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# Making mediation law

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# TABLE OF CONTENTS

---

Foreword.....	iii
Preface.....	v
<b>Chapter 1: Introduction</b> .....	1
Goal of this book.....	1
Structure of this book.....	2
The diversity–consistency tension in mediation regulation.....	2
You cannot not regulate mediation .....	3
Law and regulation.....	3
What is a regulatory policy? .....	4
<b>Chapter 2: Regulatory Landscape</b> .....	7
The regulatory landscape for mediation draws on the public and private sectors .....	7
The mediation landscape.....	8
Centralized access to mediation in the mediation landscape .....	8
Court-related mediation: Justice model .....	8
Court-related mediation: Marketplace model .....	9
Decentralized access to mediation in the mediation landscape .....	10
Community mediation.....	10
Private mediation .....	10
Hybrid models.....	11
Sustainable diversity in the mediation landscape .....	13
<b>Chapter 3: Regulatory Project</b> .....	15
Why do we need a dispute resolution policy?.....	15
Why do we need a mediation policy? .....	16
From good policy to good regulation.....	16
Stakeholders: Who is interested and why do they think it is important?.....	17
Principal stakeholders .....	17
Involved stakeholders .....	17
Affected stakeholders.....	17
Framework: What are we talking about? .....	18
Mediation definition.....	18
Implications of the definition .....	18
Distinguishing mediation from other dispute resolution mechanisms.....	18
Focus: What are the relevant criteria?.....	19
Policy principles .....	19

User interests .....	19
International empirical findings.....	20
<b>Chapter 4: Regulatory Principles.....</b>	<b>23</b>
What is the scope of the proposed regulatory plan? .....	23
Who is the target audience? .....	24
Who are the relevant regulatory actors? .....	25
Regulatory form .....	25
Regulatory content .....	27
Triggering mechanisms—How is demand for mediation initiated?.....	27
Process and procedure—How is the mediation process conducted?.....	27
Standards—How are mediation practitioner standards and quality assurance measures regulated? .....	30
Rights and obligations—How are rights and obligations of participants (mediators, parties, and lawyers in mediation) regulated?.....	32
What is the rule or the principle to be enunciated?.....	36
How to match the form to the content.....	36
How to determine the appropriate regulatory mix .....	36
<b>Chapter 5: Success Factors and Pitfalls: How to Make It Work and What to Avoid.....</b>	<b>41</b>
Success factors .....	41
Lessons learned.....	42
Fitting the policy to the people .....	42
<b>Chapter 6: Regulatory Topics Checklist.....</b>	<b>45</b>
<b>Appendix A: Particular Issues: Cross-Border and Online Mediation.....</b>	<b>49</b>
Cross-border mediation: Regulatory instruments .....	49
Online mediation and dispute resolution: Regulatory instruments.....	51
<b>Appendix B: Further Reading.....</b>	<b>53</b>
Articles.....	53
Books .....	54
Categories of law .....	55
Legislation, European Union, and international legal instruments.....	55
Practice directions.....	56
Case law.....	56
Institutional rules and other soft regulation.....	56
Policy documents .....	57
Websites .....	57
Notes .....	57

## FOREWORD

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The *Mediation Series* is a celebration of the long-term work of the International Finance Corporation (IFC), member of the World Bank Group, in helping client countries adopt and integrate mediation to increase the effectiveness of their conflict resolution systems. Since 2004, IFC has extended technical assistance to both governments and the private sector, globally, to ensure that mediation is established effectively. IFC's projects cover the Balkans, East and South Asia, Sub-Saharan Africa, and the Middle East and North Africa and have led to a considerable increase in the use of commercial mediation.

The success and the expansion of our mediation projects globally and the scarcity of material in Arabic have led and inspired the *Mediation Series*. The series offers a unique and comprehensive set of Alternative Dispute Resolution (ADR) learning resources for users, policy makers, lawyers, judges, and ADR professionals. The resources promise to support the growth and sustainability of mediation and ADR in the region and beyond.

The *Mediation Series* consists of a three-book-package (*Mediation Essentials*, *Making Mediation Law*, and *Integrated Conflict Management Design Workbook*) that provides both breadth and depth on various important topics. The *Mediation Essentials* deskbook serves as an orientation guide to ADR generally and to mediation specifically for users, advisers, and mediators. *Making Mediation Law* offers a robust perspective on how to design successful mediation policy and legislation. *Integrated Conflict Management Design Workbook* offers a hands-on focus for designing efficient and effective dispute management systems with companies and organizations. The publications appear in both English and Arabic, except for *Integrated Conflict Management Design Workbook* (Arabic only).

### ABOUT MAKING MEDIATION LAW

*Making Mediation Law* focuses on regulatory aspects of mediation and provides a step-by-step guide to making mediation policy and law. Mediation law affects all parties and can take a variety of different forms, from private contracts and codes of conduct to legislation.

For mediation law to be successful, it requires a set of principles and techniques. The authors of this book provide an exposition of those principles and techniques, encapsulating the regulatory aspects of mediation in a step-by-step guide. This easy-to-read, practical book draws on international research, policy, and practice, and it offers valuable advice to a wide audience involved in the lawmaking process. Given the universality of the topic, the book serves a broad audience, is written in practical terms, and is offered in English and Arabic. Each chapter enriches the theoretical discussion with practical case studies. The first part of the book focuses on common issues, definitions, and models of mediation. It is important for readers to have a good grasp of those key concepts before they move to the hands-on sections. For individuals more familiar with mediation, the later chapters may be of more interest as they delve into the practical details of

how to set the stage for institutionalizing mediation, followed by a summary of best practices and common pitfalls. Readers who are eager to start the policy and lawmaking process will find easy-to-use checklists and templates in the later chapters.

A handwritten signature in black ink, consisting of a stylized 'M' followed by a horizontal line that extends to the right.

**Mouayed Makhoul**

*IFC Regional Director for the Middle East and North Africa*



# PREFACE

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At the start of the 21st century, mediation continues to enjoy a fresh and vibrant image. It symbolizes a transformation in the way people approach resolving disputes, the way lawyers advise clients, and the way judges dispense justice.

As a dispute resolution process, mediation offers flexible solutions for a fast-changing world. While the substantive laws of nation-states grapple with (a) the fuzzy borders of online transacting, (b) the increasing difficulty of separating national from international, (c) the challenges of a global mobile workforce and global families, and (d) the way environmental disasters ignore national borders, mediation aims to offer dispute resolution procedures tailored to the needs of disputants. Those disputants might be corporate business entities, start-ups, online consumers, or indigenous leaders in charge of vast resources subject to foreign investment.

Needless to say, regulatory activity in this area has been, and continues to be, significant throughout the world, with the United Nations Commission on International Trade Law (UNCITRAL) playing a leading role in the international commercial arena. Yet, making law on mediation presents a unique challenge that can be framed as follows: how do we best regulate a dispute resolution mechanism, the most attractive characteristic of which is its procedural and substantive flexibility?

*Making Mediation Law* offers a step-by-step guide to making mediation law. It sets out best practice principles, one of which is the involvement of a wide range of interested individuals and groups in the law making process. Drawing from international research, policy, and practice, the book shows that mediation law belongs to everyone and can take a variety of different forms, from private contracts and codes of conduct to legislation.

*Making Mediation Law* is written in accessible language and is suitable reading for everyone interested in the future of mediation practice.

## ACKNOWLEDGMENTS

The publication of this manual was made possible because of the generous support of the Spain-IFC Technical Assistance Trust Fund and Switzerland's State Secretariat for Economic Affairs (SECO) through contributions to the trust fund supporting the activities of the World Bank Group's Investment Climate Advisory Services.

The primary authors of this manual are Nadja Alexander and Felix Steffek. The authors wish to acknowledge that various parts of the publication are drawn from the following works: N. Alexander, *International Comparative Mediation: Legal Perspectives* (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2009); K. Hopt and F. Steffek, *Mediation: Principles and Regulation in Comparative Perspective*, 1st ed. (Oxford, UK: Oxford University Press, 2013); and F. Steffek, and H. Unberath in cooperation with H. Genn, R. Greger, and C. Menkel-Meadow, *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Oxford, UK: Hart Publishing, 2013). The preparation of the manual was led by Fatma Ibrahim; the finalization was orchestrated by a team composed of Nina Pavlova Mocheva, Akvile Gropper, and Ejona Fuli from the World Bank Group.

We are grateful to our team of peer reviewers: Nina Mocheva, alternative dispute resolution expert at the World Bank Group, and Dr. Eman Mansour, director of the Investors' Dispute Settlement Center, affiliated to the Egyptian General Authority for Investment and Free Zones (GAFI).

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We would also like to thank Alex Azarov and Crystal Chin for their contributions and assistance.

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# CHAPTER ONE

## Introduction



# CHAPTER ONE

## Introduction

Mediation is a procedure in which an intermediary without decision-making powers (the mediator) systematically facilitates communication between the parties of a conflict with the aim of enabling the parties themselves to take responsibility for resolving their dispute. Mediation is a highly flexible and adaptable process—a factor that can create challenges for regulators. In fact, some people suggest that mediation should not be regulated at all. Yet, mediation does not and cannot exist in a regulatory vacuum.

## GOAL OF THIS BOOK

The goals of this book are to:

- Describe the regulatory landscape of mediation.
- Outline the parameters of a regulatory project about mediation.
- Offer a step-by-step guide to making policy and law about mediation.
- Generate enthusiasm among a wide range of regulatory stakeholders to become involved in shaping the future of mediation.

This book will be useful for all regulatory stakeholders:

- Members of parliament and the executive
- Government departments dealing with law and justice issues
- Judges
- Lawyers
- Mediation users
- Mediators
- Mediation advisers
- Mediation organizations
- Other professional organizations whose members mediate

Mediation is a highly flexible and adaptable process—a factor that can create challenges for regulators. In fact, some people suggest that mediation should not be regulated at all.

## STRUCTURE OF THIS BOOK

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In the introduction, we set out the goals and structure of the book before explaining some ideas that inform our approach to the topic.

Next, in chapter 2, we offer an international overview of the regulatory landscape that considers the different ways in which people can access mediation. This approach allows readers to visualize the bigger picture of the kind of access points that can be activated to grow mediation practice.

In chapter 3, we commence the Regulatory Project. We cover the questions and issues you need to think about and work through when you consider regulating mediation or any aspect of it. In this chapter, “regulatory project” refers to your project to regulate the practice of mediation or to “make mediation law.” This chapter helps you to establish the parameters for your project.

Chapter 4 leads into the next stage of making mediation law, which involves making decisions about the content and regulatory form that you wish to use to regulate various aspects of mediation.

Chapter 5 looks at success factors, pitfalls, and lessons learned.

Finally, in chapter 6, we provide you with a regulatory topics checklist. Once you have worked through chapters 3 and 4 to develop your ideas, you may find it useful to go through the regulatory topics checklist to firm up your ideas.

We also provide you with two appendixes to this book. Appendix A contains an outline of regulatory instruments relevant to cross-border and online mediation. Appendix B offers a list of books, articles, regulatory instruments, and other resources for readers.

## THE DIVERSITY–CONSISTENCY TENSION IN MEDIATION REGULATION

---

In considering approaches to regulating mediation, it is useful to begin with the theme that has continued to define and dominate discussions, debates, and developments in relation to mediation around the world: the diversity–consistency dilemma.

The diversity–consistency dilemma refers to the tensions between two motivations: on the one hand, diversity in practice through flexibility and innovation and, on the other hand, to establish consistent and reliable measures of quality in mediation practice through regulation. The debate begins with the issue of definitional consistency and the risks of excluding certain mediation practices in the search for uniformity. It extends to concerns that rule consistency may stifle the growth of mediation, inhibit its opportunities for innovative development, and lead it down the highly legalized path that arbitration has traveled.

Diversity–consistency tensions reflect a multiplicity of interests relating to consumers, practitioners, service providers, and governments. For example, consumers demand a flexible and responsive process that accommodates their needs and offers quality and accountability in its delivery. In a professional field as new as mediation, many consumers remain uninformed about quality and are unable to judge mediator qualifications and performance. Consumer confusion is exacerbated by the diversity of mediation practice that spans transformative, negotiation-based, and advisory models. Protecting consumers from incompetent and unconscionable practices demands mediator accountability. That accountability, in turn, requires some level of transparency and disclosure in mediation processes combined with appropriate practice and approval standards. However, 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 qualification and skills of their mediators.

We suggest that it is a question neither of diversity at the expense of consistency nor flexibility over form. Rather, decisions need to be made about which aspects of mediation are most useful standardized and which are best made more flexible.

