THE SINGAPORE CONVENTION, THE EU AND ITALY: THE LONG RUN TOWARDS THE SIGNING OF THE CONVENTION

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I. THE STATE OF THE ART

Last August, during the official signing ceremony, 46 states signed the Singapore Convention, including China and the US. More recently, at the Treaty event entitled "Treaties in Support of the 2030 Agenda for Sustainable Development" held at the United Nations headquarters in New York from 24 to 27 September 2019, five more states signed the Convention (Armenia, Chad, Ecuador, Gabon and Guinea-Bissau). As of 29th January 2020, Rwanda has become the 52nd signatory state. No one can help but notice the significant absence of the European Union and all of its member states.

Many have suggested that the fact that the European Union and Great Britain haven't signed the Singapore Convention will diminish its global relevance. Following this assumption, the momentum gained from the Convention in civil and commercial mediation stands to benefit the countries signing in Asia and the Pacific region, including the US, but will not have a global impact, for now leaving Europe excluded.

I respectfully disagree with this idea.

The fact that mediation in the far eastern side of the globe has flourished does not mean that it has diminished on the globe's other sides. This is especially true when one considers that the first effect of the Singapore Convention, even before it is ratified by

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the signatory states, is to put the focus on mediation as a tool to resolve international conflicts. The European Union first did this ten years ago.

II. THE EU DIRECTIVE 2008/52/CE

As a matter of fact, before becoming positive law in and of itself, Directive 2008/52/CE on cross-border mediation acted as a catalyst for the attention and efforts of governments, law-practitioners, and economic actors. It showed them the concrete benefits that mediation offers, much like the Singapore Convention is doing now.

In the European Union, the Directive set out the framework and the principles which the member states had to respect and aspire to when legislating in civil and commercial mediation. But it was more than that. The EU also requires new countries which want to join the Union to include in their internal legislation laws favorable to alternative dispute resolution, both generally and specifically favorable to commercial and civil mediation. The directive had a huge impact on mediation development in the member states, especially in countries such as Italy, Spain, and Greece.

To think that the European Union can now be absent on the world stage of international commercial mediation makes no sense at all. This is even more true in the case of Italy, with its huge amount of accumulated experience in the last decade. The European Union and Italy simply must be a part of the conversation on international commercial mediation.

That being said, it's true that the news that Europe didn't sign the treaty was met with a bit of disappointment by supporters of mediation across the continent.

III. THE POSITION OF THE UE

As it is reported in the report on the panel on negotiation on the Singapore Convention (Singapore, 7 August 2019, lunch-time panel) Dr. Norel Rosner, Legal and Policy Officer, Directorate-General for Justice and Consumers of the European Commission, said that the EU would have preferred a soft-law instrument to

govern the question of executability of agreements made in mediation, i.e. something without direct binding effect, instead of an international convention. As the negotiations progressed, the European Union favored the two-track strategy made up of a convention and a model law.

Dr. Rosner also confirmed that that the European Union started an assessment procedure for the Singapore Convention in February of 2019 and that this process would take a bit of time. This is because it must take into account all of the interested parties, not just the member states, but also the commercial, economic, and financial actors.

IV. Is There an Exclusive Competence of the UE to the Signing of the Convention?

Just before the official signing ceremony, the minister of Internal Affairs and Justice of Singapore, K. Shanmugan, explained that the European Union hadn't signed because it was still examining the possibility of the Union itself signing versus each individual member state. The minister referred to a legal question which was well founded and deserves further consideration.

Article 3, paragraph 2, of the Treaty of the Functioning of the European Union states: "The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope." The signing of the Singapore Convention would fall directly under this article.

In an opinion from the European Court of Justice from the 7th of February, 2006, with regards to signing the new Convention of Lugano, the court examined whether the power to sign was an exclusive or a shared competence of the EU. This was specifically concerning the judicial competence and the capacity to execute decisions in civil and commercial issues. The Court strongly confirmed that this was an exclusive competence of the European Union. It is also noteworthy that the new Lugano Convention, much like mediation, falls within the scope of civil and commercial judicial cooperation.

And this opinion makes a lot of sense. The European Union must avoid situations of contradiction between the legislation of different member states when it comes to jurisdiction and enforceability.

Therefore, it makes sense, from my point of view, that Europe proceeds with healthy caution, valuing every aspect of the case while listening to the interests of the parties involved.

The fact that the negotiations on the convention lasted only three years is noteworthy and reflects the strong interest in mediation of international commercial disputes. However, it also may not have left the EU the necessary time to carry out all the steps required to allow for its signing and subsequent ratification.

Within the European Union there already exist consolidated and sophisticated mechanisms upon which the recognition of executive actions among the member states can be based. As far as mediation is concerned, the mediation directive itself states in article 6 paragraph 2 that the agreements reached in mediation can be rendered enforceable in a judgment, a decision, or an authentic act of a court or other competent authority. In addition, in preamble subpoint 20 of the directive you can read that: "The content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognized and declared enforceable in the other Member States in accordance with applicable Community or national law".

Therefore, Europe is by no means a stranger to the idea of the recognition of enforceability with regards to agreements reached in mediation, also at the international level. In fact, the opposite is true.

In countries such as Italy where the agreements reached in mediation are already legally enforceable according to art. 12 D. Lgs. 28/2010, the fact that an agreement reached in an international mediation would also have the same force of law would simply be a bonus. This is said also recognizing that in certain European countries such as Belgium, Cyprus, Croatia, Lithuania, and Spain, regardless of the value of the agreement reached in mediation, the European Mediation Directive has already been accepted into their respective national legislations with regards to international mediation regulation. Therefore, also for these states the acceptance of the Singapore Convention would represent solely added value.

In addition, the Council of Europe's Commission for the Efficiency of Justice (CEPEJ), of which the Russian Federation is

a member state, recommended in its recent European Handbook for Mediation Lawmaking that member states should take into consideration the ratification of the Singapore Convention to assure the efficient recognition of agreements reached in international mediation.

Therefore, from my point of view, the point at which the EU accedes to the Singapore convention will be the right time. This will be when all of the interested parties have been heard, and when all of the potential issues with regards to the risk of contradictions between the Convention and individual national laws have been seen and resolved.

V. In Conclusion

The development of a multilateral treaty such as the Singapore Convention constitutes a reference base for the international community, with the hope that it will support and promote the development of international commercial mediation as a method of dispute resolution. It is my opinion that the EU and Italy, of course, is naturally destined to be part of it and to promote the further development of international commercial mediation.