Cross-Border Mediation: Towards a Balanced Framework for Cross-Border Dispute Resolution in the European Union

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Abstract

This paper takes the entry into force of the Singapore Convention on Mediation on 12 September 2020 as an opportunity to reconsider whether the European Union has reached its once ambitious goal to create a balanced relationship between mediation and litigation in cross-border disputes. After a brief overview of the current legal framework for cross-border mediation in the EU in the first section, the meaning of the concept of a balanced relationship and its implications for the regulation of mediation in cross-border disputes are analysed. Starting with the observation that the use of cross-border mediation is still very limited, this second section argues that attempts to establish a balanced relationship in quantitative terms are misguided. Instead of attempting to correct alleged decision deficits by the parties to a dispute, the paper emphasises the regulatory responsibility of European legislators to create a level playing field for different cross-border dispute resolution mechanisms. In this respect, the third section identifies the surprising absence of private international law rules in the EU's mediation framework as a structural disadvantage of mediation, as compared to litigation and arbitration. The last part of the paper examines in detail the interaction between mediation and the Brussels Ia Regulation to provide specific examples of legal obstacles to cross-border mediation and potential ways to overcome them.

Keywords: Mediation, Private International Law, Singapore Convention, Mediation Directive, Balanced Relationship, Mandatory Mediation, Enforceability, Lis Pendens, Enforcement

Since the adoption of the 1958 New York Convention,[1] international arbitration has rapidly gained popularity and established itself as the mechanism of choice for pri-

1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10/6/1958, United Nations Treaty Series, vol. 330, No. 4739, pp. 3 ff.

vate international dispute resolution.[2] However, arbitration has lost some of its initial appeal as stakeholders express frustration over increasing legalism, drawn-out proceedings and rising costs.[3] Against this backdrop, cross-border mediation[4] is often promoted as the "New Arbitration", a faster and cheaper way to resolve cross-border civil and commercial disputes.[5]

So far, this has remained a vision for the future. Despite the considerable domestic success of mediation in several jurisdictions and its claimed advantages in cross-border disputes, private international mediation is still a rare phenomenon.[6] Statistics from institutional providers of dispute resolution services illustrate the limited uptake of mediation in cross-border disputes.[7] In 2020, the International Chamber of Commerce (ICC) received only 45 requests for mediation as opposed to 946 requests for arbitration.[8] The London Court of International Arbitration (LCIA) reported 3 mediations compared to a record number of 440 arbitrations in the same year.[9] But there is reason for hope: On 7 August 2019, the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention) opened for signature and has been met with a widely positive reception.[10] So far, over 50 countries have signed the Convention and it entered into force on 12 September 2020.[11] By providing a uniform mechanism for the cross-border enforcement of settlement agreements resulting from mediation (MSAs), the Singapore Convention is the first multilateral treaty to address the private international law of mediation. Many stakeholders now believe that the Singapore Convention could give a similar boost to private international mediation as the New York Convention did to international arbitration.[12]

At first sight, the experience with cross-border mediation in the European Union (EU) indicates that such optimism should be viewed with caution. With the Media-

2 *Born*, p. 96; *Barker*, Loy LA Int'l & Comp LJ 1996/1, p. 6; for current data see: *School of International Arbitration*, 2021 International Arbitration Survey: Adapting arbitration to a changing world, p. 5; available at: http://www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey (15/6/2021).

3 See: *Stipanowich*, U. Ill. L. Rev. 2010/1, pp. 1 ff.; *Barkett*, in: Rovine (ed.), p. 359 ff.

4 For the purpose of this paper "private international mediation" and "cross-border mediation" are used interchangeably.

5 See: *Nolan-Haley*, Harv. Negot. L. Rev. 2012, p. 61 with a critical analysis of this trend; *Alexander*, SAcLJ 2019 (Special Issue), p. 446, para. 88, concluding that the 21st century is the "mediation century"; *Barker*, Loy. LA. Int'l. & Comp. LJ. 1996/1, pp. 8–10; *Abramson*, ILSA J. Int'l & Comp. L 1997/2, p. 323.

6 *Strong*, Wash. & Lee L. Rev. 2016/4, p. 2023; *Alexander*, Contemp. Asia Arb. J. 2014/2, p. 408.

7 *Martin*, in: Rovine (ed.), p. 411.

8 See: https://iccwbo.org/media-wall/news-speeches/icc-announces-record-2020-caseloads-in-arbitration-and-adr (15/6/2021).

9 LCIA 2020 Annual Casework Report, p. 8, available at: https://www.lcia.org/LCIA/reports.aspx (15/6/2021).

10 The text of the Convention is available at: https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf (15/6/2021).

11 For the current status of the Singapore Convention see: https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status (15/6/2021).

12 *Chong/Steffek*, SAcLJ 2019, pp. 448–449, para. 1.

tion Directive,[13] the EU introduced its framework for mediation in cross-border civil and commercial cases in 2008. The Directive pursues the ambitious objective to establish "a balanced relationship between mediation and litigation" within the EU.[14] In 2013, the EU amended this legal framework with the simultaneous adoption of the ADR-Directive and the ODR-Regulation.[15] Yet, the effect of these instruments has been very limited in quantitative terms. It is estimated that mediation is used in less than 1% of all cross-border cases within the EU.[16] Over 10 years after the Member States had to implement the Mediation Directive,[17] this sobering result seems to suggest that regulation has very little impact on the actual use of cross-border meditation. In search for an explanation of this "underutilisation" of mediation, some proponents of mediation have attributed the limited uptake of cross-border mediation to decision deficits caused by irrational behaviour of the disputants. They recommend that parties to a dispute should be "nudged" towards mediation to achieve a more balanced relationship between mediation and litigation.[18] This paper argues that this approach is misguided. Instead, the EU should primarily aim for more equality in the regulation of cross-border dispute resolution. In this respect, the Singapore Convention is a welcome opportunity to improve the legal framework for mediation within the EU, which still presents considerable obstacles to the efficient functioning of mediation in a cross-border context. After a brief overview of the current legal framework for cross-border mediation in the EU (A.), the paper explores the concept of a "balanced relationship" as envisioned by the Mediation Directive (B.). It then argues that PIL-regulation has not only a crucial role in establishing more "balance" in cross-border dispute resolution, but also has the potential to increase the actual use of mediation within the EU (C.). The last section provides examples of imbalances in the EU's current cross-border dispute resolution regime by analysing the interaction between cross-border mediation and European Civil Procedure law and suggests ways to overcome such imbalances (D.).

A. The European Mediation Framework

The European Single Market is a unique and highly integrated economic community of 27 States. For the EU's vision of a borderless market, it is essential that cross-border disputes are resolved efficiently. Consequently, increasing the effectiveness of cross-border dispute resolution has always been a high priority on the EU's agenda.[19] For a long time, the EU concentrated its efforts only on removing

13 Directive (EC) 52/2008 ("Mediation Directive"), OJ L 136 of 24/5/2008, p. 3.
14 Art. 1(1) Mediation Directive.
15 Directive (EU) 11/2013 ("ADR Directive"), OJ L 165 of 18/6/2013, p. 63 and Regulation (EU) 524/2013 ("ODR Regulation") OJ L 165 of 18/6/2013, p. 1.
16 *De Palo* et al., European Parliament Study 2014, p. 162; *De Palo*, European Parliament Briefing 2018, p. 1.
17 Art. 12(1) Mediation Directive.
18 See *infra* B.I.2.
19 *Rühl*, ICLQ 2018/1, p. 101.

the obstacles to cross-border litigation. Numerous European legislative instruments thus aim at developing "the *judicial* cooperation in civil matters having cross-border implications".[20] However, the promises of the Alternative Dispute Resolution (ADR) movement to provide faster, more efficient and more satisfying dispute resolution ultimately also caught the attention of European legislators. Today, the EU considers ADR and in particular mediation as a potent "tool" to increase access to justice within the internal market.[21] The integration of mediation in the EU's "toolbox" for cross-border dispute resolution can thus be understood as a conceptual shift from a litigation centered approach to a more differentiated – albeit also increasingly fragmented –[22] cross-border dispute resolution system, which entails extrajudicial redress mechanisms.[23] The following section provides a brief overview of the legal framework for cross-border mediation in the EU.

I. The Mediation Directive

Initial efforts to promote mediation date back as far as 1998.[24] However, the EU did not cross the threshold to establishing its own legislative framework for cross-border mediation until the adoption of the 2008 Mediation Directive and its subsequent implementation by the Member States. Despite its ambitious objective to create "a balanced relationship between mediation and litigation",[25] the Directive does not aim to regulate mediation comprehensively.[26] It pursues a minimum harmonisation approach, which intends to implement a basic framework for cross-border mediation in Europe. Beyond these basic rules, the Directive allows Member States substantial freedom to maintain or develop different national conceptions and regulatory models of mediation.

The Mediation Directive applies without limitation to all civil and commercial disputes with a cross-border implication.[27] Mediation is defined as "a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator."[28] Besides rules directed at ensuring access to mediation and establishing certain quality standards,[29] the Direc-

20 Art. 81(1) Treaty on the Functioning of the European Union (TFEU); see also: *Meller-Hannich/Höland/Krausbeck*, ZEuP 2018/1, p. 32; *Wagner*, ZZP 2018/2, pp. 183 ff., who provides an overview of the relevant legislative instruments.
21 See: Recital (2) Mediation Directive; *Onţanu*, in: Cadiet/Hess/Requejo Isidro (eds.), p. 51.
22 *Onţanu*, in: Cadiet/Hess/Isidro (eds.), p. 51; *Hess*, 'Europäisches Zivilprozessrecht', pp. 102–103, para. 3.7.
23 Similar: *Hopt/Steffek*, in: Hopt/Steffek (eds.), p. 199.
24 See: Recommendation EC 257/98 on the Principles Applicable to Bodies Responsible for the Out-of-Court Settlement of Consumer Disputes, OJ L 115/41 of 17/4/1998, p. 31.
25 Art. 1(1) Mediation Directive.
26 *Vandekerckhove*, in: Titi/Fach Gómez (eds.), p. 183.
27 Art. 1 Mediation Directive.
28 Art. 3(a) Mediation Directive.
29 See: Art. 4, 5 and 9 Mediation Directive.

tive recognises that it is necessary "to introduce framework legislation addressing, in particular, key aspects of civil procedure."[30] Yet, the Directive is surprisingly limited in this respect. It merely ensures that the mediation process is confidential and that, if the parties fail to agree on a settlement, access to courts is not prevented by national prescription and limitation periods.[31] On the other hand, the Directive is remarkably silent on cross-border aspects of mediation.[32] Unlike the Brussels Ia Regulation[33] for litigation or the New York Convention for arbitration, the Mediation Directive does not contain uniform PIL-rules. This is particularly evident in Art. 6 Mediation Directive, which foresees an obligation of the Member States to ensure the enforceability of settlement agreements resulting from mediation on a national level. As regards the process of cross-border enforcement, Art. 6(4) Mediation Directive clarifies it provides no such mechanism and parties are required to rely on pre-existent European PIL-instruments.[34] Similarly, the Mediation Directive does not provide any rules for the assessment of the validity and enforceability of agreements to mediate ("mediation agreements").

II. The ADR-Directive and the ODR-Regulation

Since the 2009 Treaty of Lisbon, the growing importance of ADR, with mediation as most prominent representative, is also reflected in EU Treaty law.[35] In 2013, the EU's legislative activity in the field of ADR reached its preliminary peak with the adoption of the ADR Directive and the ODR Regulation. With these instruments the EU intended to strengthen the confidence of consumers in the internal market, by providing them with access to simple, fast and low-cost out-of-court dispute resolution.[36] The ADR-Directive and the ODR-Regulation differ from the Mediation Directive in that they cover only certain consumer-to-business contracts.[37] However, they are not restricted to cross-border disputes nor are they limited to a certain dispute resolution mechanism. Instead, both instruments cover the vast range of processes that operate under the label ADR. The ADR Directive and the ODR Regulation mainly aim to strengthen the institutional support of ADR. The

30 Recital (7) Mediation Directive.
31 See: Art. 7 and Art. 8 Mediation Directive.
32 In more detail: *Esplugues/Iglesias*, in: European Parliament 2016, pp. 78–80; see also: *Eidenmüller*, SchiedsVZ 2005/3, pp. 124 ff., who already criticised this aspect of the Mediation Directive during the drafting stage.
33 Regulation (EU) 1215/2012 ("Brussels Ia Regulation"), OJ L 351 of 20/12/2012, pp. 1 ff.
34 Recital (20) Mediation Directive.
35 See: Art. 81(2)(g) TFEU.
36 Art 2(3) ADR Directive; see also: *European Commission*, Report on the application of Directive 2013/11/EU of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on Online Dispute Resolution for Consumer Disputes (hereafter: "2019 Report on the ADR Directive and the ODR Regulation") COM (2019) 425 final, p. 2.
37 Art. 2(1) ADR-Directive and Art. 2 ODR-Regulation; for a critical assessment of the EU's legislative competence see: *Rühl*, J. Consum. Policy 2015/4, pp. 433–435.