## YOU CANNOT NOT REGULATE MEDIATION

Regulation is often associated with statutory intervention. This association represents an outcome-focused and now outdated view that was made on the basis of “simplistic and mechanistic models of economic rationalism, legalism, and government control.” Traditional distinctions between public and private and between regulated and deregulated can be confusing, as regulatory frameworks increasingly comprise different layers. Regulation in the 21st century is a system featuring a range of regulatory instruments and stakeholders engaged in dialogue, deliberation, and decision

making. This system leads to a greater engagement with diverse regulatory forms beyond legislation and to the extension of soft law options and private contracting (for example, agreements to mediate and mediation clauses) and industry norms (for example, codes of conduct, practice standards, and accreditation standards).

## LAW AND REGULATION

Regulation by the market is often thought of as involving the absence of law or the result of deregulation by the state. However, deregulated spaces are not empty. They involve the reduction, removal, or absence of only one kind of regulation, such as legislation. Where the market dominates, the laws of supply and demand have a regulatory effect. In addition, so-called deregulated 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 (box 1.1).

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. A more useful question is how to regulate mediation appropriately in light of the different approaches to regulation.

### Box 1.1: Laws regulate

In examining the laws of mediation, it is useful to think of law in terms of regulation. We make laws to regulate our behavior to one another, and those laws can derive from the state, self-management through contract or industry norms, and the marketplace. For example, dispositive (or default) law permits private parties to tailor rules to regulate their business relationship. Typically, this tailoring occurs through contractual arrangements such as agreements to mediate or mediation clauses.

On contractual instruments in mediation, see Nadja Alexander, Fatma Ibrahim, and Jean-François Roberge, *Mediation Series: Mediation Essentials* (Washington, DC: IFC/World Bank Group, 2016), chapter 5.

This broad understanding of law and regulation is consistent with contemporary regulatory theory, which has shifted its focus from government rulemaking to the context of institutions and interest groups.

This volume introduces the notion that everyone can play a role in regulating mediation. It offers a step-by-step approach to developing a mediation policy that can be transformed into law through a variety of regulatory forms.

## WHAT IS A REGULATORY POLICY?

---

Policy refers to a set of principles, a strategy, or a course of action that is suggested or proposed by a government, an institution, or an organization.

A policy outlines a plan—what the ministry, the institution, or the organization hopes to achieve and the methods and principles it will use to achieve them. A policy is not a law; however, it can often identify new laws that are needed to achieve its goals (box 1.2).



## Box 1.2: Case illustration—Working Group on Mediation



The Department of Justice of Hong Kong SAR, China, set up the Working Group on Mediation in 2008. Wong Yan Lung, senior council and a former secretary for justice, chaired the group. A cross-sector body, the working group comprised representatives from the Judiciary; the Legal Aid Department; legal professional bodies; universities; and alternative dispute resolution organizations. Its purpose was to review the development of mediation services in Hong Kong SAR, China, following the October 2007 policy address of Donald Tsang, the then–chief executive of Hong Kong SAR, China, “to map out plans to employ mediation more extensively and effectively in Hong Kong in handling higher-end commercial disputes and relatively small scale local disputes.”<sup>a</sup>

The working group published its report in February 2010 with 48 recommendations that cover three policy areas:

- Training and accreditation
- Public education and publicity
- Regulatory framework for mediation

In relation to the area of legal framework, Recommendation 33 suggests the introduction of a Mediation Ordinance and 15 recommendations deal with various aspects of the proposed Mediation Ordinance.

After the report was published, a mediation task force was established to implement the policy. Once the work of the task force was complete, the Department of Justice under the subsequent secretary for justice, Rimsy Yuen, set up the Steering Committee on Mediation to continue ongoing mediation policy work in Hong Kong.

a. Department of Justice, Hong Kong Special Administrative Region, “Report of the Working Group on Mediation” (Hong Kong–SAR, China: February 2010), para. 2.1.

# CHAPTER TWO

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## Regulatory Landscape



## CHAPTER TWO

### Regulatory Landscape

Mediation is often thought of as a process that is connected to the courts, and this connection certainly can be the case. However, mediation is also the product of private business-based initiatives, as figure 2.1 and comments demonstrate.

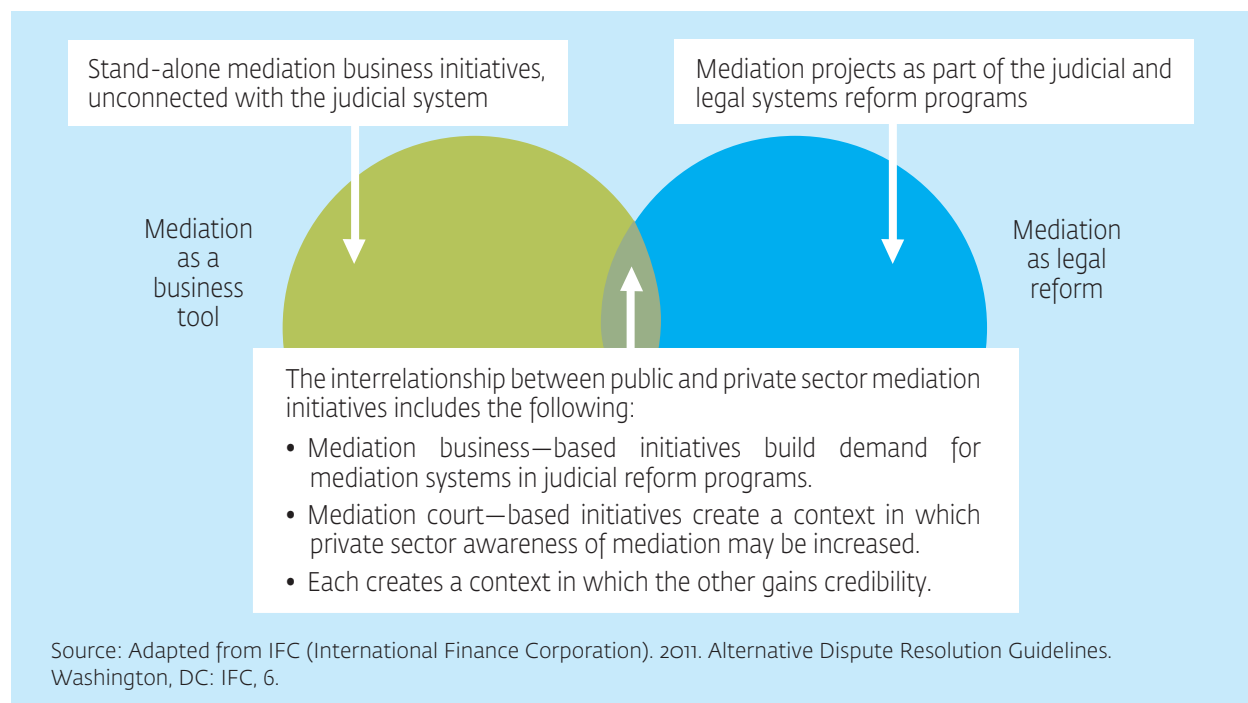
## THE REGULATORY LANDSCAPE FOR MEDIATION DRAWS ON THE PUBLIC AND PRIVATE SECTORS

A number of key points need to be made in relation to figure 2.1:

- The range of private sector as well as public sector initiatives offers much wider scope for mediation and other mediation interventions than is often thought to be the case.
- Neither approach is better than the other. Each model has different features, and effective projects need to consider which model offers potential for maximum benefit in a given context. The central argument for private sector involvement in mediation reforms is that it maximizes the scope and application of interventions and hence its likely effectiveness. Private sector participation also involves mediation users or potential users in the reform process, thus increasing awareness and use of mediation.
- The overlap area of the public and private sectors is also critical and may generate particular effects. The area offers opportunities for each sector to enhance implementation of mediation in the other. For example, a court (public body) may have a mediation referral program that refers cases to private sector mediators. Here, the public and private sectors work together. This practice is called the court-related mediation market model, and it is discussed with examples subsequently in this chapter. At the same time, note that mediation regulatory projects can still be effective whether they focus exclusively in the private or public sector.

Each model has different features, and effective projects need to consider which model offers potential for maximum benefit in a given context.

Figure 2.1: Interrelation of private business-based and public court-based mediation initiatives



- It follows that properly diagnosing the private and public sector possibilities and the enhancement that each might lend to the other is important in developing mediation regulatory interventions.

## THE MEDIATION LANDSCAPE

Building on the private-public dichotomy, an overview of the regulatory landscape around the world suggests four primary access points for mediation. In figure 2.2, the vertical axis represents the nature of distribution of mediation services from centralized to decentralized. The horizontal axis represents the balance between private marketplace input and public government input into mediation services for regulation, financial, and other support. The diagram identifies and characterizes the multiple access points to mediation. The four quadrants represent different regulatory trends that can be found in the mediation landscape.

## CENTRALIZED ACCESS TO MEDIATION IN THE MEDIATION LANDSCAPE

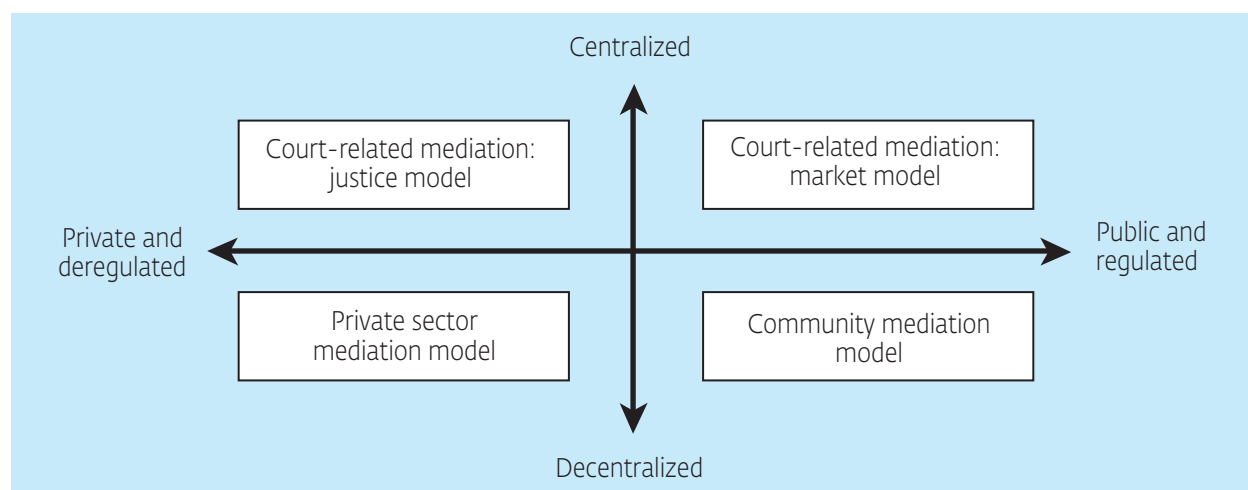
Court-related mediation (represented by the two top quadrants in figure 2.2) indicates a trend toward a centralized approach to mediation with the court as the central access point for mediation services.

The primary distinction in court-related mediation programs is whether providing mediation services is considered to be (a) an integral part of the justice system and therefore a function of the court (the justice model) or (b) an emerging private sector marketplace for resolving disputes with the court outsourcing mediation cases (the marketplace model).

## COURT-RELATED MEDIATION: JUSTICE MODEL

In the justice model, the court refers parties to mediation. Usually, the mediation takes place in

Figure 2.2: The mediation landscape



Box 2.1: Case illustration—Singapore

In Singapore, the justice model was introduced as a pilot with district court judges as mediators. In 1995, the Primary Dispute Resolution Centre was established at the state courts. Now called the Centre for Dispute Resolution, it provides alternative services for all court cases. Mediating judges, or settlement judges, are trained in interest-based mediation and do not hear trials; instead, they specialize in mediation. Surveys indicate a settlement rate of more than 85 percent and high levels of satisfaction with judicial mediation. This court-based mediation model was free for litigants until May 2015, when fees were introduced at S\$250 per party for district court mediation. With the civil jurisdiction of the district court ranging from S\$60,000 to S\$250,000, S\$250 is a small amount compared to the value of the disputes. The amount is affordable—but it is a sufficiently serious amount for parties to settle their dispute out of court. Overall, the model can still be characterized as the justice model because mediation is seen as an integral part of the justice system and therefore a function of the court. Note that mediation services are still free for all other nondistrict court disputes (magistrate’s court claims under S\$60,000, claims for harassment, and others). When mediation results in settlement, such settlements may be directly enforceable as court orders.

a court building and is conducted by court-based mediation practitioners. The mediators are drawn from the judiciary, court personnel, panels of mediators attached to the court, or a community mediation organization. The mediators are chosen and appointed by the court and the costs of the mediation are treated as costs of the justice system. Examples of the justice model of court-related mediation can be found in Germany, parts of Scandinavia, Slovenia, and other (mainly civil

law) jurisdictions. However, some common law jurisdictions, such as Singapore, also feature this model (box 2.1).

