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ENFORCEMENT OF NEGOTIATED AND MEDIATED SETTLEMENTS IN THE EU AND IN THE ANGLOSPHERE: A COMPARATIVE APPROACH

Abstract

This article compares enforcement of negotiated and mediated settlements across members of the EU and the 'Anglosphere'. While both EU and Anglosphere jurisdictions tend to treat a negotiated settlement as a contract the parties can, jointly with the court, transform into an enforceable court order, a practice in Anglo but not civil law is a court order permanently dismissing a case pursuant to a settlement the court does not see. Moreover, EU and Anglo countries tend to have greater differences in relation to mediated settlements. Anglo courts tend to treat them similarly to negotiated settlements, while some EU countries make it easier for parties to obtain court approval of a mediated settlement than a negotiated settlement.

The article begins with the enforceability of negotiated settlements as contracts and then compares methods of making negotiated settlements as enforceable as court orders. It then compares Anglo treatment of mediated settlements largely as negotiated settlements with

EU jurisdictions that provide a separate right to enforce mediated settlements. Finally, it shows how contrasting Anglo and EU approaches to mediated settlements emerged in Brexit and the Singapore Convention.

KEYWORDS

Alternative Dispute Resolution, negotiation, mediation, release, negotiated settlement, mediated settlement, enforcement of negotiated settlement, enforcement of mediated settlement, approval of negotiated settlement, approval of mediation settlement, settlement, amicable settlement, court settlement

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alternatywne metody rozwiązywania sporów, negocjacje, mediacja, zwolnienie z długu, ugoda wynegocjowana, ugoda mediacyjna, wykonalność ugody wynegocjowanej, wykonalność ugody mediacyjnej, zatwierdzenie ugody mediacyjnej, ugoda, ugoda polubowna, ugoda sądowa

I. INTRODUCTION

Law throughout the EU and large ‘Anglosphere’ jurisdictions (the US, England, Canada, and Australia) permits parties to civil litigation to end their cases by agreement, whether the agreement is concluded in negotiation or mediation. And both EU and Anglo jurisdictions tend to treat a negotiated settlement like a contract the parties can, jointly with the court, convert into an enforceable title or a consent judgment. However, Anglo and EU jurisdictions tend to diverge more with respect to mediated settlements, which Anglos tend to treat more similarly to negotiated settlements, but which the EU and civil law nations within it tend to treat more differently from negotiated settlements.

These differences in law may be accentuated by differences in legal costs and culture. In Anglo jurisdictions, discovery-intensive litigation is expensive and negotiated settlements have long been the usual way litigation is resolved.¹ So mediated settlements are often just a slightly different way of doing something

¹ Yun-chien Chang, Daniel Klerman, ‘Settlement Around the World: Settlement Rates in the Largest Economies’ (2022) 14(1) *Journal of Legal Analysis* 80–175, <<https://doi.org/10.1093/jla/laac006>> accessed 11 April 2023 (‘Common law countries, such as the US, UK, and Australia, tend to have the highest settlement rates. Countries with legal systems based on French civil law, such as France and Belgium, tend to have the lowest settlement rates. Countries with legal systems

lawyers often do, which is settle. In the civil law systems of EU nations, by contrast, discovery is more limited, lawyers and litigation are not so expensive, and negotiated settlements are less common.² So mediated settlements are quite different from what lawyers usually do, which is litigate to the end. In such a nation, mediated settlements may look more similar to arbitration awards than to negotiated settlements because both mediators and arbitrators are third-party neutrals whose professional credibility may increase courts' willingness to enforce outcomes to which they contributed.

Part II of this article shows the enforceability of negotiated settlements as ordinary contracts in both the Anglo and EU jurisdictions noted above. Part III compares methods for making negotiated settlements more readily enforced than ordinary contracts. Part IV contrasts Anglo jurisdictions, which largely treat mediated settlements like negotiated settlements, with EU jurisdictions, which provide separate law – including separate grounds to deny enforcement – for mediated settlements.

II. ENFORCEABILITY OF NEGOTIATED SETTLEMENTS AS CONTRACTS

We define a 'settlement' (much as some people would define an 'amicable settlement') as an agreement resolving a dispute and thus preventing or ending litigation or arbitration. Some settlements address multiple claims each party has against the other, or many parties' claims, but for simplicity this article speaks of settling one claim a plaintiff or potential plaintiff (P) has against the defendant or potential defendant (D). In that context, a settlement is the sale of a claim by P to D, and the sales price is whatever D pays or promises to pay P, which is typically but not necessarily money.³

If a claim has not yet been asserted in court, a potential P who could sue D may instead accept some negotiated amount of money from D in exchange for whatever (then-unknown) remedy P would win from suing. Generally, across the

in the German or Nordic civil law families, such as Germany, China, and Sweden, tend to have middling settlement rates').

² Ibid (n 1) ('For some countries, such as Russia, Poland, France, and Turkey, even the highest estimate of the settlement rate is under 20%, indicating that the true settlement rate is clearly very low').

³ Stephen J Ware, *Principles of Alternative Dispute Resolution* (4th edn, West Academic Publishing 2023) § 3.3; Keith N Hylton, 'Selling Out: An Instrumentalist Theory of Legal Ethics' (2021) 34(19) *The Georgetown Journal of Legal Ethics* 54 ('A settlement occurs when the defendant, the violator of the plaintiff's right, purchases the claim from the plaintiff').

Anglosphere and EU nations, D's performance of P's settlement – even though the settlement was concluded privately, with no involvement by a court – typically precludes P from further recovery on the claim P sold to D. So, if after accepting the full settlement payment from D, P nevertheless sues D on that claim, D will present the court with proof of the settlement (typically a document at least P signed) and D's payments required by the settlement, which will prompt the court to dismiss P's suit permanently, unless P can show that the settlement is unenforceable under a ground that would make any contract unenforceable.

For example, France's Civil Code states that 'a settlement is a contract by which the parties resolve an existing dispute or prevent a dispute from arising'.⁴ The settlement prevents the parties from instituting or continuing legal proceedings with the same subject matter'.⁵ Similarly, the German Civil Code defines a settlement as 'a contract by which a dispute or uncertainty of the parties with regard to a legal relationship is removed by way of mutual concession'.⁶

Anglosphere nations also treat settlements like other contracts and thus permanently dismiss claims covered by them.⁷ 'Since a settlement is merely an agreement or contract to end a dispute', its formation,⁸ interpretation,⁹ and defences¹⁰ are all

⁴ Article 2044 of French CC ('La transaction est un contrat par lequel les parties, par des concessions réciproques, terminent une contestation née, ou préviennent une contestation à naître. Ce contrat doit être rédigé par écrit'. 'A settlement is a contract by which the parties, through mutual concessions, terminate a dispute which has arisen, or prevent a dispute which is about to arise. This contract must be reduced to writing').

