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International Standards for Commercial Mediators

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ABSTRACT

This paper talks about the international standards for commercial mediators. It introduces the standards of eight different jurisdictions and afterwards, evaluates whether there should be one accrediting standard for all international commercial mediators.

In the introduction chapter, the paper talks about the problems with the current legal system and then explains the growth of mediation in today's society. By discussing the nature and practice of mediation, whether mediation should be compulsory or voluntary in light of Article 6 of the European Convention on Human Rights, rationale of the various jurisdictions covered, the paper then talks about the attributes that make a good mediator as well as the accreditation and training of mediators.

From chapter two to chapter nine, the paper focuses on eight jurisdictions in which mediation is firmly enshrined within one legal culture to those that are just embarking on the concept (namely Australia, New Zealand, Indonesia, Malaysia, India, Hong Kong, California and Canada). Each chapter talks about the developments of commercial mediation, law and institutions as well as training and accreditation of mediators within their respective jurisdictions.

In the concluding chapter, it discusses whether there should be one accrediting standard for international commercial mediators by exploring the advantages and disadvantages of having one accrediting standard as well as the author's analysis and point of view on the subject.

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LIST OF ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ABA	American Bar Association
ACCC	Australian Competition and Consumer Commission
ACDC	Australian Commercial Disputes Centre
ACR	Association for Conflict Resolution
ACT	Australian Capital Territory
ADC	Australian Dispute Centre
ADR Canada	ADR Institute of Canada
ADR	Alternative Dispute Resolution
ADRA	Australian Dispute Resolution Association
AJAC	Access to Justice Advisory Committee
AMA	Australian Mediation Association
AMINZ	Arbitrators' and Mediators' Institute of New Zealand
C. Med	Chartered Mediator
CDM	Certificate in Dispute Management
CDR	Collective Decision Resources
CIArb	Chartered Institute of Arbitrators
CIDB	Construction Industry Development Board
CPD	Continuing Professional Development
CRS	Conflict Resolution Service
DRB	Dispute Resolution Branch
DRO	Dispute Resolution Office

DSCV	Dispute Settlement Centre of Victoria
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
FMC	Family Mediation Canada
HKIAC	Hong Kong International Arbitration Centre
HKMAAL	Hong Kong Mediation Accreditation Association Limited
IAMA	Institute of Arbitrators & Mediators Australia
IIAM	Indian Institute of Arbitration and Mediation
IICT	Indonesian Institute for Conflict Transformation
IMI	International Mediation Institute
KLRCA	Kuala Lumpur Regional Centre for Arbitration
LEADR	LEADR –Association of Dispute Resolvers
LIV	Law Institute of Victoria
LLB	Bachelor of Laws
LSWA	Law Society of Western Australia
MMC	Malaysian Mediation Centre
MSB	Mediator Standards Board
NAAC	National Appeal and Audit Committee
NADRAC	National Alternative Dispute Resolution Advisory Council
NCCUSL	National Conference of Commissioners on Uniform State Laws
NMAC	National Mediation Accreditation Committee
NMAS	National Mediator Accreditation System
NSWBA	New South Wales Bar Association

NY Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
NYU	New York University
NZD	New Zealand Dollar
OHS	Occupational Health Safety
PMN	Indonesian Mediation Centre (Pusat Mediasi Nasional)
Q. Med	Qualified Mediator
QAP	Qualifying Assessment Programme
RCMAC	Regional Chartered Mediator Accreditation Committee
RM	Malaysian Ringgit
RMAB	Recognised Mediator Accreditation Body
SCRAM	Schools Conflict Resolution and Mediation
SPIDR	Society for Professionals in Dispute Resolution
UMA	Uniform Mediation Act
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Committee on Trade and Development
VCAT	Victorian Civil and Administrative Tribunal
VET	Vocational Education and Training
WTO	World Trade Organisations
ZOPA	Zone of Possible Agreements

CHAPTER 1. MEDIATION IN TODAY'S SOCIETY

1.1. INTRODUCTION

The major obstacle hindering the use of mediation globally is that when a dispute arises, parties often refer the matter to their legal experts who have their client's interest at heart and act as the 'gatekeepers' for mediation. Some lawyers prefer the conservative approach to resolving disputes, and often stick to the well-tested approach of litigation which is deeply rooted in a lawyer's education and training. Lawyers see themselves as advocates whose primary role is to assist in the adjudication process of a client's dispute rather than amicably assisting parties' to resolve their disputes in a setting which preserves ongoing relationships. Professor Bryan Clark commented that:

> [W]hile some lawyers and judges are champions (whatever their motives might be), many remain on the fringes apathetic, others are openly sceptical or even anti-mediation in their posturing, and a smattering can be described as doomsayers, predicting an untrammelled glut of mediation riding roughshod over the purity of the application of law and legitimacy of formal justice systems. Against this backdrop, the next chapter analyses the notion of lawyer resistance to mediation and investigates the motives of

> those lawyers who may be seen as a roadblock to mediation's progress.[1]

With mediation being relatively under-developed in some civil law jurisdictions, there is a perception that when one contemplates the adoption of good faith negotiations or some form of mediation, one is being seen as weak and its case has no substance of success within the confines of the litigation process. On the other hand, litigation being deeply rooted in our culture is not perfect in any sense as some jurisdictions view litigation with some doubt and trust.

With society being more sophisticated and access to justice as a fundamental right of every citizen comes the reliance on the state to fund such a process. Litigation is expensive to say the least and for a state to continuous fund all matters that need some form of redress could bankrupt a nation. Some disputants do have the means and resources to handle matters on their own and the state should facilitate such to a degree with the view of creating a harmonious environment which all can live peacefully while submitting their disputes to a just and equitable process such as mediation. In some jurisdictions, corruption in the judiciary, the lack of transparency, lack of interaction with society, the prolonged time to resolve a matter as well as the uncertainty of the outcome and its impact towards society are often seen as the drawbacks of litigation.

To combat these limitations, some nations have been instrumental in introducing reforms to its entire legal system. Take Europe as an example, the European

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[1] Bryan Clark, *Lawyers and Mediators* (Springer Science & Business Media 2012) 24.

Union in May 2008 adopted the European Mediation Directive 2008/52/EC[2] (the Mediation Directive) to govern matters associated with cross-border disputes in civil and commercial related issues within Member States,[3] of which Members States are obliged to implement provisions of the Mediation Directive by 21 May 2011. A cross-border dispute is defined in Article 2(a) of the Mediation Directive as a dispute in which at least one of the parties is domiciled or habitually resident in a Member State (meaning any of the 27 States[4] of the European Union with the exception of Denmark) other than that of any other party on the date on which - the parties agree to use mediation; mediation is ordered by the court; an obligation to use mediation arises under national law; or the court invites the parties to use mediation. The Mediation Directive applies to a cross-border dispute in which two or more parties voluntarily attempt to reach a consensus through the assistance of a mediator which ultimately lead in most cases to an amicable settlement. The objective of the Mediation Directive, as stated under Article 1 is 'to facilitate access to dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings'. Although the Mediation Directive does not impose a duty upon the parties to mediate, nevertheless it does identify from a broader perspective the essence and true benefits of the process, thus leaving Member States to work on the detail arrangements associated with the actual conduct of the mediation from start to finish. Under recital 16 of the Mediation

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2 Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF> accessed 8 July 2016.

3 ibid art 2.

4 (*Gov.UK*, 24 July 2015) <www.gov.uk/eu-eea> accessed 8 July 2016.

Directive, 'Member States should encourage, by any means they consider appropriate, the training of mediators and the introduction of effective quality control mechanism concerning the provision of mediation services' and Article 4(1) and 4(2) of the Mediation Directive, Member States are obliged through self-regulation to encourage the appropriate training of mediators, to the development of, and adherence to voluntary codes of conduct and other effective quality control mechanisms in relation to the provision of mediation services. Although the Mediation Directive did not require Member States to implement a uniform code of conduct for mediators, nevertheless in the United Kingdom, the Civil Mediation Council created a registered mediation organisation scheme and a register mediator scheme for individual mediators as well as producing a code of good practice for mediators.[5] One problem associated with decentralising responsibilities to individual Member States is the lack of consistency across the board in the training and Continuing Professional Development (CPD) requirements of mediators thus creating a disparity which is difficult to align when one is comparing standards especially when mediators from different jurisdictions apply techniques differently, which may confuse disputants, resulting in uncertainty of outcomes, given that the spirit of mediation is to aid parties in the settlement of their disagreement. There are a few areas in which the Mediation Directive does not apply, in particular to areas such as pre-contractual negotiations and early neutral evaluation under recital 11.

[5] Civil Mediation Council, 'Code of Good Practice for Mediators 2009' [2009].

Following on from the Mediation Directive, the European Union introduced the Directive on Consumer ADR 2013/11/EU[6] as well as the ODR Regulation (524/2013).[7] The Consumer ADR Directive seeks to promote Alternative Dispute Resolution (ADR) within the European Union by encouraging the use of approved ADR entities that ensure minimum quality standards, such that approved ADR entities are impartial, offer services at no or nominal cost to the consumer, handle complaints within 90 days of referral and above all provide transparent information about their services. The Consumer ADR Directive applies to domestic and cross-border disputes relating to complaints by a consumer who resides in the European Union against a provider of goods and services in the European Union. However, it does not apply to the providers' complaints against consumers nor does it apply to grievances associated between providers themselves. On the other hand, the ODR Regulation provides for the European Commission to establish an interactive website through which parties can initiate ADR in relation to disputes concerning online transactions. In 2014, the European Union through the European Union Parliament's Committee for Legal Affairs commissioned a study[8] *Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the*

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6 Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L165/63 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF> accessed 8 July 2016.

7 Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L161/1 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF> accessed 8 July 2016.

8 Giuseppe De Palo and others, 'Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the European Union' (2014) <www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf> accessed 8 July 2016.

Number of Mediations in the European Union to ascertain the effectiveness of the Mediation Directive and found that since the introduction of the Mediation Directive in 2008, mediation has remained underused in the majority of Member States and to rectify this problem, the only solution would be to introduce some form of mandatory mediation through either an amendment towards the Mediation Directive or by securing commitments from Member Sates towards its implementation. Although no official response to the study has been published as far as the author is aware nevertheless the European Union did not stand still on this aspect and in September 2015 launched an online consultation[9] to gather views on the extent to which the Mediation Directive has achieved its objectives and to consider whether there should be changes to the Mediation Directive. Results of the consultation are expected in 2016.

Although various Governments throughout the world are actively promulgating mediation as a means of assisting disputants resolve their disputes in a private and informal manner, there are still sceptics in the community who believe that litigation is by far the best form of dispute resolution.

In 2002, Ward LJ stated the following in the case of *Day v Cook*:[10]

> Finally, I ask in utter despair, and probably in vain, is it too much to expect of these parties that they seek to avail of this court's free

[9] European Commission, 'Public Consultation on the Application of Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters' (*European Commission*, 11 December 2015) <http://ec.europa.eu/justice/newsroom/civil/opinion/150910_en.htm> accessed 8 July 2016.

[10] *Day v Cook* [2002] 1 BCLC1 [188].

> ADR service so that a legally qualified mediator can guide them to a long overdue resolution of this dispute which reflects little credit to the legal profession?

Against this backdrop, in this chapter, the author will first examine the problems associated with the current legal system and briefly discuss the nature and practice of mediation with a clearer focus on the methodology and the role mediators play within the entire process. The author will then examine the practicability of the top-down approach versus the practicability of the bottom-up approach in promulgating mediation. The author will also outline the practicable aspects of compelling unwilling parties to mediate in light of Article 6 of the European Convention on Human Rights and its impact towards standards before moving on to explain the rationale and justification of the various jurisdictions covered within the thesis with the view of addressing whether there is a need to regulate mediators within the wider context, given that mediation is a service and the question is whether mediators are in fact 'fit for purpose' and can provide quality service that disputants can depend on through and through as highlighted under section 16(3) of the Sale of Goods Ordinance Chapter 26 of the Laws of Hong Kong:[11]

> Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought, there is an

[11] Hong Kong Sale of Goods Ordinance (Cap 26), s 16(3) <www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/23ED1E5FEF0DE073482575EE00303555/$FILE/CAP_26_e_b5.pdf> accessed 8 July 2016.

> implied condition that the goods supplied under the contract are reasonably fit for that purpose.

Similarly under section 5 of the Supply of Services (Implied Terms) Ordinance Chapter 457 of the Laws of Hong Kong[12] in that 'In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill'.

[12] Hong Kong Supply of Services (Implied Terms) Ordinance (Cap 457), s 5 <www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/501FAF196B9187A8482575EF000A0EED/$FILE/CAP_457_e_b5.pdf > accessed 8 July 2016.

1.2. PROBLEMS WITH THE CURRENT LEGAL SYSTEM

Legal systems have often been criticised as being 'too slow, too expensive and too complex or cumbersome' and 'this has led periodically to the commissioning of reports looking into possible reforms' in many jurisdictions.[13] For example:

In England, Lord Woolf in his 'Interim Report on Access to Justice' stated that:

> Throughout the common law world there is acute concern over the many problems which exist in the resolution of disputes by the civil courts. The problems are basically the same. They concern the processes leading to the decisions made by the courts, rather than the decisions themselves. The process is too expensive, too slow and too complex. It places many litigants at a considerable disadvantage when compared to their opponents. The result is inadequate access to justice and an inefficient and ineffective system.[14]

In Australia, Justice D A Ipp stated that:

> It is sufficient to state that there is a general perception that the administration of justice is unable to cope with the vast increase in litigation, and injustices through unnecessary delays, excessive

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13 Chief Justice's Working Party, 'Civil Justice Reform: Interim Report and Consultative Paper on Civil Justice Reform' (2001), 5 <www.info.gov.hk/archive/consult/2002/FullReport.pdf> accessed 8 July 2016.

14 Lord Woolf, 'Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales, Lord Chancellor's Department, London' (1995) 4.

> costs and other causes are rife. Pessimism and cynicism about justice and the legal system abound. This has led to what has been described as a loss of faith in the adversary system.[15]

Whereas in Hong Kong, the Chief Justice's working party on civil justice reform interim report and consultative paper[16] of which the author was actively involved stated that:

> The existence of a civil justice system enabling individuals and corporations effectively to enforce their legal rights underpins all investment, commercial and domestic transactions as well as the enjoyment of basic rights and freedoms. If the system becomes inaccessible to segments of society, whether because of expense, delay, incomprehensibility or otherwise, they are deprived of access to justice.…
>
> …The available evidence indicates that the civil justice system in Hong Kong shares the defects identified in many other systems. In varying degrees, litigation in our jurisdiction:- is too expensive, with costs too uncertain and often disproportionately high relative to the claim and to the resources of potential litigants; is too slow in bringing a case to a conclusion; operates a system of rules imposing procedural obligations that are often disproportionate to the needs of the case; is too susceptible to

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15 Justice D A Ipp, 'Reforms to the Adversarial Process in Civil Litigation' (1995), pt I 69 ALJ 705 and pt II 69 ALJ 79, 705.

16 Chief Justice's Working Party (n 13) 1.

> tactical manipulation of the rules enabling obstructionist parties to delay proceedings; is too adversarial, with the running of cases left in the hands of the parties and their legal advisers rather than the courts, and with the rules often ignored and not enforced; is incomprehensible to many people with not enough done to facilitate use of the system by litigants in person; and does not do enough to promote equality between litigants who are wealthy and those who are not.

Resolving disputes through litigation can be expensive, to an extent that parties after having embarked on such a process are disillusioned and often feel that the system has failed them to a certain degree. As society becomes more and more litigious, one needs to strike a balance that preserves confidence while at the same time ensuring that one has an opportunity to address one's underlying concerns in a relatively straight forward and cost effective manner.

Litigation is time consuming. Take India as an example, the courts are overburdened[17] and stretched to an extent that parties may need to wait for years for their case to be heard; and on top of this, it will take years for the litigants to complete the adjudicating process given the complicated and formal procedures that one has to follow within the confines of the litigation regime.[18] This is not to mention additional time that may incur if the litigants feel that the outcome lacks merit or substance and take the opportunity to appeal the decision.

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17 Nandini M Nambiar, 'Power Dynamics in Mediation – Part 2' (2015) 7 (3) The Indian Arbitrator 2, 4.

18 Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes* (OUP 2007) 39.

Litigation takes place in a courtroom and the general public is allowed under normal circumstances to hear the matter in question and the media has access to court hearings. With one's dirty laundry open to scrutiny, it may have a detrimental effect on one's business as well as personal reputation. There is also a risk for commercially sensitive information being exposed to the market thereby putting one's business in a disadvantageous position against its competitors. Although some jurisdictions have grappled with the balance of disclose that meet individual and societal needs, nevertheless some commentators have stated that:

> The effort to achieve the appropriate balance between, on the one hand, policies favouring confidentiality and, on the other hand, policies favouring disclosure has created a complex labyrinth of confidentiality rights and obligations, riddled with exceptions.[19]

Judges are often assigned randomly by the judiciary. Litigants generally do not have the freedom to select judges on the basis of their expertise to assist them with their disputes. Not having the freedom to select may cause concern to the parties as they may fear that the judge is not able to step into their shoes to effectively resolve the matter thus creating uncertainty towards the process and ultimately losing confidence and faith in the legal process in its entirety. With Mediation becoming more popular in the global economy,[20] disputants will have another avenue to assist them in resolving their difference, given that in court

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19 Stephen B Goldbger and others, *Dispute Resolution: Negotiation, Mediation, Arbitration and Other Processes* (6th edn, Kluwer 2012) 248.

20 Mikey Campbell, 'Apple, Samsung Agree to Mediate California Patent Dispute' (*appleinsider*, 28 September 2015) <http://appleinsider.com/articles/15/09/28/apple-samsung-agree-to-patent-suit-settlement-mediation> accessed 8 July 2016.

proceedings it is difficult to address linguistic and cultural difference whereas mediation being a flexible process can enable parties to tailor the process to their particular needs with the view of addressing these differences amicably.

1.3. NATURE AND PRACTICE OF MEDIATION

1.3.1. What is Mediation

Conflict or dispute refers to the incompatibility between more than one person, opinions, interests, positions or principle resulting in tensions between them. The word originated from Latin word *conflīgere* where *con* means together and *flīgere* means to strike, putting them together it means to strike together and can be interpreted into striking against each other. Conflicts occur between friends, spouses, families, co-workers, organisations, businesses, government, and nations so basically anyone can have conflicts with another. It is normal, ubiquitous, and unavoidable.[21] Although conflicts can be useful in some occasions,[22] the majority of people perceive conflict as something negative and that it should be avoided, as negative emotions are inevitably involved during the process. But because the cost and time spent and wasted on such conflicts can sometimes be huge, people have always sought ways to resolve them in an effective and efficient manner in order to minimise costs and time, hoping to retain the relationship with the opposing party and at the same time satisfy the different interests conflicting parties may have as much as possible. Nowadays, courts are not the exclusive venues for resolving differences among bitter rivals in our society. In society, the call for ADR is on the rise. Amongst the various ADR techniques, mediation is by far the most established amongst various jurisdictions.

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21 See generally Christopher W Moore, *Mediation Process: Practical Strategies for Resolving Conflict* (4th edn, Jossey-Bass 2014).

22 ibid.

Mediation is where someone acting as a mediator comes between the two people or parties who are in conflict or have a dispute and facilitate them to come up with a solution that both parties will be satisfied with. Bringing two conflicting parties to the table to reconcile their differences through mediation is very popular in the business world and the reason why people are doing that is because of the many benefits associated with it. Firstly, mediation saves time and is relatively cost friendly. Bringing a case to court may incur a huge amount of legal fees and the mandatory procedures for court hearings and trials are usually lengthy but mediation can take place in a matter of days or even hours because there are no such formal procedural requirements. Secondly, it provides privacy and confidentiality. A case, if brought to court, will be known to the public which is extremely undesirable for businesses because of commercial reasons, strategies and reputations, businesses would want to avoid people knowing about disputes in projects, even just the existence of a dispute should be kept in secret. However, through mediation it can be kept confidential. Thirdly, unlike litigation and arbitration where a third party will arbitrarily decide on the outcome of a dispute and usually only one party wins while the other loses, mediation is all about autonomy. Parties can make decisions, negotiate and come up to an agreement themselves that is possible for both parties to benefit from it.

Eileen Carroll, the Deputy Chief Executive of Centre for Effective Dispute Resolution, a pioneer in promulgating mediation to various jurisdictions in Europe and Asia, stated that the comparatively modern definition of mediation reflecting the current state of knowledge and development should encompass the following attributes as far as possible:

> Mediation is a flexible process of dispute resolution in which one or more impartial third parties intervenes in a conflict or dispute with the consent of the participants and assists them in negotiating a consensual and informed agreement. In mediation, the decision-making authority rests with the participants themselves. Recognising participants' needs, cultural differences and variations in style, the mediator facilitates the communication between the participants and assists them to define and clarify issues, reduce obstacles to communication, develop an empathic and constructive interaction, explore possible solutions and, when desired, reach a mutually acceptable agreement. Mediation presents the opportunity to express differences and improve relationships and mutual understanding, whether or not an agreement is reached. It provides a confidential and non-adversarial context for the participants to resolve their conflict in collaborative manner.[23]

Whereas Sir Laurence Street[24] defined mediation[25] as:

> [A]n informal process aimed at enabling the parties to a dispute to discuss their differences in total privacy with the assistance of a neutral third party (mediator) whose task it is first to help each party to understand the other party's view of the matters in dispute

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23 Raymond Hai Ming Leung, *Hong Kong Mediation Handbook* (2nd edn, Sweet & Maxwell 2014) 19-20.

24 Former Chief Justice and Lieutenant Governor of New South Wales, Australia.

25 Laurence Street, 'Mediation: A Practical Outline' (5th edn, 2003) 3 <www.aer.gov.au/system/files/Mediation%20guide%20-%20Sir%20Laurence%20Street.pdf> accessed 8 July 2016.

> and then to help both parties to make a dispassionate, objective appraisal of the total situation. As part of the process the mediator talks confidentially with each party. The object is to help the parties to negotiate a settlement. The discussions are wholly without prejudice. Nothing that is said by either party can be used or referred to in any later proceedings (eg in a Court case). The mediator arranges and chairs the discussions and acts as an intermediary to facilitate progress towards settlement.

From this definition one can ascertain that mediation is an informal private process in which the mediator being a crucial figure in the process facilitates the parties' to reach an amicable settlement.

On the other hand, Professor Laurence Bouelle, also an Australian explained the importance of having a clear definition for mediation:

> [D]efinitions are significant in several practical and political ways. Definitions of mediation are important in practical terms: because government provide funding for 'mediation' programs, some 'mediators' enjoy an immunity from liability for negligence, and there are developing codes of conduct and ethical standards which apply to 'mediators'.… Appropriate definition benefits both the users of mediation services and those who advise them on and refer them to mediation. Politically the definitional debate is significant in that different professions and organisations tend to define

> mediation in terms of the self-interest of their members. Thus a 'social work' definition might imply that it is necessary for mediators to have counselling skills, while 'legal' definition could imply that knowledge of the law is essential. While the mediation terrain is being claimed by competing groups of potential service providers, the particular definition of mediation which prevails is politically significant.[26]

Despite its importance, however, there is no single definition of 'mediation' that is universally accepted.[27] The flexible characteristics of mediation has permitted the development of a wide range of approaches to mediation, and this in turn has given much scope for variation in the definition of mediation to suit different practice and theoretical constructs.[28] The interchangeable use of the terms 'conciliation' and 'mediation' in some countries has, further, added complexity to the definition of mediation.[29]

A general definition of mediation has, for instance, been suggested by Folberg and Taylor:

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26 Laurence Bouelle, *Mediation: Principles, Process, Practice* (1st edn, Butterworths 1996) 7.

27 Russell Hinchy, 'Commercial Mediators: Do They Have Style?' (1999) 2 (6) The ADR Bulletin 53, 54.

28 Nadja Alexander, *Mediation: Process and Practice in Hong Kong* (LexisNexis Hong Kong 2010) 5.

29 In some countries, eg the United Kingdom, conciliation is taken to mean a more interventional and evaluative style of mediation, in which the neutral third party, the conciliator, plays an advisory role to parties on the substantive issues of the dispute and issues formal recommendations and settlement proposal. In essence, there is no internationally agreed norm.

> [Mediation] can be defined as the process by which the participants, together with the assistance of a neutral third person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.[30]

Other examples of a general definition of mediation include 'a confidential, voluntary, non-binding and private dispute resolution process in which a neutral person (the mediator) helps the parties to reach a negotiated settlement'[31]; and 'a facilitative process in which disputing parties engage the assistance of a neutral third party who acts as a mediator in their dispute'.[32]

Whilst the definition and approaches to mediation are subject to variance, there are certain distinctive features that are common to most models of mediation. Broadly speaking, 'to mediate means to act as a peacemaker between disputants'. [33] At its most fundamental level, mediation is a private and confidential dispute resolution process whereby the parties appoint a neutral third party to assist them in reaching a mutually acceptable negotiated agreement that is both voluntary and consensual. The emphasis on party-autonomy, voluntariness and consensus in mediation means that the parties enjoy greater control over both

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30 Jay Folberg and Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation* (Wiley 1984) 7.

31 Hong Kong International Arbitration Centre, 'Hong Kong International Arbitration Centre Mediation Rules' (1999) cl 1 < www.hkiac.org/mediation/rules/hkiac-mediation-rules> accessed 8 July 2016.

32 Henry Brown and Arthur Marriott, *ADR Principles and Practice* (1st edn, Sweet and Maxwell 1992) 108.

33 Nicholas Gould, 'Developments in Construction Mediation and Recent Research' (Chartered Institute of Arbitrators 3rd Mediation Symposium, United Kingdom, 27 October 2010) 71, 80.

the procedure and outcomes of the process.[34] In a Hong Kong District Court case,[35] the Court refused to accede to the request of the Plaintiff for an order that the Defendants proceed with mediation. The Court stated that 'for an order relating to mediation to be meaningful, the parties must be willing to be engaged in such an activity. Mediation is a voluntary process.' Nevertheless, the Court further stated that the parties are expected to have considered attempting mediation at an early stage of legal proceedings.

In another Hong Kong case,[36] Registrar Lung of the High Court stated that if the parties could agree to mediate at the Timetabling Questionnaire stage in the legal proceedings, then it would remove the need for many lengthy and costly steps in the litigation process such as witness statements and expert reports. Implicitly, parties are expected to have attempted or arranged mediation before filing the Timetabling Questionnaire. On this basis Registrar Lung went further by assisting the parties in preparing a checklist[37] to assist solicitors in the preparation of the Case Management Summons.[38] The following is an extract of the checklist that relates to mediation:

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34 In mediation, the parties are free to leave the process at any time and they are similarly free to accept or reject any resolution at the end of the mediation. The mediator has no authority to impose a decision that is not voluntary and consensual. In addition, parties have the flexibility and freedom to shape the discussions and find innovative solutions. The mediation process is not necessarily confined to the legal positions of the parties and the strict rules of evidence. Instead, the parties are encouraged to think openly and creatively to the root of the problems and arrive at unlimited number of possible resolutions.

35 *Pradeep Ramchandra Ghatge v Mukesh Kumar Adukia* [2011] HKEC 463.

36 *Faith Bright Development Ltd v Ng Kwok Kuen* [2010] 5 HKLRD.

37 ibid [28].

38 A Case Management Summons is an application to the Court for case management directions when the parties are unable to agree on the directions.

(1) Solicitors are reminded to advise clients on costs and to seek information from the Mediation Information Centre at the High Court Building, which is free of charge.

(2) Discussion with the solicitor of the other party or parties on the issues of disputes and the best course to take for the resolution of clients' disputes.

(3) Timetable for parties to make arrangements for mediation.

(4) Should there be a short stay of the proceedings? If so, for how long? If not, what are the reasons?

(5) The further conduct of the proceedings and the best course to take in order to save time and costs if mediation fails.

The confidentiality afforded in mediation, can be regarded as 'one of the most important philosophical tenets of mediation'.[39] In a Hong Kong court case,[40] the judge approved the issuing of a subpoena with respect to a mediator, requiring her (a barrister) to attend to give evidence at a trial scheduled between 6 and 20 July 2015. Subsequently, the trial was discontinued as the parties in dispute resolved the matter amicably. If on the other hand the mediator did attend the trial, it would have been interesting to learn the extent to which the mediator's evidence would have been admissible and whether the mediator could reframe from giving such evidence in the interest of preserving the confidentiality of the mediation process.

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39 David Spencer and Michael Brogan, *Mediation Law and Practice* (Cambridge University Press 2006) 312.

40 *Champion Concord Ltd v Kao Lee & Yip* [2015] HKEC 412.

The question then arises as to the mediator's responsibility and whether in assisting the court one would be seen as breaching one's responsibility to the parties' and that of the law,[41] or could one rely on the provisions of the law ie 'the disclosure is made in accordance with a requirement imposed by law'. This question is difficult to answer at this stage and once mediation evolves and with the introduction of evaluative elements of mediation into the equation then matters would be much clearer. Till then, mediators would need to ensure that they are fully protected and the best way forward for the time being would be to provision for such matters within the mediator's terms and conditions and for the mediator to consider purchasing relevant professional indemnity insurance.

In the case of *S v T*[42], it stated that:

> Unless this [confidentiality] is adhered to, the whole mediation system will come to naught and people will use mediation as a tactical advantage and then seek to introduce evidence which has come from an unsuccessful mediation and somehow bring that into court proceedings.[43]

In fact confidentiality is central to mediation and the mediation will not succeed if the parties do not have the trust in the process for communicating fully and openly

41 Hong Kong Mediation Ordinance (Cap 620) <www.legislation.gov.hk/blis_pdf.nsf/CurAllEngDoc/41900F89AE6EA77648257A240054AF9F/$FILE/CAP_620_e_b5.pdf> accessed 8 July 2016.

42 *S v T* [2010] HKCU 932.

43 ibid para 4.

without the fear of compromising their cases before the court.[44] Under paragraph 4 of the European Code of Conduct for Mediators, it states that:

> The Mediator must keep confidential all information arising out of or in connection with the mediation, including the fact that the 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.[45]

Whereas under Article 7 of the Mediation Directive, it preserves the spirit of confidentiality in mediation with the exception of the overriding considerations of public policy and the need to enforce any settlement arrangements as a result of the outcome of the mediation process. The decision of *Farm Assist* highlighted the exceptional circumstances that the court granted an application requiring the mediator to give evidence of the mediation in the interests of justice as economic duress was alleged in that case, and the conduct of the parties at the mediation had to be assessed to determine whether the settlement agreement should be set aside.[46] The United Kingdom Civil Mediation Council Guidance Note Number 1 dated 8 July 2009 provides some practical examples to be learned from the *Farm*

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44 Burnley Richard and Lascelles Greg, 'Mediator Confidentiality – Conduct and Communications' <www.cedr.com/library/articles/Mediator_confidentiality_SJBerwin.pdf> accessed 8 July 2016.

45 'European Code of Conduct for Mediators', s 4 <http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf> accessed 8 July 2016.

46 *Farm Assisted Ltd (in liquidation) v Secretary of State for the Environment, Food and Rural Affairs (no.2)* [2009] EWHC 1102.

Assist case.[47] Mediators within the jurisdiction of the United Kingdom would be obliged to disclose confidential information under certain exceptional circumstances, namely when required by law, for example under the Proceeds of Crime Act or statutory power of authority such as Inland Revenue; to prevent risk of harm to the public; when the mediator believe that there is a risk of significant harm to the health, life, or well-being of a person or threat to their safety; or to prevent criminal activity or preventing mediators being charged with colluding in the commission of an offence or failure of disclosure would be a criminal offence.[48]

In Hong Kong as a result of the Civil Justice Reforms in 2009,[49] mediation is becoming part of the court's process and mediators need to be aware of the various legal requirements and protocols, if not their competence would be called into question. In the paper by Koo and Zhao,[50] they discussed the concerns of transferring conflict resolution from judges to the parties involved in mediation giving rise to the risk that information disclosed might be used to the disadvantage parties in subsequent proceedings. As mediation is a means of delivering justice in private, what aspects of mediation should be transparent to the public in the interest of justice should be decided.[51] The Hong Kong Mediation Ordinance (Mediation Ordinance) has also laid down the confidentiality of mediation

47 'Civil Mediation Council, Guidance Notes No 1: Mediation Confidentiality' (8 July 2009) <www.civilmediation.org/downloads-get?id=245> accessed 8 July 2016.

48 Stuart Sime, Susan Blake and Julie Brownie, *A Practical Approach to Alternative Dispute Resolution* (3rd edn, OUP 2014) ch 14.

49 The Government of Hong Kong Special Administrative Region Department of Justice (DOJ), 'Report of the Working Group on Mediation' (February 2010).

50 A K C Koo and Yun Zhao , 'The Development of the Legal Protection for Mediation Confidentiality in Hong Kong' (2010) Common Law World Review vol 40, 263-277.

51 S Sihombing, C To and J Chiu, *Mediation in Hong Kong: Law and Practice* (Wolters Kulwer 2014) ch 11.

communications with exceptions including requirements imposed by the law, prevention of injury to a person or of serious harm to the well-being of a child.[52] The Mediation Ordinance provides disclosure with leave of court whereby the court consider justifiable in the interest of the public or administration of justice.[53] Public interest includes (but not limited to) detecting crime and exposing serious impropriety; protecting public health, safety and welfare; protecting the most vulnerable members of society; preventing the public from being misled by actions or statements of individuals or organisations.[54] The *Chu Chung Ming* case provides practitioners with the guiding principles for the departure of confidentiality with regard to public interest and in the interest of the administration of justice.[55] In general confidentiality would not override the duty to disclose facts concerning serious criminal activities such as child abuse, violence to persons, large scale fraud or organised crime.[56] In the paper by Koo and Zhao, the scholars stated that there are three distinct concepts at common on mediation confidentiality and there are exceptions namely (1) contractual obligations: exception-court would compel disclosure of all relevant information needed for fair disposal of a case.[57] (2) Legal professional privilege: exception – client and legal advisor have abused their confidential relationship to facilitate a crime of fraud.[58] (3) The without prejudice rule: exception – proof of

52 Hong Kong Mediation Ordinance (n 41) s 8(2) and s 8(3).
53 ibid s 10 (2)(b) and s 10 (2)(c).
54 Nadja Alexander, 'Hong Kong Annotated Statutes: Mediation Ordinance (Cap 620)' (Wolters Kluwer 2013).
55 *Chu Chung Ming v Lam Wai Dan* [2012] 4 HKLRD.
56 ibid V1/8/5.
57 *Three Rivers District Council v Governor and Company of Bank of England (no.4)* [2004] UKHL 48, [2005] 1 AC 610 [28].
58 *Paragon Finance Plc v Freshfields* [1999] 1 WLB 1183 (CA).

unambiguous impropriety.[59] The concept of confidentiality within the confines of mediation is a complex matter in which the mediator is caught between the dilemmas of upholding confidentiality or disclosing information in the interest of justice, either way, the mediator is placed in a disadvantage position as:

> The effort to achieve the appropriate balance between, on the one hand, policies favouring confidentiality and, on the other hand, policies favouring disclosure has created a complex labyrinth of confidentiality rights and obligations, riddled with exceptions.[60]

To sum up, mediation is not a public process, all key decisions are made and disclosed only behind closed doors to the mediator, and confidentiality is always emphasised no matter externally or internally.[61] If the parties want to re-examine the practice of the mediator during a concluded mediation, the court will disallow such as held in *Champion Concord Limited v Lau Koon Foo*,[62] so mediation is truly a 'black box'.[63] The only way to ensure a fair mediation practice depends largely on the role the mediator as well as his/her conduct.[64]In case of mediator's ethical dilemmas, the best way to make appropriate decisions is by first identifying the core value of mediation, namely 'neutrality, self-determination,

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59 *Forster v Friendland* [1992] CAT 1052; *Unilever Plc v Procter and Gamble Co* [2000] 1 WLR 2436.

