International Mediation

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Dispute Boards: A Different Approach to Dispute Resolution

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Mediators’ Codes of Conduct and Ethical Guidelines – A Comparative Analysis

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Introduction

Mediators’ codes of conduct and ethical guidelines are an important point of reference for both mediators and the users of mediation services. They define, in a transparent, accessible, and understandable manner, the most important principles that apply to mediation proceedings. By referring to codes of conduct and ethical guidelines, all parties involved may quickly form a common understanding of the minimum standards that constitute the basis of the proceedings.

The present article seeks to confirm the proposition that — while disposing of a varying degree of self-regulatory depth and detail — mediators’ codes of conduct and ethical guidelines commonly promote quasi-universal principles when it comes to the “state-of-the-art” application of this tool of consensual dispute resolution.

To this end, the authors have embarked on an exercise of conducting a comparative analysis of the deontological frameworks provided by some

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of the leading mediation service providers and regulators; in particular, (i) the Centre for Effective Dispute Resolution (CEDR),[2] (ii) the European Commission,[3] (iii) the Florence International Mediation Chamber (FIMC),[4] (iv) the International Mediation Institute (IMI),[5] (v) Judicial Arbitration and Mediation Services (JAMS),[6] (vi) the Mediators' Institute of Ireland (MII),[7] and (vii) the Singapore International Mediation Institute (SIMI).[8] As a matter of good order, it is noted that numerous other national and international codes and guidelines exist alongside those just mentioned. They are of equal relevance.

As will be demonstrated, the mediators' codes of conduct and ethical guidelines compared for the purposes of this publication (the "Codes") show a considerable degree of overlap. This suggests that the principles reflected in the Codes represent the smallest common denominator across various jurisdictions. Mediators committed to performing their duties as a third-party neutral in accordance with these principles will very likely not disappoint. They will deliver what they are commonly expected to bring to the negotiation table. Codes of conduct and ethical guidelines thus very much have a *raison d'être* alongside the relevant regulatory frameworks that bind mediators at the level of their home jurisdictions. Their significance is particularly pronounced in cross-border dispute resolution scenarios.

Relevance of Codes of Conduct and Ethical Guidelines — A Need for Self-Regulation?

In recent years, mediation has increasingly gained recognition as a relevant method of commercial dispute resolution in both domestic and international cases. This holds especially true for jurisdictions that — given the existing

2 *See* CEDR Code of Conduct for Third Party Neutrals, available at https://mk0cedrxdkly80r1e6.kinstacdn.com/app/uploads/2019/11/Code-of-Conduct-for-Third-Party-Neutrals.pdf.

3 *See* The European Code of Conduct for Mediators, available at https://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.

4 *See* FIMC Code of Ethics, available at http://www.fimcmediation.com/code-of-ethics/.

5 *See* IMI Code of Professional Conduct, available at https://www.imimediation.org/practitioners/code-professional-conduct/.

6 *See* JAMS Mediators Ethics Guidelines, available at https://www.jamsadr.com/mediators-ethics/.

7 *See* MII Code of Ethics and Practice, available at https://www.themii.ie/code-of-ethics-and-practice.

8 *See* SIMI Code of Professional Conduct for SIMI Mediators, available at https://www.simi.org.sg/What-We-Offer/Mediators/Code-of-Professional-Conduct.

legal tradition or the existing legal framework — are less familiar with consensual approaches and where litigation and arbitration are traditionally in the focus of those involved in commercial disputes.

In a cross-border context, the trend appears to be the same; especially in dispute resolution processes conducted by reference to procedural frameworks of leading international dispute resolution service providers, e.g., the Vienna International Arbitral Centre (VIAC) in Austria or the International Chamber of Commerce (ICC) in France, established methods of alternative dispute resolution such as arbitration are increasingly combined in practice with non-confrontational methods, e.g., by building "mediation windows" into formal arbitration processes.

Furthermore, the adoption, by the United Nations General Assembly, of the United National Convention on International Settlement Agreements Resulting from Mediation, in December 2018, and the strong and positive echo received at the Convention's signing ceremony in Singapore, in August 2019, underline the growing relevance of mediation as a tool of international commercial dispute resolution.

Against this background, the question arises whether mediators engaged in international dispute resolution processes can be obliged to adhere to international best-practice standards in mediation in addition to any relevant regulatory frameworks that bind them at the level of their home jurisdictions.

Since the nature of mediation is quite different from dispute resolution before state courts or arbitral tribunals, it is difficult to establish generally applicable standards in terms of proper procedural rules. Given that a key feature of mediation is procedural flexibility — the mediator remains to a certain extent in the parties' hands when it comes to questions of process — extensive regulatory interventions at the procedural level do not make sense as a matter of principle.[9] At the same time, however, where clear-cut procedural rules do not exist, ensuring that certain quality standards are adhered to is paramount.

The conduct of commercial mediation proceedings, as well as the question of the requisite competence of a mediator, is governed by the applicable domestic and international laws which are also sources of minimum standards and regulations on the conduct of mediation proceedings

9 As a matter of clarification, the institutional mediation rules proposed by most of the leading international dispute resolution service providers worldwide do not place any procedural restrictions on either the mediators or the parties who referred their dispute to resolution in a mediation process administered by an institution (e.g., VIAC, ICC, and so on). Institutional mediation rules are generally limited to clarifying certain administrative aspects of the institutional mediation process, such as, for example, the formal commencement and termination of the procedure, selection and appointment of the third-party neutral, costs, and confidentiality.

and the procedural and/or material law implications of such proceedings (e.g., the question of whether the initiation of mediation proceedings has an effect on the relevant statute of limitation). Other aspects of the mediation process are usually not regulated.

However, in order to ensure that mediation proceedings are conducted on the basis of (minimum) standards of quality and ethics, these aspects must be addressed. They concern, *inter alia*, the independence of the mediator, trust, transparency, and other ethical questions. They are particularly important when it comes to defining the standards that any mediator in any jurisdiction should follow to create and sustain the trust of the parties. At the same time, addressing these aspects also serves the purpose of educating the parties on the principles of mediation.

It is against this background that mediation "soft law" — in the form of codes of conduct and ethical guidelines — has developed over the course of the past years. The question of which particular domestic or international codes of conduct or ethical guidelines shall apply in a given case depends on the mediation clause and/or the mediation agreement entered into by the parties to the mediator.