⁵ Article 2052 of French CC ('La transaction fait obstacle à l'introduction ou à la poursuite entre les parties d'une action en justice ayant le même objet' [The transaction precludes the initiation or continuation of legal proceedings between the parties concerning the same subject matter]).

⁶ Section 779 (1) BGB.

⁷ Ware (n 3) § 3.39(a). E.g., N.Y. Civil Practice Law and Rule 3211(a)(5) ('A party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... the cause of action may not be maintained because of ... [a] release'); Cal. Civ. Code § 1541 ('An obligation is extinguished by a release therefrom given to the debtor or the released party by the creditor or releasing party, upon a new consideration, or in writing, with or without new consideration').

⁸ Philip Chong, Elizabeth Tout, *United Kingdom in John Fellas, Transnational Litigation* (2024) § 29:86 (formation of a settlement is by 'the general requirements of English contract law (offer, acceptance, consideration, due capacity, and an intention to create legal relations)').

⁹ Chitty on Contracts, ch. 26–109 (35th edn, Sweet & Maxwell 2025) ('The general principles applicable to the interpretation of contracts are applicable to a release'). *BCCI v Ali* [2001] UKHL 8 [9–10]. As 'determining the scope of the release is a matter of interpretation', courts often face the challenge of allocating the risk of claims that are unknown to the parties at the time the release is signed. Daniele Bertolini, 'Releasing the Unknown: Theoretical and Evidentiary Challenges in Interpreting the Release of Unanticipated Claims' (2023) 48(2) *Queen's Law Journal* <<https://canlii.ca/t/7n6jl>> accessed 29 April 2025, 61–100, at 63.

¹⁰ 'As a settlement agreement is a contract, it can be challenged as any other contract. Thus, it could be found to be void on grounds of concepts such as mistake, frustration, fraud and illegality.

generally governed by ordinary contract law in England, the US, and Canada.¹¹ If Anglosphere courts treat settlements differently from other contracts, it may be by making them easier to enforce, such as by applying defences more narrowly to settlements than they do to other contracts. For instance, several courts have held that even if a unilateral mistake is sometimes a defence to other contracts, only a mutual mistake suffices against a settlement.¹² Similarly, civil codes across EU nations generally make defences to settlement agreements the same as defences to other contracts, with some exceptions. For example, as in the Anglosphere, the defence of a mistake may be applied more narrowly to settlements than it is to other contracts.¹³

Much as ordinary contract law generally governs enforcement of settlements to permanently dismiss P's claims, contract law similarly governs in both EU and Anglo jurisdictions if D does not make the payments required by a settlement because P may then generally enforce the settlement in a breach of contract suit governed by ordinary contract law.

III. MAKING A NEGOTIATED SETTLEMENT MORE THAN A CONTRACT

In both the Anglosphere and the nations of the EU, P enforcing a settlement by suing for its breach can be slow and expensive because it takes two steps. First, P starts a new suit (presumably last in line on the court's docket) for breach of

It could also be set aside on grounds of misrepresentation, duress and undue influence'. Donald Lambert, 'Mediation in United Kingdom' (9 September 2019) Lexology <<https://www.lexology.com/library/detail.aspx?g=02ee5416-79ba-484b-bd62-cb26318d330b>> accessed 30 June 2025. *Watson v Sadiq* [2013] EWCA Civ 822 at [49] ('The customary basis upon which such a contract compromising litigation can be set aside are those upon which any ordinary contract can be set aside, i.e. for misrepresentation, fraud, undue influence, duress and the like').

¹¹ Ware (n 3) § 3.39(b) (quoting US cases); Daniele Bertolini (n 5) 61–100, at fn.1 (referring to duress, unconscionability, and mistake as 'grounds upon which the validity of a release can be challenged').

¹² *Brown v Cnty. of Genesee*, 872 F.2d 169, 174 (6th Cir. 1989).

¹³ Art 918 § 1 Polish Civil Code ('The evasion of the legal effects of a settlement concluded by mistake shall be admissible only if the mistake pertains to a state of fact which, in accordance with the contents of the settlement, both parties considered undisputable, and the dispute or uncertainty would not have arisen if at the time of concluding the settlement the parties knew the true state of things. § 2. It shall not be possible to evade the legal effects of a settlement following the discovery of evidence concerning the claims to which the settlement persists unless the settlement was concluded in bad faith'). See Daniel Dulęba, *Settlement in Polish Civil Law* (Ugoda w polskim prawie cywilnym) (1st edn, LexisNexis 2012) 18–30.

the settlement, which can take years. This action seeks a court order that D do what D promised in the settlement. Only if P wins that order and D still does not comply, can P use government officers to enforce the settlement.¹⁴

In contrast to the slow two-step contract-enforcement process just explained, a settlement negotiated after the parties have begun litigation can, in both Anglo and EU jurisdictions, be made more enforceable by P than a mere contract. In the Anglosphere, parties jointly ask the court to convert their settlement into some form of an ‘agreed judgment’,¹⁵ ‘consent judgment’,¹⁶ or ‘consent decree’ of the court.¹⁷ In Canada¹⁸ and the US, parties may ask a court to ‘enter judgment’ on a settlement and retain jurisdiction over the case, so P can enforce the agreement on motion (a simple, expedited procedure) without need for a new suit.¹⁹ Similarly, England has various forms of consent judgments,²⁰ including consent orders for simple money judgments and ‘Tomlin orders’ for more complex settlements,²¹

¹⁴ Anthony DiSarro, ‘Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation’ (2010) 60(2) *American University Law Review* 275, 282–83 (US) ‘Where they are part of a contract, settlement terms can only be enforced via the breach-of-contract route. This entails a two-step process. First, the party seeking enforcement will have to commence a plenary action to obtain a decree of specific performance. Then, the party can enforce the specific performance decree through a contempt proceeding. The two-step enforcement process is lengthier and consumes more judicial resources than contempt of a settlement which has been entered as a court order’. In England as in the U.S., ‘[i]f litigation has not commenced, the settlement agreement usually operates as a contract between the parties, thereby requiring fresh proceedings to be issued [a new suit] for any breach’; Shahla F Ali, ‘Court Mediation Reform: Efficiency, Confidence and Perceptions of Justice’ (2018) 021 *University of Hong Kong Faculty of Law Legal Studies Research Paper Series* 76 (England). See Stefan Rützel and others, *Commercial Dispute Resolution in Germany* (2nd edn, C.H.Beck 2016) 66–67.

¹⁵ *Palavan v McCulley*, 498 S.W.3d 134, 137 (Tex. App. 2016).