60 Goldbger and others (n 19) 248.

61 Sihombing, To and Chiu (n 51).

62 *Champion Concord Limited v Lau Koon Foo* [2011] 14 HKCFAR 837.

63 Sihombing, To, and Chiu (n 51).

64 See generally Mary Anne Noone and Lola Akin Ojelabi, 'Ethical Challenges for Mediators Around the Globe: An Australian Perspective' (2014) 45 Wash. U J L & Pol'y 145.

voluntariness, and confidentiality',[65] and then examine how it competes with or incompatible with his/her own moral value of fairness.[66]

For the liability of criminal offences, Hong Kong approach toward the concealment of criminal offences is different from Australia. Under the Hong Kong context, there is no exemption clause nor can a mediator acting in 'good faith' escape liability. Similarly for admissibility of mediation communications as evidence, Hong Kong has no absolute restriction as long as greater interest outweighs the confidentiality requirement. Whereas in Australia, there is only one case that set precedent for mediator's confidential liability and that is *Tapoohi v Lewenberg*,[67] this case held that mediators owe a duty of care to parties and the parties can hold then liable if there is any breach of that duty of care. As such, Australia aims at preserving mediation confidential privilege as their top priority whereas Hong Kong maintains the best interest for both mediating parties and that of the public, a balancing approach which is difficult to draw the line until there are solid case precedents to assist.

Similar to Hong Kong, New Zealand provisions usually start off with the importance of upholding confidentiality but conclude with conditions justifying exceptions. New Zealand however places much more emphasis on upholding confidentiality and vest power in the courts to exercise discretion unlike Australia where discretion is as far as the author is aware never used. Compared with Hong

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65 ibid.

66 Michele S Riley, 'Ethical Considerations in Mediation' (A Presentation for the Asia Pacific Mediation Forum 2008 International Conference, Malaysia, 16-18 June 2008) <www.asiapacificmediationforum.org/resources/2008/19-michele.pdf> accessed 8 July 2016.

67 *Tapoohi v Lewenberg* [2003] VSC 410.

Kong, the New Zealand Evidence Act 2006[68] contains provisions outlining the powers of the court to exercise discretion in permitting or prohibiting privileged or non-privileged evidence in court proceedings. Though the courts are entrusted with such discretionary power, the statues are written to uphold the doctrine of confidentiality only under certain circumstances would the courts exercise their discretionary power. Under section 52(1) of the Evidence Act 2006[69] it stipulates that a court has discretion as to the permission or restriction of any kind of information to be admissible in court proceedings under a privilege.[70] Under section 52(4) a court has the power to grant directions in order to protect confidentiality or limit the specific usage of privileged information and those limits are stipulated under section 69 of the Evidence Act 2006.[71] With such strong reliance on the courts to exercise a large spectrum of discretionary power may not be favoured in Hong Kong because of uncertainty of outcomes.

Mediation in Canada is subject to a laxer confidentiality restriction. Similar to Hong Kong, the Canadian Criminal Code[72] does not impose an obligation to report. However, most provinces impose a duty to report when there is a reason to believe that a child has been or likely to be abused or neglected.[73] While there are various provincial legislations governing some aspects and conduct of mediations, none of these statues impose a requirement of confidentiality. Parties to the

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68 Evidence Act 2006 <www.legislation.govt.nz/act/public/2006/0069/latest/whole.html> accessed 8 July 2016.

69 ibid.

70 ibid s 52(1).

71 ibid s 69.

72 Government of Canada, 'Justice Law Website' (1985) Criminal Code C-46 <http://laws-lois.justice.gc.ca/eng/acts/C-46/> accessed 8 July 2016.

73 Anthony N Doob and Carla Cesaroni, *Responding to Youth Crime in Canada* (University of Toronto Press 2004) 191.

mediation decide whether they want to make the process confidential and if so, to what extent.[74] As such, a Canadian mediator who faces a situation of whether to disclose will have to turn to the common law to see if he/she should disclose the information or not. While the Mediation Ordinance of Hong Kong confines the scope of confidentiality, the Supreme Court of Canada gives parties the freedom to agree to confidentiality clauses that differ from the ordinary scope of confidentiality as long as the consent is absent of fraud or illegality and the intention is clear within the mediation agreement.[75] In 1999, the Supreme Court of Canada in *Smith v Jones*[76] commented on the relevance of violating the confidentiality principle in a public safety circumstance.[77] The Supreme Court unanimously ruled that privilege and confidentiality could be breached in certain circumstances where there is a danger to public safety. The Supreme Court set out three factors that must be considered to warrant a breach of confidentiality for the protection of public safety: whether there is an obvious risk to an identifiable person or group of persons; whether there is a risk of serious bodily harm or death; and where the danger is imminent. Even though the Canadian court did not clarify whether the disclosure is mandatory or discretionary, the judgment nevertheless provides a safety net for a mediator to rely on when the mediator acts in accordance to his/her consciousness to protect the public interest and prevent a crime from occurring. The current law in Hong Kong does not provide sufficient protection or immunity to a mediator thus exposing the mediator to the risk of

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74 Canada Department of Justice, 'Dispute Resolution Reference Guide' <www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/intro.html> accessed 8 July 2016.

75 *Union Cardide Canada Inc & Dow Chemical v Bombardier In*c [2014] SCC 35.

76 *Smith v Jones* [1999] 1 SCR 455.

77 Roy J O'Shaughnessy and others, 'Canadian Landmark Case, Smith v Jones, Supreme Court of Canada: Confidentiality and Privilege Suffer Another Blow' (1999) 27 (4) J Am Acad Psychiatry Law.

being liable no matter what the mediator chooses to do if the scenario does not fall under the statutory exceptions of the Mediation Ordinance whereas Canada allows the parties in dispute and the mediator to customise the scope of confidentiality and the Canadian law is similar to the Australian law being less stringent and creates room for the mediator to avoid liability to a certain degree. Until the law further clarifies how should a mediator draw a line on when he/she can breach the information received conflicts with a moral standard, a mediator in Hong Kong could only wish the party had never communicated the information to him/her so he/she is not caught in such a tricky position of whether to disclose or not disclose.

As one can see from the above, although four common law jurisdictions legal regimes stem from the United Kingdom, nevertheless the way in which mediation confidentiality is handled differ to some degrees in application and for a mediator to be trained and accredited in one jurisdiction to be able to apply one's skill set in another jurisdiction without actually going through some training in the jurisdiction in which one intends to practice would create some uncertainties. On the question of a global standard for accrediting mediators, one needs to grapple with the dilemma that interpretation between common law jurisdictions and that of civil law jurisdictions, practices, legal principles and above all cultural differences are not the same and for one to tailor make a standard that fits all would in reality be a difficult and complicated task to accomplish within a short period of time. In the context of arbitration, the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Award[78] became possible simply because of the dissatisfaction of the Genève Protocol on

[78] New York, 10 June 1958.

Arbitration Clauses 1923.[79] Up till now it is still going through a transformation phrase and for one to advocate a common standard globally for mediation would indeed take time to come to fruitation. However if one looks at it from a globalisation point of view allowing mediators to cross over to different jurisdictions to apply one's skills set under a common umbrella of standards would only benefit disputants and society as a whole.

1.3.2. Voluntary or Compulsory

Some believe that mediation should be voluntary whereas others are of the view that for mediation to develop further at a faster pace, it should be imposed. Given the difficulties in adopting compulsory mediation in California,[80] it can be seen that compulsory mediation is not straightforward. In the case of *Halsey v Milton Keynes General NHS Trust,*[81] the courts gave parties the encouragement of mediating their differences because if they had unreasonably refused they would face the consequences of an adverse cost order. As stated by Dyson LJ in Halsey:

> It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest of terms. It is quite another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to

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79 New York Arbitration Convention, 'History 1923-1958' <www.newyorkconvention.org/travaux+preparatoires/history+1923+-+1958> accessed 8 July 2016.

80 Alan Dunnigan, 'Restoring Power to the Powerless: The Need to Reform California's Mandatory Mediation for Victims of Domestic Violence' 37 University of San Francisco Law Review <http://lawblog.usfca.edu/lawreview/wp-content/uploads/2014/09/C126.pdf> accessed 8 July 2016.

81 *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.

> impose an unacceptable obstruction on the right to access to the courts.[82]

Article 6 of the European Convention on Human Rights (ECHR) states that 'in the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...'.[83] Some believe that if one is compelled to go to mediation then one is clearly violating one fundamental right of access to justice under Article 6 of ECHR. Article 6 of ECHR enshrines the right to a fair trial which presents one of fundamental hallmarks of the rule of law within Europe. In the case of *Declourt v Belgium*,[84] the court stated that:

> In a democratic society within the meaning of the Convention, the right to a fair administration of justice hold such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and purpose of that provision…

whereas in the case of *Airey v Ireland*[85] the court held that the ECHR is 'intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'. Mediation in a way can address matters embodied in Article 6 of ECHR as it permits disputants to obtain recourse more expeditiously in a less expensive matter while disputants retain some form of control over the entire

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82 Per Dyson LJ in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA (Civ) 579, para 9.

83 European Court of Human Rights, 'European Convention on Human Rights' <www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 8 July 2016.

84 *Declourt v Belgium* [1970] 1 EHRR 355 <www.osce.org/odihr> accessed 8 July 2016.

85 *Airey v Ireland* [1979] 2 EHRR 305.

process thus providing wider access to justice. Although one may argue one has a constitutional right of access to justice and the courts, one needs to understand that having an effective remedy that disputants can accept and comply with is more crucial than uncertainty created by an endless process of prolonged delays within the court system, which has an adverse effect on individuals' health. The concept of fairness and access to justice is crucial for any democracy and as most practitioners are of the view that administration of justice has gone to a stage whereby those engaged in the process are disillusioned with the entire process,[86] as the length of legal proceedings between various jurisdictions varies and for one to convey the message of a fair process across all borders without hindrance or delay would be a difficult task indeed. With the introduction of mediation into one's legal system one can argue that one is providing disputants with a timely solution for one to resolve their differences thus minimising costs in the litigation process. In fact mediators levitate the ready constrained legal systems of many jurisdictions and provide some form of relief to the financially strapped court process of many jurisdictions.[87] As Warren K. Winkler Chief Justice of Ontario stated in his concluding remarks:

> Access to justice, as a fundamental principle of the civil justice system, dictates that problems of cost, delay, judicial economy and proportionality must become more prominent in our approach to delivery of legal services in our free and democratic society. If

86 Roscoe Pound, 'The Causes of Popular Dissatisfaction with the Administration of Justice' (Annual convention of the American Bar Association, 1906) p 1, 395 <https://law.unl.edu/RoscoePound.pdf> accessed 8 July 2016.

87 The Honourable Warren Winkler, 'Access to Justice, Mediation: Panacea or Pariah?' (2007) 16 (1) Canadian Arbitration and Mediation Journal 5-9 <www.ontariocourts.ca/coa/en/ps/speeches/access.htm> accessed 8 July 2016.

> litigants of modest means cannot afford to seek their remedies in the traditional court system, they will be forced to find other means to obtain relief. Some may simply give up out of frustration. Should this come to pass, the civil justice system as we know it will become irrelevant for the majority of the population. A legal system accessible only to the very poor and the very well to do presages its own demise. Our courts and the legal profession must adapt to the changing needs of the society that we serve. Mediation affords many parties an opportunity to access the civil justice system quickly and at relatively low cost.[88]

Whereas Lord Woolf in the review of the civil proceedings in England and Wales did not advocate compulsory mediation on the basis that it was fundamentally wrong to deny citizens the right to seek a remedy from the courts.[89] However Chief Justice of the Supreme Court of New South Wales stated that:

> The power to order mediation over the objection of the parties was directed, in particular, at the category of litigants who, perhaps as a matter of tactics, are not willing to suggest or consent to mediation but are nevertheless content to take part in a mediation process if directed to do so by a judge.[90]

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88 ibid.

89 Woolf (n 14); Lord Woolf 'Access to Justice, Final Report' (1996).

90 Hon T F Bathurst, 'The Role of the Courts in the Changing Dispute Resolution Landscape' (2012) 35 (3) UNSW Law Journal 870 <www.austlii.edu.au/au/journals/UNSWLawJl/2012/36.pdf> accessed 8 July 2016.

Turning back to the case of *Halsey v Milton Keynes General NHS Trust*,[91] Dyson LJ further stated that 'the courts role is to encourage not compel [mediation]. The form of encouragement may be robust', as the judge was of the view that if one compels parties who are unwilling to participate in the mediation process would ultimately lead to additional costs as well as infringe one's rights enshrined within Article 6 of the ECHR. On the other hand many jurisdictions such as Australia and Hong Kong[92] have integrated mediation within one's civil justice system and if one borrows the concepts from these jurisdictions, one may be inclined to belief that access to the courts is only a temporarily suspension of the litigation process and eventually disputants if they are unable to resolve their difference through mediation will revert back to the court system, which in essence does not contradict Article 6 of the ECHR, as Mr. Justice Lightman stated that:

> An order for mediation does not interfere with the right to a trial: at most it imposes a short delay to afford opportunity for settlement and indeed an order for mediation may not even do that, for the order for mediation may require or allow the parties to proceed with preparation for trial.[93]

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91 *Halsey* (n 81) para 9.

92 Practice Direction -31, 'Mediation' <http://legalref.judiciary.gov.hk/lrs/common/pd/pdcontent.jsp?pdn=PD31.htm&lang=EN > accessed 8 July 2016.

93 Hon Mr Justice Lightman, 'Mediation: an Approximation to Justice' (SJ Berwin's Mediation Summer Drinks Reception, 28 June 2007) <www.cedr.com/articles/?item=Mediation-an-approximation-to-justice-a-speech-by-The-Honourable-Mr-Justice-Lightman> accessed 8 July 2016.

He further stated that 'by reason of the nature and impact on the parties of the mediation process, parties who enter the mediation process unwillingly often can and do become infected with the conciliatory spirit and settle'.

Belgium being a signatory to the ECHR has not seen any challenges whatsoever, given its stance on compelling parties to mediate prior to formal commencement of court proceedings. The European Court of Justice (ECJ) ruled in case C-317/08 [94] that compulsory mediation scheme imposed by Italian law did not amount to a breach of Article 6 of the ECHR. Also Article 5 (2) of the Mediation Directive[95] states that:

> This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.

Turning to the United States of America under the Alternative Dispute Resolution Act of 1998 [96] some states in the United States of America have compulsory mediation schemes in place requiring disputants to first mediate their difference prior to engaging in formal litigation. Given that the United States of America

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94 Official Journal of the European Union, 'Joined Cases C-317/08 to C-320/08' (2010) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62008CA0317> accessed 8 July 2016.

95 Official Journal of the European Union, 'Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008: on Certain Aspects of Mediation in Civil and Commercial Matters' (2008) <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32008L0052> accessed 8 July 2016.

96 Alternative Dispute Resolution Act 1998 <www.adr.gov/ADR%20ACT%201998.pdf> accessed 8 July 2016.

have strong views on democracy and freedom of speech, and if one is compelled to mediation, surely Americans would object to the concept entirely. So the question one has to answer is that if one is ordered to go to mediation does that mean that one has theoretically waived one's rights to a trial. The answer should be one that allows flexibility, as access to justice is a fundamental right and to compel one to resolve their difference in mediation alone would undoubtedly violate the provisions of Article 6 of the ECHR but if one is to integrate mediation into one's legal domain then educating society that one's strict legal rights have only been temporarily suspended for the sake of efficiency, cost effectiveness and above all preserving ongoing relationships would ultimately lead to a harmonious society where the concept of 'justice delayed is justice denied'[97] would be a thing of the past as society evolves.

By integrating mediation into one's legal regime would allow many jurisdictions to develop their standards that are comparable to international norms without the fear that one is prohibiting individuals their right to access to justice especially for those countries in Europe that operate under the provisions of Article 6 of the ECHR. Nevertheless one is faced with the dilemma that to encapsulate mediation into one's over-riding legislation is a task on its own. The concept might work for some jurisdictions whereas for others some empirical evidence would go a long way to convince those in legislature that having a common standard that is transferable across borders will not affect one's fundamental rights in relation to access to justice but will enhance uniformity among jurisdictions thus creating

[97] Stated by William E Gladstone who was a British Statesman and the Prime Minister (1868-1894).

confidence that justice is affordable to all no matter which jurisdiction one intends to reside or conduct business. As most people know, the success of mediation in most cases rests on the parties' willingness to engage in the process as Ward LJ stated 'you may be able to drag the horse a horse (a mule offers a better metaphor) to water, but you cannot force the wretched animal to drink if it stubbornly resists'.[98]

1.3.3. Mediation vs Justice

A query had been raised on the outcome of a divorce mediation case where the husband petitioner in fact sought divorce with his principal wife with a view to marrying his concubine in mainland China thus allowing his illegitimate son the right to obtain the citizenship in Hong Kong. There is no doubt that mediation has its shortcomings and disadvantages as it is impossible to deal with what reasonable persons objectively think unjust. Due to the fact that every single mediation case has its own outcome, standards and precedents cannot be developed and followed by future similar cases. Fierce controversy has been fuelled over settlement reached by the parties who seize significantly imbalanced power. In this regard, mediation will further signify their differences and hence contribute to unfair results. For instances, especially for divorce mediation in China, women may be in a subservient position when dealing with negotiation and bargaining with their counterparts, mediation may possibly disadvantage women. It is well acknowledged that mediation may also be inappropriate for cases involving domestic violence and child abuse in family mediation as the

[98] *Colin Wright v Michael Wright (Supplies) Ltd & Turner Wright Investments Ltd* [2013] EWCA (Civ) 234 [3].

frightened party could not negotiate freely and how would mediation be seen as a just and fair process in the eyes of the law under these circumstances.[99]

Examples of unsuitable conditions for the adoption of mediation, namely broad policy at stake affecting the public interest, disputes over the question of law, parties utilising mediation as a tactic with bad faith and malicious thought, threat of personal danger, issues on criminal activities, domestic violence and child abuse, parties in an intense emotional and mentally unstable state, dispute over uncompromising difference of value, matters that the court may order remedies and a distinguishingly imbalance of power between the parties. [100]

Due to the fact that there is no single regulatory body to standardise the accreditation of mediators in Hong Kong, it could not be denied that there has indeed been quality problems associated with mediators who provide ADR services.

For the past couple of years, there have been a number of complaints against the quality of mediators, alleging that they were bias and prejudicial to disputants and failed to settle the disputes in a costly and timely manner.[101]

On 14 July 2012, the Hong Kong media revealed that some mediators were collaborating with legal practitioners to make the parties undergo a mediation process within a prescribed timeframe of two hours knowing that a successful

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99 Leung (n 23) 295-297.

100 ibid.

101 'Conspiring with Lawyers to Processing Fake Mediation – No Accreditation System causing Mediators' Quality Problem' *Sing Tao Daily* (Hong Kong, 14 July 2012) A18.

outcome would not be possible, in essence deliberately failing to achieve an outcome resulting in the case reverting back to litigation where the legal practitioners will benefit in money terms at the expense of the parties' thus creating a sense of injustice to the parties.[102] A sort of 'sham' mediation, which is debated a lot in the community.

In two Hong Kong court cases,[103] the parties made applications under Practice Direction 31[104] for the Court to decide on a minimum amount of time that each party should commit to the mediation process. Registrar Lung in both cases accepted that the minimum level of participation should be left to the discretion of the mediator. He referred to the proposed direction in footnote 4 of Appendix C of Practice Direction 31, which provides that participation can be up to and including at least one substantive mediation session (of a duration determined by the mediator) with the mediator. The Court emphasised that the whole purpose of having a minimum level of participation is to ensure that parties are going to undertake the mediation in a sincere, open and frank manner. The Court should not impose anything that is more than necessary for the parties to participate as mediation is voluntary and any party may decide to terminate it at any stage of the mediation. To make an inflexible direction about the minimum level of participation may germinate other unnecessary disputes between the parties.

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102 ibid.

103 *Resource Development Ltd v Swanbridge Ltd* [2010] HKEC 841; *Hak Tung Alfred Tang v Bloomberg LP* [2010] HKEC 1227.

104 Practice Direction -31 (n 92).

Another injustice may also arise from what is said to be judicial mediation in China in which the divorce case mentioned above involving domestic violence would very often be 'erased' even though the court could establish a case of assault to the battered women.[105] These two scenarios involve court or judicial intervention to some extent. In this regard, any court intervention on mediation has to be cautiously handled. Therefore, Hong Kong's approach on mediation is emphasised on the principle of voluntariness and facilitation with adverse cost orders imposed by the court if the parties do not show proof that they have attempted to attend mediation in good faith.

John Budge, the chairman of the accreditation committee of the Hong Kong Mediation Accreditation Association Limited (HKMAAL) said that:

> [I]t was always a very difficult balance between accessing justice and settling cases. There was always a tension between trying to make parties resolve matters satisfactorily and doing the job so that the parties did not feel that judges had forced them to mediate.[106]

However, on the other hand, Mr. Albert Wong Kwai-huen, a former Law Society president and a former Inter-Pacific Bar Association president, who strongly promotes mediation, claimed that no parties could be forced to sign a settlement agreement if they felt the terms were unfair to them and added that mediation

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105 See generally Xin He and Kwai Hang Ng, 'In the Name of Harmony: the Erasure of Domestic Violence in China's Judicial Mediation' (2012) 1 International Journal of Law, Policy, and the Family.

106 MOY Patsy, 'New Body Will Uphold Mediation Standards' *South China Morning Post* (Hong Kong, 23 July 2012) <www.scmp.com/article/1007525/new-body-will-uphold-mediation-standards> accessed 8 July 2016.

would therefore not give rise to the problem of injustice.[107] Mr. Wong further rejected arguments that mediation could undermine justice as fewer and fewer cases were being heard in court. He claimed that even before the Civil Justice Reform in Hong Kong, 70 per cent of cases were settled before going to court. He added the reform had helped shorten the time needed to reach a settlement from one or two years to four or five months, saving legal costs for the parties involved.[108]

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107 MOY Patsy, 'Lawyers Falling Short of Mediators' *South China Morning Post* (Hong Kong, 16 July 2012) <www.scmp.com/article/1006905/lawyers-falling-short-mediators> accessed 8 July 2016.

108 ibid.

1.4. THE ROLE OF A MEDIATOR

Under Article 3 (b) of the Mediation Directive[109] a mediator is defined as:

> any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

Throughout the mediation process, the mediator plays a crucial role that gives the parties an opportunity to negotiate in a private and confidential environment. The mediator controls the mediation process and encourages open discussion between the parties. His/her primary role is to facilitate communications, seek common ground and encourage the parties to find agreement where possible. The mediator acts as a middleman when personal conflicts arise. He/she also helps the parties to formulate and implement strategies designed to overcome obstacles during the process.

The mediator gathers information and assists the parties in generating options and assessing risk. The mediator continuously seeks the view of parties through joint and/or private sessions. The mediator does not normally have a decision-making power, and as such, he/she will not determine the matter in dispute nor will he/she impose a view on the parties. The parties have the right to withdrawn from the

[109] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32008L0052> accessed 8 July 2016.

mediation at any time and the right to decline to agree to a solution in mediation and to have the dispute determined by a court. Once a settlement agreement is reached and signed by the parties however, it will become binding and enforceable in most jurisdictions.

Given the importance of the role of a mediator, parties are given the right to choose their own mediator. They can either appoint a lawyer or a mediator that has a particular expertise who understands the disputes in question. If parties are not able to agree on the mediator, they may seek directions from the court.

The following section outlines the different roles of a mediator and talks about the attributes that make a good mediator. Some of the basic skills would be good communication skills, problem solving skills and knowing how to be fair. Depending on their abilities, background and personalities, different mediators will have different approaches when facilitating parties in different situations. Even the same mediator will know several different approaches to adopt in different situations because it is more effective to reach settlements in those circumstances. Moreover, while these skills may be acquired through mediation trainings, being able to use them during actual mediation is easier said than done; most of the skills are not actually obtained until the mediator has had the chance of using and practicing them in actual mediations. There are practicing mediators who have spent years on improving their skill sets yet they still have not got the hang of it, not because they are incompetent, rather it depends on the parameters in which they are working on whether it permits them to adopt such skill sets appropriately.

1.4.1. The Different Roles of a Mediator

The roles of a mediator are multi-fold:

(1) The mediator acts as the 'manager of the process': who provides firm but sensitive control. He/she conveys confidence to the parties that the process is all worthwhile as well as gives momentum and a sense of purpose and progress.

(2) The mediator is a 'facilitator': that helps the parties to overcome deadlock and find ways of working co-operatively towards a settlement that is mutually acceptable.

(3) The mediator acts an 'information-gatherer': He/she absorbs and shuffles data obtained during the mediation and uses the information to assist the parties to identify common ground, shared goals and zones of agreement.

(4) The mediator is a 'reality-tester': who assists the parties in taking a private and realistic view of the dispute instead of a public posturing and muscle-flexing view.

(5) The mediator, being an impartial third party, is a 'problem-solver': that brings a clear head and creative mind to help the parties construct an outcome that best meets their needs.

(6) The mediator acts as a 'sponge': that soaks up the parties' feelings and frustrations and helps them to channel their energy into positive approaches to the issues

(7) The mediator acts as a 'scribe': that writes or assists the parties in writing the settlement agreement, ensuring that all issues are covered and that all the terms of the agreement are clear.

(8) The mediator acts as a 'settlement supervisor': that checks whether the settlement agreements have worked out and will be available if further problems occur. If no agreement is reached at the end of the mediation, the mediator will act a 'settlement prompter' who helps the parties by keeping the momentum towards final settlement.

1.4.2. Attributes of a Good Mediator

Carey, in her article 'Credentialing for Mediators – To Be or Not to Be?', has listed out a number of competencies that a good mediator should possess. These include the following:[110]

(1) Be persistent: a mediator has to be persistent during the process because there will be a number of issues that have to be discussed and it is necessary that the mediator focuses on the real problems and issues and not be distracted by other issues which deflect the real concerns;[111]

(2) Identifying the real interests: a successful mediator is able to differentiate the position stated by the parties and the real underlying interests. Being able to do so, the mediator will then be able to come up with a number of

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110 Teresa V Carey, 'Credentialing for Mediators – To Be or Not To Be?' (1995) 30 University of San Francisco Law Review 635, 641.

111 ibid.

creative and constructive options in order to facilitate the parties in reaching a final agreement;[112]

(3) Maintaining a positive tone: a mediator has to maintain a positive and constructive tone in order to influence parties in entrusting the mediator and that they will be able to reach an agreement;[113]

(4) Thoroughness: As a number of issues will be discussed in both joint and private sessions, the mediator has to ensure that every issue has been dealt with thoroughly and discreetly;[114]

(5) Ability to handle difficult people: a mediator has to be able to work under stress and be able to handle both difficult people and situations in a positive and careful manner;[115]

(6) Be patient: as parties may have numerous concerns, a good mediator has to be patient to understand the views of the parties and their concerns in order to facilitate the mediation;[116]

(7) Remain neutral: the mediator has to remain neutral and will need put aside one's biased view and focus on the real objectives of the mediation in order to come up with the most ideal outcome for both parties; and[117]

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112 ibid.
113 ibid.
114 ibid.
115 ibid.
116 ibid.
117 ibid.

(8) Sustaining outcome: the mediator has to ensure that the resolution does satisfy all parties 'substantively, procedurally, and psychologically'.[118]

Furthermore, throughout the mediation process, the mediator has to comply with two fundamental principles of mediation: fairness and confidentiality.

(1) Fairness: The mediator has to act as an impartial third party in the mediation who has no vested interest in the outcome of the mediation. The mediator also has to be fair and gives both parties the same time and opportunities to express their views in the mediation. Apart from that, the mediator has to show gestures of courtesy throughout the process to make the parties feel comfortable and at ease.

(2) Confidentiality: The confidentiality of mediation is the main feature that makes mediation an attractive alternative of dispute resolution. Without confidentiality, mediation would become almost the same as litigation as it will then function in a public and open manner.[119] The confidentiality in mediation can be separated into three levels. The first level is the confidentiality of discussions held within the mediation session. The second level is the confidentiality of discussions held within the private sessions during the mediation process. The third level is confidentiality of documents exchanged in the mediation and they cannot be adduced as evidence in subsequent court proceedings.

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118 ibid.

119 Christopher To, 'Mediator's Qualification and Obligations' in Sala Sihombing, Christopher To and James Ciu (eds), *Mediation in Hong Kong: Law and Practice* (1 edn, Wolsters Kluwer 2014) 217.

1.5. CHOOSING A MEDIATOR

If parties are unable to reach a consensus on the choice of the mediator, some jurisdictions provide for such default mechanisms within their legal frameworks. In a Hong Kong court case,[120] Registrar Lung attempted to set a standard approach for choosing a mediator when the parties were unable to agree on the choice of a mediator. The court will consider all the relevant objective data, in the following priority:

(1) nature of the matter and the issues for mediation;

(2) amount involved and the importance of the matter to the parties;

(3) mediators' knowledge and experience in respect of the issues in order to determine whether the mediators are the appropriate persons to deal with the issues concerned;

(4) experience of the mediators in mediation;

(5) other relevant experiences such as that of legal practice, arbitration or social experience;

(6) fees and expenses for the mediation;

(7) availability of the mediators, bearing in mind that mediation will be taking place near the trial; and

[120] *Upplan Co Limited v Li Ho Ming* [2010] HKEC 1257.

(8) other relevant factors.

On the materials and information before it, the court will make an assessment of the nominated mediators to determine, on the balance of probabilities, who will most likely be able to conduct the mediation smoothly, successfully and economically and as such the court will make its rational and dispassionate decision accordingly.

Although this is a standard approach by the Hong Kong courts, the emphasis placed on the objective criteria will differ from case to case depending on the circumstances. The court will call for an element of flexibility to be exercised when considering these objective criteria. For example in the *Swanbridge* case[121] the court stated that the mediators were equal in everything but cost, the price charged by each mediator would become the most important factor in making their decision.

[121] *Resource Development Ltd v Swanbridge Ltd* [2010] HKEC 841.

1.6. TRAINING TO BECOME A MEDIATOR

Take the jurisdiction of New York as an example unlike lawyers, there is no state requirement for any course, training or test one has to go through or pass before he/she can practice mediation. To put it short, mediators can come from various backgrounds, not necessarily from law or any other discipline. In fact, some of the top mediators have not even gone through any official training at all and still perform much better than those who had. As there are no entry requirements or licenses needed for one to become a mediator in the State of New York, any individual who has or has not received training can practice mediation privately; it may just be difficult for those with no prior training to acquire actual mediations but, on the other hand, client's businesses are not guaranteed even after going through training. Nevertheless, many private institutions provide all sorts of training to individuals who wish to be more competitive when pursuing a career in mediation in the State of New York.

For mediators to do their jobs properly, the appropriate trainings are very much needed as their first step into the industry, if not disputants may question whether the mediator has the reasonable care and skill to carry out the mediations effectively and efficiently.

Various private institutions within the state of New York provide training courses. These private training courses are classified mainly into two parts: basic and advance. Basic mediation training, or initial mediation training as some would call

them, lays the basis for an individual to become a mediator. [122] In New York, a number of institutions, associations and universities like the New York City Bar Association, the New York University (NYU) School of Law, the New York Peace Institution and the American Arbitration Association, just to name a few, provide such training through courses designed by themselves. For instance, the basic mediation training offered by private institutions, like the New York Peace Institution, provides a 40-hour course primarily on introducing mediation, understanding conflicts, identifying issues, enhancing communication skills and examining cultural issues.[123] Another course that provides similar training is the Mediation Clinic offered by the NYU School of Law. The course again focuses on basic mediation skills such as communication, problem-solving and negotiation skills.[124] Advance mediation training, on the other hand, mainly provides more specific training for individuals who would like to be specialised in a particular area such as commercial related disputes involving financial instructions. Compared to the basic training courses, fewer institutions provide advance courses that focus on advanced commercial mediation training. The New York City Bar Association is one of the few institutions which provide a 3-day advanced commercial mediation training where individuals will learn more about pre-mediation process, techniques for dealing with issues and performing assessments and the use of settlement agreements and ethical issues.[125] Although there are no requirements for the training of private mediators, there are

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122 Similar to that adopted within the jurisdiction of Hong Kong.

123 New York Peace Institute, 'Trainings' <http://nypeace.org/basic-mediation-training/> accessed 8 July 2016.

124 NYU Law, 'Mediation Clinic' <www.law.nyu.edu/academics/clinics/semester/mediation> accessed 8 July 2016.

125 New York City Bar, 'Event Calendar' <https://services.nycbar.org/iMIS/Events/Event_Display.aspx?EventKey=ACM061413&WebsiteKey=f71e12f3-524e-4f8c-a5f7-0d16ce7b3314> accessed 8 July 2016.

requirements and rules to comply with for mediators who wish to serve on court rosters in the commercial division of the courts. Mediators who wish to serve on court rosters will have to comply with Part 146 of the Unified Court System's ADR Office.[126] Part 146 has a section that focuses on the required qualifications and training of mediators on court rosters.[127] Under this guideline, mediators will have to complete a 40 hours of mediation training that is approved by the Unified Court System's Alternative Dispute Resolution Officer. Of the 40 hours of required training, at least 24 hours has to be training on basic skills and techniques and an additional training of 16 hours on the techniques relating to case type-specific context.[128] In addition to the 40 hours, mediators will also have to have experiences in mediating the area designated to them by the Court, such as commercial cases. As for mediators who wish to serve on the rosters, they must have at least 10 years of experience in practicing commercial law or be an accountant or a business professional that has had similar years of experience. As we look closely, most of the training courses provided by the private institutions mentioned above are approved under Part 146, which means the courses are of approved quality. In other words, upon completion of both a basic and advance training course and with some actual experience, mediators are qualified to serve on court rosters and that the only requirement left is to attend six hours of approved relevant mediation training every two years of practicing in order to satisfy part 146. These, however, are suggested guidelines for mediators serving

126 New York State Unified Court System, 'Alternative Dispute Resolution: Part 146' <www.nycourts.gov/ip/adr/Part146.shtml> accessed 8 July 2016.

127 New York State Unified Court System, 'Administrative Rules of the Unified Courts System & Uniform Rules of the Trial Courts' <www.courts.state.ny.us/rules/chiefadmin/146.shtml#4> accessed 8 July 2016.