**COURT-RELATED MEDIATION: MARKETPLACE MODEL**

By contrast, the marketplace model represents a private form of court-related mediation, in which the court outsources mediation services. The

mediators are typically not employed by the court and are members of a panel of court-approved mediation service providers who set their own fees that the disputants pay. Thus, the marketplace model promotes a straightforward system in which the user pays—when the user pays, the user has a choice. Accordingly, the parties select mediation service providers from the court panel. In most cases, the parties are also free to agree on a mediation service provider who is not on the panel. The marketplace model of court-related mediation originated in common law jurisdictions, and examples can be found in Australia; Canada; China; Hong Kong SAR, China; the United Kingdom; and the United States. This model can also be found in some civil law jurisdictions as the following case illustrations show (box 2.2).

## DECENTRALIZED ACCESS TO MEDIATION IN THE MEDIATION LANDSCAPE

The lower two quadrants of the mediation landscape (as shown in figure 2.2) indicate a move away from the courts and away from centralization.

## COMMUNITY MEDIATION

The community mediation model represents a combination of a high degree of regulation or

government support with a decentralized approach (box 2.3). In this model, mediation is widely accessible through community-based mediation organizations and other community organizations, such as shelters for refugees and women, legal centers that are government sponsored, legal aid, and the police. Mediators include volunteers, employees of community mediation organizations, and freelance mediators working on contract. Typically, disputants do not pay for the service. Where mediation services are not volunteered, the government carries the costs. Although there is great variety in community mediation practice, most practice models follow an interest-based or transformative approach.

## PRIVATE MEDIATION

The private mediation quadrant represents the combination of a decentralized and a private and deregulated approach (box 2.4). In this area, private sector organizations and freelance mediators offer fee-for-service mediation. Mediators represent a wide variety of professions with a corresponding range of qualifications that depend on organizational or industry requirements and standards.

### Box 2.2: Case illustrations—Marketplace models

In Bosnia and Herzegovina, a court-related mediation marketplace model was introduced. Mediations are conducted by mediators in a center outside of the courts. However, initial training and education in mediation is free to judges as well as to lawyers and others outside the courts to encourage understanding and awareness. Such training and education also encourage referrals by court.

In Hong Kong SAR, China, a court-related mediation marketplace model operates with Practice Direction 31 requiring prelitigation mediation in most civil cases. Parties can obtain mediators privately or through a range of mediation institutions. In addition, the courts house the Joint Mediation Helpline Office (JMHO). The JMHO has been set up by eight mediation centers with the support. The JMHO manages a list of mediators and offers information about mediation and mediators to the general public.

## HYBRID MODELS

The mediation landscape (figure 2.2) is a model that helps classify different types of access points for mediation. As mediation practice develops and becomes increasingly sophisticated, hybrid models borrow from different quadrants (box 2.5). For example, industry mediation schemes can develop

with the support of the government. In this case, industry bodies (such as telecommunications, franchising, construction, banking, and finance) refer disputes to a private mediation institution; however, the parties remain free to mediate outside of the scheme if they so wish. The intention of such schemes is to boost the use of private mediation. Whereas such schemes may be private in their legal form, they usually have the support of the

### Box 2.3: Case illustration—Bangladesh

In Bangladesh, a community mediation program uses a multitier structure of village mediation committees to deliver informal nonbinding mediation services. The program is built on an existing traditional dispute resolution system and on a system of educated and trained women mediators to increase access to the services for female members of the community. Community mediation services can help resolve (a) commercial disputes in which businesses operate at the village level or (b) construction disputes that involve members of a village and land rights issues.

### Box 2.4: Case illustration—Private mediation

In countries such as Australia, Canada, the United Kingdom, and the United States, the private commercial mediation sector is strong and still growing.<sup>a</sup> Encouraged through many years of court-referred mediation on the marketplace model, private mediation of commercial disputes is now well developed.

Parties can access private mediation service providers in numerous ways, including the following:

- Directly through word of mouth or the Internet
- Through their private lawyers or in-house counsel
- Through dispute resolution clauses
- In an arbitral framework and process<sup>b</sup>

a. For more information on the dissemination of mediation in various countries and fields, see Klaus J. Hopt and Felix Steffek, “Mediation: Comparison of Laws, Regulatory Models, and Fundamental Issues,” in *Mediation: Principles and Regulation in Comparative Perspective*, ed. by K. J. Hopt and F. Steffek (Oxford, U.K.: Oxford University Press, 2013), 94–96.

b. Christian Bühring-Uhle, Lars Kirchhoff, and Gabriele Scherer, *Arbitration and Mediation in International Business*, 2nd ed. (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2006), 108–109, and Christian Bühring-Uhle, Gabriele Scherer, and Lars Kirchhoff, “The Arbitrator as Mediator: Some Empirical Insights,” *Journal of International Arbitration* 20 no. 1 (2003): 81–88.

government, at least at their commencement. In addition, the industry schemes are usually more centralized than decentralized in the sense that an industry body refers to one private mediation organization.

Another hybrid model involves a central government authority (not a court) that refers disputes to an industry body equipped to conduct mediations. This hybrid model is similar to the marketplace model of court-referred mediation, except that the referrals come from a noncourt entity.

### Box 2.5: Case illustration—Hybrid models

In Hong Kong SAR, China, mediation to resolve investment disputes enjoyed high-profile media coverage in the Lehman Brothers–related minibond disputes.<sup>a</sup> After the collapse of Lehman Brothers, about 48,000 investor who had bought HK\$20 billion in investment products issued or linked to Lehman Brothers complained to the Hong Kong Monetary Authority (HKMA) about the banks that sold them the products. In 2008, the HKMA appointed the Hong Kong International Arbitration Centre (HKIAC) as the service provider for the Lehman Brothers–related Investment Products Dispute Mediation and Arbitration Scheme. The HKMA referred more than 1,000 cases involving 16 banks to the HKIAC. Most disputes were settled within a week of appointment of the mediators, and the mediations did not exceed five hours.

Financial Services and the Treasury Bureau proposed establishing the Financial Dispute Resolution Centre (FDRC) in Hong Kong SAR, China, to specifically handle financial disputes.<sup>b</sup> The FDRC came into operation in 2012 as an independent and impartial organization administering the Financial Dispute Resolution Scheme (FDRS). Financial institutions authorized by the HKMA and licensed by the Securities and Futures Commission are members of the FDRS administered by the FDRC.<sup>c</sup>

In 2007, the Hong Kong Mediation Council introduced a pilot scheme for mediation of low-value construction disputes. The pilot ran for a year until August 31, 2008, and was then extended to August 31, 2009.<sup>d</sup> Under this pilot, mediation was provided by an accredited mediator pro bono—or no fee—for up to eight hours for disputes up to HK\$3 million. A mediator fee of HK\$1,500 per hour was borne by both parties equally (unless otherwise agreed) for mediation time beyond the eight hours. More recently, the pilot scheme has been replaced by the Construction Mediation Scheme, which deals with construction disputes of differing values. The scheme aims to encourage and facilitate wider and further uses of mediation, and it is administered by the HKIAC.<sup>e</sup>

a. Bonnie Chen, “Mini-bond Investors Urged to Try Mediation,” *The Standard*, March 26, 2009.

b. Financial Services and the Treasury Bureau, “Proposed Establishment of an Investor Education Council and a Financial Dispute Resolution Centre” (Consultation paper, Hong Kong government, February 2010), [http://www.gov.hk/en/residents/government/publication/consultation/docs/2010/consult\\_iec\\_fdrc\\_e.pdf](http://www.gov.hk/en/residents/government/publication/consultation/docs/2010/consult_iec_fdrc_e.pdf).

c. See FDRC website at [www.fdrc.org.hk](http://www.fdrc.org.hk).

d. Hong Kong Mediation Council, Hong Kong International Arbitration Centre, brochure, [http://worldsmeexpo.hktdc.com/pdf/2011/SMEForum/Dec\\_3/46/HFLeung.pdf](http://worldsmeexpo.hktdc.com/pdf/2011/SMEForum/Dec_3/46/HFLeung.pdf).

e. This case illustration is adapted from Nadja Alexander, *The Hong Kong Mediation Manual* (Hong Kong SAR, China: Lexis Nexis 2014).



## SUSTAINABLE DIVERSITY IN THE MEDIATION LANDSCAPE

Countless variations of mediation practice can be found in the four quadrants. Whereas mediation practice often has a starting point in one of the quadrants, advanced mediation jurisdictions generally show a representation of mediation programs in at least three of the four quadrants (box 2.6). Arguably, such representation is a reflection of

the continued development of mediation processes and programs through different private and public sectors and societal and cultural groups. In addition, a relatively balanced distribution of mediation services indicates a broad range of access points to mediation. Sustainable diversity is essential for the continued attractiveness of mediation as an adaptable and innovative alternative to traditional court procedures.

### Box 2.6: Case illustration—Australia

Australia offers an example of a jurisdiction that features access to mediation in all four quadrants. Mediation commenced in the early 1980s through a variety of community justice initiatives (community mediation model) focusing on neighborhood and family disputes. In the early 1990s, formalized state court mediation schemes were introduced around the country using the court-related mediation marketplace model. The federal court of Australia offered—in addition to the marketplace model—mediation conducted by senior court registrars (court-related mediation justice model). In this model, mediators are not judges but full-time court employees who are trained in interest-based mediation and specialize in mediating in the court. Many specialized quasi-judicial tribunals in Australia (for example, the Australian Administrative Tribunal) also offer a version of the justice model. The final model to develop in Australia has been private sector mediation (for example, private prelitigation commercial mediation). Whereas private mediation has long been offered, the demand for it has varied. The introduction of the court-related mediation marketplace model helped boost private mediation. In 2015, a high level of public awareness and a proliferation of industry-based schemes helped develop the private mediation sector.

Now that we have mapped out the regulatory landscape for mediation, including the type of access points for mediation services that are available, it

is time to start thinking about the parameters of a “regulatory project” for your jurisdiction.

# CHAPTER THREE

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## Regulatory Project





## CHAPTER THREE

### Regulatory Project

## WHY DO WE NEED A DISPUTE RESOLUTION POLICY?

As indicated previously, *policy* refers to a strategy or a plan—and it may include a set of principles—proposed by a government, an institution, or an organization.

What is a good dispute resolution policy, and what does it aim for? A dispute resolution policy refers to a plan and a guiding set of principles to introduce and then to roll out different forms of dispute resolution. Such a policy aims for the resolution of conflicts such that the legitimate interests of the parties involved are satisfied. Why are informal negotiations and formal court proceedings not sufficient to achieve this goal? Different parties have different interests and are involved in different conflicts. For some, negotiations or court proceedings are the best way forward. For others, however, alternative approaches are better suited. Examples of alternative approaches are arbitration, conciliation, and mediation.

Modern dispute resolution policies offer a set of different dispute resolution mechanisms with varying characteristics to fulfill the differing interests of the citizens in dispute resolution. The availability of sophisticated dispute resolution increases economic prosperity and justice. Economic efficiency will rise when the parties can choose a mechanism that solves their dispute for the lowest cost and creates the most favorable benefits. Policies that permit and facilitate dispute resolution regimes to fulfill the legitimate interests of citizens and to reject wishes that lack legitimacy create the foundations for achieving justice. In short, good dispute resolution policy is an essential building block for a prosperous and just society.

What is a good dispute resolution policy, and what does it aim for? A dispute resolution policy refers to a plan and a guiding set of principles to introduce and then to roll out different forms of dispute resolution.

## WHY DO WE NEED A MEDIATION POLICY?

Empirical research shows that citizens consistently employ dispute resolution mechanisms that are not suitable for them—that is, the mechanisms do not reflect their real interests. For example, parties might turn to the court to solve their dispute even though both parties prefer to control the outcome and prefer to keep the dispute private. Why does this happen? Reasons vary. Sometimes traditional practices or advisers who favor trials push the parties toward the courts even though mediation would better suit their interests. Sometimes the regulatory framework favors one dispute resolution mechanism without a good reason. For example, sometimes the way costs are regulated lures the parties into litigation even in situations in which mediation would be cheaper both for the parties and the state.

