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PART XV

CONSENSUAL DISPUTE RESOLUTION AND ARBITRATION

Chapter 4

Comparative Mediation Law

Mapping Mediation Law with the Mediation Matrix

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1 IMAGINE

1 Imagine a performing artist walking along a tightrope, holding a long, light rod. To help her balance, she continually moves the rod, changing the angle of the rod to maintain a constant – her balance in space. If she were to hold the rod in a fixed position, what would happen? She would fall off. The movement of the rod allows her to maintain a deeper continuity and make it to the other end, alive. The tightrope walker offers a metaphor for dispute resolution systems, and mediation systems, in particular. Just like a tightrope walker, mediation systems are sustainable only if they are given the freedom to be flexible while being rooted in reliable and robust formal legal frameworks.

2 OVERVIEW

2 While Part XV encompasses Consensual Dispute Resolution (CDR) generally, this chapter focuses on mediation. Why? Mediation is the fastest-growing area of CDR in terms of institutional and court programs and development of laws. Internationally, it is the subject of numerous cross-border legal instruments, most significantly the United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the Singapore Convention on Mediation (SCM), which came into force on 12 September 2020.

3 From an international comparative perspective, it is imperative to establish a framework to conceptualize the law on mediation. A systematic approach can lay the foundations for future international comparative research that is both academically robust and meaningful from policy and practice perspectives. Accordingly, this chapter focuses on mediation and highlights the relationship between law and mediation.

4 At the centre of this chapter, readers will find the *mediation matrix* – a systematic approach to thinking about and analysing the law relating to mediation that draws upon regulatory theory. It identifies four aspects of mediation that can be subject to regulation. In addition, it identifies the types of regulation that are most commonly used in relation to mediation. By bringing (regulatory) form and function together, the mediation matrix offers a language for comparing regulatory approaches to mediation. The key question addressed by the mediation matrix is: what aspects of mediation are regulated and how? Before addressing this question, however, this chapter offers some context and basic definitions to set the scene.

3 THE FREEDOM WITHIN FRAMEWORK TENSION … AND THAT TIGHTROPE

5 Mediation is an agile and adaptable process – a factor which can create challenges for regulators. Despite many policy debates on the suitability of regulating mediation,[2] policy and lawmakers have managed to promulgate thousands of laws, codes and standards on the significant yet elusive subject of mediation.[3] Many forces are at play in the regulation of contemporary mediation practice. They reflect a rapidly growing marketplace moving in different and sometimes contradictory directions. Press has identified six trends in mediation practice:

> institutionalization (co-option of mediation into court programs, government agencies and business and community organizations);
>
> regulation (codes, standards, rules and legislation);
>
> legalization (case law on aspects of mediation);
>
> innovation (experimentation with court-annexed mediation models);
>
> internationalization (international mediator accreditation) and;
>
> co-ordination (for example, among legislatures in relation to 'model' laws and among mediation organizations).[4]

6 Regulation has been, and continues to be, one of the most controversial topics in the development of mediation from a life skill to an occupation and finally to a profession. In considering approaches to regulating mediation, it is useful to begin with a theme that

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[2] See, for example, the debate within the Japanese ADR Study Committee on whether regulation by legislation was consistent with the essence of ADR. This Committee was established to consider and make recommendations on the development of ADR in Japan: see A Yamada, 'The Impact of ADR Law of 2004: Liberalisation or Legalisation?' in *Session III: Conference Proceedings of the International Arbitration Conference: Mediation, Arbitration and Recent Developments* (Taipei 2008) 2–16. See also the debates of the UNCITRAL Working Group on Conciliation, *Report of the Working Group on Arbitration on the work of its thirty-fifth session* (Vienna 2003) Document N° A/CN.9/506, 6 https://documents.un.org/doc/undoc/ltd/v01/900/28/pdf/v0190028.pdf?token=xYkVr0De1sqQYxWHjN&fe=true accessed 2 January 2024, 2-28. See also the debates leading up to the enactment of the Uniform Mediation Act 2001: The United States National Conference of Commissioners on Uniform State Laws, 'Uniform Mediation Act and Official Comments', (2003) 1 Journal of Dispute Resolution 1, 5–6.

[3] In 2024, a Lexis keyword search of the term mediation in United States legislation alone results in more than 10,000 hits. This figure does not include codes, case law, practice directions and other standards. A similar search done on Australian legislation also returned more than 10,000 hits.

[4] S Press, 'International Trends in Dispute Resolution: A US Perspective' (2000) 3 ADR Bulletin 21.

has continued to define and dominate discussions, debates and developments about ADR around the world: the freedom–framework tension.[5]

7 The freedom–framework tension refers to the pull between two seemingly opposite motivations: to embrace, on one hand, freedom and diversity in practice through flexibility and innovation, and the need, on the other, to provide a framework for consistent and reliable measures of quality in mediation practice through regulation. Here, the tightrope metaphor introduced at the start of this chapter helps to visualize the critical nature of this tension. Without tension in the tightrope, the performing artist will fall. She cannot sustain her movement, however focused, to either side. In other words, to regulate mediation sustainably into the future, it is imperative not only to recognize this tension between freedom and framework, but also to nurture it.

8 The freedom–framework tension sets the tone for debates on the need (or not) for definitional consistency in mediation and the risks of excluding certain mediation practices in the search for uniformity.[6] It sets parameters for concerns that rule consistency may stifle mediation's growth, inhibit its opportunities for innovative development and lead it down the highly legalized path that arbitration has travelled.[7]

9 Further, freedom–framework tensions reflect a multiplicity of interests relating to consumers, practitioners, service-providers and governments. For consumers, by way of example, there is a demand for a flexible and responsive process which accommodates their needs and which offers quality and accountability in its delivery. At the same time, many consumers remain uninformed about quality and unable to judge mediator qualifications and performance. Consumer confusion is exacerbated by the diversity of mediation practice, spanning transformative, negotiation-based and advisory models.[8] Protecting consumers from incompetent and unconscionable practices demands mediator accountability which, in turn, requires some level of transparency and disclosure about mediation processes as well as appropriate practice and approval

[5] In previous work, this tension has been referred to as the diversity – consistency tension. See also National Alternative Dispute Resolution Advisory Council, 'A Framework for ADR Standards' (2001) Canberra Attorney-General's Department, p4 and 70–71, in particular recommendation 1 https://www.yumpu.com/en/document/read/4632392/a-framework-for-adr-standards-national-alternative-dispute- accessed 2 January 2024.

[6] On the challenges of mediation definitions, see L Boulle, *Mediation and Conciliation in Australia* (Lexis Nexis, Sydney 2023) 3-15.

[7] Ibid. See also J Zekoll, M Bälz and I Amelung, 'The Changing Face of Dispute Resolution', in J Zekoll, M Bälz and I Amelung (ed), *Formalisation and Flexibilisation in Dispute Resolution* (Koninklijke Brill NV, 2014) 1, 2-3. See also R Carroll, 'Trends in Mediation Legislation: 'All for One and One for All' or 'One at All'?' (2002) 30 University of Western Australia Law Review 167, 195 f. See also comments in relation to the adoption of the Uniform Mediation Act 2001 in the United States, for example, R Benjamin, 'The Uniform Mediation Act: A Trojan Horse?' (2001) https://mediate.com/the-uniform-mediation-act-a-trojan-horse/ and the 'Uniform Mediation Act Working Reporter's Notes' https://mediate.com/november-2000-draft-of-the-uniform-mediation-act/ accessed 2 January 2024.

[8] N Alexander, 'The Mediation Meta Model: Understanding Practice' (2008) Conflict Resolution Quarterly 26, 97-123.

standards. At the same time, competing concerns for protecting the integrity of the process through strong confidentiality provisions can reduce mediator accountability. Finally, the question of accountability raises the issue of the obligations of mediation service-providers to inform clients about the nature of the dispute resolution process they are entering and the qualifications and skills of their mediators.

10 This chapter shows that it is not a question of freedom at the expense of legal framework or flexibility over regulatory form. Rather, decisions need to be made about which aspects of mediation are most usefully standardized and which are best served by more flexible arrangements.

4 YOU CANNOT NOT REGULATE

11 Regulation is often associated with statutory intervention but it is much more than that. Traditional distinctions between public and private, and between regulated and deregulated, can be confusing as regulatory frameworks increasingly comprise different layers. Contemporary theories of regulation have shifted their focus from outcomes to process and from government rule-making to the broader context of institutions and interest groups engaged in the decision-making process. [9] These are referred to as regulatory actors.

12 In their review of mediation trends around the world, Hopt and Steffek reflect on the unusually high number of regulatory actors – courts, parliaments, executives, private mediation organizations and so on – representing different groups playing their part in regulating mediation. [10] The many and diverse regulatory actors shaping mediation regulation include:

a. referring bodies such as courts and mediation provider organizations;

b. mediators;

c. professional advisors such as lawyers;

d. repeat users of mediation such as insurers and corporations;

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[9] L Nussbaum, 'Mediation as Regulation: Expanding State Governance over Private Disputes' (2016) 2 Utah Law Review 361, 400-403. See also H Collins, 'Regulating Contract Law', in C Parker, C Scott, N Lacey & J Braithwaite (ed), *Regulating Law* (Oxford University Press 2004) 29.

[10] K Hopt and F Steffek, 'Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues', in K Hopt and F Steffek (ed), *Mediation–Principles and Regulation in Comparative Perspective* (Oxford 2013) 3,114.

e. dispute resolution service providers, professional organizations such as bar associations and law societies;

f. industry groups with an interest in mediation for their business-to-consumer (B2C) and business-to-business (B2B) disputes such as telecommunications and banking; and

g. policymakers such as government departments of justice, politicians and legislators.[11]

13 The involvement of various regulatory actors leads to engagement with diverse regulatory forms beyond formalistic state-made law, such as legislation. It extends to forms of so-called soft law, which includes codes of conduct, institutional mediation rules, standard mediation agreements and clauses and corporate mediation pledges. In addition, regulation by private contract (specific mediation agreements and clauses) and the market laws of supply and demand play an important role in shaping the regulatory landscape for mediation. Soft forms of regulation possess greater capacity to respond to changing circumstances and needs. By way of illustration, standard mediation agreements may be varied by the parties to them and only become binding on the individuals when they enter a contractual relationship. Legislation, by contrast, can apply directly to individuals and may be mandatory, in which case it will override any contractual arrangements to the contrary.

14 In a world of global villages with growing access to affordable telecommunications and other technologies, regulatory activities led by regulatory actors such as non-government multi-national organizations and industries are less restricted by jurisdictional boundaries and occur increasingly on an international scale. Such cross-border initiatives offer opportunities for harmonization. Equally, their adaptive nature has the potential to encourage diversity. As argued in previous work, both diversity and harmonization are important values, and the tensions between them are vital to achieving sustainable and responsive international mediation practice.[12] A mix of regulatory forms for mediation is not only inevitable, it is desirable.

15 This broad understanding of law and regulation makes it clear that you cannot *not* regulate. For example, regulation by the market is often thought of as involving the absence of law or the result of deregulation by the state. However, as explained above, deregulated spaces are not empty. They involve the reduction, removal or absence of one kind of regulation only, such as legislation. As indicated above, so-called deregulated

[11] See generally, K Hopt and F Steffek, 'Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues', in K Hopt and F Steffek (ed), *Mediation–Principles and Regulation in Comparative Perspective* (Oxford 2013) 3.

[12] N Alexander, 'Harmonization and Diversity in the Private International Law of Mediation: The Rhythms of Regulatory Reform', in K Hopt and F Steffek (ed), *Mediation—Principles and Regulation in Comparative Perspective* (Oxford University Press 2013) 131, 138-145.

spaces may be filled with other forms of regulation, such as well-established business or professional practices, industry or professional codes of conduct and complaints and disciplinary mechanisms.

16 In this light, the debate about whether or not to regulate mediation is misinformed. Regulation has always occurred and it cannot be — and could not have been — avoided.

17 Against this background, the term 'law' is understood in a broad sense and is used interchangeably with 'regulation' in this chapter. There are five main regulatory approaches in the mediation space:

a. Market–Contract Approach;

b. Collective Self-Regulation;

c. Court regulation;

d. Court jurisprudence and case law;

e. Legislative approaches.

18 Next, each of these regulatory approaches is considered in more detail.

4.1 Market–Contract Approach

19 As the term suggests, the market–contract approach to mediation is based on free market and contract law concepts and derives from values such as freedom of the individual, choice and competition and commitment to contractual undertakings. In this approach, parties can engage in any arrangement for the provision of mediation services in terms of the laws of supply and demand and subject to the legal requirements of private contract.

20 Market principles assume that consumers have access to information in order to make informed choices. In the context of mediation, this would entail that parties are educated about what expectations they can have of mediators and different mediation processes and that they have the ability to differentiate between good and poor-quality mediation. Supply and demand are functions of individual decisions of producers and consumers within a given market. Collectively these decisions determine the allocation of resources, production levels and consumer patterns without state intervention. In other words, according to market principles, the laws of supply and demand would determine the price and quality of goods and services related to mediation. The market relies only on minimalist legal infrastructure such as the enforcement of the rules of contract and property law.

21 Private contracting is both an expression of party autonomy and a form of self-regulation. Here parties choose the parameters for their relationship and interaction by making private contractual arrangements. Typical contractual arrangements in relation to mediation include:

a. dispute resolution clauses in commercial or other contracts which trigger mediation processes;

b. mediation agreements (agreements to mediate), which contain the rights and obligations of contracting parties in the mediation and the nature of the process they have agreed to enter;

c. confidentiality agreements with non-party participants in the mediation; and

d. mediated settlement agreements.

22 While relying on court application of the law for ultimate enforcement, private contracting gives legal form to the ideals of party autonomy and individual responsibility. It allows parties to self-regulate on a mutualized basis to create their own terms for engaging in mediation. In transactions where the stakes are high for the parties, contractual provisions tailor-made to suit their particular needs can be a valuable investment of time and money. These costs can be reduced where there are repeat transactions with the same party. Conversely, in low-stakes matters, standard contracts usually regulate the parties' mediation relationship. In addition to terms specified in the contract, contract terms may be incorporated by reference. References to institutional mediation practice standards, model clauses and other precedents are common.

23 A market–contract approach to mediation regulation is evident in much of the early life of mediation before collectively organized and more formalized approaches to regulating mediation emerged. Despite the increased institutionalization of mediation, a market–contract approach in relation to high-end commercial disputes continues to flourish in a number of jurisdictions such as the United States of America (United States). Here, parties choose to opt out of, or adapt to, certain co-existing regulatory systems such as mediation codes of conduct, approval standards and default legislation in order to tailor the terms and conditions of the mediation to their individual needs. In mediation speak, they are exercising party autonomy by engaging in an individualized form of self-regulation (private contract) in terms of how they resolve their dispute.

4.2 Collective Self-Regulatory Approach

24 Collective self-regulatory approaches refer to regulatory initiatives led by organizations, institutions, industries and communities. Collective self-regulation can take the form of codes, standards, benchmarks and similar instruments established by private or public bodies, or a combination of both. Examples of private bodies include dispute resolution

organizations, private training institutions, chambers of commerce and professional associations of lawyers as well as other professions. Public bodies such as government agencies, legislative bodies, courts, tribunals, publicly-sponsored dispute resolution centres and public education and training institutions are regularly involved in establishing mediation credentialing standards and codes of conduct. Illustrative here are the credentialing and ethics codes issued by: (1) the Australian National Mediator Accreditation System (Australia), (2) the Singapore International Mediation Institute (SIMI) (Singapore) and (3) the nation-wide quality seal for mediator accreditation in Germany established by the *Qualitäts-Verbund Mediation* (QVM),[13]an alliance of the major German professional mediation training and accreditation associations.[14]

25 By their very nature, collective self-regulatory approaches embrace collaborative, consultative and reflective processes, as distinct from top-down policy regulation. Collective self-regulatory approaches embody reflexive and responsive theories of regulation.[15] Reflexion builds upon the notion of responsiveness and highlights the opportunity for individuals involved to identify issues, reflect upon them and negotiate their own solutions. Responsiveness refers to collaboration between government and the group or collective being regulated. This regulatory approach promotes innovation and choice in terms of the determination of the self-regulatory mix and is generally more flexible, adaptable and responsive than more formal regulatory forms. It is said to achieve a greater degree of 'buy-in' from industry members as they have the opportunity to participate in decision-making regarding regulation issues. Legitimacy of the area subject to regulation and conformity with the regulation itself are also enhanced through the participatory nature of self-regulatory approaches.

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[13] Zertifizierung QVM gGmbH, https://qv-mediation.de/zertifizierung/ accessed 1 November 2023. See also Qualitäts-Verbund Mediation entwickelt Gütesiegel für Ausbildung und Akkreditierung von Mediatoren (2018) Mediation Hannover https://steinberg-mediation-hannover.de/qualitaets-verbund-mediation-entwickelt-guetesiegel-fuer-ausbildung-und-akkreditierung-von-mediatoren/ accessed 28 October 2023.

[14] *Bundesarbeitsgemeinschaft für Familienmediation* (National Working Committee for Family Mediation), *Bundesverband Mediation* (Federation for Mediation), *Bundesverband Mediation in Wirtschaft und Arbeitswelt* (Federation for Commercial and Workplace Mediation), *Deutsche Gesellschaft für Mediation* (German Society for Mediation) and *Deutsches Forum für Mediation* (German Forum for Mediation).

[15] On reflective regulation, see D Hess, 'Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness' (1999) 25 (1) Journal of Corporate Law 41. Collins defines reflexive regulation as regulation which seeks to achieve the cooperation and collaboration of those subject to regulation, see H Collins, *Regulating Contracts* (Oxford University Press 2002) 65. See also J Braithwaite, 'Types of responsiveness' in P Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press 2017) 117, 117 and 118. See also generally J Braithwaite, 'Responsive Excellence' and W Wagner, 'Regulating by the Stars' in C Coglianese (ed), *Achieving Regulatory Excellence* (The Brookings Institution 2017) 23 and 36 respectively.

4.3 Court Regulation

26 Here we refer to norms set by courts themselves. In a way this is a form of collective self-regulation examined above. However, because of the special status and role courts play in dispute resolution, they are considered separately here.

27 In numerous jurisdictions, courts are able to set practice guidelines, directions or policies for their judges and court staff. This is particularly so in common law jurisdictions, where practice directions play a major role in how disputes are handled on a day-to-day basis. Certainly, practice directions have played a major role in triggering mediation processes throughout the common law world, for example in Australia, the United States, the United Kingdom, Canada, Singapore and Hong Kong,[16] and illustrations of these are considered below.

4.4 Court Jurisprudence and Case Law

28 The judiciary can play an important role in the development of mediation law in both civil and common law jurisdictions. As disputes arise about aspects of mediation, courts will be tasked with interpreting mediation clauses, mediated settlement agreements, legislation, general law and various soft law provisions applicable to mediation processes, mediators and others involved in mediation.