128 ibid.

on court rosters and does not apply to private mediators, yet it provides some basis for individuals who wish to source for appropriate mediators when a dispute is about to happen. A reality check of whether the mediator chosen is in fact fit for purpose and has the reasonable care and skill to handle parties' dispute in an efficient and effective manner. However, when one examines the training offered in New York, it brings up the question of whether the 40 hours or a few hours each week for half a year are sufficient to give an individual all the training necessary to acquire all the skills needed to be a good and competent mediator. It doesn't seem that the hour requirements for training by the state of New York are fully sufficient in any ways for a mediator to handle disputes or conflicts in this ever changing business world. As the author in his book *Mediation in Hong Kong: Law and Practice,* stated 'Even if this time is extended, these skills can take months and years to develop and must be continually practiced to improve'.[129] So, can these short training courses really guarantee the standards and qualifications of the mediators? Looking back at the mediation training courses, most of the basic ones really only cover brief topics on basic theory, skills and techniques and do not focus enough on the application and precautions. Although there are advanced trainings tailored for specific areas, it is not likely that the more advanced skills and knowledge can be discussed and practiced in depth in such short period as those advance courses are relatively short too. In fact, some may argue that it is hard for an individual to learn within such a short timeframe while it takes others years of practice to master the skills and therefore by simply completing these courses it does not necessarily mean that these individuals are

[129] Sihombing, To, Chiu (n 51) 133.

better than those who have not done so. At the end, most of the skills mentioned above are personal ones and some people do them naturally better than others even without any training or practice. Moreover, mediation can be applied to almost all kinds of disputes in all sort of areas, and having a similar background as the conflicting parties or having relevant knowledge in the disputing issue does help to solve the problem because a mediator can identify issues and focus on them with ease compared to another mediator who may find option generating difficult as this mediator has no knowledge in the disputed issue. Also, some parties may look for mediators that have a certain background, knowledge or stance on particular issues. For example, as Carey mentioned, 'an organization in the City of West Hollywood, which has a large gay population, requires that only gay mediators handle disputes involving gay disputants'.[130]

In addition, it would be difficult in fact to develop a sufficient system of training or education because of the nature of mediation. The practices of mediators vary widely. For instance, there are the evaluative and facilitative approaches to mediation, which are two completely different approaches. On top of that, the attitude, background and relationship between the parties would be contributing factors in how a mediator could handle the dispute. The balance of a relatively general course of mediation practice and an in depth course is important. Having a general course preserves the flexibility and innovativeness of mediation because it allows mediators to explore their personal preferred style through actual practice. On the other hand, having an in depth course would allow mediators to know in greater detail the different methods one can adapt, meaning that their practices

[130] Carey (n 110) 637.

would be of certain quality because they would be working closely to guidelines and standards. However, this also means that their creativity would be greatly reduced, resulting in 'clone' mediators being produced as a result of the consistency of training methodology.

It is a common practice for all professions to be listed within their professional associations' panel/roster, such as lawyers on the law society, so the associations can provide them with information on further trainings or practice opportunities, usually in the form of pro bono cases or referrals. Mediators are no exception either, as they need to continuously keep themselves in top form. That is why most of the time, after completing the mediation training courses, the private institutions might offer trainees apprenticeship to the institutions so they can volunteer as mediators in the community to gain practical experiences or membership of mediation associations that will allow them to access resources on mediation matters including upcoming events on mediation that they may wish to attend. Mediators need experience to acquire business but without business it is hard to have experience, which could be a vicious circle without an ending in sight. On the job training is very important for any profession, one should keep on learning ways to enhance one's abilities and hone one's skill sets appropriately with the view of facilitating disputants to narrow their differences and attempt to reach a path of mutual understanding and ultimately reach an agreement that parties will honour and adhere to. Therefore going through the training courses and obtaining the necessary membership of an association is a good way to start. Membership is also a way to help mediators to advertise themselves by making them known to the world through the various channels offered by these

institutions. All these will help build mediators portfolio in making him/her a more valuable competitor in the large pool of private practicing mediators both domestically and internationally.

Given that there are no unified qualifications for an individual to become a mediator, in some incidences it really depends on the prior experience gained in the field and the personal reputation that the mediator has acquired in the community for one to be appointed. In Europe, some Members States have established requirements for mediator qualifications however such requirements are not uniform among Members States, as such the issue that most people tend to raise is that whether a mediator who has obtained a lower number of training hours, may enjoy the freedom to practice in another Member State where mediators are subject to longer training durations. The question boils down to standards and whether a common standard across the board would be in the best interest of all. This question although idealistic and should be pursued if we are to call mediation a truly global dispute resolution method that has no borders, however in reality this would be a task in its self to achieve.

1.7. ACCREDITATION OF MEDIATORS

> We think it is desirable to establish a single body to accredit mediators in order to ensure quality and consistency. It will also help educate the public about mediation and mediators, and ultimately enhance public confidence in mediation.[131]

This was a speech delivered by the then Secretary for Justice, Mr. Wong Yan Lung, at the Mediation Roundtable Conference on 29 March 2010. Mr. Wong Yan Lung has made many similar public speeches during the years when he was Hong Kong's Secretary for Justice.

Accreditation is a form of recognition or quality assurance usually given by an organisation to approve that a practice of a mediator is of certain standards and quality. Being accredited gives mediators an opportunity to demonstrate their commitment to the practice and that they are performing at a certain quality level so the client would have faith in them. 'Despite the growing use of ADR and mediation as an alternative to litigation in the United State of America, there is still an absence of a specific method to certify qualified mediators'.[132] Whereas in Australia and Hong Kong there are accreditation systems and standards for mediators in place. In some parts of the United States of America and for that matter within some jurisdictions of Europe, it depends on whether governments in

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131 Yan Lung Wong, 'Changing the Mindset' (Mediation Roundtable Conference, Hong Kong, 29 March 2010).

132 Mandy Zhang , 'To Certify, or Not To Certify: A Comparison of Australia and the US in Achieving National Mediator Certification' (2008) 8 (2) Pepperdine Dispute Resolution Law Journal 307, 309

those countries/states see mediation as an alternative or complimentary redress to that of the courts.

As Zhang put it:

> The accreditation of mediators is an issue that has gained momentum in the U.S. within the last twenty five years due to mediation's increasing popularity in all areas of the law, from personal injury, employment, land use, family and divorce disputes to court-annexed mediation programs.[133]

As most professionals hold a license when offering services to the public, currently in some parts of the United States of America, there have been debates going as to whether or not there should be a body who has oversight of accreditation with the view of setting and maintaining standards of practicing mediators so as to reinforce the concept that a mediator is a proper profession just like doctors and lawyers:

> Such questions have sharply divided the American mediation community, where one side insists that 'mediators should be licensed, like doctors or lawyers, to prevent unqualified people from becoming mediators' while the other side wants to keep

[133] ibid 318.

> mediation as a profession which is open to all people regardless of degrees or training.[134]

On the side where people support the idea of having a uniform accreditation system, it is believed that by establishing an accreditation system or standard, users of mediation will be at some level protected as it prevents those who do not have proper knowledge from being abused by an unqualified mediator and who is not competent in performing mediation. It is also seen to be effective in ensuring quality of the mediators as the system would subject mediators to certain training and education. Moreover, a uniformed accreditation system would also lead to other more effective protections. Without accreditation, it would be hard to put in methods to discipline the actions of a bad mediator. It is also impossible in building a system where users of mediation can make complaints against the actions of a mediator, or even appeal and challenge against the validity of the settlement agreement that follows. Lastly it is seen to prevent negligence as there will be a neutral organisation overseeing the practices of mediators thus ensuring that its mediators conform to certain standards rendering them fit and proper to provide mediation services.

On the other side for those who do not support the accreditation system, it is argued that requiring accreditation would affect the flexible nature of the industry itself as it restricts their practices by putting shackles in the form of certificates on them. The system would be hard to regulate due to the nature of the practice, it may increase the costs of hiring a mediator because the parties would have to

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134 ibid 319.

spend more time waiting for an available mediator or even pay for the expensive yet immediately available one. It could also cause fewer practitioners to join the field because of the hurdles they have to jump through before becoming one. It also appears that the practices of mediators would become more similar because they are all assessed in accordance with the same practice guidelines. Another main reason why it is difficult to establish a uniform accreditation system is because of the difficulty on implementation as it might not accurately reflect the skills of the mediator. As Carey stated, '[t]he path of each mediation follows a different route depending on the type of dispute; the disputants' cultures, personalities, interest and needs'.[135] It is hard to determine who will be qualified or experienced enough to assess the competence of the mediators.

There were also suggestions that accreditation could be achieved by requiring mediators to pass an examination. However, this appears to be a complicated matter which would require extensive research into the current market of mediation. Firstly, the difficulty of the examination is an issue. An examination with low passing rate would reduce the number of people entering the field of mediation, which greatly reduces the flexibility of the profession. A simple examination would be regarded as completely meaningless because it serves no purpose of examining the candidates.

Secondly, the skills of a mediator cannot adequately be reflected from a written examination. Some may say that the examinations can be in the form of simulations, however, the mere fact that the assessor does not prefer the style

[135] Carey (n 110) 637.

adopted by the candidates do not indicate that the candidates were performing poorly.

If a uniformed accreditation system were to be adopted, it would open up to further complexity as some voices of the community may request review boards to be established to oversee the practices of the mediators. There would also be requests for the judiciary to be the ultimate assessor and review the decisions of the review boards, just like how lawyers' disciplinary actions can be appealed to court. In those events, the members of the review boards have to be of seniority in the mediation community and members of the judiciary have to be educated in regards to mediation. Laws may need to established to cater for such uniformity and some are of the view that, mediations would soon become overly complicated and would no longer be flexible and easy to access, as matters become more legalistic in nature. Furthermore, reviewing mediations would mean that the contents of mediation could no longer be confidential. For both education and quality assurance purposes, mediations would be required to be transparent to a certain extent. However, this would greatly discourage parties to use mediation because one of the main reasons for parties to use mediation as a possible recourse of resolving one's differences is that their affairs can remain unknown to the outside world.

1.7.1. The Importance of Accreditation and Training of Mediators

> To ensure the quality of mediators, all concerned should make a concerted effort to develop a common benchmark in this jurisdiction for accreditation as mediator. For this purpose, the benefit of overseas experience and the assistance of overseas expertise would be useful. The benchmark should be of high quality and should be comparable to the standard set in major jurisdictions where mediation is at a mature stage. When developed, the benchmark should be able to gain recognition in other jurisdictions. All mediation bodies should co-operate to develop this benchmark as soon as practicable.[136]

The above quote indicates the importance of having an accredited standard and the significance of taking reference to other jurisdictions' ways of setting an accreditation standard for mediation.

In the United States of America, since 2001, the US Uniform Mediation Act (UMA) has been adopted[137] (a top down approach) and the Act promotes the uniformity and the use of mediation.[138] However, some states, such as California, Delaware and New York, have not adopted the UMA but instead have adopted similar legislation. Another example is Australia where the National Mediator

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136 Andrew Nang Li Kwok, 'Opening Address Mediation in Hong Kong: The Way Forward' in Katherine Lynch and Erica Chan (eds), *Mediation in Hong Kong: The Way Forward* (The University of Hong Kong 2009) 3.

137 At the time of writing this Chapter, 11 States have adopted the UMA.

138 Felicity Hutcheson, 'Current Trends, Process and Practice in Mediation and Alternative Dispute Resolution' (2008) The New Zealand Department of Labour <www.dol.govt.nz/PDFs/mediation-resolution.pdf> accessed 8 July 2016.

Accreditation System (NMAS) was established after many years of effort. This System is an industry based scheme (a bottom up approach) that mediator organisations agree to accredit mediators voluntarily according to specific standards that were established in 2008.[139] However, in England and Wales, accreditation is based on an organisational or sector specific basis instead of having one national accreditation standard.[140]

Using Australia as an example again, it has a National Alternative Dispute Resolution Advisory Council (NADRAC) that ensures that Mediators are trained to a recognised standard and are 'fit for purpose'.[141] Without NADRAC to monitor mediation, a number of concerns would be apparent, such as an inadequate protection of consumers of mediation services, public's lack of knowledge, lack of consistency of standard or the difficulty for newly qualified mediators to enter into the field.[142] Understanding the objectives of having nationally consistent mediator accreditation standards will also help one to understand why there is such a need for one standard.

The NADRAC believes that with such unified accreditation standard in place for mediators, it will help (1) improve mediators knowledge, skills, and ethical standards; (2) promote quality in mediation practice; (3) protect clients of mediation services by establishing a system of accountability; (4) give recognition

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139 National Alternative Dispute Resolution Advisory Council (NADRAC), 'National Mediator Accreditation System' (2015).

140 Nadja Alexander, *Global Trends in Mediation* (2nd edn, Kluwer Law International 2006) 456.

141 Australian Government Attorney-General's Department, 'NADRAC Publications' <www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx> accessed 8 July 2016

142 Zhang (n 132) 310.

to mediators for their skills and expertise; and (5) bring more credibility and acceptance of mediation in Australia and abroad.[143] Another importance of having a certification/accreditation system is that it makes it easier for clients to make complaints against the mediators as there will be a standard protocol for one to refer to, thus giving assurance to consumers while at the same time projecting a highly transparent and accountable system that disputants will come to trust and respect.

There is debate in society as to whether we need a global accrediting standard for mediators. There are numerous reasons to support such accrediting standard and some of the advantageous are discussed below.

Having one accrediting standard for mediators would protect consumers from incompetent mediators as all mediators are required to attain a certain standard. It would also save the consumers' time and money as they can avoid hiring incompetent mediators.

By promoting one accrediting standard for mediators, it will help reduce court congestion as mediation will then be recognised and be seen as an effective path to resolve disputes other than litigation. Therefore, with a valid accreditation system in place for mediation, people will be more willing to go for mediation and hence court congestion will be greatly reduced to an extent which is manageable.

Mediators will be seen as more credible if there is an accrediting standard that is recognised all around the world. Therefore, accreditation will help promote

143 ibid.

mediation through increasing credibility of mediators as well as allowing mediators to provide their services in different jurisdictions without having to re-qualify in different jurisdictions again, eliminating barriers, thus increasing competition and opportunities.

Having a globally recognised accreditation standard will help create a consistent system for any training or learning of mediation. Also it will provide verification of the experience of the mediators and for those who attempt to enter this field, they will have a standard to take reference to. It will then be more appealing to those who are interested to enter the field of mediation due to the ease of access of relevant information.

With a consistent standard of accreditation, it would appear to be fairer to everyone in the field as they all have to meet the same requirements in order to become a mediator. Consumers of the mediation service will also benefit, as all mediators have to satisfy the same requirements. It will allow them to select the competent mediators according to the system. Consumers who wish to have mediation with parties at another state or country will be benefited as well because it will be easier for all parties to agree on a mediator as the standard of competency from jurisdiction to jurisdiction will be the same.

As mentioned above, mediators will be seen as more professional if there is a recognisable international standard available. In addition, with one accrediting standard that is recognisable internationally will give an incentive to accredited mediators to further develop their knowledge and expertise within the field as that

will increase their recognisability all around the globe and they will be more encouraged to influence the development of mediation for the benefit of society.

1.7.2. Practicability of the top-down approach versus the practicability of the bottom up approach when trying to formulate standards for mediation

In policy implementation there are two ways in which one can adopt to promulgate policies, one relates to the top-down approach whereas the other relates to the bottom up approach. In the top down approach, the government plays an active role in setting direction and policy in the interest of the public at large whereas in the bottom up approach, the industry gathers together to formulate policies in the interest of its constituents. Although the top down approach has it merits as it takes the entire community interests into consideration in formulating policy nevertheless it has been criticised for only taking statutory language as a starting point thus ignoring political aspects into the equation. Take Hong Kong for example, with the current political/societal and economic climate, it would be difficult for the government to implement policy and change in the context of mediation as many practitioners believe that if the government has a hand in shaping the direction and scope of mediation then mediation would not become a viable alternative. In saying this although the government has a passion to advocate mediation, nevertheless with the stalemate of the legislative process and filibustering taking place in the legislative council, one could only imagine what some legislators would raise the question whether the government is trying to convince the community to adopt mediation so that it will eventually be part

and parcel of the way people resolve disputes which in turn the government can also adopt to hide matters within the disguise of mediation from legislators. On the contrary if you take Singapore as an example, the top down approach does have its merits as most people in Singapore follow the government's directions and if the government has a stance on a matter, then it is just a matter of implementation within a certain timeframe. As such adoption and implementation of mediation in Singapore can be classified as a top down approach whereby the government forms a committee where practitioners, users and consumers gather together to establish policies that the government will adapt as part of its established requirements. This is evident by the speed in which Singapore established, the Singapore International Mediation Centre.[144] On 23 April 2016, the Institute of Banking and Finance of Singapore established a common set of competency standards so as to raise the professionalism of financial advisers and improve their perceived trustworthiness, given that many people nowadays have doubts about the advices of financial advisors as a result of persistent scandals within the industry. The unified standard would help consumers gain more confidence in the qualification of their advisers. The Institute of Banking and Finance of Singapore Chief Executive Officer Ms. Ong Puay See mentioned that '[i]ndependent accreditation will bring back the concept of professional trusted adviser'.[145] Standards help consumers search for a competent individual with much ease. When customers demand a superior product or service, they believe established standards to be a good indicator of quality and as such individuals will

144 Singapore International Mediation Centre, 'About the Singapore International Mediation Centre (SIMC)' <http://simc.com.sg/> accessed 8 July 2016.

145 Xin En Lee, 'Financial Advisers Agree on Competency Standards' *The Straits Times* (Singapore, 23 April 2016) <www.straitstimes.com/business/banking/financial-advisers-agree-on-competency-standards> accessed 8 July 2016.

realise the benefits of pursuing standards, even if the body certifying or accrediting such standard is private or of a statutory nature. So whether the policy is established from a top down approach versus a bottom up approach will depend on entirely whether industry is organised and coordinated enough to establish policies through a local level and if not then government may assist by steering policy forward until a point whereby industry can re-establish itself in taking such matters forward.

Most individuals believe that their interests are of paramount importance and for them a top down approach would facilitate such implementation with ease as it is directed and implemented, whereas the bottom up approach involves consensus building which takes patience and time to implement, as each stakeholder has their own interests to look after.

In Hong Kong, the issue as to whether there is a need to establish a statutory body for mediation training and accreditation has had much debate. This top down approach needs to strike a balance between statutory regulation and operational flexibility as many see this approach as interfering in the healthy development of mediation and if the government is keen on adopting such approach then there is a need to consider the views of stakeholders and similar organisations that operate under such conditions to ensure that the consumers and practitioners will benefit from such a strategy. Since the establishment of the HKMAAL, (in which the author is affiliated with) through a bottom up approach, there are concerns in some sectors of the community that the HKMAAL is a becoming a body in its self, which is only answerable to its board. Although one of the functions of

HKMAAL is to formulate accreditation standards for mediators as well as to set training requirements for approving mediation training courses, some believe that HKMAAL has too much authority and power to dictate policy for the entire community and if such affects the community a government vehicle should be tasked with such important remit. However many practitioners believe that by formulating standards through a bottom up approach, one will be able to tailor make such policies and requirements to the needs of the community as many practitioners would have input to such policies through a consensus building approach to formulating the policy, which would be in the interests of all. As government personnel are not familiar with the intrinsic elements of how mediation actually operates from a practical aspect and for them to establish policy based on theories and principles would make implementation of such policies become impracticable and overly complicated, not to mention the bureaucracy it brings into the equation. As one of the prime features of mediation is voluntariness, as such parties are free to decide whether to engage mediators accredited by HKMAAL or not and it is entirely up to the parties to decide. If disputants find accredited mediators to be valuable, then accrediting organisations like HKMAAL will likely flourish. Nevertheless, it was observed from the latest statistics provided by HKMAAL that, of the total 2,109 accredited General Mediators and Family Mediators, there were 126 mediators who had not renewed their membership in 2015-2016.[146] This may be an indicator of the deficiency of the bottom up approach. Disputants will decide what value accreditation is likely to afford them by deciding what premium one is willing to pay for such

[146] Email from Mr David So to the author (11 July 2016).

accreditation. Whether one adopts a top down approach versus a bottom up approach it entirely depends on the jurisdiction, its political structure, the industry, the government, the desire for standards and above all if customers really do find value in visiting an accredited rather than unaccredited massage therapist then the market will provide the incentive for practitioners to pursue such accreditation. Within the context of the European Union, one is faced with the dilemma that some Member States have accreditation systems in place whereas some have no systems whatsoever in place and rely solely on market forces to dictate. Take the Mediation Directive[147] as an example it has had a luke warm response as stated in the paper *Rebooting the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Number of Mediations in the European Union*[148] in which the abstract of the paper stated that:

> Five and a half years since its adoption, the Mediation Directive (2008/52/EC) has not yet solved the 'EU Mediation Paradox'. Despite its proven and multiple benefits, mediation in civil and commercial matters is still used in less than 1% of the cases in the EU. This study, which solicited the views of up to 816 experts from all over Europe, clearly shows that this disappointing performance results from weak pro-mediation policies, whether legislative or promotional, in almost all of the 28 Member States. The experts strongly supported a number of proposed nonlegislative measures that could promote mediation

147 Directive 2008/52/EC (n 109).

148 Giuseppe De Palo and others, 'Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU' (2014) <www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf > accessed 8 July 2016.

> development. But more fundamentally, the majority view of these experts suggests that introducing a 'mitigated' form of mandatory mediation may be the only way to make mediation eventually happens in the EU.

From the paper, experts believe that a top down approach would be best, but the question then one needs to address is whether Member States would adhere to such a directive approach from the European Commission, given that mediation in its true form is entirely voluntary and if Members States do not integrate such within their legal systems and compel one to go to mediation solely without recourse to the courts then the issue of whether one is infringing one's basic rights of access to the courts afforded to one under Article 6 of ECHR would be a topic of much debate in the European community. A complicate matter indeed, whereas in Hong Kong, the Government adopted the top down approach to implement the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration[149] within the Arbitration Ordinance Chapter 609 of the Laws of Hong Kong[150] to combine both domestic and international arbitration into a unified regime without much debate and concern within the community. A task which is much easier to accomplish when one is dealing with one jurisdiction as compared to multiple jurisdictions. The

149 United Nations Commission on International Trade Law, 'UNCITRAL Model Law on International Commercial Arbitration 1985: With Amendments as Adopted in 2006' <www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf > accessed 8 July 2016.

150 Hong Kong Arbitration Ordinance (Cap 609) <www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/$FILE/CAP_609_e_b5.pdf > accessed 8 July 2016.

International Bar Association[151] of which the author is a member is a membership based organisation that publishes guidelines to assist those in the legal community in providing professional services to their clients and the community at large. Some would classify the organisation as 'the global voice of the legal community', a bottom up approach which engages its constitutions in developing best practices. Nevertheless, as most people are aware mediation is not really a legal process and many people involved in the profession are non-lawyers and if one is to promulgate a common global standard for mediation then the organisation would find it difficult to accomplish and as such the organisation merely advocates best practices and leaves the legal community to decide best as to whether it wishes to adopt those practices within its domain.

In essence there is not really one size that fits all,[152] it depends on a variety of factors and parameters ranging from political, societal and individual attributes. Whether one adopts a top down approach versus a bottom up approach to implementing common standards in mediation requires much thought, debate and analysis. Through empirical data, gauging the sediments of the community and those who provide such services would be the best approach to consider. Although the top down approach may be a noble call for some form of standards to be firmly in place to establish competency and creditability nevertheless without an effective bottom up strategy of making such standards a reality, mediation will still be considered as a secondary professional to a certain degree.

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151 International Bar Association <www.ibanet.org/> accessed 8 July 2016.

152 Political Pipeline, 'Top-down and Bottom-up Approaches within Implementation' (2013) <https://politicalpipeline.wordpress.com/2013/02/21/top-down-and-bottom-up-approaches-within-implementation/> accessed 8 July 2016.

1.7.3. An Umbrella Body or A Standardised System of Accreditation?

To set a consistent accreditation standard for international mediators, it is necessary to consider the question of whether the accreditation of mediators should be conducted by a body and if so, what body should that be (ie a body established by law (top down approach) or a body credited by the community at large (bottom up approach) or a mixture of both. To examine this, one has to consider both the advantages and disadvantages of having such an umbrella body.

Having a uniform standard and framework under the auspices of a single umbrella accrediting body helps ensure the consistence of quality and standards of mediators as well as the process of accreditation, which includes training and education.[153] Moreover, the public will have more confidence as there is only one body regulating all mediators and this will avoid any conflicts or confusions that would happen if there are more than one accrediting body.[154]

However, with a single umbrella accrediting body, the current existing accrediting bodies may refuse to surrender the right and jurisdiction they enjoy as they have already developed a set of standards and approach that is tested and accepted by the mediation community.[155] In order to cope with this issue, legislation (a top down approach) may be required to request all mediators to comply with this system because those who have been accredited for some time now may not have

153 DOJ (n 49).

154 ibid.

155 ibid.

any incentive to adhere to the new standards.[156] Furthermore, it will be difficult to monitor all mediators if there is one umbrella body as the world is so large and complex and for a single umbrella body to carry out such a task, it will be extremely daunting and if not a impossible task to handle. Another disadvantage is that parties may have the freedom to appoint anyone, regardless of whether one is an accredited mediator or not.[157]

The objective of having a single umbrella accreditation system in place is to ensure the professionalism and competency of mediators so that the public can be afforded a choice to choose from whereby they can get some assurance that those on the list are trained and qualified to a standard that meets international norms.[158] The Law Reform of Ireland Report on Alternative Dispute Resolution: Mediation and Conciliation[159] concluded that 'where individuals are commercially and professionally presenting themselves as practising mediators or conciliators, such individuals must have received proper training and accreditation in these processes'.

Based on this, the following chapters will look into some civil and common law jurisdictions to ascertain for the reader whether these jurisdictions have any sights of implementing a national accreditation system for mediators which eventually can lead to a single international body tasked with the ambit of accrediting mediators on an international scale. Finally the remaining chapter will debate the

156 ibid.

157 ibid.

158 ibid.

159 Law Reform Commission, 'Alternative Dispute Resolution: Mediation and Conciliation' (LRC 98-2010) <www.lawreform.ie/_fileupload/reports/r98adr.pdf>accessed 8 July 2016.

concept and conclude with some directions as to what steps need to be taken going forward.

1.8. THE RATIONALE AND JUSTIFICATION OF THE VARIOUS JURISDICTIONS COVERED

The thesis presents jurisdictions from important legal cultures in which some are more mature in the adoption of mediation whereas others are gradually embracing mediation. The thesis hopes to contrast the differences between advance adoption in some jurisdictions such as Australia, Hong Kong, and Canada versus the start of adoption in some jurisdictions such as Malaysia, India and Indonesia to give the reader a feel of the nature and context in which policies, standards and the frameworks take time to come to fruitation as well as the momentum in implementing further standards in some jurisdictions such as New Zealand and California. The selection covers both western and asian jurisdictions to give the reader a comparison between different cultural and historical backgrounds that may affect one's understanding of the concept and ultimately one's desire to pursue the necessary legal framework and infrastructure to establish a common standard that ensures confidence in the quality of its mediators within one's jurisdiction. As the saying goes, if one values a person with certain qualities then that person would be in high demand. Not everyone is born with such qualities, nevertheless with training and persistence one is able to achieve such qualities in the end. Ensuring that consumers are protected and are receiving a reasonable service that conforms to certain standards requires those who render such services to adhere to some form of standard that is consisted through and through and the only way to achieve such is through the establishment of some form of accreditation. With accreditation, end users can be assured of the quality of work that will be delivered by those accredited mediators when one engages them.

Although it is not possible to cover all jurisdictions, nevertheless the jurisdictions chosen do give the reader some sense of the scope and extent to which some jurisdictions have aligned their legal frameworks to embrace mediation thus enabling disputants to focus on their core businesses as opposed to being entangled in a complicated and time consuming legal process which does not give disputants control over the outcomes of their disputes.

As mentioned in this chapter, even common law jurisdictions have diverse views on some of the core ingredients of mediation such as confidentiality and privilege. Some adopt a conservative approach to disclosure of information in mediation whereas others adopt a strict approach in which the court has the ultimate discretion to disclose. With this in mind the thesis hopes to bring to the reader's attention that adopting a common standard across common and civil law jurisdictions is a task in its self, as the jurisdictions covered only provide one with the notions of such diversity within a limited context. The ability to implement a common standard in more advance jurisdictions is not an easy task as shown in the jurisdictions covered in the thesis that training and assessment differ to a great degree. To align such diverse standards is not easy and for those jurisdictions that are beginning to embrace mediation, the last thing in their mind is a common standard, and they simply want to make widely known this process so that disputants could relief the court of its growing burden without infringing one's access to the courts if mediation is not successful.

CHAPTER 2. AUSTRALIA

2.1. DEVELOPMENT OF MEDIATION IN AUSTRALIA

2.1.1. Introduction

Mediation is not only a Western construct; informal forms of mediation have permeated all cultures to varying degrees throughout history.

> Mediation extols the virtues of forgiveness and negotiated settlement and has been practiced for at least two millennia in Eastern nations such as China, Japan and Korea under the influence of Confucianism. It also had roots in Judaism, was evidenced in earl Quakerism and the African 'moot' court.[160]

Australia has a long history of over 100 years in using 'conciliation' and 'arbitration' to settle disputes.

> One of the first statutes passed by the Commonwealth parliament was the Conciliation and Arbitration Act 1904 which permitted the Federal Government to pass laws on conciliation and arbitration for

[160] Dale Bagshaw and Elisabeth Porter, *Mediation in the Asia-Pacific Region: Transforming Conflicts and Building Peace* (Routledge 2009) 14.

> the prevention and settlement of industrial disputes extending beyond any limits of any one state.[161]

Formal models of dispute resolution operate in different states across Australia under legislation.[162] These models of arbitration are 'increasingly being adapted, modified, and at times, transformed into processes that incorporate mediation elements'.[163]

2.1.2. Mediation in Australia

The use of mediation in common law countries, such as Australia, can be traced back to the 1970s and has been rapidly increasing since. Mediation refers to a process in which an impartial third party facilitates negotiations between two or more disputing parties according to their needs and interests. Another form of dispute resolution, known as conciliation is similar in many ways to mediation, but differs in one important aspect. The conciliator is allowed to provide legal information and/or suggest solutions to the parties involved while the mediator is prohibited from doing so. 'Conciliators can be much more directive and interventionist than interest-based mediators'.[164] Though, in practice the technical differences that separates the two forms of dispute resolution is becoming harder to distinguish.

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161 The Mediation Doctors, 'Mediation in Industrial Relations' <www.digitalsmarttools.com/eRowlett/Mediation_in_Industrial_Relations.htm> accessed 8 July 2016.

162 For example, the Commercial Arbitration Act 1984 (NSW) and the Commercial Arbitration Act 1986 (ACT).

163 Nadja Alexander, *Global Trends in Mediation* (2nd edn, Kluwer Law International 2006) 48.

164 ibid 2.

(a) Definition of 'mediation'

Laurence Boulle identified three approaches in defining the system of mediation:

(1) The 'Conceptualist' approach emphasises on specific values, principles and objectives of mediation. The theory behind conceptualism is highly prescriptive and does not necessarily reflect what happens in mediation practice.

(2) The 'Descriptive' approach does not define mediation in terms of an idealised concept or philosophical assumption. Instead it is defined in terms of what actually transpires in practice. The definition has no prescriptive content and reflects the common denominator of many forms of mediation practice. This approach is adopted in the UNCITRAL Model Law on International Commercial Conciliation.

(3) The 'Market' approach allows the practitioner to determine what is required on a case sensitive basis. A good example is the Tasmanian Supreme Court Rules of 2000 which illustrates the market approach by saying that 'a mediation is to be conducted in any manner the mediator determines'.[165]

In Australia, there are three authoritative sources that provide some unifying force in mediation's definition and description. One is the NADRAC; NADRAC is an

[165] Laurence Boulle, *Mediation: Principles, Process, Practice* (3rd edn, LexisNexis Butterworths 2011) 16.

independent government appointed advisory council. The second body comes from within the mediation movement itself. Lastly, definition and description relating to mediation can be found in Commonwealth legislations.[166]

In the late 1990s, NADRAC incorporated all three approaches identified by Boulle above, into its definition of mediation. Though NADRAC has no legal binding force, its terminology is widely accepted among mediators as the standard. NADRAC defines mediation as:

Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.[167]

Generally, mediation can be divided into two main categories: commercial and non-commercial mediation. This chapter will only address the matters related to commercial mediators. The term 'commercial' encompasses different forms of business and economic activity, including commerce and trade, taxation, bankruptcy and takeovers.[168] UNCITRAL issued a supplementary guide to

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166 Examples of Commonwealth legislations: Civil Law (Wrongs) Act 2002; ACT Civil and Administrative Tribunal Act 2008.

167 NADRAC, 'Alternative Dispute Resolution Definitions' (1997) 5.

168 Boulle, *Mediation: Principles, Process, Practice* (n 165) 359.

explain what is meant by 'commercial' in its Model Law on Commercial Conciliation:

> The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.[169]

Non-commercial mediation includes industry relations, customer complaints, employment, personal injury, human rights and family issues. These issues are outside the scope of this chapter and will therefore not be addressed.

(b) Six objectives of mediation

The objectives of mediation can be broadly categorised into qualitative and quantitative mediation. Six objectives can be identified when the mediation scheme is closely examined. These are: efficiency, access to justice, self-determination of parties, transformation, social transformation, and social control.

[169] United Nations, 'UNCITRAL Model Law on Commercial Conciliation with Guide to Enactment and Use 2002' (2004) art 1 (1).

Each will be discussed in turn. Efficiency is one of the most apparent goals of many mediation programmes. An efficient mediation programme would lead to:

> …the reduction of court waiting lists, the workload of the judiciary, costs to disputants, cost to the state-sponsored judicial system, and the time involved for all participants in resolving disputes. An efficient dispute resolution system would allow non-mediable matters speedier and therefore more affordable access to the courts.[170]

Access to justice involves empowering parties to overcome economic, organisational and procedural obstacles to justice, though some may argue that 'mediation does not provide the procedural safeguards of a court where an imbalance in bargaining power exists between the parties'.[171]

Mediation allows for self-determination of the parties. It provides a facilitative forum by encouraging the parties to generate possible options by identifying their own needs and interests. Self-determination of the parties maximises fulfilment of corresponding interests and ultimately creates a mutually acceptable outcome.

There seems to be an overlap between the objectives of 'transformation' and 'self-determination of the parties'. The major difference is that the former objective is not focused on the individual interests but rather on the relationship between the

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170 Alexander, *Global Trends in Mediation* (n 163) 10.

171 ibid.

parties. In other words, 'the aim is to develop a shared perception of their relationship, which will lead to changes in how they interact with each other'.[172]

The social transformation of the disputing culture of a community involves restoring the 'ownership and responsibility for conflict management to the community rather than allowing conflicts among community members to be determined by outsiders such as the courts'.[173]

> By keeping the management of conflict out of the public domain and beyond the protective shadow of the rule of law, industries, institutions and organisations representing 'repeat player' business may use mediation to promote their own interests without the influence of external social, moral, cultural and legal norms, and public scrutiny.[174]

(c) Traditional court-annexed mediation

Most Courts in Australia are empowered by legislation and rules granting judges or an officer of the Court, to refer matters to mediators at any time during the litigation process, with or without the consent of the parties. This is referred as 'Court-annexed' or 'Court referred' mediation.

'Court annexed mediation began in Australia in 1983, when the Victorian County Court Building cases List made provisions for matters to be referred to mediators

172 ibid 11.
173 ibid.
174 ibid.

for the resolution of cases'.[175] The objective is to deliver efficient service in terms of dispute settlement (an example of quantitative justice), and to empower the disputants to manage their own conflict (an example of qualitative justice).[176]

The court-annexed mediation in Australia exists in various forms at federal, state and local levels.[177] It can be mandatory as well as voluntary. Depending on the jurisdiction, mediators can include court personnel such as registrars or other employee's trained as mediator, or private's mediators' registered on a court mediation panel. The costs associated with mediation are borne by the court.

Boulle identifies four forms of court-connected mediation in practice in Australia.[178] First one is the informal referral to mediation where the court encourages the parties to mediate their dispute in the absence of formal regulation. Second is the formal referral to mediation according to legislation where (a) the court considers the matter suitable for mediation, and (b) the parties to agree to mediate. This form of court-connected mediation can be found in the Federal Court of Australia and some New South Wales courts. The third one is the formal referral to mediation according to legislation where the court considers the matter suitable for mediation. However, parties may find themselves at the mediation table against their wishes. This form of court- connected mediation can be found in Queensland, Victorian and Western Australian courts.

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175 John North, 'Court Annexed Mediation in Australia - an Overview' (Malaysian Law Conference, 17 November 2005) <www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/speeches/20051117CourtAnnexedMediationinAustralia.pdf > accessed 8 July 2016.