ADR Directive obliges each Member States to provide consumers with access to an ADR-entity that meets the quality standards set out in the Directive. The ODR Regulation establishes an online-platform designed as a single point of entry for consumer disputes arising from contracts concluded online.[38] This platform does not offer any dispute resolution services itself but only directs consumers to a competent ADR-entity. Although both instruments seek to strengthen consumer access to justice, especially in cross-border disputes, they barely address the specific legal issues which arise in this context. As a single exception, Art. 11 ADR Directive provides that, in situations involving a conflict of laws, consumers shall not be deprived of their mandatory rights in the Member State where they are habitually resident. Apart from that, the ADR Directive is silent on important issues such as the enforceability of the outcome of ADR proceedings conducted in accordance with the Directive.

III. The Efforts of UNCITRAL to Harmonize International Mediation

Outside the EU, the United Nations Commission on International Trade Law (UNCITRAL) has undertaken substantial efforts to promote mediation as a mechanism for the resolution of cross-border disputes. These efforts resulted in the adoption of the 1980 UNCITRAL Conciliation Rules and the 2002 UNCITRAL Model Law on International Commercial Conciliation.[39] However, compared to the UNCITRAL Arbitration rules, these instruments have had a rather limited impact and are not widely used within the EU.[40] The latest UNCITRAL project which resulted in the amendment of the 2002 Model Law[41] and, more notably, the Singapore Convention is off to a better start: Among the over 50 signatories of the Convention are some of the world's largest economies, including the United States, China and India.[42] The Convention is a binding multilateral treaty with the primary goal of promoting the use of mediation in international commercial disputes.[43] The updated 2018 UNCITRAL Mediation Model Law simply incorporates the content of the Convention in the existing 2002 Model Law. Like the New York Convention with respect to arbitral awards, the Singapore Convention provides a global mecha-

38 See: *Cortés*, Leg. Stud. 2015/1, p. 120.

39 UNCITRAL Conciliation Rules (1980), available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/conc-rules-e.pdf (15/6/2021); UNCITRAL Model Law on International Commercial Conciliation (2002), available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/03-90953_ebook.pdf (15/6/2021); the Model Law has been amended in 2018 to also incorporate the provisions of the Singapore Convention.

40 *Hau*, ZZPInt 2016/2, p. 162.

41 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) (hereafter: "UNCITRAL Mediation Model Law"), available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf (15/6/2021).

42 For the current status see: https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status (15/6/2021).

43 *Schnabel*, Pepp. Disp. Resol. L.J. 2019/1, p. 2.

nism for the enforcement of MSAs. The Convention applies to settlement agreements resulting from mediation and concluded in writing by parties to a commercial dispute (Art. 1(1) Singapore Convention). Subject to limited grounds for refusal (Art. 5 Singapore Convention), such can be enforced in any country that is a party to the convention (Art. 3(1) Singapore Convention). Despite the generally positive reception of the Convention, it is still unclear whether the EU will adopt it. From the very start of the project, the EU was sceptical as it saw no need for harmonization and considered a treaty on this topic unrealistic.[44] Although delegates from the European Union were later actively involved in the drafting process, this scepticism remained present during the negotiations.[45] Today, the EU still is not a signatory to the Singapore Convention and, so far, has not expressed any intention thereof.

IV. The EU's Evaluation and its Vision for the Future of the European Mediation Framework

In its report on the implementation of the Mediation Directive, the European Commission found that the Mediation Directive had significantly increased the awareness of mediation.[46] At the same time however, the Commission had to concede that stakeholders only reported very limited or no cases in which cross-border mediation was actually used.[47] The limited quantitative success of the Directive was mainly blamed on "the adversarial tradition prevailing in many Member States, the low level of awareness of mediation and the functioning of the quality control mechanisms."[48] The Commission concluded that no amendments to the Directive were necessary and that further improvement of the Directive could mainly be achieved on a Member State level.[49] The Implementation Report on the European Framework for ADR and ODR arrived at a similar conclusion. It noted that although consumers "have access to high-quality ADR procedures across the Union in virtually all retail sectors", these ADR procedures still are underused.[50] Yet, the Commission again found that no amendments to the legal framework were necessary and decided instead to rely only on further promotion and financial support for ADR to increase the use of these mechanisms.[51] Although the EU thus had to admit that the conceptual shift towards a more differentiated system of cross-border dispute reso-

44 Ibid., pp. 5–6.
45 Ibid., p. 6.
46 *European Commission*, Report on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, COM(2016) 542 final, p. 11.
47 *Psaila* et al., European Commission Report 2016, p. 79.
48 *European Commission*, Report on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, COM(2016) 542 final, p. 11.
49 Ibid., p. 12; see also: *Vandekerckhove*, in: Titi/Fach Gómez (eds.), pp. 184–191.
50 *European Commission*, 2019 Report on the ADR Directive and the ODR Regulation COM (2019) 425 final, p. 17.
51 Ibid.

lution, with mediation as an important component, had not found a way into actual practice, a clear vision for the future of the EU mediation framework is missing. Overall, the impression remains that the EU's commitment to integrating mediation in its legislative framework for cross-border dispute resolution has waned. The EU's scepticism and reluctance towards the Singapore Convention reinforces this impression.

B. The Notion of a Balanced Relationship

The Mediation Directive aims to establish a balanced relationship between litigation and mediation but does not further specify what it considers "balanced". The evaluations conducted by the European Commission paint the clear picture that, at least in quantitative terms, the impact of the European framework for cross-border mediation has fallen far short of initial expectations. As reasons for this "underutilisation" of mediation, the Commission has mainly identified factors such as a lack of awareness of mediation and its benefits as well as cultural preferences for adjudicative dispute resolution mechanisms. This represents the idea that the reluctance of parties to engage in cross-border mediation is based on uninformed or even irrational behaviour and suggests that the use of mediation will increase naturally once disputants have become more familiar with the process.[52] The EU's focus on the promotion of mediation is consistent with this analysis. Yet, over 12 years after the adoption of the Mediation Directive and over 20 years since the EU has started to promote mediation as a cross-border dispute resolution mechanism, there is little evidence that educational and promotional efforts alone are sufficient to increase the uptake of cross-border mediation.

I. The Quantitative Approach to Establishing a Balanced Relationship

1. Low Mediation Rate in Cross-Border Cases as a "Market Failure"?

The fact that parties refuse to engage in cross-border mediation despite its proposed advantages and continued promotional efforts has been coined the "EU mediation paradox".[53] That the low mediation rate is perceived as a paradox is closely linked to the assumption that mediation offers a cheaper and faster way of resolving cross-border disputes and thus is economically superior to litigation.[54] Consequently, some scholars have argued that, from an economic perspective, the low media-

52 In the context of international commercial and investment mediation: *Strong*, Wash. & Lee L. Rev. 2016/4, p. 2012.

53 See: *De Palo/Canessa*, in: Cortés (ed.), pp. 409–410.

54 *De Palo/Canessa*, in: Cortés (ed.), p. 410; *Barendrecht/de Vries*, Cardozo J. Conflict Resol. 2005/1, p. 84; see also the study: *De Palo/Feasley/Orecchini*, European Parliament Note 2011 (hereafter: "The Cost of Not Using Mediation Study").

tion rate constitutes a market failure, which needs to be corrected.[55] In economics, a market failure describes a situation which leads to an inefficient allocation of goods or services on a free market.[56] Based on the conviction that a higher mediation rate would increase the overall efficiency in the "market for cross-border dispute resolution services",[57] much of the discussion on how to achieve a more balanced relationship between mediation and litigation has thus revolved around finding the most effective way to increase the number of mediations.[58] Advocates of mediation's economic benefits have requested that European legislators should aim to directly increase the number of mediation proceedings within the EU by requiring Member States to make mediation a mandatory pre-trial requirement for most disputes.[59] Some scholars have even proposed "a quantifiable way of ascertaining whether the balanced relationship called for in Art. 1 of the Mediation Directive would effectively be reached."[60] According to this quantitative approach the "balance" between mediation and litigation should be measured on the basis of a certain economic target number, which provides for a fixed proportion of cases that must be mediated in each Member State and failing to meet this number would be a ground for legal action against this Member State.[61] Similar to the analysis of the Commission, this approach builds on the notion that the "underutilisation" of mediation cannot be explained rationally.[62] However, instead of the mere promotion of mediation, advocates of the quantitative approach argue that the objective of a balanced relationship requires the EU to adopt legislative measures directly targeted at increasing the number of mediations. Still, the question remains: If the parties to the dispute were better off using mediation, why is it that despite the EU's continuing efforts to promote mediation hardly anyone chooses it?

2. Escaping the Default Effect by Nudging Users towards Mediation?

In search of an explanation as to why the supposed market failure in cross-border dispute resolution has proved so persistent, proponents of the quantitative approach have turned to the popular field of behavioural economics. Behavioural economics acknowledges that humans do not always act rationally in the economic sense and

55 See: *Barendrecht/de Vries*, Cardozo J. Conflict Resol. 2005/1, p. 84, noting, however, that further research is necessary (pp. 112 ff.).
56 *Gómez-Barroso*, in: Marciano/Ramello (eds.), pp. 1376 ff.; *Ledyard*, in: Eatwell/Milgate/Newman (eds.), p. 185.
57 It is of course problematic to conceive dispute resolution merely as a market for services (see below: B.II.3.).
58 See for instance: *De Palo* et al., European Parliament Study 2014, p. 149, Figure 26 and accompanying text; *De Palo/Canessa*, in: Cortés (ed.), p. 423; *De Palo*, European Parliament Briefing 2018, pp. 8 ff.; *Alexander*, Contemp. Asia Arb. J. 2014/2, pp. 413–415.
59 See: *De Palo* et al., European Parliament Study 2014, p. 164.
60 *De Palo/Canessa*, in: Cortés (ed.), p. 411; *De Palo*, European Parliament Briefing 2018, p. 2.
61 Ibid.
62 *De Palo*, European Parliament Briefing 2018, p. 11; *Alexander*, Contemp. Asia Arb. J. 2014/2, pp. 405 ff.

seeks to identify circumstances in which irrational cognitive biases and other psychological barriers cause decision deficits.[63] Drawing on research in behavioural economics, mainly the so-called default effect is made responsible for the parties' resistance to choosing mediation.[64] The default effect describes the empirical finding that, when facing a decision, agents often show a strong tendency towards the default option – the outcome in a given situation if no active choice is made.[65] It explains, for instance, why the rate of organ donors is significantly higher in countries which require their citizens to opt out from organ donorship as opposed to counties which ask their citizens to actively register as a donor and why companies can save paper and reduce their environmental footprint if they change the default printer setting to double-sided printing.[66] The significant effect a change of the default setting has on outcomes in various choice scenarios is mainly explained by three factors.[67] First, especially when a choice is complicated, due to inertia and procrastination people tend to refrain from making an active choice and thus likely stick with the *status quo*.[68] Second, even if the default is chosen randomly, parties may perceive the default rule as an implicit endorsement of this option.[69] The third reason is loss aversion, the behavioural finding that people dislike losses more than corresponding gains.[70] Since the default rule acts as a reference point, it also determines what is perceived as a gain or as a loss.[71]

It is not surprising that these insights from behavioural economics have great appeal to policymakers. Anticipating and using cognitive biases, for instance, by deliberately setting a default rule, can enable legislators to steer the decision of parties toward a desired outcome – a concept known as "nudging".[72] Consequently, advocates of a quantitative approach to ascertaining a balanced relationship argue that legislators should engage in "some serious nudging"[73] to overcome the market failure in cross-border dispute resolution.[74]

63 For an introduction see: *Eidenmüller/Stark*, in: Basedow et al. (eds.), pp. 170 ff.
64 In detail: *Barendrecht/de Vries*, Cardozo J. Conflict Resol. 2005/1, pp. 83 ff., who, however, also emphasise that it is essential not to overestimate the impact of psychological barriers, p. 111; see also: *Alexander*, Contemp. Asia Arb. J. 2014/2, pp. 413–415; *De Palo/Canessa*, in: Cortés (ed.), pp. 415–416.
65 *Sunstein*, Univ. Chic. Law Rev. 2011/78-4, p. 1350; *Di Porto/Rangone*, in: Alemanno/Sibony (eds.), pp. 49–50.
66 *Sunstein*, J. Consum. Policy 2005/4, p. 585; *Sunstein*, U. Pa. L. Rev. 2013/1, pp. 4, 13.
67 *Di Porto/Rangone*, in: Alemanno/Sibony (eds.), p. 38.
68 *Sunstein*, Univ. Chic. Law Rev. 2011/78-4, p. 1397; *Sunstein*, U. Pa. L. Rev. 2013/162-1, p. 17.
69 *Sunstein*, Univ. Chic. Law Rev. 2011/4, pp. 1397–1398.
70 Ibid., p. 1398.
71 Ibid.; *Barendrecht/de Vries*, Cardozo J. Conflict Resol. 2005/1, p. 99.
72 For an introduction, see: *Eidenmüller/Stark*, in: Basedow et al. (eds.), p. 175.
73 *Alexander*, Contemp. Asia Arb. J. 2014/2, p. 416.
74 *De Palo*, European Parliament Briefing 2018, p. 11.

