing and recorded in any form*

4) *the dispute in which the settlement agreement is reached should be commercial by nature* – which excludes disputes over contracts concluded for personal, family or household purposes or agreements arising out of family, inheritance, or employment law.<sup>118</sup>

5) *a mediation agreement could not be approved by any other means (through a court or an arbitration tribunal)* – which opens the possibility of obtaining enforcement by the use of other procedures. This means that international MSAs approved by a court, an arbitration tribunal or through other procedures which themselves make enforcement of such agreements possible are excluded from the scope of the Singapore Convention. The aim of this statement is to avoid concurrence with the other enforcement mechanisms, providing the mechanism for MSAs in out-of-court and out-of-arbitration mediation.

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110 NY Morris-Sharma, 'The Singapore Convention Is Live, And Multilateralism, Alive!' (2019) 20 *Cardozo Journal of Conflict Resolution* 1014; JH Chahine, EM Lombardi, D Lutran, C Peulve 'The acceleration of the development of international business mediation after the Singapore Convention' (2020) 4 *European Business Law Review* 773.

111 T Schnabel (n 10) 266.

112 JH Chahine, EM Lombardi, D Lutran, C Peulve (n 112) 772.

113 Singapore Convention on Mediation <<https://www.singaporeconvention.org/>> accessed 1 October 2022.

114 Art. II of the New York Convention.

115 NY Morris-Sharma (n 112) 1010.

116 Para. 1 Art. 1 of the Singapore Convention.

117 Para. 1 Art. 1 of the Singapore Convention.

118 Para. 2 Art. 1 of the Singapore Convention.

There is a general question of whether the provisions of the Singapore Convention should apply automatically to all international MSAs or only to those to which the parties have agreed upon a specific clause to that effect. According to Para. 1 (b) of Art. 8 of the Singapore Convention, 'a party [...] may declare that it shall apply this Convention only to the extent that the parties to the MSA have agreed to the application of the Convention'<sup>119</sup>. In fact, the stated provision establishes the possibility of applying an 'opt-in regime'<sup>120</sup> at the national level. In accordance with Para. 3 Art. 8 of the Singapore Convention, reservations may be made by a party to the Convention at any time. When Ukraine signed the Singapore Convention, an appropriate reservation was not made in this regard. There is a debate among scholars and practitioners about this issue, connected with the concerns that the relevant reservation will nullify the positive effect of the ratification since parties will rarely use the relevant opportunity in practice. By comparison, the New York Convention does not contain such a provision for the application of execution of international commercial arbitration, as it is applied by default.<sup>121</sup>

The Singapore Convention, like the New York Convention, is a framework, setting out only the general requirements for the procedure, such as the documents to be filed to the court or other competent institution to obtain the enforceable title for the international MSAs and the cases which exclude the enforcement of such agreements. This means that it gives a wide range of discretion to the national legislator for the creation of the special procedure for this purpose in the national civil procedural legislation.

The grounds for refusing to grant the relief includes parties' incapacity; any sort of invalidation of the agreement according to the applicable law; the mediation ability of the case; a serious breach by the mediator of standards without which the party would not have entered into the MSA; the mediator's misconduct in relation to issues of impartiality and independence; the fact that the settlement is not binding or is not final, or has been subsequently modified; the fact that the obligations in the MSA have been performed or are not clear or comprehensible; when the enforcement is contrary to the terms of the MSA or public policy.<sup>122</sup> In order to avoid the parallel proceedings within the meaning of Art. 6 of the Singapore Convention, the national authority can adjourn the decision or oblige the other party to provide suitable security at the request of a party.

Ukraine signed the Singapore Convention in 2019, but it has not been ratified yet. In Ukraine, the development of amendments to the procedural legislation, connected with the signing of the Singapore Convention, took place simultaneously with the preparation of the Draft Law of Ukraine 'On Mediation', which was adopted on 16 November 2021. In 2019, a Working Group was established in the Ministry of Justice of Ukraine to prepare both draft laws – the Draft Law of Ukraine 'On Mediation' and the Draft Law of Ukraine 'On Ratification of the Singapore Convention' (the Draft Law) within the relevant amendments to the procedural legislation on this regard.<sup>123</sup> Both acts were prepared, but the government decided to separate them for voting in the Verkhovna Rada.

119 Para. 1 (b) Art. 8 of the Singapore Convention.

120 N Alexander, S Chong (n 10) 150.

121 Ibid, 161.

122 Art. 5 of the Singapore Convention.

123 Working Group was established at the Ministry of Justice of Ukraine to prepare both draft laws – the Draft Law of Ukraine 'On Mediation' and the Draft Law of Ukraine 'On Ratification of the Singapore Convention' according to the Decree of the Ministry of Justice of Ukraine on the 27 of June 2019 No 2487/7.

The Draft Law proposed a procedure that is quite similar to the mechanism of recognition and enforcement of international commercial arbitration awards<sup>124</sup> and reflects the main statements of the Singapore Convention. It proposed an 'opt-in regime' for MSAs in which the debtor's place of residence, business, or property is located in Ukraine. It is proposed that an application for enforcement of international MSAs may be submitted within three years from the date of its signing. It should contain all information provided for in Art. 4 of the Singapore Convention and should be submitted to the Court of Appeal, whose jurisdiction extends to the city of Kyiv (as for the procedure for recognition and enforcement of arbitral awards). It is proposed to consider such an application in the open court hearing by a judge within two months from the date of its admission to court, notifying the parties of the possibility of filing the objections for the debtor within one month.