176 Alexander, *Global Trends in Mediation* (n 163) 9.

177 B Sordo, 'Australian Mediation Initiatives to Resolve Matters Awaiting Trial' (1994) 5 ADR Journal 62.

178 Boulle, *Mediation: Principles, Process, Practice* (n 165) 188-192.

The last one is the formal routine referral to mediation according to legislation. This form of court-annexed mediation envisages a referral to mediation without consideration of the suitability of the disputes or the attitude of the parties towards mediation. Variations of this form of court-annexed mediation can be found in the family law jurisdiction, the Administrative Appeals Tribunal (AAT)[179] and more recently in South Australian Magistrates Court.[180]

(d) Modern forms of mediation models

Other than the traditional court-annexed mediation, nowadays four conceptual models of mediation are interchangeably practiced in Australia. They constitute archetypical models in that they are not always identifiable in mediation's operation but are rather ways of conceptualising the different tendencies encountered in practice. Two or more of the archetypical models can be seen in one mediation, for example, employment mediation may start with facilitative mode, but ends up with the settlement or evaluative model.[181]

Settlement mediation

Settlement mediation is also known as compromise or distributive mediation. The mediator (normally barrister or manager) would encourage incremental bargaining power between the parties and ultimately move the parties to points of compromise which is close to the mid-point between parties' original positional

179 Administrative Appeals Tribunal Amendment Act 1975 (Cth), s 34 (A).

180 Andrew Cannon, 'Lower Court Pre-lodgement Notices to Encourage ADR' (2000) 2 (9) ADR Bulletin 1.

181 Boulle, *Mediation: Principles, Process, Practice* (n 165) 43.

demands. Commercial, personal injury, insurance and industrial disputes are examples of when this mediation model tends to be applied.[182]

Facilitative mediation

Facilitative mediation is a rational-analytic mediation and aims to problem-solve. The mediator (mostly expert in mediation skill and technique) would encourage the parties to communicate and make their own decisions more effectively based on the parties' personal / commercial interest instead of their legal rights / duties. This model has been increasingly used in community, family, workplace, organisational, environmental and partnership disputes.[183] However, this interest-based approach is not suitable where 'there are imbalances of power, unless special safeguards are put in place, as it requires parties to be competent to negotiate and to co-operate'.[184]

Transformative mediation

Transformative mediation is a kind of therapeutic mediation. The emphasis is not on problem-solving but on the nature of the process itself. The mediator (usually psychologist or expert in counselling) would tackle the underlying causes of the parties' dispute, with the aim to improve their relationship through recognition and empowerment, even at the expense of no settlement. This model is popular in

182 ibid 44-45.

183 ibid.

184 Bagshaw and Porter (n 160) 19.

matrimonial, parent and adolescent, family networks, and continuing relationship disputes.[185]

Evaluative mediation

Evaluative Mediation is similar to advisory and normative mediation. The mediator (normally the expert in substantive areas of the dispute) would advise and persuade the parties, based on his professional expertise provided, to reach a settlement according to the legal rights or entitlements of the parties, and within the anticipated range of court, tribunal or industry outcomes. This model is common in commercial, personal injury, trade practices, matrimonial property, and anti-discrimination disputes.[186]

At first, the facilitative model was practiced in mediation, especially in the community and family domains. However, this has been changing in the last two decades. The institutionalisation and legalisation of mediation have produced seismic shifts from facilitative to evaluative and settlement mediation, despite it being difficult to teach the latter and to accommodate it within the National Mediation Accreditation Standards. [187]

Cases suitable for mediation

All cases are suitable for mediation, regardless of their complexity or number of parties. 'The types of matter commonly mediated at the Federal Court include

185 Boulle, *Mediation: Principles, Process, Practice* (n 165) 44-45.

186 ibid.

187 ibid 400.

corporation law, intellectual property, industrial law, consumer law, human rights, admiralty, tax and costs'.[188]

Five elements need to be considered when determining whether to refer a case to mediation:

(1) The parties' willingness to participate in mediation;

(2) The possibility that a judge's decision will not end the dispute;

(3) The parties' desire to keep their relationship

(4) The existence of non-monetary factors; and

(5) The potential of a negotiated outcome that better suits the needs and interests of the parties than a judge's decision

It has been widely accepted that mediation does offer more benefits than a trial, including:

(1) A dispute can be resolved more quickly through mediation than through the court

(2) The cost is lower if a dispute can be resolved through mediation, additionally, the failed party is normally responsible for the legal costs of the successful party

(3) Mediation is less formal and less intimidating than appearing in court

[188] Federal Court of Australia, 'Mediation' <www.fedcourt.gov.au/case-management-services/ADR/mediation> accessed 8 July 2016.

(4) Mediation is private, confidentiality prevails, details during the process would not be revealed to the public without the parties' consent or special court order

(5) Higher satisfaction to the parties as they decide and agree on the outcome of the dispute

(6) Settlement agreement should be final unless the parties agree to modify

No wonder there has been an increasing use of mediation as a means of settling disputes compared to trial litigation over the last two decades.

2.1.3. Growth of international mediation

Apart from the rapid growth in using mediation to settle disputes domestically, 'there have been indications of the increasing use of mediation in cross-border commercial disputation, some commentators contending it is the fastest growing dispute resolution system in this area'.[189] Traditionally it is more common to use arbitration for settling cross-border disputes 'because of the treaty-based provision for enforcement of awards across jurisdictions'.[190]

Australia is a signatory to a number of these treaties, the significant ones are:

(1) As a founder member of the United Nation Organisation:

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189 Boulle, *Mediation: Principles, Process, Practice* (n 165) 390.

190 ibid.

> Australia is a signatory to the United Nations Charter which provides for the use of negotiation, mediation, conciliation and arbitration for dealing with threats to international peace and confers on the Security Council overriding in this area.[191]

(2) Australia was a foundation signatory to the 1947 General Agreement on Tariffs and Trade and subsequently to all the 'covered agreements' of the World Trade Organisation (WTO). 'One of the WTO agreements is the Dispute Settlement Understanding which deals with claims that a country's law or practices are in breach of trade obligations'.[192]

(3) 'Australia is a member of the International Convention on the Settlement of Investment Disputes which regulates disputes between foreign investors and host countries'.[193] In early 2010, the United Nations Committee on Trade and Development (UNCTAD) produced a report which spelt out the scenarios in which mediation could be used in disputes under this convention.

(4) 'Australia is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (NY Convention) which provides for the direct enforcement of awards'[194] made in member countries. While there is no comparable treaty for cross-border enforcement of mediated settlements, it has been shown that Med-Arbs can also attract the benefits of this Convention.

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191 ibid 391.

192 ibid.

193 ibid 392.

194 ibid.

(5) 'The UNCITRAL Model Law on International Commercial Conciliation provides a legal framework for mediation in cross-border disputes. Australia is one the several countries which have given effect to the Model Law, as it has to UNCITRAL's Model Law on Commercial Arbitration'.[195]

Like arbitration, international mediation can take place in an 'ad-hoc' manner or on an 'institutional' basis. Very often the process of international mediation would not stand alone but is combined with arbitration to become the Med-Arbs in order to enjoy cross-border enforcement that is afforded to arbitration awards.

2.1.4. The institutionalisation of mediation

> A major theme in Australian mediation development is that of gradual institutionalisation over time.[196] Institutionalisation refers to 'mediation's shift from an unregulated existence on the margins of formal societal systems towards more mainstream, organised and regulated forms of practice'.[197]

The prevalence of mandatory mediation, the structural relationships between courts and mediation and the expanding role of judges in dispute resolution activities have all contributed to this gradual change. The traditional legal culture had influenced certain aspects of mediation practice; rendering it at times adversarial, legalistic and evaluative. At the same time, mediation and other ADR

195 ibid 393.
196 ibid 395.
197 ibid 395.

processes have also influenced and modified the conventional features of the legal culture.

Currently, there is no comprehensive legislative framework for ADR. However, there is legislation in different states within Australia that address specific aspects of ADR. For example, the Federal Court of Australia Act 1976 includes provisions in relation to mediation and arbitration, whilst the Mediation Act 1997 covers mediation services. In November 2006 NADRAC 'released a guide titled 'Legislating for alternative dispute resolution' to address key issues, including 'referral' to ADR, confidentiality and admissibility of ADR communications, and immunity of ADR practitioners'.[198]

Both benefits and drawbacks are found in institutionalisation in the development of mediation. It has been beneficial in terms of the promotion and understanding of the mediation process, in providing economies of scale, and in facilitating standard-setting, training and education, and systems of quality and accountability. The drawbacks are the loss of flexibility, informality and self-determination. 'There is also concern that institutionalisation results in quantitative factors of efficiency trumping qualitative factors of effectiveness in evaluation survey of mediation practice'.[199]

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198 NADRAC, 'Dispute Resolution Terms: the Use of Terms in (Alternative) Dispute Resolution' (2003) <www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Legislating%20for%20Alternative%20Dispute%20Resolution.PDF> accessed 8 July 2016.

199 Boulle, *Mediation: Principles, Process, Practice* (n 165) 396.

2.1.5. Evidence of increasing use of ADR processes within the litigation system

Most disputes in Australia are in fact resolved before entry into the litigation system. Once within the litigation system, the traditional trial processes account for the determination of a relatively small number of disputes, most of which are resolved by the use of mediation processes. The parties are not obligated to reveal to the court or tribunal that they have opted to use mediation to resolve these disputes. The parties can simply seek their own private mediator and notify the court after the dispute has been settled.

The issue of whether parties should be referred to the ADR processes has been very controversial since 1980. But it was no longer regarded as an issue after the case *Idoport Pty Ltd v National Australia Bank Ltd & 8 Ors*[200] where Justice Einstein referred to recent amendments in the rules of the Supreme Court of New South Wales that allowed for the referral of matters to mediation without consent, and noted that:

> ….no doubt it is true to say that at least some people, perhaps many people compelled to mediate will not approach the process in a frame of mind likely to lead to a successful mediation. There is, however, a substantial body of opinion albeit not unanimous that some persons who do not agree to mediate, or who express a

[200] *Idoport Pty Ltd v National Australia Bank* [2001] NSWSC 427.

> reluctance to do so, nevertheless participate in the process often leading to a successful resolution of the dispute.
>
> I am advised that in Victoria no difference in success rates or user satisfaction between compulsory and non-compulsory mediation has been noted. Not all research or anecdotal evidence is to this effect.
>
> It appears that, perhaps as a matter of tactics, neither the parties nor their legal representatives in a hard-fought dispute are willing to suggest mediation or even to indicate that they are prepared to contemplate it. No doubt this could be seen as a sign of weakness. Nevertheless, the parties are content to take part in the mediation conference if directed to do so by a Judge.

There is a category of disputants who are reluctant starter, but who become willing participants. It is that category that the new power is directed.[201]

In *Browning v Crowley*,[202] Bryson J described the benefits of compulsory mediation as follows:

> A number of factors have suggested to me that the Court ought to decide in favor of compulsory mediation. One group of factors relates to the complexity of the issues, the amount of costs likely to be incurred, the amount of time of the Court (at the expense of the public) which is likely to be engaged, the burden of costs and also

201 Alexander, *Global Trends in Mediation* (n 163) 39.

202 *Browning v Crowley* [2004] NSWSC 128.

> the burden of personal attendances on the parties associated with the contemplated hearing. While the expense of mediation cannot be disregarded, and there is a clear prospect that it may be incurred without result, it is relatively small in relation to what the parties are likely to be embarking on if the case goes to hearing. Experience favors mediation in cases arising out of long-standing personal relationships [……]
>
> Even in cases where, as in this case, there is a large gulf between the parties' positions, which are clearly defined in a way which does not seem to allow for compromise, experienced [sic] teaches that mediators have a recognizably significant number of cases produced results with which the parties are prepared to agree. I have a general view that there is a public interest in relatively peaceable resolution conflicts. [203]

According to last year's Supreme Court statistics, it showed that approximately 97% of matters are resolved before the trial and that the mediation process is the central contributor to such a high success rate.

(a) The rise of dispute resolution bodies

NADRAC has reported that in 2001 there were 114 organisations in Australia involved in providing or formally referring parties to ADR services (and this did not include sole practitioners). The trend is still on the rise.

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[203] ibid [5]-[6].

In this chapter, nine ADR service providers are selected for further discussion. They are the most influential organisations in the development of mediation in Australia:

(1) Australian Commercial Disputes Centre (ACDC)

(2) Australian Mediation Association (AMA)

(3) Chartered Institute of Arbitrators (CIArb) Australia

(4) Dispute Resolution Centre – Bond University

(5) Dispute Resolution Branch, Queensland Department of Justice and Attorney-General (DRB)

(6) Dispute Settlement Centre of Victoria (DSCV)

(7) Institute of Arbitrators & Mediators Australia (IAMA)

(8) LEADR – Association of Dispute Resolvers (LEADR)

(9) National Alternative Dispute Resolution Advisory Council (NADRAC)

These are either industrial, government or private organisations which have developed their own dispute resolution processes and systems to encourage the settlement of disputes outside the courts and tribunals.

(b) Mediation process

The process of mediation will be dependent upon how mediation is triggered. Mediation can be triggered in three ways:

(1) A court or tribunal

(2) A contract

(3) An agreement to mediate

Court or tribunal ordered mediation process

As pointed out above, most courts would require the litigation matters to be referred to mediation before the case goes to hearing. List of mediators are provided by the courts for the parties to choose. If no settlement is arrived after the mediation, the matter will in all likelihood revert back to the court for determination. Costs will normally be borne by both parties on 50/50 basis. But in some jurisdictions like the Victorian Civil and Administrative Tribunal (VCAT) costs will be taken up by the court or tribunal.

Contract induced mediation process

In order for the parties to settle the dispute through mediation, there must be a clause in the contract that states when a dispute arises from the contract or any matter of contractual bearing the parties must go to mediation. A well drafted mediation clause in the contract would help erase ambiguities and thus speed up the mediation process. The magic clause should at least contain the following:

> *Any dispute, controversy, or claim arising out of or in connection with this contract, including any question regarding its existence, validity, or termination shall be finally resolved by mediation under the rules of ……*

Similar to court ordered mediation, costs will be equally split between the parties normally. The contract should specify the terms of settlement if resolution of the dispute is achieved through mediation. The terms of settlement must be in writing and co-signed by the parties. They are binding on the parties and override the terms of the original contract if there is any conflict. Either party may commence legal proceedings in case mediation fails.

Mediation by agreement

Any party to any dispute may at any time agree to mediate. The mediation agreement is the basis for the parties to commence mediation proceedings, after which the parties need to appoint a mediator in order to begin the process.. The agreement must be comprehensive and non-challengeable. It should embrace all matters that gave rise to the dispute.

Enforceability may be in question if the dispute is settled outside the auspices of the court or a tribunal. It is prudent to have lawyers present if the mediation is initiated by contract or by agreement, so that the lawyers can advise on the terms of the mediated settlement and the consequence of unsettled claims.

No matter which method detailed above triggers mediation, the procedures carried out after would be more or less the same to an extent.

2.1.6. The professional requirement of mediators

With the trend in settling disputes by mediation, mediators are not necessarily judges, or lawyers as required in the olden days. More professionals and

experienced practitioners in disputes relating to their field have been invited to conduct mediation in recent years. There was formerly debate as to whether prospective mediators required education and training in mediation skills and procedures. But there was a continuous outcry for improving the quality and standard of the mediators from the repeat users.

(a) National Mediator Accreditation System

While there was no national educational standard for all mediators, there were many training systems designed by various dispute resolution bodies, to train their own mediators, with a primary focus on 'elementary training' and 'continuing professional development'.

Mediation in Australia has turned a significant corner with the inception of the NMAS in 2008. The Scheme introduces Recognised Mediator Accreditation Bodies (RMABs), these are self-identified organisations that assume the responsibility for accrediting mediators under the NMAS. One of the functions of RMABs is to ensure that the mediators (prospective and qualified) fulfil the requirements as set out under the Scheme.

(b) The Australian Standard

As the development of mediation in Australia illustrates, there has been a shift of focus away from industrial resolution processes to a more communication based method in handling disputes within the business sector. Clear evidence in relation to this shift arose when Standards Australia formulated standards to be applied for

the purpose of prevention, handling and resolution of disputes.[204] The Standards are directed at improving existing approaches and practices in respect of all external disputes.

> In the Standards 'dispute prevention' refers to measures used to build and maintain relationships in order to prevent problems from developing into disputes. These measures include contractual arrangements, cultural changes, negotiations and partnering arrangements.[205]

Section 2 of the originating Standard outlines the essential principles for maintaining good working relationships. The use of ADR processes is also explored.

(c) The Australian Competition and Consumer Commission

At the federal level, benchmark and codes have been developed. For example, 'the Minister for Customs and Consumer Affairs has released benchmarks for industry-based customer dispute resolution schemes to guide industry in developing and improving dispute resolution schemes'.[206] The Australian Competition and Consumer Commission (ACCC) also published guidelines to assist the business community, especially the small business sector, to adopt benchmarks for dispute avoidance. 'The guidelines aim to embed dispute avoidance practices in everyday operation, encourage the use of ADR processes

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204 *Australian Standard – Guide to the Prevention, Handling and Resolution of Disputes AS 4608-1999* (Standards Australia, Sydney 1999).

205 Alexander, *Global Trends in Mediation* (n 163) 50.

206 ibid 51.

(with a particular focus on mediation) and assist to develop the benchmarks for dispute avoidance and dispute resolution'.[207] To make it comprehensive, the characteristics of a conflict adverse company are also included.

(d) Codes of Conduct

While there is no binding and comprehensive national mediator code, many organisations have developed their own codes of conduct. These include professional bodies, such as the Law Societies in South Australia and Western Australia and private service-providers such as ACDC, IAMA and LEADR. 'Generally, however, courts have not been active in developing codes of conduct for court-connected mediation despite the fact that they have been strongly recommended where mediation is mandated by legislation, courts or tribunals.'[208] Assuming that the birth of contemporary mediation in Australia occurred during the 1990s, a slow movement towards the development of competency standards, codes of conduct and ethical obligations has emerged in many areas of mediation practice since then.[209]

2.1.7. Legislation on mediation

All States and Territories and the Commonwealth in Australia have legislation that applies to specific areas of disputes, or to particular dispute resolution forums such as courts and tribunals. The steadily increasing number of mediations as means of dispute resolution raises concerns about the need for legislative

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207 ibid.

208 Boulle, *Mediation: Principles, Process, Practice* (n 165) 467.

209 Laurence Boulle, 'Minding the Gaps- Reflecting on the Story of Australian Mediation' (1999) 11 (2) Bond Law Review 217, 229.

provisions that clarify the legal status of mediators and further the objectives of mediation by protecting the integrity of the process in other ways.[210] Two broad types of provisions in legislation can be categorised: regulatory and beneficial legislation.

Regulatory legislation regulates the practice of mediation by mediators. It establishes standards of competency (minimum qualifications) and an approval process for registration. Beneficial legislation supports the mediation process by clarifying the rights, obligations and protection of parties to mediation, mediators and to a limited extent, third parties to the mediation.

2.1.8. Mediation Act 1997

Australia is one of two only jurisdictions in the Asia Pacific Region that has a mediation law,[211] (the other being Hong Kong)[212] known as Mediation Act 1997, that governs the general application of mediation in practice. The Act's primary purpose is to establish a system of registration by an approved agency, together with the standards of competency to be met. It covers both the regulatory and beneficial provisions.

Regulatory provisions include:

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210 Robyn Carroll, 'Developments in Mediation Legislation' (2002) 5 (Number 5 ADR in Western Australia) ADR Bulletin 2.

211 Following a working group's recommendation, a Mediation Ordinance was passed in Hong Kong on 1 January 2013 which provides a regulatory framework in respect of certain aspects of the conduct of mediation within the jurisdiction of Hong Kong.

212 Hong Kong Mediation Ordinance (Cap 620) <www.doj.gov.hk/eng/public/pdf/2013/cape.pdf> accessed 8 July 2016.

(1) Section 4 on competency standards

(2) Section 5, 6, 7 & 8 on registration of mediators

Beneficial provisions include:

(1) Section 9 on admissibility of evidence

(2) Section 11 on protection from defamation

(3) Section 12 on protection of mediators (same immunity as a judge of the Supreme Court)

Registration is granted under the Act to a mediator who has satisfied the necessary requirements of the 'approved agency' but the Act does not prohibit the unregistered mediator to practice mediation. Therefore, legally one does not have to be licensed in order to advertise oneself as a mediator.

Mediators are also bound to not disclose information obtained from a mediation session other than in exceptional situations. There has been 'competing desire to protect the integrity of the process by upholding confidentiality while ensuring appropriate levels of mediator accountability'.[213] However, concerns have been expressed by the Aboriginal ADR Service about the difficulties with confidentiality in resolving disputes involving Aboriginal communities and the uncertain legal status of their mediators. In Australia, different states have different practices in mediation proceedings.

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213 Carroll (n 210) 3.

The imbalance between confidentiality, immunity, and the inconsistency with mediation proceedings urged the Government to introduce uniform provisions in relation to mediator qualifications, authorisation of mandatory mediation, standards for mediators, and to standardise the mediation proceedings across the country.

2.2. ACCREDITATION

2.2.1. Introduction to accreditation

In Australia it is not a legal requirement for one to attain accreditation or qualification in order to practice as a mediator.[214] What that means is that anyone who wishes to mediate a dispute could technically freely advertise and do so.

For commercial mediators who wish to receive referrals at a sustainable level, this may not be a viable option. Even if an individual's reputation in the industry is highly regarded, mediation is about facilitating parties to negotiate with each other to settle their dispute and not for an individual to provide a judgment for the parties. In order to instil this confidence in parties that a mediator would be able to achieve this, the mediator would need credibility. And this is one of the reasons to become accredited.

There are two situations whereby one must become accredited before they may practice as a mediator:

(1) Some organisations require that their mediators have certain qualifications before they will hire those mediators.

(2) If a mediator wants to advertise with the words 'Nationally accredited mediator', he/she must first attend a highly regulated 38 hour course, plus a very specific competency based

[214] Bond University, 'Accreditation as a Mediator in Australia' <http://bond.edu.au/about-bond/academia/faculty-law/dispute-resolution-centre/dispute-resolution-centre-accreditation > accessed 8 July 2016.

> performance assessment and role play before a nationally accredited coach; and register successfully with a 'Recognised Mediator Accreditation Body' (RMAB) in Australia.[215]

In this section of the chapter, background information into becoming a nationally accredited mediator will be explained. The history will be followed by in-depth analysis into the system, its anomalies and whether the national standard system is sufficient.

2.2.2. Defining 'Accreditation'

According to the Oxford dictionary, in layman terms the word 'accreditation' indicates a body that 'gives authority or sanction to (someone or something) when recognised standards have been met'.[216] Laurence Boulle provides insight to accreditation in the context of mediation in Australia as, '"accreditation" is used where an occupational group, professional association or public authority provides formal recognition that individuals have successfully satisfied prescribed requirements to attain the relevant occupational or professional status'.[217]

To become a commercial mediator, one would have to comply with the training and requirements of recognised accreditation bodies. The bodies that have the authority to accredit mediators mentioned in Boulle's definition above, are known as the RMABs that are approved by the Mediator Standards Board (MSB).

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215 ibid.

216 Oxford Dictionary, 'Accreditation' <www.oxforddictionaries.com/definition/English/accredit?q=accreditation#accredit_6> accessed 8 July 2016.

217 Boulle, *Mediation: Principles, Process, Practice* (n 165) 487.

The RMAB and MSB are connected to the NMAS that was implemented in 2008 to promote a uniform national standard for mediators in Australia. In this sense, the role of the MSB is, '[t]he MSB is responsible for development of mediator standards and the implementation of the NMAS'.[218] The NMAS spells out the minimum level of standards of training and assessment in order for one to become a nationally recognised mediator. There are two fundamental elements to become accredited under NMAS, that is: 'fulfilling the requirements of NMAS, and complying with a uniform Code of Practice'.[219]

However, it is important to note that the national regime is voluntary and not mandatory. That means, there are alternative avenues to become an accredited mediator. Therefore the bodies that listed as recognised RMAB's is not an exhaustive list, and there are other bodies that are not registered as RMAB's but have the power to accredit mediators.

This section of the chapter will seek to explain and elaborate the various ways that one can become an accredited mediator in Australia.

2.2.3. The road to NMAS

The development of mediation and subsequently the implementation of a national accreditation system is a by and large consistent with the purpose of the Federal Civil Justice System reforms that commenced in 1995.

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218 Mediator Standards Board, 'About Us' <www.msb.org.au/about-us> accessed 8 July 2016.

219 Mandy Zhang, 'To Certify, or Not to Certify: A Comparison of Australia and the US in Achieving National Mediator Certification' (2008) 8 (2) Pepperdine Dispute Resolution Law Journal 307, 312.

In November 1995, 'after concerns that Australian legal proceedings were becoming excessively adversarial and that this was having a damaging effect on the delivery of justice',[220] an inquiry was launched into what factors should be taken into consideration to facilitate a 'simpler, cheaper and more accessible legal system'[221] in Australia.

The whole legal system was opened to review with a common goal towards enhancing efficiency of the previous regime, among which ADR was also a focus of the Australia Law Reform Commission.

Access to Justice – An Action Plan was a report published in 1994 by the Access to Justice Advisory Committee (AJAC) that was chaired by Hon Justice Ronald Sackville.[222] In the report, ADR methods were acknowledged to be the increasingly preferred method for resolving disputes in comparison to expensive and time consuming methods such as litigation. In light of this demand, the committee was of the view 'that governments have a special responsibility for the quality, integrity and accountability of the ADR processes provided by their courts and tribunals [and indeed] to all ADR programs funded by the government'.[223]

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220 Australian Law Reform Commission, 'Review of the Federal Civil Justice System' (Australian Government, 24 January 2011) <www.alrc.gov.au/inquiries/federal-civil-justice-system> accessed 8 July 2016.

221 ibid.

222 MSB, 'National Mediator Accreditation System (NMAS) – A History of the Development of the Standards' <www.msb.org.au/sites/default/files/documents/A%20History%20of%20the%20Development%20of%20the%20Standards.pdf> accessed 8 July 2016.

223 ibid.

Consequently, the NADRAC was established in October 1995 as a specialist ADR body to facilitate the 1994 report's agenda. NADRAC is an independent advisory body for the Australian Attorney-General. Their role is to monitor the development of ADR in Australia, and to suggest as well as promote issues to the Attorney-General for further improvement.

One of the primary purposes for establishing NADRAC is 'to advise the Government and the courts and tribunals on ADR policy issues including minimum standards for their ADR programs' and '…on the merits of establishing national database…containing information about programs, agencies, practitioners and training'.[224] Furthermore NADRAC is to provide policy advice 'on the development of ways…including providing coordinated and consistent advice on achieving and maintaining a high quality, accessible, integrated Commonwealth ADR system'.[225]

Therefore since NADRAC's inception, what can be interpreted is that there was already the foresight to streamline mediation qualifications and provide a framework for the construction of MSB. The matter of accreditation would fall within the broad purpose of NADRAC. This is inevitable if the ADR system was to provide 'coordinated and consistent advice'. Moreover, a uniform accreditation system would help to achieve the high quality and accessibility to ADR services that is sought.

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224 ibid.

225 ibid.

A year after its establishment, these themes were consolidated in NADRAC's 1996-1997 annual report whereby it states:

> [T]he issues on which NADRAC will advise will include…minimum training and qualification requirements for alternative dispute resolution practitioners, including the need, if any, for registration and accreditation of practitioners and dispute resolution organisations…[226]

Further, the 1996-1997 report recognised ADR services:

> [P]articularly mediation services, continue to grow at a phenomenal rate and are becoming an increasingly important feature of the Australian justice system...increasingly also, in the commercial area, the influence of ADR is extending beyond the handling of individual disputes to areas such as contract formation, management policy, industry self-regulation and long term business relationships.[227]

It is important to emphasise that NADRAC did not intend to develop a uniform accreditation system in the sense that it would be mandatory. That is if one were to obtain accreditation from alternative professional bodies, their qualification would still be equivalent to a mediator that was accredited to national standards.

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226 NADRAC, *Annual Report 1996-1997* (Canberra) <www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/1996-1997%20Annual%20Report.pdf > accessed 8 July 2016.

227 ibid.

This point was highlighted and published by NADRAC in 2001.[228] The report[229] recognises that mediation in particular is very important for commercial dispute resolution. In such cases, private organisations and individuals are the most common avenues for provision of mediation services.[230]

The report further explains the need to balance between accredited mediators who 'need to be competent to conduct the ADR process', yet 'the knowledge and skills required vary according to the context in which it is delivered'. Boulle helps to explain that there needs to be a system in place that preserves the diversity of practice, 'in light of the diversity principle NADRAC recommended that there should not be a single pathway for accreditation and that the need for and nature of accreditation…should be determined on a sector-by-sector basis'.[231]

In particular, 'the diversity of ADR suggests that service providers need to develop their own standards which take into account the context of service provision'.[232]

Following the launch of the report, the Attorney General at the time, Hon Daryl Williams reinstated the need to strike the delicate balance and that 'the quality of ADR services is a critical component in building community confidence in

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228 NADRAC, 'Report to the Commonwealth Attorney-General: A Framework for ADR Standards' (2001) <www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Framework%20for%20ADR%20Standards%20Body%20of%20Report.pdf> accessed 8 July 2016.

229 ibid 38.

230 ibid 22.

231 Boulle, *Mediation: Principles, Process, Practice* (n 165) 492.

232 NADRAC, 'A Framework for ADR Standards' (n 228).

ADR'.[233] Signifying the importance of establishing some sort of nationally recognised accreditation scheme will enhance the legitimacy of mediation practice in Australia.

Things started to roll following NADRAC's 2004 publication, 'Who Says You're a Mediator? Towards a National System for Accrediting Mediators'.[234] The short paper sought to spark discussion in time for the 7th National Mediation Conference in Darwin on July 2 2004. Highlighting the need to remedy the scattered accreditation system that existed at the time: 'there is no overall system for accreditation in mediation. Rather there is a plethora of accreditation systems which use different benchmarks or standards'.[235]

By the 8th National Mediation Conference in May 2006, the proposals put forth thus far were well received and supported by stakeholders. Many of the proposals that were suggested during the draft stage were incorporated into the system as it is known today. For example, 'the accreditation system should be an optional arrangement and a self-regulatory model…the system should operate through existing bodies provided they satisfied threshold requirements and not through a new national infrastructure'. [236]

The implementation of the proposals was carried out by the appointed National Mediation Accreditation Committee (NMAC) that had the task of fully

233 MSB, 'NMAS – A History of the Development of the Standards' (n 222).

234 NADRAC, 'Who Says You're a Mediator? Towards a National System for Accrediting Mediators' (2004) <www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/who-says-youre-a-mediator.pdf> accessed 8 July 2016.

235 ibid 2.

236 Boulle, *Mediation: Principles, Process, Practice* (n 165) 495.

implementing NMAS and the MSB. Subsequently, two important documents that greatly govern the area of accreditation are now enshrined in the MSB Approval Standards and Practice Standards.

NADRAC was faced with a hefty responsibility in balancing the contradicting opinions that many had held:

> The consultation considered the appropriate balance among state regulation, market regulation and self-regulation by the mediation movement itself, with the second and third options prevailing. In addition the federal government provides financial and political support through the auspices of its advisory body, the National Alternative Dispute Resolution Advisory Council. The NMAS became operative in 2008.[237]

Though it has taken over ten years for Australia to establish and implement a newly refurbished nationally recognised mediation system, the progress has been one that is seen as inspiration for many other countries.[238] Moreover, in addition to the benefits of a structured mediation system mentioned above, one analyst points 'in Mediation much more than in other dispute resolution processes, the quality of the process depends heavily on the quality of the practitioner', and therefore 'the absence of any structure of procedural or substantive rules, in a

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237 Mary Hiscock and William Van Caenegem (eds), *The Internationalisation of Law: Legislating, Decision-Making, Practice and Education* (Edward Elgar 2010) 270.

238 Zhang (n 219) 312.

process conducted without direct public scrutiny, presents the real danger of harm from inept or unethical practitioners'.[239]

In this sense, the journey that Australia has taken to implement a streamlined mediation system is largely positive and successful. Though, it should be kept in mind that the final consolidation was officially completed in 2010, and hence there may still be issues that remain.

The rest of this chapter will look into what these issues may be, what requirements does one have to fulfil to become an accredited mediator according to national standards. This will be compared to the independent bodies that retain their own requirements in accrediting mediators.

2.2.4. Approval Standards

The NMAS Approval Standards specifies that it should be read in conjunction with the Practice Standards. NMAS has been quite thorough in that it ensures that the system does not function as a onetime licensing fee and after which the mediator would be free to practice in any way he/she prefers for an undetermined length of time. Under section 1(3) of the Approval Standards, it states that accreditation is contingent on the 'condition of ongoing approval', that is they

[239] Robert A Baruch Bush, 'The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications' (Washington DC National Institute for Dispute Resolution 1992) 3.

must continue to comply with the Practice Standards and also 'seek re-approval in accordance with these Approval Standards every two years'.[240]

There are two ways to become an accredited mediator as stipulated in the Approval Standards. The first method is to go through the training and be assessed competent by an RMAB,[241] this is analysed in section 3 of this chapter. The second method to become accredited is if one was found to be an 'experience qualified'.[242]

In regards to the first method, a prospective mediator must attend a training course and then be assessed to be competent by an RMAB. The Approval Standards state that 'it is not necessary for the RMAB to provide education and training… [it] may be provided by organisations other than RMABs, such as industry training providers, universities and other training providers'.[243]

The Approval Standards refers to the training requirements that must be complied with in order to become assessed in accordance with the correct standard in order to become ultimately accredited. Once again, the Approval Standards emphasises that the standards 'set out minimum voluntary accreditation requirements and recognise that some mediators who practise in particular areas, and/or with particular models, may choose to develop or comply with additional standards or

240 MSB, 'NMAS – Practice Standards' <www.msb.org.au/sites/default/files/documents/Practice%20Standards.pdf> accessed 8 July 2016.

241 ibid s 4.

242 MSB, 'NMAS Approval Standards' s 5(3)(a) and s 5(3)(b) <www.msb.org.au/sites/default/files/documents/Approval%20Standards.pdf> accessed 8 July 2016.

243 ibid s 4(1).

requirements'.[244] The purpose behind accreditation remains in line with the spirit of mediation that is to be voluntary. To achieve this, the standards are flexible. This is shown by the fact that it recognises diversity and understands that a fixed standard cannot be neatly applied to every scenario; this would not necessarily lead to the best outcome in every mediation case.

In addition, in order for a prospective mediator to become qualified, the RMAB also has to satisfy qualifying standards which can be found in section 3(6). It is made clear that 'an RMAB can be a professional body, a mediation agency or Centre, a Court or Tribunal or some other entity', as long as they possess the six characteristics listed under the section. For example, the RMAB must contain ten or more mediators accredited to NMAS' standard or that the RMAB must have a complaints system in place.

An 'experienced qualified' mediator on the other hand would be exempt from satisfying the requirements set out under sections 4, 5(1) and 5(2). An 'experienced qualified' mediator would still have to go through an RMAB and be deemed competent. Though, the 'experienced qualified' mediator would be exempt from formal education and training requirements mentioned above. There two scenarios under which a person could be considered 'experience qualified', he or she must:

(1) be resident in a linguistically and culturally diverse community for which specialised skills and knowledge are needed and/or from a

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244 ibid s 1.