II. Risks and Drawbacks of a Quantitative Approach

At first sight, the default effect provides a compelling explanation for the underutilization of mediation. The task of actively choosing the appropriate dispute resolution mechanism overwhelms the parties to the dispute and they thus stick with the default.[75] Due to loss aversion, the time and money lost in case of unsuccessful mediation acts as a deterrent to choosing mediation even if, on average, mediation would be the more efficient choice. The default effect also points to a simple solution to the "mediation paradox": Parties to a dispute should automatically be referred to mediation and required to opt out if they want to have their day in court.[76] Surveys in which the participants have articulated a preference for mediation that does not correspond to its actual usage rate seem to support this argument.[77] Upon closer analysis, these assumptions are problematic. It cannot be disputed that insights from behavioural economics can contribute to a better understanding of the parties' choice for a certain dispute resolution mechanism. However, it should also be evident that making mediation the default mechanism for dispute resolution requires more consideration than a company's decision to change the default printer setting. There is a significant risk that alleged decision deficits are relied upon too readily as a convenient excuse for the failure of the EU mediation framework to reach its goals. Nudging disputants towards mediation turns away the focus from structural issues in the current EU mediation framework, which provide legitimate reasons to refrain from using mediation in a cross-border scenario. Besides the risk of overlooking potential structural flaws in the legislative environment of cross-border mediation, which will be addressed in more detail below (D.), an approach that is merely targeted to increase the number of mediations poses other considerable dangers.

1. The Questionable Economic Rationale for Using Mediation as a Default

Even if ethical and legal concerns towards the deliberate use of "nudges" by legislators are put aside,[78] proponents of employing nudges as legislative tools emphasise that, particularly when setting default rules, caution is warranted.[79] Poorly chosen or misused default rules can prove harmful and are especially dangerous if regulators lack relevant information.[80] This is clearly the case for cross-border mediation. The underlying economic assumption that mediation provides a faster and more

75 In this sense: *Alexander*, Contemp. Asia Arb. J. 2014/2, p. 415.
76 For the purpose of this paper, it is not necessary to strictly differentiate between mandatory mediation and mediation on an opt-out basis. Opt-out models for mediation can be designed in various ways and most proposals for opt-out models in the EU at least entail some form of mandatory participation by the parties, which renders a distinction difficult.
77 See in more detail: *Hopt/Steffek*, in: Hopt/Steffek (eds.), p. 96.
78 See for instance: *McCrudden/King*, in: Kemmerer et al. (eds.), pp. 75 ff.; *van Aaken*, in: Kemmerer et al. (eds.), pp. 161 ff.
79 *Sunstein*, U. Pa. L. Rev. 2013/1, pp. 36–38.
80 *Sunstein*, Active Choosing or Default Rules?, p. 6.

cost-efficient pathway to resolving private international disputes has not yet been sufficiently tested.[81] In fact, the lack of reliable empirical data is a recurring theme in any attempt to evaluate cross-border mediation within the EU.[82] Existing evaluations comparing the effectiveness of mediation and litigation often do not take sufficient account of the fact that even without mediation, most disputes are resolved without trial –[83] the overwhelming number of claims is either settled or dropped.[84] This is also true for claims that are filed with a court. Only a small portion result in a judgment given after trial. Two popular studies conducted on behalf of the European Parliament are an illustrative example of this methodological flaw. Both the 'Cost of Not Using Mediation-Study' and the 'Rebooting Study' simply compare the estimated time disputants spend in mediation against the estimated time and cost it would take to enforce the same contractual claim in a court of first instance (including the time for filing and service, trial and judgment and, finally, enforcement).[85] Consequently, the Rebooting Study arrives at the optimistic conclusion that a success rate of merely 9% would be sufficient for mandatory mediation to provide efficiency gains.[86] However, it should be apparent that merely measuring the time and cost of obtaining and enforcing a judgment or an MSA is neither a suitable benchmark for the overall effectiveness of litigation or mediation nor a valid basis for a comparison of the two.[87] In Germany, for instance, only around a quarter

81 *Strong*, in: Titi/Fach Gómez (eds.), p. 48; *Menkel-Meadow*, in: Rovine (ed.), pp. 209–210; for England see: *Genn*, Yale J.L. & Human 2012/1, p. 405.

82 See, for instance: *European Commission*, Report on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, COM(2016) 542 final, p. 4.

83 *Kessler/Rubinfeld*, in: Polinsky/Shavell (eds.), p. 388 point to this important issue; see also: *Genn*, 'Judging Civil Justice', pp. 112–113.

84 See the foundational analysis of disputes in the U.S.: *Galanter*, UCLA L. Rev. 1983/1, p. 14.

85 *De Palo/Feasley/Orecchini*, European Parliament Note 2011, pp. 11–12; *De Palo* et al., European Parliament Study 2014, p. 123 ff., which refers for the time and cost of litigation to data collected by the World Bank in its Doing Business Report 2014 ("Enforcing Contracts" section); for the methodology of the World Bank report, which also measures the time and cost of "(i) filing and service; (ii) trial and judgment; and (iii) enforcement", available at: https://www.doingbusiness.org/en/methodology/enforcing-contracts (15/6/2021).

86 *De Palo* et al., European Parliament Study 2014, p. 164.

87 *Wagner*, in: Eidenmüller (ed.), p. 374 argues compellingly: "The product offered by a court rubber-stamping suits is not 'dispute resolution' in any meaningful sense of the term but 'enforcing claims' brought before it, regardless of their merits. This perspective resembles the one taken by the World Bank in its 'Doing Business' reports where judicial systems are ranked according to their efficiency in the 'enforcement of contracts', as measured by the duration and costs of suits brought for breach of contract. On these measures, the civil justice systems of Uzbekistan and Bhutan rank particularly high because they seem to be very fast or very cheap. It should be obvious however, that 'enforcing contracts' in the sense that the claims within a pool of cases brought into court be allowed as quickly and cheaply as possible is not the 'product' that courts are supposed to produce."

of court filings result in a judgment given after trial.[88] It is obvious that an even smaller number of judgments will need to be enforced. This means that most court cases will be resolved substantially quicker and cheaper than estimated for the purpose of the abovementioned studies. The same is most likely true for other European countries. Instead, mediation can only provide efficiency gains if, assuming the overall quality of the dispute resolution process and outcome remains the same, it succeeds in increasing the naturally occurring settlement rate or in shifting the timing of settlement to an earlier point in the dispute and thus avoids the costs of a trial.[89] Against this background, high success rates of mediation programmes, which are often cited as evidence for mediation's efficiency, are put into perspective. In addition, economists even fear that court-connected mediation programmes might divert more cases from private settlement than from trial.[90] Therefore, court-connected mediation programmes have even the potential to increase delay and congestion in courts.[91] Experiences with mandatory mediation schemes in the United States confirm that – at least in some cases – such concerns are valid: Some court-connected mediation programmes have been found to prolong the dispute resolution process by prompting subsequent litigation about the mediation process.[92] Clearly, there will also be cases where parties save time and money by resolving their dispute in mediation while private negotiation would have failed. Moreover, mediation can offer additional value in other respects, such as enabling disputants to achieve a more creative and satisfying settlement. Nevertheless, it is all but clear if and under which circumstances requiring parties to attempt to mediate their dispute would increase the overall efficiency of cross-border dispute resolution. Therefore, one should be very cautious about interpreting the low mediation rate in cross-border disputes as a market failure in need of correction.

2. The Ambiguities of the Default Effect's Implications on Mediation

Similar uncertainties exist regarding the extent to which cognitive biases and psychological barriers such as the default effect affect the choice of mediation as dispute resolution mechanism. For instance, litigation can be considered the default at the contract drafting stage. At this *ex-ante* stage (before the dispute has arisen), parties face the question whether to include a dispute resolution clause and litigation acts as a fall-back mechanism if no active choice is made. Yet, for cross-border commercial contracts, including an arbitration clause is by far the most popular choice.[93] Clearly, in this situation the default effect can be overcome. It is also notable that at this

88 *Statistisches Bundesamt* (Destatis), Rechtspflege Zivilgerichte, Fachserie 10 Reihe 2.1, 2020, p. 24.
89 *Bone*, in: Parisi (ed.), p. 161.
90 *Kessler/Rubinfeld*, in: Polinsky/Shavell (eds.), p. 388; *Bone*, in: Parisi (ed.), p. 161; *Shavell*, J. Leg. Stud. 1995/1, p. 21.
91 *Kessler/Rubinfeld*, in: Polinsky/Shavell (eds.), p. 388.
92 *Nolan-Haley*, C.J. Int'l L. & Com. Reg. 2012/4, p. 1008.
93 *Strong*, Wash. & Lee L. Rev. 2016/4, p. 1976.

stage, the vast majority of commercial actors favour an arbitration clause over a mediation clause. The default effect can hardly be made responsible for this decision. This shows that other reasons than an irrational bias towards the default option might be responsible for the reluctance of parties to engage in cross-border mediation. Similarly, at the *ex-post* stage (after the dispute has arisen) litigation could be considered the default dispute resolution mechanism if no prior contract between the parties provides otherwise. However, since most claims are settled or dropped, taking the dispute to court requires the claimant to make an active choice. Hence, even in this situation, it is not quite clear if litigation can be considered the default. Does the party who proposes resolving the dispute by mediation opt-out from litigation or rather from private negotiation or from both? Overall, there still is significant uncertainty to what extent the default effect affects the choice for a cross-border dispute resolution mechanism.[94] Therefore, using the default effect as a reason to justify "some serious nudging"[95] towards mediation is likely misguided or at least very premature.