¹⁶ Legal Aid (New South Wales), Consent judgment or order: Step by step guide <<https://www.legalaid.nsw.gov.au/my-problem-is-about/my-money/making-a-claim/step-by-step-guide-consent-judgment-or-order-plaintiff#accordion-9195955f49-item-36904a6feb>> accessed 30 June 2025 (‘If you and the defendant come to an agreement about your case, you can ask the court to make orders based on your agreement. This is called a consent judgment or order.... Once you have a consent judgment or order, if the defendant does not do what the judgment or order says they must do, you can take steps to enforce the judgment or order’).

¹⁷ Charles Alan Wright, Mary Kay Kane, *Law of Federal Courts* (8th edn., West Academic Publishing 2017) § 98 n. 1851.

¹⁸ *Ayr Hardwood Flooring Inc. v Korczmarczyk*, 2015 CarswellOnt 104 (granting Plaintiff’s motion for judgment on settlement).

¹⁹ Cal. Civ. Proc. Code § 664.6; Ingrid M. Evans, *Holding Defendants to Their Word*, *Trial*, April 2020, at 20, 22.

²⁰ Civil Procedure Rule 40.6 (Consent judgments and orders).

²¹ Paul Britton, ‘Tomlin Orders: When Are They Used?’ (2 February 2022) <<https://brittontime.com/insights/tomlin-orders/>> accessed 30 June 2025.

that may be enforced without having to commence new proceedings.²² In keeping with the Anglo culture of settlement, courts in the Anglosphere are generally willing to grant parties' joint request to enter judgment on a settlement without inquiring about the fairness of its terms, unless they bind parties who may not be adequately represented, such as children or absent members of a class action.²³ And a court in the Anglosphere would refuse to enter judgment on the presumably rare settlement that violates public policy, such as a collusive settlement among firms in the same industry that violates competition law by fixing prices.

Much as courts in Anglo jurisdictions often expedite the enforceability of settlements by entering judgment on them or otherwise converting them into court orders, litigating parties in the EU can, with court approval, make 'court settlements'. This process, typically governed by the nation's Code of Civil Procedure, makes the agreement an enforceable title.²⁴ Some EU nations generally require a full hearing for a court settlement,²⁵ while others provide a simplified procedure (such as homologation) to make a court settlement.²⁶ Grounds for courts to deny this are roughly similar across EU nations but vary somewhat. For example, Germany's Civil Code voids settlements, including court settlements, like other transactions if contrary to public policy or exploitative and disproportionate.²⁷ Similarly, a French court does not homologate a settlement that violates public

²² Chitty on Contracts (n 5) ch. 26–026.

²³ Ware (n 3) 436–437; Judicial College (England & Wales) Family Court Bench Book p.90 (January 2018) ('Consent Orders: Child Arrangements'; 'Any proposed order, whether to be made by agreement or not, must be scrutinised by the court ... to consider all the evidence and information available to help it decide if there is any risk of harm to the child').

²⁴ Section 794(1) no 1 ZPO; Article 777 § 1 no 1 of the Polish CCP ('the following shall be considered an enforcement order: ... a settlement agreement made before the court'); see Philipp Anzenberger, 'The European Dimension of Court Settlements: Open Issues and Regulatory Needs' in Vesna Rijavec and others (eds), *Diversity of Enforcement Titles in EU* (Springer 2023) 333 ('Court settlements are one of the core instruments for amicable dispute resolution before court in many European countries'); id at 340–41 ('in every Member State is the necessity of some sort of involvement of a court when concluding the court settlement. Again, there are various possibilities on how a court can be involved (for example, already before an action was brought in or during proceedings; in the presence of the parties or by a mere written contract submitted to the court; or regarding the mediatory role of the court)'); 344 ('Probably the most important (procedural) function of a court settlement in practice is its role as an enforcement title').

²⁵ '[I]f the action is still pending, the parties may submit their out-of-court settlement agreement to the court. The court will render an order, thereby converting it into an execution title (§ 278(6) ZPO), which normally does not require more than a few days'. Rützel (n 14) 66–67.

²⁶ '[T]he judge hearing a request for approval of a settlement cannot proceed to examine the substantive validity of that agreement'. Case 17-21.879 3 Octobre 2018 Cour de cassation, civile, Chambre civile 1, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000037495439>.

²⁷ Section 138 BGB.

policy, the law, or was not freely consented to.²⁸ In Poland, the court will not homologate a court settlement if it is contrary to the law or principles of community life or seeks to circumvent the law.²⁹ While an out-of-court settlement by litigating parties typically leads to withdrawal of the case, P may nevertheless re-assert the withdrawn claim until D performs the settlement. In contrast, if litigating parties make a court settlement, then P may not re-assert the settled claim unless P proves that the court settlement was invalid, which is very unlikely.

Going beyond cases in which litigation has already begun, many EU nations have procedures to make enforceable titles even out of settlements in which no case has been filed. In Germany, for example, a settlement reached by attorneys on behalf of the parties they represent may be filed with a court,³⁰ which shall declare it enforceable unless it is invalid or if its recognition would violate public order.³¹ Germany similarly empowers a notary, with the parties' consent, to declare enforceable a settlement the parties have filed with the notary.³² Some other civil law nations in Europe – such as Austria, Italy, France, and Spain – similarly empower notaries, with the parties' consent, to convert settlements and other contracts into enforceable titles, often called 'notarial deeds'.³³ As a notary does not require even the expedited approval process (homologation) of a court, leaving aside notary fees, it is generally easier, in these EU nations for a creditor outside of litigation to get an enforceable settlement from a notary than for a creditor in litigation to get an enforceable settlement because making a settlement concluded during litigation enforceable requires not only the debtor's consent, but

²⁸ Articles 12, 117, 1565–1569 of the French CCP.

²⁹ Article 203 § 4 in connection with Article 223 § 2 of the Polish CCP.

³⁰ § 796a (1) ZPO. See Rützel (n 14) 66–67, 209 ('if the settlement agreement is signed by the attorneys of record for the parties and if the respective debtor expressly submits to immediate execution, the document may be converted into an execution title as well. The settlement agreement has to be filed with the local court where one of the parties is domiciled, or with a notary public'; Krzysztof Bokwa, 'Anwaltsvergleich – niemiecka ugoda adwokacka jako wzór dla polskiego ustawodawcy?' (2018) 3 Kwartalnik ADR. Arbitraż i Mediacja 13–20.

³¹ § 796a (3) ZPO.

³² Section 794(1) 5 and 796c ZPO.