29 In common law jurisdictions, the doctrine of precedent means that court decisions may have the force of law, so-called case law. In the course of exercising their judicial function, courts may fill gaps in the law left by legislators and lend clarity and case-specific meaning to imprecise terms such as good faith. In jurisdictions such as Australia,[17] England,[18] Singapore,[19] Hong Kong,[20] New Zealand and the United States,[21] there is a steadily growing body of case law on mediation, which has helped to shape the law on mediation in those jurisdictions. While there is no equivalent of the doctrine of precedent in civil law jurisdictions, it is a de facto practice that like cases are decided

[16] Practice Direction 31 in Hong Kong is an example of court regulation that triggers the mediation process: see Practice Direction 31 (Hong Kong), https://www.hklii.hk/en/other/pd/PD31 accessed 3 January 2023. Further illustrations are set out in the section on Triggering Laws below.
[17] See D Spencer, L Barry and L A Ojelabi, Dispute Resolution in Australia: Cases, Commentary and Materials (5th edn, Lawbook Co. 2023).
[18] See M Liebmann, *History and Overview of Mediation in the UK* (Mediation in context, 2000), 19-38.
[19] For recent mediation case law from Singapore, see N Alexander and SY Chong, '23. Mediation and Appropriate Dispute Resolution' (2023) SAL Annual Review of 2022 Cases.
[20] For case law on mediation in Hong Kong, see generally, N Alexander, T K Iu, R Yuen and A Chen, *Hong Kong Mediation*, (3rd edn, Lexis Nexis Hong Kong 2022).
[21] For United States case law on mediation, see, generally, S Cole, C McEwen, N Rogers, J Coben, P Thompson and N Alexander, *Mediation: Law, Policy & Practice*, (2022-2023 edn, Thomson Reuters New York 2024).

alike. Some commentators have even suggested that there is a de facto practice of precedent in many civil law jurisdictions.[22]

4.5 Legislative Approaches

30 Legislation refers to laws made by primary formal law-making bodies, such as national parliaments, with the primary purpose of setting specific and definitive norms for a regulatory topic, such as mediation, and establishing clarity and certainty in relation thereto.

31 For the purposes of this chapter, legislative norms also encompass framework-legislation and model laws. For example, while the EU Directive on Mediation can be considered a piece of European legislation, its primary aim is to establish a framework within which nation-states can regulate the details of certain aspects of mediation; for this reason it is referred to as framework-legislation and offers an umbrella for specific informal and formal regulation that falls under it such as the national legislation and credentialing and ethics codes of the various EU member states.[23] The end result may be a hybrid or co-regulation effort but the initial framework itself is legislative in nature. In terms of model laws, the UNCITRAL Model Law on International Commercial Mediation (MLICM) offers an ideal illustration.[24] Model laws are legal texts produced as a model for enacting states to adopt as part of their domestic legislation. UNCITRAL model laws such as the MLICM have been adopted by United Nations (UN) General Assembly resolution and are offered to member and non-member states for adoption. Model laws may be adopted without amendment by enacting states. Alternatively, enacting states may elect to amend parts of a model law so that it better suits local substantive and procedural legal requirements and complies with national public policy. Thus, UN model laws are flexible instruments, and strict uniformity among national provisions, while an ideal, is not expected. The more realistic aim is harmonization in a particular legal area. According to the UNCITRAL website, the MLICM and its predecessor, the Model Law on International Commercial Conciliation (MLICC), have been adopted or adapted by 46 jurisdictions.[25] Another

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[22] N MacCormick, R Summers and A Goodhart, *Interpreting Precedents A Comparative Study* (New York Routledge 2016) 531-533.

[23] Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2008.136.01.0003.01.ENG accessed 2 January 2024; see also N Alexander, 'Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulatory Reform', in K Hopt and F Steffek (ed), *Mediation–Principles and Regulation in Comparative Perspective* (Oxford 2013) 131, 149-150.

[24] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018 (UNCITRAL) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf accessed 24 February 2024.

[25] 'Status: UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) (amending the Model Law on International Commercial

model law on mediation is the Uniform Mediation Act (UMA) in the United States. Like the MLICM, the UMA is a model law on mediation, but it targets the states of the United States. Whereas the MLICM addresses various aspects of mediation, the UMA has a narrower substantive scope, focusing primarily on mediation confidentiality and privilege.

32 Finally, legislative norms may also include delegated legislation. In the context of mediation, a useful example of delegated legislation can be found in the rules of various courts or civil procedure rules that address aspects of mediation. In Singapore, the Rules of Court 2021[26] and the Singapore International Commercial Court (SICC) Rules 2021[27] are instances of delegated legislation. The Rules of Court address mediation in Orders 5 and 21, and the SICC Rules do so in Order 9 Rules 2, 3 and 5, Order 22 Rule 3 and Order 28 Rule 11.

33 Formal legislative strategies on mediation represent a strong endorsement of mediation by the state and contribute towards its recognition as a legitimate dispute resolution practice and profession. However, the effectiveness of such a rigid form of regulation is questionable, as it may not suit the needs of the mediation process and those who use it. Mediation is promoted as a flexible process that supports party autonomy, legal and non-legal approaches to problem-solving and creative tailor-made solutions. Legislative mechanisms, however, are restricted in their capacity to deal with non-legal perspectives and high levels of generality, complexity, unpredictability and innovation. This mismatch goes some way to explain why some legislative instruments on mediation that are of general scope and application deal with specific aspects of mediation practice only, such as admissibility of mediation evidence issues, leaving other mediation issues to more responsive and potentially diverse forms of regulation. [28] This issue is explored further in the next section.

5 FIVE REGULATORY APPROACHES IN PRACTICE: A MULTI-LAYERED APPROACH

34 The five approaches to mediation regulation are not mutually exclusive. The high and diverse number of regulatory actors in the mediation space has been noted previously, as has the connection between different regulatory actors and approaches to regulation.[29]

Conciliation, 2002)' (2023) United Nations Commission on International Trade Law https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status accessed 23 February 2024.

[26] Rules of Court 2021 (Singapore).

[27] Singapore International Commercial Court Rules 2021 (Singapore).

[28] See, for example, the Uniform Mediation Act (Last Revised or Amended in 2003) (National Conference of Commissioners on Uniform State Laws, USA).

[29] See above K Hopt and F Steffek, 'Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues', in K Hopt and F Steffek (ed), *Mediation–Principles and Regulation in Comparative Perspective* (Oxford 2013) 3, 114.

35 Virtually all jurisdictions can demonstrate at least two of the regulatory approaches defined earlier; jurisdictions with extensive mediation experience are likely to show evidence of most or all five approaches.

36 Mediation in Anglo-American jurisdictions generally follows a mixed regulatory approach with significant legislative, collective self-regulatory, court regulation and market elements. In the United States, the regulation of mediation is characterized by significant legislation on a sector-by-sector basis and court rules on mediation or dispute resolution in virtually every court of the country, in addition to self-regulation on a sectoral or organizational basis. Such an approach supports diversity in mediation practice on a sector-by-sector basis, while striving for uniformity within the relevant sector. The UMA in the United States is an attempt to encourage uniformity in states' laws in relation to limited aspects of mediation such as confidentiality. For high-end commercial disputes where parties choose to tailor dispute resolution to suit their particular needs, a combination of collective self-regulation and the market-contract approach is thriving.

37 The Australian experience also reflects a mixed regulatory approach. A formal legislative approach is evident in the hundreds of statutes that regulate mediation, mainly on a sector-by-sector basis.[30] The regulation of family dispute resolution is an example of a sector-specific legislative approach.[31] At the same time, there is a well-developed self-regulatory approach to mediation activities. For example, the introduction of national mediator credentialing standards in 2008 signalled the emergence of a national collective self-regulatory approach to minimum level approval and practice regulations.[32] Importantly, the voluntary and minimalist nature of the national self-regulatory initiative continues to encourage diversity over and above the minimum standard. It does not prevent mediators from operating outside the standards; however, most courts, large corporations, government departments, industry-based mediation schemes and government-funded mediation services require mediators to comply with the credentialing scheme. So, the Australian National Mediator Accreditation System Standards, which are reviewed and amended regularly, have become the *de facto* national standard.

38 On the European continent, traditionally there has been a trend towards a legislative approach. The Austrian Law on Mediation in Civil Cases 2003 and Training Regulations 2004 evidences a dominant formal legislative approach to the regulation of the approval

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[30] For an overview of the Australian regulatory experience, see L Boulle, *Mediation and Conciliation* (Sydney, LexisNexis, 2023), 401-445.

[31] See the Australian Family Law Act 1975 (No. 53, 1975) (Australia).

[32] Australian National Mediator Accreditation System Standards 2008 (Australia). www.mediationworld.net accessed 2 January 2023. These standards were reviewed and amended in 2015 and at the time of writing are under review again. On mediator accreditation in Australia, see L Boulle, *Mediation and Conciliation* (Sydney, LexisNexis, 2023), 365-372.

and practice of mediators in civil matters. Specific legislation focussing on areas such as neighbourhood, family, victim-offender and other categories of mediation practice has also been enacted in Austria.[33] Following Austria's lead, the Slovak Republic introduced comprehensive mediation legislation in 2004[34] and other European states followed suit. Zalar points out that the majority of transitional European democracies passed statutory mediation laws as a first step in developing mediation practice and culture. He refers to Croatia, Montenegro, Serbia, Macedonia, Slovakia, Malta and Bosnia as illustrations.[35] In Asia, illustrations of a dominant legislative approach can be found in Vietnam[36] and Mongolia[37] – both civil law jurisdictions.

39 For legislation introduced after 2010, the distinctive common law/civil law regulatory trends have become less defined as lawmakers 'cherry-pick' regulatory approaches from jurisdictions with existing mediation legislation. In Hong Kong,[38] Singapore[39] and Germany,[40] for example, generally applicable mediation legislation has been introduced

[33] On Austrian mediation legislation: see S Ferz and E Filler, *Mediation: Gesetzestexte und Kommentar* (Vienna WUV 2003) and M Roth and D Gherdane, 'Mediation in Österreich – Zivilrechts-Mediations-Gesetz: Rechtlicher Rahmen und praktische Erfahrung' in K Hopt and F Steffek (ed), *Mediation – Rechtstatsachen, Rechtsvergleich, Regelungen* (Tübingen Mohr Siebeck 2008) 105, 112 f.

[34] Mediation and Amendment of Certain Acts 2004 (Slovakia).

[35] A Zalar, *Towards Primary Dispute Resolution Systems: Global Trends in Civil and Family Mediation: An Overview of Best Practice in Europe* (The Hague Conflicthantering 2006).

[36] Decree on Commercial Mediation 2017 (Vietnam) https://www.toaan.gov.vn/webcenter/portal/spc/document-detail?dDocName=TOAAN011030&Keyword= accessed 27 February 2024.

[37] Law on Mediation of Mongolia (2012) https://legalinfo.mn/en/edtl/16760186555621 accessed 29 February 2024.

[38] Mediation Ordinance 2012 (Hong Kong) https://www.elegislation.gov.hk/hk/cap620 accessed 29 February 2024. The Ordinance covers confidentiality, (non-)admissibility of mediation evidence, rights of foreign lawyers in mediation, and other rights and obligations associated with mediation. At the time the Ordinance came into force, the Hong Kong Mediation Accreditation Association Ltd (HKMAAL) was in the process of being formed. Accordingly, it was not possible to refer specifically to HKMAAL in the legislation as the premier standard setting body for mediators, and credentialing is not covered in the legislation.

[39] In Singapore, the Mediation Act implicitly recognizes the institutional self-regulatory approach. See the Mediation Act 2017 (Singapore). https://sso.agc.gov.sg/Act/MA2017 accessed 2 March 2024, which covers confidentiality, (non-)admissibility of mediation evidence, enforceability of mediated settlement agreements and other rights and obligations associated with mediation. Sec 7 allows the Minister to designate any mediation service provider to be a designated mediation service provider for the purposes of the Act, and to designate any accreditation or certification scheme administered by a mediation institution to be an approved certification scheme for the purposes of the Act. These are published in the Singapore Gazette. Sec 12 stipulates that mediation settlement agreements arising out of a private mediation (where court proceedings had not commenced) can be recorded as an order of court, but one of the requirements is that the mediation must have been administered by a designated mediation service provider or conducted by a certified mediator. Separately, credentialing standards are set by the Singapore International Mediation Institute and other recognized institutions.

[40] The Mediation Law of 2012 (Germany) https://www.gesetze-im-internet.de/englisch_mediationsg/index.html deals with various aspects of mediation including confidentiality, impartiality and disclosure requirements for mediators. However, credentialing has been delegated to the Federal Ministry of Justice. Sec 6 of the Mediation Act authorizes the Federal Ministry of Justice to issue provisions regulating credentialing of mediators. This has been done through the Ordinance on the

with deliberate content gaps. All three jurisdictions have chosen not to legislate on credentialing and practice standards for mediators, leaving this to the mediation community to address through industry standards and ethical codes of conduct. Here, the thinking seems to be that in a still-emerging mediation profession characterized by mediators from diverse professional and disciplinary backgrounds, regulation that can be responsive to, and evolve with, the profession as it learns from early experiences is more suitable than legislation. Of course, this approach does not exclude the possibility of different regulatory forms for mediator credentialing being introduced in the future. In Hong Kong, it has been expressly recognized that the possibility of legislatively backed provisions for mediator accreditation will be revisited in the future.[41]

40 Contemporary best practice models of regulation recommend a combination of private and public mechanisms in regulated markets with a high level of responsiveness to needs, interests and changes. Experts further suggest that reflexive and responsive processes – often associated with the self-regulatory and co-regulation approaches – encourage performance *beyond compliance*. [42] In other words, participation in determining regulatory measures does more than enhance awareness, understanding and compliance – it also supports aspirations to achieve best practices in the regulated market.

41 The Organisation for Economic Co-operation and Development (OECD) Recommendation of the Council for Agile Regulatory Governance to Harness Innovation provides a useful policy illustration. Adopted by the OECD Council in 2021, it endorses '[h]arnessing, under the condition that corresponding outcomes can be appropriately monitored, the opportunities provided by non-legally binding approaches either as an alternative or as a complement to other regulatory instruments'.[43] These principles are reflected in co-regulatory efforts such as the implementation of the EU Directive on Mediation.[44] Here the EU Directive (legislative in nature) sets formal parameters within

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Training and Further Training of Certified Mediators (ZMediatAusbV)[40] which regulates the standard of training by reference to the professional mediation community in Germany. See the previous discussion on the *Qualitäts-Verbund Mediation* (Quality Association Mediation) in Germany, above n 13.

[41] 'Report of the Working Group on Mediation' (2010) (Department of Justice The Government of the Hong Kong Special Administrative Region) https://www.doj.gov.hk/en/legal_dispute/pdf/med20100208e.pdf accessed 29 February 2024.

[42] N Gunningham and D Sinclair, 'Smart regulation' in P Drahos (ed), *Regulatory Theory – Foundations and Applications* (ANU Press 2017) 133, 133-135.

[43] Organisation for Economic Co-operation and Development (OECD), 'Recommendation of the Council for Agile Regulatory Governance to Harness Innovation' (OECD/LEGAL/0464) (2021) https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0464 accessed 2 March 2024. For further elaboration, see OECD, 'Practical Guidance on Agile Regulatory Governance to Harness Innovation' (2021) https://legalinstruments.oecd.org/public/doc/669/9110a3d9-3bab-48ca-9f1f-4ab6f2201ad9.pdf accessed 2 March 2024.

[44] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (European Union) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2008.136.01.0003.01.ENG accessed 8 July 2024. .

which the mediation community can regulate various aspects of mediation. The Directive defines mediation, thereby establishing its scope, and identifies the aspects of mediation that require regulation by EU member-states. The recitals clearly recognize different forms of regulation of mediation including self-regulation (recital 14), specifically referring to the European Code of Conduct for Mediators and market-based solutions (recital 17). Recital 16 encourages member-states to ensure that appropriate quality control mechanisms for mediation services are in place. Art 4 of the Directive requires member-states to encourage mediators and mediation organizations to adhere to voluntary codes of conduct and other quality control mechanisms. These provisions of the EU Directive highlight how co-regulatory approaches can accommodate diverse interest groups while still pursuing common policies.

6 THINKING ABOUT MEDIATION IN TERMS OF FUNCTION

42 Now that the most common regulatory forms for mediation have been examined, the issue of the subject-matter or content of mediation law and regulation can be addressed. The content of mediation law can be usefully categorized in terms of its function. Regulating mediation can serve several different functions:

a. It can facilitate access to mediation pathways and trigger the mediation process (triggering laws). Triggering laws and mechanisms regulate the extent to which mediation processes can be incentivized or mandated, and whether parties can be penalized for not engaging in mediation in certain circumstances.

b. It can regulate aspects of the conduct of the mediation process itself (procedural laws). Procedural laws, rules and provisions typically refer to the commencement and termination of the mediation process; the selection of the mediator; the role of the mediator; the structure of the process; and administrative matters.

c. It can support the development and recognition of the mediation profession by establishing standards for the credentialing of mediators (credentialing standards).

d. It can protect participants in mediation processes by clarifying their respective rights and obligations (legal and ethical). 'Participants' refers to mediators, administrative staff involved in organizing and preparing for the mediation, parties, legal representatives and other professionals such as experts and translators involved in the mediation. Here, further issues may arise relating to, amongst other things:

    i. the enforceability of mediation clauses, mediation agreements and mediated settlement agreements;

    ii. the confidentiality and admissibility of mediation communications in subsequent arbitration or court proceedings; and

iii. the impact of the commencement of mediation on litigation limitation periods.

43 Each of these four aspects of mediation can be regulated by any combination of the five regulatory forms outlined previously. The various permutations of regulatory form and functional content are represented visually in Figure X. This visual representation is called the Mediation Matrix.

Figure X: The Mediation Matrix

Regulatory form →

Functional content ↓

	Market–Contract Approach	Collective Self-Regulation	Court regulation	Jurisprudence and case law	Legislative approaches
Triggering					
Procedural					
Credentialing standards					
Rights and obligations					

7 MAPPING MEDIATION LAW WITH THE MEDIATION MATRIX

44 The Mediation Matrix offers a systematic approach to understanding and comparing mediation laws. For the purposes of illustrating how the Mediation Matrix can be used as a comparative tool, illustrations of mediation laws from various common law and civil law jurisdiction will be presented according to their:

a. primary function: triggering, procedural, credentialing standards or rights and obligations; and

b. regulatory form.

45 First, mediation triggering laws in their various regulatory forms will be examined, followed by procedural aspects of mediation. Then, mediator credentialing, and finally rights and obligations of mediation participants will be explored.

46 As explained previously, the term 'law' is understood in a broad sense and extends beyond formalistic legislative norms to include various forms of soft law.

7.1 Triggering Laws

47 As indicated above, triggering laws facilitate mediation pathways by 'triggering' the mediation process. Research shows that most people are subject to the status quo bias – that is, they resist change and prefer the familiar. Therefore, they are reluctant to embrace mediation without incentives or triggers being present.[45] A global review of mediation regulatory practice has shown that multiple diverse triggering mechanisms and private and public access points to mediation are effective in encouraging the use of mediation across a range of sectors.[46]

[45] See generally on nudge theory or choice architecture, R Thaler and C Sunstein, *Nudge The Final Edition* (Penguin Publishing, 2021). See also N Alexander, *Nudging Users Towards Cross-Border Mediation: Is it Really About Harmonised Enforcement Regulation?* (Contemporary Asia Arbitration Journal 2014) 411.