3. Other Drawbacks of Nudging Parties Towards Mediation

Besides these uncertainties with respect to the underlying assumptions, a quantitative approach to establishing a balanced relationship has further significant drawbacks. A particular risk is that Member States will use mediation programmes to generate budget savings instead of adequately equipping courts with sufficient funds and qualified personnel to deal with complex cross-border cases.[96] Instead of an additional avenue to access justice – as famously envisioned by *Cappelletti* and *Garth* –[97] mediation then risks becoming a barrier to the constitutional right of European litigants to seek redress in courts.[98] This threat was also recognised by the European Court of Justice (CJEU). In *Alassini*, the CJEU held that mandatory mediation proceedings must not prevent litigants from exercising their right to obtain judicial redress.[99] As a consequence, the CJEU set clear boundaries for such programmes.[100] Concerns that parties do not settle in mediation because they believe it is the best mechanism to resolve their dispute but are rather driven into settlement by fear of an expensive and inefficient court system are not unfounded. It is at least notewor-

94 *Barendrecht/de Vries*, Cardozo J. Conflict Resol. 2005/1, p. 111 despite demonstrating a number of ways in which pschological barriers can lead to defaults being sticky also emphasise that it is essential not to overestimate the weight of such barriers to choosing a dispute resolution mechanism.
95 *Alexander*, Contemp. Asia Arb. J. 2014/2, p. 416.
96 *Hau*, ZZPInt 2016/2, p. 157.
97 *Cappelletti/Garth*, Buff. L. Rev. 1978/2, pp. 181 ff.
98 *Nolan-Haley*, N.C.J. Int'l L. & Com. Reg. 2012/4, p. 1008; *Hess*, in: Cadiet/Hess/Requejo Isidro (eds.), pp. 24–25.
99 CJEU, joined cases C-317/08, C-318/08, C-319/08 and C-320/08, *Rosalba Alassini and Others v Telecom Italia SpA*, ECLI:EU:C:2010:146 paras. 54–57.
100 Ibid.

thy that Italy, which is widely known for its overburdened court system,[101] runs one the most "successful" mediation schemes in Europe in terms of the number of cases mediated.[102] When parties are driven into settlement by an overburdened court system, or even just by a mediator who constantly reminds them that a trial is to be avoided at all costs, it is likely that claimants will significantly lower their claims only to prevent the dispute from going to court.[103] This raises serious concerns about the fairness of the settlement achieved in mediation. Finally, the focus of the quantitative approach on increasing the number of mediations risks overlooking the broader implications such fundamental changes might have. Against the backdrop of an increasing privatisation of justice, more attention has been drawn in recent years to the important public functions of civil litigation.[104] Public adjudication ensures that mandatory law is applied and thus serves a crucial constitutional role in preserving the rule of law – a task that mediation cannot fulfil.[105] In the same vein, civil courts contribute to the clarity, predictability and development of the law, which promotes social order and provides the foundation for a functioning economy.[106] When parties increasingly resort to private dispute resolution processes, there is a risk that civil courts will not attract enough cases for the civil justice system to fulfil its public functions properly. Economists have even expressed concerns that this could lead to another, but different type of market failure: Since the important public functions of civil litigation play no immediate role for a private party's choice of a certain dispute resolution mechanism – the external costs of an increasing privatisation of justice are borne by the public as a whole –, an increasing use of mediation and other private dispute resolution mechanisms can lead to an overall inefficient outcome.[107] Thus, having litigation as the default mechanism for dispute resolution may very well strike the right balance. Clearly, however, the quest for a balanced relationship between mediation and litigation should be approached more carefully than by pursuing the most effective way to increase the number of mediations.

III. Achieving Balance by Creating Equality in the European Framework for Cross-Border Dispute Resolution

As the current EU legislation and accompanying promotional activities have not achieved their objective and setting mediation as the default by making it mandatory, albeit with some form of opt-out option, is also not an appropriate means to reach a more balanced relationship between mediation and litigation, the question

101 For current data see: *European Commission*, EU Justice Scoreboard 2020, COM(2020) 306 final, p. 11, Figures 6 and 7.
102 For comparative data see: *De Palo/Canessa*, in: Cortés (ed.), pp. 413–414.
103 See: *Genn*, Judging Civil Justice, p. 113.
104 See: *Hess*, in: Cadiet/Hess/Requejo Isidro (eds.), pp. 36–43.
105 *Genn*, Yale J.L. & Human 2012/1, p. 398.
106 *Genn*, Judging Civil Justice, p. 3.
107 *Fisher*, in: Parisi (ed.), pp. 286–289.

remains what else can be done. It is suggested that, instead of correcting supposed decision deficits by the parties, the EU should refocus on improving the current legal framework for mediation within the EU. As will be discussed below (D.), there are currently plenty of legitimate reasons for parties to refrain from using mediation. Although mediation is an informal process that seeks to achieve a consensual and interest-based dispute resolution, it does not exist in a legal vacuum.[108] Besides the potential benefits mediation may offer in cross-border disputes which are intrinsic to it as a process – these will also be addressed below (C.I) –, the attractiveness of mediation fundamentally depends on the quality of the underlying legislative framework. Before engaging into "serious nudging"[109] to increase the quantity of mediations, it is the primary responsibility of European legislators to ensure that the attractiveness of mediation is not hampered by deficits in the regulation of mediation or the absence thereof. Ideally, regulation should enable users to choose the mechanism that they consider best suited to resolve their dispute because of its inherent characteristics. This will only be possible if the regulation of cross-border dispute resolution creates a level playing field for mediation, litigation and arbitration.[110] Understood in this way, the objective of a balanced relationship does not call for a certain rate of mediations but for a differentiated approach to regulating cross-border dispute resolution, which aims for equality across dispute resolution mechanisms and does not favour one mechanism over the other.[111]

This understanding of a balanced relationship has important implications on the regulation of cross-border mediation: First, legislation must aim to ensure that cross-border mediation is in principle equally attractive as cross-border litigation or international arbitration.[112] This also means that the specific legal problems that arise in a cross-border context should not disproportionally affect the effectiveness of mediation as opposed its alternatives. This objective is consistent with the EU's vision of a borderless market where the cross-border nature of a dispute does not constitute an obstacle to the enforcement of the rights of a party. In addition, it emphasises party autonomy as a policy goal in cross-border dispute resolution. Second, since the individual mechanisms for cross-border dispute resolution interact with each other, legislation must aim to provide sensible solutions for situations in which rules for different mechanisms interfere with each other. This demands a comprehensive approach to regulating dispute resolution, which does not view the individual mechanisms as independent "tools" but as part of a coherent system.[113] In contrast, the EU has often acted as if the different mechanisms for cross-border

108 *Eidenmüller*, SchiedsVZ 2005/3, p. 124.
109 *Alexander*, Contemp. Asia Arb. J. 2014/2, p. 416.
110 Also emphasising the responsibility of legislators: *Strong*, Wash. & Lee L. Rev. 2016/4, p. 2040.
111 Similar: *Hopt/Steffek*, in: Hopt/Steffek (eds.), p. 199.
112 See: *Onțanu*, in: Cadiet/Hess/Requejo Isidro (eds.), p. 68.
113 In particular for consumer disputes, the EU refers to the different legislative instruments as a "toolbox": *European Commission*, 2019 Report on the ADR Directive and the ODR Regulation, COM (2019) 425 final, pp. 18 f.

dispute resolution occupy entirely separate legal worlds.[114] As regards the relationship between litigation and arbitration, starting with *West Tankers*,[115] this has led to a series of highly controversial decisions by the CJEU.[116] The attempt to reconcile the relationship between EU Law and international arbitration was one of the major controversies in the reform of the Brussels I Regulation and is still subject to an ongoing debate. Similarly – this will be addressed in more detail in Section D. –, EU law does not provide answers for many questions arising from the relationship between mediation and litigation. Ultimately, creating a balanced framework for cross-border dispute resolution within the EU requires further detailed and comprehensive analysis. It is needless to mention that this goes beyond the scope of a single paper. The following sections focus only on the role and potential of PIL-regulation in this regard.

C. Private International Law and the Legal Environment of Cross Border Disputes

I. Mediation and the Specific Characteristics of International Disputes

To better understand the impact of PIL-regulation on mediation it is first helpful to consider the advantages mediation as a process can offer for resolving cross-border disputes. In this respect, private international mediation shares many characteristics of international commercial arbitration, which are considered beneficial for cross-border disputes. Similar to arbitration, in mediation parties can choose a neutral *forum* and thus avoid the potential bias of national courts.[117] Parties are also able to tailor the procedural rules to their individual preferences, instead of having to cope with an unfamiliar foreign procedural law.[118] Instead of a judge, who might be unfamiliar with the subject matter or the law governing the dispute, they can select an expert in their particular field of business to assist them in resolving their dispute.[119] Furthermore, the institutional support of cross-border mediation is strong – most popular international arbitration bodies offer mediation programmes as well.[120] Consumers can additionally rely on the broad network of ADR institutions established by the ADR Directive. Finally, mediation might have an advantage over litigation and arbitration in doing justice to the international character of a dispute as it – in theory – depends even less than arbitration on the application of the

114 For the relationship between litigation and arbitration: *Bermann*, Fordham Int'l L.J. 2011/5, p. 1193.
115 CJEU, Case C-185/07, *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc*., ECLI:EU:C:2009:69.
116 For a recent overview of the relevant case law see: *Hartley*, J. Priv. Int. Law 2021/1, pp. 53 ff.
117 *Strong*, Wash. U. J. L. & Pol'y, 2014/1, p. 27.
118 Ibid.
119 Ibid.
120 *Abramson*, ILSA J. Int'l & Comp. L. 1997/2, p. 324.

rules of a particular national legal system.[121] In cross-border litigation and to a lesser extent international arbitration, the procedural law is determined by the law of the *forum* or the seat of arbitration, respectively. The substance of the dispute will generally also be governed by the law of a particular state. Due to mediation's flexibility and its reliance on the parties' self-determination this is less relevant in international mediation.[122] In international commercial arbitration, attempts have been made to avoid the application of a particular national legal system by resorting to unwritten principles of so-called transnational law, including the *lex mercatoria*. However, for the most part, these attempts have remained vague and unpredictable and thus have not gained broad acceptance.[123] Still, such principles might serve as a sufficient basis for an agreement between the parties in cross-border mediation. Consequently, mediation has the potential to offer a more neutral dispute resolution process that takes better account of the transnational nature of the underlying relationship between the parties of the dispute.[124]

Against this backdrop, it is again surprising that mediation does not share the success of international arbitration. At first sight, this contributes to the notion that the limited use of mediation in a cross-border context is highly irrational. However, the reasons put forward by the Commission and the proponents of the quantitative approach – a cultural preference for adjudicative mechanisms of dispute resolution, limited familiarity with mediation and its benefits and irrational cognitive biases –[125] should have similar effects in domestic disputes. Considering the advantages of mediation in transnational disputes, this suggests that mediation would be used even less in domestic disputes. Yet, the opposite is true. Since the reluctance of parties to engage in private international mediation is not limited to the EU but is a global phenomenon, different explanations are necessary.

II. Private International Law Rules in Cross-Border Mediation

The most fundamental difference between mediation on the one hand and arbitration and litigation on the other concerns the legal framework in cross-border disputes. With the New York Convention, arbitration is supported by a truly international body of law.[126] The New York Convention contains a relatively simple set of uniform PIL-rules that address the fundamental procedural issues of arbitration in a cross-border context, including the enforcement of arbitration agreements as well as the recognition and enforcement of arbitral awards. The Brussels Ia Regulation provides a similar set of core rules for cross-border litigation, which aim to establish the "free movement of judgments" within the EU.[127] For mediation, so far, no com-

121 As will be discussed below (D.III.).
122 *Menkel-Meadow*, in: Rovine (ed.), The Fordham Papers 2014, p. 195.
123 See: *Born*, pp. 2870–2873.
124 *Menkel-Meadow*, in: Rovine (ed.), pp. 193–195.
125 See supra at: A.IV.
126 *Eidenmüller/Großerichter*, in: Basedow et al. (eds.), p. 61.
127 In more detail: *De Cristofaro*, Int. J. Proced. Law 2011/2, pp. 432 ff.

parable legal framework exists. The Mediation Directive and the ADR Directive merely harmonise national rules to a certain extent, but do not provide uniform rules for the cross-border aspects of mediation.[128] To understand the potential benefits of such uniform rules, it is helpful to consider the legal obstacles diverging national PIL-rules can create in cross-border disputes.

Private international law addresses three key problems in transnational disputes. First, it decides which *forum* may seize jurisdiction over the dispute. Second, it determines the law governing the substantive elements of the dispute. Finally, it defines the circumstances under which dispute resolution outcomes are recognised and enforced in a foreign state. Contrary to their designation as "international", PIL-rules are traditionally a part of a country's domestic legal system and thus can vary greatly from country to country.[129] In the absence of international harmonisation, differences between PIL-rules can cause considerable legal risks and uncertainty. This is most evident with respect to litigation, where issues like parallel litigation with diverging outcomes, uncertainty regarding the applicable law and difficulties in enforcing a judgement outside the country of origin adversely affect the efficiency of the dispute resolution process. However, since mediation does not exist in a legal vacuum,[130] it is also affected by PIL-rules. Mediation agreements and MSAs are negotiated in the "shadow of law",[131] concluded as contracts and rendered enforceable only by the authority of a particular state. Thus, in mediation, private international law issues can arise with respect to (1) the legal framework that applies to the mediation procedure itself, (2) the effects of the mediation agreement and the mediation proceedings on simultaneous or subsequent judicial proceedings, (3) the substantive law that governs the rights and obligations of the parties and (4) the effects of a settlement agreement including the conditions for its enforceability in another country.[132] Therefore, PIL-rules have a significant impact on the efficient functioning of mediation in a cross-border context.