³³ E.g., Austria, Section 1(17) of the Enforcement Act (includes 'notarial deeds' (*Notariatsakten*) as enforceable titles, provided the debtor submits to immediate execution within the document); Italy Article 474(2), no 3 of the Code of Civil Procedure (states that 'acts received by a notary or other public official authorized by law to receive them' are enforceable titles (*titoli esecutivi*). Additionally, Article 474(2), no 2 includes 'authenticated private writings' (*scritture private autentiche*) as enforceable titles, though specifically for obligations involving sums of money contained within them); France Article L. 111-3, 4° of the Code of Civil Enforcement Procedures (settlement agreement becomes an enforceable title (*titre exécutoire*) when it is formalized as a notarial act (*acte notarié*) bearing the executory formula, allowing for direct enforcement by a bailiff without a court judgment); Spain Civil Procedure Act Article 517(2)(4°) (a settlement agreement becomes an enforceable title if it is formalized as a 'public deed' (*escritura pública*) before a notary).

also the court's approval. In contrast, notaries in the Anglosphere lack the power to make a settlement enforceable. So, in these common law systems, it is easier for a creditor in litigation than outside of litigation to get an enforceable settlement, as a creditor must start litigation to then get court approval of the settlement, which makes it enforceable by the sheriff, bailiff, or other enforcement officer.

On the other hand, a practice in Anglo but not civil law is a court order permanently dismissing a case pursuant to a settlement not submitted to the court. The norm in the US is settling civil and commercial litigation with two documents: (1) a one-paragraph Stipulation of Dismissal filed in court, and (2) a settlement agreement that remains confidential with the parties unless one of them sues for its breach.³⁴ English courts similarly dismiss cases permanently even though the court does not see the terms of settlement.³⁵ So if D breaches the settlement, P can sue for breach of the settlement contract but cannot revive P's original claim, which was permanently dismissed. In contrast, courts in EU Member States generally do not dismiss cases permanently (with binding preclusive effect) unless the court examines the settlement to convert it into an enforceable title. So, a court ruling issued based on a settlement kept confidential from the court typically merely withdraws the claim, which does not have preclusive (*res judicata*) status. Therefore, if D breaches the confidential settlement, P may reinstate or resubmit P's original claim.

IV. ENFORCEMENT OF MEDIATED SETTLEMENTS, INCLUDING GROUNDS TO DENY ENFORCEMENT

As noted above, negotiated settlements have long been common in the Anglosphere. So, integrating mediation into these jurisdictions was relatively easy because mediating a settlement tends to be just a slightly different way of doing what has

³⁴ Judith Resnik, 'The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure' (2014) 162 U. Pa. L. Rev. 1793, 1818 ('stipulations of dismissal need not include underlying agreements'); Dustin B Benham, 'Foundational and Contemporary Court Confidentiality' (2021) 86 Mo. L. Rev. 211, 229 ('In most circumstances, courts dismiss cases upon the agreed request of the parties. The agreement is not filed and only put before the court in the event of a breach as part of a contract action').

³⁵ Civ. Pro. Rule 40.6(3)(b)(i); David Foskett & John Sorabji, *Foskett on Compromise* 43 (Sweet & Maxwell, 10th edn 2024); § 10–17ff. *Zenith Logistics Services (UK) Ltd and others v Coury* [2020] EWHC 774 para. 50–74 (QB) (reaffirming previously established principle that, upon parties' joint request, courts use 'Tomlin orders' to stay and then dismiss cases with prejudice without inspecting the terms of settlement unless an issue is raised upon an application to enforce the order, but in this case, one of the orders the parties sought would have the court do more than merely dismiss and required immediate enforcement, and thus was not a true Tomlin order but instead a consent order entitling the court to inspect the terms of settlement).

long been routine, negotiating a settlement. Consequently, in the Anglosphere, law on mediated settlements largely follows the precedents of law on negotiated settlements, which mostly just apply ordinary contract law.³⁶ For example, it is telling that when an English lawyer was asked, ‘In what circumstances can the mediation settlement agreement be challenged in court?’, the lawyer responded about settlements generally – because it does not matter whether a settlement was made in mediation or negotiation: ‘As a settlement agreement is a contract, it can be challenged as any other contract. Thus, it could be found to be void on grounds of concepts such as mistake, frustration, fraud and illegality. It could also be set aside on grounds of misrepresentation, duress and undue influence’.³⁷

Part III explains that Anglosphere courts routinely dismiss civil and commercial cases with prejudice against refiling – so the court’s dismissal has *res judicata* effect – even though the court does not see the settlement agreement that prompted the parties to agree to dismiss the case. This is also true, at least in the US, of mediated settlements. The court does not need to see them, but only the stipulation of dismissal, to dismiss the case permanently.³⁸ Part III also explains that parties to Anglosphere litigation can add to the enforceability of their negotiated settlement by jointly asking the court to convert it into some form of a consent judgment. The same is true of mediated settlements.³⁹ Unlike the law in some EU countries discussed below, parties in the Anglosphere jointly asking the court to convert their settlement into a consent judgment or other court order largely trigger the same judicial standards, whether the settlement was negotiated or mediated.

³⁶ Sarah R Cole and others, *Mediation: Law, Policy, & Practice* (Thomson Reuters 2024) § 7:2 (‘most disputes involving enforcement of mediated settlement agreements are resolved based on traditional contract principles’); Lambert (n 6) (‘Settlement agreements entered into as a result of mediation are enforceable in the same way as any other legally binding contract, on the normal principles of English contract law’).

³⁷ Lambert (n 6).

³⁸ E.g., Caroline Harris Crowne, ‘The Alternative Dispute Resolution Act of 1998: Implementing A New Paradigm of Justice’ (2001) 76 N.Y.U. L. Rev. 1768, 1811 n. 29 (‘The federal courts in New York that have mediation programs only require the parties to file a stipulation of dismissal upon reaching a settlement; their written agreement need not be filed with the court’); Markus B Zimmer & Laura M Gray, ‘Alternative Dispute Resolution in the U.S. District Court’ Utah B.J., Nov. 1994, at 12, 14 (‘In a successful mediation, after the parties reach agreement on how to settle their dispute, they submit a stipulation for dismissal to the court’).

³⁹ In England, ‘When successful, mediation may result in a Tomlin order’. Allison Bull, ‘Family property: lawyer-assisted mediation’ (2018) 5 Private Client Business 180–185. In the US, ‘The best practice is to reduce any mediation settlement agreement (MSA) to a stipulated or consent judgment and have it entered as an order of the court’. Thomas H Oehmke, *Commercial Arbitration* § 26:48. In US eviction mediation, ‘If a settlement is reached, a mediator will create a stipulated judgment, and the judge will sign it’. Rachel Elliott, ‘The Eviction Crisis is Rampaging’ (2025) 1 Journal of Dispute Resolution 77.