In the given context, it is important to note that codes of conduct and ethical guidelines generally only bind the members of specific mediation institutions or professional organizations. For example, the Code of Ethics and Practice of the Mediators' Institute of Ireland (MII) applies to "all Practitioners, Certified, Associate, General and Trainee Members of the MII" by virtue of their agreement to be bound by the MII Code of Ethics and Practice (Article 3).

In Austria, mediators who are also practicing as lawyers are obliged to observe the Guidelines for Members of the Austrian Bar acting in the Framework of Mediation (*Richtlinien für die Tätigkeit von Rechtsanwälten im Rahmen von Mediation — RL-Mediation*)[10] issued by the Austrian Bar Association. Other mediators, i.e., mediators who have not trained as lawyers and are not members of the Austrian bar, are not bound to adapt their practice such that these guidelines are fully complied with.

The RL-Mediation deal with relevant matters such as the mediator's independence, impartiality, and neutrality. Other aspects covered are confidentiality and the duty to observe professional secrecy. The RL-Mediation also contain a prohibition for members of the Austrian bar to act as both counsel and mediator in one and the same dispute. On the other hand, they expressly allow lawyer mediators to engage in the drafting of the settlement

10 RL-Mediation, available (in German) at https://www.rakwien.at/userfiles/file/Gesetze/rl-mediation2015_16052017_01.pdf.

documentation under the condition that all parties (and, as the case may be, their legal representatives) have given their consent.

The universe of mediators' codes of conduct and ethical guidelines is vast. At first glance, this may confuse not only the users of mediation services but also even mediators. Yet, they serve very important purposes, most notably that of giving visibility to the most pertinent principles that should inspire mediation processes at both the domestic and international level. In that sense, they constitute a positive example of self-regulation and should be welcomed with enthusiasm.

General and Pre-Mediation Requirements

The Mediator as a Person of Competence

Almost all of the Codes compared for the purpose of this publication require mediators to be "competent".[11] However, the question of what exactly the term "competence" stands for and how it should be proven is subject to hot debate. The competence requirement, for example, generally includes the necessity of a certain minimum of training hours (e.g., forty hours,[12] 220 to 365 hours,[13] and so on). At the same time, this requirement excludes all those mediators who did not take a formal mediation course in the required number of hours. Pioneers, who shaped and established today's mediation practice and who did not attend a formal training, might be excluded because of such a requirement.

On the other hand, training in mediation leads to a certain level of professionalism, which mediation arguably needs in order to be perceived as a viable alternative dispute resolution mechanism. In light of this, the current trend leads to a certification of mediators and in particular the requirement of a minimum amount of training.

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11 The European Code of Conduct for Mediators, Article 1; IMI Code of Professional Conduct, Article 2.

12 Pursuant to "Mediation Development Toolkit, Ensuring implementation of the CEPEJ Guidelines on mediation", "Guidelines on Designing and Monitoring Mediation Training Schemes" of the European Commission for the Efficiency of Justice (CEPEJ) (adopted at the 32nd plenary meeting of the CEPEJ in Strasbourg on 14 June 2019), forty hours are "the minimal acceptable benchmark for the teaching and practice of the practical aspects of mediator skills, bearing in mind that these trainings are only intended to train people to a base level of mediator competence".

13 Hours required pursuant to the Ordinance of the Austrian Federal Minister of Justice on training to become a mediator registered with the Federal Ministry of Justice. The actual amount required depends on the mediator's previous education (e.g., lawyers are required to have 220 hours of training, instead of 365 hours).

Mediation is — as defined by the SIMI Code of Professional Conduct for SIMI Mediators — "a process where two or more parties appoint a third-party neutral to assist them in a dialogue oriented toward managing conflict or resolving a dispute or issue, which can also include negotiating agreements". Mediators are expected to have the necessary skills and qualifications to fulfil this task as a basic competence requirement, i.e., to assist the parties to negotiate, communicate, and to make decisions.

There are objective elements to the determination of a mediator's competence, which all mediators should fulfil and which apply irrespective of the case at hand, and subjective elements, which will have to be determined with regard to the specific case. However, "[t]he determination of competency is a holistic one".[14] It is not one factor alone which will determine whether a mediator is competent for a specific case.

As objective elements to the determination of a mediator's competence, mediators are required:

(1) To have a proper training and to continuously update their education and practice their mediation skills in accordance with Article 1 of the European Code of Conduct for Mediators (this includes theories of communication, nature of conflicts and their effect on people, ways to assist people to communicate and how to overcome obstacles to communication, and so on); and

(2) To comply with any relevant standards or accreditation schemes and regulations in the country of practice as stipulated in Article 1 of the European Code of Conduct for Mediators and Article 2 of the CEDR Code of Conduct for Third Party Neutrals.

In addition, a mediator, as subjective element to the determination of competence, must have:

(1) Specific knowledge that may be required for a certain case as referred to by the SIMI Code of Professional Conduct for SIMI Mediators in its Footnote 1; and

(2) Sufficient time to prepare and conduct the process expeditiously and efficiently as being also a part of competence and explicitly referred to in Article 2 of the CEDR Code of Conduct for Third Party Neutrals.

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14 SIMI Code of Professional Conduct for SIMI Mediators, Article 1, Clause 1.2., footnote 1: "The determination of competency is a holistic one. It includes the possession of, or familiarity with technical and/or subject-specific knowledge that may be required for certain cases, as well as the mediator's general suitability for a case taking into account factors such as the mediator's experience level, and any conflicting interests."

The question of competence goes hand in hand with the mediator's duties with regard to promoting his/her practice. To promote one's own competence is a basic feature to build up a career in mediation. Promoting someone's practice is therefore not prohibited. However, some codes of conduct (e.g., the European Code of Conduct for Mediators (Article 1) and the CEDR Code of Conduct for Third Party Neutrals (Article 2)) require explicitly of mediators that any promotion has to be conducted in a professional, truthful, and dignified way. This includes that any promotion shall not mislead or misrepresent any aspect of the mediator's expertise and/or experience as specifically required by the SIMI Code of Professional Conduct for SIMI Mediators (Article 2, Clause 2.1.).