> rural/or remote community where there is difficulty in attending a mediation course or attaining tertiary or similar qualifications; or
>
> (2) have worked as a mediator prior to 1 January 2008 and have experience, training and education that satisfies an RMAB that the mediator is equipped with the skills, knowledge and understandings set out in the core competencies referred to in the Practice Standards, and who has met the continuing accreditation requirements set out in Section 6 below in the 24 months prior to making an application.[245]

In a September 2007 *Commentary on Approval Standards* report led by Professor Tania Sourdin, pointed out the issues that could arise from the description of an 'experienced qualified' mediator. The IAMA had submitted their doubts on this matter:

> IAMA queries this exclusion on the grounds of discrimination: this para can be read as proposing that linguistically and culturally diverse or rural/remote communities do not need to have access to well-trained and properly accredited mediators.[246]

Despite this, the provision for 'experienced qualified' has remained the same in the final Approval Standards. It remains to be seen whether this could potentially cause any problems in the future as the qualifications for section 5(3)(a) is quite

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245 ibid s 5(3)(a) and s 5(3)(b).

246 Tania Sourdin, 'Commentary on Approval Standards' (Australian National Mediator Standards 2007) 19.

vague and guidance is not provided on what constitutes a 'linguistically and culturally diverse community' and 'rural/remote community'.

Whether one qualifies as a mediator through 'experienced qualified' or attending the relevant training courses, both avenues are equally subject to the 'Approval requirements for mediators'.[247]

Section 3 provides a list of personal qualifications which the mediator must possess to be accredited despite attending all the required training courses and assessment. Most in the list are straightforward, such as payment of registration fee to MSB. The registration fee is set annually; in 2012 this was set at A$100 including GST applicable for first time accreditation or re-accreditation for a two year period. Though, some accreditation bodies waive this fee. For example, the Australian Dispute Resolution Association (ADRA) states in its accreditation form that 'for ADRA Practitioner members there is no fee for national accreditation through LEADR'.[248]

Perhaps the requirement that attracts most contention is that to be accredited, the RMAB must be of the opinion that the prospective mediator is of 'good character'.[249] A wide discretion is granted to RMAB's under section 2 to determine whether a potential mediator is of good character, subject to the evidence provided to the RMAB from the applicant. The requirement takes into

247 MSB, 'NMAS Approval Standards' (n 242) s 3.

248 Australian Dispute Resolution Association, 'Application for ADRA Members for National Accreditation Through LEADR'.

249 MSB, 'NMAS Approval Standards' (n 242) s 3(1).

consideration the concerns that were voiced by the Law Society[250] stating that most who have entered the legal profession are already subject to providing proof of 'good character' therefore, it is unnecessary to duplicate existing requirements. As seen in the final, 'the revised Standards recognise that existing arrangements are in place and that duplication is not required'. Essentially, if a prospective mediation comes from a profession and has already fulfilled requirements as set out in section 3, they will not be required to prove it twice.

2.2.5. The benefit of NMAS

Mandy Zhang[251] helps to summarise five essential objectives that NADRAC had in mind when it commenced to produce a framework and structure for a uniform national mediation system. It had been the hopes that a national mediation system would:

> (1) improve mediator knowledge, skills and ethical standards; (2) promote quality in mediation; (3) protecting clients of mediation services by establishing a system of accountability; (4) giving recognition to mediators for their skills and expertise; (5) bringing more credibility and acceptance of mediation in Australia within the country and abroad.

250 Sourdin (n 246) 10.

251 Zhang (n 219) 311.

In an article that was published in the American Journal of Mediation, Conrad Daly[252] investigates the void that many mediators face in various countries due to the nature of the profession. He argues that with the increasing use of ADR by society, it becomes more important for 'its component parts must be readily definable and identifiable'.[253] Furthermore, giving legitimacy to mediation processes is especially highlighted as 'society will allocate such weight only in the instance that the given technique is esteemed to be legitimate'.[254] Accreditation is suggested, and rightly so, as the gateway to legitimising the mediation profession. Australia was singled out by the author as 'the most substantial governmental effort to address this apparent void'.[255]

Further to enhance legitimacy, the establishment of a NMAS provides an outlet for accountability. A mediator that breaches the Practice Standards or ethical codes now has a central procedural process for clients to voice their complaints. 'If accredited mediators fail to maintain the necessary CPD requirements, they will be automatically de-accredited from the NMAS. However, all mediators will be provided with an appeals process for any decision made by an RMAB.'[256] Boulle explains that the issue of accountability links into accreditation as one of the requirements enshrined in the Approval Standards is that applicants' relationship with an RMAB must have the 'appropriate and relevant ethical

252 Conrad C Daly, 'Accreditation: Mediation's Path to Professionalism' (2010) 4 American Journal of Mediation 39-44

253 ibid 40.

254 ibid.

255 ibid 44.

256 Zhang (n 219) 316.

requirements, complaints and disciplinary processes...'[257] Though, 'this is a relatively undeveloped aspect of the system',[258] and may be an area that should be expecting further refinement in the near future.

The benefits from implementing a NMAS has proved to be welcomed and beneficial for practitioners and clients alike, although during the drafting stages there were some institutions that submitted their comments against the implementation of a national standard. One example is the comments put forth by the Law Council of Australia ADR Committee (the Law Council) in August 2007. The Law Council was of the position that even though NMAS proposes to be voluntary, 'many lawyer mediators may need to comply with them if they become widely accepted,' and ultimately 'may effectively become mandatory'.[259] This was resonant in the Law Council's 2004 submission on the draft proposals whereby 'albeit a voluntary one, is that over time the national standard will become the lowest standard, as a consequence of accrediting bodies deciding not to bother to adopt a higher standard'.[260] This is a true concern as in NMAS's Approval and Practice Standards; they state that they provide the minimum standards to become an accredited mediator. However, as can be seen with the training programmes that are offered to prospective mediators, none go beyond what is minimally required. There are a few organisations that are exempted from

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257 MSB, 'NMAS Approval Standards' (n 242) s 3(1)(e).

258 Boulle, *Mediation: Principles, Process, Practice* (n 165) 496.

259 Law Council of Australia, 'Submission on Draft Accreditation Standards for Mediation, To Professor Tania Sourdin' (2007) 3-4 <www.lawcouncil.asn.au/FEDLIT/images/Draft_Accreditation_Standards_for_Mediation.pdf> accessed 8 July 2016.

260 Law Council of Australia, 'National Mediator Accreditation System: Draft Proposal for Public Consultation' (2004) <www.lawcouncil.asn.au/FEDLIT/images/National_Mediator_Accreditation_System.pdf> accessed 8 July 2016.

this, such as LEADR, who offers their own self-regulated accreditation system on top of NMAS.

2.2.6. Self-regulated accreditation systems

A point that has been repeated in almost every published piece relating to NMAS is that it is a voluntary. As mentioned above in Section 2.23, one of the important issues that was emphasised since the initial deliberations to implement a uniform accreditation system is to do with the balancing act of granting a qualification and recognising that knowledge and skills can vary greatly on a case-by-case basis in this field. Essentially, making the NMAS voluntary indicates that accreditation is not a licensing requirement, and opting out to become accredited by national standards does not mean an applicant would be barred to practice as a commercial mediator in Australia.

There are two types of organisations that continue to retain a self-regulation model for commercial mediation accreditation purpose despite the establishment of NMAS in 2008. The two types that will be discussed here are membership organisations and professional associations.[261] Membership organisations refer to organisations such as LEADR and ACDC. The former continues to retain its own self-regulated accreditation procedure in addition to offering the NMAS. The latter however, is similar to the majority of membership organisations who have chosen to integrate NMAS into their organisational model instead of retaining a

[261] Boulle, *Mediation: Principles, Process, Practice* (n 165) 488.

self-regulating model. Discussion on professional associations will be referring to 'law societies, bar associations and other professional bodies...'[262]

(a) Membership organisations

For the purposes of this discussion, the membership organisations that will be explored will focus on one of the most well known ADR providers in Australia: LEADR and IAMA. Though voluntary, most membership organisations have succumbed to the standards of NMAS. One of the few remaining membership organisations to still retain their own self-regulated accreditation standards is LEADR and IAMA.

As already mentioned, LEADR simultaneously offers applicants an option to become NMAS qualified or LEADR qualified. Under the LEADR accreditation scheme, the difference from NMAS is not substantial but instead it can be described as holding candidates to a higher standard compared to NMAS. The structure is by and large the same, as prospective mediators are required to attend training courses before assessment, to comply with a practice standard and procedure to maintain their mediator status.

Similar to NMAS, LEADR offers accreditation through training and education as well as 'experience qualified' accreditation. Though unlike NMAS, LEADR offers two levels of accreditation that are 'accreditation' and 'advanced accreditation'. Advanced accreditation requires that the applicant to have already completed the requirements set out under accreditation in addition to

[262] ibid 489.

demonstrating three years minimum of 250 hours of practice with written evaluations supporting their proficiency from at least 10 of the involved parties[263] 'or written assessments of high level competence by two supervisors, or assessment of high level competence by an independent assessor'.[264] Both methods require that the accredited mediator to comply with maintaining and continuing training.

The application form provided by LEADR is the same whether to be accredited by LEADR and NMAS. LEADR can be said to take the national standard higher. Under section 5(2) of the Approval Standards, it states that a mediator must demonstrate competence by assessment 'in at least one 1.5 hour simulation'. LEADR requires that in addition to completing a LEADR dispute resolution workshop or an equivalent training programme from a recognised institution, the prospective applicant must demonstrate his or her competency in a simulated 2 hour mediation that will be videotaped. This may be because 1.5 hour simulated mediation is usually reckoned to be a tight time frame, and therefore 2 hours will give the mediator applicant more time to exhibit their mediation skills.

The IAMA is another membership organisation that allows accreditation 'for either internal IAMA accreditation or accreditation under the NMAS'.[265] ACT Administrator for IAMA, Delice Stewart provides insight on what benefit comes from attaining internal accreditation over accreditation according to national

263 LEADR, 'Accreditation' <www.leadriama.org/accreditation/apply-for-leadr-and-leadr-advanced-accreditation> accessed 8 July 2016.

264 Boulle, *Mediation: Principles, Process, Practice* (n 165) 489.

265 IAMA, 'The Practitioner's Certificate in Mediation' (2008) 2 <www.iama.org.au/sites/default/files/Events/Training%20Informaion/ThePractitionersCertificateInMediationBrochure_2011_006.pdf> accessed 8 July 2016.

standards. She says that becoming accredited to NMAS standards will provide a mediator in Australia with more credibility, naturally as it is becoming the recognised standard. Though, the benefit of internal accreditation mainly filters down to the issue of fee. 'IAMA is a one off fee, whereas you have to pay an annual fee for NMAS,' says Stewart.[266]

A representative for LEADR helped to set clear the difference between becoming LEADR accredited and NMAS accredited. The representative explains[267] that the requirement for training towards LEADR and NMAS remain the same, that is a five day mediation course provided by LEADR or another recognised institution. Becoming LEADR qualified will come along with minute perks, such as a successful applicant will be given a mediator profile on the LEADR website and will therefore have a higher chance of receiving referrals. Whereas becoming NMAS accredited, you will be one of many that are listed as accredited mediators on the national registrar that NMAS has put in place. Another matter that was addressed has to do with the re-accreditation requirements. Technically, NMAS requires that a mediator become re-accredited every two years, whereas LEADR states on their website that re-accreditation happens every three years. However, practically it has been explained that NMAS is much more regulated in this regard, where every two years a mediator will have to fill out a form demonstrating they have fulfilled the minimal re-accreditation requirements as set out in the Approval Standards. This may prove difficult for some new mediators who cannot log at

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266 Interview with Delice Stewart, ACT IAMA Administrator, IAMA (Hong Kong, 23 October 2013).

267 Interview with representative for LEADR – Association of Dispute Resolvers (Hong Kong, 23 October 2013).

least 25 hours of mediation, co-mediation or conciliation.[268] Whereas LEADR explains that 'at the moment we don't follow up to make sure you have those requirements'.[269]

Overall, the split between NMAS and internal accreditation can largely be attributed to a transitional period since NMAS was officially implemented in 2008. There is the foresight for both membership organisations to harmonise NMAS and internal accreditation. It should be noted that membership organisations that continue to offer internal accreditation are of a minority as the majority of other membership organisations only offer NMAS accreditation. And the existence of internal accreditation is largely due to convenience from the perspective of membership organisations for prospective mediators while NMAS becomes more settled.

(b) Professional Associations

The Law Council of Australia ADR Committee (the Law Council) as already described above in Section 2.25, was against implementing a national accreditation system due to concerns that the NMAS draft proposals did not sufficiently take into consideration the nature of lawyer mediators. As a result, two models of mediation accreditation have given rise following implementation of NMAS in 2008. 'The first involving close integration with the national system and the second operating separately from that system'.[270] Many of the professional associations, such as law societies and bar associations have already

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268 MSB, 'NMAS Approval Standards' (n 242) s 6 (1)(a)(i).

269 LEADR – Association of Dispute Resolvers (n 267).

270 Boulle, *Mediation: Principles, Process, Practice* (n 165) 489.

integrated themselves with the national system. These would be listed by MSB as RMAB contacts.[271] Some of these are the Law Institute of Victoria (LIV), Law Society of Western Australia (LSWA), New South Wales Bar Association (NSWBA) and Queensland Bar Association to name a few. The LSWA, for example now pronounces on the website that they are a RMAB and therefore have the power to accredit applicants. Though, LSWA does not offer any training courses, only that they may receive applications and accredit prospective mediators.

Associations such as the NSWBA also adopted the integrated model but 'with addition of local professional requirements over and above those of the NMAS Approval standards'.[272] The additional requirements include 'at least 10 points of mediation experience over their careers and five years experience as a legal practitioner'.[273] Though, NSWBA acknowledges an alternative equally viable route if this requirement can't be met. For example, it continues to explain 'for those who do not meet these two requirements to be accredited by another organisation such as LEADR, IAMA or another mediation provider which offers courses that comply with the Standards'.[274] The 10 points of mediation experience is applicable to accreditation of 'new' mediators, and is a requirement

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271 MSB, 'RMAB Contact List' <www.msb.org.au/accreditation-bodies/rmab-contact-list> accessed 8 July 2016.

272 Boulle, *Mediation: Principles, Process, Practice* (n 165) 489.

273 NSWBA, 'Accreditation and Re-accreditation of Mediators in 2010' (2010) s 3 <www.nswbar.asn.au/circulars/2010/march/accreditation.pdf> accessed 8 July 2016.

274 ibid.

if the applicant wishes to be included on both the District Court and Supreme Court mediator panels.[275]

On the other end are professional associations such as the LIV who have decided to retain its own mediation accreditation arrangement. Under LIV, a mediator who meets LIV's requirements will become an 'accredited specialist in mediation'. What this means is that:

> [A] lawyer who is accredited as a specialist is recognised as having an enhanced skill level, as well as substantial involvement in established legal specialty areas...requires specialists to demonstrate superior knowledge, experience and proficiency in a particular area of law to ensure that recognition as an accredited specialist is meaningful and reliable.[276]

LIV has 'maintained a stand-alone arrangement with retention of its system of specialist accreditation for mediators, along the lines of those in other areas of practice specialty'.[277]

There are two parts in the assessment in order to become accredited under LIV, and candidates must satisfy each accordingly. First is the written assessment followed by a 1.5 hour simulated mediation assessment. The written examination is open book consisting of six questions relating to general areas of mediation

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275 ibid s 10(b).

276 LIV, 'Accredited Specialisation Application Guidelines 2015: Family Law' <www.liv.asn.au/PDF/Professional-Development/Accredited-Specialisation/Family-law/Family-Law-App-Guidelines.aspx> accessed 8 July 2016.

277 Boulle, *Mediation: Principles, Process, Practice* (n 165) 490.

such as: trends towards mandatory mediation and standards and ethics of mediations and the mediation process.[278] For the simulated mediation assessment, the competency requirements between NMAS' practice standards and LIV's assessment criteria are essentially the same. Though, NMAS does go into slightly more detail in what is expected under the umbrella terms of knowledge, skills and ethical understanding.

Besides passing assessment, the applicant must also show that he or she is eligible for accreditation. This includes:

> [M]embership of the Law Institute of Victoria, current practising certificate, at least 5 years experience in practice, substantial involvement in mediation over the past three years, participation in at least 10 mediations as a mediator, formal mediation training, three references in support of the application and successful completion of the prescribed assessment program.[279]

This threshold is clearly higher than the national standard, as the only main eligibility requirement is training, assessment and those approval requirements listed under s3 of the Approval Standards.

One of the reasons why LIV and similar professional associations choose to retain their own accreditation system may be due to some of the concerns voiced during

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278 LIV (n 276).

279 ibid.

comments at the draft proposal stage.[280] LIV submitted their comments in September 2007 where they highlighted the problem with the proposed criteria that qualifies an association or organisation as a RMAB. Under the Approval Standards, [281]a RMAB must have more than ten mediator members[282] and a 'complaints system that either meets Benchmarks for Industry-based Customer Dispute Resolution or be able to refer a complaint to a Scheme that has been established by Statute'.[283] In its commentary paper, LIV pointed out that:

> [T]he LIV notes that it would fall outside the RMAB's criteria...given that it does not maintain an internal complaints system in relation to solicitor mediators. Under the Legal Profession Act 2004, all complaints received about... practising solicitors that conduct mediations are to be referred to the Legal Services Commissioner. This situation also applies to the Victorian Bar.[284]

This creates a unique problem that is most obvious with professional bodies, mostly legal professional associations such as LIV. It is not that the body does not want to become integrated into the NMAS, but that as the rules have been set out and finalised – there is no room for associations such as LIV to fit into its requirements.

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280 Law Council of Australia (n 259)

281 MSB, 'NMAS Approval Standards' (n 242) s 3(6).

282 ibid s 3(6)(a).

283 ibid s 3(6)(c).

284 Letter from Geoffrey Provis to Professor Tania Sourdin (6 September 2007) <www.liv.asn.au/getattachment/171ff2a4-9f3a-447c-a254-ce59acaf910e/Draft-Accreditation-Standards-for-Mediation.aspx> accessed 8 July 2016.

This is an extension into the duplication problem[285] that was discussed above. As stated clearly by LIV 'While the LIV agrees that it is important for mediation participants to have access to a complaints scheme, such a scheme, in the case of solicitor mediators, already exists through the Legal Services Commissioner'.[286] Not only does this create a duplication of qualification problem but also wasted time and costs as that would indicate attending extra training courses. Consequently, lawyer mediators who have been accredited by LIV may have to apply for accreditation separately if they wish to advertise as certified to national standards.

As the NMAS further develops and refines its rules, an area worth looking at may be to relax the requirements that, qualifies a body to become an RMAB. Bodies such as Law Societies, such as LIV could be presumed to be reliable seeing as the entire profession is so heavily regulated. Perhaps there is room to see whether NMAS may provide further circumstances whereby a body would have to complaint system in place, but perhaps it does not necessarily have to be internal.

2.2.7. Always room for improvement

Through it all, Australia has made a commendable effort towards a national accreditation mediation standard that encompasses all needs. As a system that has only been implemented in 2008, with a transitional phase calculated for another two years, as with many things – initial practical application inevitably reveals flaws that were not calculated for, some of which have been described above.

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285 MSB, 'NMAS Approval Standards' (n 242) s 1(4).

286 Provis (n 284).

Despite this, Australia's national accreditation standard is recognised by the international community as a significant step towards national mediation accreditation. 'Australia has over the past four years developed a system of national mediator accreditation which has been examined by several overseas jurisdictions, as well as International Mediation Institute (IMI)[287] itself.'[288]

In addition, a wide range of literature often utilises Australia as a solid example in cross country comparisons. In a journal article by Mandy Zhang,[289] she compares the progress that Australia has achieved in comparison to the United States. She explains that as people are becoming more hesitant to commence proceedings against another through court litigation and consequently a 'rise of business mediation comes an increasing number of self-proclaimed mediators who all want to be part of this lucrative industry'. [290] The United States, for example, had started to discuss implementation of a national accreditation standard approximately around the same time as Australia. However, for the United States, this had never materialised in the end.

The Task Force on Mediator Certification was created by the Association for Conflict Resolution (ACR) to provide a framework for a national certification programme in hopes to remedy the lack of uniformity in the United States.

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287 International Mediation Institute

288 Hiscock and Van Caenegem (n 237).

289 Zhang (n 219).

290 Zhang (n 219) 307

Unfortunately, the national system never materialised and this was largely due to insufficient public consultations.[291]

Though, some have suggested when comparing Australia to international standards that 'in comparative international terms, it constitutes a low threshold system requiring only six days of dedicated mediation training and accreditation time, considerably less arduous than comparable systems in Europe'.[292] This may be true, as even when the United States was contemplating a national standard, the suggested 'at least 100 total hours of training or academic coursework in conflict resolution',[293] in order to become eligible for assessment and accreditation.

This point has been counter argued in saying:

> [S]o far, the empirical study of parties' assessments of mediator qualifications revealed that parties prefer mediators with experience…the studies find no difference in mediation results when the mediator has no training, though mediators with more mediation experience tended to reach settlement more frequently.[294]

Therefore, Australia does recognise that ultimately what matters is the purpose behind mediation. That is a neutral third party attempting to 'improve the process

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291 Zhang (n 219) 328.

292 Hiscock and Van Caenegem (n 237) 270.

293 Zhang (n 219) 322.

294 Sarah Cole, Craig McEwen, Nancy Rogers, James Coben and Peter Thompson, *Mediation: Law, Policy and Practice – Chapter 11 – Fairness, Effectiveness and Access* (2011-2012 edn, West Thomson 2012) 2

of decision-making and to assist the parties reach an outcome to which each of them can assent, without having a binding decision-making function'.[295] Even in 2004 while the concept of a national standard was being discussed, NADRAC had identified in its discussion paper the problem of quantifying when one becomes a mediator: 'it is hard to say at what point one "becomes a mediator", but it is possibly after hundreds of hours of experience'.[296] As research tells, this is achieved best by practice and less through simulated mediation circumstances.

Another area that some academics have pointed out as lacking further clarification is the issue of culture in the mediation accreditation process. The word is mentioned but not elaborated upon in the Practice Standards.[297] The problem is what standard should a mediator be to be considered culturally aware and sensitive to the parties? One author suggests that 'intercultural training programs should be included as a main part of accreditation training'.[298] A criteria and framework are suggested as possible solutions to develop intercultural mediation training as well. As one of the main roles of a mediator is to be impartial and assist parties in their negotiation, it becomes much more important in this aspect for a mediator to be aware of as 'culture is of great relevance to the understanding of dispute resolution'.[299]

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295 Boulle, *Mediation: Principles, Process, Practice* (n 165) 13.

296 NADRAC, 'Who Says You're a Mediator?' (n 234).

297 MSB, 'NMAS – Practice Standards' (n 240) s 3(3)(a), s 5 (6), s (3)(a)(vi), s 9(7).

298 Siew Fang Law, 'Culturally Sensitive Mediation: The Importance of Culture in Mediation Accreditation' (2009) 20 ADRJ 162, 166 <www.academia.edu/243509/Culturally_sensitive_mediation_The_importance_of_Culture_in_mediation_accreditation> accessed 8 July 2016.

299 ibid.

One last issue that may benefit from further development is the concept of mediation accreditation as stated under the existing Approval Standards. Currently, there is only one level of accreditation that is offered to applicants who go through NMAS approved training and assessment. Unlike LEADR[300], that offers two levels of accreditation: normal accreditation and advanced accreditation. It may be beneficial for mediators if NMAS was able to distinguish between different levels of mediators.

This problem was addressed in the form of a qualitative study that was executed by the ACDC in 2010. The ACDC designed a survey questionnaire that was answered by 226 mediation participants, this included 'mediators, parties to the mediation and advisors/support people—in order to ascertain what those involved in mediation practice identify as important elements of the process and the important characteristics of mediators'.[301]

As the survey was inclusive of all stakeholders to mediation, it is hard what weight should be given to each category. Nonetheless, for this paper I will focus on the parties' response because like many service providers across all industries, supply is fuelled by customer demand and it is what parties prefer during the mediation process that can determine a need for change.

One of the questions posed on participants was whether they felt that their mediator would have to possess the relevant skills, knowledge and competency to

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300 cf s 2(6)(1)

301 Lynne Richards, 'Theory and Practice: What Empirical Study Tells Us About the Future of the National Mediator Accreditation System (NMAS)' (Australian Commercial Disputes Centre 10th National Mediation Conference, Adelaide, 7 September 2010) .

conduct mediation. The results showed that 'parties indicated that they valued mediator accreditation more highly than other professional attributes such as having worked on high profile cases or a legal background'.[302] Furthermore, 'Seventy percent (70%) regarded formal mediation qualifications as important compared with 75.8% of mediators'.[303]

It was clear from the results gathered that participants placed a much heavier emphasis on a mediator that has been deemed competent by accreditation compared to other stakeholders. The results may have useful implications for the future direction of NMAS and professional development.

Richards analyses that:

> [I]f parties perceive specialisation as desirable, then additional training in specialist areas must be advantageous. Further development of the current National Standards by the Mediator Standards Board to include specialist competencies…and a more fulsome qualification that recognise higher order skills and specialisations… could provide opportunities for higher level qualifications that recognise higher order skills and specialisations.[304]

302 ibid.
303 ibid.
304 ibid.

Moreover, Richards continues to explain that introduction of multiple accreditation levels 'would not jeopardise or undermine the benefits arising from a consistent, nationally recognised mediator identity'.[305]

[305] ibid.

2.3. MEDIATION TRAINING

2.3.1. Introduction to mediation training

During the early 1980s, many Australian mediation organisations and initiatives were established as very distinct entities and operated independently from one another. Some examples include the community justice mediation centres, court-connected mediation, and organisations such as LEADR, ADRA, Australian Dispute Centre (ADC) and ACDC. Most of these organisations offer mediation for all sorts of disputes.[306] Membership of most if not all of them is open to lawyers and non-lawyers, although some organisations, like LEADR, have a strong legal membership base.

Before the launch of NMAS, there is no formal training required for those who want to practise as mediators, but basic training is required for admission to mediator panels maintained by service-providing associations.[307] There are some mediators standards refer to training obligations, such as NSW's compulsory provisions preventing lawyers to act as sole mediators unless they have completed an approved training course and had appropriate mediation experience.[308] Queensland Law Society required mediators have to be committed and with further education and training in the field of mediation.

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306 One exception is the ACDC, an organisation that focuses its services in the area of commercial mediation. Nevertheless, ACDC will also mediate or provide mediators for matters in other practice area.

307 Boulle, *Mediation: Principles, Process and Practice* (n 165) 227.

308 John Wade, 'My Mediator Must be a QC' (1994) 5 ADRJ 161-163.

Mediation training is commonly given by experienced practising mediators and not by theoreticians, they are offered by mediation service providers and academic institutions. Previous qualifications and experiences are not required for admission to training courses, although they may be required for admission to mediator panels.[309]

Basic training comprises three or four day courses to deal with the knowledge about the theories of conflict, models of negotiation, the mediation process and the legal rules affecting mediation practice, skills in communication, mediator interventions and negotiation techniques, and finally the conduct of the mediator, like the attitudes relating to standards and ethical issues.[310]

Many institutions provide intermediate and advanced level training courses for those who have completed basic training. These courses further develop skills, additional theory of conflict management, interdisciplinary perspectives on mediation, and problematic issues in standards and ethics.[311]

Specialist training is available for lawyers and advisers to be mediators, the training takes the form of in-house workshops in law firms, continuing education workshops run by professional associations.[312] This would help broaden lawyer mediation and reduce the number of cases to court litigation.

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309 Boulle, *Mediation: Principles, Process and Practice* (n 165) 228.

310 Society for Professionals in Dispute Resolution Commission on Qualifications, 'Ensuring Competence and Quality in Dispute Resolution Practice' (1994) 1 CDRJ 147.

311 Boulle, *Mediation: Principles, Process and Practice* (n 165) 231.

312 ibid 232.

Though there are some critics about lawyer mediation should be more regulated, leading institutions eg LEADR has already taken part in the specialist sections within legal professional associations and developments of courses on ADR in law schools are all indications of the institutionalisation of mediation.[313]

Commercial mediators should recognise the three models of mediation that are used in a great diversity of contexts, they are facilitative mediation, evaluative mediation and transformative mediation. Facilitative mediation combines process intervention with an integrative approach to bargaining, it focuses on integrative interest-based negotiation rather than a distributive, positional-based bargaining, ie as a consultant than an advocacy role. The outcome is the parties would like to continue in their business and social relationship after the resolution of the dispute; the second one is the evaluative mediation or so-called 'expert advisory mediation' to tackle complex and technical matters of the dispute. The mediators keep tracks on parties' positions and rights, thereby allowing the problems to be defined in a narrow and legalistic manner and excluding broader issues from the agenda, the mediation may be mandatory and would require professional, experienced and specialised knowledge on the industry, eg construction or maritime, etc.; the last one is the transformative mediation relates to the conflicts about the parties' relationship, whether of a personal, professional, or business nature, it would have a chance to be more difficult to settle due to the complexity of the issues.[314]

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313 Mary Anne Noone, 'Lawyers as Mediators: More Responsibility?' (2006) 17 ADRJ 96, 100.

314 Nadja Alexander, 'The Mediation Metamodel: Understanding Practice' (2008) 26 (1) Conflict Resolution Quarterly 115-117.

For commercial disputes, there are lots of matters including, eg commercial and retail leases, property issues like the disputed ownership, goods and services matters involves delivers and price review clauses, franchising, construction and building matters and copyright issues, etc. As the scope of commercial mediations are more closely reflecting the greater ease and familiarity with the professional and clients, the requirement is different in some peoples' thinking.[315]

A mediator may often have the role of problem solver, rather than interventionist mediator. Resolution is simpler if the mediator practises facilitative techniques as the disputants are seeking a commercial outcome and this method enables each side to see more clearly where the other party is coming from.[316]

In the past, there has emerged a distinct trend for organisations to collaborate and develop strategic alliances. Many of these organisations played a significant role in the pioneering years of Australian mediation by pooling their knowledge and experience.

In establishing their own identity, they were experimental and innovative, bringing different ideas and experiences into the mediation marketplace. More recently, many of these organisations have collaborated in terms of exchanging ideas and war stories, convening to deliberate issues such as the development of standards and guidelines for mediator accreditation. At the same time, one may well ask whether such a diverse pool of collaborating programmes and

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315 Ruth Charlton, *Dispute Resolution Guidebook* (LBC Information Services, Sydney 2000) 112-113.

316 ibid 132.

organisations pursuing similar or the same goals is still today more advantageous than not. In other words, would it make sense in this coming decade to streamline resources, and create fewer organisations with a more centralised institution? This question remains uncertain to this day.

NMAS in Australia was implemented in 2008 based on a voluntary accreditation system. Mediators in Australia are not required to obtain the standard in order to practice. The Scheme introduced the Recognised RMABs which take the responsibility for accrediting mediators under the NMAS. Once a mediator is accredited by an RMAB, RMABs have their own policies to maintain mediators' standard and compile the NMAS's approval requirements.[317]

NMAS was developed by the NADRAC but NADRAC was not responsible for the implementation of NMAS implementation. Another major independent industry body MSB is responsible for monitoring and evaluating the NMAS. Mediation organisations may select NMAS and other organisations in other specific fields which recognised similar accreditation schemes.[318]

RMABs must follow NMAS' Approval Standards. The Approval Requirements include that mediators should have their own positive characters and backgrounds to act well during the process[319], they should provide the following documents to the RMAB as proofs of competency to meet the Approval Standards. This can be

317 David Spencer and Samantha Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (2nd edn, Thomson Reuters 2009).

318 MSB, 'NMAS' - Introduction <www.msb.org.au/sites/default/files/documents/NMAS%201%20July%202015.pdf> accessed 29 July 2015.

319 MSB, 'NMAS Approval Standards' (n 242) cl 3(1).

the evidence of good character.[320] This can probably be proved through referral letters from employers and tertiary educational institutions; 'An undertaking to comply with ongoing practice standards and compliance with any legislative and approval requirements',[321] this means that mediators must pay attention to any amendment or changes to regulations when practising their skills as mediators; 'evidence of relevant insurance, statutory indemnity or employee status',[322] social statuses, personal liabilities, somewhat concerning the impartiality, honest and incorruptible; 'evidence of membership or a relationship with an appropriate association or organisation that has appropriate and relevant ethical requirements, complaints and disciplinary processes as well as ongoing professional support' - this may be the RMAB itself but may also include other relevant memberships or relationships,[323] directly related to the accreditation from RMABs in order for practise; and finally 'evidence of mediator competence by reference to education, training and experience'.[324] This focuses on school or vocational training that the candidate should take part in.

The major areas of concern for RMABs lie in training and education. RMABs have the role to ensure a potential mediator's competence. It is not necessary to provide in-house training and education programmes to individual mediators though some organisations do provide training and education for the purposes of consistent chain management. Alternatively, there are universities and other training providers that offer such courses to prepare a mediator for

320 ibid cl 3(1)(a).
321 ibid cl 3(1)(b).
322 ibid cl 3(1)(c).
323 ibid cl 3(1)(d).
324 ibid cl 3(1)(e).

accreditation.[325] RMABs focuses on the integrity of the mediators, emphasising that they should maintain their own standard to meet the requirement of the MSB, and specific training may need to be taken if the cases are relating to different industries and modified process such as conciliation, family issues etc. in order to make use of appropriate skills and expertise.[326]

Threshold training and education requirements are needed to unify the standard of mediators. Starting from 1 January 2008 to advertise as nationally accredited mediator, one must have completed mediation training and education courses either through RMABs or universities. There is an exemption of this requirement where one can show that they are 'experienced qualified' in mediation.[327] To be 'experienced qualified', an individual must show they have 5-10 years of experiences on mediation coaching and handling disputes. The criteria of the training courses include, they should be hosted by instructors with three years' experience each as a mediator and instructor;[328] and issues relating to coaching, like accredited assistant instructors or coaches for the simulated practice session;[329] and a minimum of 38 hours training;[330] and sufficient simulation practice in the mediation process on a practical perspective;[331] and subjective training team feedbacks for the mediators.[332]

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325 ibid cl 4(1)
326 ibid cl 4(2)
327 ibid cl 5(1).
328 ibid cl 5(1)(a).
329 ibid cl 5(1)(b).
330 ibid cl 5(1)(c).
331 ibid cl 5(1)(d).
332 ibid cl 5(1)(e)

Mediators must have completed additional assessments besides the 38-hour training workshop, including writing tasks and recorded role play sessions to evaluate one's criteria:[333] 'the outcome of the skills assessment (in terms of competent or not yet competent)',[334] like the mediation practice session; 'relevant strengths and how they were evidenced',[335] 'relevant weaknesses and how they were evidenced',[336] a kind of self-SWOT analysis and 'relevant recommendations for further training and skills development',[337] as a post-mediation issues for the role play.

Experienced mediators must be approved by the RMAB and have the following competences and qualities to meet the Practice Standard:[338] specialised skills to mediate ethic minority communities which have different cultural means and norms, eg Aborigines and Torres Strait Islanders in Australia;[339] or Applicants who fully recognise the core competencies in the Practice Standards and the CPD requirement assigned by RMAB and having acted as a mediator prior to 1 January 2008,[340] the mediators may act as conciliators or a party of Arb-Med Process etc and should meet the following requirements:[341] registration and membership record in the profession,[342] four years of education in universities or advanced educational institutions, eg Vocational Education and Training (VET)-approved

333 ibid cl 5(2).
334 ibid cl 5(2)(a).
335 ibid cl 5(2)(b).
336 ibid cl 5(2)(c).
337 ibid cl 5(2)(d)
338 ibid cl 5(3).
339 ibid cl 5(3)(a).
340 ibid cl 5(3)(b).
341 ibid cl 5(4).
342 ibid cl 5(4)(a).

organisation;[343] and five years' experience of service provision in the field submitted to RMAB approval, and this would be the minimum requirement for all non-mediation educated students.[344]

2.3.2. Training and education of mediation at University

Australian university education plays a major role in the development of knowledge, understanding and skills of future lawyers in the area of mediation. Mediation courses at universities have undergone a period of major growth and attracted significant interest from both students and employers of lawyers. Furthermore, indications are that this interest is likely to continue and even increase. The selection of subjects at universities at both undergraduate and postgraduate level continues to expand as even more specialisation is offered.