III. The Potential of Uniform Private International Law Rules to Create More "Balance" in International Dispute Resolution

It is needless to mention that uncertainties and risks created by the absence of uniform PIL-rules are not the single reason for the limited success of mediation in international disputes. The low uptake of cross-border mediation is likely a result of a multiplicity of factors, including cultural, economic, and legal issues.[133] Also, mediation as a process does not only have advantages for resolving transnational dis-

128 *Eidenmüller/Großerichter*, in: Basedow et al. (eds.), p. 61.
129 *Alexander*, in: Hopt/Steffek (eds.), p. 134.
130 *Eidenmüller*, SchiedsVZ 2005/3, p. 124.
131 See the foundational article of: *Mnookin/Kornhauser*, Yale Law J. 1979/5, p. 950.
132 *Eidenmüller/Großerichter*, in: Basedow et al. (eds.), p. 61.; see also: *Alexander*, in: Hopt/Steffek (eds.), p. 134; *Großerichter*, in: Eidenmüller/Wagner (eds.), pp. 423–431, paras. 1–12.
133 *Menkel-Meadow*, in: Rovine (ed.), p. 193.

putes. For instance, the increased complexity of international commercial relationships, which often involve multiple contracts and parties, has been identified as an obstacle to the efficient functioning of mediation in a cross-border context.[134] Still, for EU legislators, it is worth focusing on the legal issues created by PIL-rules. As highlighted above, European legislators should see it as their core responsibility to create a balanced framework for cross-border dispute resolution where each mechanism is treated equally. Against this background, the absence of PIL-rules for mediation is surprising. As will be demonstrated in the following section (D.), the current legal framework for mediation within the EU presents several obstacles to the efficient functioning of mediation in cross-border disputes. Uniform PIL-rules have the potential to address these problems and secure a smooth interaction between mediation, litigation and arbitration.

It is likely that this would also benefit mediation's actual usage. Empirical studies demonstrate that the choice for a particular dispute resolution mechanism, including mediation, is mainly motivated by a cost-remedy analysis.[135] Ultimately, from the various advantages and disadvantages that are associated with individual dispute resolution mechanisms, saving costs and time are still the most important motives for the parties' choice.[136] Since uniform PIL-rules can significantly increase the predictability as well as time- and cost-efficiency of mediation in a cross-border context, addressing the legal obstacles to the efficient functioning of mediation in a cross-border context can thus be crucial.[137] If neither the parties nor their lawyers can make a reliable prediction about how cross-border mediation proceedings will proceed and which obstacles are to be expected, it is unlikely that the parties to a dispute can be convinced to opt for mediation. The importance of predictable PIL-rules is also evident when parties are faced with the choice of which dispute resolution mechanism to include in their contract. At this stage, envisioning potential disputes and legal obstacles that might occur when trying to resolve future disputes by a certain dispute resolution mechanism is difficult.[138] Without a reliable and predictable legal framework, drafting an appropriate dispute resolution clause is difficult and causes high transaction costs.[139] It is understandable that parties to a contract might not be willing to bear such costs at this early stage when they still hope that no dispute will arise under the contract.[140] Instead, if the parties decide to include a dispute resolution clause, they will likely opt for a mechanism that allows them to use standard form clauses.[141] In this respect, Art. II New York Convention

134 In detail: *Strong*, Wash. U. J. L. & Pol'y, 2014/1, pp. 16–24.
135 *Danov/Bariatti*, in: Beaumont et al. (eds.), p. 589.
136 *Strong*, Wash. & Lee L. Rev. 2016/4, p. 2031; for international commercial disputes see: *Danov/Bariatti*, in: Beaumont et al. (eds.), p. 589.; for consumer disputes see: *European Commission*, Consumers' Attitudes towards Cross-Border Trade and Consumer Protection Final Report 2018, p. 137.
137 *Strong*, in: Titi/Fach Gómez (eds.), pp. 54–57.
138 *Barendrecht/de Vries*, Cardozo J. Conflict Resol. 2005/1, p. 88.
139 Ibid.
140 Ibid.
141 Ibid., pp. 88–89.

provides a uniform standard for the validity of arbitration agreements, which allows the agreement to be enforced in any of the over 160 countries that have adopted the Convention. In addition, the New York Convention sets a uniform standard for most other pressing issues in international arbitration. Within the EU, the Brussels Ia Regulation provides similar assistance if the parties decide to litigate potential disputes. The Regulation sets uniform requirements for binding choice of court agreements, allocates jurisdiction between Member States, reduces the risk of parallel proceedings, and ensures that judgments can be recognised and enforced throughout the EU.

Finally, it is worth considering the historical development of private international dispute resolution, which also suggests that PIL-rules can significantly influence the parties' choice for a dispute resolution mechanism. Using consensual mechanisms to resolve private international disputes was not uncommon during the early 20th Century.[142] It was only in the second part of the 20th Century that conciliation as well as cross-border litigation became increasingly replaced by arbitration as a preferred means of cross-border dispute resolution.[143] While international conciliation fell into relative disuse,[144] the number of arbitrations increased rapidly in the same time period. The ICC's dispute resolution statistics provide an illustrative example for this development. In the early years of the ICC, more disputes were resolved under the ICC's Conciliation rules than by arbitration.[145] This changed fundamentally in the following decades. In 1956, the ICC only reported 32 requests for arbitration.[146] This number has risen to 946 arbitrations in 2020 while requests for mediation, despite setting a new record, remained relatively low at 45.[147] Arbitration's immense rise in popularity is undoubtedly linked with the adoption of the New York Convention, which entered into force in 1959 and, today, is considered the cornerstone of international commercial arbitration.[148] A similar, albeit less pronounced, trend can be observed in cross-border litigation in the EU. The Brussels Convention and its successors are widely regarded as successful PIL-instruments and it is generally accepted that the adoption of the Brussels-regime has increased the efficiency of cross-border litigation within the EU. Although comprehensive statistical data does not exist, this has likely also resulted in an increase of cross-border litigation in most European jurisdictions.[149] Against this background, it is apparent that PIL-regulation of mediation is not only necessary to achieve more equality across international dispute resolution mechanisms but also has the potential to increase its actual usage.

142 *Strong*, Wash. U. J. L. & Pol'y, 2014/1, p. 12.
143 Ibid.
144 *Schwartz*, ICSID Review 1995/1, p. 99.
145 Ibid.
146 *Born*, p. 92.
147 See: https://iccwbo.org/media-wall/news-speeches/icc-announces-record-2020-caseloads-in-arbitration-and-adr (15/6/2021).
148 *Born*, p. 102.
149 *Dnes*, in: Beaumont et al. (eds.), p. 472.

D. Identifying and Overcoming Imbalances in the Current Cross-Border Mediation Regime

The final part of this paper aims to provide specific examples of imbalances in the current European cross-border mediation regime. It is needless to mention that this section cannot provide a comprehensive list of legal issues that contribute to a structural disadvantage of mediation in a cross-border context. Instead, the following examples focus only on the relationship between cross-border mediation and the Brussels Ia Regulation, the main instrument of European Civil Procedure law. While the law of international arbitration has largely developed outside the EU,[150] the EU-created Brussels Ia Regulation supplies uniform PIL-rules for cross-border litigation in EU courts. Therefore, current structural disadvantages of mediation resulting from its interaction with the EU cross-border litigation regime can be directly attributed to EU legislation or the absence thereof. The Brussels Ia Regulation only regulates two of the three key problems traditionally covered by private international law, namely jurisdiction and enforcement. Therefore, the following does not address the choice of law issues of private international mediation in detail. Instead, the focus is on the procedural interaction between mediation and cross-border litigation. In addition to imbalances regarding jurisdiction and enforceability, this section also addresses the management of parallel proceedings, which in principle could be considered a subcategory of jurisdictional issues but deserves separate consideration because of its great practical importance.

I. Imbalances with Respect to Jurisdiction

1. Is there a "Mediation Exclusion" in the Brussels Ia Regulation?

Within the EU, the Brussels Ia Regulation provides rules for jurisdiction in civil and commercial disputes with a cross-border element. The Regulation stipulates a limited number of grounds based on which a Member State court may assume jurisdiction over a dispute. Art. 1(2)(d) Brussels Ia Regulation only explicitly excludes arbitration from its scope. However, this does not necessarily mean that the Regulation applies to mediation and other ADR proceedings. Mediation relies on a voluntary settlement between the parties instead of a decision by a third-party neutral – the mediator merely assists the parties in reaching a settlement. It is already clear from Art. 1(1) Brussels Ia Regulation, which refers to "court or tribunal", that the jurisdictional regime of the Regulation is not directly applicable to cross-border mediation proceedings. Therefore, mediation proceedings themselves are excluded from the scope of the Brussels Ia Regulation.[151] However, uncertainties exist already at this point. Some authors argue that the Brussels Ia Regulation should be applied to

150 See: *Bermann*, Fordham Int'l L.J. 2011/5, pp. 1193–2001.
151 *Hau*, ZZPInt 2016/2, p. 162; *Antomo*, in: Vorwerk/Wolf (eds.), Art. 1 Brüssel Ia-VO, para. 108.

mandatory mediation proceedings.[152] While this has some appeal, particularly in dealing with parallel proceedings,[153] it is hardly reconcilable with the wording of the Regulation, which refers to "court", "court proceedings", "jurisdiction" and "judgment".[154] Although the term "court" within the meaning of the Brussels Ia Regulation is to be interpreted autonomously and, as Art. 2(a) and Art. 3 Brussels Ia Regulation show, is not necessarily restricted to courts in a traditional sense, a minimum requirement should be that the court has the authority to render a binding decision on the parties.[155] Furthermore, if the Brussels Ia Regulation was applied directly to mandatory mediation proceedings, mediators then would have to determine, *inter alia*, whether they have "jurisdiction" under the Regulation (Art. 27 Brussels Ia Regulation) and whether another "court" has been seized first of the same subject matter (Art. 29(1) Brussels Ia Regulation). Moreover, defendants would risk that their participation in the mediation proceedings would amount to a submission to the jurisdiction of the courts of the Member State where the proceedings are held (Art. 26(1) Brussels Ia Regulation). Against this background and taking into account the various forms in which mandatory mediation can be structured and organised under national law, the direct application of the Brussels Ia Regulation to such proceedings likely causes more problems than it solves. Therefore, the jurisdictional rules of the Brussels Ia Regulation should not be applied to mediation proceedings.

The line between mediation proceedings, which fall outside the scope of the Regulation, and litigation is blurred when a court becomes involved in the mediation process. Here, the fact that the Brussels Ia Regulation does not contain an explicit "mediation-exclusion" becomes even more problematic. In this context, it is helpful to consider the controversial relationship between international arbitration and the Brussels Ia Regulation briefly. With respect to arbitration, Recital (12) Brussels Ia Regulation provides that, in essence, the arbitration exclusion in Art. 1(2)(d) should be understood to not only cover arbitral proceedings itself but to also all judicial proceedings with arbitration as principle subject matter.[156] Thus, the arbitration exclusion applies for instance when a court is asked to provide a declaratory judgment over the validity of the arbitration agreement, when the constitution of the arbitral tribunal or the powers of the arbitrators are in dispute or when a party asks a court to issue ancillary injunctions directed at, for example, securing evidence for the arbitral proceedings.[157] Where, on the other hand, the validity of the arbitration agreement is only a preliminary issue in the proceedings or the judicial proceedings are merely related to arbitration but have a civil and commercial matter as their main subject, the Brussels Ia Regulation governs the issue of jurisdiction.

152 *Mankowski*, in: Rauscher (ed.), Art. 1 Brüssel Ia-Vo, para. 242.
153 This will be addressed below under D.II.1.
154 *Hau*, ZEuP 2019/2, pp. 388–389.
155 See: CJEU, Case C-414/92, *Solo Kleinmotoren GmbH v Emilio Boch*, ECLI:EU:C:1994:221, para. 17.
156 In more detail: *Hauberg Wilhelmsen*, pp. 44–45.
157 *Hartley*, Int'l & Comp. L.Q. 2014/4, p. 861.