The way in which the mediator's services are presented is of particular relevance as there is a distinction and sometimes even a gap between the competence level that is required of a mediator and the competences parties may expect the mediator to have. The parties' expectations can be much higher and a mediator, who is not able to meet these expectations, may harm not only the case he is mediating, but also the profession as a whole. This holds particularly true if a mediator created unrealistic expectations by overstating his abilities.

Appointment and Fee Arrangements

The mediator's work starts with the acceptance of his/her appointment as a mediator. Before starting with the mediation, the mediator has to, according to most of the Codes compared for the purpose of this publication, ensure that the parties understand and agree to certain issues, namely:

(1) The fees charged by the mediator (if any);
(2) The mediator's independence, impartiality, and neutrality;[15]
(3) Whether the mediator has the appropriate background and competence to conduct the mediation in the given case;[16] and
(4) The mediation process to be used (facilitative, evaluative, and so on).[17]

The Mediator's Fees

Mediators have no duty to charge fees for their services, but if they do, they have to fulfil certain requirements. Mediators have to provide the

15 FIMC Code of Ethics, Article 4: "Before initiating any mediation procedure or before meeting the parties, a mediator must sign a statement of impartiality, independence and neutrality […]"; The European Code of Conduct for Mediators, Article 1.
16 The European Code of Conduct for Mediators, Article 1.
17 SIMI Code of Professional Conduct for SIMI Mediators, Article 5, Clause 5.4.

parties with complete information as to the mode of remuneration (fees and expenses) which they intend to apply (e.g., hourly rates, lump sum fee, and so forth). If an institution administers the mediation, this requirement covers the institution and the institutional fees too.[18]

There is one recognized limitation to a fee agreement between the mediator and the parties, namely, that the fees should not be based on or relate to the outcome of the mediation as specifically stated by the SIMI Code of Professional Conduct for SIMI Mediators.[19] The reason is that the mediator should not put the parties under pressure to reach an agreement. An outcome-based fee arrangement could cause a serious conflict of interest between the mediator's interest in the outcome of the mediation and her/his duty to respect the parties' self-determination.

In addition, the mediator has to discuss with the parties how the fees will be paid, e.g., in what proportion they share the fees as provided for in the SIMI Code of Professional Conduct for SIMI Mediators.[20] Although most Codes do not forbid that the fees are paid by one party only, or in equal parts by all parties to the mediation, a mediator will in practice keep a special eye on the fact that this might cause imbalances to the mediation process, which the mediator, by using his/her skills, will have to compensate for.

The SIMI Code of Professional Conduct for SIMI Mediators[21] provides that in case the mediator withdraws from a case, he/she has a duty to return to the parties any fees already paid relating to the period following withdrawal. This is of course easier to manage if the parties agreed to hourly rates and not to a lump sum amount.

It is advisable for mediators to ask for the payment (even a preliminary payment) in advance. Practice has shown that parties are generally more willing to pay money in advance than after they have settled their case or even more so if the mediation has failed. In case the mediation has already started, but not ended, and requested fees do not get paid, there is a strong indication that this would justify the mediator to withdraw/terminate the mediation with good cause.

The Agreement between the Mediator and the Parties

The mediator works on the basis of an agreement entered into by the mediator and the parties. A specific form is not mandatorily required. Most Codes (including the European Code of Conduct for Mediators

18 CEDR Code of Conduct for Third Party Neutrals, Article 3.
19 SIMI Code of Professional Conduct for SIMI Mediators, Article 6, Clause 6.2.
20 SIMI Code of Professional Conduct for SIMI Mediators, Article 6, Clause 6.2.
21 SIMI Code of Professional Conduct for SIMI Mediators, Article 6, Clause 6.1.

(Article 3)) only require the agreement to be in writing if and to the extent the parties request this.

From a practical point of view, however, it is advisable to draw up the agreement in writing and to include the fee arrangements therein. The agreement does not only serve evidentiary purposes but is also a checklist of those issues the mediator has to explain to the parties. The Codes generally require mediators to make sure that the parties understand and expressly agree to the terms and conditions of the mediation agreement.[22]

With regard to the content of the agreement, the Codes provide little guidance. Some specifically refer to the confidentiality of the mediator and the parties. From a practical point of view, most mediation agreements cover the following issues:

(1) General description of the mediation process (including a description of the mediator's and the parties' roles);
(2) Mediation as a voluntary process;
(3) Confidentiality;
(4) The mediator's impartiality and independence;
(5) Mediation fees; and
(6) The mediator's and the parties' right to withdraw or terminate the mediation.

Domestic regulatory requirements may necessitate that additional issues be raised in the agreement.

Explaining Mediation as a Process to the Parties

The mediator has an obligation to ensure that the parties understand the mediation process and the role of each and every participant.[23] The best way to ensure that the parties have been provided with a full picture is to provide substantial information as a mediator directly to the parties, and not to trust in the parties' confirmation to have done this by themselves or to have been provided with the relevant information by their attorneys, or any other person or institution.

This is, however, not an explicit requirement. Under certain circumstances (e.g., the mediator mediated between the same parties already before), it might be sufficient to refer to previous information provided by the mediator itself or by a third person. The mediator has to explain what style of mediation (e.g., transformative, evaluative, facilitative, or

22 The European Code of Conduct for Mediators, Article 3; FIMC Code of Ethics, Article 5.
23 The European Code of Conduct for Mediators, Article 3; FIMC Code of Ethics, Article 5.

narrative mediation) the mediator performs and what the parties' basic rights are (e.g., mediation as a self-determined process; party's right to end a mediation, to ask for a private meeting, and to keep the shared information confidential; and so on). The mediator should further ensure that the parties understood their role, *inter alia*, the role of their advisers and the role of the mediator as well as the enforceability of any resulting agreement as set out by the IMI Code of Professional Conduct.[24]

Last but not least, this requirement also covers — as specifically mentioned in Article 4 of the FIMC Code of Ethics — that the mediator has to confer with parties regarding suitable dates on which the mediation may take place.