In the late 1980's Australian law schools were among the first to respond to the mediation movement by offering studies in mediation and ADR as part of the law curriculum at both undergraduate and postgraduate levels. Since 2000, the vast majority of Australian Law schools have integrated ADR into their law studies programme either in the form of electives or compulsory subjects. There are a growing number of law schools now offering postgraduate studies such as graduate certificates or master courses specialising in ADR.

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343 ibid cl 5(4)(b).

344 ibid cl 5(4)(c).

2.3.3. Certificate IV of Mediation

Government imposed Certificate IV [345] which is a comprehensive nationally recognised qualification and is a part of the VET system. The qualification includes competencies required and providing training packages for potential mediators to qualify, like supporting the interests, rights and needs of clients within duty of care requirements and support the rights and safety of children and young people. Other aspects include using targeted communication skills to build relationships, working within a relevant legal and ethical framework, facilitating responsible behaviour, and respond holistically to client issues and refer appropriately. Mediators also need to provide support and care relating to loss and grief, develop, implement and review services and programmes to meet client needs; identifying clients with language and literacy needs and respond effectively, conducting a sound assessment of a dispute in preparation for mediation, gathering and clarifying information for the mediation process.

Mediators have to manage communication processes to define the dispute, facilitate mediation processes and interaction between the parties, consolidate and conclude the mediation process and reflect and improve upon professional mediation practice and work effectively with Aboriginal and/or Torres Strait Islander people and Contribute to Occupational Health Safety (OHS) processes.[346]

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345 Australian Government Training, 'Qualification Details: CHC42312 - Certificate IV in Mediation (Release 1)' <https://training.gov.au/Training/Details/CHC42312> accessed 8 July 2016.

346 Australian Government Training, 'Qualification Details: CHC42308 - Certificate IV in Mediation (Release 1)' <http://training.gov.au/Training/Details/CHC42308> accessed 8 July 2016.

Conflict Resolution Service (CRS) is a good example for providing training courses in Certificate IV, which supports the practice of Mediation and Co-Mediation across a broad range of government and private sectors including various industries, agencies, and community groups. It involves the completion of 15 units, 9 of them directly about the process of Mediation and 6 others that relate to the environmental factors that affect conflict and mediation and how people operate as effective practitioners in the workplace.

The Mediation unit contains 9 modules delivered by CRS as part of the Mediation Training, including conduct a sound assessment of a dispute in preparation for mediation (preparation for the mediation process and to assist clients to be aware of their roles and responsibilities in mediation), gather and clarify information for the mediation process (establishing common ground and how mediators support clients in gathering and presenting information), manage communication processes to define the dispute (establish and manage the communication process to enable the parties to define the dispute), facilitate the mediation process (to maintain the flow of the mediation process to achieve the optimum outcome for all parties), facilitate interaction between parties in mediation (requirement for mediators to facilitate the agreed process of mediation), consolidate and conclude the mediation process (requirement for the mediators to conclude the session and support the implementation of any agreement), reflect and improve upon professional mediation practice (evaluation of own work, continuing self-development and effective supervision within an ethical code of practice), work within a legal and ethical framework (requirement by people to work within a legal and ethical framework that supports duty of care requirements), utilise

targeted communication skills to build relationships (application of specialist workplace communication techniques to build and maintain strong relationships with colleagues and clients, based on respect and trust.

2.3.4. A mediator's technique and role

Mediators should provide 'neutral and safe environment for talks' between the parties, overcomes logistical barriers such as the fundamental issues, like the venue, time and reluctance when taking the first step in the main session. They should also act as a facilitator of discussions to analyse the Zone of Possible Agreements (ZOPA) for the parties,[347] that is bearing in mind of reality-testing[348] to meet both parties' expectation and proceed to caucus if needed; they should enforce ground rules through questioning parties' assumptions and bottom line and act as: i) an emotion balancer to control the mediating atmosphere; and ii) a compliance monitor to prevent and resolve disputes over implementation.[349] Mediation confidentiality and impartiality are required and caucus session may be needed at post-mediation stage as a follow-up procedure.[350] Moreover, Principles of Fairness includes the following suggested by Ardagh and Cumes as Impartiality, knowledge and understanding of the dispute resolution mechanisms, efficiency on judgments, personal characters and devotees of natural justice,[351]

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347 Christian Bühring-Uhle, Lars Kirchhoff and Gabriele Scherer, *Arbitration and Mediation in International Business* (2nd edn, Kluwer Law International 2006) 189.

348 ibid 248.

349 ibid 189.

350 See generally Kathleen M Scanlon and Kathy A Bryan, 'Will the Next Generation of Dispute Resolution Clause Drafting Include Model Arb-Med Clauses?' (2009) in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation – The Fordham Papers 2009* (Martinus Nijhoff Publishers 2010).

351 Anne Ardagh and Guy Cumes, 'Lawyers and Mediation: Beyond the Adversarial System?' (1998) 9 Australian Dispute Resolution Journal 72, 77-78.

which gives each party an equal, reasonable and interactive chance of presenting his/her case with the opponent. Astor also mentioned the four elements of neutrality,[352] which indicates in another aspects of mediators' impartial attitude, including No influence to the outcome or content of the mediation, but just control the mediation process; Not partisan, treat the parties equally; Not be influenced by financial or personal connection with the disputants; and Freedom from influences by governments.

Techniques of the Mediators concern the mediators' questioning and listening techniques, also noticing parties' behaviours and reactions during the process;[353] for co-mediation process, mediators from different professional backgrounds can complement each other and support different parties;[354] mediators should observe parties' attitudes, perceptions, communication patterns such as intonations, facial expressions to check if there is any information, misinformation which affects data and content collection from the parties, and also prevent offensive languages to worsen the situation;[355] they should have got both substantive knowledge and legal knowledge during the education process, applying skills to deal with interpersonal disputes and pinpointing the legal implications of the dispute, to consider the enforceability of settlements reached, recognising the legal issues relevant to commercial agreements.

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352 Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16 Social Legal Studies 221, 223.

353 Bühring-Uhle, Kirchhoff and Scherer (n 347) 192.

354 ibid.

355 Christopher W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (3rd edn, Jossey-Bass 2003) 62.

2.3.5. Problems associated with training mediators

On the face of it, the concept of mediation is largely positive and promises an expedient way to settle conflicts. However, training and education of mediators remains a major concern. These concerns will be highlighted and explained below.

(a) No teaching tradition

One of the major problems for the trainer is that there is no established training procedure that can be followed. Different courses have been developed by different institutional organisation such as LEADR, NMAS. In addition, Law societies and universities provide near identical training programmes which illustrates unnecessary duplication. In these circumstances there is much scope for creativity but also for idiosyncrasy in what is taught and how. Principles of designing the training courses involve establishing goals and objectives, determining the essential knowledge base, specific skills and attitudes for course content and identifying the methodology necessary to produce competency and evaluate efficacy.[356]

There are numerous opinions issued by various organisational bodies and academics that suggest how training of mediators should be approached. There is no complete research and audit on what constitutes effective curriculum and training programmes.

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[356] Elizabeth Koopman, 'The Education and Training of Mediators' in J C Hansen (ed) *Divorce and Family Mediation* (Aspen Systems, Rockville, 1985) 118, 124.

(b) Different professional area

Mediation faces the difficulty of unifying numerous interdisciplinary professions to compose a theory and practice that appeases all. This is compounded by the fact that each profession has its own perspective of what mediation should include. These include professions such as sociology, psychology, law, communications, political science, organisation behaviour, anthropology, industrial relations and so forth.

The need to integrate these perspectives places important demands on course design. The challenge is to master the elements from individual disciplines, to translate and apply them across fields, and integrate them into a coherent and effective teaching programme so that practitioners can prepare well to respond to the multi-dimensional disputes.[357]

(c) Theoretical base on teaching

Some commentators have noted that the theoretical and philosophical revolving around mediation training are not clearly identified nor understood. There is a need in Australian mediation to clarify this further as it is regarded as 'central, crucial and critical importance'.[358] The developments of theories of mediation, of dispute or conflict resolution and of conflict itself have not received enough devoted attention to experiment in practice and the implementation of programmes. There is little theoretical origin of the prescribed procedures

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357 Raymond Albert, 'Mediator Expectations and Professional Training: Implications for Teaching Dispute Resolution' (1985) Journal of Dispute Resolution art 6.

358 Greg Tillett, 'Conflict Resolution: Training and Education' (Conflict Resolution Trainers' Conference, Sydney University, November 1989) 9.

identified, explained, or subject to critical analysis. Many courses are focused on practicing or how to deal with the certain issue but these courses do not go further on the issue of how the theory was developed. Texts available on the mediation process are largely process-oriented, designed for teaching the skills and how to set up in practice and contain limited, if any, treatment of theoretical, philosophical or ideological issues.[359] Models of mediation are more readily distinguished by differences in process than those of theory or philosophy, although there may be significant differences in underlying theoretical assumptions, ideology and values. Training courses for particular models are characterised by positional statements, prohibitions and exhortations, often without explaining the theoretical backdrop.

The need to expose course participants to a range of theoretical perspectives has been advocated for in the past. As it is unlikely that any one theory can provide a satisfactory and coherent explanation of conflict, it is argued that students should explore a range of theories critically, creatively, and be encouraged to develop their own personal approaches. Theoretical studies can also take account of cultural issues and the cultural context of dispute resolution theories and practice, and raise questions of social justice, structural conflict, structural violence, social inequality and ideology.

(d) Skills training

[359] See generally Blair H Sheppard, 'Book Review: The Art and Science of Mediation' (1988) 4 (2) Negotiation Journal 161 - 170.

The objective of training courses is to develop students' practical skills and the theory. But very often courses adopt process rules that are to be followed strictly and it is argued that mediators should be exposed to a wide range of strategies and techniques so that flexibility may be achieved in practice.[360] In the experiential learning, the demands of such an approach may not always be understood or there may be no clear model for implementing it.[361] Mediation in Australia can benefit from more practice based training in order to understand how to handle different real life scenarios instead of focusing heavily on mediation theories.

Role plays and simulations heavily dominate teaching methods - a situation which creates unique methodological problems. Classroom dynamics can be volatile and unpredictable, requiring careful managements.[362]

(e) Ethics

A final difficulty is created by the need to address issues of ethical practice in training for mediation of interpersonal disputes. This has implications both for what to teach and how to teach. It can be said that every decision of a dispute resolution practitioner is an ethical one. Some writers have pointed out the difficulties in training practitioners to consider the ethical implications of their performance and how to respond to the inevitable ethical dilemmas they will encounter.[363] Role-playing, which dominates training strategies, is considered

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360 Tillett (n 358) 9.

361 See generally Roy J Lewicki, 'Challenges of Teaching Negotiation' (1986) 2 (1) Negotiation Journal 15 - 27.

362 Hilary Astor and Christine M Chinkin, 'Dispute Resolution as Part of Legal Education' (1990) 1 Australian Dispute Resolution Journal 40-56.

363 Gregg B Walker, 'Training Mediators: Teaching About Ethical Concerns and Obligations' (1988) 19 Mediation Quarterly 33; Sarah Childs Grebe, Karen Irvin and

inadequate for integrating knowledge into an ethical framework. Courses need to provide grounding in philosophical and ethical theory, and explore tacit ethical assumptions,[364] rather than prepare mediators on the basis of ethical behaviours according to a particular model. Codes of conduct face the danger of falling into a 'grey area' that we do not know. It has been suggested that ethical teaching and codes should address the matters such as legal rights and duties, the limits of competency, and how to deal with specific situations, such as disclosure of physical and substance abuse or illegal activities. Lastly, some of the basic legal concepts such as the contract law or the business law inside the commercial mediation training process should also be included.

(f) Trainers

Ideally, those who train practitioners in dispute resolution should have both teaching skills and experience in mediation. In practice, there are significant structural and practical problems for a practice like dispute resolution, which is in its formative stages. The need to train mediators is pressing, and suitably qualified instructors are not always available. Some can only provide basic training and without extensive practical experience, or formal qualifications or skills as educators, proffer themselves as trainers. Due to the fact that trained practitioners do not have sufficient experience to apply training to practice, it is difficult for them to convert theory into practice.

Michael Lang, 'A Model of Ethical Decision Making in Mediation' (1989) 7 Mediation Quarterly 133; Sarah Childs Grebe, 'Ethical Issues in Conflict Resolution: Divorce Mediation' (1989) 5 Negotiation Journal 179; Kevin Gibson, 'The Ethical Basis of Mediation: Why Mediators Need Philosophers' (1989) 7 Mediation Quarterly 41;.

364 Sarah Childs Grebe, 'Family Mediation Training Programs: Establishing Standards' (1988) 19 Mediation Quarterly 13.

Formal regulation of trainers at this stage was said to be infeasible and premature,[365] although it was advocated and may need to be considered in the future. This conclusion is consistent with the Commission's view on the need for regulation of training and practitioners generally. It is premature to require formal standards to be met when they cannot be established or enforced readily. The Commission's recommendation for an Advisory Council and the Database will provide a means by which the qualifications of trainers are on the public record and the quality of training is open to review.

2.3.6. Training Conclusion

The Australian private sector has played an active role in the development of mediation practice in Australia. Well known private sector service providers include LEADR, the ACDC, the ADRA, the law societies of the various states, and the ADC whose members represent other mediation groups as well as stakeholders.

These organisations offer a rich variety of mediation services including mediations, catalogues or panels of mediators who are available to mediate disputes, mediation venues, standard mediation documentation (for example, agreements to mediate, mediation clauses), publications about mediation, and conferences.

As Altobelli points out, many industries have integrated mediation and other forms of ADR into their dispute management processes procedures without

365 LEADR, <www.resolution.institute> accessed 8 July 2016.

legislative compulsion.[366] Examples of these dispute management schemes include the Telecommunications Industry Ombudsman, the Life Insurance Complaints Schemes, the Australian Banking Industry Ombudsman and the National Electricity Code. These kinds of management schemes can also provide the training programme to their members in order to know more about the mediation in their respective industries.

Apart from the above private sector, Australian Law Societies have directed resources into the further development of mediation and ADR practice. In general, the societies provide training and education as well as accreditation of mediators who form a panel of mediators from which disputants may choose. As law societies are professional bodies that represent the interests of lawyers, practitioners that train through these professional bodies must also be admitted as a solicitor in order to practice. Law societies also provided information and documentation about mediation for lawyers and the public. A notable initiative of the Queensland Law society is the now national Schools Conflict Resolution and Mediation (SCRAM) competition for high school students. In SCRAM participating students are required to form small teams to mediate a conflict scenario. This highly successful educational initiative was recently recognised in the report of the EDR Task Force of the Law Society of NSW that recommended continued support for the programme.[367] The competition has been instrumental in increasing awareness of mediation and mediation skills among school children, and at the same time, promoting the role of lawyers as mediators.

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366 Tom Altobelli, 'Mediation in the Nineties: The Promise of the Past' (5th National Mediation Conference, Brisbane, May 2000).

367 Law Society of NSW, *Report of the EDR (Early Dispute Resolution) Task Force* (1999).

The conditions under which private mediators perform their mediation services vary according to whether or not they mediate under the umbrella of a particular private sector organisation, and, if so, which one. For example, unless provided by the organisation for which they mediate or by specific legislation, mediators do not enjoy immunity from prosecution, this is a stark contrast to the immunity afforded to judges adjudicating court litigation.[368] Where lawyers mediate as part of their legal practice, it would seem that they are bound by the same professional and ethical standards as for all other aspects of their legal practice.[369]

[368] For an example of where legislation has granted immunity to mediators, see Dispute Resolution Centres Act 1990 (Qld) and the Mediation Act 1997 (ACT).

[369] For example, Legal Practitioners (Amendment) Act No 2 1997 (ACT), in particular the definition of "legal practice".

2.4. MEDIATION ETHICS AND RESPONSIBILITY

Mediation is said to be a consensual process in which a third party, works with the disputing parties to help them explore, and if appropriate, reach a mutually acceptable resolution of some or all of the issues in dispute. There is no single process which can definitively claim to be mediation. There are many variables involved in the process, with many approaches to them. The adoption of a particular approach to the variables of a model of mediation does not change the basic definition but it does affect the perception of mediator roles; the approach to the disputants' roles and the perception of successful outcomes. Mediation is fast becoming an accepted way of dispute resolution process as it can take place quickly and often with relatively little expense in contrast to taking the dispute to a court or a tribunal. It gives the parties an opportunity to participate directly and informally in resolving their own dispute. It also gives the parties control over the process itself and the outcome.

The Council of Chief Justices of Australia and New Zealand, in an important move in March 1997, agreed that it is a function of the State to provide the necessary mechanisms for the resolution of disputes and that Court annexed mediation was part of that process.[370] Mediation is not an inferior type of justice but a different type of justice. Studies of dispute resolution show that people

[370] North (n 175).

greatly value quick resolution of disputes and the opportunity to put their case in the presence of a neutral person.[371]

As with other professional services, users of mediation should be in a position to expect that there are certain codes of conduct or practice to govern the behaviour of mediators especially there are many variables involved in the process as well as different approaches to tackle the dispute. The development of mediation codes in different countries is a good indication of the growing needs in this area.

In Australia, there are no one set of binding and comprehensive national codes of conduct, many organisations developed their own individual ones. Despite the fact that the courts have been advocates of having disputes resolved by mediation, they are not active in developing codes of conduct for court-connected mediation. The most people tend to adopt the NMAS Practice Standards, which is used in conjunction with the Approval Standards.

The Practice Standards apply to:

any mediator acting as a third party to support two or more individuals or entities to manage, settle or resolve disputes, or to form a future plan of action through a process of mediation and who voluntarily decides to become accredited under the NMAS. [372]

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371 Lydia Kinda, 'The Importance of Being Ethical as a Lawyer: What can go wrong if you aren't ethical' (2012) 18 <www.gordonandjackson.com.au/uploads//documents/seminar-papers/Ethics_and_Professional_Responsibility_GVLA_250912.pdf> accessed 8 July 2016.

372 MSB, 'NMAS – Practice Standards' (n 240).

The Practice Standards aims at: specify practice and competency requirements for mediators; and inform participants and others about what they can expect of the mediation process and mediators.[373]

The Practice Standards should be read in conjunction with the Approval Standards. As stated in the Practice Standards, there are a range of different mediation models in use across Australia and that mediation can take place in all areas where decisions are made. [374] The Practice Standards set out only minimal practice requirements and recognise that some mediators who practice in particular areas of with particular models may choose to develop or comply with additional standards or requirements. [375]

According to Boulle, codes of conduct fall into three categories:

(1) those with provisions binding on practitioners, such as mediators accredited under NMAS, they must comply with both the Approval and Practice Standards

(2) those with guiding but non-binding principles, such as the Law Council's Ethical Standards for Mediators, the Queensland Law Society's Standards of Conduct for Solicitor Mediators and

373 ibid.
374 ibid.
375 ibid.

(3) hybrid codes with mixture of both types of provisions, such as the New South Wales Law Society provisions on the Agreement to Mediate. [376]

These distinctions are relevant to mediators' standards of care: a departure from the binding provisions could render mediators liable to charge of unprofessional conduct, whereas a guideline provision provides a more tentative standard of care.[377] However, very often the binding provisions are drafted in a broad sense, which makes disciplinary action difficult. Under NMAS, it has moved a step further, the Approval Standards provided that non-compliance with the Practice Standards could lead to removal and suspension.[378]

2.4.1. NADRAC on Codes of Conduct

NADRAC has been commissioned to report on the current position of standards for ADR in Australia and on future directions for their development. Its purpose is to assist relevant bodies and individuals to develop and promote standards for ADR in Australia.[379] When providing its recommendations, the Council was conscious in its deliberations of the need to balance two principles:

(1) The diversity principle: to recognise the diversity of contexts in which ADR is practiced and to promote the development of standards within those particular contexts.

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376 Boulle, *Mediation: Principles, Process, Practice* (n 165) 468.

377 ibid.

378 MSB, 'NMAS Approval Standards' (n 242).

379 NADRAC, 'A Framework for ADR Standards' (n 228).

(2) The consistency principle: to promote some consistency in the practice of ADR by identifying essential standards for all ADR service providers.[380]

The final report made 21 recommendations, recommendation 1 is on the requirement for a code of practice which takes account of essential areas as well as developing ADR standards on an ongoing process while recognising the diversity of ADR.[381] The report also recommended that appropriate code of practice clause to be inserted when there is a contract with a provider for ADR services and this should also be the case for government contracts.[382] These recommendations further put emphasis on codes of practice on a progressive basis so as to bring ADR in a more transparent manner, however, the framework fall short of recommending a binding and comprehensive national mediator code on the back of the above two principles of diversity and consistency. The recommendations embrace the fact that mediation can come in many forms and in many different situation and that if a uniformed set of codes are recommended, it probably will bring about higher drawbacks and restrictions than benefits. However, it would not be able to lower the barriers to make complaints as one would find it difficult to lodge a complaint based on the non-definitive codes of conduct.[383] Moreover, NADRAC approach is more on voluntary adoption, non-adoption will not have disciplinary actions imposed.

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380 ibid.

381 ibid.

382 ibid Recommendations 7 and 8.

383 ibid 29-31.

2.4.2. Mediator competency, knowledge and skills

Competency is defined as the ability to do something successfully or efficiently.[384] Some scholars see 'competence' as a combination of knowledge, skills and behaviour used to improve performance; or as the state or quality of being adequately or well qualified, having the ability to perform a specific role.[385] One of the influential experts on organisational behaviour, Richard Boyatzis, drew a distinction between the tasks and outcomes required in a job and the behaviours an individual would need to perform them. His definition of competency is '…an underlying characteristic of a person in that it may be a motive, trait, skill, aspect of one's self image or social role or a body of knowledge…'.[386]

One of the fundamental points in his definition is the focus on behaviours rather than task outcomes. Competencies are discrete dimensions of behaviour which are relevant to performance. The level of performance will also be affected by how easily and effectively an individual can carry out the necessary behaviours. Competence can be defined as the 'what', that is, the outcomes which would define effective performance in aspects of the job at which a person is competent. Competencies can then be defined as the 'how', that is, behaviours and actions or the like used to achieve the desired outcomes, which is the aspects of the person that enable him to be competent.

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384 Oxford Dictionary, 'Competence' <http://oxforddictionaries.com/definition/american_english/competence?region=us&q=competency> accessed 8 July 2016.

385 Wikipedia, 'Competence' <http://en.wikipedia.org/wiki/Competence_(human_resources)> accessed 8 July 2016.

386 Richard Boyatzis, *The Competent Manager: A Model for Effective Performance* (John Wiley & Sons 1982).

The Law Council's standards stipulate that a person must not mediate unless they have 'the necessary competence to do so and to satisfy the reasonable expectations of the parties'.[387] The NMAS Practice Standards require mediators must be competent and have the relevant skills and knowledge.[388] Section 7.1 describes how mediators could be competent by seeking 'regular professional debriefing' with the purpose to 'address matters relating to skills development, conceptual and professional issues, ethical dilemmas, and to ensure the ongoing emotional health of mediators'.[389] Mediators should also participate in CPD training.[390] Both sessions aim at ensuring that mediators are kept up to date with the development of mediation in the ever changing society with changes in demands and expectations. Section 7.3 provides lists of what knowledge, skill and ethical understanding and commitment are expected of a competent mediator. These lists are not exhaustive, they aim at giving a general guideline of what area of importance a competent mediator should concentrate. They are only descriptive and worded at levels of generality which made interpretation unclear. As in Section 7.3.ii, using words like 'appropriateness or inappropriateness' would invite a wide and subjective interpretation of the situation. Hence, new and inexperienced mediators will find it difficult to follow. Skills of a mediator as described in the NMAS Practice Standard relate primarily to running of the mediation session. These include preparation and dispute diagnosis; intake and screening of both the parties and the dispute to assess suitability for mediation; conduct and management of the mediation process; appropriate communication

387 Law Council of Australia, 'Ethical Guidelines for Mediators' (2006) s 4.

388 MSB, 'NMAS – Practice Standards' (n 240) s 7.

389 ibid s 7(1).

390 ibid s 7(2).

skills, including listening, questioning, reflecting and summarising, required for the conduct of mediation; negotiation techniques and the mediator's role in facilitating in mediation; potential responses to high emotion, power imbalances and violence; use of separate meetings and shuttle mediation; asking questions about or in appropriate circumstances; and drafting of mediated agreements.[391]

Here again, the standard did not define precisely the skill levels expected of the mediator and how these skills are being assessed in case of dissatisfactory mediation session. The standard has made a description of what kind of competence is expected of a mediator but short of a detailed description of how a mediator should behave to meet the required competence. The work by NADRAC on A Framework for ADR Standards acknowledged that there was limited material available which specified practitioner competencies, knowledge or skills.[392] It is proposed that knowledge and skills relevant to ADR to be included in the individual training and education programmes as it is featured in several overseas programmes such as in the United States, Model Standards of Conduct for Mediators, Performance-Based Assessment – a Methodology for use in selecting, training and evaluating mediators.[393]

2.4.3. Ethical standards for mediation

As mediation is moving towards professionalism, a strong ethical paradigm is important. If ethical standards are not effectively maintained, public confidence in

391 ibid s 7(3)(b).

392 NADRAC, 'A Framework for ADR Standards' (n 228) 42.

393 ibid 45.

the independence and trustworthiness of mediators will erode and the administration of informal justice will be undermined.[394] The NMAS Practice Standards provide provisions for ethical understandings which relate to: the avoidance of conflicts of interest; marketing and advertising of mediation; confidentiality, privacy and reporting obligations; neutrality and impartiality; fiduciary obligations; supporting fairness and equity in mediation; as well as withdrawal from and termination of the mediation process.[395]

No detailed explanation of how the ethical understandings are supposed to be played out. According to Rachael Field, currently in Australia, mediation ethics can be said to be little more than aspirational.[396] Ethics has been described by Valdemar W. Setzer as 'Ethics is not definable, is not implementable, because it is not conscious, it involves not only our thinking, but also our feeling.'[397]

The Law Council of Australia issued an ethical guideline for mediators in 2006, the guidelines of conduct are intended to perform three major functions, namely, to serve as a guide for the conduct of mediators; to inform mediating parties of what they should except; and to promote public confidence in mediation as a process for resolving disputes.[398] The guidelines cover nine specific areas, ie process, impartiality, conflict of interest, competence, confidentiality, termination of mediation, recording settlement, publicity and advertising, and fees.

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394 Rachael Field, 'A Mediation Profession in Australia: An Improved Framework for Mediation Ethics' (2007) 18 (3) Australian Dispute Resolution Journal 178-185.

395 MSB, 'NMAS – Practice Standards' (n 240) s 7(3)(c).

396 Field (n 394).

397 Valdemar W Setzer, *Ethics Protocols and Research Ethics Committees: Successfully Obtaining Approval for your Academic Research* (Academic Publishing International Ltd 2011) 65.

398 Law Council of Australia, 'Ethical Guidelines for Mediators' (n 387).

Further work has been done also by NADRAC on ethics, which it refers as to the attitudes and conduct of individual ADR practitioners. NADRAC focuses on eight areas in ADR practice with ethical implications, most of which are relevant to mediation, namely promoting services accurately, ensuring effective participation by parties, eliciting information; managing continuation or termination of the process; exhibiting lack of bias, maintaining impartiality, maintaining confidentiality, and ensuring appropriate outcomes.[399]

The framework provided a much more thorough description on ethical issues that may arise on the above eight areas so that they are taken into account when the standards are further developed.

2.4.4. Avoiding conflict of interests

One of the most common ethical standards expected of a profession is the avoidance of conflicts of interest, practitioner should remain neutral and impartial. The concept of neutrality is seen to be central to mediation. Neutrality plays a critical role in legitimising the mediation process, making it credible, because neutrality promises fair practice and links mediation with the authority and legitimacy of adjudicative process in which the judge is impartial.[400] Field claimed that neutrality is an unsatisfactory concept that mediation cannot seem to do without, she advocated more that mediation should move towards professionalism and satisfy the traditional characteristics of a profession in that (1)

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399 NADRAC, 'A Framework for ADR Standards' (n 228) 110-4.

400 Rachael Field, 'Ethics for a Mediation "Profession": An Answer to the Neutrality Dilemma' (2007) 10 (2) ADR Bulletin.

a sustainable claim to exclusive technical competence in a field; (2) as service ideal to distinguish them from business or commercial activities; and (3) a sense of community.[401] According to Field, it is no longer satisfactory to rely on the mythical notion of mediator neutrality, or to ignore the dilemmas it creates for practice. What is important is to profess self-determination, develop enforceable professional ethics and accept that it is a developing profession in its own right and build strong ethical framework thereto.[402]

The NMAS Practice Standards deals with conflicts of interest in section 5 in conjunction with impartiality. It defines impartiality as 'freedom from favouritism or bias either in word or action, or the omission of word or action, that might give appearance of such favouritism or bias'.[403] It further prescribes detailed practices to be followed by mediators, such as:

A mediator will disclose actual and potential grounds of bias and conflicts of interest. The participants shall be free to retain the mediator by an informed waiver of the conflict of interest. However, if in the view of the mediator, a bias or conflict of interest impairs their impartiality, the mediator will withdraw regardless of the express agreement of the participants.

A mediator should identify and disclose any potential grounds of bias or conflict of interest that emerge at any time in the process. Clearly, such disclosures are

401 ibid.

402 ibid.

403 MSB, 'NMAS – Practice Standards' (n 240) s 5(1).

best made before the start of a process and in time to allow the participants to select an alternative mediator.

A mediator should avoid conflicts of interest, or potential grounds for bias or the perception of a conflict of interest, in recommending the services of other professionals. Where possible, the mediator should provide several alternatives if recommending referrals to other practitioners and services.

A mediator will not use information about participants obtained in mediation for personal gain or advantage.

A mediator should not become involved in relationships with parties that might impair the practitioner's professional judgment or in any way increase the risk of exploiting clients. Except where culturally required, practitioners will not facilitate disputes involving close friends, relatives, colleagues/supervisors or students.

The NMAS also touches on charges for services as a potential bias and provides that 'mediator will not base fees on the outcome of the mediation, but it is not unethical for a mediator to act pro bono or to leave to the discretion of the parties the payment of any fees'.[404] Contingency fee arrangement is clearly forbidden as it potentially creates conflicts of interests and poses questions on the mediator's impartiality and neutrality. In order to receive the fees, a mediator may use undesirable tactics to ensure a settlement is reached. Similar provision has been highlighted in the Law Council of Australia on Ethical Guidelines for Mediators

[404] ibid s 12(3).

that a mediator must fully disclose his or her fees to the parties and that a mediator should not agree to a fee which is contingent upon the result of the mediation or amount of settlement.[405]

2.4.5. Confidentiality

An important ethical requirement in mediation is confidentiality, a mediator should respect the confidentiality of the participants.[406] Mediation is promoted as being a private, confidential and privileged process and confidentiality has been depicted as a defining feature of the system.[407] The growing popularity of mediation is centred on its confidentiality nature. Much has been discussed on this area. The Law Society of Australia provides that 'subject to the requirements of the law a mediator must maintain the confidentiality required by the parties'.[408]

As the confidentiality is centre to the process, the guidelines further elaborate on how this should be done to preserve it, namely (i) Understand the expectations of the parties and endeavour to meet them. This should be clarified when the mediation begins and when it ends, and whether conversations on the telephone, in meetings and communications by email and other means are also confidential; (ii) The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they, and any other persons present at the mediation, and the mediator may make; (iii) A mediator should not disclose any matter that a party requires to be kept confidential unless the mediator is given

405 Law Council of Australia, 'Ethical Guidelines for Mediators' (n 387).
406 MSB, 'NMAS – Practice Standards' (n 240) s 6.
407 Boulle, *Mediation: Principles, Process, Practice* (n 165) 669.
408 Law Council of Australia, 'Ethical Guidelines for Mediators' (n 387) s 5.

permission to do so or the mediator is required by law to do so; and (iv) The parties and the mediator may make their own rules with respect to confidentiality, or the accepted practice of the mediator or an institution may mandate a particular set of expectations.[409]

The clause implies parties' ability to define confidentiality and freedom to waive confidentiality when they are comfortable with it. It once again endorses the consensual nature of mediation and the flexibility it can provide to the parties in dispute.

The NMAS has a detailed session on confidentiality, which covers: the responsibility of the mediator in confidentiality except in circumstances such as non-identifying information, with the consent of the participants, when required by law or ethical concerns or potential threat to human life or safety; participants' expectations of confidentiality and to clarify them before undertaking the mediation process; mediator's responsibility in informing the participants of the limitations of confidentiality, such as statutory, judicially or ethically mandated requirements; obligations of confidentiality during separate sessions; the procedures to be respected when mediator is subpoenaed to testify; any discussion with the participant's lawyers and other experts must obtain prior consent from participants; any disclosure of agreement to the mediation, permission must be

409 ibid.

obtained from participants; as well as the responsibility of the mediator to maintain confidentiality in the storage and disposal of client records.[410]

Both the Law Society and the NMAS cover confidentiality in a comprehensive and extensive manner and provided that confidentiality should always be upheld except in situations where participants agreed to waive it or there are requirements from the court to disclose it. There are generally more restrictions on confidentiality where mediations are required to be reported back to courts, tribunals or agencies. Though it is generally expected that the reporting should be kept to the minimal but courts and administrators sometimes want further information about the participation and behaviour of the mediating parties.[411]

Most courts in Australia have legislation and rules which empower judges, or an officer of the court, to refer matters to mediators at any time during the litigation process.[412] This is referred to as 'Court annexed' or 'Court referred' mediation. In some courts, the power of referral can be without the consent of the parties. Though the rules of referral differ from court to court but in general they are quite similar. The rules allow the court to provide for the confidentiality of the process as in a normal mediation, however, reality could be different as the expectation of the court is often higher in terms of information requirements.

The fundamental principles and advantages of mediation require that the parties have the utmost faith in the mediator's ability to receive information and keep the

410 MSB, 'NMAS – Practice Standards' (n 240) s 6.

411 Boulle, *Mediation: Principles, Process, Practice* (n 165) 480.

412 North (n 175).

information confidential without fear that knowledge of any part of that information by the trial judge might prejudice that party's right to a fair and impartial hearing on the merits.[413] In a submission to the Australian Law Reform Commission, the Law Council's Alternative Dispute Resolution Committee stated that it was inappropriate for ADR services to be provided by judges, judicial registrars, registrars or any other court officials. To preserve fairness, impartiality, confidentiality, mediation should be left to mediators and judges should entrust the professionalism of mediators to come up with the outcomes.

In the submission made on behalf of the ADR Directorate, NSW Department of Justice and Attorney General examined the issues surrounding integrity of the ADR processes. It addresses certain aspects relating to confidentiality, non-admissibility and immunity of ADR practitioners in relation to court or tribunal ordered mediations. In relation to court-ordered mediations, the ADR Directorate challenges the question of confidentiality of an ADR practitioner is primarily an ethical issue and is generally best dealt with by reference to standards of professional conduct rather than by legislation.[414] It should be noted that in NSW court or tribunal-ordered mediation may be conducted by court registrars, private practitioners, and government-run mediation services, who may have a different view relating to non-disclosure and confidentiality. Under Section 31 of the Civil Procedure Act 2005, it provides the circumstances under which a mediator may disclose information obtained in connection with the administration or execution of mediation, which are somewhat consistent with other ADR scheme. These

413 ibid.