[46] See generally N Alexander, EU Mediation Law Handbook—Regulatory Robustness Ratings for Mediation Regimes (Wolters Kluwer 2017); K Hopt and F Steffek, Mediation—Principles and Regulation in Comparative Perspective (Oxford University Press 2013); and N Alexander, International and Comparative Mediation—Legal Perspectives (Wolters Kluwer 2009) Chapter 3.

48 Triggering mechanisms include court referrals to mediation (such as voluntary, mandatory, opt-out referrals),[47] required mediation information sessions,[48] legal requirements to mediate before litigating, tax or financial incentives to mediate,[49] corporate mediation pledges,[50] mediation awareness programs[51] and mediation clauses.[52]

49 Meanwhile multiple kinds of triggering mechanisms can be found across different legal systems. It is useful however to consider how common law and civil law jurisdictions

[47] For example, in Australia, the Farm Debt Mediation Act 1994 in New South Wales requires parties to engage in mediation before a financial institution can foreclose on a farm. Also, in the South Australian Supreme Court, parties can be referred to mediation with or without their consent. See L Boulle and R Field, *Australian Dispute Resolution Law and* Practice (Lexis Nexis 2017) para 10.46, 10.48-10.49 and 10.51. In another example, in the United Kingdom, HM Courts and Tribunals Service's Online Civil Money Claims service piloted an opt out mediation scheme for claims between GBP 500-£10,000 for those commencing claims without legal representation – see HM Courts & Tribunals Service, 'HMCTS opt out mediation evaluation report' (21 March 2023) https://www.gov.uk/government/publications/hmcts-opt-out-mediation-evaluation/hmcts-opt-out-mediation-evaluation-report accessed 18 March 2024.

[48] For example, under the new mediation laws in Italy, parties involved in certain categories of disputes must now personally participate at the first meeting with the neutral or potentially face financial penalties – see G Matteucci, 'Italy, "the country where everything ends in court" New rules on mediation 2023'(2023) 24 (2) Revista Eletrônica de Direito Processual 65, 74-75, 81. In Austria, mediation information sessions are mandatory for child custody cases – see C H Van Rhee, 'Mandatory Mediation before Litigation in Civil and Commercial Matters: A European Perspective' (2021) 4 (12) Access to Justice in Eastern Europe 7, 17.

[49] For example, Italy's 2022 Reform of Mediation Law (Legislative Decree 28/2010) (Italy). The Legislative Decree stipulates that parties who pay a mediation fee receive a tax credit equal to the fee, up to a limit of EUR 500, if the mediation is successful (Legislative Decree 28/2010, Art 20). In the United Kingdom, the family mediation voucher scheme is a time-limited scheme designed to support parties who may be able to resolve their family law disputes outside of court by reducing the mediation costs of eligible participants by up to GBP 500; see Gov.uk, 'Guidance, Family Mediation Voucher Scheme' (last updated 7 April 2021) https://www.gov.uk/guidance/family-mediation-voucher-scheme accessed 8 March 2024.

[50] For a recent illustration from Singapore see: Singapore International Mediation Institute, 'Forty-two MNCs and industry associations declare support for mediation in cross-border disputes as global movement for mediation gains momentum' (31 August 2023) https://simc.com.sg/blog/2023/08/31/forty-two-mncs-and-industry-associations-declare-support-for-mediation-in-cross-border-disputes-as-global-movement-for-mediation-gains-momentum accessed 18 March 2024.

[51] See for example the Mediation Awareness programme for Judges by the European Commission for the Efficiency of Justice (European Commission for the Efficiency of Justice (CEPEJ) 'Mediation Development Toolkit on Ensuring implementation of the CEPEJ Guidelines on mediation' (5 December 2019) https://rm.coe.int/cepej-2019-18-e-mediation-awareness-programme-for-judges/168099330b accessed 8 March 2024.

[52] See for example *Maxx Engineering v PQ Builders Pte Ltd* (High Court General Division, Singapore) Judgment 27 March 2023 [2023] SGHC 71.

initially differed in how they encouraged the use of mediation, as this reflects core aspects of the common and civil law mindsets respectively.

50 In many common law jurisdictions, a range of incentives – from mediation information sessions to mandatory court mediation referrals[53] – have been available to encourage or require disputants to engage in mediation. Generally speaking, common law jurisdictions have been more open to using strong incentives to encourage the uptake of mediation including requiring parties to attend mediation. Here, the principle of voluntariness in mediation applies to the potential settlement agreement but not necessarily to the choice to attend mediation. Initially triggering mechanisms were primarily court-centred, (e.g. referrals from courts). However, over time, they have shifted to lawyers in the form of requirements to advise parties on mediation generally and specifically, if there are duties upon parties in relation to mediation (see below). Most recently, duties have been placed on the parties themselves in the form of requirements to mediate before the close of pleadings. By way of illustration, in

[53] For example, the Federal Court of Australia has the capacity to order parties to attend compulsory mediation conducted by registrar mediators; also, in the South Australian Supreme Court, parties can be referred to mediation with or without their consent. See L Boulle and R Field, Australian Dispute Resolution Law and Practice (Lexis Nexis 2017) para 10.51. It is also worth considering, in contrast, the approach taken by the Singapore International Commercial Court, of which the Court is empowered with subtler prerogatives to urge litigants to consider proceeding to mediation instead; Paragraph 77(11) of the Singapore International Commercial Court Practice Directions (effective 1 July 2023) states, 'Where parties are not willing to attempt mediation or any other form of ADR, the Judge may direct that the issue of mediation or any other form of ADR be considered at the next Case Management Conference or at a specified stage in the proceedings'.

jurisdictions such as Australia,[54] Singapore,[55] South Africa,[56] India,[57] Hong Kong,[58] Fiji,[59] and the United Kingdom,[60] provisions requiring parties to reasonably engage in mediation before trial with penalty costs if they fail to do so are in place.

51 In contrast, civil law thinking in the European context has traditionally adhered to the notion that voluntariness in mediation extends to the choice to attend mediation or not. However, there has been a noticeable shift from this early stance in a number of civil law jurisdictions. While mediation triggers often take the form of soft incentives, such as the requirement for mediation information sessions in Austria[61] and Germany,[62] and court

[54] Civil Dispute Resolution Act 2011 (Australia) Sec 6-11.

[55] Rules of Court 2021 (Singapore) O 21 r 2(a), which provides: 'In exercising its powers to fix or assess costs, the Court must have regard to all relevant circumstances including—(a) efforts made by the parties at amicable resolution.' See also, D Quek, 'Supreme Court Practice Directions (Amendment No. 1 of 2016): A Significant Step in Further Incorporating ADR into the Civil Justice Process' (2016) Singapore Law Gazette http://v1.lawgazette.com.sg/2016-03/1524.htm accessed on 10 December 2023.

[56] Uniform Rules of Court of South Africa (South Africa) Rule 41A and Form 27; see also The Judiciary of the Republic of South Africa, Amendment of Uniform Rules of Court with the Insertion of Case Management Rules (South Africa) https://www.judiciary.org.za/images/news/2019/AMENDMENT_OF_UNIFORM_RULES_OF_COURT_WITH_THE_INSERTION_OF_CASE_MANAGEMENT_RULES.pdf accessed on 10 December 2023.

[57] J Gupta, 'Mandatory Pre-Institution Commercial Mediation In India: Premature Step In The Right Direction? Kluwer Mediation Blog' (2018) http://mediationblog.kluwerarbitration.com/2018/09/01/mandatory-pre-institution-commercial-mediation-india-premature-step-right-direction/?doing_wp_cron=1596331448.8228340148925781250000 accessed on 10 December 2023.

[58] Practice Direction 31 (Hong Kong). https://www.hklii.hk/en/other/pd/PD31 accessed 10 December 2023.

[59] Trade Disputes Act 1978 (Cap 97) (Fiji) Art 4 http://www.paclii.org/fj/legis/consol_act_OK/tda1978169/ accessed on 10 December 2023.

[60] Practice Direction on Pre-Action Conduct in the UK (United Kingdom) Paragraph 4.4(3), which lists unreasonably refusing to consider ADR as an example of noncompliance with the Practice Direction or relevant pre-action protocol.

[61] As mentioned above at n 48, in Austria, mediation information sessions are mandatory for child custody cases - see C H Van Rhee, 'Mandatory Mediation before Litigation in Civil and Commercial Matters: A European Perspective' (2021) 4(12) Access to Justice in Eastern Europe 7, 17. Also, in the context of court-annexed mediation, courts are obliged to inform the parties, where appropriate, of the existence of institutions capable of alternative dispute resolution (including mediation); note however that there is no general requirement for parties to attend mediation information events - see M Roth and D Gherdane, 'Mediation in Austria: The European Pioneer in Mediation Law and Practice' in K Hopt and F Steffek (ed), *Mediation—Principles and Regulation in Comparative Perspective* (Oxford University Press 2013) 247, 258-259; also see C Lenz and M Risak, 'Austria' in N Alexander et al (ed), *EU Mediation Law Handbook—Regulatory Robustness Ratings for Mediation Regimes* (Wolters Kluwer 2017) 43.

[62] *Zivilprozessordnung* 2001 (Germany) § 278(5), states that the German courts may suggest to parties that they proceed to mediation (or another suitable ADR procedure); if the disputants express

referrals only with consent of parties in France[63] and other civil law states,[64] there are also illustrations of mandatory requirements regarding mediation.[65] In 2023, Italy

willingness to attempt to settle their conflicts amicably by mediation, the court may subsequently stay its own proceedings. It may be aptly described as a 'soft' mediation trigger; see also K Osswald and G Flecke-Giammarco, 'Germany' in N Alexander et al (ed), *EU Mediation Law Handbook—Regulatory Robustness Ratings for Mediation Regimes* (Wolters Kluwer 2017), para 357–359.

[63] See Art 22 of the Act of 8 February 1995 (Act no. 95-125 of 8 February 1995 concerning the organization of the jurisdictions and the civil, criminal and administrative procedures) modified by Regulation (ordonnance) no. 2011-1540 of 16 November 2011 transposing Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (*Ordonnance n° 2011-1540 du 16 novembre 2011 portant transposition de la directive 2008/52/CE du Parlement européen et du Counseil du 21 mai 2008 sur certains aspects de la médiation en matière civile et commerciale*) (it shall collectively be referred to in this footnote as the 'Act'), which governs the process of how a judge in court may direct a party before it to mediation, with the parties consent. It is the judge who appoints the mediator and determines the length of the mediator's assignment, with the consent of the parties' involved (Art 22-3 of the Act); the court will terminate litigation proceedings if the mediation is successful. See also K Deckert, 'Mediation in France: Legal Framework and Practical Experiences' in K Hopt and F Steffek (ed), *Mediation—Principles and Regulation in Comparative Perspective* (Oxford University Press 2013) 455, 463-464; see generally, D Wietek, 'France' in N Alexander et al (ed), *EU Mediation Law Handbook—Regulatory Robustness Ratings for Mediation Regimes* (Wolters Kluwer 2017).

[64] For example, the General Code of Procedure of Ecuador, Art 294.6, which reads 'The judge, ex officio, or at the request of a party, may order that the controversy be transferred to a legally constituted mediation center, so that an agreement can be sought between the parties. In the event that the parties sign a mediation record in which a total agreement is recorded, the judge will incorporate it into the process to conclude it.' In Spain, Law 5/2012 of 6 July 2012 on civil and commercial mediation allows judges in civil and commercial matters to encourage parties to attempt mediation whenever this is believed suitable to the case - see C. H Van Rhee, 'Mandatory Mediation before Litigation in Civil and Commercial Matters: A European Perspective' (2021) 4(12) *Access to Justice in Eastern Europe* 7, 19. In Japan, see Arts 17 and 20(1) of the Civil Mediation Act of Japan (Law No. 222 of 1951). Art 17 stipulates that '[i]f mediation carried out by a mediation committee is unlikely to be successful, and the court finds it appropriate, it may, by its own authority and to an extent that does not contradict the objectives of the parties' petitions, issue a necessary order to resolve the case after hearing the opinions of the civil mediation commissioners composing the mediation committee, giving consideration to equitable treatment of the interests of both parties, and taking into account all relevant circumstances. Through this order, the court may order the payment of money, delivery of an object, or any other provision of economic benefit.' Art 20(1) states that '[w]hen the court in charge of the case finds it appropriate, it may, by its own authority, refer the case to mediation and handle the case itself or have the case handled by a court with jurisdiction; provided, however, that this does not apply to cases in which there is no agreement by the parties after the arrangement of the issues and evidence of the case has been completed.' See also The Act on Promotion of Use of Alternative Dispute Resolution (Act No. 151 of 2004) (Japan) https://www.japaneselawtranslation.go.jp/en/laws/view/3774 to promote ADR procedures such as arbitration, mediation and conciliation accessed 8 July 2024.

[65] For example, in France, the Law of 18 November 2016 on the Modernization of Justice for the Twenty First Century introduced a mandatory ADR obligation for small claims and neighbourhood disputes – see C. H Van Rhee, 'Mandatory Mediation before Litigation in Civil and Commercial Matters: A European Perspective' (2021) 4 (12) Access to Justice in Eastern Europe 7, 17-18.

introduced a number of triggers and incentives for mediation such as mandatory mediation before court hearings for certain types of disputes including family covenants and real estate disputes. In addition, tax incentives in the form of tax credit for successful mediation capped at €500 were introduced.[66] Other civil law jurisdictions with mandatory mediation include Turkey[67] and Romania.[68] Outside of Europe, a number of civil law jurisdictions with provisions that mandate mediation in certain circumstances include Indonesia,[69] Qatar,[70] Korea,[71] Ecuador[72] and Vietnam.[73]

52 Beyond the courts, mediation and mixed-mode dispute resolution clauses[74] are increasingly popular triggering mechanisms, especially in commercial disputes. Courts increasingly give effect to properly drafted dispute resolution clauses by drawing on

[66] See 2022 Reform of Mediation Law (Legislative Decree 28/2010) (Italy), Art 20, which stipulates that parties who pay a mediation fee receive a tax credit equal to the fee, up to a limit of EUR 500, if the mediation is successful.

[67] T Bilecik, 'Turkish Mandatory Mediation Expands Into Commercial Disputes' (2019) Kluwer Mediation Blog http://mediationblog.kluwerarbitration.com/2019/01/30/turkish-mandatory-mediation-expands-into-commercial-disputes/?doing_wp_cron=1596331215.4248208999633789062500 accessed 10 December 2023; see also E Tan, N Ayik and Y Tarman, 'Amendments Regarding Compulsory Mediation, Concordatum, and Receivables Arising from Subscription Agreements' (2018) Cakmak Alert https://cakmak.av.tr/wp-content/uploads/2019/07/1-771081993-1.pdf accessed 10 December 2023.

[68] C Gavrila, 'Mandatory "mediation attempt"' (2018) Kluwer Mediation Blog http://mediationblog.kluwerarbitration.com/2018/09/14/mandatory-mediation-attempt/?doing_wp_cron=1596331444.7880830764770507812500 accessed 10 December 2023.

[69] Supreme Court Regulation No. 1 Year 2016 on Court-Annexed Mediation Procedure, which obliges disputants to attempt to mediate their civil disputes in court before proceeding to trial; see also H Smith Freehills, 'ADR in Asia Pacific: Spotlight on Indonesia' (23 February 2017) https://www.herbertsmithfreehills.com/insights/2017-02/adr-in-asia-pacific-spotlight-on-indonesia accessed 12 March 2024 .

[70] Qatar Financial Centre Civil and Commercial Courts Regulations and Procedural Rules 2022 (Qatar) Art 25.1 https://www.qicdrc.gov.qa/courts/court/regulations-and-procedural-rules/regulations-court accessed on 10 December 2023.

[71] See for example the Family Litigation Act (South Korea), Art 50; the Labour Union and Labour Relations Adjustment Act (South Korea), Art 53-61.

[72] The Arbitration and Mediation Law (Ecuador) was enacted in 1997 and codified in 2006, and Art 15 requires mandatory mediation prior to arbitration https://ccq.ec/wp-content/uploads/2019/01/Ley-de-Arbitraje-y-Mediacio%CC%81n.pdf accessed 8 July 2024.

[73] In Vietnam, some cases will require mediation before the disputes can be brought to court. The Labour Code 2019 (Vietnam), Art 188 Clause 1, states that individual labour disputes shall be settled through mediation by labour mediators before being brought to the Labor Arbitration Council or the Court - see LawNet, 'Circumstances in which conciliation is required when settling disputes in Vietnam' (19 October 2020) https://lawnet.vn/thong-tin-phap-luat/en/dan-su/circumstances-in-which-conciliation-is-required-when-settling-disputes-in-vietnam-114661.html accessed 18 March 2024.

[74] For example, arb-med-arb clauses or lit-med-lit clauses.

freedom of contract principles.[75] For example, the English case of *Ohpen Operations UK Limited v Invesco Fund Managers Limited*[76] demonstrates the importance of properly drafted ADR clauses and offers insight into the criteria courts use when deciding whether to stay court proceedings in support of an ADR provision. The High Court's Technology and Construction Court (King's Bench Division) determined that the following criteria had to be met:

a. The agreement must create an enforceable obligation requiring the parties to engage in alternative dispute resolution.

b. The obligation must be expressed clearly as a condition precedent to court proceedings or arbitration.

c. The dispute resolution process to be followed does not have to be formal but must be sufficiently clear and certain by reference to objective criteria, including machinery to appoint a mediator or determine any other necessary step in the procedure without the requirement for any further agreement by the parties.

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[75] For a detailed perusal of legal enforceability of alternative dispute resolution (ADR) clauses, see K Han and N Poon, 'The Enforceability of Alternative Dispute Resolution Agreements—Emerging Problems and Issues' (2013) 25 Singapore Academy of Law Journal 455, 47: from a perusal of precedents from England, Australia, Hong Kong and Singapore, the authors have advised 'parties (and their legal advisors) [. . .] to pay very careful attention to ensure that ADR clauses are felicitously drafted [in order for it to be] ultimately enforceable', as it appears to be the sentiments of courts across several jurisdictions that ADR clauses must be meticulously drafted so that they may not be rendered unenforceable for uncertainty. Consider *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* (2012) EWCA Civ 638 para 35–37; *Aiton Australia Pty Ltd v. Transfield Pty Ltd* 1999 WL 33121599 (NSWSC 1999); and *Hyundai Engineering and Construction Co Ltd v Vigour Ltd* (2005) HKEC 258 para 16–30. See also *Children's Ark Partnerships Ltd v Kajima Construction Europe (UK) Ltd & Anor* [2022] EWHC 1595 (TCC), which confirmed that United Kingdom courts will generally seek to uphold agreed mandatory contractual dispute resolution terms and will stay proceedings brought without compliance with those terms.
For views about proper drafting and enforceability of mediation clauses in continental Europe (eg German and Austrian perspectives), see generally: N Alexander, 'International and Comparative Mediation—Legal Perspectives' (Wolters Kluwer 2009) para 171–213; see also P Tochtermann, 'Mediation in Germany: The German Mediation Act–Alternative Dispute Resolution at the Crossroads' in K Hopt and F Steffek (ed), *Mediation–Principles and Regulation in Comparative Perspective* (Oxford University Press 2013) 521, 538-539. For a discussion on the enforceability of cross-border mediation agreements in the EU context, see also M Senftl, 'Cross-Border Mediation: Towards a Balanced Framework for Cross-Border Dispute Resolution in the European Union' (2021) 24 *ZEuS Zeitschrift für Europarechtliche Studien* 515, 540-545.