The Mediation Process

In General

The FIMC Code of Ethics sets out in Article 4 that the mediator must perform his/her role with due diligence, independently from the value and type of claim, number of meetings, and remuneration. This includes that the mediator has to take into account the circumstances of the case, including possible power imbalances and any particular wishes the parties may express.[25] The European Code of Conduct for Mediators further specifies that the parties must have adequate opportunities to be involved in the process.[26]

Under Article 3 of the CEDR Code of Conduct for Third Party Neutrals, the mediator has the obligation not to prolong the process unnecessarily. This particular obligation includes, pursuant to Article 3 of the European Code of Conduct for Mediators, that a mediator has to further a prompt settlement of the dispute (if possible). The mediator has to make sure that all parties have equal opportunity to seek legal or other counsel prior to finalizing any resolution or settlement as set out by the SIMI Code of Professional Conduct for SIMI Mediators.[27]

Furthermore, this obligation includes that the mediator has to terminate the mediation if there is no reasonable likelihood of progress being made towards settlement of the dispute through the process as required by the CEDR Code of Conduct for Third Party Neutrals.[28] Under the

24 IMI Code of Professional Conduct, Article 4, Clause 4.1.
25 The European Code of Conduct for Mediators, Article 3.
26 The European Code of Conduct for Mediators, Article 3.
27 SIMI Code of Professional Conduct for SIMI Mediators, Articles 4 and 5.
28 CEDR Code of Conduct for Third Party Neutrals, Article 3.

European Code of Conduct for Mediators, the mediator must inform the parties and may terminate the mediation if a settlement is being reached that for the mediator appears unenforceable or illegal, having regard to the circumstances of the case and the competence of the mediator for making such an assessment, or the mediator considers that continuing the mediation is unlikely to result in a settlement.[29]

In addition, the Codes generally allow caucuses, i.e., private meetings of the mediator with only one party, if the mediator deems it useful.[30] Under the SIMI Code of Professional Conduct for SIMI Mediators, caucusing is a procedural tool for the mediator as long as it is ensured that equal opportunity to engage in private communication with the mediator will be provided to both parties.[31] The same provision also provides that before caucusing, the mediator should ensure that both parties are aware of the fact that the mediator is engaging in private communications with one or more of the parties.

Independence, Impartiality, Neutrality

In General

It is indispensable that a mediator is a person distinct from the parties to the mediation. The Codes contain buzzwords such as "impartiality" and/or "independence" and/or "neutrality" in order to explain how a mediator should act in his professional capacity:

(1) The header of Article 2 of the European Code of Conduct for Mediators reads "Independence and Impartiality";
(2) The Singapore International Mediation Institute uses "Independence, Neutrality and Impartiality" as a heading for Article 4 of its Code of Professional Conduct for SIMI Mediators;
(3) The CEDR Code of Conduct for Third Party Neutrals in Article 4 refers to "Independence and Neutrality"; and
(4) The IMI Code of Professional Conduct limits the heading of its Article 3 to "Impartiality".

In terms of legal linguistics, the terms independence, impartiality, and neutrality have the following meaning:

(1) "Impartial" means to be "not favoring one side more than another; unbiased and disinterested; unswayed by personal interest";[32]

29 European Code of Conduct for Mediators, Article 3, Clause 3.2.
30 European Code of Conduct for Mediators, Article 3, Clause 3.1.
31 SIMI Code of Professional Conduct for SIMI Mediators, Article 5, Clause 5.6.
32 *Black's Law Dictionary* (11th ed. 2019), at p. 901.

(2) "Independent" means to be "not subject to the control or influence of another, not associated with another (often larger) entity, not dependent or contingent on something else";[33] and
(3) "Neutral" means, for example, to be "not supporting any of the people or group involved in an argument or disagreement; indifferent to the outcome of a dispute; refraining from taking sides in a dispute; impartial; unbiased; not inherently favoring any particular faction or point of view; couched so as not to express a predisposition or preference".[34]

The above shows that the three terms are either used to complement each other, or as synonyms (assuming that they have the same scope). The latter particularly holds true for the terms "impartiality" and "neutrality", as according to the definition of these terms an impartial person is neutral. The term "neutral" is also used to cover both fundamental qualities of impartiality and independence at the same time.

Irrespective of the term used, the extent of what mediators are required to fulfil tends to be identical in all the Codes compared. In the following, the term "neutral" will be used to describe a person, while the terms "independent" and "impartial" are used to describe certain qualities of such person.

Requirements

In General. A mediator, as the neutral party, has to be impartial and independent. These two qualities represent the objective (independence) and the subjective (impartiality) markers of the mediator's equidistant position in the process.

A mediator has to fulfil these requirements before accepting the appointment, during the mediation and after the mediation. Some Codes expressly require the mediator not to give advice or accept employment with any party in the same or a substantially related matter for a certain period of time (e.g., twelve months)[35] or an unlimited time[36] after the mediation has ended.[37] To overcome this hurdle, the mediator would have to provide full disclosure and obtain express consent by all parties.

It is the mediator's proper duty to constantly evaluate whether he/she can perform his/her tasks impartially and independently. The mediator

33 *Black's Law Dictionary* (11th ed. 2019), at pp. 919–920.
34 *Black's Law Dictionary* (11th ed. 2019), at p. 1252.
35 IMI Code of Professional Conduct, Article 3; FIMC Code of Ethics, Article 10.
36 CEDR Code of Conduct for Third Party Neutrals, Article 4.
37 IMI Code of Professional Conduct, Article 3.

will have to disclose not only actual biases and dependences, but also perceived (potential and appearing)[38] or actual threats.

Impartiality. "Impartiality" means that a mediator:

(1) Shall not give preference to a party to the detriment of another party;[39]
(2) Shall act in an unbiased manner;[40]
(3) Shall serve all parties equally with respect to the process of mediation[41] (this includes that all have adequate opportunities to be involved in the process);[42] and
(4) Shall act fairly.[43]

Article 3 of the IMI Code of Professional Conduct clarifies that "[b]ias or favoritism can result from several sources: mediator reaction to a mediation participant's personal characteristics, background or values […]".[44] Picking up on this very principle, the JAMS Mediators Ethics Guidelines expressly adds "[...] the parties' backgrounds, personal attributes, or conduct during the session […]" (Article 5). It further sets out that "a Mediator should exercise caution in accepting items of value, including gifts or payments for meals, from a party, insurer or counsel to a mediation during or after a mediation, particularly if the items are accepted at such a time and in such a manner as to cast doubt on the integrity of the mediation process".