414 ADR Directorate, New South Wales (2010).

include circumstances such as: with the consent of the person from whom the information was obtained; if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger or injury to any person or damage to any property; if the disclosure is reasonably required for the purpose of referring any party or parties to a mediation session to any person, agency, organisation or other body and the disclosure is made consent; and in accordance with a requirement imposed by law.

A fundamental issue on disclosure is about 'lawful excuse' or 'reasonable excuse'. A 'reasonable excuse' is generally regarded as a somewhat broader exception than a 'lawful excuse'.[415] The inclusion of these terms enables disclosure in exceptional circumstances but this need to be handled carefully to avoid the risk of manipulation and undermine the confidence of parties to mediation. Questions are often asked on how far disclosure should be made in case of potential criminal acts. In general, there are three types of scenarios that call for consideration:

(1) During a mediation a person discloses that he or she intends to commit a serious criminal offence, or that a child or adult is at risk of harm;

(2) During a mediation a person discloses that he or she has committed a serious criminal offence, but there is no reason to think there is any imminent risk of harm or of a further offence being committed;

415 ibid.

(3) No disclosure of an offence are made during the mediation, but the police subsequently request information from the mediator as part of their investigation into a serious criminal offence. [416]

The NMAS Practice Standards dealt with the first scenario and permitted disclosure as an exception to confidentiality. [417] It appears that in the NSW legislation, the first scenario would also be permitted to disclose.

Confidentiality is seen as the backbone of mediation however, confidentiality has also been seen as a blocker to the development of mediation. It has been challenged that due to confidentiality, there is limited review of how mediation is conducted and whether the process is conducted fairly. Under the shield of confidentiality, it is often difficult to successfully lodge complaints against mediators. NADRAC has also reported that there are only limited cases of complaints lodged.

NADRAC in its published report summarised the issues of confidentiality, which potentially put at risk the integrity of the mediation process as follows: where a participant wishes to challenge the fairness of an ADR process; where a participant wants to disclose information gathered in an ADR process for commercial or other advantage not contemplated by the parties; where a participant discloses information to the detriment of one of the parties or the practitioner in an ADR process; where a participant wishes to challenge the professional judgment of a practitioner; where a participant seeks to rely upon or

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416 ibid.

417 MSB, 'NMAS – Practice Standards' (n 240) s 6(1)(d).

use an expert who may have been involved in the ADR process, and who may be bound by an agreement that includes terms imposing confidentiality obligations; where a participant wishes to review the outcome of an ADR process or the ADR settlement agreement; and where an ADR participant alleges that an ADR practitioner is in breach of their ethical responsibilities, or is guilty of misconduct, and wants to make a complaint.[418]

The added problem of confidentiality in Australia is the lack of certainty surrounding it, which may arise from the various possible sources of confidentiality obligations, inconsistencies in the scope of confidentiality protection afforded by these sources, and uncertainty among practitioners about the existence and scope of confidentiality obligations in particular circumstances.

As Alexander observes, 'false sense of confidentiality may not only cause damage to a party, it may impair the credibility of the mediation system in general.'[419]

2.4.6. Confidentiality and privacy

There are four dimensions to the scope of confidentiality and privacy:

(1) Privacy, in the sense of mediation's isolation from the general public

(2) Non-disclosure by mediators of one party's information to other parties

(3) Disclosures by those within mediation to outsiders to the system; and

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418 NADRAC, 'Maintaining and Enhancing the Integrity of ADR Processes' (2011) s (3)(2).

419 Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (Kluwer Law International 2009) 247.

(4) Court admissibility in evidence of information from mediation.[420]

Privacy refers to the physical and structural circumstances while confidentiality refers to access or exposure about what transpires in mediation.[421] Mediation can therefore be private but not confidential. The High Court made this distinction in *Esso Australia Resources Ltd v Plowman*.[422] Privacy often links with the private session where the mediator has to ensure it is not disturbed by the other party. In the context of mediation, confidentiality may extend to various aspects of the mediation process, including: information created or shared in a mediation joint session, such as the mediator's notes, documents and visual material; information provided to the mediator in a private session, phone call or email with one of the parties; ideas for resolution, offers or settlement agreements; observations of behaviour and conduct of parties in mediation; and the reasons for failure to reach agreement at mediation.[423]

2.4.7. Breach of confidence and mediator liability

Mediator and clients have a delicate relationship, confidential information is provided so as to facilitate the mediation process with a view to resolve the dispute in question. Often the court will protect communication provided on a confidential basis and bar unreasonable disclosure. A breach of confidence arises if the mediator uses the acquired confidential information other than for mediation purposes or it is disclosed to a third party. Where there is a mediation contract

420 Boulle, *Mediation: Principles, Process, Practice* (n 165) 673.

421 ibid.

422 *Esso Australia Resources Ltd v Plowman* [1995] 183 CLR 10.

423 Alexander, *International and Comparative Mediation* (n 419) 248.

containing a confidential clause, court would be able to grant relieve under equitable principles. When there is no remedy in contract, the court may be willing to exercise equitable injunction to grant relief against abuse of confidential information. As mentioned in the previous section, due to confidentiality, it is often difficult to bring the mediator into account of their conduct. In order to successfully make the mediator accountable for their possible misconduct, some sort of relaxation of confidentiality must be made to make the investigation of the complaint possible. NADRAC has in fact indicated that there should be exceptions to non-disclosure of this type in order to facilitate investigation.[424] However, concerns have been raised under the NMAS complaint regime with regard to confidentiality, which is supposed to be the heart of mediation.

2.4.8. Unresolved ethical issues

In the earlier session, we have seen that the language used for codes of conduct has been pretty broad and short of prescription of definitive directions. It is not surprising that the interpretation of the codes are very much left to the mediators and one would also wonder whether the same mediator would be consistent in applying the rules. Hence, it is inevitable that there are still plenty of unresolved ethical issues.

Boulle has posed questions which are not resolved by most codes of conduct, including: To what extent mediators responsible for ensuring the substantive fairness and reasonableness of mediated settlements? To what extent should

[424] NADRAC, 'The Resolve to Resolve - Embracing ADR to Improve Access to Justice in the Federal Jurisdiction: A Report to the Attorney-General' (2009) 171.

mediators assist 'weaker' parties in negotiation and decision-making, such as advising when they need legal advice? How should mediators respond ethically to problems arising from cross-cultural diversity encountered in some mediation? What are the responsibilities of mediators when impending settlements appear to be unconscionable in nature? To what extent should mediators protect interests of parties not present in mediation, for example when claimants to a deceased estate are disregarding absent parties legally entitled to provision? To what extent can mediators use 'distortions' of facts or negotiation position to increase the likelihood of reaching settlement? To what extent can mediators be simultaneously impartial and fair? [425]

The above questions definitely will not have an easy answer owing to the fact that mediation is such a diverse practice. The existing codes are written at such a high level of generality, key ethical codes are not easily understood or interpreted. On the other hand, recognised mediation organisations are careful not to limit their members to a narrow interpretation which could potentially affect efficient and effective practice in reality. Hence, the balance of the two has always invited continuous debates. As Boulle observes, the NMAS Practice Standards reflect and advance much of the previous Australian work on codes of conduct, as well as absorbing influences from abroad. [426] The evolution of mediation to professionalism will establish an important foundational framework to support a more sophisticated approach to ethics in mediation. [427] According to Field, conceptualising mediation as a profession is potentially the key to achieving

425 Boulle, *Mediation: Principles, Process, Practice* (n 165) 483.

426 ibid 484.

427 Field, 'A Mediation Profession in Australia' (n 394) 4.

recognition of three critical aspects of strengthening the imperative to improve mediation ethics:

(1) Recognition of the expertise involved in the practice of mediation

(2) Recognition of the process' legitimacy as a just and appropriate practice in its own right

(3) Recognition of the social and political significance of mediation.[428]

[428] ibid.

2.5. THE WAY FORWARD

'Pathways to Resolution: the Challenge of Diversity' was the selected theme for the 14th bi-annual National Mediation Conference[429] held in Melbourne last year. Over 400 mediators and interested parties gathered together to discuss the challenge of diversity which aptly describes the current Mediation landscape in Australia, if not for the rest of the Mediation world.

In addressing the question of how commercial mediators are trained and accredited in Australia, 'diversity' is a recurring motif that consistently appears not only as the driving force behind growth of the profession and building the accreditation systems in Australia but also a 'challenge' for policy makers, practitioners, consumers and leaders of the mediation community in assessing, determining and setting the level of skills, standards and codes of conducts to be expected, required or practised from the accredited mediators.

The 'diversity' phenomenon in the Australian Mediation landscape is not an accidental occurrence. Diversity is already intrinsically prevalent in the Australian

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429 A biennial conference held since 1992. While the National Mediation Conferences are not constitutive bodies but they have developed a quasi-representative character and became a source of system's recognition in the Mediation community in Australia and usually headed by renounced leaders of the Mediation community such as Laurence Boulle and Tania Sourdin. The 2014 conference has over 400 attendees ranging from senior policy markers, managers, judges and leaders in the field of mediation, negotiation and dispute resolution with the aim to explore the conference theme. Conference theme is chosen from the feedbacks of selected delegates. Presenters are asked to present around the conference theme. Some of the topics discussed during the conference this year include 'Is diversity of practice weakening the mediator brand?', 'Diversity – Stumbling block or stepping stone in ADR', 'Finding the balance – Diversity and standards in training', 'Exploring additional credentialing of the Victorian mediator', 'Diversity of lawyers' participation in mediation' (The 14th Biennial National Mediation Conference, Melbourne, 9-11 September 2014) <www.mediationconference.com.au/past-conferences/> accessed 8 July 2016.

society as it is one of the most multicultural countries in the world[430] and its government is a federation of states and territories, consisting effectively nine independent legal systems.[431] As noted by Soudin in the 2007 report presented on Australian National Mediator Accreditation System:

> Mediators are drawn from every professional field. Mediators can have an original discipline based in law, medicine, business, social science or the arts, or may be unrelated to any discipline. Mediators may also be drawn from every culture and region of Australia. They can be Vietnamese, African, Indigenous and many mediators adapt practice to suit the need of the particular culture in which they are operating. The multidisciplinary nature of mediation means that mediators are diverse in terms of backgrounds, education, culture and approach. There are also different approaches to mediation. A mediation process can take hours, days or even years (for example, in complex native title mediation). Mediators may be full time, part time, local, regional, national or international.[432]

Against this diversified backdrop, policy makers and the mediation community further contributed to the diversity issue by actively nurturing, encouraging and

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430 Meredith Griffiths, 'Australia Second Most Multicultural Country' *ABC News* (17 November 2010) <www.abc.net.au/news/2010-11-17/australia-second-most-multicultural-country/2339884> accessed 8 July 2016.

431 Australiand Government Attorney-General's Department, 'About Australia: Legal System' <www.ag.gov.au/legalsystem/Pages/default.aspx> accessed 8 July 2016.

432 Tania Sourdin, 'Australian National Mediator Accreditation System' (2007) Professional Standards and Ethics 4.

promoting the need for diversity in the pursuit for healthy organic growth of the industry. As Carroll put it 'mediation is a flexible and adaptable process, unhampered by the many procedural and evidential rules that apply to determinative processes, it needs to be sensitive to diversity'.[433] Alexander observed that 'Australia has resisted the trend towards centralised regulation and institutionalisation and has adopted regulatory policies which reflect a desire to promote quality services within a decentralised and diverse mediation marketplace'.[434] He also noted that the NADRAC, an independent policy advisory body to the Australian Attorney-General, '…has taken the path of encouraging diversity of standards in recognition of the broad range of professional backgrounds and practices of Australian mediators'[435] in its 2001 report titled 'A Framework for ADR Standards'[436].

One of the challenges of diversity is how to define Mediation accurately while balancing each party's interest. Given the array of "mediation" models and the many variables and processes within each model, having an accurate definition is important. Boulle highlighted why definition matters in the following paragraph:

> [D]efinitions are significant in several practical and political ways. Definitions of mediation are important in practical terms: because government provide funding for 'mediation' programs, some 'mediators' enjoy an immunity from liability for negligence, and

433 Carroll (n 210) 3.

434 Alexander, *Global Trends in Mediation* (n 163) 27.

435 Nadja Alexander, 'What's Law Got To Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions' (2001) 13 (2) Bond Law Review 5, 15.

436 NADRAC, 'A Framework for ADR Standards' (n 228).

> there are developing codes of conduct and ethical standards which apply to 'mediators'…Appropriate definition benefit both the users of mediation services and those who advise them on and refer them to mediation. Politically the definitional debate is significant in that different professions and organisations tend to define mediation in terms of the self-interest of their members. Thus a 'social work' definition might imply that it is necessary for mediators to have counselling skills, while 'legal' definition could imply that knowledge of the law is essential. While the mediation terrain is being claimed by competing groups of potential service-providers, the particular definition of mediation which prevails is politically significant.[437]

In order to have a meaningful discussion on the current requirements for accreditation, training, level of skills and ethical standards, one would require the adoption of a benchmark definition to differentiate the types of mediation that are being practised in Australia today. Again, challenges are encountered not only from the different definitions used but also in the ways that the same definitions are interpreted differently in the absence of comprehensive guidelines and examples. The practical impacts may be quite significant when the terms are put in use in the real world.

Different approaches and styles of practices may require additional or more stringent requirements to be met, often these additional requirements may be

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[437] Laurence Boulle, *Mediation: Principles, Process, Practice* (1st edn, Butterworths 1996) 11.

mandatorily required under the statutory law (eg family mediation) or pre-existing rules and standards that the mediators may already be subject to from his other profession (eg the law society or Bar association).

Different goals and objectives may also give a very different perspective in interpreting, defining and setting the meaning of mediation for accreditation purpose and level of ethical and skill standards required, they may compliment or add to the minimum requirements for accreditation but often in practice the industries and governing bodies set conflicting or different ethical standards and accreditation requirements [438] that serve their goals, political agenda and occupational interests.[439]

Legal and professional liabilities may also be quite different in respect of duty of care, insurance requirement and immunity to negligence (eg lawyers promoted as mediators for 'their special skills, training and experience' would imply a level of expertise and the standard of care may be higher than other non-legal mediators).[440]

For any prospective commercial mediator who wishes to practice commercial mediation in Australia and wish to acquire the National Accreditation title must be

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438 Law Council of Australia, 'Submission on National Mediator Accreditation System Revised Draft Approval Standards' (2013).

439 See the different responses received on defining ADR Terminology: NADRAC, 'ADR Terminology—Responses to NADRAC Discussion' (2003) <www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/ADR%20Terminology%20Responses%20to%20NADRAC%20Discussion%20Paper.doc> accessed 8 July 2016.

440 Spencer and Hardy (n 317) 41.

wary that the mediation field in Australia is approaching its mature phase in its development towards professionalism.

Recent developments in Australia, eg the closure of NADRAC and the integration of its function into the Attorney General Department, the proposed merger of LEADR and IAMA, the steering committee towards a Peak body, the ever increasing standards and legislations that are relevant to the code and conduct of a mediator, has indicated that the industry is 'merger and acquisition' mode, whereby the fittest survive. However, the current state of the market is at an interesting stage and further changes are expected in relation to accreditation, ethnic, code of conduct skills and training requirements as the industry attempts to move towards professionalism.

CHAPTER 3. NEW ZEALAND

3.1. INTRODUCTION: DISPUTE RESOLUTIONS INSIDE AND OUTSIDE THE COURTROOM IN NEW ZEALAND

Coloured by its colonial background and distinct tribal customs, the legal system of New Zealand largely inherits the British common law tradition and at the same time retains some of its customary rules such as the Maori customary laws. Central to such a legal system with statutory laws, common law and customary rules as the major sources of law are the fundamental principles of parliamentary sovereignty, the rule of law and separation of the judicial, legislative and executive powers.[441] Issues are determined in multiple levels of courts, namely the Supreme Court, the Court of Appeal, the High Court, the district courts and various tribunals, through an adversarial process in which the judge and his/her jury play the role of an umpire and decide on matters of law and facts respectively after scrutinising the arguments and evidence from both sides of the plaintiff and defendant.[442]

However, disputes do not always have to be settled through costly and time-consuming litigation processes. Mediation is often believed to be an alternative to

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441 Richard Scragg, New Zealand's Legal System: The Principles of Legal Method (OUP, 2005) 6-9.

442 Courts of New Zealand, 'The Structure of the Court System' <www.courtsofnz.govt.nz/about/system/structure/overview> accessed 8 July 2016

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resolving disputes outside the legal sphere.[443] The increasing popularity of mediation has been viewed as a rebuttal to its status as a mere 'alternative' to the seemingly mainstream solution of litigation as reality has revealed that most disputes are dealt with outside the legal sphere and instituting court proceedings has been but an 'exceptional way of dealing with disputes'.[444] Given the importance of mediation, this chapter aspires to look into the application of mediation in New Zealand and will focus primarily on the training and accreditation procedures for mediators. At the end of the chapter an evaluation over the current system of mediation in New Zealand will be made with regards to recent demands for a uniform mediation code/law.

443 Laurence Boulle, Virginia Goldblatt and Phillip Green, *Mediation: Principles, Process, Practice* (2nd edn New Zealand Ed, LexisNexis NZ Limited 2008) 87-93.

444 ibid 87.

3.2. AN OVERVIEW OF THE LEGAL FRAMEWORK AND APPLICATION OF MEDIATION IN NEW ZEALAND

In spite of the great significance and impressive credentials of ADR in New Zealand, there is no general mediation statute in New Zealand to govern the application of mediation.[445] As indicated in Appendix 6 of the *Guidelines on Process and Content of Legislation - 2001 edition and amendments*[446] (a copy of which is enclosed in Annex A), rules in relation to mediation are scattered across isolated provisions in miscellaneous legislations that two broad categories of such legislations can be observed: enactments that provide for the use of ADR without laying down procedures or giving guidance regarding the application of ADR and enactments that set up a process for the resolution of disputes which may vary from legislation to legislation, yet are in general more or less self-contained. It is found that whilst many Acts in New Zealand provide for mediation as an alternative means of dispute resolution, yet these Acts often do not contain elaborate rules for mediation.

Due to the absence of a single mediation act, there has never been a unified concept of mediation nor a consistent definition of mediation.[447] Mediation has been predominantly defined in the academia as 'an informal and confidential proceeding in which the contestants participate voluntarily and try to solve a

445 Heyo Berg, 'Mediation in New Zealand: Widely Accepted and Successful' in Klaus J. Hopt and Felix Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (OUP 2013) 1096.

446 Legislation Advisory Committee, 'Guidelines on Process and Content of Legislation' (2001 edn, last updated in 2007) app 6 <www.lac.org.nz/guidelines/2001-edition/> accessed 8 July 2016.

447 Berg (n 445) 1097.

conflict with the help of a mediator', whose role is not to give an ultimate ruling, but to pave the way for an agreement between the parties.[448] It is believed that mediation has its foundation on the self-determination of the parties, and it allows the parties to reconcile different positions.[449] The Law Commission of New Zealand defined mediation as a process 'led by a neutral third party who works with the disputing parties to help them explore and, if appropriate, reach a mutually acceptable resolution of some or all of the issues in dispute.'[450] Similarly, the Legislation Advisory Committee has defined mediation as:

> [A] flexible process conducted confidentially, in which a neutral third person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of the resolution.[451]

Although the definition of mediation varies from institution to institution, several core features can be summarised in order to erect a common foundation for discussion. From these core features, it can be understood that mediation is a confidential 'decision-making process' in which a third party, the mediator, assists

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448 P Hutcheson and S Hooper in P Spiller (ed), *Dispute Resolution in New Zealand* (2nd edn, OUP 2007) 57, 65.

449 ibid.

450 New Zealand Law Commission, 'Delivering Justice for All: A Vision for the New Zealand Courts and Tribunals' (2003) 87.

451 Legislation Advisory Committee (n 446) para 18(2)(3).

the disputed parties to reach an outcome that both parties can assent to, with the mediator having no capacity to make a decision for the parties.[452]

Mediation is adopted primarily through judicial reference in New Zealand, yet there are also suggestions that private mediation for general civil disputes valued under NZD 50,000 could be instituted.[453] Judicial mediation procedures are found in different enactments. Courts and public authorities can refer parties to private commercial mediators for matters including those before the District or High court, the Environmental court, the Health and Disability Commissioner, or the Privacy Commissioner. Generally, commercial mediation is adopted as a contractual obligation established in an agreement to mediate between the parties so that should any disputes arise, the parties will resort to mediation.[454] In the realm of commercial mediation, legal issues are mainly governed by general principles of contract law, with some influence of statutory law that may govern the contract such as the Contractual Mistakes Act 1977.[455] In regards of such mediation clauses, New Zealand courts assume the role to enforce the intentions of parties in commercial negotiations[456] and the courts can encourage the use of mediation via the exercise of discretion in favour of staying proceedings to ensure that mediation can be performed.[457]

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452 Boulle, Goldblatt and Green (n 443) 8.

453 Berg (n 445) 1101.

454 ibid 1106.

455 Boulle, Goldblatt and Green (n 443) 257.

456 *Manukau City v Fletcher Mainline Ltd* [1982] 2 NZLR 142; *Fletcher Challenge Energy Ltd v Electricity Corp of New Zealand Ltd* [2002] 2 NZLR 433.

457 Boulle, Goldblatt and Green (n 443) 260.

The profession of mediation in New Zealand has been 'self-regulating' as there are limited statutory regulations imposed on mediators.[458] There are two main professional bodies regulating the practice of mediation on a voluntary basis, the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) and LEADR. The former originated from a local branch of the British establishment of the CIArb and the latter was a division of the Australian LEADR organisation.[459] The two organisations have established their own accreditation systems and codes of conduct, model mediation clauses and standards of professional training in mediation.[460] The following part of the chapter will focus on the procedures of how a commercial mediator is trained and regulated in New Zealand.

458 ibid 284.

459 Arbitrators' and Mediators' Institute of New Zealand Inc, 'About AMINZ' <www.aminz.org.nz/Category?Action=View&Category_id=641> accessed 8 July 2016; LEADR <www.resolution.institute/> accessed 8 July 2016.

460 Berg (n 445) 1100.

3.3. TRAINING OF MEDIATORS

The issue of training for mediators has attracted some contentions on whether a mediator should be trained or should remain as an ordinary reasonable person that is not under a category of professionals. Views have also been held that the importance of parties' intentions and desires should outweigh the education and training requirements of mediators. Nevertheless, these arguments have not gained much support in the field of mediation, instead, an increase in the provision of mediator training and independent accreditation schemes from AMINZ and LEADR has been observed.[461] This is mainly because of the need to ensure accountability and quality of mediation so as to minimise the risk associated with mediation conducted in a unprofessional manner.[462] Some believe that the lack of claims against mediators as demonstrating that training should not be compulsory as the market will eventually weed out inadequate mediators.

Both AMINZ and LEADR offer courses for the training of mediators, and so do some universities in New Zealand. The Fellowship Programme from AMINZ, for instance, which is the highest level of membership in AMINZ, has a syllabus that is offered in four parts: communication skills, law and practice of mediation, mediation and practical dispute resolution.[463] It has been commented as a course that paves a strong academic theoretical knowledge base.[464]

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461 Boulle, Goldblatt and Green (n 443) 288-289.

462 M Herman, N Hollett, D Eaker, J Gale and M Foster, 'Supporting Accountability in the Field of Mediation' (2002) 18 Negotiation Journal 30.

463 AMINZ, 'Fellowship' <www.aminz.org.nz/Category?Action=View&Category_id=708> accessed 8 July 2016.

464 Boulle, Goldblatt and Green (n 443) 290.

On an advanced level, trainees can also opt for specialised trainings that focus on additional theories of conflict, dispute resolution, problem-solving and negotiation skills. Interdisciplinary perspectives and further skills development through practice sessions may also be found in such advanced trainings. Apart from specialised trainings conducted in the form of skills enhancements, case studies, and practice sessions, clinical training may also be involved at a higher level. Trainees will get to polish and develop skills useful to conduct mediation, under the guidance of supervisors in a clinical environment. Pre- and post-practice debriefing and reflection sessions as well as observation sessions are often included to enrich the learning experience as well as to consolidate knowledge.

Some universities in their Bachelor of Laws (LLB) programmes and district law societies' continuing education seminars in New Zealand offer basic courses on mediation skills and theory. Universities offer courses on mediation as well as ADR in general on both undergraduate and postgraduate levels. Postgraduate schools that offer such courses include the Massey University Dispute Resolution Centre and Waikato University Law School. University training programmes usually involve two streams of subjects. The first are academic-based subjects on theories and other ADR topics that are examinable by the writing of research papers and presentations. The second are practical subjects which involve the assessment of skills needed in conducting mediation. Some programmes from these institutions can be counted as qualifications in preparation for admission to the Fellowship Programme from AMINZ.[465]

[465] ibid 292-293.

3.4. ACCREDITATION OF MEDIATORS

In New Zealand, the mediation profession is not regulated and there is no restriction for anyone to call himself/herself as a mediator.[466] The practice of mediation can be conducted by unaccredited individuals. The use of label 'mediator' is arbitrary.

Majority of the training programmes aim to assist aspiring mediators attain the necessary professional accreditation qualifications. Since there is no national authority providing an accreditation system for mediators in New Zealand, any entity can provide such provided it has been approved by the New Zealand Qualifications Authority.[467] Currently, the two regulatory bodies, AMINZ and LEADR have their own accreditation and certification processes in place for its members.

AMINZ upholds a two-level accreditation system in which members can be accredited as Associates or Fellows. An Associate is recognised for his/her experience and qualifications. To attain this level of membership, one has to embark on training programme that covers the basic understanding of the law and dispute resolution, together with an elective on either evidence and advocacy or the law for mediators.[468] As for the higher level of Fellowship, one has to

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466 Kay Hewitt, 'Critical Mediation Issues: New Zealand Literature and Practice' (2008) Research Report for Mapp 581 Project <www.mediate.com/GeoffSharp/docs/SUBMITTED%20MEDIATION%20RESEARCH%20(2).pdf> accessed 8 July 2016.

467 New Zealand Qualifications Authority <www.nzqa.govt.nz> accessed 8 July 2016.

468 AMINZ, 'Education Syllabus for Associateship' <www.aminz.org.nz/Attachment?Action=Download&Attachment_id=104> accessed 8 July 2016.

undertake an interview, a one-day seminar, a three-hour written examination and a one-day practical examination in order to satisfy the prescribed standard.[469] As aforementioned, the syllabus of the Fellowship Programme involves more practical training on skills enhancement for mediation practice.

Whereas LEADR offers a two-level accreditation scheme[470] that recognises LEADR and standards adopted by the Australian Capital Territory (ACT). Aspiring mediators are required to complete a LEADR dispute resolution workshop or a comparable workshop, and undertake an assessment in the form of a simulated mediation or provide evidence of competence in conducting actual mediations. Advanced accreditation sets additional requirements to basic accreditation. On top of the basic requirement for accreditation, the candidate is required to have completed a minimum of 250 hours of practice with written evaluations on their proficiency by those involved with the mediations.[471]

In addition to the qualification requirements, AMNIZ and LEADR also impose an obligation for accredited mediators to undertake annual CPD activities, such as attendance at seminars, workshops or conducting a prescribed number of mediations which fulfil one's obligations. Performance-based activities such as practice development, skills audits and reassessments can also count towards such requirements. AMINZ adopts a different CPD system than LEADR. The AMINZ system is based on a point calculation system in which mediators will get various scores from a range of activities in order for one to accumulate certain scores to

469 AMINZ, 'Fellowship' (n 463).

470 Basic and Advanced Accreditation.

471 LEADR, 'Accreditation' <www.resolution.institute/accreditation/apply-for-leadr-and-leadr-advanced-accreditation> accessed 8 July 2016.

fulfil the CPD requirements; whereas the system of LEADR focuses on the number of hours one participates in CPD activities. Failure to comply with the CPD requirements may result in one's removal from the panel of mediators.

3.5. CODE OF ETHICS FOR MEDIATORS

Mediators to an extent have some core responsibilities which entail ethical standards. These responsibilities include the power to collect and disclose information in separate meetings on a confidential basis and direct discussions that have an impact to the success of the mediation. The unique non-partisan position of the mediator and the special relationship he/she has with both parties also calls for high professional standards. Unlike a lawyer, the mediator does not and should not be accountable to the parties involved, hence neutrality is of paramount importance. The mediator's dualistic relationship with both parties also requires a high standard of ethics so as to maintain the neutrality of the mediator.[472]

Both AMINZ and LEADR have developed their own codes of ethics. Five duties have been highlighted by scholars as common ethical duties that reside in both codes of ethics.[473] Firstly, the mediator has the duty to avoid conflicts of interest. In the Code of Ethics from LEADR, it requires that the mediator should disclose all 'actual and potential conflicts of interest known to the mediator'.[474] Such a duty of disclosure is also included in the Code of Ethics of AMINZ.[475] The second duty is for one to maintain impartiality, which is a crucial duty,[476] as impartiality is the fundamental concept of maintaining trust and fairness in the entire

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472 National Working Party of Mediation, *Guidelines for Family Mediation: Developing Services in Aotearoa – New Zealand* (LexisNexis NZ Limited, 1996) 55-59, 68-71.

473 Boulle, Goldblatt and Green (n 443) 306-310.

474 LEADR, 'Code of Ethics' <www.resolution.institute/about-us/code-of-ethics> accessed 8 July 2016.

475 AMINZ, 'AMINZ Code of Ethics' <www.aminz.org.nz/Folder?Action=View%20File&Folder_id=4&File=CodeofEthicsfinal1December2011.pdf> accessed 8 July 2016.

476 Phillip D Green, *Employment Dispute Resolution* (LexisNexis Butterworths, 2002) 4-5.

process.[477] The duty to remain impartial is also incorporated in LEADR's Code of Ethics,[478] as well as the AMINZ Code of Ethics.[479] Thirdly, the mediator should maintain confidentiality throughout the process as stated within the AMINZ Code of Ethics.[480] The LEADR requires that not only does the mediator need to maintain confidentiality throughout the process, he/she also needs to address feedback and complaints while maintaining confidentiality.[481] Moreover, the mediator also needs to avoid coercion and undue influence. The AMINZ Code of Ethics in its commentary stated that since the voluntary nature of mediation gives parties the right to walk away from the mediation, the mediator should avoid coercive conduct in an effort to achieve an outcome.[482] Although the same provision prohibiting coercive behaviours of mediators is not found in the LEADR's Code of Ethics, Clause 23 of the Code restates the need for mediators to respect self-determination of the parties.

477 Phillip D Green, 'A Question of Ethics' (AMINZ Conference, 21 July 2002).

478 LEADR (n 474) cl 15.

479 AMINZ (n 475) statement 2.

480 ibid statement 6.

481 LEADR (n 474) cl 22.

482 AMINZ (n 475) statement 9.

3.6. PROFESSIONAL NEGLIGENCE WITHIN MEDIATION

Mediation in New Zealand has throughout the years experienced significant growth. However, unlike other forms of ADR such as arbitration which has been regulated to a degree by the Government,[483] the mediation industry is still unregulated.[484]

Some sectors of the community are of the view that mediation regulations should not be imposed as the industry has been operating under a territory of self-regulation, which has by far being successful, whereas others believe that some form of regulation would provide for better standards and safeguards for consumers as well as enhancing the status of mediation thus improving the legitimacy of such a process in the eyes of potential disputants and affording some sort of protection to practitioners. In the case of *Robert Samuel Mccosh v David A R Williams*[485] which concerns the liability of a mediator. Mr. Williams acted as the mediator of the dispute between Mr. McCosh and his three daughters, in relation to entitlements to farming land. A settlement agreement was achieved in which Mr. McCosh transferred 21,530 shares of New Zealand Dairy Group Ltd to his three daughters. However a few days later, the daughters advocated that they should have received 59,430 shares instead which was denied by Mr. McCosh. The daughters requested Mr. Williams to decide the issue. Mr. Williams issued a

483 New Zealand Legislation, 'Arbitration Act 1996' <www.legislation.govt.nz/act/public/1996/0099/latest/DLM403277.html> accessed 8 July 2016.

484 Daniel Becker, 'The Need for More Regulation of Mediation' <www.lawsociety.org.nz/practice-resources/commentary/law-reform-background/the-need-for-more-regulation-of-mediation > accessed 8 July 2016.

485 *Robert Samuel McCosh v David A R Williams* [2003] CA275/02 (CA).

'Summary Determination' which declared that the agreement referring to 21,530 shares should really mean 56,954 shares. Mr. McCosh subsequently alleged that Mr. Williams was negligent and sought for damages as a result. The court decided that 'Mr. Williams did exceed his jurisdiction. He cannot properly be said to have been engaged in interpreting the document (agreement)'[486] and 'we [the court] are therefore of the view that Mr. Williams acted without jurisdiction'.[487]

Another case concerning mediator's liability is that of *Tapoohi v Lewenberg (No.2)*[488] (Australia). In this case, siblings disputed the entitlement of their mother's estate. They agreed to mediate to settle the dispute. At the mediation, it was orally expressed that taxation advice be sought before the final mediation settlement. The settlement stated that Toppphi shall forthwith pay $1.4m to Lewenberg in exchange for land. One year later, Tapoohi recognised the capital gains tax and filed proceedings against her sister, lawyers and the mediator based on the fact that settlement was subject to further tax advice. Tapoohi alleged that the mediator had a duty of care as well as a contractual responsibility in the matter. Although the case was subsequently dismissed, Hobersberger J held that the mediator may be in breach of both contractual and tortuous liabilities based on what has been presented to the court so far.[489]

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486 *Robert Samuel McCosh v David A R Williams* [2003] CA275/02 (CA) para 28.

487 *Robert Samuel McCosh v David A R Williams* [2003] CA275/02 (CA) para 32.

488 *Tapoohi v Lewenberg* [2003] VSC 410.

489 The Mediation Doctors, 'Mediator Liability' <http://digitalsmarttools.com/eRowlett/Mediator_Liability.htm> accessed 8 July 2016.

Based on the cases mentioned above, the possibility of one being brought to court on the grounds of negligence is something that one needs to be aware of, as society is becoming more litigious in nature.

3.7. THE NEED FOR A UNIFIED MEDIATION LAW

The idea of establishing a uniform mediation act has been criticised to an extent that the existing 'beauty of mediation [that] lies in its informality, voluntary nature, versatility and adaptability'[490] would be greatly affected. The flexibility of mediation that allows it to accomplish extraordinary outcomes in the interest of disputants may be compromised if strict statutory control through legislation is applied. On the other hand, scholars and practitioners are of the view that government endorsement in the form of legislation would legitimate the process and increase its usage in the community.[491] Standardised definition and procedures can also clean up scattered models of mediation across legislations in New Zealand and bring about a consistent terminology and approach to process issues.[492] Another advantage of enacting a uniform mediation legislation is that it heightens the certainty and predictability to fundamental legal questions in relation to mediation, especially questions regarding the concept of confidentiality and privilege, which can afford greater protection to both mediators and parties.[493] Although under the existing system, there are guarantees that information discussed or presented during the proceedings or the outcome of the disputes reached will remain in camera. This is the case even though the parties in dispute specifically provide for confidentiality in their agreed mediation agreement or

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490 Deborah Clapshaw and Susan Freeman-Greene, 'A Mediation Act – Do We Need One?' (AMINZ Conference, Auckland, 21-22 February 2003) 193.

491 ibid 195.

492 Claire Baylis, 'Reviewing Statutory Models of Mediation/ Conciliation in New Zealand: Three Conclusions' (1999) 30 VUWLR 279.

493 Clapshaw and Freeman-Greene (n 490) 195.

settlement agreement. In an article written by Goldblatt,[494] confidentiality provisions as stated in the mediation agreement may be ineffective as parties in the dispute could simply choose to ignore the provisions, knowing that the legal remedy available to the other party is pretty limited.[495] In any event, the suffering party will often be disinclined to bring legal action, knowing of the further negative publicity it would bring.