[76] *Ohpen Operations UK Limited v Invesco Fund Managers Limited* (Technology & Construction Court, King's Bench Division, United Kingdom), Judgment 16 August 2019, [2019] EWCH 2246 (TCC).

d. The court has a discretion to stay proceedings commenced in breach of an enforceable dispute resolution agreement. In exercising its discretion, the court will have regard to the public policy interest in upholding the parties' commercial agreement and furthering the overriding objective in assisting the parties to resolve their disputes.

53 In the American case of *Kemiron Atlantic Inc v Aguakem International Inc*,[77] the contract specified that parties had to go to mediation before arbitration. The court held that since neither party requested mediation, the arbitration clause was not activated, and the Federal Arbitration Act did not apply. It stated that where contracting parties agree to make the commencement of arbitration dependent upon satisfaction of a condition precedent, the failure to satisfy the specified condition will preclude a party from initiating arbitration.

54 In Australia, in the seminal case of *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*,[78] the contracting parties had an arbitration clause but agreed by correspondence to try to conciliate their dispute. They met with a mediator and reached agreement on a number of issues before adjourning, pending collation of further information. The plaintiff sought a stay of arbitration proceedings, alleging there was a legally binding agreement to mediate, the effect of which was that the arbitration could not resume until mediation was concluded. The parties would take all reasonable steps to endeavour to resolve the mediation agreement. The Supreme Court of New South Wales held that the parties' intention could be discerned from the correspondence and the evidence of how they had conducted the mediation until the point at which it was adjourned. The court ordered a stay of the arbitral proceedings, indirectly giving effect to the mediation agreement.

55 In several jurisdictions including Hong Kong and Singapore, mediation legislation expressly recognizes mediation clauses and mediation agreements and their *prima facie* enforceability.[79] In Singapore, Sec 8 of the Mediation Act expressly permits courts to stay litigation and make appropriate orders pending the fulfilment of a mediation clause.

56 An often overlooked but nevertheless important soft incentive to use commercial mediation are corporate and government pledges to encourage the use of mediation

[77] *Kemiron Atlantic Inc v Aguakem International Inc* (Court of Appeals, Eleventh Circuit, US) Judgment 8 May 2002, 290 F 3d 1287 (11th Cir 2002).
[78] *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (Supreme Court, New South Wales, Australia) (Judgment 13 April 1992 (1992) 28 NSWLR 194 at 209.
[79] For Hong Kong, see Sec 2(1) Mediation Ordinance Ord. No. 15 of 2012 and for Singapore, see Sec 4 of the Mediation Act 2017.

and avoid litigation. These are a growing form of self-regulation that may indirectly trigger mediation processes. Prominent examples from around the world include the United Kingdom Government Pledge 2001, the Viadrina Declaration 2008, which records German and Polish judicial support for mediation in cross-border family and child kidnapping disputes, the CPR ADR Pledge, signed by more than 5500 American companies and law firms, the International Trademark Association ADR Pledge, the Individual and Corporate Pledges of the Mediation First Community in Hong Kong, the Euro-Mediterranean Charter on Appropriate Dispute Resolution 2007, signed by the Arab Union of Lawyers, the Egyptian Bar Association, the Council of the Bars and Law Societies of the European Union (CCBE), the Union of Turkish Bars, and the MNCs for Mediation Pledge at the 2023 Singapore Convention Week.[80] In Australia, all federal government departments are subject to an ADR Directive, the equivalent of a government pledge, to use mediation wherever possible.[81] As a result, Australian government departments frequently mediate, for example in taxation disputes and commercial contract disputes, amongst others.

57 In bringing this section to a close, it is noteworthy that mediation practice appears to be more developed with more cases mediated in jurisdictions which have multiple effective triggering laws and mechanisms.

7.2 Procedural Laws

58 Process and procedure govern aspects of mediation such as commencement, termination, selection and appointment of mediators, administrative matters related to the mediation and internal mediation protocols. One of the hallmarks of mediation is its process flexibility. It follows that soft regulation, such as mediation standards and rules of dispute resolution institutions, bar associations and other professional bodies, typically deal with aspects of procedure.[82] However, as explained below, legislation and court decisions also extend to aspects of mediation procedure.

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[80] Singapore International Mediation Centre, 'MNCs and Industry Associations Declare Support for Mediation in Cross-Border Disputes as Global Movement for Mediation Gains Momentum' (31 August 2023) https://simc.com.sg/news/mncs-and-industry-associations-declare-support-mediation-cross-border-disputes-global-movement accessed 7 Mar 2024.

[81] See Australian Government Attorney-General's Department Office of Legal Services Coordination, 'Guidance Note No. 12 Use of Alternative Dispute Resolution (ADR)' (June 2018) https://www.ag.gov.au/sites/default/files/2020-03/Guidance-note-12-use-of-alternative-dispute-resolution-adr.pdf accessed 26 March 2024.

[82] See, for example: The Institute of Arbitrators and Mediators Australia, *Conciliation Rules* (2006) pt II www.iama.org.au/pdf/ConciliationRules.pdf accessed 5 August 2008.

59 Institutional rules are generally preferred to manage the internal mediation process, as parties can adjust the provisions to suit their needs. Insofar as they are incorporated into private contracts and therefore bind parties and can be interpreted by courts, institutional mediation rules have the effect of procedural laws. Mediator standards and codes of conduct apply directly to the mediator and are usefully read together with such procedural rules. Mediator standards are addressed below.[83]

60 Here are some illustrations of institutional rules that focus on procedural issues in mediation. The Singapore International Mediation Centre (SIMC) sets institutional rules for commercial mediation, which deal with fees, mediator appointment, administrative issues, and aspects of mediation procedure such as the role of the mediator, pre-mediation conferences, timelines and the use of electronic communications (ODR). There is also a general provision that the mediator should consult with the parties in relation to the conduct of the mediation. The Mediation Rules and the Mediation Procedure of the International Chamber of Commerce (ICC) address similar matters but indulge in further administrative details providing explanatory guidance (in its Mediation Procedure) and addressing matters such as the language spoken at the mediation session. The London Court of International Arbitration (LCIA) provides mediation rules specifying aspects of the process of mediation such as the requirements of written submissions to the mediator and document exchange. There are also provisions regulating *ex parte* meetings and the role of the mediator in making settlement recommendations to parties jointly and separately.[84]

61 While soft forms of regulation dominate the procedural aspects of mediation, aspects of procedure can also be found in case law and even formal law (legislation).

62 In terms of legislation, provisions on procedure vary in terms of their content and detail. Legislation may:

a. Be silent on the procedure. By way of illustration, the Hong Kong Mediation Ordinance[85] is silent on procedure, although the comprehensive definition of mediation in Sec 4 does seem to promote a facilitative approach to mediation, but

[83] See para 68-90 below.

[84] See International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) Rules Amended and Effective 1 March 2021 (International Centre for Dispute Resolution), https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules_1.pdf?utm_source=icdr-website&utm_medium=rules-page&utm_campaign=rules-intl-update-1mar accessed 9 March 2024, rule M-9.

[85] Mediation Ordinance (Cap. 620) 2013 (Hong Kong).

falls short of excluding more directive mediation approaches and does not explicitly address aspects of the process.

b. Include provisions that clarify that mediation procedure is to be shaped by the mediator and/or the parties. Illustrative here is Art 7(1) and (2) of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018 (UNCITRAL Model Law on Mediation), which provides 'the parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted'. In the absence of parties' agreement, 'the mediator may conduct the mediation proceedings in such a manner as the mediator considers appropriate'. Similarly, Art 22 of the People's Mediation Law of China[86] provides that the mediator is free to adopt various means to mediate disputes depending on the circumstances of each dispute. As a matter of practice, at least for commercial disputes, parties will turn to institutional rules to govern their mediation process. An example of such a set of rules in China can be found in the Shanghai Commercial Mediation Centre (SCMC) Mediation Rules. This legislative provision is a useful example of how legislation recognizes self-regulation and the use of institutional rules.

c. Deal with the supplementary aspects of mediation procedure such as commencement of mediation, appointment of mediators, termination and the like. Arts 5, 6, and 12 of the UNCITRAL Model Law on Mediation deal with these matters.

d. Set out specific aspects of mediation procedure. The UNCITRAL Model Law on Mediation contains two such provisions. Art 8 of the Model Law clarifies that mediators may meet with the parties jointly or separately, thereby confirming that private (caucus) sessions may be part of the process. Art 7(4) of the Model Law specifies that mediators may make proposals – a very specific (and not uncontroversial) aspect of mediation procedure, which is associated with advisory or directive forms of mediation. Similarly, Art 22 People's Mediation Law of China[87] also provides that 'mediators may make proposals or recommendations for settlement to the party/parties'.

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[86] 中华人民共和国人民调解法 (People's Mediation Law of the People's Republic of China) 2010 (China).

[87] 中华人民共和国人民调解法 (People's Mediation Law of the People's Republic of China) 2010 (China).

63 The above points (b), (c) and (d) are not mutually exclusive. For example, as shown above, the UNCITRAL Model Law on Mediation contains provisions clarifying that the mediator and the parties can shape the process; it includes provisions on appointment, commencement and termination; it also contains a number of specific provisions on mediation procedure. Noteworthy is that the Model Law provisions are default provisions with the effect that parties can vary these terms according to their wishes and consistent with the principles of party autonomy and procedural flexibility.

64 Given the flexibility of the mediation process, it is unusual for courts to decide upon matters related to mediation procedure. However, courts have been known to address issues related to procedure in situations where the parties have different views on the nature of the process in which they have engaged or agreed to engage. This was the case in *Acorn Farms Ltd v Schnuriger*[88] where the plaintiff thought it was engaged in a mediation process and not, as was found to be the case, arbitration. The Hong Kong case of *Gao HaiYan v Keeneye Holdings Ltd*[89] highlights the cultural confusion that may arise in relation to defining mediation procedures, especially where it is linked to other dispute resolution processes such as arbitration. As His Honour Mr Justice Reyes (as he then was) commented in his judgment at first instance, *'[…] labelling a process as mediation does not mean that anything goes. There are appropriate and inappropriate ways of conducting mediations*'. It is beyond the scope of this chapter to delve any deeper into these cases. However, it is important to note the implications of these decisions on applicable procedural law, evidence, the use of witnesses and overall dispute resolution strategy especially if a party thinks it is in a mediation but actually is involved in an arbitration.

65 Another situation where procedural issues might arise in a court case is where a claim is made that the mediator did not conduct the mediation according to professional standards. This issue has come up in a number of cases across various jurisdictions. In Singapore, *Violet Netto*[90] involved an allegation of coercion and pressure against co-mediators which was not substantiated by the evidence. In reviewing the evidence, the court described standard mediator interventions of reality testing and ensuring mediating parties are aware of the implications and/or costs of pursuing alternatives to

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[88] *Acorn Farms Ltd v Schnuriger* (High Court, New Zealand) Judgment 22 May 2003 [2003] 3 NZLR 121.

[89] *Gao HaiYan and another v Keeneye Holdings Ltd and another* (Court of First Instance, Hong Kong) Judgment 12 April 2011 [2011] HKCFI 240, [2011] 3 HKC 157. The parties appealed and the outcome from the Court of First Instance was overturned, but for reasons unrelated to the mediation point that is to be discussed below: see *Gao Haiyan and another v Keeneye Holdings Ltd and another* (Court of Appeal, Hong Kong) Judgment 2 December 2011 [2011] HKCA 459, [2012] 1 HKC 335, [2012] 1 HKLRD 627.

[90] *Chan Gek Yong v Violet Netto* (Hight Court, Singapore) Judgment 20 September 2018 [2019] 3 SLR 1218.

settlement, such as going to trial. The court confirmed that these interventions were part of mediation and did not amount to undue pressure. In another illustration the Australian case of *Tapoohi v Lewenberg & Ors (No 2)*,[91] shows the importance of conducting mediation according to the terms of the mediation agreement. Here, the Supreme Court of Victoria examined in detail the difference between solicitors' evidence as to the process the mediator described in correspondence to the parties prior to the mediation and the *actual* conduct of the mediator and the mediation process as it transpired.

66 With the coming into force of the Singapore Convention on Mediation[92] in 2020, which establishes a direct enforceability mechanism for international mediated settlement agreements that fall within its scope, it is conceivable that issues of mediation procedure may increasingly form the subject of dispute between the parties. Art 5 of the Convention sets out grounds upon which relief in relation to a mediated settlement agreement can be refused. One of those grounds refers to a 'material breach of mediator standards' as a factor which could in certain circumstances amount to a ground of refusal (Art 5(1)(e)). Accordingly, mediator standards of conduct contribute to setting the parameters for mediation procedures and clarifying mediator interventions that are acceptable and those that are not. Mediator standards often take the form of soft regulation. Illustrations include the European Code of Conduct for Mediators,[93] the Australian National Mediator Accreditation System[94] and the SIMI Professional Code of

[91] *Tapoohi v Lewenberg & Ors (No 2)* (Supreme Court of Victoria, Australia) Judgment 21 October 2003 [2003] VSC 410. This case illustration is adapted from A Limbury, '*Mediation Lessons from the Cases: Part 2*', Kluwer Mediation Blog (22 February 2019), http://mediationblog.kluwerarbitration.com/2019/02/22/mediation-lessons-from-the-cases-part-2/ accessed 5 March 2024.

[92] United Nations Convention on International Settlement Agreements Resulting from Mediation 2020.

[93] European Code of Conduct for Mediators 2004 http://www.euromed-justice-iii.eu/document/eu-european-code-conduct-mediators accessed 9 March 2024.

[94] Australian National Mediator Practice Standards (2015) https://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system.pdf accessed 9 March 2024.

Conduct for Mediators.[95] However, they can also be found in (subordinate) legislation such as is the case in Austria[96] and Vietnam.[97]

7.3 Mediator Credentialing

67 Mediator credentialing refers to the requirements for individuals to be recognized as professional mediators. Credentialing is an umbrella term that includes accreditation, certification and approval. Mediator credentialing can be examined in terms of:

a. threshold/eligibility requirements;

b. requirements for attaining credentialing standards themselves; and

c. requirements for maintaining the standards.

7.3.1 Threshold Requirements for Mediator Credentialing

68 Mediator approval standards may contain threshold requirements that play a gatekeeping function in determining eligibility and suitability for mediator approval. Illustrations of mediator threshold requirements include generalist or specialist prior education, work experience,[98] age[99] and character[100].

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[95] Singapore International Mediation Institute (SIMI), SIMI Code of Professional Conduct for SIMI Mediators (Revised 2023) https://www.simi.org.sg/What-We-Offer/Mediators/Code-of-Professional-Conduct-Revised-2023 accessed 9 March 2024.

[96] *Zivilrechts-Mediations-Gesetz*, BGBl. I Nr. 29/2003 (Law on Mediation in Civil Law Matters) 2003 (Austria); *Zivilrechts-Mediations-Ausbildungsverordnung – ZivMediatAV*, BGBl. II Nr. 47/2004 (Obligatory qualifications and training of mediators in the By-Law on Training for Mediation in Civil Matters) 2004 (Austria).

[97] Law No. 58/2020/QH14 (Law on mediation or dialogue at the Court) 2020 (Vietnam).

[98] In France, commercial mediation organization CMAP requires its mediators to have at least 10 years' experience in a relevant professional field such as law, business or finance – see *Centre de Mediation et d'Arbitrage de Paris pour regler vos conflits* www.cmap.fr accessed 19 April 2024. In Hong Kong SAR, A person must have three years of professional work experience – see Hong Kong Mediation Accreditation Association Limited, 'How to become a Mediator' http://www.hkmaal.org.hk/en/HowToBecomeAMediator_G.php accessed 19 April 2024.

[99] Pursuant to Art 9(1) of the *Zivilrechts-Mediations-Gesetz*, BGBl. I Nr. 29/2003 (Law on Mediation in Civil Law Matters) 2003 (Austria), mediators must be at least 28 years of age; Russian legislation imposes the same age requirement. In Uzbekistan, mediators must be a minimum of 25 years of age: Law on Mediation, Art 12.

[100] Australian National Mediator Approval Standards (2015) https://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system-2015.pdf#page=3 accessed 10 March 2024, Sec 2.1 of which requires that a person must be of good character as evidenced by written references from two qualified witnesses.

69 Setting threshold standards on the basis of education and degree requirements reflects the idea that mediation quality flows from a particular educational track or professional status. Civil law jurisdictions such as Portugal, Spain, Russia[101] and Mongolia[102] are more likely to embrace the tertiary entry-level requirement than common law jurisdictions. However, it is by no means a standard approach in civil law jurisdictions, given that they often require very substantial and detailed mediator training (see below).

70 This view is not endorsed by the *Report on Mediator Credentialing and Quality Assurance* in the United States.[103] Mediation communities in the United States, Canada, England and Australia have largely – but not completely – displayed preference for other approaches to the issue, which do not require tertiary qualifications for individuals aspiring to be mediators.

71 An illustration of specialist – as distinct from general – educational requirements can be found in programs that require mediators to be qualified lawyers.[104] Organisations that represent lawyers, such as law societies and bar associations, typically allow only lawyers to be recognized as mediators under their schemes.[105] As such a law degree becomes a prerequisite for being recognized as an approved mediator in such programs. In another illustration, in France, entry requirements for the State Diploma in Family Mediation include post-baccalaureate study of two to three years in one of a number of substantive areas.[106]

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[101] On Portugal, Spain and Russia see N Alexander and F Steffek, *Making Mediation Law* (International Finance Corporation 2016) 30.

[102] Law on Mediation 2012 (Mongolia), Art 9.

[103] See American Bar Association Section of Dispute Resolution, Task Force on Credentialing, 'Report on Mediator Credentialing and Quality Assurance' (2002), 24–25.

[104] See, for example, the District Court of Columbia mediation program for civil court matters, which notes that 'mediators are very experienced, senior members of the United States District Court Bar who have been selected by the Court to be on the panel of mediators' https://www.dcd.uscourts.gov/sites/dcd/files/FAQs_about_District_Court_Mediation_Program_030618_Final.pdf accessed 19 April 2024, and the conciliation program in the small claims courts in Bavaria, Germany (Art 8(1) of the Bavarian Conciliation Law (BaySchlG)).