Article 10 of the FIMC Code of Ethics sets out that "impartiality means a mediator's subjective attitude which cannot give preference to a party to the detriment of another party". This is a subjective criterium, because while a certain behavior may form the basis to question the mediator's impartiality for some people, it does not create any concerns for others. Whether someone acts impartially or not depends on the circumstances, the parties, the case, and so on. However, it should be recalled that a mediator has to disclose not only actual threats to his impartiality, but

38 IMI Code of Professional Conduct, Article 3.
39 FIMC Code of Ethics, Article 10; similarly, CEDR Code of Conduct for Third Party Neutrals, Article 4.
40 SIMI Code of Professional Conduct for SIMI Mediators, Article 4; IMI Code of Professional Conduct, Article 3.
41 The European Code of Conduct for Mediators, Article 2.2; SIMI Code of Professional Conduct for SIMI Mediators, Article 4.
42 CEDR Code of Conduct for Third Party Neutrals, Article 4.
43 CEDR Code of Conduct for Third Party Neutrals, Article 4.1; SIMI Code of Professional Conduct for SIMI Mediators, Article 4.
44 Article 3 of the IMI Code of Professional Conduct lists further examples which are for the purpose of this article mentioned under the category "independence".

also potentially or apparently perceived impartialities. The mediator has to consider a circumstance as potentially causing doubt as to his/her impartiality and, therefore, disclose it.

As it is generally accepted that mediators may caucus (i.e., hold a private meeting with one party only and in the absence of the other party), the mediator is free to talk to, phone, communicate with, or meet with one party with or without the knowledge of the other party, provided it has been explained to the parties that this might happen and that this does not call into question the mediator's impartiality.[45]

Independence. "Independence" is an objective standard[46] and can easily be proven to exist. It is also described in terms of a conflict of interest, which may arise from either of the following:

(1) A personal or business relationship of the mediator with one or more of the parties;[47]
(2) A financial or other interest, direct or indirect, of the mediator in the outcome of the mediation;[48]
(3) The mediator, or a member of his firm or business having acted in any capacity other than mediator for one or more of the parties;[49] or
(4) Any matter involving a close member of the mediator's family.

Consequences

If the mediator feels unable to conduct the mediation in an impartial or independent manner, he/she will express that concern and withdraw from the mediation or not accept the appointment in the first place.[50]

If the mediator feels competent to conduct the process in an impartial and independent manner, but harbors a perceived (potential and appearing)[51] or actual concern that the parties or either party may question such competence, this does not automatically imply unfitness of the neutral to act as mediator.

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45 MII Code of Ethics and Practice, Article 57.
46 FIMC Code of Ethics, Article 10.
47 The European Code of Conduct for Mediators, Article 2, Clause 2.1; CEDR Code of Conduct for Third Party Neutrals, Article 4.
48 The European Code of Conduct for Mediators, Article 2, Clause 2.1; CEDR Code of Conduct for Third Party Neutrals, Article 4.
49 The European Code of Conduct for Mediators, Article 2, Clause 2.1.; CEDR Code of Conduct for Third Party Neutrals, Article 4.
50 IMI Code of Professional Conduct, Articles 1 and 3; SIMI Code of Professional Conduct for SIMI Mediators, Article 4; CEDR Code of Conduct for Third Party Neutrals, Article 4; The European Code of Conduct, Article 2.
51 IMI Code of Professional Conduct, Article 3.

The mediator should, however, fully disclose any such circumstance and address it with the parties to their satisfaction. This recommendation is expressly set out in Article 3 of the IMI Code of Professional Conduct. Upon full disclosure, the parties will have to renew their consent to the mediation and the neutral to act as mediator.[52] If a party still raises objections, the mediator will have to withdraw.[53]

Confidentiality

Confidentiality is key to any successful mediation process. As a fundamental principle, it is addressed — in more or less detail — in all Codes compared for the purpose of this publication.[54]

Rather detailed rules are contained in the MII Code of Ethics and Practice[55] and the IMI Code of Professional Conduct,[56] both addressing confidentiality before, during, and after the mediation. In the FIMC Code of Ethics, confidentiality is framed as an obligation for mediators, parties, and other process participants alike, with additional directives for mediators (non-disclosure of any information arising from the mediation; disclosure only upon express consent by the involved party). These principles are also echoed in Article IV of the JAMS Mediators Ethic Guidelines. The SIMI Code of Professional Conduct for Mediators, by contrast, approaches the subject by providing a catalogue of exceptions to the strict confidentiality rule.[57]

Finally, in the CEDR Code of Conduct for Third Party Neutrals, confidentiality is addressed within the context of the mediator's conduct of the process, i.e., in the programmatic postulation that the neutral will ensure that the parties understand the obligations relating to confidentiality in consistence with any relevant CEDR model procedure.

The essence of all of the above is captured in quite concise terms in Article 4 of the European Code of Conduct for Mediators:

> "The mediator must keep confidential all information arising out of or in connection with the mediation, including the fact that the

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52 IMI Code of Professional Conduct, Article 3; SIMI Code of Professional Conduct for SIMI Mediators, Article 4; CEDR Code of Conduct for Third Party Neutrals, Article 4; The European Code of Conduct, Article 2.

53 IMI Code of Professional Conduct, Article 3.

54 MII Code of Ethics and Practice, Articles 37 *et seq.*; SIMI Code of Professional Conduct for SIMI Mediators, Article 7; FIMC Code of Ethics, Articles 5c, 8, 9, and 10; IMI Code of Professional Conduct, Article 5; CEDR Code of Conduct for Third Party Neutrals, Article 5.2; The European Code of Conduct for Mediators, Article 4.

55 MII Code of Ethics and Practice, Articles 37 *et seq.*

56 IMI Code of Professional Conduct, Article 5.

57 SIMI Code of Professional Conduct for Mediators, Article 7.

> mediation is to take place or has taken place, unless compelled by law or grounds of public policy to disclose it. Any information disclosed in confidence to mediators by one of the parties must not be disclosed to the other parties without permission, unless compelled by law."