In addition, the existing regulation of mediation may not be optimal. So, even if the parties manage to steer their dispute to the right mechanism, the outcome might be inefficient and unjust. A good mediation policy helps to avoid these problems relating to choice and quality (box 3.1).

## FROM GOOD POLICY TO GOOD REGULATION

Better regulation is one way to address poor decision-making behavior by those involved in disputes and imperfect legal rules and standards. We need to establish what kind of regulation promises the best results. Possible regulatory tools are legislation, ministerial instruments, court rules, professional self-regulation, codes, and contracts. As a first step, consider the following:

- Who are the interested stakeholders?
- What is the general framework for dispute resolution processes?
- What are the principles that should guide the regulatory policy?

As a second step, regulatory principles should define the following:

- Scope of a regulatory scheme
- Regulatory actors
- Target audience
- Regulatory instruments available
- Function of regulation
- Type of rule or standard to be enunciated
- Method to match function to form

We address these issues in turn.

### Box 3.1: Example—Why we need mediation

A 2007 study by the United Kingdom’s National Audit Office collected statistical data for family disputes in the years 2004 to 2006.<sup>a</sup> According to the study, the average costs of mediation were £752, whereas court proceedings accounted for more than twice as much—£1,682. Assuming that the state provides financial assistance for mediation as well as for court proceedings, this finding meant that aggregate costs amounted to almost £74 for the taxpayer because mediation was not used in appropriate cases. Also, the mediations covered by the study were resolved more quickly than court proceedings were. The mediations needed an average of 110 days, while the court proceedings lasted an average of 435 days.

a. National Audit Office, “Legal Aid and Mediation for People Involved in Family Breakdown”—Report by the Comptroller and Auditor General, London, March 2, 2007, <https://www.nao.org.uk/report/legal-aid-and-mediation-for-people-involved-in-family-breakdown/>.

# STAKEHOLDERS: WHO IS INTERESTED AND WHY DO THEY THINK IT IS IMPORTANT?

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## PRINCIPAL STAKEHOLDERS

The principal stakeholders of mediation policy are the parties of an ongoing or future conflict. They are affected by the conflict, and their interests should guide the regulation of dispute resolution. The parties have a right of access to effective and fair dispute resolution, in particular in the form of mediation. Mediation promises fair dispute resolution because its flexibility deals particularly well with the widely differing interests of the parties. Cost and time efficiency are statistically proven strengths of mediation compared with other forms of dispute resolution. However, the potential interests of the parties go far beyond money and time. Such further interests are as follows:

- Durable resolution of the dispute
- Mutually beneficial agreements
- Individually tailored solutions
- Integrative and constructive method of dispute resolution

## INVOLVED STAKEHOLDERS

The next set of stakeholders comprises all those who are directly or indirectly involved in mediation: the mediators and their professional associations, advisers such as lawyers and experts, supporting persons such as assistants and translators, and the mediation trainers and their associations. The experience of prior reform initiatives shows that these stakeholders notably voice two sorts of interests: (a) those concerning the quality of their contribution to mediation proceedings and (b) those concerning the income from and working conditions of their occupation. The suggestions to

improve the quality of mediation proceedings are valuable inspirations for policy making. The claims to income and professional working conditions entail difficult questions of creating a cadre of mediators and the distribution of income between all those involved in dispute resolution.

*In comparison with court proceedings, the statistical research available supports the expectation of cheaper and faster dispute resolution through mediation. In addition, empirical mediation research has proven remarkably high success quotas, notable procedural satisfaction rates and a perceptible reconciliation function.*

—Hopt and Steffek, *Mediation* (2013), 119

## AFFECTED STAKEHOLDERS

Further stakeholders are individuals who are not involved in the mediation but are still affected. Examples of such stakeholders are people close to the parties (colleagues, other industry players, friends and supporters), judges, arbitrators, lawyers, notaries, and taxpayers. These stakeholders are often concerned about whether they will indirectly benefit or suffer from mediation. People connected to the parties (for example, children of quarrelling parents) might prefer the nonconfrontational style of mediation, but they might fear agreements infringing their protective rights. Judges, arbitrators, lawyers, and notaries might see the potential in contributing to a balanced system of dispute resolution, for example, by referring disputes to mediation or advising parties in mediation. Other stakeholders, however, might see mediation as a threat to their share in the market for dispute resolution.

# FRAMEWORK: WHAT ARE WE TALKING ABOUT?

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## MEDIATION DEFINITION

Mediation is generally accepted to be a structured process comprising one or more sessions in which one or more mediators—without adjudicating a dispute or any aspect of it and with the goal of enabling the parties to take voluntary responsibility for resolving their dispute—assist the parties to do any or all of the following:

- Identify the issues in dispute.
- Explore and generate options.
- Communicate with one another.
- Reach an agreement regarding the resolution of the whole or part of the dispute.<sup>2</sup>

## IMPLICATIONS OF THE DEFINITION

The free will of the parties is an essential element of mediation. There is debate in some jurisdictions whether initiating mediation can be mandatory in certain circumstances. However, there is consensus that neither the content nor the effect of a mediated outcome can be forced on the parties against their will. The free will of the parties entails the autonomy of the parties to bind themselves. This binding can take the form of a contractual clause to try mediation should a conflict arise. It can also take the form of a settlement agreement developed in mediation in which the parties bind themselves to a solution and its enforcement.

Further, commonly shared characteristics of mediation are as follows:

- Decision making lies with the parties and not the mediator.
- The mediator is neutral.
- The mediator offers the parties expertise in communication and negotiation support.
- Mediation is conducted confidentially.
- Mediation reaches beyond the strict letter of the

law to include nonlegal interests such as financial, relational, and other priorities of the parties<sup>3</sup>

The final characteristic in the list emphasizes the interests of the parties over their legal positions as the basis of dispute resolution. It also stresses that mediation targets the social conflict between people and that the law's function is to contribute to the solution of this conflict.

## DISTINGUISHING MEDIATION FROM OTHER DISPUTE RESOLUTION MECHANISMS

Regulating mediation requires distinguishing mediation from other forms of dispute resolution. How could one regulate without knowing what one regulates? Yet, in the absence of a commonly accepted terminology for dispute resolution, delineating the processes for dispute resolution from one another remains challenging. Here, a functional approach is recommended to distinguish mediation from other ways to resolve disputes. A functional approach is less concerned with technical and doctrinal details of different legal systems. Instead, what matters are the effects and events that follow from legal rules in real life. Because the parties are the principal stakeholders of dispute resolution policy, they should also be the focus of a functional understanding of dispute resolution mechanisms. In other words, in explaining mediation and distinguishing it from other processes, we will look at (a) dispute resolution processes from the perspective of the parties and how they experience mediation and (b) other processes from a practical point of view.

Against this background, dispute resolution mechanisms can be characterized using the following features:

- *Initiation control.* Is each party's consent needed to initiate the dispute resolution mechanism?
- *Procedure control.* Do the parties determine the procedure?
- *Result-content control.* Do the parties determine the content of the result of the dispute resolution?

This determination corresponds to whether the mechanism is evaluative, that is, whether the law or a third person evaluates the conflict.

- *Result-effect control*. Is the parties' consent needed for the result to be binding?
- *Neutral choice control*. Do the parties choose the neutral?
- *Information control*. Do the parties control the disclosure of information? That is, is the procedure private?

By using these functional characteristics, essential mechanisms for dispute resolution can be distinguished, as shown in table 3.1.<sup>4</sup>

## FOCUS: WHAT ARE THE RELEVANT CRITERIA?

### POLICY PRINCIPLES

Three principles of particular relevance for mediation policy are party autonomy, equality, and efficiency.

- *Party autonomy* places the parties at the center of dispute resolution through mediation. The parties are responsible for their dispute as well as for being in a position to resolve it. The mediator and other third parties assist the parties in solving their dispute. As a consequence, the interests of the parties determine whether the dispute

will be resolved and, if so, the content of such resolution, for example, the substantive terms of a settlement.

- *Equality* essentially requires treating similar situations the same. Party autonomy and equality may conflict, with the result being that policy decisions have to be made that will balance the interests affected.
- *Efficiency* aims at maximizing the satisfaction of interests of all involved at the least possible cost. Because the citizens expect that their affiliation to a society increases the realization of their interests, efficiency is an important element of justice. Hence, the cost-benefit relationship is relevant for policy making in the field of dispute resolution and of mediation, in particular. Consequently, the design of dispute resolution mechanisms may reflect that certain mechanisms are exceptionally well suited for specific types of disputes.

### USER INTERESTS

The conduct of mediation proceedings depends on the parties' wishes. Therefore, mediation policy makers should listen to the conflicting parties and understand their interests. Empirical surveys can help to grasp what the citizens want from dispute resolution providers. One example is the International Mediation Institute's 2013 "International Corporate Users Survey."<sup>5</sup> On the question of whether mediation should be a compulsory

Table 3.1: Dispute resolution mechanisms and their characteristics

	Parties together have...					
	Initiation control	Procedure control	Result-content control	Result-effect control	Neutral choice control	Information control
Negotiation	yes	yes	yes	yes	N/A	yes
Mediation	yes	yes	yes	yes	yes	yes
Conciliation	yes	yes	no	yes	yes	yes
Arbitration	yes	yes	no	no	yes	yes
Adjudication	no	no	no	no	no	no

Note: n/a = not applicable.



procedural step in the conduct of all commercial disputes, in both litigation and arbitration, 48 percent of responders were in favor of mediation being a mandatory step, whereas 37 percent disagreed and 15 percent were ambivalent. As its title indicates, the cited survey refers to corporate users only. Hence, it does not say anything on the interests of noncommercial parties, such as consumers. This insight cautions against simplifying and overextending the result.

## INTERNATIONAL EMPIRICAL FINDINGS

A summary of the empirical findings available shows that mediation is a valuable method for resolving disputes and is worth promoting. The

success rate of mediation, understood as the conclusion of a settlement or similar agreement, is remarkably high. A cross-country comparison reveals success rates of more than 50 percent, often around 75 percent or even higher.<sup>6</sup> Mediation does equally well if the understanding of a successful mediation is not limited to a successful conclusion of a settlement but is extended to the satisfaction of the parties with the process. Cross-country data shows satisfaction rates of the parties of 80 percent and higher.<sup>7</sup> This finding translates into high implementation rates of mediation settlement agreements.<sup>8</sup> It seems that the reconciliation effect of mediation leads to more favorable implementation rates of such agreements compared with court orders.





# CHAPTER FOUR

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## Regulatory Principles



## CHAPTER FOUR

### Regulatory Principles

## WHAT IS THE SCOPE OF THE PROPOSED REGULATORY PLAN?

Select a regulatory plan that is general, sector specific, or integrated (table 4.1).

Table 4.1: Scope of regulatory plan

Regulatory plan	Description	Jurisdictions with regulatory plan adopted <sup>a</sup>
1. General	General mediation laws extend to all mediation or mediators in a given jurisdiction.	Austria; Germany; Hong Kong SAR, China; Japan; Samoa
2. Sector specific	Sector-specific regulation refers to laws dedicated to mediation in a specific industry, court, mediation program, area of law, or other defined context.	Australia, France, the United Kingdom, the United States
3. Integrated	Integrated mediation laws focus on a particular sector; however, they are not stand-alone laws. Integrated laws are incorporated into general regulatory instruments dealing with a particular topic, for example, when court-referred mediation is covered by the applicable civil procedure code, court statute, or rules.	Australia (in relation to family, farm debt, and franchising disputes, among others) Californian Evidence Code (ss 1115–1128) in relation to mediation evidence Many jurisdictions, including Australia; Belgium; France; Germany; Hong Kong SAR, China; the United Kingdom; and others have integrated regulation for court-referred mediation. Here the regulatory provisions are covered by the applicable civil procedure code, court statute, or rules.

a. Note that jurisdictions may have more than one regulatory plan, for example, general regulation complemented with specific or integrated legislation for certain areas.

## WHO IS THE TARGET AUDIENCE?

Once the regulatory plan (general, sector specific, or integrated) is selected, it is time to identify the audience in further detail.

1. *Consider*: Is the proposed regulatory plan targeting mediators, mediation service providers,

users of mediation services, or all of these audiences? See table 4.2.