[105] Under the Law Society Mediation Scheme by the Law Society of Singapore, all mediators from the Panel are experienced lawyers who have satisfied the minimum criteria of mediator accreditation and mediation experience set by the Law Society https://www.lawsociety.org.sg/for-lawyers/dispute-resolution-schemes/law-society-mediation-scheme/ accessed 14 March 2024.

[106] N Alexander, S Walsh and M Svatos, *EU Mediation Law Handbook: Regulatory Robustness Ratings for Mediation Regimes* (Wolters Kluwer 2017) Chapter 12: France, 319.

72 In terms of the character requirement, a number of European countries including France and Austria do not permit persons with a criminal record to qualify as mediators.[107] Other jurisdictions such as Australia, Canada and the United States have a 'good character' or similar requirement instead. This effectively means that those with a criminal record are not automatically excluded and that eligibility to qualify as a mediator is determined on a case-by-case basis in relation to the 'good character' criterion.[108]

7.3.2 Attaining Mediator Credentials

73 In terms of content, mediator training typically aims to provide mediator-trainees with specific competencies around mediation knowledge, law and ethics, process management and skills, and relationship management and skills. However, mediator training varies in terms of its duration, pedagogy and nature of assessment.[109]

74 In most common law jurisdictions, including Australia, Canada, Hong Kong SAR, New Zealand, and the United States, mediation training often consists of 40 hours of specialized, interactive skills training followed by role-play assessment and, in limited cases, a written assessment. Other jurisdictions, such as the United Kingdom, require fewer hours.

75 In most civil law jurisdictions, training ranges from 90 to 400 hours conducted in three-day blocks over one to two years (for example, Austria, approximately 370 hours; Germany, approximately 150 hours; France, approximately 100 to 200 hours; Belgium, approximately 90 hours). Assessment includes theoretical and practical components and usually a number of live cases and reports on those cases.

76 In certain jurisdictions such as civil law Austria and common law Australia, recognition of prior learning permits mediator candidates to obtain credit toward training

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[107] In France, see *Code de procédure civile* (Civil Procedure Code) 2007 (France), Art 131-1 to 131-15 on court-based mediation. In Austria see *Zivilrechts-Mediations-Gesetz*, BGBl. I Nr. 29/2003 (Law on Mediation in Civil Law Matters) 2003 (Austria), Sec 11(2).

[108] For example, the ADR Institute of Canada requires its mediators to be of good standing, Principles Criteria Protocol for the designation Chartered Mediator, 'VI. Membership.' See also the Australian National Mediator Approval Standards (2015) Sec 2 which requires potential mediators demonstrate that they are of 'good character' https://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system-2015.pdf#page=3 accessed 10 March 2024.

[109] See N Alexander and F Steffek, *Making Mediation Law* (International Finance Corporation 2016) 31.

requirements from previous training and work experience.[110] Conversely, IMI mediator certification cannot be obtained through prior recognition of experience and candidates must comply with certification requirements including an assessed mediation role-play.[111]

77 Once training and assessment have been completed, mediator candidates can apply for mediator credentials. Some countries require mediators to obtain professional indemnity insurance to secure a place on the panel.[112]

78 Mediator training can be general or subject-specific. When seeking a mediator, the choice between a specialist- and a generalist-accredited mediator may have implications in terms of mediator duties and accountability, and these factors need to be reflected in the training. Family mediator approval systems, for example, often require training specific to the family context, domestic violence assessment and the needs of children.[113] On the international level, IMI seems to have adopted a more generalist approach in its Certification Scheme, although it does offer a more advanced certification for investor-state mediation.[114]

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[110] See § 5 of the Austrian Training Regulations of 2001 (ZivMediat-AV) and Sec 2.5 of the Australian National Mediator Approval Standards (2015) https://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system-2015.pdf#page=3 accessed 10 March 2024.

[111] International Mediation Institute's Competency Criteria for Mediation Advocates and Advisors https://imimediation.org/orgs/competency-criteria-mediation-advocates-advisors/ accessed on 10 March 2024.

[112] See, for example, Sec 10.2(b)(iii) Australian National Mediator Practice Standards (2015) in Australia, and § 19 ZivMediatG in relation to professional indemnity insurance in Austria.

[113] See, for example, recommendation N° R (98)1 on Family Mediation in Europe (Council of Europe 1998) and European Charter for Training in Family Mediation for Separation and Divorce (1992). In the United States see the American Bar Association Task Force on Credentialing Mediators (2002), above note 38, especially the references to family mediator credentialing, and the Academy of Family Mediators, Standards of Practice for Family and Divorce Mediation at www.mediate.com//articles/afmstds.cfm accessed on 14 March 2024. In Canada the ADR Institute of Canada requires specialized competencies in specific mediation fields such as family mediation. In Australia nationally recognized specialist family mediator accreditation is available in addition to general mediator accreditation: see Family regulation available at www.aifs.gov.au/familypathways accessed on 14 March 2024.

[114] International Mediation Institute Competency Criteria for Investor-State Mediators https://imimediation.org/wp-content/uploads/2022/03/IMI-Investor-State-Mediation-Competency-Criteria.pdf accessed 10 March 2024.

79 From a user's perspective, the more minimalist the mediator training and education requirements, the more likely importance will be attached to threshold and maintenance requirements when selecting a suitable mediator.

80 From a mediator's perspective, the more minimalist the mediator training and education requirements, the greater the need for continuing professional training and updates.

7.3.3 Maintaining the Credentialing Standard

81 Once mediators have attained the required standard and been approved, they must maintain the standard in order to retain their recognition as a professional mediator. Mediators failing to maintain their practice standards will find themselves open to complaints and possible removal from mediator registers or lists. Mediator credentialing standards maintenance takes different forms including continuing professional development, such as the Austrian requirement of 50 hours every five years.[115] Other typical requirements for maintaining standards include clinical experience, supervision, skills audits, adherence to codes of conduct, acquisition of professional liability insurance and payment of fees and charges. [116] The ADR Institute of Canada requires its Chartered Mediators to accumulate 33 Continuing Education and Engagement points every year and to submit an annual report.[117] In Australia[118] and Singapore,[119] mediators must renew their accreditation and demonstrate compliance with maintenance requirements every two years; in Hong Kong, the Hong Kong Mediation Accreditation Association Limited (HKMAAL) requires its members to renew their mediator accreditation every year.[120] The Austrian mediation law registers mediators for an initial period of five years. After four years, registered mediators are invited to extend their registration for another 10 years, provided they have complied with continuing professional development

[115] See *Zivilrechts-Mediations-Gesetz*, BGBl. I Nr. 29/2003 (Law on Mediation in Civil Law Matters) 2003, Sec 20.

[116] See, for example, Australian National Mediator Practice Standards (2015) https://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system.pdf Sec 2.5(b)(iii), 8 and 10.2(b)(iii). In relation to professional indemnity insurance in Austria, see *Zivilrechts-Mediations-Gesetz*, BGBl. I Nr. 29/2003 (Law on Mediation in Civil Law Matters) 2003 (Austria), Sec 19.

[117] ADR Institute of Canada, 'Principles, Criteria, Protocol and Competencies required for the designation Chartered Mediator' (2021) www.adrcanada.ca accessed 19 April 2024, Part III Art VII.

[118] Australian Disputes Centre, National Mediator Accreditation System Approval Standards, Sec 3 https://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system.pdf accessed 10 March 2024.

[119] See Singapore International Mediation Institute Renewal Requirements https://www.simi.org.sg/What-We-Offer/Mediators/Renewal-Requirements accessed 10 March 2024.

[120] Hong Kong Mediation Accreditation Association Limited, 'CPD for a HKMAAL Accredited Mediator' http://www.hkmaal.org.hk/en/CPDCriteria.php accessed 17 April 2024.

requirements.[121] Feedback and complaints mechanisms also support the maintenance of quality standards.[122] IMI requires mediators to adhere to the IMI Code of Professional Conduct or another code of conduct. Users of mediation services who believe the appropriate standards have not been met may activate the IMI Professional Conduct Assessment Process.[123]

7.3.4 Credentialing and the Professionalization of Mediation

82 As part of the professionalization of mediation practice, there is a discernible trend towards uniform credentialing of mediators. Across the world, this trend has been embodied in different regulatory forms, primarily:

a. legislative solutions; or

b. regulation by a professional community of mediators.

83 In terms of regulatory form, a preference seems to have emerged for uniform accreditation standards to be regulated by the professional community of mediators. While legislative regulation of mediator credentialing can also be found (see below), international best practice has sought to develop responsive, soft law regulatory solutions for the credentialing of mediators that are designed and implemented by the mediation community itself. This approach is based on the view that quality assurance for the still emerging mediation profession through certification must be adaptable to changing circumstances and needs, and that soft regulatory forms can best meet this need. On an international level, the self-regulatory mediator accreditation initiative of the International Mediation Institute (IMI) is illustrative of a regulatory approach led by the international community of mediators.

84 On a domestic level, an increasing number of jurisdictions are making a deliberate choice to develop non-legislative uniform mediator standards designed by the professional

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[121] See Zivilrechts-Mediations-Gesetz, BGBl. I Nr. 29/2003 (Law on Mediation in Civil Law Matters) 2003 (Austria), Sec 13.

[122] See, for example, the complaints mechanism requirements in ss 3.1(b) Australian National Mediator Standards: Practice Standards (2015).

[123] See International Mediation Institute Code of Professional Conduct https://imimediation.org/practitioners/code-professional-conduct/ and Professional Conduct Assessment Process https://imimediation.org/practitioners/professional-conduct-assessment-process/#:~:text=IMI%20Professional%20Conduct%20Assessment%20Process,-3.1%20The%20IMI&text=To%20activate%20the%20Assessment%20Process,the%20subject%20of%20the%20Complaint accessed 10 March 2024.

community of mediators. Examples of such jurisdictions include Singapore, Hong Kong, Australia, Germany and Mongolia.

85 In Singapore, institutional self-regulation of mediator credentialing is spearheaded by SIMI. While other institutional credentialing standards are also relevant for mediation practice in Singapore,[124] SIMI is the premier credentialing body for the city state of Singapore. Similarly the HKMAAL serves Hong Kong SAR.[125] Australia has a notable national industry-led credentialing system, called the National Mediator Accreditation System, which was first established in 2008, and which is regularly reviewed and amended.[126] Meanwhile in Germany, an alliance of the major German professional mediation training and accreditation associations has formed to establish the Quality Association for Mediation[127] with the aim of creating a uniform certification standard.[128] Finally, the Law on Mediation of Mongolia[129] established a Mediation Council with membership comprising diverse stakeholders to establish credentialing standards.

86 Notably, in a number of Anglo-influenced countries such as Australia, New Zealand, Hong Kong, Singapore, Canada and the United States, mediator credentialing standards historically evolved on a sector-by-sector basis by court programs, employer bodies of mediators, industry bodies and other service-providers. The global trend towards uniform standards has affected some of these jurisdictions but not all. For example, both Hong Kong and Australia have uniform requirements for general mediators; at the same time both jurisdictions maintain separate requirements for family mediator accreditation, such requirements being more onerous than those for general

[124] See, for example, Sec 12 of the Mediation Act 2017 (Singapore) which refers to 'certified mediators'. In this context, the Sec 7(1)(b) Act gives the relevant Minister authority to 'designate any accreditation or certification scheme administered by a mediation institution to be an approved certification scheme for the purposes of this Act.'

[125] See Hong Kong Mediation Accreditation Association Limited http://www.hkmaal.org.hk/en/index.php accessed 10 March 2024.

[126] See the Mediator Standards Board https://msb.org.au accessed 8 July 2024; and see also the Australian National Mediator Accreditation System https://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system.pdf accessed on 14 March 2024.

[127] In German, *Qualitäts-Verbund Mediation* (QVM).

[128] See https://qv-mediation.de/zertifizierung/ accessed: 01 November 2023. See also *Qualitäts-Verbund Mediation entwickelt Gütesiegel für Ausbildung und Akkreditierung von Mediatoren* (2018) *Mediation Hannover* https://steinberg-mediation-hannover.de/qualitaets-verbund-mediation-entwickelt-guetesiegel-fuer-ausbildung-und-akkreditierung-von-mediatoren/ accessed 28 October 2023.

[129] Art 10 of the Law on Mediation of Mongolia (2012).

mediators.[130] In this way, the trend towards uniformity and professionalism is able to encourage diversity in mediator credentialing.

87 In other common law jurisdictions where the mediation community has not been able to agree on uniform standards, such as the United Kingdom and the United States, there have been initiatives to move in this direction. In England, the Civil Mediation Council has set out guidelines for credentialing mediators.[131]

88 With the general ethos of remaining adaptable and subject to some exceptions, the jurisdictions reviewed above have tended to embrace responsive regulation through uniform institutional and industry-based (informal soft law) mediator standards which have the buy-in of users of mediation services, the professional community of mediators, and referrers (such as courts and lawyers).

89 In contrast, some civil law jurisdictions, such as Austria,[132] Slovakia,[133] Kazakhstan,[134] Vietnam[135] and Uzbekistan, have taken a formal legislative approach to credentialing, with the effect that their standards are less adaptable to change, and more rigid. By way of illustration, Austria issued a comprehensive set of Regulations in 2004 setting out training and credentialing requirements. Uzbekistan's Law on Mediation sets out the requirements for a professional mediator:[136] a professional mediator is a person who undertakes a 144-hour training course for mediators approved by the Ministry of Justice (MOJ), and is registered in the Register of Professional Mediators, maintained by the MOJ and posted on its website.

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[130] See Hong Kong Mediation Accreditation Association Limited Accreditation Requirements for Family Mediators http://www.hkmaal.org.hk/en/HowToBecomeAMediator_F.php accessed 10 March 2024. For Australia, see the Family Law Act 1975 and specifically the provisions related to family dispute resolution practitioners (FDRPs).

[131] N Alexander, S Walsh and M Svatos, *EU Mediation Law Handbook: Regulatory Robustness Ratings for Mediation Regimes* (Wolters Kluwer 2017) Chapter 9: England and Wales, 214.

[132] See *Zivilrechts-Mediations-Gesetz*, BGBl. I Nr. 29/2003 (Law on Mediation in Civil Law Matters) 2003 (Austria).

[133] See Act on Mediation (Act No. 420/2004 Coll. On mediation and on the amendment of certain acts) 2004 (Slovakia).

[134] See Law on Mediation 2011 (Kazakhstan).

[135] See Civil Procedure Code 2015 (Vietnam).

[136] Law on Mediation 2018 (Uzbekistan), Art 12 https://lex.uz/docs/4407205 accessed 10 March 2024.

90 Finally, a legislative approach that applies to generalist mediators does not preclude a different regime for specialist mediators, such as family mediators, as seen in France[137].

7.4 Legal and Ethical Rights and Obligations

How are legal and ethical rights and obligations of mediation participants regulated?

91 Here we are dealing with the rules governing the legal rights and obligations of mediation participants – including mediators, parties, lawyers, experts, translators and administrative staff. These rights and obligations typically form the focus of mediation legislation and general law principles.

92 Mediation legislation can be general in application,[138] sector-specific[139] or court-specific.[140]

93 Beyond legislation, legal rights and obligations of mediation participants are also contained in case law and general law principles as well as in the terms of mediation agreements. In relation to mediation agreements (including clauses), provisions from institutional rules and other soft law instruments may be expressly incorporated. Therefore, the terms of mediation agreements need to be read together with applicable legislation and in light of relevant case law.

94 In addition to legal rights and obligations in the strict sense, it is necessary to consider rights and obligations that are ethical in nature. Ethical obligations are typically found in

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[137] N Alexander, S Walsh and M Svatos, *EU Mediation Law Handbook: Regulatory Robustness Ratings for Mediation Regimes* (Wolters Kluwer 2017) Chapter 12: France, 319.

[138] For example, the *Mediationsgesetz* (Mediation Act 2012) (Germany); Mediation Act 2017 (No. 1 of 2017) (Singapore); Mediation Ordinance (Chapter 620) (Hong Kong); *Zivilrechts-Mediations-Gesetz*, BGBl. I Nr. 29/2003 (Law on Mediation in Civil Law Matters) 2003 (Austria); Decree 22 (on Commercial Mediation) (Vietnam); The Law of the Republic of Kazakhstan of January 28, 2011 No. 401-IV About mediation (as amended on 27-12-2019) (Kazakhstan); The Law of the Republic of Uzbekistan On Mediation 2019 (Uzbekistan); Alternative Dispute Resolution Act of 2004 (Republic Act No. 9285 of April 2, 2004) (Philippines); and the Malaysian Mediation Act (Act 749 of 2012) (Malaysia).

[139] For example, the Australian Farm Debt Mediation Act 1994 (Australia); Canadian Farm Debt Mediation Act 1997 (Canada); the Australian Family Law Act 1975 (Australia); Arts 255 and 373-2-10 of the Civil Code (France) which addresses French family mediation; Code of Civil Procedure Turkey (Act No. 6100 dated 12 January 2011) (Turkey), which addresses commercial mediation regulation in Turkey; Trade Disputes Act 1978 (Cap 97) (Fiji), Art 3 of which addresses trade disputes regulation in Fiji; The Environment Dispute Adjustment Act (Act No. 5393, 28 August 1997) (South Korea); and Consumer Protection Act of 2019 (Act No. 35 of 2019) (India) which addresses consumer mediation regulation in India.

[140] For example, Western Australian Supreme Court Act 1935 (Act No. 036 of 1935 (26 Geo. V No. 36)), Part VI (Secs 69–72) (Australia); Art 10 of the Vietnam Code of Civil Procedure No. 92/2015/QH13 of November 25, 2015 (Vietnam).

soft law instruments such as codes of conduct, ethical codes, institutional rules and practice standards. Importantly, legal and ethical rights and obligations have a strong overlap, particularly in flexible dispute resolution processes such as mediation, which leave much to the discretion of the mediator as well as the other players such as lawyers and parties.

95 As an illustration of the intertwined relationship between ethical and legal obligations, the duty of mediator impartiality or its equivalent is found as a legal duty in some legislation but is absent in other legislation. Notably, the UMA model law in the United States contains an optional provision on the impartiality of the mediator, which reflects the differing views on this obligation.[141] At the same time, impartiality or its equivalent is nearly always found in soft law instruments such as ethical codes.

96 It is beyond the scope of this chapter to explore the relationship between legal and ethical obligations in mediation. As the author has written elsewhere:

> It is not the lack of comprehensive formal regulation that leads to unethical conduct by professionals involved in mediation, or indeed any other activity. Rather, it is the illusion of separation between ethics and law (regulation) that allows individuals to hide behind the letter of the law while flouting its spirit.[142]

97 Accordingly, the following discussion extends to both legal and ethical rights and obligations of mediation participants without making a hard-line distinction between them.

98 In mediation settings, rights and obligations usually revolve around issues relating to, *inter alia*, the enforceability of mediation clauses, mediation agreements and mediated settlement agreements (MSAs), confidentiality and admissibility of mediation communications in arbitration or court proceedings, and the impact of mediation on litigation limitation periods. The duties of mediators will be considered first.