Taking of Notes / Record Keeping

Of all the Codes compared for the purpose of this publication, only the MII Code of Ethics and Practice and the JAMS Mediators Ethic Guidelines contain express references to the issues of record keeping and the taking of notes.

In Article 46, within the broader context of the issue of confidentiality, the MII Code of Ethics and Practice sets out that the mediator's own notes of the mediation process are the property of the mediator and may not be disclosed to the parties or the clients, except as required by law. The MII Code of Ethics and Practice also expressly encourages all involved in a mediation not to take verbatim notes and sets out that the mediator should agree at the beginning of any mediation session with all of those involved as to what is to happen to notes taken and the flip chart pages.[58]

Furthermore, it is expressly stipulated that mobile phones, cameras, and tape recorders must be turned off during a mediation session and that no photographs may be taken of the flip chart notes unless by agreement of all participants. Also, the mediation session may not be recorded.[59]

The JAMS Mediators Ethic Guidelines, while going far less into detail, require that the mediator's notes, the parties' submissions, and other documents containing confidential or otherwise sensitive information should be stored in a reasonably secure location. They also set out that the documents mentioned may be destroyed after ninety days after the mediation has been completed, or sooner, if all parties so request or consent.[60]

As regards the issue of record keeping, the MII Code of Ethics and Practice sets out in Article 75 that it is upon the mediator to ensure that any mediation records are stored securely. It also places the mediator under the obligation to decide what papers to keep and for how long. The MII recognizes that there are different and valid views of mediators as to whether or not the file, the mediator's notes, and any papers in the mediation should be retained after the mediation process is finished and,

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58 MII Code of Ethics and Practice, Article 44.
59 MII Code of Ethics and Practice, Article 45.
60 JAMS Mediators Ethic Guidelines, Article IV.

if so, for how long. It places the onus on each mediator to seek their own advice and come to their own decision on this.

In particular, under the MII Code of Ethics and Practice, the mediator must be aware of all relevant legislation relating to recording and storage of personal information, especially the Freedom of Information and Data Protection legislation, and how it applies to their own mediation work. If so requested, the mediator must inform the parties about their entitlements to access information recorded about them.[61]

While displaying a rather unusual degree of detail, the JAMS Mediators Ethic Guidelines, as well as the MII Code of Ethics and Practice, indeed reflect approaches that may be described as international best practices in mediation.

Termination of Proceedings

The intended goal of any mediation is that a settlement is reached between the parties, which ends the mediation. In case the mediation fails to generate positive progress, the process may be terminated on the initiative of either of the parties or on the initiative of the mediator.

The European Code of Conduct for Mediators provides that the parties are generally free to withdraw from the mediation at any time without giving any justification.[62] The same approach is taken in the SIMI Code of Professional Conduct for SIMI Mediators.[63] The IMI Code of Professional Conduct clarifies that this right of the parties may be limited by the applicable law, court rules, or contractual provisions agreed between the parties;[64] the mediation may have lasted for a certain period of time; or at least one mediation session would have had to take place before a withdrawal may become effective.[65]

With regard to the mediator's possibility to withdraw from the mediation, three linguistic differences may be identified: the European Code of Conduct provides in Article 3, Clause 3.2., that the mediator may terminate the mediation if:

(1) A settlement is being reached that appears unenforceable or illegal for the mediator, whereby the mediator should take the circumstances of the case and its own competence for making such an assessment into account; or

61 MII Code of Ethics and Practice, Articles 75–77.
62 The European Code of Conduct for Mediators, Article 3, Clause 3.3.
63 SIMI Code of Professional Conduct for SIMI Mediators, Article 5, Clause 5.5.
64 The IMI Code of Professional Conduct, Article 4, Clause 4.3.1.
65 *See* Huber-Starlinger/Baier in *VIAC Handbook* (2019), Article 11.

(2) The mediator considers that continuing the mediation is unlikely to result in a settlement. The European Code of Conduct for Mediators therefore provides the mediator with a possibility to withdraw from the mediation and leaves it to the mediator's discretion to do so or not.

By comparison, the IMI Code of Professional Conduct provides for an obligatory withdrawal of the mediator. Article 4, Clause 4.3.2. stipulates that a mediator shall withdraw from the mediation if the negotiation among the parties appears to be moving toward an unconscionable or illegal outcome. The mentioned provision defines the term "unconscionable outcome" as one which is the product of undue pressure, exploitation, or duress:

> "An unconscionable outcome reflects one party's exploitation of an existing power imbalance to the degree that the resulting agreement 'shocks the conscience' and violates accepted legal and cultural norms of fairness."[66]

It is, however, likely that in cases such as these, a mediator operating pursuant to the European Code of Conduct for Mediators would equally come to the conclusion to withdraw from the case.

A linguistically balanced approach is adopted by the SIMI Code of Professional Conduct for SIMI Mediators[67] and the JAMS Code of Ethics.[68] Both Codes use the term "should", as opposed to "shall"[69] and "may".[70]

Article VII of the JAMS Mediators Ethics Guidelines specifically mentions the lack of mediation prerequisites (e.g., informed consent, conflict of interest, the mediator's inability to remain impartial, and so on) as reasons for the mediator to withdraw from the mediation under the header "A mediator should withdraw under certain circumstances".

Other Codes, such as the IMI Code of Professional Conduct, mention reasons for a mediator to withdraw from the mediation in different Clauses (e.g., Clause 3 and Clause 4.3.).

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66 IMI Code of Professional Conduct, Article 4, Clause 4.3.2.
67 SIMI Code of Professional Conduct for SIMI Mediators, Article 5, Clause 5.9.
68 JAMS Code of Ethics, Article VII.
69 IMI Code of Professional Conduct, Article 4, Clause 4.3.2.
70 The European Code of Conduct for Mediators, Article 3, Clause 3.2.

Post-Mediation Obligations

Limits to the Mediator's Further Engagement for the Parties

With the exception of the European Code of Conduct for Mediators, post-mediation duties of mediators are addressed in all of the Codes compared. The respective references are largely found within the context of the confidentiality rules set out in those Codes.