Anglo jurisdictions generally do not provide any method to enforce a mediated settlement that is not also available to enforce a negotiated settlement. To the contrary, it can be harder to enforce a mediated settlement than a negotiated settlement. For example, some states' statutes in the US say that a mediated settlement agreement is not legally binding unless it contains a provision stating that it is,⁴⁰ although no law imposes an analogous requirement on negotiated settlements. In addition, to preserve the confidentiality of mediation, 'privilege rules preclude testimony about oral settlements reached through mediation, but do not preclude oral settlements reached through negotiations without a mediator'.⁴¹ So in at least these two respects, a mediated settlement can be *less* enforceable than a negotiated settlement. These are, however, minor exceptions to the Anglosphere's general rule that the same law governs negotiated and mediated settlements, so they are equally enforceable.

Much as Anglo jurisdictions generally treat negotiated and mediated settlements similarly, several EU nations treat negotiated and mediated settlements similarly in important respects. For example, Part III explains that nations such as Germany, Austria, Italy, France, and Spain empower notaries, with the parties' consent, to convert negotiated settlements and other contracts into enforceable titles. These nations (Germany,⁴² Austria,⁴³ France,⁴⁴ Italy,⁴⁵ and Spain⁴⁶) also

⁴⁰ Cal. Evid. Code § 1123; Tex. Fam. Code Ann. § 6.602(b)(1)–(3); Minn. Stat. Ann. § 572.35.

⁴¹ Cole (n 30) § 7:19.

⁴² Section 796c ZPO.

⁴³ See Agnieszka Okońska, 'Mediacja – Austria, Niemcy, Szwajcaria', in Andrzej Torbus (ed), *Mediacja w sprawach gospodarczych. Praktyka – teoria – perspektywy* (Ministerstwo Gospodarki 2015) 66–67.

⁴⁴ Article L. 111-3, 4° of the Code of Civil Enforcement Procedures.

⁴⁵ Article 12 (1) of Legislative Decree 28/10: 1. Ove tutte le parti aderenti alla mediazione siano assistite dagli avvocati, l'accordo che sia stato sottoscritto dalle parti e dagli stessi avvocati, (...), costituisce titolo esecutivo per l'espropriazione forzata, l'esecuzione per consegna e rilascio, l'esecuzione degli obblighi di fare e non fare, nonché per l'iscrizione di ipoteca giudiziale. Gli avvocati attestano e certificano la conformità dell'accordo alle norme imperative e all'ordine pubblico. See Ivan Smanio, 'Obowiązkowa mediacja we Włoszech' (2020) 3 *Quartale ADR*. Arbitraz i Mediacja 74; Luigi Majoli, 'L'esecuzione dell'accordo in mediazione' (ADR Intesa 2021) <<https://www.adrintesa.it/esecuzione-accordo-in-mediazione>> accessed 2 May 2025.

⁴⁶ Article 23(3) and 25(1) of the Spanish Civil and Commercial Mediation Act. The enforcement of agreements resulting from mediation initiated while a proceeding is underway shall be brought before the court that approved the agreement. Article 26 of the Spanish Civil and Commercial Mediation Act; see José Luis Iglesias Buhigues, Guillermo Palao Moreno, Rosario Espinosa Calabuig, Carmen Azcárraga Monzonís, 'Spain', in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*. Volume II (Intersentia 2014), 437–438; Carmen Azcárraga Monzonís, Pablo Quinzá Redondo, 'Mediation in Spain: Novelty Derived from the Boost of the European Legislator', in Carlos Esplugues, Louis Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015) 701–702.

empower notaries, with the parties' consent, to convert mediated settlements into enforceable titles. And much as some EU nations have court approval procedures to make a negotiated settlement an enforceable title ('court settlement'), so they tend to have court approval procedures (discussed below) to make a mediated settlement an enforceable title. Some EU nations' laws even specifically state that a mediated settlement approved by the court shall have the same legal effect as a negotiated settlement concluded before the court.⁴⁷ Moreover, an EU regulation on the cross-border enforcement of judgments generally includes cross-border enforcement of 'court settlements', which it defines as 'settlement[s] which ha[ve] been approved by a court of a Member State or concluded before a court of a Member State in the course of proceedings'.⁴⁸ This broad definition includes not just negotiated court settlements but also mediated settlements subject to the court approval procedures discussed next. So, in all those respects, law in the EU and many of its members treats negotiated and mediated settlements similarly; and thus, at that high level of generality, resembles Anglo law, which generally treats negotiated and mediated settlements similarly.

On the other hand, when parties jointly ask a court to convert their settlement into an enforceable title, this court's approval of a mediated settlement is, in most EU nations, unlike the Anglosphere, governed by a different law than court approval of a negotiated settlement. This difference between mediated and negotiated settlements is consistent with Directive 2008/52/EC, which introduces general rules for the enforceability of mediated settlements, but not negotiated settlements. And in contrast to the Anglosphere, but perhaps in the spirit of the Directive, some EU nations make it easier for parties to obtain court approval of a mediated settlement than a negotiated settlement. As Part III noted, while some EU nations provide a simplified procedure (homologation) to convert a negotiated settlement into an enforceable title, others generally require a full hearing for the court to convert a negotiated settlement into an enforceable title. Similarly, while some EU nations provide a simplified procedure (homologation) to convert a mediated settlement into an enforceable title,⁴⁹ others generally require a full hearing for the court to

⁴⁷ Article 18 (1) of Bulgarian Mediation Act: Споразумение по правен спор по смисъла на чл. 1, ал. 1 от закона, постигнато в процедура по медиация, има силата на съдебна спогодба и подлежи на одобрение от районните съдилища в страната. See: Sevdalina Aleksandrova, 'Bulgaria', in Giuseppe de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012) 36–37. Article 183¹⁵ § 1 Sentence 1 of Polish CCP: 'Uгода zawarta przed mediatorem, po jej zatwierdzeniu przez sąd, ma moc prawną ugody zawartej przed sądem. Podobnie w prawie bułgarskim ugoda mediacyjna ma moc ugody sądowej'.

⁴⁸ Article 2(b) of Regulation (EU) No 1215/2012 of 12 December 2012.

⁴⁹ See Jean-Georges Betto, Adrien Canivet, 'France', in Giuseppe de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012) 119.

convert a mediated settlement into an enforceable title.⁵⁰ However, some nations, such as Poland, that require a full hearing to convert a negotiated settlement into an enforceable title, provide a simplified procedure (homologation) for the approval of a mediated settlement which gives it the character of an enforcement title.⁵¹

The conditions for court approval (homologation) of a mediated settlement differ significantly in the legal systems of individual EU countries. Although Directive 2008/52/EC introduces general rules for the enforceability of mediated settlements, variation among EU Member States remains. The examples provided below indicate legal provisions of EU countries that contain clear provisions specifying the grounds for approval (or refusal to approve) mediated settlements. However, in some countries, such rules are not expressly stated, making it difficult to unequivocally assume that all EU countries have adopted a separate model for approval (a simplified procedure for approving mediated settlements), e.g., the Netherlands.