2. *Consider*: The target audience is identified. Now, consider to what extent there might be exceptions to the scope of the regulatory plan identified (table 4.3). For example, a general regulatory plan may not be intended to cover certain sectors, such as mediation of consumer disputes, workplace

Table 4.2: Target audience

Target audience	Examples
Mediators	<ul style="list-style-type: none"> <li>• Only mediators accredited under a national or other recognized scheme</li> <li>• Any person who holds himself or herself out to be a mediator and uses a written agreement to mediate</li> <li>• Any person who holds himself or herself out to be a mediator, regardless of whether he or she uses a written agreement to mediate</li> <li>• Other</li> </ul>
Users of mediation services	<ul style="list-style-type: none"> <li>• Individuals in dispute</li> <li>• Repeat players, such as               <ul style="list-style-type: none"> <li>–Businesses</li> <li>–Government departments</li> <li>–Professional advisers acting for parties in mediation</li> </ul> </li> <li>• Others</li> </ul>
Mediation service providers (including referral bodies)	<ul style="list-style-type: none"> <li>• Courts</li> <li>• Law societies and bar associations</li> <li>• Dispute resolution organizations, such as arbitration and mediation organizations</li> <li>• Independent mediators</li> <li>• Others</li> </ul>
Others, please specify	

Table 4.3: Regulatory plans and exceptions

Selected regulatory plan	Examples of exceptions
General	<ul style="list-style-type: none"> <li>• Consumer mediation</li> <li>• School mediation</li> <li>• Victim-offender mediation</li> <li>• Workplace mediation</li> <li>• Neighborhood and community mediation</li> </ul>
Sector specific: Identify the sector	<ul style="list-style-type: none"> <li>• Mediation in the financial sector</li> <li>• Exceptions may relate to cross-border financial mediation or mediations involving institutions listed in a schedule</li> </ul>
Integrated: Identify the sector	<ul style="list-style-type: none"> <li>• Family mediation to be integrated into the family law, generally</li> <li>• Exceptions may relate to               <ul style="list-style-type: none"> <li>–Mediations conducted by a nonqualified mediator under the legislation (other rules may apply here)</li> <li>–Mediations conducted by court staff (other rules may apply here)</li> </ul> </li> </ul>

disputes, neighborhood disputes, school disputes, or others.

3. *Consider:* Mediation is a dispute resolution process that operates on a stand-alone basis and also in combination with other processes that resolve disputes, such as arbitration and court proceedings.<sup>9</sup> Does the regulatory plan extend to mediation as a stand-alone process only, or, for example, will it extend to mediation that takes place in an arbitration or court proceeding? Will the regulatory plan extend to mediation in one or more of the following circumstances? See table 4.4.

## WHO ARE THE RELEVANT REGULATORY ACTORS?

Regulatory actors are not limited to formal lawmakers such as legislators. Worldwide, the types of regulatory actors involved in mediation regulation are far ranging. The previous subsection identified the categories of stakeholders who may be interested in mediation policy. Stakeholders involved in mediation policy making are referred to as regulatory actors. Table 4.5 identifies the types of regulatory actors most commonly involved in making mediation policy. As you think about your own jurisdiction, identify the potential regulatory

actors for making mediation policy with a check (✓) in the middle column. If you are working on a particular regulatory project, then focus on the regulatory actors relevant to the project. In the third column, provide further details about the regulatory actors, such as the names of relevant departments, organizations, individuals, their websites, and contact details.

## REGULATORY FORM

Regulatory form is particularly important in relation to the diversity–consistency tension. Here, regulation is understood as inclusive. It includes positivist notions of law, such as legislation, ordinances, case law (juridification), and practice directions. It extends to forms of soft regulation, such as codes of conduct for mediators, institutional mediation rules, and other industry standards (codification and institutionalization), mediation pledges, and clauses. In addition, regulation by private contract and the market laws of supply and demand play an important role in shaping the regulatory landscape for mediation. See box 4.1 and box 4.2.

Generally, soft regulation is more flexible and responsive to changing circumstances than are hard forms of regulation such as legislation. In the early

Table 4.4: Options for regulatory plan

Mediation as a stand-alone process not currently covered by legislation	yes-----not sure -----no
Mediation that falls within existing arbitration legislation	yes-----not sure -----no
Mediation that falls within other legislative frameworks, for example, court-referred mediation	yes-----not sure -----no
Processes similar to mediation, such as conciliation that is subject to existing legislation (Note that sometimes the distinction between mediation and conciliation is difficult to determine, yet it is very important.)	yes-----not sure -----no

stages of contemporary mediation development, it is useful to consider flexible and responsive forms of regulation along with traditional hard regulatory forms. The soft forms involve a greater range

of regulatory experts and are more adaptable to changing circumstances as the professional field of mediation develops. Table 4.6 outlines the different characteristics.

**Table 4.5: Types of regulatory actors**

Type of regulatory actor	√	Examples
Lawmakers		Legislators
Policy makers		Relevant government's department of justice or law
Courts and judges		General courts and specialist courts
Lawyers		Barristers, solicitors, legal practitioners, attorneys, and notaries
Other professionals involved in dispute resolution		Engineers, medical professionals, counselors, psychologists, social workers, financial and business consultants, and others
Users		Individuals, consumers, organizations, small firms, large corporations, and government departments
Dispute resolution institutes		Arbitration or mediation organizations
Professional organizations		Bar associations, mediator organizations, engineer associations, or other professional associations with mediator members
Other		

### Box 4.1: Did you know?

A mediation pledge is a statement in which the signatories promise a principled approach to conflict resolution with a stronger focus on mediation. A mediation pledge can be part of a more general pledge for a systematic approach to dispute resolution with a focus on alternative dispute resolution; the general pledge is then called an ADR (alternative dispute resolution) pledge. Most often, such a pledge takes the form of a public statement. For example, a company may pledge to always consider and try mediation, if suitable, before going to court.

Mediation pledges are being used in many countries, including France, Germany, Poland, Singapore, the United Kingdom, and the United States.

Table 4.6: Soft law versus hard law

Soft law characteristics	Hard law characteristics
Flexible	Fixed
Not subject to strict rules of interpretation	Subject to strict legal rules of interpretation
Responsive to changing or evolving circumstances	Limited scope to respond to changing or evolving circumstances
Dispositive in nature, that is, usually binding on individuals by entering a contract such as an agreement to mediate	May be dispositive or mandatory in nature
Involve a wide range of regulatory actors and experts	Involve a narrower field of regulatory actors and experts, particularly in the last stages of making a law final

## REGULATORY CONTENT

For content, different aspects of mediation can be regulated. They fall into the following four categories: (a) triggering mechanisms, (b) process and procedure, (c) standards, and (d) rights and obligations.

### TRIGGERING MECHANISMS—HOW IS DEMAND FOR MEDIATION INITIATED?

Triggering mechanisms include court referrals to mediation (voluntary, mandatory, and other incentives), mediation information sessions, mediation clauses, legal requirements to mediate before litigating, corporate mediation pledges, and mediation awareness programs.

Transnational experience 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. In most common law jurisdictions, a range of incentives—from mediation information sessions to mandatory court mediation referrals (referral without consent of the parties)—is available to convince disputants to engage in mediation. In Australia; Hong Kong SAR, China; and the United Kingdom, there are

provisions encouraging parties to reasonably engage in mediation before trial with penalty costs if they fail to do so.<sup>10</sup> Here the principle of voluntariness in mediation applies to the agreement of a solution but not necessarily to the choice to attend mediation.

In contrast, civil law thinking often adheres to the notion that voluntariness in mediation extends to the choice to attend mediation or not. Therefore, there are fewer requirements to attend mediation, and mediation triggers are generally described as soft, such as in the awareness programs in Austria and Germany and in court referrals only with consent of parties in France (box 4.3). As a result, mediation practice in most civil countries tends to lag that of common law countries. Of course, there are exceptions to the general trends—for example, civil law in Italy with mandatory mediation—however, the differences in the general mindset between civil and common law thinking remain relevant.

### PROCESS AND PROCEDURE—HOW IS THE MEDIATION PROCESS CONDUCTED?

What procedures are used for (a) the internal mediation process, (b) appointment of mediators, (c) payment, and (d) administrative matters? Procedural regulation manages aspects of mediation such as commencement, termination, protocols, and

## Box 4.2: Illustrations of regulatory form

*Legislation:* The German Mediation Act 2012 establishes duties of mediators and rights of parties in mediation.

*Ordinance:* The Hong Kong Mediation Ordinance regulates confidentiality and nonadmissibility.

*Framework regulation:* The European Directive on Civil and Commercial Mediation is designed to achieve homogeneity and predictability in mediations of commercial disputes.

*Court Practice Directions:* Practice Direction 31 in Hong Kong SAR, China, requires parties to mediate before litigating when it is reasonable to do so.

*Court precedent (common law):* Australia, Canada, the United Kingdom, and the United States have much case law on confidentiality, enforcement of mediated settlement agreements, mediation clauses, and other issues.

*Nonlegislative standards:* The Australian National Mediator Approval and Practice Standards provide one example; also, the International Chamber of Commerce mediation rules are another example of a set of international institutional rules that can be incorporated into parties' mediation arrangements by private contract. Over time, they have a standardizing, harmonizing, and normalizing effect.

*Private contract:* Agreements to regulate many aspects of mediation, particularly in the absence of legislation on the topic, for example, rights and duties of participants and mediator, confidentiality, requirements for mediated outcome (for example in writing), and so on.

## Box 4.3: Case illustration—Austria

The Austrian experience provides a useful example of what happens when triggering mechanisms are not considered in the regulatory plan. Initially, mediation initiatives focused on the training and regulation of mediators and on the aspects of the mediation process, with little effort to incentivize demand. Consequently, despite extensive quality legislation relating to mediators, very few mediations took place. Subsequent efforts have focused on triggering mediation through nonlegislative means—or soft triggering—such as awareness programs at courts.



selection and appointment of mediators. A global review of mediation regulatory practice shows

that most jurisdictions prefer to use nonlegislative regulatory forms for internal process issues (box 4.4).<sup>11</sup>

#### Box 4.4: Case illustrations—Rules governing mediation

In Hong Kong SAR, China, process primarily follows institutional rules, such as the Mediation Rules of the Hong Kong International Arbitration Centre and the Hong Kong Mediation Accreditation Association Limited Mediator’s Code of Conduct. When these rules are incorporated into mediation clauses and agreements to mediate, they become binding on the parties involved. The Hong Kong Mediation Ordinance (see box 1.2) does not deal with process, apart from a detailed definition of mediation that describes an interest-based process and a section expressly permitting foreign lawyers and nonlawyers to support parties in mediation.

In France, internal mediation processes are regulated by the numerous codes of conduct and ethics drafted by different regional or national mediation centers in the country. Legislation on mediation deals with other aspects of mediation such as rights and obligations (see below).

In the United Kingdom, there is little general legislation about cross-border mediation and no legislation on domestic mediation. Detailed rules on the internal process of mediation are contained in institutional mediation rules and agreements to mediate.

#### Box 4.5: Case illustration—Mediation accreditation

Mediator accreditation (certification) in Hong Kong SAR, China, is voluntary. Nothing legally prevents anyone who does not have accreditation from offering mediation services. This statement remains true even with the enforcement of the Mediation Ordinance 2013. (box 1.2) So why do people bother getting accredited? The answer lies in the power of industry and professional self-regulation.

After its establishment in 2013, the Hong Kong Mediation Accreditation Association Limited (HKMAAL) quickly became the premier mediation accreditation body in Hong Kong SAR, China. At the time of this writing, more than 2,000 general accredited mediators are on HKMAAL’s panels. In Hong Kong SAR, China, the value of professional accreditation is recognized by the majority of stakeholders: mediators; users of mediation services (for example, litigants); and referring bodies, such as courts, professional associations, and dispute resolution organizations. Further, by adopting accreditation-friendly mediation rules and codes such as the Hong Kong Mediation Code, referral bodies and mediation users continue to encourage accreditation as a foundation for professional practice.

## STANDARDS—HOW ARE MEDIATION PRACTITIONER STANDARDS AND QUALITY ASSURANCE MEASURES REGULATED?

The regulation of mediation practitioner standards is often referred to as professionalization. Such regulation shifts mediation away from being an activity requiring life skills to one requiring training, assessment, and certification. The professionalization of mediation tells us who is in the “mediation club” and who gets to mediate. Therefore, professionalization is also about who is not in the club and who does not get to mediate.