While the arbitration exclusion together with Recital (12) and several decisions by the CJEU clarifies some issues, the relationship between arbitration and the Brussels Ia Regulation remains subject to an intensive debate.[158] Although similar issues can arise with respect to mediation, mediation's relationship with the Brussels Ia Regulation has hardly attracted any attention. For instance, it is easy to imagine that a court is asked to decide whether a mediation agreement is valid. A preliminary injunction to secure evidence for mediation proceedings is less likely, but also possible, especially when the mediation is carried out like a mini-arbitration. The issue of jurisdiction can also arise when a court orders the parties to take part in a mediation session or when it assists the parties in reaching a settlement in court-connected mediation proceedings.[159]

The Mediation Directive provides no guidance on the issue of jurisdiction in judicial proceedings which relate to cross-border mediation. As regards the Brussels Ia Regulation, the fact that, despite the prior adoption of the Mediation Directive, the Brussels I Recast did not explicitly exclude mediation from its scope suggests that judicial proceedings relating to mediation are covered under scope of the Regulation.[160] If the reason behind the arbitration exclusion is only seen in giving effect to the pre-existing international arbitration regime, this would also argue in favour of including proceedings with mediation as their main subject under the scope of the Brussels Ia Regulation.[161] On the other hand, it cannot be overlooked that the Brussels Ia Regulation does not properly fit for most jurisdictional issues relating to mediation proceedings:[162] Suppose, for instance, the parties to a dispute have agreed to mediate their dispute in London. Pursuant to Art. 4 Brussels Ia Regulation, the courts at the domicile of the defendant would have jurisdiction over all issues relating to the conduct of the London mediation proceedings. This would include a decision on whether the London mediation agreement gives rise to an obligation to participate in the mediation proceedings in good faith and whether a party has fulfilled such obligation. Moreover, the courts at the domicile could also decide whether the London mediator has the necessary qualifications and whether the mediation proceedings complied with the relevant national standards. Since, in this case, the judicial proceedings are evidently most closely connected to London, the place where the proceedings are held, the application of the Brussels Ia Regulation does not produce satisfying outcomes. Furthermore, including court proceedings relating to mediation within the scope of the Brussels Ia Regulation creates problems in mixed proceedings such as "Med-Arb", where mediation is used prior to arbitration as a part of a multi-tiered dispute resolution clause.[163]

Nevertheless, it is preferable not to extend the arbitration exclusion in Art. 1(2) (d) Brussels Ia Regulation to judicial proceedings with mediation as their main sub-

158 For a recent overview see: *Hartley*, J. Priv. Int. Law 2021/1, pp. 53 ff.
159 For the issue of settlements see: *Hau*, ZZPInt 2016/2, p. 163.
160 See: *Dendorfer-Ditges/Wilhelm*, Y.B. on Int'l Arb. 2017/5, pp. 243–245.
161 *Mankowski*, in: Rauscher (ed.), Art. 1 Brüssel Ia-Vo, para. 235.
162 Ibid.
163 Ibid, para. 237.

ject by way of analogy. Applying national PIL-rules to the issue of jurisdiction would most likely not lead to more convincing results and instead cause further uncertainty and unpredictability. In international arbitration, the courts at the "seat" of arbitration generally have jurisdiction for court proceedings relating to arbitration.[164] While this concept of a "seat" is well established in international arbitration, the same is not true for international mediation.[165] The Singapore Convention, albeit only addressing issues at the "back-end" of the mediation process, deliberately does not conceive a "seat" of mediation and instead favours a "delocalised" approach with respect to the enforcement of MSAs, meaning that the enforceability of MSAs does not depend on the domestic law of the jurisdiction where the agreement was made.[166] In absence of an internationally accepted consensus on which courts should have jurisdiction in judicial proceedings relating to mediation, applying the arbitration exclusion also to mediation has no significant benefits. Instead, the contentious issue of how to properly delineate the scope of the Brussels Ia Regulation and international arbitration would be transferred to mediation.

Overall, the practical implications of this problem should not be overestimated. For instance, judicial proceedings concerning the conduct of mediation are significantly less likely to occur than in arbitration, since, ultimately, in mediation the parties themselves are responsible for resolving their dispute.[167] Still, the issue of jurisdiction can arise in various contexts and more legal certainty is necessary. A first step towards a clarification of the relationship of cross-border mediation to the jurisdictional regime of the Brussels Ia Regulation could involve the addition of a Recital that specifically addresses this topic. A further step towards more certainty and predictability would be the design of a uniform jurisdictional rule that attributes jurisdiction in matters concerning cross-border mediation based on connecting factors specifically designed for this purpose.[168]

2. The Enforceability of Mediation Agreements

A different, albeit closely connected, issue that deserves specific discussion concerns the enforceability of mediation agreements. Mediation agreements can either be incorporated into a contract by a clause referring all future disputes arising under the contract to mediation, or concluded *ad hoc*, after a dispute has arisen. The term enforceability of a mediation agreement generally refers to all legal consequences and remedies that either come into effect or are available when a party breaches the me-

164 *Born*, pp. 1651–1652.
165 *Chong*, 'Singapore Convention Series: Why Is There No "Seat" of Mediation?', 1/2/2019, available at: http://mediationblog.kluwerarbitration.com/2019/02/01/singapore-convention-series-why-is-there-no-seat-of-mediation/ (15/6/2021).
166 *Alexander/Chong* (eds.), Art. 1. Singapore Convention, paras. 1.14–1.16.
167 For data on which issues prompt litigation in relation to mediation see: *Coben/Thompson*, Harv. Negot. L. Rev. 2011, p. 57.
168 See: *Salehijam*, Mediation and Commercial Contract Law, p. 156 who provides an example of how such a provision could be designed.

diation agreement. Such consequences can range from, for instance, the inadmissibility of a claim and cost sanctions in the subsequent judicial proceedings to the right of a party to claim specific performance or damages.[169] As noted above, this section will only deal with the procedural aspects of this problem. In this respect, the enforceability of the mediation agreement is relevant from a jurisdictional perspective. Unlike arbitration agreements, mediation agreements do not confer jurisdiction over a dispute to a third-party neutral with decision power. Nevertheless, similar to what is known in arbitration as the negative aspect of the competence-competence doctrine,[170] a mediation agreement can (temporarily) oust a court's jurisdiction. This issue arises if, contrary to a mediation agreement, a party refuses to participate in the mediation proceedings and instead files an action in court. Typically, the court then must decide if it will hear the case despite the (alleged) mediation agreement. Otherwise, it will dismiss the claim for inadmissibility or stay the proceedings in favour of mediation.

The Mediation Directive does not provide an answer as to how a mediation agreement affects judicial proceedings before a Member State court. Even more generally, the Mediation Directive offers barely any guidance on the issue of enforceability.[171] The ADR-Directive at least recognizes in its Art. 10(1) that ADR agreements can have "the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute." However, it is limited to establishing that consumers cannot be bound by such agreements if they were concluded before the dispute arose. Moreover, the provision is unclear in so far as it does not specify whether it only applies to a complete waiver of the right to sue or, as will be more often the case in mediation, also includes a temporary waiver.[172] Finally, the Brussels Ia Regulation is of little help, as it does not address the question whether and under which circumstances the parties may waive their right to pursue a claim in court.

Since European law lacks a harmonised approach, the legal effects of mediation agreements are governed by the applicable national law. In determining the applicable national law, additional problems arise from differing conceptions about the legal nature of such agreements. The uncertainty regarding the legal qualification of mediation agreements is, in turn, caused by the lack of a common understanding on the legal effects of such agreements. Some Member States qualify mediation agreements as substantive in nature, others treat them as procedural or a mixture of both.[173] At least from the perspective of private international law, the latter is the

169 For a comprehensive overview of potential remedies for the breach of a mediation agreement see: *Salehijam*, Mediation and Commercial Contract Law, pp. 56–74.

170 *Mills*, in: Schultz/Ortino (eds.), pp. 90–92.

171 See: *Eidenmüller*, SchiedsVZ 2005/3, pp. 126–127, who already criticized this issue during drafting stage of the Mediation Directive.

172 *Meller-Hannich/Höland/Krausbeck*, ZEuP 2018/1, p. 26; *Hau*, ZZPInt 2016/2, pp. 165–166.

173 *Alexander*, International Comparative Mediation, pp. 176–181.

correct approach.[174] To the extent that mediation agreements are considered contractual, this suggests that the Rome I Regulation,[175] which provides for an autonomous European meaning of contract and is thus independent from the national qualification of mediation agreements, determines the applicable law. Yet, Art. 1(2)(e) Rome I Regulation contains an exception for arbitration agreements as well as choice of court clauses but does not explicitly exclude mediation agreements from its scope. Again, it is not quite certain whether this exclusion should be extended by way of analogy to also include mediation agreements. In this case, national PIL-rules would determine the applicable law. However, it seems that this view is less prominent with respect to Art. 1(2)(e) Rome I Regulation than it is with respect to Art. 1(2)(d) Brussels Ia Regulation.[176] Nevertheless, to the extent that the legal effects of a mediation agreement are directly relevant for the proceedings in a Member State court, the agreement should be qualified as procedural.[177] In accordance with the general rule that procedural issues are governed by the law of the *forum*, this means that at least the question of whether a court will dismiss the claim or stay the proceedings in favour of a mediation agreement is determined by national procedural law.[178] This is in line with the approach most Member States courts have adopted.[179]

It is not surprising that outcomes vary when the law of the *forum* is applied. France, for instance, takes a strict approach towards enforcing mediation agreements. In France, mediation agreements are *prima facie* binding and oblige the parties to attempt to resolve the dispute through mediation first.[180] A claim that is brought in breach of a mediation agreement will be held inadmissible, as long as the parties have not fulfilled this obligation.[181] In other countries, such as Hungary, the existence of a mediation agreement does not prevent a court from hearing the claim.[182] In other Member States, the effects of mediation agreements on court proceedings are still uncertain.[183] In addition to diverging national conceptions regarding the legal effects of mediation in principle, uncertainty arises from differing national standards on how such agreements must be drafted to be effective. Some countries recognize mediation agreements only when they are in written from.[184]

174 *Großerichter*, in: Eidenmüller/Wagner (eds.), p. 431 para. 13; *Steffek*, in: Greger/Unberath/Steffek, para. 5.
175 Regulation (EC) No 593/2008 on the law applicable to contractual obligations ("Rome I Regulation"), OJ L 177 of 4/7/2008, pp. 6 ff.
176 *Großerichter*, in: Eidenmüller/Wagner (eds.), p. 431 para. 37; *Steffek*, in: Greger/Unberath/Steffek, F. para. 5.
177 *Steffek*, in: Greger/Unberath/Steffek, F. para. 8.
178 *Großerichter*, in Eidenmüller/Wagner (eds.), p. 431 para. 37.
179 In detail: *Salehijam*, Mediation and Commercial Contract Law, pp. 47–53.
180 *Deckert*, in: Hopt/Steffek (eds.), p. 468; *Chong/Steffek*, SAcLJ 2019, p. 463.
181 *Deckert*, in: Hopt/Steffek (eds.), p. 471.
182 *Jessel-Holst*, in: Hopt/Steffek (eds.), p. 612; *Alexander*, International Comparative Mediation, p. 175.
183 *Salehijam*, Int'l Trade & Bus. L. Rev. 2018, p. 286; *Alexander*, International Comparative Mediation, p. 174.
184 *Salehijam*, Int'l Trade & Bus. L. Rev. 2018/21, p. 296.

English courts tend to apply a very high threshold for the certainty of mediation agreements. As a result, in several decisions such agreements have been held to be unenforceable for uncertainty.[185] National courts might also have different opinions on how long it is appropriate for a mediation agreement to suspend a party's right to seek judicial redress or on what actions are necessary on behalf of the parties to comply with the obligations arising from the agreement before their claim is allowed to be heard in court. Consequently, even in Member States that are ready to give effect to mediation agreements in principle, different thresholds apply as to when a mediation agreement will be held enforceable.[186]

Besides the general uncertainty caused by a lack of harmonisation, from a jurisdictional perspective there is a real risk that a party will undermine the mediation agreement by issuing a claim in a Member State court whose national law does not consider the agreement enforceable. In this case, the plaintiff can rely on the jurisdictional regime of the Brussels Ia Regulation because the court is seized as of the substance of the dispute. Moreover, if the court refuses to give effect to the mediation agreement and proceeds to decide on the merits of the case, this decision is in principle enforceable throughout the EU as the breach of a mediation agreement does not constitute a ground for non-recognition under the Brussels Ia Regulation's enforcement regime.[187] The means available to the parties to a mediation agreement to mitigate this risk are limited. Even if the mediation agreement – under the applicable national law – imposes a substantive duty upon the parties not to issue a claim before mediation has been attempted unsuccessfully, it is not possible to enforce this duty by means of an anti-suit injunction.[188] With respect to arbitration, the CJEU has established that anti-suit injunctions, albeit directed at the parties of the arbitration agreement, interfere with the right of a Member State's court to determine and exercise its jurisdiction under the Brussels Ia Regulation.[189] Hence, anti-suit injunctions are irreconcilable with the principle of mutual trust established by the Regulation. There is no reason to treat anti-suit injunctions in favour of mediation differently. Furthermore, if the CJEU's approach is applied consistently, this also means that other remedies for the breach of mediation agreements, such as a party's right to claim damages, which are available under some national laws, are problematic in a cross-border context. A court which awards damages for the breach of a mediation agreement on the ground that a party brought an action before the courts of another Member State effectively interferes with that court's jurisdiction in a similar way as an anti-suit injunction would.[190] It is hard to believe that such practice is compatible with EU law.[191] This demonstrates that the considerable freedom in determining the

185 For an overview of the relevant decisions see: Ibid., pp. 287–293.
186 Ibid., p. 296.
187 *Hau*, ZZPInt 2016/2, p. 167.
188 Ibid.
189 CJEU, Case C-185/07, *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.*, ECLI:EU:C:2009:69, paras. 24–28.
190 For arbitration agreements see: *Mankowski*, in: Rauscher (ed.), Art. 1 Brüssel Ia-VO, para. 215.
191 For arbitration agreements see: *Hartley*, J. of Priv. Int. Law 2021/1, p. 64.

legal consequences of mediation agreements, which the Mediation Directive grants to Member States, can be deceptive.