A narrow scope of examination of the mediated settlement is provided for in Hungarian law. The only condition for approval of a mediated settlement is its legality. If the settlement complies with the law, it shall be approved by a court order.⁵² Similarly, in Malta, the mediated settlement agreement shall be enforceable unless the content of that agreement is contrary to national law.⁵³

A mediated settlement in Italy shall be enforceable after a court verifies its formal correctness and compliance with the law and public policy.⁵⁴ Analogous premises

⁵⁰ See Urs P Gruber, Ivo Bach, 'Germany', in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*. Volume II (Intersentia 2014), 175–176. See also <<https://ezine.eversheds-sutherland.com/global-guide-to-alternative-dispute-resolution/netherlands>>; Pim Albers, 'The Netherlands' in Giuseppe de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012) 363.

⁵¹ Maciej Zachariasiewicz, 'Poland' in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*. Volume II (Intersentia 2014) 296–297. On the legal nature of a mediated settlement in Polish law see Ewa Gmurzyńska, Rafał Morek, 'Poland', in Giuseppe de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012) 261.

⁵² Section 239 (1) of Hungarian CCP: Ha az egyezség – ideértve a 238. § (2) bekezdésében meghatározott megállapodást is – megfelel a jogszabályoknak, a bíróság azt végzéssel jóváhagyja, ellenkező esetben a jóváhagyást megtagadja, és az eljárást folytatja.

⁵³ Section 17B(1)(b) of Maltese Mediation Act: l-kontenut tal-ftehim għandu jkun eżegwibblisakemm, f'dak il-każ fil-kwistjoni, il-kontenut majkunx kontra l-liġi nazzjonali. See Lauren R Keller, 'Malta', in Giuseppe de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012) 248.

⁵⁴ Article 12 paragraph 1-bis of Legislative Decree 28/10: Quando le parti aderenti alla mediazione non sono tutte assistite dagli avvocati, l'accordo allegato al verbale è omologato, su istanza di parte, con decreto del presidente del tribunale del luogo dove ha sede l'organismo di mediazione avanti al quale l'accordo è stato raggiunto, previo accertamento della regolarità formale e del rispetto

are subject to examination in the case of a mediated settlement concluded under Romanian law.⁵⁵

In contrast, a broader list of grounds for refusing to approve a mediated settlement is provided for in many EU nations. The French regulation provides for a relatively broad scope of court review of the mediation agreement, as the court assesses whether the agreement was concluded in good faith, whether the written agreement still reflects the parties' understanding, whether it was formulated in such a way that it can be submitted to enforcement and does not create difficulties in interpretation, whether it does not infringe the rights of third parties and whether it does not infringe the principles of social coexistence.⁵⁶

Under Cypriot law, the court may reject an application for enforcement of a mediated settlement agreement if it finds that the content of the agreement is illegal or unenforceable or that the dispute cannot be resolved through mediation.⁵⁷ In Finland, a mediated settlement may not be confirmed as enforceable if it is unlawful or manifestly unreasonable, or if it violates the rights of a third party. A mediated settlement may also not be confirmed unless it can be enforced in accordance with the provisions of the Enforcement Act (705/2007).⁵⁸ The Belgian Judicial

delle norme imperative e dell'ordine pubblico. See Marcello Marinari, 'Italy', in Giuseppe de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012) 192; Ilaria Queirolo, Chiara Gambino, 'Italy', in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation. Volume II* (Intersentia 2014) 242; Alessandra De Luca, 'Mediation in Italy: Feature and Trends', in Carlos Esplugues, Louis Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015) 360.

⁵⁵ Article 58 (2) of Romanian Act on Mediation and the Organization of the Mediator Profession: Întelegerea părților nu trebuie să cuprindă prevederi care aduc atingere legii și ordinii publice, dispozițiile art. 2 fiind aplicabile. See Anca-Elisabeta Ciucă, Constantin-Adi Gavrilă, 'Romania', in Giuseppe de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012), 294; Ramona Gratiela Milu, Mihai Taus, 'Romania', in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation. Volume II* (Intersentia 2014), 354; Daniel-Mihail Șandru, Dragoș-Alin Călin, 'La Médiation en Roumanie la Médiation entre l'Habitude d'Avoir Recours au Système Traditionnel de Justice et le Remboursement de l'Intégralité des Frais de Justice' in Carlos Esplugues, Louis Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015) 622.

⁵⁶ Joanna Kolber, 'Mediacja – Francja, Belgia', in Andrzej Torbus (ed), *Mediacja w sprawach gospodarczych. Praktyka – teoria – perspektywy* (Ministerstwo Gospodarki 2015) 111–112.

⁵⁷ Section 32 (3)(β) of Cypriot Mediation Act in Civil Disputes: Μετά από αίτηση που κατατίθεται δυνάμει του εδαφίου (1), το δικαστήριο δύναται να- (β) απορρίψει την αίτηση για εκτέλεση της συμφωνίας συμβιβασμού, αν κρίνει ότι το περιεχόμενο της συμφωνίας αντίκειται στο νόμο ή δεν είναι εκτελεστό ή αν η διαφορά δεν μπορεί να επιλυθεί με διαμεσολάβηση. See: Achilles C Emilianides, Natalia Charalampidou, 'Cyprus', in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation. Volume II* (Intersentia 2014) 122.

⁵⁸ § 23 of Finnish Mediation Act: Sovintoa ei saa vahvistaa täytäntöönpanokelpoiseksi, jos se on lain vastainen tai selvästi kohtuuton taikka jos se loukkaa sivullisen oikeutta. Sovintoa ei myöskään

Code provides for the possibility of refusing to approve a mediated settlement if it is contrary to public order or if the agreement reached following family mediation is contrary to the interests of the minor children.⁵⁹ Luxembourg law provides for a broader list of grounds for refusing approval of a mediated settlement. The judge shall refuse approval if it is contrary to public order or to the interests of the children; if it cannot be made enforceable under a specific provision; or if the dispute cannot be settled through mediation.⁶⁰

Under Polish law, the court shall refuse to make the settlement agreement enforceable or to approve all or part of the settlement agreement concluded before the mediator if the agreement is contrary to the law or principles of community life, or if it seeks to circumvent the law, or if it is incomprehensible or contradictory.⁶¹

saa vahvistaa, ellei sitä voida panna täytäntöön siten kuin ulosottokaarella (705/2007) säädetään. See Petri Taivalkoski, 'Finland', in Giuseppe de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012) 103–104; Liisa Sippel, 'Scandinavian Countries', in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation. Volume II* (Intersentia 2014) 382; Petri Taivalkoski, Annika Pynnä, 'The Courts and Bar Association as Drivers for Mediation in Finland' in Carlos Esplugues, Louis Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015) 286.