Legislative solutions to professional certification (also referred to as credentialing and accreditation) are usually expensive and require government organization or financing. In contrast, industry regulation is supported by the industry itself with expertise, financing, and other matters. Current best practice trends focus on developing responsive regulatory solutions for professionalization issues. Contrary to some civil law jurisdictions such as Austria and Slovenia, which passed legislation detailing accreditation standards, an increasing number of jurisdictions are making a deliberate choice to develop nonlegislative uniform standards drawn from the mediation industry or profession. These jurisdictions include Australia; Germany; Hong Kong SAR, China; and Singapore.<sup>12</sup>

They have adopted the view that quality assurance through certification must be balanced with the flexibility, diversity, and innovation that mediation promises. To this end, responsive regulation, achieved through standards of national mediator codes of conduct, with the buy-in of the mediation of community, was considered more useful than legislative intervention. Thus the path to professionalization in Australia; Hong Kong SAR, China; and Singapore features uniform nonlegislative certification standards (box 4.5). Singapore has multilevel standards for entry-level mediators and for more experienced mediators.

In other jurisdictions, such as the United Kingdom and the United States, the mediation industry and profession have not been able to agree on uniform standards, although there have been attempts to achieve such standards.

Mediator certification requirements can be categorized into three elements:

- Requirements
- Attaining the standard
- Maintaining the standard

*Requirements.* What do candidates need to be eligible for consideration as a mediator, even before they consider training? They should consider their age, level of education, field of education specialization, and work experience, and they should have no criminal conviction (box 4.6).

### Box 4.6: Case illustration—Mandatory threshold requirements

- *Australia:* A person must be of good character evidenced by a signed statement by two qualified witnesses.
- *Austria:* A person must be at least 28 years old and have no criminal convictions. Similar provisions exist in Portugal.
- *Hong Kong SAR, China:* A person must have three years of professional work experience.
- *Russia:* A person must have a university degree.
- *Spain:* A person must have a university degree or a superior professional background.

*Attaining the standard.* What training and assessments do candidates need to reach the standard of a competent mediator and become certified as a mediator? Candidates must consider the number of training hours, the content of the training, and the style of training (for example, the number of role-plays, the practical and written assessments, and the qualifications of trainers and coaches). See box 4.7.

*Maintaining the standard.* What is required to maintain one's certification as a mediator? Which

continuing professional education, practice, and other requirements must mediators comply with? To retain certification, mediators should consider continual professional development, mediation and co-mediation practice, mediation simulations, and observations (box 4.8).

From a user's point of view, the professionalization of mediation is a significant theme. It reflects the consistency-diversity dilemma—that is, the need to balance standardized quality assurance with cultural

### Box 4.7: Case illustration—Training

In most common law jurisdictions, including Australia; Canada; Hong Kong SAR, China; 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 some cases, a written assessment. Other jurisdictions, such as the United Kingdom, require fewer hours.

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.

In civil and common law countries, once training and assessment have been completed, mediator candidates can apply for mediator certification (also called accreditation or credentialing). Some countries such as Australia and Austria require mediators to obtain professional indemnity insurance to secure a place on the panel.

### Box 4.8: Case illustration—Professional development

Most civil and common law countries have continual professional development (CPD) requirements for mediators to retain their certification. Some jurisdictions also have practice requirements.

- *Australia:* CPD 25 hours over two years, plus mediation practice hours
- *Austria:* CPD 50 hours over five years
- *Belgium:* CPD 18 hours over two years
- *France:* No national standard; however, can be up to CPD 20 hours each year depending on certifying organization
- *Hong Kong SAR, China:* CPD 15 hours over three years

diversity. Business leaders, including Deborah Masucci, former head of American International Group Inc.'s Employment Dispute Resolution Program, have publicly endorsed the need for an international pool of mediators who are recognized for competence, skill, and experience and who have the backing of reputable organizations.

One organization established to meet this need is the public interest initiative, the International Mediation Institute (IMI). IMI operates with the support of mediation organizations around the world to certify international mediators on the basis of its competency certification scheme and standards for training and assessment. The IMI recognizes that different mediation practices exist and accommodates diverse mediation models in its standards.<sup>13</sup> Quality assurance is offered not by standardizing practice but by using mechanisms such as peer and client review and a code of professional conduct based on the overarching principles of transparency, trust, competence, confidentiality, and neutrality. The Singapore International Mediation Institute is a regional cross-border mediation hub set up with the support of IMI. It offers several levels of mediator recognition with the highest level matching the IMI certification.

## RIGHTS AND OBLIGATIONS— HOW ARE RIGHTS AND OBLIGATIONS OF PARTICIPANTS (MEDIATORS, PARTIES, AND LAWYERS IN MEDIATION) REGULATED?

Participants have rights and obligations during mediation and after mediation. Participants include mediators, parties, and lawyers. Rights and obligations may be regulated in legislation, common law principles, court rules, codes of conduct, and private contractual arrangements.

Rights and obligations are typically the focus of mediation legislation (for example, the Mediation Act in Germany; Mediation Ordinance in Hong Kong SAR, China; the Uniform Mediation Act in the United States) and general law principles (for example, case law in Australia, Canada, the United Kingdom, and the United States). In addition, mediation rights and obligations continue to be regulated through agreements to mediate and institutional rules (for example, International Chamber of Commerce mediation rules and Singapore International Mediation Centre mediation rules).

### Box 4.9: Regulatory case illustration—Duties of mediators

- *Duty of impartiality*: See the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation, article 6 (2).
- *Duties in relation to conducting the process and advice giving*: See UNCITRAL Model Law on International Commercial Conciliation, article 6 generally.
- *Duties related to confidentiality*: See UNCITRAL Model Law on International Commercial Conciliation, articles 8, 9, 10; Hong Kong SAR Mediation Ordinance sections 8, 9, 10; Singapore International Mediation Centre Mediation Rules, rule 6.

First, the duties of mediators will be considered. In general, mediators are subject to the following duties:

- Impartiality (box 4.9)
- Providing disclosure
- Conducting the process and giving advice
- Terminating the mediation
- Reporting
- Rights and duties in relation to enforceability of mediation clauses, agreements to mediate and mediated settlement agreements; and
- Duties related to confidentiality and mediation evidence in subsequent proceedings: insider—outsider confidentiality; insider—insider confidentiality; insider—court confidentiality (box 4.10).

### Box 4.10: Did you know? Three kinds of confidentiality

The following tripartite classification of confidentiality covers the various situations of confidentiality in mediation: insider–outsider confidentiality, insider–insider confidentiality, and insider–court confidentiality.

Insider–outsider confidentiality refers to a general duty of confidentiality in the face of outside parties. This classification means that those parties involved in a mediation (insiders) cannot make prohibited disclosures to people outside the mediation (outsiders). The duty can apply to the various participants in mediation, such as the parties, mediators, advisers, experts, interpreters, witnesses, and relevant support staff. The duty prohibits those participants from disclosing mediation information to outsiders or nonparticipants. An example can be found in the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation, article 9.<sup>a</sup>

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. As a matter of practice, mediators manage insider–insider confidentiality in one of two ways: the open communication approach or the in-confidence approach. In the former, information passed to mediators in private sessions is not treated as confidential unless specifically requested by the relevant party. The other approach, the in-confidence model, operates by treating all information disclosed privately as confidential unless otherwise indicated by the disclosing party. An example of the open communication approach can be found in UNCITRAL Model Law on International Commercial Conciliation, article 8.

Insider–court confidentiality involves the rights and obligations associated with protecting these mediation communications from being legally discovered or 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. Specifically, it is about the admissibility of mediation communications in evidence in court or tribunal proceedings. An example can be found in UNCITRAL Model Law on International Commercial Conciliation, article 10.

a. See United Nations, *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002* (New York: United Nations, 2004), [http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf).

Next, the duties of lawyers representing clients in mediation will be considered (box 4.11). Lawyers may be subject to the following obligations:

- To act in the best interests of the client
- To consider settlement if it may be in the client's best interests
- To avoid breaches of confidentiality between clients
- To act in good faith toward other parties and lawyers
- Duty to the court and the administration of justice
- Duties associated with confidentiality

#### Box 4.11: Regulatory case illustration—Duties of lawyers in relation to mediation

- *Germany*: Lawyers are under a general duty to advise clients on alternative dispute resolution in the process of establishing the most favorable way to solve a legal conflict.
- *Italy*: The lawyer's duty to advise on mediation is reinforced by the possibility for the client to void the lawyer–client contract in case of noncompliance.
- *Poland*: Lawyers are obliged by law and a code of ethics to advise clients on the possibility of mediation.

#### Box 4.12: Case illustration—United Kingdom

As indicated earlier in the chapter in the discussion on mediation triggering mechanisms, parties in the United Kingdom may face cost sanctions for failing to reasonably engage in mediation. While this provision applies to premediation behavior, the British case of *Earl of Malmesbury v. Strutt and Parker*<sup>a</sup> suggests that the duty might extend to the mediation itself. In this case, the court considered the application of cost sanctions in relation to a party's unreasonable behavior 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, made the following comments:

[T]he 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.

The judge equated the behavior 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 behavior could be taken into account in cost determinations. Therefore, the court considered it appropriate to take the former category of behavior into account.

In this case, both parties waived privilege so that evidence from the mediation could be considered in relation to the award of costs.

a. See *Malmesbury v. Strutt and Parker* (2008) EWHC 424 (Q.B.), [http://www.cedr.com/library/edr\\_law/Earl\\_of\\_Malmesbury\\_v\\_Strutt-and\\_Parker.pdf](http://www.cedr.com/library/edr_law/Earl_of_Malmesbury_v_Strutt-and_Parker.pdf).



Depending on the legal system, parties will have one or more of the following duties and rights:

- A duty to engage in mediation if it is reasonable to do so
- A duty to participate in mediation in good faith
- The right to commence court proceedings after a mediation that failed to achieve a settlement (litigation limitation periods are relevant here)

- The right to enforce a mediated settlement agreement

Box 4.12 provides an example of a legal obligation to engage in mediation. Financial incentives for parties to pursue mediation are addressed in box 4.13.

### Box 4.13: Did you know? Two models for dealing with costs and mediation

There are two models for regulatory approaches to costs. They can be distinguished according to the type of incentives provided for the conflict parties.

In the first regulatory model, a mediation costs rule that applies to the parties may never create costs for the state. This principle can be observed in the costs laws of the United Kingdom mentioned in box 4.12.

There, a party that rejects an attempted alternative dispute resolution can be held liable for the costs of litigation even when it succeeds with the claim in court. On closer examination, this cost incentive is created only through a threatened redistribution between the parties rather than through monetary incentives provided for by the state.

The second regulatory model aims at avoiding net costs for funding the court system (in particular, by avoiding unnecessary court cases). To reduce net costs for the treasury, however, countries that use this model provide cost incentives for mediation that lead directly to additional expenses for the state. For example, the costs laws of Sacramento County, California, provide for an initial financial grant for the first three hours of mediation. A rate of US\$200 an hour is set for those first three hours of work by court-recognized mediators, and it is met by the court budget. The expectation is that this mediation incentive will avoid court cases that would create even greater costs for the treasury.

In addition, a cost incentive in favor of mediation is the fact that the usual costs of mediation are lower than the usual costs of litigation and arbitration, without the state intervening to exert regulatory control.

## WHAT IS THE RULE OR THE PRINCIPLE TO BE ENUNCIATED?

Now that you have considered the functions and the form of the various rules in the regulatory plan, the rules or principles must be defined. When framing rules and principles, they can be general and abstract; or they can be concise, specific, and targeted (table 4.7).

## HOW TO MATCH THE FORM TO THE CONTENT

Mediation regulation does not have to take the same form. Different aspects of mediation can be regulated in different ways; that is, the aspects can take different forms. This section helps you work out how to match the regulatory form (see regulatory form in chapter 3) to the regulatory content (earlier in this chapter table 4.8).

Now that you have gone through the regulatory planning process once, go back to the beginning and review (table 4.9).

## HOW TO DETERMINE THE APPROPRIATE REGULATORY MIX

There have been different approaches to mediation regulation throughout the world. The three main approaches are (a) extensive state regulation, (b) extensive private regulation, and (c) mixed models (table 4.10).

Contemporary best practice models 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 responsive regulatory mechanisms—often associated with self-regulatory approaches and even formal framework approaches—encourage performance beyond compliance (box 4.14). In other words, participation in determining regulatory measures does more than enhance awareness, understanding, and compliance—it supports aspirations to achieve best practice in the regulated market.