Overall, the lack of a uniform European approach towards the enforceability of mediation agreements creates significant uncertainty as regards the applicable law, their legal effects as well as the available remedies and the requirements for proper drafting of such agreements. Thus, parties that enter a mediation agreement face considerable risks and unpredictability in cross-border disputes as they cannot reliably be assured that a mediation agreement will prevent the other party from pursuing the dispute in court. A study from the United States shows that disputes over the obligations of a party under the mediation agreement are the second most common cause for litigation relating to mediation.[192] Currently, the best way to mitigate the risk of a party undermining the mediation agreement by suing in a *forum* where the agreement is not enforceable is to enter into an exclusive jurisdiction agreement in addition to the mediation agreement.[193] Furthermore, since the law of the *forum* only applies to the procedural part of the agreement, parties should enter into a choice of law agreement as regards the substantive part of the mediation agreement. It is apparent that this renders the construction of an appropriate dispute resolution clause relatively complicated. This legal complexity stands in stark contrast to the "delegalized" approach to dispute resolution that is considered one of the main advantages of mediation.[194] More importantly, the legal complexity of "opting-out" from litigation in favour of mediation causes considerable transaction costs. As discussed above,[195] this is a price parties might not be willing to pay at the stage of contract drafting.[196] The infamous reputation of dispute resolution clauses as so-called "midnight-clauses" also highlights that parties and their lawyers are regularly not willing to devote much time to the design of dispute resolution clauses. The option to draft mediation clauses in a simple and standardized form is thus crucial for mediation to be considered a real alternative for cross-border dispute resolution. The current uncertainty regarding the enforceability of mediation agreements puts mediation in a considerable disadvantage compared to litigation and arbitration. For arbitration, Art. II New York Convention provides the basic conditions under which arbitration agreements must be recognized and enforced. Similarly, Art. 25 Brussels Ia Regulation sets out the basic requirements for exclusive choice of court agreements. Therefore, both arbitration and litigation provide a relatively simple and reliable way to ensure that a dispute is resolved by the institution or court which the parties have chosen.

Despite evidence that the overwhelming number of stakeholders in international mediation would favour the introduction of a similar instrument for international

192 *Coben/Thompson*, Harv. Negot. L. Rev. 2011, p. 57; *Salehijam*, Mediation and Commercial Contract Law, p. 150.
193 See: Art. 25 Brussels Ia Regulation.
194 See e.g.: *Nussbaum*, Utah L. Rev. 2016, p. 381.
195 See: C.III.
196 *Barendrecht/de Vries*, Cardozo J. Conflict Resol. 2005/1, p. 88.

mediation,[197] during the drafting of the Singapore Convention the issue of enforceability of mediation agreements was deliberately left out. The main argument put forward was that it would be difficult to define the scope of a mediation agreement and that parties, during the negotiations, might find it necessary to include matters not contemplated in the mediation agreement.[198] However, this argument is hardly convincing as determining the scope of a mediation agreement is not fundamentally different from defining the scope of an arbitration agreement. Moreover, the scope of the agreement is even less relevant in mediation, since the mediator has no decision power and the parties ultimately either amicably resolve the dispute or, after failing to do so, proceed to litigation or arbitration. Finally, the concern that the parties could be restricted by the mediation agreement in negotiating a settlement is also unfounded. A mediation agreement merely defines the issues which the parties *must* attempt to resolve by mediation and does not have any bearing on which issues the parties *can* address during the process. This suggests that the real reason for the decision to exclude mediation arrangements from the scope of the Singapore Convention was to avoid further complicating the process of building consensus in the difficult multilateral negotiations. Since, pursuant to Art. 81(1)(2)(g) TFEU, the EU has the legislative competence to unilaterally adopt PIL-rules with respect to cross-border mediation, the EU is in a fundamentally different position. Considering the problems discussed above, it would be highly advisable for the EU to adopt a provision setting out uniform conditions for the enforceability and the legal effects of mediation agreements.[199] Since most mediations arise from pre-dispute clauses, this will likely benefit the actual use of mediation in cross-border disputes.[200]

II. Imbalances in the Management of Parallel Proceedings

Another important issue in international civil procedure law is the management and avoidance of parallel proceedings. The Brussels Ia Regulation resolves jurisdictional conflicts between courts in cases involving the same subject matter by a strict "first come, first served" rule. Pursuant to Art. 29 Brussels Ia Regulation, any court other than the court first seized must stay its proceedings until the court first seized has determined its jurisdiction. Under the Brussels Ia Regulation, parties can regularly choose between several courts which have jurisdiction to hear the case. Being able to fix the *forum* by suing first can create a considerable tactical advantage, as this allows a party not only to determine the court but also the accompanying procedu-

197 *Strong*, Wash. & Lee L. Rev. 2016/4, p. 2051; See also: *Chong/Steffek*, SAcLJ 2019/31, pp. 462–463.

198 The United Nations Commission on International Trade Law, Working Group II (Dispute Settlement), Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-third Session, Doc. A/CN.9/861, 17/09/2015, para. 69.

199 In more detail on what such provision could cover: *Salehijam*, Mediation and Commercial Contract Law, p. 150.

200 *Strong*, Wash. & Lee L. Rev. 2016/4, p. 2026.

ral law. On the other hand, if a party hesitates to file a claim in court, they face the risk of having to defend themselves against a pre-emptive strike in a court chosen by the other party. Art. 29 Brussels Ia Regulation can also be used to merely delay the resolution of the dispute: Unwilling debtors have abused negative declaratory actions known as "Italian-torpedo actions" by suing in courts known for excessively long proceedings, thereby blocking actions for performance by the other party throughout the EU.[201] Art. 29 Brussels Ia Regulation therefore encourages a "race to the courthouse", in which the party bringing an action first can secure a tactical advantage.

1. The "Race to the Courthouse" and Mediation

As noted above, the jurisdictional regime of the Brussels Ia Regulation does not apply to mediation proceedings. Because of this and the fact that Art. 29 Brussels Ia Regulation only uses the word "court", the initiation of mediation proceedings in itself generally has no *lis pendens* effect.[202] This has significant side effects on the use of cross-border mediation. The "race to the courthouse" under Art. 29 Brussels Ia creates a strong incentive for parties to secure jurisdiction in the preferred forum before trying to settle the dispute amicably.[203] On the same token, lawyers are also less likely to encourage their clients to try mediation, as they risk being held liable if they do not, as a first step, file a claim in the country whose law promises the best outcome for their client.[204] The fact that a party who proposes to resolve the dispute by mediation has to potentially give up the tactical advantage of being able to sue first renders a proposal for mediation highly unlikely once a dispute has arisen.[205] That the "race to the courthouse" creates a hostile environment for cross-border mediation has also caught the attention of European legislators. In the new Brussels IIb Regulation,[206] which deals with jurisdiction in family law matters and enters into force on 1 August 2022, Recital (35) proposes the following:

> Taking into account the growing importance of mediation and other methods of alternative dispute resolution, also during court proceedings, in accordance with the case-law of the Court of Justice, a court should also be deemed to be seised at the time when the document instituting the proceedings or an equivalent document is lodged with the court in cases where the proceedings have in the meantime been suspended, with a view to finding an amicable solution, upon application of the party who instituted them, without the document instituting the proceedings having yet been served upon the re-

201 While the scope for such actions has been restricted under the Brussels Ia Regulation, there are still scenarios in which torpedo actions can be possible; see: *Kenny/Hennigan*, Int'l & Comp. L.Q. 2015/1, pp. 197 ff.
202 *Hau*, ZEuP 2019/2, p. 389.
203 *Danov/Bariatti*, in: Beaumont et al. (eds.), p. 690–691.
204 Ibid., p. 691.
205 For other potential barriers to choosing a non-default mechanisms *ex post* see: *Barendrecht/de Vries*, Cardozo J. Conflict Resol. 2005/1, pp. 94–111.
206 Council Regulation (EU) 2019/1111 ("Brussels IIb Regulation"), OJ L 178 of 2/6/2019, pp. 1 ff.

> spondent and without the respondent having had knowledge about the proceedings or having participated in them in any way, provided that the party who instituted the proceedings has not subsequently failed to take any steps that he or she was required to take to have service effected on the respondent.

By the length of this sentence alone it is apparent that the Brussels IIb Regulation has not come up with a simple solution. Recital (35) mainly reiterates that parties may return to mediation after a court has been seized. Furthermore, it clarifies that a court is also deemed to be seised when an application for a stay of the proceedings is made without the knowledge of the defendant. Since Recital (35) only provides guidance on the interpretation of the relevant time at which a court is deemed to be seised for the purpose of the Regulation (Art. 17 Brussels IIb Regulation),[207] it offers little help, if, for instance, under national procedural law a stay of the proceedings requires an application by *both* parties. Under German Civil Procedure law, the claimant has no influence on the time at which the claim will be served upon the defendant and an application for the stay of the proceedings requires at least some form of consent by the defendant.[208] Therefore, in Germany, a claimant cannot on its own apply for a stay of the proceedings pending the outcome of an attempt to reach an amicable solution to the dispute. In any case, the solution proposed by Recital (35) does not exempt a party from the need to initiate judicial proceedings in accordance with the respective national procedural law to secure jurisdiction in the preferred forum. Consequently, mediation at least becomes less attractive. A major advantage of mediation is that it promises a resolution to a dispute that is not based on the *legal positions* but rather the *interests* of the parties. This advantage of mediation is impaired if a party must first ensure to file a proper claim – in cross-border disputes this can be rather complicated – before being able to resolve the dispute by mediation without compromising one's legal position. Moreover, pending court-proceedings can contribute to an adversarial atmosphere between the parties and thus increase the difficulty of reaching a settlement. Finally, the involvement of a court also generates additional costs even if the dispute is eventually settled in the mediation proceedings.

It does not seem possible to resolve these issues by simply equating the initiation of mediation and other ADR proceedings with the initiation of court proceedings under Art. 29 Brussels Ia Regulation. This would give rise to significant legal uncertainty and could even create additional potential for abuse, for instance in the form of "torpedo mediation applications".[209] A more feasible option could be the adoption of a uniform provision that allows for a stay of the proceedings upon application by the claimant if evidence of an attempt to resolve the dispute amicably by mediation is provided. In addition, the EU should continue to reduce the potential for abusive litigation tactics as this will also lower the incentive to participate in the race to the courthouse. Another way to address this problem and increase the use of

207 The equivalent rule of the Brussels Ia Regulation is Art. 32(1).
208 *Becker-Eberhard*, in: Krüger/Rauscher (eds.), § 271 ZPO, para. 20.
209 *Hau*, ZEuP 2019/2, p. 389.

mediation, although admittedly a vision of the future, could involve structural changes to the court system itself. By transforming courts into "multi-door courthouses" where mediation is offered as equal alternative to litigation, the race to the courthouse could as well be a race to mediation.[210]

2. Mandatory Mediation and lis pendens

A slightly different problem occurs if a party is required to participate in mediation proceedings pursuant to the national law of a Member State. Since mediation proceedings generally do not have a *lis pendens* effect, the claimant could lose the "race to the courthouse" if the defendant files a claim in another Member State while mandatory mediation proceedings are pending. This issue was recently the subject of the CJEU's decision in *Schlömp*.[211] In *Schlömp*, the court held that in view of the duties conferred upon it by the Swiss Code of Civil Procedure, a Swiss conciliation authority should by exception be treated as a "court" within the meaning of the Lugano Convention.[212] The decision of the CJEU suggests that certain procedural minimum standards must be fulfilled for a conciliation authority to be considered a court for the purpose of *lis pendens*.[213] The judgment also emphasises that the conciliation authority had the authority to render a binding decision for low value claims.[214] Recital (35) of the Brussels IIb Regulation on the other hand, albeit referring to the CJEU's decision, indicates that the mere fact that conciliation proceedings are mandatory is sufficient:

> According to the case-law of the Court of Justice, in the case of lis pendens, the date on which a mandatory conciliation procedure was lodged before a national conciliation authority should be considered as the date on which a 'court' is deemed to be seised.