The grounds for the rejection of the enforcement of the MSAs are the same as in Art. 5 of the Singapore Convention. At the same time, the practical application of these grounds can cause serious difficulties. This applies, for example, to such grounds as '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' since, in this case, it would be extremely difficult for national judges to assess whether the mediator complied with certain standards, especially if the mediation took place abroad and under the rules of another state due to the lack of knowledge of Ukrainian judges of the relevant standards. In addition, it may be extremely problematic in this case to assess the conduct of a Ukrainian mediator in the event of a MSA being enforced abroad, as at the moment in Ukraine, there are still no uniform standards that should be followed by mediators and to which they should adjust their behaviour, and this may in fact prevent an acceptance of such agreements. Ultimately, it is a question of trust in mediation and the work of the mediators; increasing this trust and improving professional, ethical standards is therefore of crucial importance. This increase in the value of mediation as an alternative to court proceedings and, thus, an increase in trust in this method is the starting point of the Mediation Directive, in particular, in Recitals 5 and 19.<sup>125</sup>

As to Austria's perspective on the ratification of the Singapore Convention, the EU has not signed the Singapore Convention yet. This is a difficult question connected with the status of the EU and the rules for ratification of international treaties by the EU as a single unity. The question is whether the whole EU as a unit should sign the convention or whether individual states also can do so.<sup>126</sup> In the literature, we can find different concerns about the joining of the EU to the Singapore Convention, which can be summarised in two focal points connected to the mediation standards and existing mechanisms for the regulation of international MSAs in the EU. The first concern relates to the competence of the third-country mediators and mediation standards, taking into account different approaches around the world.<sup>127</sup> From this point of view, the EU has adopted the EU Mediation Directive, which provides a compendium of the unified general approach to mediation despite the national peculiarities within the EU, but third countries can have their own standards, which can vary and raise some concerns about the professional level of mediators. The second notion is connected to the fact that the EU Mediation Directive also provides the possibility to obtain the enforcement of mediation

124 Arts. 474-482 of the CPC of Ukraine.

125 Recitals 5 and 19 of the 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 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0052&from=en>> accessed 1 October 2022.

126 JH Chahine, M Lombardi, D Lutran, C Peulve (n 112) 771.

127 S Ferz (n 71) 12.

agreements resulting from mediation within the existing national mechanisms within the EU, which is quite effective.<sup>128</sup>

All in all, the joining and ratification of the Singapore Convention may take mediation practice to a new level by significantly increasing its use in cross-border commercial disputes, as occurred after the adoption of the New York Convention in the context of arbitration.<sup>129</sup> The ratification of the Singapore Convention will have a positive impact on Ukraine's image as an economic partner on the global stage and the development of mediation practices in Ukraine. Ukraine's accession to this act requires ensuring the existence of mechanisms at the level of national procedural legislation capable of implementing the provisions of the Singapore Convention.

## 5 CONCLUSIONS

The recognition and enforcement of MSAs play a significant role in the promotion of mediation both at the national and international levels, making mediation a real alternative to litigation and arbitration in a private law context. In Austria, there are several possibilities for making MSAs enforceable at the national level in line with Art. 6 of the EU Mediation Directive – a notarial deed, approval by the arbitration tribunal, and approval by the court. At the same time, there is a set of international instruments to make MSAs enforceable in cross-border disputes within the meaning of the Brussels Ia Regulation, the New York Convention, national procedures for the recognition and enforcement of foreign court judgments, and other acts. Such a harmonious system of mechanisms covers a huge variety of MSAs and is considered to be effective. That is why it is useful to consider Austrian approaches on this matter for the improvement of the Ukrainian procedures connected to the enforcement of MSAs. In particular, the procedure of approval of MSAs in out-of-court mediation and the possibility of the enforcement of such agreements as notarial deeds should be provided. The procedure for obtaining the enforcement writ for the award of a domestic arbitration can be simplified by the possibility of direct enforcement of such awards as it is in Austrian civil procedure. Taking into account Ukraine's status as an EU candidate country, special attention should be paid to the Brussels Ia Regulation during the adaptation of Ukrainian legislation to EU law. In this regard, the new simplified procedure for the enforcement of judgments and other enforceable titles should be introduced in future. At the same time, we can see a similar regulation of the proceedings for recognition and obtaining an enforceable writ for international arbitral awards caused by the adoption of the New York Convention. More problematic in this regard for both legal orders is the ratification of the Singapore Convention. Ukraine has signed it and taken the first steps towards its ratification. For Austria, as a member of the EU, this process is not so easy. However, we believe that the development and unification of the standards of the mediation procedure all over the world and the great efforts of the international community can bring the mediation practice to a new level, as occurred with arbitration at the time of the ratification of the New York Convention back in 1958.

128 Ch Chong, F Steffec 'Enforcement settlement agreements resulting from mediation under the Singapore Convention: Private International Law Issues in Perspective' (2019) 31 Singapore Academy of Law Journal 485-486.

129 Ch G Hioureas 'The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward?' 46 Ecology Law Quarterly 64; E Silvestri 'The Singapore Convention on Mediated Settlement Agreements: A New String to the Bow of International Mediation?' (2019) 3(4) Access to Justice in Eastern Europe 5.

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