Table 4.7: Advantages and disadvantages of types of rules

Framing rule	Advantages	Disadvantages
General and abstract	Can accommodate a wide range of stakeholder interests Offers some flexibility through scope for interpretation	Fails to offer sufficient guidance and certainty in a range of diverse sectors and situations
Concise, specific, and targeted	Can be tailored to suit the needs of a specific group	May not accommodate unexpected applications of the rule



**Table 4.8: Guidelines for rules according to focus**

Ask yourself about the focus of the proposed rule	Use this guideline
Does the provision focus on encouraging parties to go to mediation (triggering)?	If the goal is to encourage the use of mediation in a new mediation jurisdiction, then multiple triggering provisions that use a variety of regulatory forms are suggested. This triggering allows for multiple access points to mediation and, therefore, increases the accessibility to and use of mediation services. Where mediation use is low, consider using triggers with strong incentives or that are mandatory. Consider nonlegislative triggers as much as possible because they are less intrusive and easier to change as the mediation field develops.
Does the provision focus on internal elements of mediation, such as process?	Consider using soft law forms, such as nonlegislative standards and institutional rules, and also tailoring the process by using private contract.
Does the provision focus on the quality and certification of mediators?	In a jurisdiction where mediation is still new and developing as a profession, consider nonlegislative standards, such as national mediator certification standards established by the major mediation organizations in the jurisdiction. This regulatory form offers flexibility as mediation develops as a profession. Legislative regulation can be introduced once the mediation profession has been established or when problems occur.
Does the provision regulate rights and obligations of mediation participants (mediators, parties, lawyers, and others)?	These provisions link the mediation process and its participants directly to the legal system of the jurisdiction. Therefore, the three Cs—clarity, certainty, and consistency—are important. Mandatory provisions in legislation offer the three Cs and cannot be overridden by institutional rules or clauses in agreements to mediate or by other contracts between the parties. Therefore, the rules remain clear, certain, and consistent, thus allowing lawyers and courts to interpret them in the same way over time. Alternatively, default provisions in legislation place parties in a position to amend statutory rights and duties of themselves or the mediator. This position supports party autonomy yet challenges the consistency of rights and obligations of participants in mediation.

**Table 4.9: Review**

Review Action	Example
Review the proposed regulation and take into account existing dispute resolution regulation (for example, existing regulation on arbitration) and potentially overlapping provisions.	If a mediation takes place in the framework of an arbitration procedure, will the arbitration law or the proposed mediation regulation apply?  Sections 33(3) and (4) of the Hong Kong Arbitration Ordinance, Cap 609, address the management of information obtained from a party by an arbitrator acting as a mediator during mediation. The effect of these provisions is that mediation proceedings conducted as a part of an arbitration or multitiered dispute resolution (MDR) foreseen in either section 32(3) or 33 of the Arbitration Ordinance are governed by the Arbitration Ordinance and not the Mediation Ordinance. From a practical perspective, this governance by the Arbitration Ordinance means that the confidentiality of mediation and admissibility of mediation communications as evidence may be regulated differently. The way confidentiality and admissibility are handled depends on whether mediation is conducted as part of an MDR process with the same person acting as mediator and arbitrator or with different individuals as mediator and arbitrator.
Check assumptions about the content of the regulation in relation to its proposed scope and function and about the nature of the obligations contained in it.	After identifying overlapping legislation, revisit exceptions to the scope of the proposed law.

Table 4.10: Approaches to mediation regulation

Approach	Examples
<p>Extensive state regulation: Refers to far-reaching state (legislative) mandatory regulation of mediation.</p>	<p>In Austria, mediation of civil matters is intensively regulated by the Civil Law Mediation Act (Zivilrechts-Mediations-Gesetz). This act is supplemented by the Civil Law Mediator Training Regulations (Zivilrechts-Mediations-Ausbildungsverordnung), which set out training requirements in binding form and with relatively extensive detail. Cross-border mediation is regulated in a separate law, which effectively implements the European Mediation Directive (EU-Mediations-Gesetz).</p> <p>In Bosnia and Herzegovina and Serbia, extensive mediation laws were enacted by the state and civil procedure codes amended to support the development of mediation and regulate its operation.</p> <p>Japan is a further example of this regulation model. In the field of conciliation and mediation, Japan has two general procedural law sources in statutory form, and subordinate legislative provisions supplement them.</p> <p>Arguments raised in favor of a high regulatory density are consumer protection, the need for state promotion of mediation, legal certainty, and the necessity to draw a line between mediation and professional legal services.</p>
<p>Extensive private regulation: Regulation of mediation is largely left to stakeholders (such as parties, mediators, lawyers, professional associations) to create their rules through contract and codes.</p>	<p>In England and Wales, the legislature has largely restricted itself to creating cost incentives for the use of mediation in general civil and commercial proceedings, as well as to supporting it through obligations in proceedings. There is also the interesting example of the Civil Mediation Council, a state-supported but privately constituted organization that ensures a degree of unity and minimum standards among private mediation associations by means of issuing a quality seal.</p> <p>The supporters of private regulation sometimes argue that mediation is as yet insufficiently established or widespread for any need for regulation to be assessed and met. On the contrary, precipitate regulation would hinder the development of mediation by practitioners, academics, and associations involved. Comprehensive regulation of mediation is sometimes also rejected on grounds of an underlying incompatibility with the intrinsic nature of mediation as a discrete procedure outside civil litigation.</p>
<p>Mixed models, options: Refers to a regulatory mix whereby the state and the stakeholders can create choice by offering different models and options from which to choose.</p>	<p>In Germany, for example, regulation can provide for mediation by registered and unregistered mediators with different legal consequences.</p> <p>In Australia and the United States, the absence of a comprehensive national mediation regulatory approach combined with piecemeal development of sector-specific regulation through soft and hard law mechanisms offers diversity and choice for informed users of mediation.</p>

## Box 4.14: OECD quality and performance principles

The Organisation for Economic Co-operation and Development's OECD *Guiding Principles for Regulatory Quality and Performance*<sup>a</sup> provides a useful policy illustration. Adopted by the OECD Council in 2005, it endorses a regulation mix that promotes “innovation through market incentives and goal-based approaches” and is compatible with “competition, trade investment-facilitating principles at domestic and international levels.” These principles echo those of legal reform projects that promote mediation as a dispute management mechanism that provides benefits for trade and investment and economic growth and stability. They are also reflective of the principles of interest-based mediation itself.

a. See <http://www.oecd.org/fr/reformereg/34976533.pdf>.

# CHAPTER FIVE

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Success Factors and Pitfalls:  
How to Make It Work and  
What to Avoid



## CHAPTER FIVE

# Success Factors and Pitfalls: How to Make It Work and What to Avoid



## SUCCESS FACTORS

Mediation offers attractive characteristics, namely (a) cost and time advantages, (b) high success and satisfaction rates, and (c) flexibility to maximize the fulfillment of the interests of the parties. Still, mediation policy and the regulatory context play an important role in providing an attractive environment for the parties to choose the dispute resolution mechanism that best suits their interests. Important success factors for the regulation of mediation are as follows:

- *Institutional integration of mediation.* The challenge is to design dispute resolution institutions that guide conflicts to mediation if the mechanism is best suited to satisfy the interests of the parties (box 5.1).
- *Enabling mediation law.* Mediation policy should provide a reliable framework without limiting the flexibility of mediation and by putting mediation on an equal footing with other dispute resolution mechanisms. This policy applies to both private and judicial mediation.
- *Information.* Many stakeholders suffer from information deficits. By improving stakeholders' understanding of the characteristics of the dispute resolution mechanisms available, the decision making of the parties, lawyers, judges, in-house counsel, and others will be improved.
- *Incentives to counter predictable human error.* Regulatory incentives and other impulses can influence human behavior in dispute resolution and can be an effective strategy to counter parties from making choices that potentially are not in their interests. Such incentives, even if they generate costs, are often a less expensive solution for public finances compared with funding a court system that does not always fit the conflict needs of the parties (box 5.2).

Mediation offers attractive characteristics, namely (a) cost and time advantages, (b) high success and satisfaction rates, and (c) flexibility to maximize the fulfillment of the interests of the parties.

## Box 5.1: Institutional integration

An example of institutional integration of mediation can be illustrated by judges screening incoming cases on the basis of a questionnaire. The questionnaire asks the parties to reveal mediation indicators. Such indicators are characteristics of the dispute that show whether it is suited for mediation. If the court considers the case suited for mediation, the court will issue a recommendation to the parties to try mediation.

## Box 5.2: Incentives

Examples of incentives to manage decision deficits of parties affected by disputes include the following:

- A duty for lawyers to discuss (and document) the suitability of dispute resolution with their clients
- A requirement on parties to engage in mediation before court when it is reasonable to do so
- A subsidy for the first hour of a mediation

## LESSONS LEARNED

In jurisdictions where mediation plays no role or only a minor role, “teething problems,” such as low-quality mediation processes, lack of information, weak institutional support, confidentiality problems, and abuse of mediation need to be overcome. The difficulty for policy makers is to solve those problems without suffocating mediation by overregulation. A key issue is to break the vicious circle of mutual obstruction: incomplete information leads to low demand for mediation, which leads to the being unattractive, which leads lawyers and judges to hold little respect for mediation. As a result, mediation is rarely recommended to and chosen by the parties.

In jurisdictions where mediation is firmly established, other problems are more prevalent. The danger is that well-meant regulation limits the flexibility of mediation through overly restrictive and formal rules. Another problem is to establish the correct level of protection for parties with

relatively little means or interest to engage in mediation, in particular certain groups of consumers or individuals with a weak negotiation position. Care needs to be taken that such groups are not systematically disadvantaged in mediation.

## FITTING THE POLICY TO THE PEOPLE

Mediation policy should ideally be created with a view to the specific environment. Such a view includes (a) the specific conflict culture, (b) the particular rules and standards of the jurisdiction, (c) the historical development of dispute resolution, (d) the established practices of dispute resolution, (e) the unique moral guidelines, and (f) socioeconomic particularities. Particularly, the stage of development of mediation in the jurisdiction plays an important role. The stage will have an effect on the choice and content of regulation (if any). A blind transfer of regulatory solutions from other legal systems

runs the risk of failure. Hence, this book attempts to inspire and provoke questions, but it cannot offer a one-size-fits-all approach to regulating mediation. An interdisciplinary perspective is a good approach to identifying the particularities of the mediation environment to be regulated. The legal approach can be complemented by ethical, economic, social, psychological, historical, and other disciplines.

The diversity–consistency tension is at the heart of the conversation about mediation regulation. The tension needs to be sustained and managed rather than resolved. In the same way as mediators are trained to live with uncertainties and to expect the unexpected, so too must policy makers embrace

the diversity–consistency tension. Ultimately, regulating mediation is a creative act involving the following:

- A cast of colorful regulatory actors representing different interests in mediation
- A broad range of regulatory form options consisting of hard and soft law instruments offering differing levels of robustness and responsiveness
- Diverse regulatory themes with one of four primary functions: triggering mediation processes, regulating the internal mediation process, setting standards for mediators, and regulating rights and obligations of participants in mediation

# CHAPTER SIX

## Regulatory Topics Checklist





# CHAPTER SIX

## Regulatory Topics Checklist



In the following tables (tables 6.1–6.8), we provide checklists of regulatory aspects to consider when making decisions about establishing legal norms. The appearance of a topic on a list does not mean that regulation is recommended. Rather, it is merely a reminder of what to consider.