Instead of generally attributing a broader meaning to the term court, Recital (35) suggests that Art. 17 Brussels IIb Regulation or Art. 32 Brussels Ia Regulation respectively, which define the time at which a court is deemed to be seised, should be interpreted to also cover the initiation of mandatory mediation proceedings. This approach seems preferable, as it is in line with the procedural principle of equality of arms, which is reflected in Art. 32 Brussels Ia Regulation.[215] Nevertheless, many open questions remain. It is unclear, for instance, whether conciliation proceedings can be considered mandatory, if the failure to pursue such proceedings is only subject to monetary sanctions and does not lead to the inadmissibility of the claim.[216] Moreover, by using the term "national conciliation authority" Recital (35) seems to

210 The concept of a multidoor courthouse was originally proposed by *Sander*, F.R.D. 1976, p. 131.
211 CJEU, Case C-467/16, *Brigitte Schlömp v Landratsamt Schwäbisch Hall*, ECLI:EU:C:2017:993.
212 Ibid., para. 55.
213 Ibid., para. 53.
214 Ibid.
215 *Hau*, ZEuP 2019/2, pp. 391–393.
216 Ibid., p. 393.

suggest that only conciliation proceedings before publicly organized ADR bodies can have a *lis pendens* effect. This may be understandable against the background that Art. 20 Brussels IIb Regulation, just like Art. 29 Brussels Ia Regulation, only refers to "courts". Nevertheless, for the parties it hardly makes a difference whether mandatory ADR proceedings are organized under public or private law.[217] To address the issues created by the *lis pendens* rule in the case of mandatory mediation, therefore, neither the solution which attributes a broader meaning to the concept of court, nor an extensive interpretation of Art. 32(1) Brussels Ia Regulation is sufficient. Since Recital (35) and the decision of the CJEU point in somewhat different directions, further clarification by European legislators is necessary. Such clarification should also address the question under which circumstances mediation proceedings can be considered mandatory.

3. Lis pendens and Mediation Agreements

Finally, it is safe to assume that even the broadest possible understanding of the word "court" and the most expansive interpretation of Art. 32(1) Brussels Ia Regulation do not allow for an extension of the *lis pendens* rule to mediation proceedings if the obligation to participate in such proceedings results from a mediation agreement between the parties.[218] In this case, the fact that Art. 29 Brussels Ia Regulation is not applicable has the consequence that a party can undermine the ongoing mediation proceedings by issuing a claim in a Member State which does not recognize the enforceability of the agreement.[219] As noted above, the means to mitigate this risk are currently limited.[220] This again underlines the need for uniform PIL-rules on the validity and enforceability of mediation agreements.

III. Imbalances in the Enforcement of Mediation Settlement Agreements

MSAs are, apart from rare instances in which the agreement falls short of a legally binding outcome,[221] concluded as contracts. Ideally, this contract is honoured on a voluntary basis. However, just like with any other contract, this will not always be the case. If a party needs to enforce the MSA, it is possible to simply issue an action for performance of the contract in any competent Member State court and to then proceed to enforce the judgment. In this case, however, mediation would be relatively redundant as a dispute resolution mechanism. Enforcing MSAs as contracts not only produces significant additional costs and delay, it also merely postpones judicial proceedings instead of replacing them. Although it is often reiterated that

217 Ibid.
218 See also: *Hau*, ZEuP 2019/2, p. 394.
219 See *supra* D.I.2.
220 See: D.I.2.
221 *Alexander*, International Comparative Mediation, p. 300.

MSAs have a greater chance of performance,[222] there is a considerable potential for abuse if a party agrees to mediation with the mere intention to delay fulfilling its contractual obligations. It is hard to imagine that in a commercial context where settlements can involve large sums of money, potentially due to be paid in instalments over a longer period, a party will be satisfied with the mere assurance of the other party that – this time – it will adhere to its contractual obligations.

Hence, there is a need for an alternative mechanism for enforcement of MSAs that does justice to mediation's function as a dispute *resolution* mechanism. As already noted above, Art. 6 Mediation Directive obliges the Member States to ensure that MSAs can be made enforceable. However, Art. 6 falls short of providing a uniform mechanism for the enforcement of MSAs.[223] Instead, the means by which MSAs can be made enforceable remain subject to the law of the Member State where the application for enforcement is made.[224] This does not necessarily have to be the Member State in which the mediation proceedings took place.[225] In some Member States certain MSAs are directly enforceable.[226] Most Member States, however, require additional procedural steps to render the agreement enforceable. Given the plurality of legal systems in the European Member States it is unsurprising that the national mechanisms for enforcement of MSAs vary considerably.[227] The necessary procedural steps can involve declarations or other documents issued by either the parties' lawyers, a notary public, a settlement body, a court, or a certain administrative authority, etc.[228] Consequently, MSAs can take various forms, depending on the applicable national enforcement mechanism – the Mediation Directive itself, for instance, envisions a "judgment, decision or authentic instrument".[229] In most Member States, the additional step of rendering the MSA enforceable again requires the consent of both parties – a request by only one party is not sufficient.[230] National law also determines if and to what extent MSAs are subject to review. Member States, for instance, might check either *ex officio* or upon application of a party if the agreement complies with its public policy or mandatory law or infringes the rights of third parties.

Once the agreement has taken the hurdles for enforceability on a national level, the cross-border enforceability is determined by the applicable EU PIL-instruments.[231] Since there is no specific EU instrument for the cross-border enforcement of MSAs, it is necessary to match the form in which the MSA has been vested under Member State law with the corresponding European instrument for cross-border

222 See for instance: *Hopt/Steffek*, in: Hopt/Steffek (eds.), p. 45.
223 *Alexander*, International Comparative Mediation, p. 301.
224 Art. 6(2) Mediation Directive.
225 *Steffek*, in: Greger/Unberath/Steffek (eds.), para. 51.
226 *Hopt/Steffek*, in: Hopt/Steffek (eds.), p. 46.
227 *Meidanis*, J. Priv. Int. Law 2020/2, pp. 281–283.
228 *Hopt/Steffek*, in: Hopt/Steffek (eds.), p. 45.
229 Ibid.
230 *Hopt/Steffek*, in: Hopt/Steffek (eds.), p. 47.
231 *Meidanis*, J. Priv. Int. Law 2020/2, p. 283.

enforcement.[232] For instance, MSAs can be enforced under the Brussels Ia Regulation if the agreement falls within the scope of the Regulation and takes the form of judgment, settlement agreement or authentic instrument.[233] For family law matters the enforcement regime of the Brussels IIa Regulation applies. Subject to certain conditions, MSAs can also be enforced in accordance with other EU PIL-instruments, such as Regulation (EC) No 805/2004,[234] if the MSA provides for the payment of a fixed sum on a certain due date – an instrument which hardly encourages creative settlements.[235]

Although Art. 6 Mediation Directive in theory provides a high level of enforceability of MSAs within the EU, the complicated interplay between national law and EU PIL-instruments renders cross-border enforcement difficult. It will be hardly possible for a party to avoid consulting a local lawyer in Member State where the application for enforcement is made. The multiple steps required to first ensure the enforceability of the MSA on a national level to then obtain a title which is enforceable throughout the EU stand in stark contrast to the promise of mediation as an informal process. Furthermore, the desire to avoid unfamiliar foreign procedural law can be one of the reasons why parties considered choosing mediation in the first place. This is especially relevant since national law also determines the scope of review for the national enforcement instrument in which the MSA is vested and thus creates a gateway for the involvement of national courts. As regards the actual cross-border enforcement, the need to match the MSA with a compatible EU PIL-instrument for cross-border enforcement further adds to the legal complexity of the enforcement proceedings. Considering that the pro-enforcement regime created by the New York Convention is widely regarded as the main reason for the international success of arbitration, the significance of an efficient enforcement mechanism for the success of cross-border dispute resolution should be apparent.

The twisted path to cross-border enforcement of MSAs within the EU thus constitutes a considerable structural disadvantage of mediation compared to litigation and arbitration. A uniform PIL-regime for the cross-border enforcement of MSAs would provide a neutral mechanism for enforcement that does justice to the *international* character of the dispute. If, as the concept of a balanced relationship indicates, mediation is to be treated as an equal alternative to litigation and arbitration, this also requires that MSAs are provided with a distinct enforcement mechanism.[236] Stakeholders in international mediation overwhelmingly share the belief that this would have a beneficial effect on the use of mediation in cross-border disputes.[237]

232 *Esplugues/Iglesias*, in: European Parliament 2016, p. 82.
233 See: Art. 2, Art. 36, Art. 39, Art. 58 and Art. 59 Brussels Ia Regulation.
234 Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143 of 30/4/2004, pp. 15 ff.
235 In more detail on the European instruments applicable for the enforcement of MSAs: *Großerichter*, in: Eidenmüller/Wagner (eds.), pp. 458–459, paras. 64–67; *Hau*, ZZPInt 2016/2, pp. 172–173.
236 *Meidanis*, J. Priv. Int. Law 2020/2, pp. 295–299.
237 *Strong*, Wash. & Lee L. Rev. 2016/4, p. 2055.

The Singapore Convention, albeit with a limited scope, introduces such a mechanism for the "direct enforcement" of MSAs. Under Art. 3 Singapore Convention, an international MSA as defined in Art. 1 Singapore Convention can be either enforced or used as a defence against claims in each signatory state. Art. 5 Singapore Convention provides an exhaustive list of grounds on which the enforcement may be refused. Overall, the Singapore Convention breaks new ground by equipping mediation with its own international enforcement regime. If mediation is to become a real alternative to litigation and arbitration in cross-border disputes in the future, this step is both consequential and necessary. International arbitration and, within the EU, cross-border litigation can rely on an international instrument for the enforcement of dispute resolution outcomes. The 2019 Hague Judgments Convention[238] aims to establish a legal framework for the cross-border enforcement of judgments on an international level. Against this background, a direct enforcement mechanism for international MSAs would ensure consistency and equality across dispute resolution mechanisms and thus would contribute to achieving a more balanced legal framework for cross-border dispute resolution. While the best approach to align the Singapore Convention with the Mediation Directive and the current EU enforcement regime must remain open for future discussion – besides an adoption of the Singapore Convention, the implementation of the updated 2018 UNCITRAL Model Law is also an option –, it is apparent that the current rules are insufficient. Therefore, the EU should not hesitate to take the necessary steps to adopt and implement the Singapore Convention in its framework for cross-border mediation. This, in turn, could be seen as an opportunity to gain the necessary experience for the introduction of a general mechanism providing for the direct enforcement of MSAs within the EU.

E. Conclusion

This paper has demonstrated that more than promotional efforts will be necessary to increase the use of cross-border mediation within the EU. However, instead of correcting alleged decision deficits by changing defaults and nudging, it is the primary legislative responsibility of the EU to first ensure that the legal framework for cross-border disputes does not impair the effectiveness of mediation as opposed to litigation and arbitration. In this respect, the relationship between mediation and private international law offers plenty of room for improvement. The current legal framework for cross-border mediation within the EU contains many structural flaws, which provide legitimate reasons for parties to refrain from using cross-border mediation. The most pressing issues are the lack of a uniform rule regarding the enforceability of mediation agreements and the absence of a distinct instrument for

238 Hague Conference on Private International Law, 41: Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=137 (15/6/2021).

the enforcement of MSAs. Addressing these structural obstacles will not only achieve more equality across dispute resolution mechanisms, it will likely also benefit the uptake of mediation without driving parties into settlement. While it is not surprising that the development of a balanced framework for cross-border dispute resolution takes time, it is disappointing that the EU's commitment to integrating mediation in its cross-border dispute resolution system seemingly has waned. One can only hope that the Singapore Convention provides new impulses for European legislators to further pursue their once ambitious objective to establish a balanced framework for cross-border dispute resolution.

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