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[141] Uniform Mediation Act (Last Revised or Amended in 2003) (National Conference of Commissioners on Uniform State Laws, USA), Sec 9 (on mediator's disclosure of conflicts of interest).

[142] N Alexander, 'Through the Looking Glass: exploring the regulatory-ethical ecosystem for mediation' in M Moscati, M Palmer & R Marian (ed), *Comparative Dispute Resolution* (Edward Elgar Publishing 2020) 172, 181.

7.4.1 Mediators

99 Mediators may be subject to a range of duties. Some of the more common duties are set out below with regulatory illustrations.[143]

100 *Disclosure duties*:

a. Mediator disclosure requirements are regularly found in codes of conduct and statements of ethical duties such as Art 2.1 of the European Code of Conduct for Mediators.[144] Art 4 of the European Directive on Mediation requires member states to encourage mediators and service-providers to adhere to codes of conduct, including on matters of disclosure. Disclosure obligations are also found in legislation and in model laws such as Sec 9 of the UMA.

101 Duties of disclosure impose a continuing obligation on mediators to communicate to the parties' potential conflicts of interest and grounds for bias in relation to the mediation process. Potential conflicts of interest may arise where the mediator has at any time prior to the mediation provided legal, counselling or other services to, or has had any social or professional relationship with or financial interest in, any of the participants. In certain circumstances disclosure requirements may also require disclosure of mediators' qualifications and other matters related to their competency, as in Sec 9 of the UMA. Disclosure requirements are closely related to issues of impartiality, independence,[145] neutrality and fair treatment which are said to form the core aspects of the mediator's role. Sec 9(a)(1) of the UMA makes this explicit by requiring disclosure of matters that 'a

[143] This section is adapted from N Alexander, 'International Comparative Mediation: Law and Practice' in S Cole, C McEwen, N Rogers, J Coben, P Thompson & N Alexander (ed), *Mediation: Law Policy Practice (2023-2024)* (Thomson Reuters 2023) 1113.

[144] European Code of Conduct for Mediators 2004 http://www.euromed-justice-iii.eu/document/eu-european-code-conduct-mediators accessed 9 March 2024. In Australia see Sec 7 of the Australian National Mediator Practice Standards (2015) and Sec 3 of the Law Council of Australia's Ethical Guidelines for Mediators (2018). In the United States see Standard III of the Michigan Supreme Court's Mediator Standards of Conduct (2023) and Sec 7(d) of the Supreme Court of South Carolina Court Annexed ADR Rules, as well as Sec III, Appendix B Standard of Conduct for Mediators of the same. See also provisions 1.3 and 3.4 of the International Mediation Institute's Code of Professional Conduct.

[145] In this context, the French Civil Procedure Code refers to the 'guarantees of independence necessary for the exercise of mediation': see Art 131(5).5 C pr civ.

reasonable individual would consider likely to affect the impartiality of the mediator.'[146] Art 2.1 of the European Code of Conduct for Mediators[147] contains similar requirements.

102 The disclosure requirements are designed to enhance self-determination by assisting parties to make fully-informed choices in relation to the selection of their mediator, to remove doubts about the fairness of the process and the person conducting it, and finally, to establish 'a visible, fundamental and familiar safeguard of public protection.'[148] If after full disclosure parties agree to continue with the mediator, the mediation may proceed, according to Sec 9(2)(g) of the UMA.[149] The European Code of Conduct for Mediators also requires the explicit consent of the parties in this situation; in addition to a guarantee from the mediators that they are 'certain of being able to carry out the mediation with full independence and neutrality in order to guarantee full impartiality'.[150]

103 Duty of impartiality:

a. Impartiality is a fundamental principle of mediation and is found in various regulatory instruments including statutes, codes of conduct, self-regulatory standards and private contracts. The terms 'neutrality' and 'fair treatment' are also used in relation to this duty.

104 The European Code of Conduct for Mediators distinguishes between independence and neutrality,[151] on one hand, and impartiality on the other, whilst at the same time recognising in the final paragraph of Art 2.1 that all three concepts are connected with one another. Whereas the former concepts are linked to duties of disclosure around conflicts of interest (Art 2.1), impartiality is defined by reference to mediator behaviour (Art 2.2). The idea of impartiality is also encapsulated in Art 7(3) of the MLICM which

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[146] See Uniform Mediation Act (Last Revised or Amended in 2003) (National Conference of Commissioners on Uniform State Laws, USA), Sec 9(a)(1).

[147] European Code of Conduct for Mediators 2004 http://www.euromed-justice-iii.eu/document/eu-european-code-conduct-mediators accessed 9 March 2024.

[148] See Reporter's Notes to the UMA in National Conference of Commissioners on Uniform State Laws, *Uniform Mediation Act with Prefatory Note and Comments* (Chicago: NCCUSL 2001).

[149] A similar provision can be found in the International Centre for Dispute Resolution (ICDR) International Mediation Rules (2021), Art M-5(3).

[150] European Code of Conduct for Mediators 2004 http://www.euromed-justice-iii.eu/document/eu-european-code-conduct-mediators accessed 9 March 2024, Art 2.1.

[151] On independence of the mediation practitioner see D Cooper and R Field, 'The Family Dispute Resolution of Parenting Matters in Australia: An Analysis of the Notion of an 'Independent' Practitioner' (2008) 8 QUT Law and Justice Journal 158.

provides that mediators 'shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case'.[152] This provision focuses on the behaviour of mediators in the process, and from a practitioner's point of view may be more tangible and achievable than neutrality. The European Directive on Mediation defines a mediator in Art 3(b) as someone who conducts mediation in an impartial manner, thus signalling impartiality as a central aspect of the mediator's role.[153]

105 Another aspect of impartiality may arise in relation to the concept of *(unauthorised) practice of law*. Where mediators provide parties with legal advice or assistance in drafting terms of settlement, they may be engaging in conduct that amounts to the practice of law, thereby attracting the application of rules regulating the legal profession.[154]

106 *Duty to consider termination in certain circumstances*: In order to preserve the integrity of mediation, mediators may terminate the process in certain circumstances. By way of example, Art 12(b) of the MLICM provides that mediators may terminate a mediation if they are of the view that further efforts at conciliation are no longer justified. The type of situations that may lead a mediator to terminate a mediation are varied.[155]

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[152] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements resulting from Mediation (2018) https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation accessed 19 April 2024.

[153] In contrast Sec 9(g) of the UMA contains a requirement of mediator impartiality that is optional. It allows *fully- informed* parties to accept mediators who may fall short of a strict standard of impartiality, thereby recognising more directive and expert advisory mediators. See Reporter's Notes to the UMA in National Conference of Commissioners on Uniform State Laws, *Uniform Mediation Act with Prefatory Note and Comments* (Chicago: NCCUSL 2001).

[154] J Nolah-Haley, 'Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective' (2002) 7 Harvard Negotiation Law Review 235, 256-9.

[155] Consider generally the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018), Art 12 and the commentary in the Text with Guide to Enactment and Use https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation accessed 19 April 2024; see also WIPO Mediation Rules 2021 (WIPO). Note the need for mediators to 'take all appropriate measures to ensure that any agreement is reached by all parties through knowing and informed consent, and that all parties understand the terms of the agreement' under the European Code of Conduct for Mediators 2004 http://www.euromed-justice-iii.eu/document/eu-european-code-conduct-mediators accessed 9 March 2024, Art 3.3.

107 *Duties relating to confidentiality and (non-)admissibility of mediation evidence in subsequent proceedings*:[156] Here mediators – and other mediation participants[157] – are subject to various duties of confidentiality and have corresponding rights associated with confidentiality. Confidentiality and related evidential issues present a particularly complex area of mediation law that fall into three main categories:

a. insider–outsider confidentiality: participants involved in a mediation (insiders) cannot make prohibited disclosures to people outside the mediation (outsiders),[158]

b. insider–insider confidentiality: regulates the flow of information in mediation, especially in relation to private sessions (also known as caucuses) between the mediator and a party,[159] and

c. insider–court confidentiality: involves the rights and obligations associated with protecting these mediation communications from being admitted in evidence in court and arbitral proceedings. It is categorized as a specific form of insider–outsider confidentiality in which the court is the outsider. Technically, however, this area is not about confidentiality but rather about admissibility of evidence.[160]

108 As indicated in the references, the MLICM contains provisions on all three types of mediation confidentiality; however, in many jurisdictions, the law on mediation confidentiality is not so clearly set out and is found in a variety of informal and formal regulatory instruments. While it is beyond the scope of this chapter to examine this topic

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[156] Consider generally the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018 (UNCITRAL), Arts 9–11; WIPO Mediation Rules 2021 (WIPO), Arts 15–18; and the European Code of Conduct for Mediators 2004 http://www.euromed-justice-iii.eu/document/eu-european-code-conduct-mediators accessed 9 March 2024, Art 4; Mediation Act 2017 (No. 1 of 2017) (Singapore) Secs 9–11; Mediation Ordinance (Chapter 620) (Hong Kong), Secs 8–10; SIMC Mediation Rules 2024, Rule 9; Malaysian Mediation Act (Act 749 of 2012) (Malaysia) Secs 15–16; Pusat Mediasi Nasional Mediation Procedure 2004, Rule 7; Fiji Mediation Centre (FMC) Mediation Procedure, Rules 7.1 and 11; Qatar International Court and Dispute Resolution Centre (QICDRC) Mediation Rules, Rules 16-19.

[157] See discussion on parties' and lawyers' duties at paras 112-138 below.

[158] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018 (UNCITRAL), Art 10.

[159] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018 (UNCITRAL), Art 9.

[160] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018 (UNCITRAL), Art 11.

in detail, it is useful to establish the parameters of mediation confidentiality using the above tripartite classification.

109 *Reporting to the courts and other institutions which administer mediations*: In court and other institutional settings, mediators may have reporting duties associated with data collection. For example, they may be required to submit a form with details of whether the mediation took place, the time allocated to the mediation, whether a settlement was reached and other non-confidential information. Such reporting is consistent with Sec 8(2)(e) of the Hong Kong Mediation Ordinance, which provides that parties may disclose a mediation communication if 'the disclosure is made for research, evaluation or educational purposes without revealing, or being likely to reveal, directly or indirectly the identity of a person to whom the mediation communication relates.' A similar legislative provision is found in Singapore[161] and Samoa.[162]

110 Here are two case illustrations involving allegations of different kinds against mediators that relate to some of the duties outlined above. The first is the Australian case of *Tapoohi v Lewenberg (No. 2)*,[163] which illustrates the potential for adverse legal consequences for mediators who move beyond a facilitative role. In this case, it was alleged that excessively directive behaviours of the mediator amounted to undue influence and pressure on the parties and a breach of his duty of care to them. These mediator behaviours included suggesting solutions, making statements which interfered with the self-determination of the parties and advising parties on enforceability issues. An interlocutory application by the mediator to dismiss the case against him was rejected on the basis that there a legal case to answer. The Victoria Supreme Court suggested that the mediator's excessively directive behaviour could conceivably amount to a breach of his duty of care to the disputants. The claim against the mediator was subsequently settled. The decision sent Australian mediators scurrying to check their codes of conduct, contracts and applicable statutes to ensure that their behaviour was in line with regulatory expectations about mediators' conduct.

111 A more recent illustration is the United Kingdom case of *Aujla v. Aujla*[164] in which the court found that the mediator exhibited 'pugnacious and forceful' behaviour and even raised his voice at one of the parties. Nevertheless the court concluded that such behaviour did not constitute duress. The court pointed out that the claimant could not

[161] Mediation Act 2017 (No. 1 of 2017) (Singapore), Sec 9.
[162] Alternative Dispute Resolution Act 2007 (2007, No. 30) (Samoa), Sec 8.
[163] *Tapoohi v Lewenberg & Ors (No 2)* (Supreme Court of Victoria, Australia) [2003] VSC 410. This case was also discussed above in the section on procedural laws.
[164] *Mr Rajinder Aujla v Mr Narvinder Aujla* (County Court at Reading, United Kingdom) Judgment 5 October 2022, 2022 WL 10640367.

assert that his 'will was overborne' by the mediator in circumstances where he had access to his legal counsel at all times, and his solicitor had consistently advised him that he did not have to make an offer or counter-offer, or sign off on any offers, if he did not wish to do so. In respect of the mediator's shouting at them, his solicitor testified that she had advised the claimant that he 'should not be bullied'. The court also noted that he could have withdrawn from the mediation at any time. Further, the court ruled that even if the mediator's behaviour had constituted duress, this would not render the mediated agreement voidable – the claimant must also establish that the defendant was 'fixed with actual or constructive notice of the conduct complained of, or in the alternative, that the mediator was acting as [the defendant's] agent.' The defendant did not have actual notice of the mediator's behaviour, as the parties were in separate rooms with the mediator shuttling between the rooms, and there was no reason to consider the defendant to have constructive notice of the mediator's conduct towards the claimant. The mediator was also clearly not the defendant's agent. The court therefore rejected the claimant's arguments of duress.

7.4.2 Lawyers' Duties

112 Lawyers representing clients who go to mediation may be subject to a range of duties. Some of the more common duties are explored below.

113 *To act in the best interests of the client*:[165] This is a general duty on lawyers, which is to be interpreted according to context. Where mediation is available to the client and could be a suitable strategy, it is arguable that the duty to act in the best interest of the client would require at least a consideration of the use of mediation.

114 *To advise clients on alternative dispute resolution and the process of establishing the most favourable way to solve their conflict*:[166]

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[165] See for instance, Solicitors' Practice Rules (Cap 159H) (Hong Kong), Rule 2(c); the Law Society of Hong Kong, *The Hong Kong Solicitors' Guide to Professional Conduct, Volume 1* (2014) https://www.hklawsoc.org.hk/en/Support-Members/Professional-Support/Professional-Guide/The-hong-kong-solicitors-guide--to-professional-conduct--volume-1 accessed 12 March 2024, Principle 1.01; The *Gesamte Rechtsvorschrift für Rechtsanwaltsordnung*, (Lawyers' Professional Rules) (Austria), §9(1).

[166] For example, in Singapore, Rule 5 and Rule 17(2)(e)(ii) of the Legal Profession (Professional Conduct) Rules 2015 may be interpreted to suggest that lawyers should furnish information concerning the resort to alternative dispute resolution processes when advising their clients.

a. In Ireland, Secs 14 and 15 of the Irish Mediation Act require lawyers before proceeding to litigation to:

   i. advise their clients to consider mediation as a means of attempting to resolve their disputes,

   ii. provide their clients with information in respect of mediation services,

   iii. inform their clients about the advantages of resolving the dispute outside of court as well as the benefits of mediation,

   iv. advise their clients that mediation is voluntary and may not be a suitable means to resolve all disputes, and

   v. inform their clients about how mediation is a confidential process, as well as about the enforceability of MSAs.

115 In Italy, lawyers have a duty under Art 4(3) of Decree 28/2010 to expressly inform their clients, in writing, of the option of mediation (in situations where mediation is a voluntary option) or the requirement to mediate (in certain civil and commercial actions where mediation is required under Art 5 of Decree 28/2010). The information provided must be signed by the client. If the lawyer fails to so inform their client, the client may void the contract for services.[167]

116 Further, lawyers will always have the duty to advise their clients on said clients' obligations in relation to mediation, for example a party's obligation to attend mediation in certain circumstances. As these party obligations change, so will the parameters of the lawyers' obligations to inform.[168]

[167] G de Palo and L Keller, 'Mediation in Italy: Alternative Dispute Resolution for All' in K Hopt and F Steffek (ed), *Mediation–Principles and Regulation in Comparative Perspective* (Oxford University Press 2013) 667, 673 and 679. Similarly, in France, the decree of 2015 has obliged lawyers when filing a civil suit to state the attempts endeavoured towards arriving at an amicable resolution of the dispute – this has been interpreted as a decree indirectly requiring lawyers to advise their clients on proceeding to alternative forums for dispute resolution such as mediation. See D Wietek, 'France' in N Alexander, S Walsh and M Svatos (ed), *EU Mediation Law Handbook: Regulatory Robustness Ratings for Mediation Regimes* (Kluwer Law International BV 2017) 299, 346.

[168] See the discussion on parties' rights and obligations at paras 128-138 below.

117 *To act in good faith toward other parties and lawyers*: take for instance, Principle 11.01 of the Hong Kong Solicitors' Guide to Professional Conduct,[169] which imposes on lawyers a duty to act in good faith towards other parties and lawyers.[170] The principle would apply to mediation settings.

118 *Duties associated with confidentiality and admissibility of evidence from mediation*: these duties are typically covered by the specific provisions on confidentiality and related issues examined above.[171]

119 The following two cases from Australia and Singapore highlight how important it is for lawyers to be aware of their obligations in mediation. These obligations, while generally similar across jurisdictions, may be framed in different ways and subject to variations.

120 In the Australian case of *Studer v Boettcher*,[172] the Court of Appeal of the Supreme Court of New South Wales considered the question of whether a solicitor had been negligent in preparing his client's case for mediation and representing the client in the mediation. The dispute, which involved the sale of real property, was settled at mediation. After the mediation, the client took action against his solicitor, claiming that (a) his solicitor had unduly pressured him into accepting the mediated settlement by negligent advice and/or improper pressure; and (b) if the original action had proceeded to judgment, the client would have obtained a better financial outcome.

121 With respect to the issue of coercion, the Court stated that it is never the function of a legal advisor to coerce the client. A solicitor is entitled to seek to persuade a client to accept and act on the solicitor's advice on the basis that it is in the client's best interest. Any persuasion undertaken by the lawyer must be devoid of self-interest. Ultimately, however, the decision lies with the client. It is the lawyer's job to ensure that the client's decision is an informed one.

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[169] The Law Society of Hong Kong, *The Hong Kong Solicitors' Guide to Professional Conduct, Volume 1* (2014) https://www.hklawsoc.org.hk/en/Support-Members/Professional-Support/Professional-Guide/The-hong-kong-solicitors-guide--to-professional-conduct--volume-1 accessed 12 March 2014, para 11.01.

[170] See also The *Gesamte Rechtsvorschrift für Rechtsanwaltsordnung* (Lawyers' Professional Rules) (Austria) §9(1), which can be broadly interpreted to oblige lawyers to act bona fide in such a manner 'which does not contravene their conscience and the laws'.

[171] See earlier discussion on confidentiality in the context of mediator duties at para 107 above.

[172] *Studer v Boettcher* (Supreme Court of New South Wales, Court of Appeal, Australia) Judgment 24 November 2000 [2000] NSWCA 263.

122 On the issue of negligence, the Court pointed out that it is often impossible to predict the outcome of litigation with a high degree of certainty. Therefore, advice is not necessarily negligent merely because the court ultimately takes a different view than one party's legal representative.

123 Finally, the Court found that the solicitor had acted in the best interests of his client by being adequately prepared for the mediation and had given sound advice to the appellant. In reaching this conclusion, it considered the following matters:

a. Based on the law and the documentary evidence, the client had a very difficult case.

124 The client faced difficulty in terms of producing certain witnesses at trial.

125 Although the solicitor originally had hoped to settle at the mediation for considerably less than the sum finally agreed upon, the nature of the evidence changed immediately prior to, and during, the mediation. The solicitor's response to these changes was reflected in his advice to his client to settle.