**Table 6.1: Fundamental structures**

Regulatory area	Civil and commercial law, general laws governing mediation, specific regulation for particular types of disputes
Dispute resolution act or specific laws	Integration of mediation and other dispute resolution procedures in one act or separate laws
Types of rules	Mandatory, semimandatory (that is, only mandatory for one side) or dispositive statutes, regulations, codes, model agreements, and so forth
Rulemaker	Parliament, executive branch, courts, chartered associations, private mediation providers, independent institutions, parties, mediator

**Table 6.2: Mediation definition and procedure**

Definition of mediation	Differentiation from other types of out-of-court dispute settlement, relationship with everyday attempts at dispute settlement, and activities of lawyers, psychologists, and so forth; confidentiality and mediator neutrality and impartiality as essential characteristics but not part of definition of mediation
Structure and course of mediation procedure	Regulation of mediation procedure, presence of advisers, personal attendance, virtual mediation, duration of mediation
Mediator	Regulation of agreement between the parties and the mediator, role of the mediator, regulation of selection and refusal of mediator, co-mediation, record keeping

**Table 6.3: Mediation and court proceedings**

Relationship of mediation to court proceedings	Common or differentiating rules for private, court-annexed, and judicial mediation; information of the court on the progress of the mediation
Mediation before going to court	Inadmissibility of claim, enforceability of agreements to mediate, requirements on lawyers to provide information and advise the parties, and so forth
Court-initiated mediation	Rights and obligations of courts to check for mediation suitability, rights and obligations to inform parties, rights and obligations to give directions to the parties; initiation of judicial or court-external mediation
Changing procedures	Rules to allow for an easy transfer from court proceedings to mediation or vice versa

**Table 6.4: Costs of mediation**

Cost incentives and sanctions	Cost incentives in the form of direct state subsidies, redistributive cost sanctions for uncooperative parties
Mediator fees	Free market choice, state control, cost exemptions, and state subsidies
Effects on court costs	Independent calculation of court costs, reduction of court fees
Distribution of mediation costs between the parties	Regulation, contract
Legal aid	Conditions, connection to quality control, amount, contributions by mediators or their associations

**Table 6.5: Mediation and limitation and prescription periods**

Limitation and prescription	Suspension during or restart of time periods after mediation
Scope	Legal claims, other rights (particularly substantive and procedural limitation and prescription periods), relative effect on the parties to the mediation, possible effects on third parties, determination of affected claims (and other rights)
Definition of start of mediation	Agreement to mediate, request to attend mediation when mediation is compulsory, actual start of the procedure
Definition of end of mediation	Statement of one party, both parties, and the mediator that the mediation has failed; parties have reached agreement; treatment of interrupted and then restarted mediation
Determination of start and end of mediation	Presumptions, determination by documentation obligations

**Table 6.6: Consequences of successful or failed mediation**

Agreement where mediation has been successful	New type of contract (declarative agreement) or use of existing contract types (particularly settlement), extent and legal limits of agreement
Implementing the agreement	Enforceability, enforcement procedures, competence for declaration of enforceability, substantive checks (if yes, what is the standard or the benchmark?), application requirement (one or both parties?)
Procedure where mediation has failed	Transfer to court procedure, relationship to other forms of out-of-court dispute settlement

**Table 6.7: Confidentiality**

Legal basis	State laws or contract, substantive law, and procedural law
Relevant procedures and situations	Court procedure, arbitration procedure, outside procedures
Relevant persons	Parties, mediators, legal advisers, translators, experts, judges involved, other third parties, assistants of all such persons
Substantive law	Discretion and other confidentiality duties
Procedural law	Right to refuse to testify, restrictions on parties to submit facts and evidence
Scope	Different types of information carriers and transmission versus the danger of “flight into mediation”; limitation to the mediation matter and to the parties of mediation

**Table 6.8: Professional laws of mediators**

Regulatory approaches	Authorization model (official admission to practice as a mediator) Incentive model (everyone allowed to practice as mediator; however, favorable rules for the parties—concerning, for example, the confidentiality and the quality of mediation—only apply if the mediation is carried out by a registered mediator) Marketplace model (no public interventions in the professional law of mediators)
Access to profession	Quality assurance, training requirements, admission conditions, grounds for exclusion
Lists of mediators	Institutions administering the lists, contents of lists
Professional practice	Using titles, compulsory liability insurance (if yes, insured amount), continuing education duties, consumer protection, relationship to professional law of other groups (lawyers, notaries, and so forth)
Institutions	State oversight, private self-regulation, mixed solutions
Mediators	Neutrality/impartiality, duties, liability, rights

# APPENDIX A:

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## Particular Issues: Cross-Border and Online Mediation



## **APPENDIX A:** Particular Issues: Cross-Border and Online Mediation

This appendix outlines particular issues of cross-border and online mediations. They are independent developments, cross-border and online mediations are also interrelated in practice. For example, it is not uncommon for some parts of cross-border mediations such as preliminary meetings to be conducted online or through telecommunications.

Consider a dispute resolution clause signed in the Arab Republic of Egypt as part of a commercial banking contract by parties from Lebanon and France. The clause stipulates that the United Arab Emirates' substantive law is to apply to the resolution of any dispute arising out of the contract and that mediation is to be the initial dispute resolution process. The mediator is from Switzerland, and she is subject to the applicable professional code of mediator conduct in Switzerland. The place of mediation is to be in London, and the British law on mediation (procedural law) prima facie applies to the mediation process. However, initial discussions between the mediator and the parties with their lawyers take place on videoconference using Internet technology.

This scenario shows the potential interaction of (a) different legal regimes and (b) online and international mediation.

The following discussion outlines the main regulatory instruments that address cross-border and online mediations.

The clause stipulates that the United Arab Emirates' substantive law is to apply to the resolution of any dispute arising out of the contract and that mediation is to be the initial dispute resolution process.

### **CROSS-BORDER MEDIATION: REGULATORY INSTRUMENTS**

Mediation regulation first developed domestically. On a cross-border level, mediation regulation has become increasingly relevant. With the opening of more geopolitical borders and the rise in online transactions, the regulation of cross-border mediation is a highly topical matter.

A number of international bodies have been active in creating cross-border regulatory instruments. In 2002, the United Nations Commission on International Trade Law (UNCITRAL) published the Model Law on International Commercial Conciliation (“conciliation” is used in the sense of mediation here), which has been adopted by 14 countries in 26 jurisdictions and continues to be influential in policy discussions worldwide. In 2015, UNCITRAL determined to take up the task of developing a multilateral convention on the enforceability of international commercial mediated settlement agreements with the goal of further encouraging cross-border mediation.

The European Directive on Mediation in Civil and Commercial Disputes,<sup>14</sup> which requires member states of the European Union (EU) to regulate aspects of cross-border mediation, has been implemented across the region. In addition, the EU policy has specifically addressed cross-border mediation in consumer disputes. In 2005, the EU established the European Consumer Centres Network to inform customers of their rights and to assist in the resolution of cross-border complaints and disputes.<sup>15</sup> The European Commission issued recommendations in 1998 and 2001 reinforcing its support for the use of mediation in cross-border consumer disputes.<sup>16</sup> The EU directive on consumer alternative dispute resolution (ADR)<sup>17</sup> and the EU regulation on online dispute resolution (ODR)<sup>18</sup> focus on rolling out a regulatory plan to address issues in consumer ADR—especially in relation to online services. Together these regional regulatory instruments seek to respect the diversity of mediation offerings while providing a comprehensive regulatory coverage to ensure the integrity of mediation processes and fair regulation of rights and obligations of those involved.

In relation to family disputes, numerous cross-border regulatory instruments exist. The Hague Conference on Private International Law has produced three relevant conventions. The first is the Hague Convention on Parental Responsibility and Protection of Children,<sup>19</sup> also known as the Hague Convention 1996, which promotes the use of mediation with respect to matters that fall under the convention (article 31). The Hague Convention on the International Protection of Adults is a sister convention reflecting much of the Hague Convention 1996 in the context of vulnerable adults. Finally, the Hague Convention on the Civil Aspects of International Child Abduction also makes provision for mediation. In the European Union, council regulations, directives, and recommendations have been adopted that specifically relate to cross-border family mediation, reinforcing support for mediation in family disputes.<sup>20</sup>

In 2007, the Permanent Bureau of the Hague Conference on Private International Law released a feasibility study on cross-border mediation in family matters. The study examines the development of international family mediation practice and concludes with some suggestions for future work on greater international cooperation and communication about available mediators, mediation services, and national laws on family mediation. Finally, the study suggests that the Hague Conference continue to work toward uniform or harmonized standards for mediator approval and practice and for laws that regulate mediation, specifically for incentives and requirements to mediate, for confidentiality, and for the international recognition and enforceability of mediated agreements.<sup>21</sup>

## ONLINE MEDIATION AND DISPUTE RESOLUTION: REGULATORY INSTRUMENTS

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Online dispute resolution (ODR) has grown out of the application of information and communication technology to *alternative* ways to resolve disputes. A distinction can be made between traditional offline ADR, on one hand, and online dispute resolution that represents a new generation of ADR processes, on the other hand. A major challenge for the development of ODR is that service providers lack a coherent infrastructure in which to operate. Given that many ODR providers operate

independently (that is, they are not connected to a legal or professional association), benchmarks and best practices are fragmented. To be effective, commercial ODR services must show economic vitality and security, and users must have faith in the governance structure regulating trade. Industry and government need to implement a regulatory infrastructure that will allow flexibility for ODR providers while it unifies basic practices and standards. This implementation has begun with regulatory instruments such as the following:

- EU regulation on online dispute resolution<sup>22</sup>
- EU directive on consumer ADR, which also extends to consumer ODR<sup>23</sup>
- UNCITRAL draft procedural rules on ODR for cross-border electronic commerce transactions<sup>24</sup>

# APPENDIX B:

## Further Reading







## APPENDIX B: Further Reading

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## NOTES

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1. Another way to address such behavior is to introduce information initiatives—such as information campaigns or information leaflets distributed by courts to potential litigants—that enable citizens to make better decisions on dispute resolutions. However, the effectiveness of this approach is not guaranteed and needs to be tailored. See, for example, N. Alexander, “Nudging Users Towards Cross-Border Mediation: Is It Really about Harmonised Enforcement Regulation?” *Contemporary Asia Arbitration Journal* 7, no. 2 (2014): 405–18.

2. See Arab Republic of Egypt’s General Authority for Investment and Free Zones, “Mediation Rules,” article 1, for a similar definition.

3. Nadja Alexander, Fatma Ibrahim, and Jean-François Roberge, *Mediation Series: Mediation Essentials* (Washington, DC: IFC/World Bank Group, 2016), chapter 2.

4. For this table and further information, see Felix Steffek, “Principled Regulation of Dispute Resolution: Taxonomy, Policy, Topics,” chapter 3 in *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, ed. F. Steffek, H. Unberath, H. Genn, R. Greger, and C. Menkel-Meadow (Oxford, U.K.: Hart Publishing, 2013), 33–62.



5. “IMI International Corporate Users ADR Survey,” International Mediation Institute, accessed April 1, 2013, <https://imimediation.org/imi-international-corporate-users-adr-survey-summary>.
6. See Klaus Hopt and Felix Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford, U.K.: Oxford University Press, 2013), 103 et seq.
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8. See Klaus Hopt and Felix Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford, U.K.: Oxford University Press, 2013), 106.
9. On arbitration and court proceedings, see Nadja Alexander, Fatma Ibrahim, and Jean-François Roberge, *Mediation Series: Mediation Essentials* (Washington, DC: IFC/World Bank Group, 2016), chapter 1.
10. For Australia, see ss 6-11 of the Civil Dispute Resolution Act 2011; for Hong Kong SAR, China, see Practice Direction 31; for the United Kingdom, see para 4.4(3) Practice Direction on Pre-Action Conduct, which lists unreasonably refusing to consider ADR as an example of noncompliance with the Practice Direction or relevant preaction protocol.
11. See F. Steffek, “Mediation in Europa und der Welt—Rechtsvergleichende Forschung zur Umsetzung der Mediationsrichtlinie,” *Zeitschrift für Konfliktmanagement* 1 (2009): 23.
12. Australia and France have legislation on accreditation standards for family mediators but not for general mediators.
13. See [www.imimediation.org](http://www.imimediation.org).
14. Directive 2008/52/EC of the European Parliament and of the Council of May 21, 2008, on certain aspects of mediation in civil and commercial matters, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF>.
15. See [http://ec.europa.eu/consumers/solving\\_consumer\\_disputes/non-judicial\\_redress/ecc-net/index\\_en.htm](http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/ecc-net/index_en.htm).
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18. European Council Regulation No. 524/2013 of May 21, 2013, on online dispute resolution for consumer disputes and amending EC Regulation No. 2006/2004 and Directive 2009/22/EC.
19. The 1996 Hague Convention on Parental Responsibility and Protection of Children assigns the role of competent authority on the matter to the Ministry of Justice and Public Order.
20. European Council Regulation No. 2201/2003, of November 27, 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility; European Council Directive 2002/8/EC of January 27, 2003, to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes; European Council Parliamentary Assembly Recommendation 1639 (2003), of June 21, 2004, on

family mediation and equality of sexes. European Council Recommendation No. R (98) 1 of January 21, 1998, on family mediation.

21. See Hague Convention of Private International Law, Feasibility Study on Cross-Border Mediation in Family Matters (General Affairs and Policy 2007), 21–28.

22. European Council Regulation No. 524/2013 of May 21, 2013, on online dispute resolution for consumer disputes and amending EC Regulation No. 2006/2004 and Directive 2009/22/EC.

23. Directive 2013/11/Eu of the European Parliament and of the Council of May 21, 2013, on alternative dispute resolution for consumer disputes and amending Regulation No 2006/2004 and Directive 2009/22/EC.

24. See UNCITRAL, online dispute resolution for cross-border electronic commerce transactions: draft procedural rules, A/CN.9/WG.III/WP.133 (2015).