The SIMI Code of Professional Conduct stipulates that for a period of up to twelve months following the end of a mediation, SIMI mediators will not represent any party from that mediation in an advisory capacity to a mediation in the same or a substantially related matter, unless all parties to the mediation expressly consent to that representation after full disclosure (e.g., as a mediator or arbitrator) that may involve some or all of the parties, which will not be considered a representation in an advisory capacity for the purposes of this clause.[71]

In the same provision, it is further made clear that at no time following the end of a mediation will SIMI mediators adduce evidence or testify on behalf of one of the parties in making or defending a claim against another party to the same mediation where they have acquired confidential information from the other party, except insofar as the information is no longer confidential or if the party protected by the confidentiality gives consent or otherwise provided for by law.[72] Likewise, the FIMC Code of Ethics provides for a twelve-month period after the mediation during which mediators may not take on any professional assignment of any nature from the parties.[73]

The IMI Code of Professional Conduct stipulates in Article 5, Clause 5.1.4., that mediators subscribing to the Code will at no time following the end of a mediation adduce evidence or testify on behalf of one of the parties in making or defending a claim against another party to the same mediation where they have acquired confidential information from the other party, unless all that information is no longer confidential or unless the party protected by the confidentiality gives consent.

Within the context of the CEDR Code of Conduct for Third Party Neutrals, it is considered a matter of independence and neutrality that the mediator (or any member of the mediator's own firm or business or close family) will not act for any of the parties individually in relation to the

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71 SIMI Code of Professional Conduct, Article 8, Clause 8.1.
72 SIMI Code of Professional Conduct, Article 8, Clause 8.2.
73 FIMC Code of Ethics, Article 10.

dispute either while acting as mediator or at any time thereafter, without the written consent of all the parties.

Finally, in a slightly more differentiated manner, Article 53 of the MII Code of Ethics and Practice leaves it to the mediator and the parties to agree in the mediation agreement that the mediator will not be called to give evidence as a witness in any forum in relation to the mediation process and that the parties shall not call for the production of any notes or documents that the mediator has in connection with the mediation process.

The Mediator's Role in Settlement Implementation

The mediator's role in the implementation of a settlement reached by the parties is commonly framed as a matter of process in the Codes compared for the purposes of this publication. No express references were found in the MII Code of Ethics and Practice and the FIMC Code of Ethics.

The CEDR Code of Conduct for Third Party Neutrals stipulates that where there is resolution during the process, the mediator will direct the parties to record any settlement in signed writing and ensure that the signatories acknowledge that by signing they accept and understand the terms of any settlement.[74]

Within the framework of the European Code of Conduct, mediators commit to taking all appropriate measures to ensure that any agreement is reached by all parties through knowing and informed consent, and that all parties understand the terms of the agreement. It is expressly made clear that the mediator, upon request of the parties and within the limits of his competence, is under an obligation to inform the parties as to how they may formalize the agreement and the possibilities for making the agreement enforceable.[75]

Quite similarly, mediators acting under the SIMI Code of Professional Conduct for Mediators are expected to ensure that all parties have equal opportunity to, where applicable, seek legal or other counsel prior to finalizing any resolution or settlement.[76]

Mediators subscribing to the IMI Code of Professional Conduct will take reasonable steps to prevent any misconduct that might invalidate an agreement reached in mediation or create or aggravate a hostile environment. They will endeavor to ensure that the parties have reached agreement of their own volition and knowingly consent to any resolution.[77]

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74 CEDR Code of Conduct for Third Party Neutrals, Article 5, Clause 5.3.
75 European Code of Conduct, Article 3, Clause 3.3.
76 SIMI Code of Professional Conduct for Mediators, Article 5, Clause 5.4. (b).
77 IMI Code of Professional Conduct, Article 4, Clause 4.2.3.

Finally, in mediations conducted by reference to the JAMS Mediators Ethic Guidelines, mediators are expressly called upon to satisfy themselves that the parties have considered and understood the terms of the settlement. If appropriate, the mediator should advise the parties to seek legal or other specialized advice.

Furthermore, if the mediator perceives that a party is unable to give informed consent to participation in the process or the terms of settlement due to, for example, the impact of a physical or mental impairment, the guidelines recommend that the process be discontinued until the mediator is satisfied that informed consent has been obtained from the party or the party's duly authorized representative.[78] If the JAMS mediator assists in the preparation of a settlement agreement and if counsel for any party is not present, he or she should advise each unrepresented party to have the agreement independently reviewed by counsel prior to executing it.[79]

Against this background, it should be noted that an additional layer of responsibility may be imposed on mediators by statutory law. Certain jurisdictions place considerable restrictions on mediators when it comes to the question of their involvement in the drafting of a settlement agreement and the further implementation of such agreement.[80]

Bolstering Settlement Agreements Resulting from Mediation

Furthermore, it has become a trend for commercial parties in cross-border disputes to revert to the tool of an award on agreed terms, for the purpose of bringing settlement agreements generated in third-party assisted negotiation processes (e.g., mediation or conciliation) within the scope of application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention").

This trend has been further bolstered by the procedural rules of institutional dispute resolution service providers which frequently recommend a combination of consensual and confrontational methods in the interest of flexible dispute resolution that is tailored towards the needs and requirements of the parties.[81]

In Med-Arb (Mediation-Arbitration) processes, the mediation occurs before the arbitration. Arbitral proceedings are only initiated in so far as the mediation failed to produce a positive outcome, or if the parties wish

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78 JAMS Mediators Ethic Guidelines, Article I.

79 JAMS Mediators Ethic Guidelines, Article VI.

80 In Austria, only mediators who are also admitted to the bar are allowed to assist in the drafting of the settlement agreement. As a further requirement, all parties (including the party representatives) must agree to such involvement of the lawyer mediator.