126 In its deliberations, the Court referred to the solicitor's discussions with his client about the costs of defending the claim and the amount of costs for which the client could be liable if he failed in his claim. Again, the Court found the lawyer's advice in this regard to be reasonable. The mediation literature refers to this practice as reality testing, and it is an important component in the role of the legal representative in mediation.

127 In *Law Society of Singapore v Hanam, Andrew John,*[173] Singapore's Court of Three Judges[174] affirmed the disciplinary tribunal's finding that the solicitor in question had breached rule 17(2)(e)(ii) of the Legal Profession (Professional Conduct) Rules 2015 by failing to advise his client on his ADR options, including mediation. The solicitor argued that he had previously advised the same client of his ADR options in one of the other lawsuits, and so he did not need to repeat the advice. The Court rejected this argument, saying this was no excuse as his duty 'is to provide a *case-specific* evaluation of ADR

[173] *Law Society of Singapore v Hanam, Andrew John* (Court of Three Judges, Singapore) Judgment 10 May 2023, [2023] SGHC 132.

[174] In Singapore, the Court of Three Judges is the body empowered to take major disciplinary action (striking off the roll, suspension, censure and/or payment of a penalty), and from which there is no appeal. Disciplinary tribunals typically hear disciplinary matters first and decide whether there is cause of sufficient gravity for disciplinary action; if there is, the Law Society then applies for an order that the lawyer be struck off, suspended, pay a penalty and/or be censured, and that application is then heard by the Court of Three Judges. See the Legal Profession Act 1966 (Singapore), Sec 93(1), 94, 98(7) and (8).

options', and such a discussion would need to be 'full and frank' and 'condescend to specifics'. The Court highlighted that the circumstances of the lawsuit in question were different from those in the earlier lawsuit, so a fresh evaluation of the ADR options was necessary, and further noted that the solicitor had not even forwarded the standard form letter from the Singapore Mediation Centre urging litigation parties to consider mediation. For this and other instances of misconduct, the solicitor was suspended for nine months.

7.4.3 Parties' Duties and Rights

128 Depending on the legal system, parties will have one or more of the following duties and rights, as explored below (with additional illustrations in the footnotes).

129 *A duty to engage in mediation in circumstances in which it is reasonable to do so*:[175] In the oft-cited English case of *Halsey v Milton Keynes General NHS Trust*,[176] Dyson LJ (as he then was) expounded on the factors which could be taken into account to decide whether a refusal to mediate was unreasonable. These included:

a. The nature of the dispute and the extent to which a binding precedent may be useful or an injunction is needed;

b. The merits of the case and, in particular, whether the refusing party reasonably believes it has a very strong case;

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[175] See the Practice Direction - Pre-action Conduct and Protocols (updated 2022) (UK) https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct#8.1 accessed 13 March 2024, para 8-11; the rule in *James Carleton Seventh Earl of Malmesbury v Strutt & Parker (a partnership)* (High Court of Justice, Queens Bench Division, UK) Judgment 18 March 2008 [2008] EWHC 424; Civil Dispute Resolution Act 2011 (Australia), Secs 6-11; Rules of Court 2021 (Singapore), Order 5 rule 1 and Order 21 rule 2; Practice Direction 31 (2014) (Hong Kong) https://legalref.judiciary.hk/lrs/common/pd/pdcontent.jsp?pdn=PD31.htm&lang=EN accessed 14 March 2024; Qatar Financial Centre Civil and Commercial Courts Regulations and Procedural Rules (2022), Art 25.1; and Art 5/A of the Turkish Commercial Code (see M Arseven, 'Turkey: Mandatory Mediation for Commercial Disputes' (2019) https://www.morogluarseven.com/news-and-publications/turkey-mandatory-mediation-for-commercial-disputes/ accessed 12 March 2024.

[176] *Halsey v Milton Keynes NHS Trust* (Court of Appeal, UK) Judgment 11 May 2004 [2004] EWCA 576. The principles enunciated in *Halsey* were subsequently upheld in *Nigel Witham Ltd v Robert Smith and others [No.2]* (Technology and Construction Court, UK) Judgment 4 January 2008 [2008] EWHC 12. See also *Churchill v Merthyr Tydfil County Borough Council* (Court of Appeal, UK) Judgment 29 November 2023 [2023] EWCA Civ 1416 for a recent case on the issue of the circumstances under which a court can order a stay of court proceedings for parties to engage in a non-court-based dispute resolution process.

c. The extent to which other settlement methods have been attempted. However, as indicated previously, judicial opinion in Hong Kong has been clear that that mediation may succeed where previous attempts to settle have failed and the fact of previous settlement attempts does not automatically make refusal to mediate reasonable;

d. Whether the costs of mediation would be disproportionately high in the circumstances;

e. Whether any delay in setting up and attending mediation may prejudice a timely court hearing; and

f. Whether mediation has a reasonable prospect of success.

130 *The right to commence court proceedings after a mediation that failed to achieve a settlement*: Litigation limitation periods are relevant here. In civil law jurisdictions, it is common to find legislative provisions which effectively suspend or interrupt the running of the applicable litigation limitation period during mediation.[177]

131 *A duty to comply with confidentiality of non-admissibility of mediation communication requirements*: These have been examined previously.[178]

132 *A duty to participate in mediation in good faith*[179] *or similar*[180] *terminology*: Duties to participate in mediation oblige parties to engage in the process to varying degrees but they do not require parties to compromise or reach settlement. Duties to participate in the mediation process in good faith can be found as a standard term in many agreements

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[177] For example, *Zivilrechts-Mediations-Gesetz*, BGBl. I Nr. 29/2003 (Law on Mediation in Civil Law Matters) 2003 (Austria), Sec 22(1). See also M Roth and D Gherdane, 'Mediation in Austria: The European Pioneer in Mediation Law and Practice'; P Tochtermann, 'Mediation in Germany: The German Mediation Act – Alternative Dispute Resolution at the Crossroads'; and R Morek and L Rozdeiczer, 'Mediation in Poland: Time for a Quiet Revolution?', all in K Hopt and F Steffek (ed), *Mediation Principles and Regulation in Comparative Perspective* (Oxford University Press 2013) 262-6, 541 and 785 respectively.

[178] See para 107 above.

[179] On the concept of good faith and how it has been interpreted in dispute resolution contexts, see R Summers, '"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54 Virginia Law Review 195; R Zimmermann and S Whittaker (ed), *Good Faith in European Contract Law* (Cambridge: Cambridge University Press 2000); and N Alexander, 'Good Faith in Mediation' (2009) 11 ADR Bulletin 68.

[180] For example, in the Uniform Civil Procedure Rules 1999 (Queensland, Australia) https://www.legislation.qld.gov.au/view/pdf/inforce/current/sl-1999-0111 accessed 13 March 2024, Rule 325 stipulates that 'parties must act reasonably and genuinely in the mediation'.

to mediate and in institutional rules such as the Australian Administrative Appeals Tribunals,[181] the Asian International Arbitration Centre Mediation Rules[182] and the Indian Institute of Arbitration & Mediation's Mediation Rules.[183] Besides good faith, other terms used in relation to this participation duty include 'meaningful', 'reasonable', 'conscionable' and 'genuine'.[184]

133 *The duty to comply with, and the right to enforce, adequately-drafted mediation clauses and mediation agreements*:[180] In France, for example, mediation clauses are considered by the courts to be legally valid and *prima facie* enforceable.[185] Similarly, in Australia,[186] the United Kingdom,[187] Hong Kong[188] and Singapore,[189] case law suggests that mediation clauses must be *meticulously drafted* so that they may not be rendered unenforceable for uncertainty.

a. In the English case of *Wah (aka Alan Tang) and another v Grant Thornton International Ltd and others*, Justice Hildyard of the High Court (Chancery Division) established three characteristics which ought to be present in an adequately-drafted mediation clause before a court may properly enforce it:

> In the context of a positive obligation to attempt to resolve a dispute or difference amicably before referring a matter to arbitration or bringing proceedings the test is whether the provision prescribes, without the need for further agreement, (a) a sufficiently certain and unequivocal commitment to commence a process (b) from which may be discerned

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[181] See Administrative Appeals Tribunal, Guidelines on The Duty to Act in Good Faith in ADR Processes at the AAT (Australia) https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/DutyToActInGoodFaith.pdf accessed 13 March 2024.

[182] Asian International Arbitration Centre Mediation Rules (2018), Rule 9.

[183] Indian Institute of Arbitration & Mediation's Mediation Rules (2023), Rule 8.

[184] See for example, the Civil Dispute Resolution Act 2011 (Australia), which encourages parties to take 'genuine steps' to resolve a dispute before commencing certain legal proceedings in the Federal Court and Federal Circuit Court.

[185] K Deckert, 'Mediation in France: Legal Framework and Practical Experiences' in K Hopt and F Steffek (ed), *Mediation—Principles and Regulation in Comparative Perspective* (Oxford University Press 2013) 455, 468.

[186] *Aiton Australia Pty Ltd v. Transfield Pty Ltd* (New South Wales Supreme Court, Australia), Judgment 1 October 1999 [1999] NSWSC 996.

[187] *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* (Court of Appeal, UK), Judgment 16 May 2012 ([2012] EWCA Civ 638, para 33–37.

[188] *Hyundai Engineering and Construction Co Ltd v Vigour Ltd* (Court of Appeal, Hong Kong), Judgment 25 February 2005 [2005] HKEC 258, para 17–33, 37– 41.

[189] *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* (Court of Appeal, Singapore), Judgment 18 October 2013 [2014] 1 SLR 130, para 54.

> what steps each party is required to take to put the process in place and which is (c) sufficiently clearly defined to enable the Court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach.[190]

134 In Singapore, the mediation clause must be worded clearly, setting out in mandatory fashion with some specificity the personnel who are required to attend the dispute resolution process and the purpose of each meeting (e.g., to attempt to resolve any conflict which had arisen between the business parties).[191]

135 Finally, legislation introduced in Hong Kong and Singapore[192] subsequent to these cases acknowledges mediation clauses in different ways.[193]

136 *The duty to comply with, and the right to enforce, MSAs*:[194] In addition to basic contract law principles which apply to mediated settlement agreements, legislative provisions may provide direct recognition and enforcement mechanisms. These vary from mediated settlement agreements that are recorded as court orders,[195] as arbitral

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[190] *Wah (aka Alan Tang) and another v Grant Thornton International Ltd and others* (High Court, UK) Judgment 14 November 2012 [2012] EWHC 3198, para 59–60.

[191] *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* (Court of Appeal, Singapore), Judgment 18 October 2013 [2014] 1 SLR 130, para 54.

[192] See Mediation Ordinance (Chapter 620) (Hong Kong), Secs 2 and 6, and Mediation Act 2017 (No. 1 of 2017) (Singapore), Sec 8.

[193] The Hong Kong legislation uses the definition of an 'agreement to mediate' (the equivalent of a mediation clause or mediation agreement) to establish the scope of application of the Ordinance. However, the Singapore legislation goes further, by expressly providing for judicial discretion to stay court proceedings when parties, not being in compliance with a mediation clause or agreement, institute court proceedings in respect to matters covered by that mediation clause or agreement. (See Mediation Ordinance (Chapter 620) (Hong Kong), Secs 2 and 6, and Mediation Act 2017 (No. 1 of 2017) (Singapore), Sec 8).

[194] Consider the United Nations Convention on International Settlement Agreements Resulting from Mediation 2019 (UNCITRAL), Arts 4 and 5 and the corresponding provisions of the UNCITRAL Model Law on International Commercial Mediation 2018 (UNCITRAL), Arts 16-20; Alternative Dispute Resolution Act of 2004 (Republic Act No. 9285 of April 2, 2004) (Philippines), Sec 17; Thailand Civil and Commercial Code, Sec 851; and Qatar International Center for Conciliation and Arbitration (QICCA) Rules of Conciliation, Art 15.3.

[195] Consider Sec 12 of the Singapore Mediation Act, which allows parties to a non-litigious private commercial MSAs, to which Singaporean law applies, to submit their agreement to the relevant court to be recorded as a court order.

awards,[196] as notarized deeds, as well as mediated settlement agreements directly enforceable under the Singapore Convention on Mediation.[197]

137 A case illustrative of the duties of parties in mediation is found in the United Kingdom. Here parties may face cost sanctions for failing to reasonably engage in mediation. While this provision applies to pre-mediation behaviour, the English case of *Earl of Malmesbury v Strutt & Parker*[198] suggests that the duty might extend to the mediation itself. In this case, the court considered the application of costs sanctions in relation to a party's unreasonable behaviour in mediation, arguably falling short of good faith participation in the process. The case dealt with a dispute in which the Earl ultimately prevailed in court, but the financial quantum awarded was significantly less than both his claim and his final offer at mediation. The judge, Justice Jack, commented that 'the claimant's position at the mediation was plainly unrealistic and unreasonable. Had they made an offer which better reflected their true position, the mediation might have succeeded'.[199]

138 The judge equated the behaviour of a party who had agreed to mediate and then acted unreasonably with that of a party who unreasonably refused to mediate. Under the British Civil Procedure Rules of 1999, the latter behaviour could be taken into account in costs determinations. Therefore, the court considered it appropriate to take the former category of behaviour into account.[200] Note that in this case, both parties had waived privilege (without prejudice privilege that applied to prevent evidence from the mediation from being admitted in subsequent proceedings) so that evidence from the mediation could be considered in relation to the award of costs.

8 THE MEDIATION MATRIX IN ACTION

139 The Mediation Matrix shows how mediation law and regulation extends well beyond the pages of formal legal instruments – such as model laws and statutes – and encompasses mediation clauses and agreements, industry standards, institutional rules, court practice directions, jurisprudence and case law. As discussed previously, the EU Directive on

[196] Consider Alternative Dispute Resolution Act of 2004 (Republic Act No. 9285 of April 2, 2004) (Philippines), Sec 17.

[197] Consider the United Nations Convention on International Settlement Agreements Resulting from Mediation 2019 (UNCITRAL), Arts 4 and 5 and the corresponding provisions of the UNCITRAL Model Law on International Commercial Mediation 2018 (UNCITRAL), Art 16-20.

[198] *James Carleton Seventh Earl of Malmesbury v Strutt & Parker (a partnership)* (High Court of Justice, King's Bench Division, UK) Judgment 18 March 2008 [2008] EWHC 424.

[199] *James Carleton Seventh Earl of Malmesbury v Strutt & Parker (a partnership)* (High Court of Justice, King's Bench Division, UK) Judgment 18 March 2008 [2008] EWHC 424, para 72.

[200] Ibid para 61-62.

Mediation expressly encourages member states to use a variety of regulatory mechanisms in relation to various aspects of mediation triggering, credentialing, procedure, and rights and obligations. The Mediation Matrix can be a useful tool in planning, reviewing and decision-making in relation to ongoing implementation of the Directive.

140 In addition to recognizing the range of regulatory forms relevant to cross-border mediation, it is equally important to differentiate the different aspects of mediation that may be subject to regulation. Four categories of the content of mediation regulation have been identified according to function:

a. regulatory mechanisms that trigger mediation,

b. regulation of the internal mediation procedure,

c. mediator credentialing, and

d. legal and ethical rights and obligations of participants in mediation processes.

141 The Mediation Matrix can be applied in numerous ways. It offers a systematic way of thinking about mediation law. Importantly, it also offers a language for mediation law – one that has been missing, or at least inadequate, to date. The ability to differentiate among various categories of regulatory form and content is necessary to achieve a comprehensive view of the mediation landscape. Further, the Matrix is useful for:

a. planning and designing how to regulate mediation in a given jurisdiction;

b. analysing and reviewing mediation law and regulation in a given jurisdiction (see the illustration of Singapore in Figure Y); and

c. comparing mediation law in different jurisdictions, countries and regions.

142 By way of illustration, a national mediation regulatory policy desirous of encouraging party autonomy without jeopardising legal certainty or dispute resolution quality may use the categories of the Mediation Matrix as follows: A formal legislative approach for rights and obligations such as admissibility of evidence in subsequent proceedings. Limitation periods and enforceability matters to address the need for legal certainty and predictability in relation to these issues. Soft legal norms can additionally be used, in particular in relation to ethical obligations. Credentialing of mediators requires a more adaptive approach, which balances the need to accommodate diverse mediation practices with the need for consumer clarity about what to expect from mediators.

Accordingly, collective self-regulatory approaches such as institutional or industry-wide soft norms are widely used here. In terms of procedure, party autonomy is paramount. Therefore, collective self-regulation and the market–contract approach are preferred as they encourage diversity and tailored approaches. To the extent that procedural issues are subject to legislation, the use of default laws,[201] allowing parties to agree to do things differently, would maintain the policy goal of party autonomy while at the same time setting a policy standard. Finally, a range of triggering provisions and mechanisms, from legislatively backed triggers to the use of mediation clauses and corporate and government pledges on mediation, can be useful to encourage the uptake of mediation.

[201] For an example of a default provision, see for example, Art 4 of the UNCITRAL Model Law on International Commercial Mediation: 'Except for the provisions of article 7, paragraph 3, the parties may agree to exclude or vary any of the provisions of this section.' The section refers to Sec 2 of the Model Law which comprises Arts 3-15.

Figure Y: The Mediation Matrix

Regulatory form →

Functional content ↓

	Market–Contract Approach	Collective Self-Regulation	Court regulation	Jurisprudence and case law	Legislative approaches[202]
Triggering	Lawyers may refer clients to mediation of their own volition Commercial contracts increasingly contain dispute resolution	Law Society Guidance Note 7.1.2 – advisory issued to assist legal practitioners in advising clients on the types of ADR options available for civil matters.[203] Law Society and SMC's Arb-Med-Arb procedure under the Law Society Arbitration Scheme Handbook.[204] An	State Courts Practice Direction 2021, 34(5)-34(11) – presumption of ADR for all civil claims & 38(6)-(10) – Overview of the Court Dispute Resolution case management process and the use of	*Zhongguo Remittance Pte Ltd v Samlit Moneychanger Pte Ltd* [2020] SGDC 73 – enforcement of mediation agreement at SMC.	Legal Profession (Professional Conduct) Rules 2015, Rule 17(2)(e) – legal practitioners obligated to evaluate the use of ADR processes together with client.

[202] Legislative approaches include delegated legislation such as court rules and legal profession rules.

[203] The Law Society of Singapore Guidance Note 7.1.2: Advisory on Dispute Resolution Options for potential Litigants https://law-society-singapore-prod.s3.ap-southeast-1.amazonaws.com/2021/12/Guidance-Note-7.1.2-Advisory-on-Dispute-Resolution-Options-for-Potential-Litigants-Final-for-issuing.pdf accessed 9 July 2024.