⁵⁹ Article 1733 (out-of-court mediation): Le juge ne peut refuser l'homologation de l'accord que si celui-ci est contraire à l'ordre public ou si l'accord obtenu à l'issue d'une médiation familiale est contraire à l'intérêt des enfants mineurs. Article 1736 (court mediation): Le juge ne peut refuser l'homologation de l'accord que si celui-ci est contraire à l'ordre public ou si l'accord obtenu à l'issue d'une médiation familiale est contraire à l'intérêt des enfants mineur. See Ivan Verougstraete, 'Belgium', in Giuseppe de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012) 25–26; Michael Traest, 'Belgium', in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation. Volume II* (Intersentia 2014), 49; Piet Taelman, Stefaan Voet, 'Mediation in Belgium: A Long and Winding Road' in Carlos Esplugues, Louis Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015) 103–104.

⁶⁰ Article 1251–22 (2) of New Luxembourg CCP: Le juge refuse l'homologation de cet accord de médiation: Le juge refuse l'homologation de cet accord de médiation: - si celui-ci est contraire à l'ordre public; - si celui-ci est contraire à l'intérêt des enfants; - si en vertu d'une disposition spécifique il n'est pas possible de le rendre exécutoire; ou - si le litige n'est pas susceptible d'être réglé par voie de médiation. See also: Article 1251–23 (2) of New Luxembourg CCP. See Séverine Menétrey, 'Luxembourg', in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation. Volume II* (Intersentia 2014), 268; Séverine Menétrey, 'La Médiation à la Croisée des Frontières: Le cas Luxembourgeois' in Carlos Esplugues, Louis Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015) 466.

⁶¹ Article 183¹⁴ § 3 of Polish CCP: Sąd odmawia nadania klauzuli wykonalności albo zatwierdzenia umowy zawartej przed mediatorem, w całości lub części, jeżeli ugoda jest sprzeczna z prawem lub zasadami współżycia społecznego albo zmierza do obejścia prawa, a także gdy jest niezrozumiała lub zawiera sprzeczności. See Mariusz Maciejewski, 'Polish Regulation Model of Civil Court Mediation and Assessment of Its Effectiveness' (2024) 16(4) *Krytyka Prawa. Niezależne studia nad prawem* 363.

A still broader list of grounds for refusing to approve a mediated settlement appears in legal systems which, in addition to compliance with the law, require the mediated settlement to account for the principles of morality. Under Bulgarian law, the competent court shall approve the agreement, once acknowledged by the parties, if it does not contradict the law and good morals.⁶² Estonian law also contains – among others – premises referring to moral principles. The court refuses to declare an agreement enforceable if: 1) the agreement goes beyond the limits established in subsection 14 (1) of the Conciliation Act; 2) the agreement is contrary to good morals or the law, or if this violates a significant public interest; 3) the agreement cannot be complied with.⁶³ Under Portugal Law, the judicial approval of the agreement reached in pre-judicial mediation is intended to verify whether it concerns a dispute that may be subject to mediation, the capacity of the parties to enter into it, whether it complies with the general principles of law, whether it complies with good faith, whether it does not constitute an abuse of rights and whether its content does not violate public order.⁶⁴ It should be recalled that one of the grounds for refusing to approve a mediated settlement under Polish law is its inconsistency with the principles of community life.

This comparison of grounds to deny enforcement of mediated settlements among EU nations shows variety among those nations. It also typically shows a separateness from the grounds to deny a negotiated court settlement, which is a difference from the typical approach of Anglo jurisdictions. As noted above, courts in the Anglosphere tend to follow the same procedures and use the same criteria when entering judgment on mediated settlements as they do when entering judgment on negotiated settlements. In contrast, this survey of EU nations shows that the procedures (which are regulated by sections of the Code of Civil Procedure) for making a negotiated settlement enforceable title tend to differ from the procedures

⁶² Article 18 (3) of Bulgarian Mediation Act: Съдът одобрява споразумението след потвърждаването му от страните, ако не противоречи на закона и добрите нрави. See Aleksandrova (n 47) 36.

⁶³ Article 627¹ (3) of Estonian CCP: Kohus ei tunnista kokkulepet täidetavaks juhul, kui: 1) kokkulepe väljub lepitusseaduse § 14 lõikes 1 kehtestatud piiridest; 2) kokkulepe on vastuolus heade kommetega või seadusega või rikub olulist avalikku huvi; 3) kokkulepet ei ole võimalik täita. See: Carri Ginter, 'Estonia', in Giuseppe de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012) 88–89.

⁶⁴ Art 14 (3) Portugal Law No 29/2013: A homologação judicial do acordo obtido em mediação pré-judicial tem por finalidade verificar se o mesmo respeita a litígio que possa ser objeto de mediação, a capacidade das partes para a sua celebração, se respeita os princípios gerais de direito, se respeita a boa-fé, se não constitui um abuso do direito e o seu conteúdo não viola a ordem pública. See Dulce Lopes, 'Portugal', in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*. Volume II (Intersentia 2014) 335–336; Maria José Capelo, 'La Médiation, une Autre Voie de Justice au Portugal?' in Carlos Esplugues, Louis Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015) 553.

for making a mediated settlement enforceable title. And the grounds for a court to deny a negotiated court settlement tend to differ from the grounds to deny making a mediated settlement enforceable title.

These differences in the treatment by EU nations of mediated from negotiated settlements may relate to Directive 2008/52/EC ‘encouraging the use of mediation’⁶⁵ ‘in cross-border disputes, to civil and commercial matters’.⁶⁶ It says:

Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.⁶⁷

This Directive’s focus on mediated settlements, with no mention of negotiated settlements, may have contributed to EU jurisdictions enacting procedures for making mediated settlements enforceable titles wholly apart from the jurisdiction’s pre-existing procedures for making negotiated court settlements enforceable titles,⁶⁸ and in some nations making it easier for parties to obtain court approval of a mediated settlement than a negotiated settlement. These differences in the treatment of negotiated and mediated settlements contrast with the usual approach of courts in the Anglosphere, which is to follow the same procedures and criteria when entering judgment on mediated settlements as they do when entering judgment on negotiated settlements. And this contrast may reflect differing views of mediators, with Anglosphere mediators primarily facilitators of the parties’ communication toward a settlement resting on parties’ consent and European mediators with a more quasi-judicial responsibility to look after the parties to ensure the quality of their settlement.