81 *See* Grill in *VIAC Handbook* (2019), Article 37, Number 13 *et seq*.

to have the negotiated settlement transposed into an award on agreed terms. When it comes to assessing the reliability of awards on agreed terms as a creative tool for rendering settlement agreements generated in third-party assisted negotiations internationally enforceable, one should be mindful of the following:

(1) First, it has been the subject of considerable debate whether the New York Convention indeed applies to awards on agreed terms that formalize settlement agreements generated in third party-assisted negotiations. The predominant view appears to be that such settlements, in so far as they were reached after the conclusion of an arbitration agreement and the appointment of the arbitrator(s), are enforceable under the New York Convention. If, however, the settlement was concluded before the parties concluded the agreement to arbitrate or even before they took the necessary steps for the constitution of the arbitral tribunal in accordance with such agreement, the applicability of the New York Convention is disputed.[82]

(2) Second, some consider the tool of an award on agreed terms in the context of consensual dispute resolution as "a convenient but ill-fitting hook".[83] The arbitrator does not form his or her own views, but rather formalizes the parties' settlement in the award. Against this background, the preconditions for the application of the New York Convention and the grounds for non-enforcement are considered as inappropriate.[84]

In view of these controversies, the efforts of Working Group II of the United Nations Commission on International Trade Law (UNCITRAL) for the creation of the United Nations Convention on International Settlement Agreements resulting from Mediation (the "Convention") are highly commendable.[85]

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82 Morris-Sharma, "Chapter III: The Courts, The Changing Landscape of Arbitration: UNCITRAL's Work on the Enforcement of Conciliated Settlement Agreements", in *Austrian Yearbook on International Arbitration* (2018), at pp. 135 *et seq.*

83 Wolski, "Enforcing Mediated Settlement Agreements (MSAs): Critical Questions and Directions for Future Research", 7 *Contemp. Asia Arb. J.* 87 (2014), at p. 98; Steele, "Enforcing International Commercial Mediation Agreements as Arbitral Awards under the New York Convention", 54 *UCLA L. Rev.* 1385 (2007), 1397.

84 Ma, "Enforcing Mediated Settlement Agreements under the New York Convention: From Controversies to Creativities", 7 *Contemp. Asia Arb. J.* 69 (2014), at p. 83.

85 United Nations, General Assembly, Report of the United Nations Commission on International Trade Law, Fifty-first session (25 June – 13 July 2018), A/73/17, available at http://www.uncitral.org/pdf/english/commissionsessions/51st-session/Final_Edited_version_in_English_28-8-2018.pdf.

On 26 June 2018, at the 51st session of UNCITRAL, the final draft of the Convention and a corresponding Model Law were approved. Also, a resolution was adopted according to which the Convention will go by the name of "Singapore Mediation Convention". This important development was preceded by three years of intense negotiations under the participation of eighty-five United Nations member states and thirty-five governmental and non-governmental organizations.

On 20 December 2018, both the Convention and the Model Law were adopted by the United National General Assembly.[86] The ceremony for the opening for signature was held in Singapore on 7 August 2019.[87] The Convention will enter into force six months after the ratification, by at least three United Nations member states.

Against this background, in order to secure the international enforceability of mediated settlement agreements, it remains advisable, at least for the time being, to resort to mediation only during or after the initiation of institutional arbitration proceedings, to the effect that the arbitration is terminated upon the successful conclusion of the mediation or that the outcome of the mediation is taken into account in the resumed arbitration proceedings. Such hybrid proceedings are commonly referred to as Arb-Med-Arb processes (Arbitration-Mediation-Arbitration).

The hybrid format implies that arbitral proceedings are initiated as a first step. Next, these arbitral proceedings are suspended for the purpose of conducting settlement negotiations in a mediation setting. If the parties succeed in settling their dispute in part or in full during the mediation, the arbitration may, upon the parties' request, be resumed for the purpose of recording the agreement in the form of an arbitration settlement, or the rendering of an arbitral award on agreed terms.

Also, the "mere" termination of the proceedings by way of a procedural decision of the arbitral tribunal is a possibility. In case of a failure of the mediation, the arbitral proceedings may be resumed and conducted as originally foreseen up until the rendering of the award on the merits by the tribunal.

In Arb-Med-Arb constellations, formally conducting the mediation within the framework of arbitral proceedings can be a strong tool for securing the international enforceability of the mediation settlement. However, careful consideration must be given to the question as to

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86 United Nations, General Assembly, Seventy-third session, Agenda item 80, Report of the United National Commission on International Trade Law on the work of its fifty-first session, Report of the Sixth Committee, A/73/496, available at https://undocs.org/en/A/73/496.

87 For the detailed list of the forty-six signatories of the Singapore Convention, *see* https://www.singaporeconvention.org/official-signatories.html.

whether a strict splitting of roles is in order or whether the roles of arbitrator and mediator may be performed by one and the same professional. Some of the Codes analyzed for the purposes of this publication position themselves in favor of the first option.[88]

Conclusion

Professional dispute resolution is increasingly designed as a nuanced process that involves both confrontational and consensual elements. Especially in Europe, mediation, as the quintessential non-confrontational catalyst of settlement, is currently seeing a sort of renaissance in the context of international and also domestic commercial dispute resolution processes.

Hand in hand with this development, codes of conduct and ethical guidelines became more important and popular, mostly around institutional providers of mediation services and training/accreditation institutions. Their aim is to promote best practice standards, manage the expectations of all parties involved, and — most importantly — strengthen the confidence of the users of mediation services, not only in the process of mediation itself, but also in the professional mediators serving the parties.

While these codes of conduct and ethical guidelines display different levels of detail and sophistication, they all encapsulate a quasi-universal understanding of the relevant features and principles governing the process of mediation in the broadest sense, namely in respect of (i) the pre-mediation stage (e.g., as regards the appointment of mediators and the relevant professional qualification requirements); (ii) the actual mediation (e.g., as regards mediators' procedural duties); and (iii) the post-mediation stage (e.g., as regards continuing duties of the mediator once the mediation as ended).

At this juncture, it remains to be seen whether mediators and users of mediation services will lean more towards certain Codes rather than others. Also, further thought will have to be given to the question as to how perceived differences — not only between the various Codes but also

88 FIMC Code of Ethics, Article 10; CEDR Code of Conduct for Third Party Neutrals, Article 4; note also the express exception contained in Article 8 (Clause 8.1.) of the SIMI Code of Professional Conduct for SIMI Mediators: "[…] Acting as a neutral in other dispute resolution proceedings (e.g., as a mediator or arbitrator) that may involve some or all of the parties will not be considered a representation in an advisory capacity for the purposes of this clause".

with regard to certain mandatory provisions contained in the regulatory frameworks at the level of mediators' home jurisdictions — can be balanced out in the interest of fortifying the standing of consensual dispute resolution at an international level.