[204] Law Society Arbitration Scheme Handbook, 2017 https://law-society-singapore-prod.s3.ap-southeast-1.amazonaws.com/2020/01/LSAS-Handbook.pdf accessed 9 July 2024.

	clauses featuring mediation	agreement to mediate a dispute under the Law Society Mediation Scheme ('LSMS') 205 SMC's model clauses on mediation and Arb-Med-Arb clause.[206] SIMC model clauses on mediation and mixed-mode mediation (e.g., arb-med-arb clause or lit-med-lit clause).[207]	Court ADR modalities for civil cases.[209] Supreme Court Practice Directions, Part 6 – Amicable Resolution of Disputes for Civil Cases.[210]	*Maxx Engineering Works Pte Lrd v PQ Builders Pte Ltd* [2023] SGHC 71 – enforcement of multi-tiered dispute resolution clause, compelling parties to undergo mediation. *Note: While these two cases deal with rights and obligations in dispute clauses, they primarily serve the function of triggering*	Rules of Court 2021, Order 5, Rule 1 – duty to consider amicable resolution of disputes. Rules of Court 2021, Order 5, Rule 3 – powers of court to order parties to resolve dispute by amicable resolution. Rules of Court 2021, Order 21, Rule 2 and 4 – powers of court to make

[205] The Law Society of Singapore website https://www.lawsociety.org.sg/agreement-to-mediate/ accessed 9 July 2024.
[206] Singapore Mediation Centre Model Clauses https://mediation.com.sg/resources/model-clauses/ accessed 9 July 2024.
[207] Singapore International Mediation Centre Model Clause https://simc.com.sg/model-clause.
[209] State Courts Practice Directions 2021, Part IV: Case Management and Court Alternative Dispute Resolution, Sec 34 https://epd2021-statecourts.judiciary.gov.sg/part-iv-case-management-and-court-alternative-dispute-resolution 9 July 2024.
[210] Supreme Court Practice Directions, Part 6: Amicable Resolution of Disputes for Civil Cases https://epd2021-supremecourt.judiciary.gov.sg/part-6-amicable-resolution-of-disputes-for-civil-cases accessed 9 July 2024.

		SIMC's corporate pledge on cross-border dispute resolution.[208]		*mediation processes and are therefore placed here in the Matrix.* *The Law Society of Singapore v Andrew John Hanam* [2022] SGDT 12 – solicitor's duty to direct clients to consider ADR.	adverse costs orders if a party has failed to discharge its duty as regards amicable resolution as in Order 5. Singapore International Commercial Court Rules 2021, Order 28 Rule 11(1).
Procedure	The internal mediation process is led by the mediation with input from parties and lawyers. Where institutional mediation rules are incorporated	The Law Society Mediation Rules, Part 3, Arts. 2-8.[211]	Supreme Court Practice Directions, Part 6. Amicable Resolution for Civil Cases - 54. ADR Offer		Mediation Act 2017, Sec 3(1) – definition of mediation, for example, clarifying the mediator's

[208] Keynote Address by Minister Indranee, at SIMC Signature Event, 'MNCs For Mediation – From Disputes to Deal-Making' (published 30 August 2023) https://www.mlaw.gov.sg/news/speeches/keynote-address-min-indranee-simc-event/ accessed 9 July 2024.

[211] Law Society Mediation Scheme Handbook 2017, Part 3, 'The Law Society Mediation Rules', https://law-society-singapore-prod.s3.ap-southeast-1.amazonaws.com/2020/01/LSMS-Handbook.pdf accessed 9 July 2024.

	into mediation agreements (agreements to enter mediation), the parties may agree to vary these.	SMC's Mediation Procedure Rules, for example, ss 2-13.[212] SIMC Mediation Rules, for example, Rules 2-8.[213] SIMC Joint Protocols – SIMC has Joint Protocols with mediation centres in Japan, Indonesia, and Türkiye to conduct mediation online	and Response to ADR Offer[215] State Court Practice Direction, 37(9) General Provisions for General Process Case Conferences 42(1)-(9) Mediation & 43(1)-(9) Conciliation[216] Singapore International Commercial Court		role as primarily 'facilitative'.[218] Mediation Act 2017, Sec 3(3) – definition of mediation includes a meeting conducted via electronic means such as video conferencing. Mediation Act 2017, Sec 4 – meaning and form of 'mediation agreement'.

[212] Singapore Mediation Centre Mediation Procedure Rules https://mediation.com.sg/wp-content/uploads/sites/6/2022/12/Mediation-Procedure-Rules-1-April-2022-with-Annexes.pdf accessed 9 July 2024.
[213] Singapore International Mediation Centre Mediation Rules https://simc.com.sg/simc-mediation-rules accessed 9 July 2024.
[215] Supreme Court Practice Directions, Part 6: Amicable Resolution of Disputes for Civil Cases https://epd2021-supremecourt.judiciary.gov.sg/part-6-amicable-resolution-of-disputes-for-civil-cases accessed 9 July 2024.
[216] State Courts Practice Directions 2021, Part IV: Case Management and Court Alternative Dispute Resolution, 37, 42, 43 https://epd2021-statecourts.judiciary.gov.sg/part-iv-case-management-and-court-alternative-dispute-resolution accessed 9 July 2024.
[218] Mediation Act 2017, 2020 Revised Edition.; Also see Annotated Laws of Singapore: Singapore Convention on Mediation Act 2020 (SCMA) by N Alexander and S Chong, 18.

		via an expedited procedure.[214]	Practice Direction 2021, 77(8)(b) - Conduct of Case Management Conferences by review of papers & 77(9)-(12) - Consideration of mediation or any other form of ADR at Case Management Conferences[217]		Singapore Convention on Mediation Act 2020 (SCMA) Arts 2(2) and 4(2) – applicability of Online Dispute Resolution methods. Rules of Court 2021, Order 5, Rule 2 – terms of amicable resolution. Singapore International Commercial Court Rules 2021, Order 9 Rule 5 and Order 28 Rule 11 – ADR.

[214] JIMC-SIMC Joint Protocol https://simc.com.sg/sites/default/files/content-files/JIMC-SIMC%20Renewed%20Protocol_2023August.pdf>; IDB-SIMC Joint Protocol < https://simc.com.sg/idb-simc-joint-protocol accessed 9 July 2024; TOBBUYUM-SIMC Joint Protocol https://simc.com.sg/sites/default/files/content-files/Joint%20Protocol%20for%20SIMC-TOBBUYUM%20August2023.pdf accessed 9 July 2024.

[217] Singapore International Commercial Court Practice Direction 2021, Sec 77 https://www.judiciary.gov.sg/docs/default-source/news-and-resources-docs/sicc-practice-directions119bfa97ac6341a6ae26c23bd84d9662.pdf?sfvrsn=7ff8bb53_2 accessed 9 July 2024.

Credentialing standards	Credentialing, while highly desirable, is not compulsory. Parties may choose mediators who are credentialed by any one of numerous credentialing organizations or a mediator who is not credentialed. However, mediations conducted by mediators not appropriately credentialed or	SMC Mediators Training Scheme leading to SMC Accredited Mediator status.[219] SIMI Credentialing Scheme.[220]	Mediation by the State Courts' Court Dispute Resolution Cluster (CDRC) will be mediated by 1) a judge in the CDRC or 2) a court volunteer mediator, accredited by the SMC and appointed as State Courts volunteer mediators.[221]		Government Gazette, Notification No. 3760, Mediation Act 2017 – Designated Mediation Service Providers and Approved Certification Scheme.[222]

[219] Singapore Mediation Centre website on SMC Mediation Skills Assessment Accreditation https://mediation.com.sg/course/mediation-skills-assessment/ accessed 9 July 2024.
[220] Singapore International Mediation Institute Credentialing Scheme website https://www.simi.org.sg/What-We-Offer/Mediators/SIMI-Credentialing-Scheme accessed 9 July 2024.
[221] Singapore Courts website: Alternatives to Trial - Mediation https://www.judiciary.gov.sg/alternatives-to-trial/mediation/going-for-mediation-in-the-state-courts-(from-1-april-2022).
[222] Singapore E-Gazette website https://www.egazette.com.sg/gazetteViewDetail.aspx?ct=gg&year=2017&weekend=636452640000000000&subscriber=1&stages=3 accessed 9 July 2924.

	approved will NOT be able to take advantage of s12 of the Mediation Act 2017, which offers private mediations a direct enforceability pathway.				
Rights and obligations	Rights and obligations are typically included in Mediation Agreements and usually contractually imported from institutional rules.	The Law Society Mediation Rules, Part 3, for example, Arts 10-11 on right to initiate judicial/arbitral proceedings, confidentiality and privacy etc.[223] SMC Mediation Procedure Rules, for example, ss 14, 15, 17 on various aspects of		*Zhong Lingyun v Yuan Fang* [2022] SGHC 82; RMD Kwikform Singapore Pte Ltd v Ehub Pte Ltd [2022] SGHC 129 – enforcement of mediated settlement agreement. *Chan Gek Yong v Violet Netto* [2018] SGHC 208 – enforcement of mediated settlement	Mediation Act 2017, Sec 8 – stay of court proceedings. Mediation Act, ss 9-11 – confidentiality provisions. Mediation Act, Sec 12 – enforcement mediated settlement agreement,

[223] The Law Society of Singapore Mediation Scheme Handbook 2017 https://law-society-singapore-prod.s3.ap-southeast-1.amazonaws.com/2020/01/LSMS-Handbook.pdf accessed 9 July 2024.

		pre-mediation and conduct of mediation sessions.[224] SIMI Code of Professional Conduct, for example, ss 3 – 12 on the independence and impartiality of mediators etc.[225]		agreement (whether there was any undue pressure by the mediator during mediation).[226] *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 – conflict of interests.[227] *TYN Investment Group Pte Ltd v ERC Holdings Pte Ltd* [2020] 5 SLR 894 – confidentiality of	SCMA, for example, ss 5-7 – on recognition and enforcement of international mediated settlement agreements. Arbitration Act 2001, Sec 63(3) and Sec 64(4) – when mediator may be appointed as arbitrator.[230]

[224] Singapore Mediation Centre Mediation Procedure Rules https://mediation.com.sg/wp-content/uploads/sites/6/2022/12/Mediation-Procedure-Rules-1-April-2022-with-Annexes.pdf accessed 9 July 2024.
[225] Singapore International Mediation Institute Code of Professional Conduct (Revised 2023) https://www.simi.org.sg/What-We-Offer/Mediators/Code-of-Professional-Conduct-Revised-2023#:~:text=The%20SIMI%20Code%20of%20Professional,when%20they%20undertake%20a%20mediation accessed 9 July 2024.
[226] [2018] SGHC 208.
[227] [2020] SGCA 29.
[230] Arbitration Act 2001, 2020 Revised Edition.

				settlement agreement terms.[228] *Pradeepto Kumar Biswas v Sabayasachi Mukjerjee* [2022] 2 SLR 340 – admissions of liability during settlement negotiations.[229]	Arbitration Act 2001, Sec 64 – power of arbitrator to act as mediator. Singapore International Commercial Court Rules 2021, Order 22, Rules 2-3 – recoverability of foreign lawyer costs in the SICC.[231] Legal Profession Act 1996, for example, Sec 35B and Sec 36P – requirements for foreign lawyer

[228] [2020] SGHC 157.
[229] [2022] SGCA 31.
[231] C Seow, 'Recoverability of Foreign Lawyer Costs in the Singapore International Commercial Court' (2023) 35 Singapore Academy of Law Journal 56 https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal/Current-Issue/ctl/eFirstSALPDFJournalView/mid/494/ArticleId/1820/Citation/JournalsOnlinePDF.

					representing party in mediation.[232]

[232] Legal Profession Act 1996, 2020 Revised Edition.

143 Figure Y depicts the mediation regulatory landscape in Singapore. It shows that (1) diverse triggering provisions and mechanisms to mediate exist across all regulatory forms and the recognition of triggering provisions (such as clauses) by Singaporean courts; (2) mediation procedure is dominated by collective self-regulation with very few legislative provisions; (3) credentialing, while recognized by legislation, is mainly regulated by institutions (collective self-regulation) although parties have the right to choose non-credentialed mediators (market–contract approach); and (4) rights and obligations are comprehensively dealt with by various pieces of legislation in addition to collective self-regulation, which can be a useful gap-filler as well as an alternative where parties choose to opt out of default (non-mandatory) legislative provisions. Also noticeable in the Matrix is evidence of a body of case law interpreting rights and obligations of participants in mediation processes. At a glance, therefore, one can glean numerous insights about the mediation regulatory landscape in Singapore and its level of sophistication.

144 In Singapore, it is noteworthy that all aspects of the functional content of mediation are covered by one or more regulatory forms. This is critical. If, for example, procedure, credentialing and rights and obligations were subject to some form of regulation but nothing had been done in relation to triggering or incentivising the use of mediation, then it would not be surprising if the number of mediations was low and mediation practice was struggling – despite comprehensive and well-balanced regulation of the other aspects of mediation. In fact, there is usually a paucity of effective mediation triggers in jurisdictions with limited mediation practice.

145 In terms of regulatory form, the Mediation Matrix does not require entries of regulatory provisions or mechanisms in every regulatory form column. At the same time, best practice in the art of regulating mediation highlights the benefits of a layering approach – with a mix of regulatory forms to promote certainty and predictability as necessary, while allowing for flexibility elsewhere. It follows that where all aspects of mediation regulation are located in one column, for example, primarily in the legislative column, it might be useful to consider extending consideration to other regulatory forms when reviewing the regulatory mediation ecosystem.

146 The practicalities of selecting and implementing an appropriate mix of regulatory instruments for an emerging mediation profession are challenging. Two New Zealand commentators emphasize how difficult it is to find a formula that accommodates the different philosophical approaches to regulating mediation. They point out that courts in different jurisdictions around the world are grappling with these dilemmas and suggest that this is at least partly:

due to the relative immaturity of mediation as a profession and the somewhat unnatural and conflicting principles that underline the differences between mediation processes (consensual and subjective) and adversarial litigation processes (imposed and ostensibly objective).[233]

147 As has been demonstrated here, the Mediation Matrix offers a tool to tackle these ongoing challenges.

9 CONCLUSION

148 This chapter began with an exploration of the tension between freedom and framework in mediation settings.

a. Freedom in the sense of party autonomy to allow parties to tailor the process to suit their particular needs and to problem-solve solutions that would ordinarily be beyond the power of a court or arbitral tribunal.

149 Framework in a regulatory and institutional sense to set parameters for the conduct of mediation participants so that freedom is balanced with accountability.

150 The freedom–framework tension provides a conceptual basis for the art of regulating mediation in a way that can preserve its flexibility while still offering standards that manage expectations and support legitimacy and accountability.

151 Taking this idea one step further, the Mediation Matrix brings together issues of (a) regulatory form, explained through five regulatory approaches to mediation, and (b) functional content, analysed through a series of four descriptive classification schemas. The Matrix provides a structured map to assist law and policy-makers navigate the labyrinth of regulatory issues in mediation. Throughout the chapter numerous examples of different kinds of mediation regulation from around the world have been presented to illustrate and contextualize the various elements of the Mediation Matrix.

152 Despite the visual simplicity of the Matrix, this chapter has shown that the complexity of the issues surrounding mediation regulation precludes a checklist approach. It is not a simple matter of placing ticks in boxes. Rather the Mediation Matrix offers both a language and a methodology for designing and analysing regulatory approaches to

[233] D Clapshaw and S Freeman-Greene, 'Do We Need a Mediation Act? Parts 1 and 2, 6(4) and 6(5)' (2003) Alternative Dispute Resolution Bulletin 61, 95, 97.

mediation. In particular, it highlights how different layers of regulation can address the freedom–framework tension.

153 Finally, this chapter has argued for a multi-layered approach to regulation in mediation – a combination of formal and informal regulatory mechanisms with strong responsive and reflexive review mechanisms in place. In a dynamic and developing professional field, participative regulatory processes with the ability to review and adapt the mediation mix to changing circumstances are vital.

ABBREVIATIONS AND ACRONYMS

ACCP	Code of Civil Procedure (Argentina)
ACHPR	African Court on Human and Peoples' Rights
ADR	Alternative Dispute Resolution
ALI	American Law Institute
ANCCPC	Argentine National Civil and Commercial Procedural Code (Argentina)
Art	Article/Articles
ATCCP	Code of Civil Procedure (Austria)
BGH	*Bundesgerichtshof* (Federal Court of Justice) [Germany]
BID	*Banco Interamericano de Desarrollo* (Inter-American Development Bank)
CDR	Consensual Dispute Resolution
CEPEJ	*Conseil de l'Europe Commission européenne pour l'efficacité de la justice* (Council of Europe European Commission for the efficiency of justice)
cf	*confer* (compare)
ch	chapter
CIDH	*Corte Interamericana de Derechos Humanos* (Interamerican Court of Human Rights)
CJEU	Court of Justice of the European Union
EBRD	European Bank for Reconstruction and Development
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
ed	editor/editors
edn	edition/editions
eg	*exempli gratia* (for example)
ELI	European Law Institute
etc	et cetera
EU	European Union
EUR	Euro
ff	following
fn	footnote (external, ie, in other chapters or in citations)
GBP	British Pound (UK)
GCCP	Code of Civil Procedure (Germany)
GDPR	General Data Protection Regulation (EU)
HKMAAL	Hong Kong Mediation Accreditation Association Limited (Hong Kong)
ibid	*ibidem* (in the same place)
ICC	International Chamber of Commerce

ICPR	Civil Procedure Regulations (Israel)
ICT	Information and Communication Technologies
ie	*id est* (that is)
IIDP	*Instituto Iberoamericano de Derecho Procesal* (Iberoamerican Institute of Procedural Law)
IMI	International Mediation Institute
JCCP	Code of Civil Procedure (Japan)
JPY	Japanese Yen
LCIA	London Court of International Arbitration
MLICC	UNCITRAL Model Law on International Commercial Conciliation
MLICM	UNCITRAL Model Law on International Commercial Mediation
n	footnote (internal, ie, within the same chapter)
no	number/numbers
OECD	Organisation for Economic Co-operation and Development
para	paragraph/paragraphs
PD	Practice Direction
PDPACP	Pre-Action Conduct and Protocols
pt	part
QVM	*Qualitäts-Verbund Mediation* (Germany)
RSC Order	Rules of the Supreme Court (UK)
SCC	Supreme Court Canada
SCM	United Nations Convention on International Settlement Agreements Resulting from Mediation; Singapore Convention on Mediation
Sec	Section/Sections
SICC	Singapore International Commercial Court
SIMC	Singapore International Mediation Centre
SIMI	Singapore International Mediation Institute
supp	supplement/supplements
TCCP	Code of Civil Procedure (Turkey)
trans/tr	translated, translation/translator
UK	United Kingdom
UKCPR	Civil Procedure Rules (UK)
UMA	Uniform Mediation Act (USA)
UN	United Nations
UNIDROIT	*Institut international pour l'unification du droit privé* (International Institute for the Unification of Private Law)
UP	University Press
US / USA	United States of America
USD	United States Dollar
USFRCP	Federal Rules of Civil Procedure (US)
v	versus

vol	volume/volumes
WB	World Bank

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Guidelines on The Duty to Act in Good Faith in ADR Processes at the AAT (Australia, Administrative Appeals Tribunal)

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