These contrasting approaches to mediated settlements intersected in the UK’s former membership in the EU. ‘In England and Wales, prior to the enactment of the 2008 Directive, recourse to mediation was fostered by the legislator and by case law’, as well as by ‘[c]osts of litigation, which are extremely high in the

⁶⁵ Art 1(1) of Directive 2008/52/EC.

⁶⁶ Art 1(2) of Directive 2008/52/EC.

⁶⁷ Art 6(1) of Directive 2008/52/EC.

⁶⁸ Carlos Esplugues, ‘Mediation in the EU After the Transposition of the Directive 2008/52/EC on Mediation in Civil and Commercial Matters’, in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*. Volume II (Intersentia 2014), 19 (‘Prior to the enactment of the 2008 Directive, some countries that support mediation have coexisted with many other States in which mediation was not recognised or where the institution was blended or confused with other ADR tools’).

country’, and ‘[t]he long-lasting tradition of high levels of pre-trial settlements’.⁶⁹ As explained in 2014 by London mediator, Tony Allen, Directive 2008/52/EC ‘required a route to swift court enforcement of mediated settlements. This has always been possible in English procedure where mediation settles a claim after issue of proceedings, by using the highly flexible Tomlin Order, enabling swift access to enforcement even of terms that a court could not order, so long as made by consent’.⁷⁰ That is, the EU Directive essentially directed England to do what it had already been doing. To comply, in 2011, England enacted regulations including adding a procedure to ‘allow parties (by consent) to have cross-border mediated settlement agreements converted to a court order’.⁷¹ This procedure required only that ‘each of the parties to the mediation settlement agreement has given explicit consent to the application for the order’ making the mediated settlement enforceable.⁷² It did not have any of the limitations or defences Part IV discusses with respect to other EU nations. In 2021, due to Brexit, this procedure (along with other 2011 regulations) were repealed,⁷³ and English courts have apparently continued providing swift court enforcement of mediated settlements by converting them into ‘Tomlin’ and other consent orders.⁷⁴

The contrasting EU and Anglo approaches to mediated settlements also appeared in the UNCITRAL Working Group that produced the Convention on International Settlement Agreements Resulting from Mediation.⁷⁵ The basic idea of this ‘Singapore Convention’ is to treat mediated settlements like arbitration awards, so it provides a framework for enforcing mediated settlement agreements ‘akin to the framework that the 1958 New York Convention provides for arbitral awards’.⁷⁶

⁶⁹ Carlos Esplugues (n 68) 20.

⁷⁰ Tony Allen, ‘The Place of Mediation in England and Wales’ (2014) 25(4) European Business Law Review 517, 522.

⁷¹ The Law Society, Alternative dispute resolution after Brexit (13 January 2021) <<https://www.lawsociety.org.uk/topics/brexit/alternative-dispute-resolution-after-brexit>> accessed 30 June 2025.

⁷² Civil Procedure Rule 78.24(6).

⁷³ Ibid.

⁷⁴ E.g., *O’Leary v Daniel*, In the High Court of Justice Chancery Division Business and Property Courts of England and Wales, BL-2021-000401, 8 July 2024. See also a form consent order for a mediated settlement <https://www.nwmediationsolutions.co.uk/tomlin-order>; Caroline Bowden, Financial Consent Orders in Mediation (17 January 2022) <<https://anthonygold.co.uk/insight/financial-consent-orders-mediation/>> accessed 30 June 2025.

⁷⁵ U.N. Convention on International Settlement Agreements Resulting from Mediation, 20 December 2018 (adopted), 7 August 2019 (signed), 12 September 2020 (effective), 3369 U.N.T.S. 154.2019 [hereinafter Singapore Convention] <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf> accessed 30 June 2025.

⁷⁶ See Timothy Schnabel, ‘The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements’ (2019) 19 Pepperdine Dispute Resolution Law Journal 1.

Throughout the course of the deliberations on the Singapore Convention, however, ‘some delegations repeatedly suggested expanding enforcement to include negotiated settlements’.⁷⁷ According to one leading mediation scholar in the US, ‘It is a fair question to ask why a mediated settlement agreement should be treated more favorably than a negotiated settlement agreement. The theoretical case for a distinction is weak’.⁷⁸ Nonetheless, the UNCITRAL Working Group’s ‘decision to cover only settlements reached in mediation was never changed’, in part because ‘if negotiated agreements were included, an enforcing authority would need to determine that a negotiated agreement was actually a settlement (i.e., resolved a dispute), which would complicate the procedure. There was also a general feeling that a more restrained instrument would garner more support from States and that a limited Convention could serve as a building block, toward greater international acceptance of consensual methods for resolving disputes’.⁷⁹

V. CONCLUSIONS

This article contrasts Anglo and EU approaches to negotiated and mediated settlements. It shows that both Anglo and EU nations generally treat negotiated settlements like other contracts and permit the parties, jointly with the court, to transform their negotiated settlement into an enforceable court order. However, this article identifies a practice in Anglo but not civil law which may contribute to the abundance of negotiated settlements in the Anglosphere – the willingness of courts to dismiss a case permanently pursuant to a settlement the court does not see.

This article notes how the abundance of negotiated settlements in the Anglosphere facilitated the spread of mediated settlements and the tendency of Anglo courts to treat mediated settlements as they treat negotiated settlements. In contrast, this article explains, EU nations tend to follow different procedures and apply different criteria for making a mediated settlement enforceable title than for making a negotiated settlement enforceable title. These differences, which tend to make it easier for parties to obtain court approval of a mediated settlement than a negotiated settlement, may relate to EU Directive 2008/52/EC, which strengthened the cross-border enforcement of mediated, but not negotiated, settlements.

Finally, this article shows that the European approach of strengthening enforcement of mediated but not negotiated settlements, rather than the Anglo approach

⁷⁷ Ellen E Deason, ‘What’s in A Name? The Terms “Commercial” and “Mediation” in the Singapore Convention on Mediation’ (2019) 20 *Cardozo Journal of Conflict Resolution* 1149.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

of treating them similarly, prevailed in the Singapore Convention, which increased cross-border enforcement of mediated but not negotiated settlements. This article leaves readers with the thought that the Convention's treatment of mediated but not negotiated settlements like arbitration awards may to some extent reject an Anglo conception of mediators as primarily facilitators of the parties' communication toward a settlement resting on parties' consent in favor of a European (or broader civil law) conception of mediators with a more quasi-judicial responsibility to look after the parties to ensure the quality of their settlement.

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