Legislation associated with mediation would give extensive protection relating to the privacy of the proceedings and specify approvals for the breach of such. Like in Australia under the ACT Mediation Act (1997) specific circumstances in the legislation are spelled out for clarity, for example, when there is intimidation of bodily injury.[496] It is expected that clear legislative commands in relation to confidentiality of the proceedings, supported by burdensome consequences of a breach, would do much to confirm the true attributes of mediation.

Statutory guidelines on basic education and qualification requirements also minimise consumer risks from inexperienced mediators, hence guarantee the quality of mediation and protect consumers from incompetent providers. Although the current training and accreditation systems devised by AMINZ and LEADR are approved by New Zealand Qualifications Authority, there is still a lack of

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494 V Goldblatt, 'Confidentiality in Mediation' (2000) New Zealand Law Journal 392, 400.

495 Where a contractual obligation of confidentiality exists and this is breached, the other party will generally be entitled to not perform their end of the bargain; for example, refrain from paying money. However, where money is already paid when the disclosure occurs, the cost of recovering it may not be justified, especially when the amount paid is small. It is the knowledge of this fact that may lead parties to disclose information.

496 The ACT's legislation, for example, provides in section 10(d)(i) that a breach of confidentiality is permitted where a person's "life, health or property are under serious and imminent threat".

consistency in the minimum qualification requirements in the training and accreditation schemes offered by AMINZ and LEADR. Codifying a set of standards, code of ethics and a system of registration and accreditation of mediators would allow better control on the qualifications and how mediations are conducted, hence raise the credibility and reputation of mediation. With appropriate standards in place, one could turn to international recognition as this could easily provide a valuable source of income to New Zealand in the form of export services as the number of Australian lawyers practicing in Hong Kong[497] has reached over 800 in total.

[497] Law Council of Australia, Factsheet on Practice of Foreign Law: Hong Kong <www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/Country_Fact_Sheets/Asia/PFL%20Hong%20Kong_map.pdf> accessed 8 July 2016.

3.8. CONCLUSION

Over the years, mediation in New Zealand has evolved to a state of general acceptance in the community, to advance matters further a concerted effort from all sectors is greatly need. Justice Winkelmannn, stated that 'when reflecting upon the role of mediation, New Zealand is able to learn from the lessons of other jurisdictions'.[498]

It is important that mediators be trained and supervised appropriately to provide services of a professional capacity. As there are no specific regulations governing mediation in New Zealand, the dilemma is that any person of legal capacity can act as a mediator and be called a mediator. Using ill trained or incompetent mediators can badly affect the mediation process and its ultimate success.[499]

Some sectors of the community are calling for a uniform mediation code/law to be enacted as they believe that a consistent piece of legislation to be uniformly adopted would be imperative in evolving the legal system to a state when access to justice would be affordable to all.

The legislation that New Zealand can seriously adopt should not be piece meal in nature but rather a comprehensive piece of legislation that lays the foundations from procedures in mediation to the encapsulation of regulations covering the practice of mediators, standards of competency and accreditation schemes which

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498 Winkelmann Hon J, 'Mediation is no Substitute for Civil Justice' (AMINZ Conference – Taking Charge of the Future, 6 August 2011).

499 New Zealand Law Commission, 'Mediation' <www.nzlii.org/nz/other/nzlc/report/R82/R82-8_.html> accessed 8 July 2016.

serves as the default requirements that one must adhere to thus levitating the need for privately established standards such as those advocated by AMINZ and LEADR. Beneficial provisions that clarify the rights, obligations and protections of parties to mediation can also be included.[500] On top of the legislative requirements, a complimentary set of mediation rules that are flexible, easy to adopt and apply should be drafted to assist disputants throughout. With improvements in the law, it is believed that mediation in New Zealand will be able to enjoy greater popularity as time evolves.

[500] Robyn Carroll, 'Trends in Mediation Legislation' (2002) The University of Western Australia Law Review 167-207.

CHAPTER 4. INDONESIA

4.1. INTRODUCTION

Mediation is a conflict resolution process in which a mutually acceptable third party, who has no authority to make binding decisions for disputants, intervenes in a conflict or dispute to assist involved parties to improve their relationships, enhance communications, and use effective problem-solving and negotiation procedures to reach voluntary and mutually acceptable understandings or agreements on contested issues.[501] The key element to this definition is the mutually acceptable third party known as the mediator. How then, can one become a mediator in Indonesia and what qualities and qualifications one should have to become a mediator? This Chapter will examine closely how commercial mediators are trained and accredited in Indonesia.

[501] Christopher W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (4th edn, Jossey-Bass 2014) 8.

4.2. MEDIATION IN INDONESIA

Indonesia has a strong culture of mediation.[502] Benton and Setiadi wrote that the conflict resolution practices in Indonesia can be classified as (1) administrative or judicial procedures in which a respected third party makes a decision or (2) consensually validated processes in which parties work together to produce mutually acceptable solutions.[503] The objective of a consensually validated approach is to achieve the traditional Indonesian thought of *mufakat* (consensus) by using a collectively endorsed procedure known as *musyawarah* (collective deliberation).[504] Moore and Santosa are of the view that the above Indonesian traditional approach to conflict resolution is similar to consensus decision making processes and roles played by a third party in the western model of mediation[505] to which Benton and Setiadi concurred.[506]

With a view of putting the idea of mediation in practice, on 11th September 2003, the Chief Justice of the Supreme Court of Indonesia issued the Regulation of the Supreme Court of the Republic of Indonesia Number 02 of the Year 2003

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502 Achmad M Santosa, 'Development of Alternative Dispute Resolution in Indonesia' (2003) <www.aseanlawassociation.org/docs/w4_indo.pdf> accessed 8 July 2016.

503 Stephen Benton and Bernadette Setiadi, 'Mediation and Conflict Management in Indonesia' in Kwok Leung and Dean Tjosvold (eds), *Conflict management in the Asia Pacific: Assumptions and Approaches in Diverse Cultures* (J Wiley & Sons 1998) 223.

504 ibid 229.

505 Christopher W Moore and Achmad M Santosa, 'Developing Appropriate Environmental Conflict Management Procedures in Indonesia' (1995) 19 (3) Culture, Resources and Conflicts <www.culturalsurvival.org/ourpublications/csq/article/developing-appropriate-environmental-conflict-management-procedures-indo> accessed 8 July 2016.

506 Benton and Setiadi (n 503) 227.

Regarding the Mediation Procedure in the Court (PerMA 02/03)[507] introducing the Court-annexed mediation process.[508] PerMA 02/03 was later superseded and supplemented by Regulation Number 01 of the Year 2008 (PerMA 01/08) whereby all civil cases in Indonesia must first be referred to mediation before an action is brought before a Court of law for resolution[509] and the failure to do so will render the subsequent judgment null and void.[510] Since then, mediation plays a vital part in the resolution of disputes and this compulsory element in PerMA 01/08 provides a strong basis for mediation standards to be introduced in Indonesia. Under a 2016 Supreme Court regulation, mediation must be undertaken before a civil case can be heard by the appointed panel of judges except for matters associated with labour disputes and bankruptcy proceedings. If the disputing parties do not act in good faith during this mandatory mediation process, the judge may declare the lawsuit unacceptable, which will result in the lawsuit being discontinued in its entirety. Figure 4.1 depicts a simplified flow of civil litigation in Indonesia.

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507 Karen Mills, 'Chapter 6: Indonesia' in Michael Charles Pryles (ed), *Dispute Resolution in Asia* (3rd edn, Kluwer Law International 2006) 165.

508 PerMA 02/03 art 2(1).

509 Except for cases that must be brought to the Commercial Court, Industrial Relationship Tribunal, objection to the decision of the Tribunal for Consumer's Dispute Resolution, and appeal against the decision of the Commercial for Supervision of Business Competition.

510 PerMA 01/08 art 2(3).

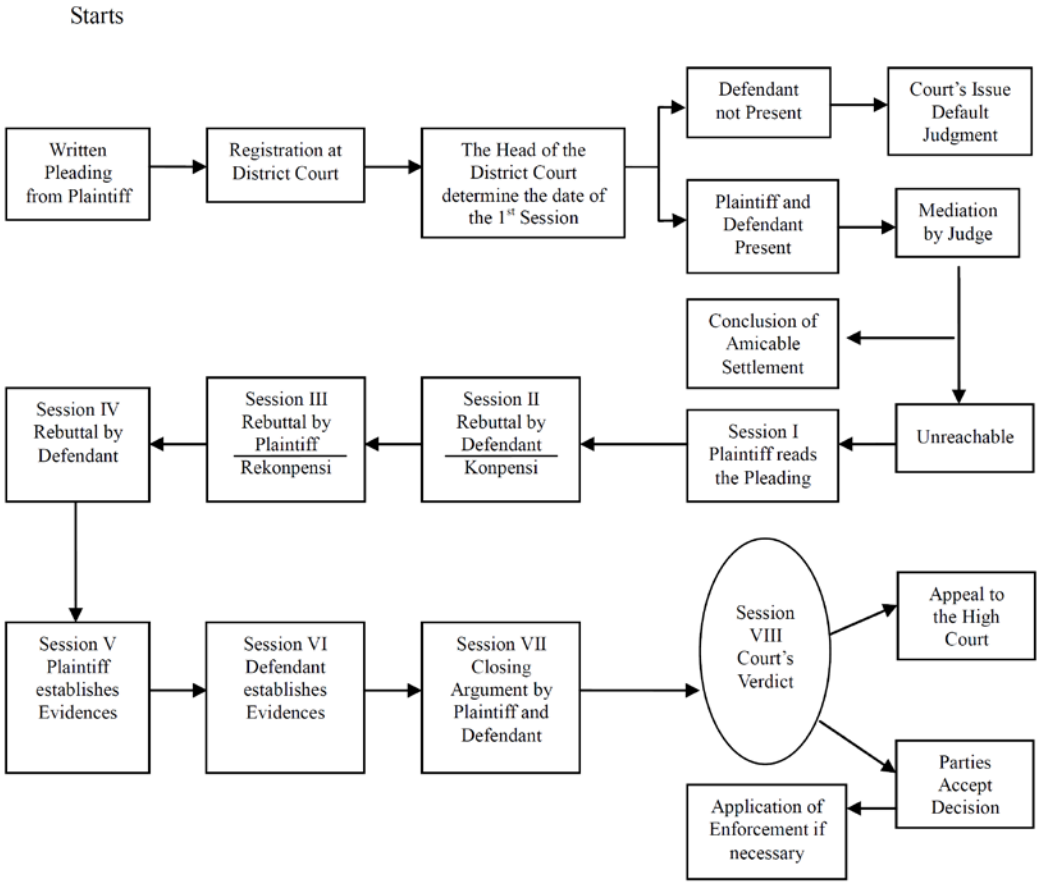

Figure 4.1 – Flow of Civil Litigation in Indonesia[511]

511 Reproduced from Juwana Hikmahanto, 'Dispute Resolution Process in Indonesia' (2003) 21 IDE Law Series 20.

4.3. A REVIEW OF LITERATURE ON MEDIATOR TRAINING

Before proceeding to examine closely as to how mediators are trained and accredited in Indonesia, it would be helpful for one to have an overview of the importance of mediator training in order for one to understand the subject in context.

Mediator training programmes have first been routinely conducted in the United States of America since the early 1970s.[512] Nonetheless, a lack of proper regulation and training would jeopardise the general perception of mediators as professionals.[513] Black-branch therefore calls for a mandatory and perhaps centralised authority to regulate the profession of mediators.[514]

Since about 1990s, there have been emerging literatures regarding mediator training and mediator competence. Bowling and Hoffman described that the professional development of mediator is divided into 3 principle stages: skills training, further reading and study, followed by personal development. In the first stage, mediators will learn various skills such as active listening, reframing, focusing on interests, prioritising issues and assisting in option generations. In the second stage, mediators will develop more in-depth understanding of the nature of the mediation process and refine their basic skills. In the third stage, mediators would have to understand how their personal qualities would influence the

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512 Moore, *The Mediation Process* (n 501) 573.

513 Jonathan L Black-Branch, 'The Professional Status of Mediators' (1998) 28 (1) Family law 39.

514 ibid 41.

mediation process.[515] Lieberman, Foux-Levy and Segal, in summarising various literatures, advocated the importance of appropriate training to ensure that each of these stages shall be sufficiently fulfilled.[516]

Going to the substance of the mediator training, Moore identified 5 key issues to be considered, namely, (1) criteria for trainee selection, (2) forums and formats for training, (3) content, methodology, and duration of training programmes, (4) qualifications for trainers and instructors and (5) consumer criteria in programme selection.[517]

Insofar as the trainee selection criteria are concerned, technically anyone should be able to be trained as a mediator. Although there has been debates as to whether one should have achieve certain academic qualification before being taken into mediation training (such as in some states in the United States),[518] the ACR formerly known as the Society for Professionals in Dispute Resolution (SPIDR) Commission on Qualifications concluded that there is no evidence to support the contention that formal academic degrees in fields other than mediation are necessary to perform as a mediator. As such, the SPIDR Commission on Qualifications recommends 'qualifications based on performance', emphasising

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515 Daniel Bowling and David Hoffman, 'Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation' (2000) 16 (1) Negotiation Journal 5.

516 See generally Etty Lieberman, Yael Foux-Levy and Peretz Segal, 'Beyond Basic Training: A Model for Developing Mediator Competence' (2005) 23 (2) Conflict Resolution Quarterly 237- 257.

517 Moore, *The Mediation Process* (n 501) 575.

518 Bobby Marzine Harges, 'Mediator Qualifications: The Trend Toward Professionalism' (1997) Brigham Young University Law Review 687, 694.

the importance training by qualified and professional trainers, performance-based testing and continuing mediation training in promoting mediator's competence.[519]

In respect of the forums and formats for training, Moore categorised that into 3 paths: (1) short courses, (2) longer training programmes and (3) mentoring and or apprenticeships. Short courses are those introductory courses presenting overviews of conflict management field and mediation practice, introductions to new areas of practice and in-depth treatment of advanced topics. These are generally not adequate to train mediators. Longer courses, with approximately 40 hours in duration, are currently the most common formal trainings. Monitoring and apprenticeships enables prospective practitioners to learn mediation skills and practice as apprentices to experience mediators.[520]

The SPIDR Commission on Qualifications helpfully identified a number of mediator competencies that need to be covered in mediator training programmes[521]. Such competencies are reproduced in Table 4.1 for reference.

519 SPIDR Commission on Qualifications, 'Qualifying Neutrals: The Basic Principles' (1989) 44 (3) The Arbitration Journal 48.

520 Moore, *The Mediation Process* (n 501) 577.

521 SPIDR Commission on Qualifications (n 519) 56.

a. Skills necessary for competent performance as a neutral include:
   (1) General
      (a) ability to listen actively:
      (b) ability to analyze problems, identify and separate the issues involved, and frame these issues for resolution or decision-making;
      (c) ability to use clear, neutral language in speaking and (if written opinions are required) in writing;
      (d) sensitivity to strongly felt values of the disputants, including gender, ethnic, and cultural differences;
      (e) ability to deal with complex factual materials;
      (f) presence and persistence, that is, an overt commitment to honesty, dignified behavior, respect for the parties, and ability to create and maintain control of a diverse group of disputants;
      (g) ability to identify and to separate the neutral's personal values from issues under consideration; and
      (h) ability to understand power imbalances.

b. Knowledge of the particular dispute resolution process being used includes:
   (1) familiarity with existing standards of practice covering the dispute resolution process; and
   (2) familiarity with commonly encountered ethical dilemmas.

c. Knowledge of the range of available dispute resolution processes so that, where appropriate, cases can be referred to a more suitable process;

d. Knowledge of the institutional context in which the dispute arose and will be settled;

e. In mediation, knowledge of the process that will be used to resolve the dispute if no agreement is reached, such as judicial or administrative adjudication or arbitration;
   (2) For mediation
      (a) ability to understand the negotiating process and the role of advocacy;
      (b) ability to earn trust and maintain acceptability;
      (c) ability to convert the parties' positions into needs and interests;
      (d) ability to screen out nonmediatable issues;
      (e) ability to help the parties to invent creative options;
      (f) ability to help the parties identify principles and criteria that will guide their decision-making;
      (g) ability to help the parties assess their nonsettlement alternatives;
      (h) ability to help the parties make their own informed choices; and
      (i) ability to help the parties assess whether their agreement can be implemented.
   (3) For arbitration
      (a) ability to make decisions;
      (b) ability to run a hearing;
      (c) ability to distinguish facts from opinions; and
      (d) ability to write reasoned opinions.

f. Where parties' legal rights and remedies are involved, awareness of the legal standards that would be applicable if the case were taken to a court or other legal forum; and

g. Adherence to ethical standards.

Table 4.1 – Performance Criteria suggested by SPIDR Commission on Qualifications[522]

[522] Reproduced from SPIDR Commission on Qualifications (n 519) 56.

Moore recognised that there have been diverse approaches in how to incorporate these competencies into training programmes. Nonetheless, he concluded that the mediation training programmes shall achieve certain educational goals. Firstly, mediation training programmes shall teach a concrete and structured process by which the mediator and the parties to disputes should use in approaching and resolving their disagreements. Secondly, mediators should be trained with contingent approaches and skills in handling special problems. Thirdly, the process needs to be presented in combination with substantive information in various aspects such as legal, psychological, technical, etc in different practice areas. Finally, ethical issues and dilemmas ought to be raised to the prospective mediators. In gist, most mediation trainers believe that a combination of presentation and hands-on practice sessions whereby trainees are given the opportunity to make attempts and integrate training materials into practice would be able to accomplish such competences.[523] This is also consistent with the views of the SPIDR Commission on Qualifications whereby the Commission promulgated the mandatory participation in practical mediation training sessions.[524]

As to qualification of trainers, it is advocated that instructors should have practice experience in the area they are teaching.[525] Regarding consumer criteria for programme selection, consumers are recommended to ask a series of critical questions regarding the qualification and experience of the trainers as well as the

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523 Moore, *The Mediation Process* (n 501) 578.

524 SPIDR Commission on Qualifications (n 519) 49.

525 Moore, *The Mediation Process* (n 501) 579.

design, focus, arrangements and durations of the programme before they are to make a selection.[526]

The whole purpose of mediator training is to ensure competency. In this regard, well-designed training programmes are necessary.[527] Nonetheless, whist adequate training is vital, efficient assessment procedures are also needed to ensure mediator competence are tested so that mediators are 'fit for purpose'.[528]

There are a number of methods to assess mediator competence. These include education and training, written examinations, settlement rates and performance-based assessments. The completion of sufficient hours of training, coupled with certain mediation experience and probably academic achievements, is one way of assessing mediator competence.[529] Nonetheless, this method of assessment is inadequate to assure mediator competence as it does not guarantee that the mediator has acquired the needed skills or maintaining the same at an adequate level.[530]

Written examinations have been suggested by many scholars to assess mediator competence.[531] Although this may assess the mediator's knowledge on some key elements to mediation such as mediation process, ethics, regulatory law, etc., it has been argued that written examinations may not be able to assess the critical

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526 ibid.

527 Harges (n 518) 713.

528 Lieberman, Foux-Levy and Segal (n 516) 239.

529 Roselle L Wissler and Robert W Jr Rack, 'Assessing Mediator Performance: The Usefulness of Participant Questionnaires' (2004) Journal of Dispute Resolution 229.

530 ibid 232.

531 Margaret S Herrman and others, 'Supporting Accountability in the Field of Mediation' (2002) 18 (1) Negotiation Journal 29.

interactive skills required in mediation process and could not be used as the only tool for mediator assessment,[532] even though it is relatively simple to administer and does not involve any subjective judgment on the part of the assessor.

Mediators may also be assessed by the number of cases they have successfully facilitated disputants to settle, commonly known as 'settlement rate'. However, given that the settlement rate is only one possible outcome of the mediation nevertheless one cannot ignore the matter of non-settlement as the mediator in some way or form has contributed to the process, whether settlement is reached at the mediation session or there afterwards, still the mediator has facilitated in the process, so the mere use of settlement rate to assess mediator competence does not paint a complete picture in support of a mediator's true competence. Furthermore, heavy reliance of settlement rate may lead to the mediator being too coerce in forcing settlement and leave out some underlying issues which may be fundamentally crucial in maintaining parties' ongoing relationships.[533] Many people forget as to who is the centre of attention within a mediation (namely the disputants) and very often deviate from the true perspective, which results in disputants feeling disillusion with the entire mediation process.

The best approach for mediator competence assessment, as noted by most commentators, is by performance-based assessment.[534] Mediators are placed in

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532 Wissler and Rack (n 529) 233; SPIDR Commission on Qualifications (n 519).

533 Wissler and Rack (n 529) 234.

534 ibid.

an environment where stimulated or real live cases are held in which their performance are observed and evaluated directly by experience assessors.[535]

[535] Wissler and Rack (n 529) 235.

4.4. HISTORY AND DEVELOPMENT OF MEDIATOR CREDENTIALING

Regulation and credentialing are two terms that refer to various ways in which one can ensure quality of service is rendered by those qualified to render such a service.[536] By regulating and credentialing mediators, one can say that mediators are professionals[537] who render a service which consumers can be assured of its safeguards. Any form of credentialing defines expectations and boundaries, core values, and specific bodies of knowledge.[538] In so doing, Milne identified 5 mechanisms, namely, licensure, certification, accreditation, registration and subscription to a standard of practice.[539]

Licensure is the most restrictive method and provides a person with the authority to a professional practice.[540] Herrman *et al* considered this as the least voluntary way of credentialing people. It requires the demonstration of a level of competence[541] and with the oversight of the government, people cannot legally practice without the license.[542] This may restrict the number of professionals entering into the market and may lead to less competition in the provision of services which has an adverse impact on parties' uptake in the mediation process thus ultimately limiting the future development and scope of mediation. A

536 ibid.

537 Black-Branch (n 513) 41.

538 Herrman et al (n 531) 32.

539 Ann L Milne, 'The Development of Parameters of Practice for Divorce Mediation' (1984) 4 Mediation Quarterly 49.

540 ibid 50

541 Herrman et al (n 531) 37.

542 Milton Friedman and Rose D Friedman, *Capitalism and Freedom* (University of Chicago Press 1982) 145.

situation many practitioners regards as undesirable, if mediation is to firmly establish a presence in the dispute resolution arena.

Certification provides documentation that a person has completed a standard level of training and experience.[543] It tests the person against predetermined standards. Contrary to licensure, people who are not certified can continue to practice.[544]

Accreditation is similar to certification and indicates that a person has achieved certain standard of performance and training.[545] Herrman *et al* described this as an objective and impartial review of institutions that educate people preparing to work in a field. It is usually used to assess mediation centres or education programmes.[546]

Registration involves a roster of persons providing a service which usually establishes the minimum qualifications.[547] When an organisation specifies certain qualifications and when it satisfies that a person has fulfilled such qualifications, it will put up the person's name on the roster. A register is similar to a roster but the screening process is less stringent than a roster as the organisation may not have its own qualification standard.[548]

A subscription to a standard of practice is the least restrictive method in regulating a profession involving the voluntarily agreement or submission to an established

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543 Milne (n 539) 50.
544 Herrman et al (n 531) 36.
545 Milne (n 539) 50.
546 Herrman et al (n 531) 36.
547 Milne (n 539) 50.
548 Herrman et al (n 531) 35.

code of ethics and a set of standards.[549] Over the past years, most mediation organisations have adopted standard of practices.[550] Although this is the least restrictive method, Herrman *et al* described it as 'aspirational and reactive'.[551]

Table 4.2 shows the common credentialing options with their potential strengths and weaknesses:-

	Statements of Standards	Registers	Rosters	Accreditation	Certification	Licensure
Who Controls	states, professional associations	States, professional associations	States, professional associations, private organisations	Professional associations	Professional associations	states
Proactive-early screening	no	no	no	yes	yes	yes
Reacts to client complaints	yes, but enforcement problematic	yes, but enforcement problematic	yes, enforcement problematic	yes, enforcement easier	yes, enforcement easier	yes, enforcement easier
Relies on academic / professional credentials	possibly, if part of a register	yes	yes	does not need to	does not need to	does not need to
Evaluates knowledge	no	no	no	yes	yes	yes
Evaluates performance – clinical assessment	no	no	no	yes	yes	yes
Supported by a job analysis	no	no	no	should be	should be	should be
Excludes people who want to mediate	subtle	yes, people lacking formal degrees	yes, people lacking formal degrees	yes, people who fail job related tests	yes, people who fail job related tests	yes, people who fail job related tests

549 Milne (n 539) 50.

550 Milne (n 539) 50; SPIDR Commission on Qualifications (n 519) 49; Herrman et al (n 531) 34.

551 Herrman et al (n 531) 34.

	Statements of Standards	Registers	Rosters	Accreditation	Certification	Licensure
Assures competence	no, very weak	no, weak	no, very weak	no, but offers more assurance	no, but offers more assurance	no, but offers more assurance
Expels for incompetence	enforcement hard	enforcement hard	enforcement hard	enforcement easier	enforcement easier	enforcement easier

Table 4.2 – Common Credentialing Options[552]

The movement of mediator credentialing originated from a symposium held in December 1982 in San Diego.[553] As recorded by Milnes, it was agreed that the development of a certification or licensure process was premature at that time but the promulgation of practice guidelines would assist with the development of the field and the provision of the service.[554]

Since then, there has been some progression in mediator credentialing. Some keynote publications include Honeyman[555] who developed certain testing format and grading criteria and SPIDR Commission on Qualifications who proposed a performance based rather than 'paper credentials' qualification criteria and that a qualification standard should be introduced as well as a variety of organisations should be established for qualifying of mediators.[556]

552 Reproduced from Herrman et al (n 531) 33.

553 Deborah B Gentry, 'The Certification Movement: Past, Present, and Future' (1994) 11 (3) Mediation Quarterly 285.

554 Milne (n 539) 53.

555 Christopher Honeyman, 'Five Elements of Mediation' (1988) 4 (2) Negotiation Journal 149.

556 SPIDR Commission on Qualifications (n 519).

SPIDR in 1995 after two and half years of deliberations by practitioners from the United State of America and Canada[557] published a very interesting document entitled 'Ensuring Competence and Quality in Dispute Resolution Practice'[558] in which it provided a comprehensive set of recommended guidelines for the formulation of standards of competence and qualifications of mediators. It supported certification credentialing but opposed to licensure because of the risk of creating arbitrary standards and possible domination by one group or profession.[559]

557 Moore, *The Mediation Process* (n 501) 589.

558 Society of Professionals in Dispute Resolution, *Ensuring Competence and Quality in Dispute Resolution Practice* (Society of Professionals in Dispute Resolution 1995).

559 ibid.

4.5. MEDIATION TRAINING IN INDONESIA

Syukur and Bagshaw have provided a helpful summary in relation to mediation training in Indonesia.[560] The curriculum for the certified mediation training adopted by the Western facilitative model of mediation, in particular that of the United States of America, Australia and Japan have in some way or form been included in many aspects of Indonesia's mediation training philosophy. The curriculum for the certified mediation training was first developed by the Supreme Court of Indonesia with the Indonesian Institute for Conflict Transformation (IICT). Most trainers from the IICT have had mediation education and training from trainers in Western countries, including the adoption within the curriculum of Dr. Christopher Moore book on Collective Decision Resources (CDR) Associates, Colorado, and United States of America.[561]

The basic certified mediation training comprises a five day or 40-hour syllabus with 30% of the time allocated for the understanding of the underlying theory whereas 70% associated with actual practice whereby participants undertake simulated role plays and games[562] so that they can apply theory into practice, ie, a 'longer training programme' as referred to by Moore.[563] This design is consistent with the idea of Moore[564] and SPIDR Commission on Qualifications[565] who asserted the importance of practice or hands on sessions. The training adopted a

560 Fatahillah Abdul Syukur and Dale Margaret Bagshaw, 'Court Annexed Mediation in Indonesia: Does Culture Matter?' (2013) 30 (3) Conflict Resolution Quarterly 369.

561 Moore, *The Mediation Process* (n 501) 577.

562 Fatahillah Abdul Syukur and Dale Margaret Bagshaw, 'Judicial Mediation in Indonesia: Challenges and Opportunities' (2012) 23 ADRJ 274.

563 Moore, *The Mediation Process* (n 501) 577.

564 ibid.

565 SPIDR Commission on Qualifications (n 519).

facilitative model of mediation whereby mediators provide primarily process assistance and focus primarily on improving the process of negotiations while leaving the substantive focus and contents as the exclusive domain of the parties.[566]

Take the training programme of the Indonesian Mediation Centre (*Pusat Mediasi Nasional*, PMN)[567] as an example. The training prefers soft-skills training and discussion than a presentation or lecture. The role plays consisted of 2 parts. The first part is role plays by trainers in which the trainers will demonstrate the necessary skills[568]. Such skills include reframing, option generating, handling contingent situations, etc as referred to by Bowling and Hoffman.[569] During this part, trainees are expected to accomplish the first stage of the Bowling and Hoffman's mediator professional development model.[570]

The second part is role plays by participants whereby participants will have to participate in not less than 6 role plays with 2 of which acting in the role of a mediator[571] and upon completion of which the trainees should be able to accomplish stage 2 of the Bowling and Hoffman's model.[572] The materials and methods of training have been approved by Asian Mediation Association.[573]

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566 Moore, *The Mediation Process* (n 501) 46.

567 PMN is one of the accredited institute offering certified mediation training in Indonesia

568 Pusat Mediasi Nasional, 'Why train at PMN?' <http://pmn.or.id/pmn/training/> accessed 8 July 2016.

569 Bowling and Hoffman (n 515) 7.

570 ibid.

571 Pusat Mediasi Nasional (n 568).

572 Bowling and Hoffman (n 515) 7.

573 Pusat Mediasi Nasional (n 568).

To echo with the idea of Kruk who identified the importance to appreciate the culture of the parties in dispute resolution,[574] a special material 'Restorative Justice' has also been added to the Western training materials in order to incorporate the philosophy of deliberation which is the basic culture of Indonesia.[575] To this end, Syukur wrote that the mediation theory based on Western models was adjusted to accommodate the traditional, local values. The trainers asked for feedbacks from participants should there be any contradictions. The simulations and role-plays were also formulated according to local culture[576] so that those involved in the training can familiarise themselves quickly in relation to the process and the expected outcomes in order to transfer theory into actual practice.

Following the recommendation of SPIDR Commission on Qualifications,[577] there is no pre-requisite requirement as to the eligibility to these mediation training programmes. Nonetheless, due to funding and practical constraints, most participants to these programmes are judges who are to administer the Court-annexed mediation in Indonesia.[578]

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574 Edward Kruk, 'Mediation and Conflict Resolution in Social Work and the Human Services: Issues, Debates, and Trends' in Edward Kruk (ed), *Mediation and Conflict Resolution in Social Work and the Human Services* (Nelson-Hall 1997) 1.

575 Pusat Mediasi Nasional (n 568).

576 Fatahillah Abdul Syukur, 'Community Mediation Training In Bali & Papua: Access To Justice In Indonesia' (1st Asia Mediation Association Conference: Mediation Diversity - Asia & Beyond Asia Mediation Association, Marina Mandarin Singapore 4 - 5 June 2009).

577 SPIDR Commission on Qualifications (n 519).

578 Syukur and Bagshaw, 'Judicial Mediation in Indonesia' (n 562) 277.

4.6. MEDIATOR CREDENTIALING IN INDONESIA

The PerMA01/08 provided a legal framework for mediator credentialing in Indonesia. Indonesia adopts a dual process of accreditation and licensure. In order for one to excise the mediator function, one shall (subject to certain exceptions as laid down in PerMA 01/08) possess a mediator certificate awarded to him/her after participating in the training organised by an organisation accredited by the Supreme Court of the Republic of Indonesia.[579] Although the terminology used in the statute was certification, the essence of which is a licensure as one cannot exercise the mediator function without the certificate.

The organisation offering certified mediation training is required to obtain accreditation. To do so, specific requirements have to be met and that the organisation must submit an application to the Chief Justice of the Republic of Indonesia; possess instructors or trainers possessing a certificate evidencing their participation in the education or training of mediation and education or training for instructors; have organised at least two mediation trainings for non-certificated court-annexed mediators; and have a court-annexed mediation educative or training curriculum rectified by the Supreme Court of the Republic of Indonesia.[580]

As discussed above, in order for one to be qualified as a certified mediator, he is required to attend the certified mediation training. In addition to that, the curriculum of PMN required him to attend a 1-hour examination conducted

[579] PerMA 01/08 art 5(1).

[580] PerMA 01/08 art 5(3).

outside the 40-hour training.[581] Following the Western approach as discussed above, the assessment is by performance-based assessments. Candidates are required to act as the mediator as well as a party to the dispute in the presence of an assessor as an independent evaluator. Assessment is done by both parties to the dispute and the independent evaluator.[582]

All certified mediators in Indonesia performing their function under PerMA01/08 are to abide by the Code of Conduct for Mediators issued by the Supreme Court. The Code of Conduct regulates the responsibility of the mediator and the parties, duty in relation to confidentiality, conflict of interest, the mediation process, competence and compliant procedures.[583]

581 Pusat Mediasi Nasional (n 568).

582 ibid.

583 The Supreme Court of Republic of Indonesia, 'Code of Conduct of Mediator' (The Supreme Court of Republic of Indonesia 2010).

4.7. CHALLENGES OF MEDIATION TRAINING

After the establishment of the Court-annexed mediation in 2003, there have been various critiques towards mediation in the Indonesia.

The major challenge to the mediator training program is the rigid adherence to the Western facilitative model. Syukur and Bagshaw considered that this has hampered the success of the Court-annexed mediation.[584] Although the training materials, as discussed above, have been modified to incorporate certain Indonesian cultural values, such modification seems to be insufficient and only touches on the surface rather than the underlying concepts and philosophy. In particular, Syukur and Bagshaw advocated that the training materials have failed to address the spiritual dimension of conflict resolutions as Indonesian's dominant values are based on Five Basic Principles (*Pancasila*).[585] In this regard, it has been said that the Western model has understated the Indonesian belief of *mufakat* (consensus) and *musyawarah* (collective deliberation) which forms part of the Five Basic Principles as the Western model considered concession to be less desirable than creating a new solution without compromising the parties' interests and rights.[586]

Another challenge is the lacking of proper or unified competence standards. The Indonesian settings to dispute resolution, as laid down by PerMA 01/08, mandated parties to resolve their disputes by mediation. This is a state mandated procedure.

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584 Syukur and Bagshaw, 'Court Annexed Mediation in Indonesia' (n 560) 385.

585 ibid 372.

586 ibid 374.

Harges, by using United States of America as an example, wrote that where the state mandates that mediators be chosen from certain lists maintained by it, the state has the duty to ensure that the mediator achieves the relevant competence[587] as well as ensuring such competence is either maintained or enhanced over a period of time. However, the Supreme Court of the Republic of Indonesia did not maintain a unified competence standard for mediators and in particular, approval standards. As discussed above, notwithstanding that certified mediators are to abide by the Code of Conduct for Mediators, the Code of Conduct is merely a practical standard but not an approval standard[588] which society will accept without dispute.

Although, as noted by Lieberman, Foux-Levy and Segal,[589] there is no sufficient empirical research to define exactly what is required for adequate mediator training, it is still undesirable to see that there is no established mediator competence standards in Indonesia,[590] given Indonesia's growing importance in international trade and its determination to build ties with neighbouring nations. In a nut shell, there is no written standard as to how a mediator will be placed on the list of mediators and no written standard as to how and to what extent an institute may offer qualified training other than the few and vague provisions in PerMA 01/08. In this regard, Mills heavily criticised PerMA 01/08 by stating that it gives no guidance as to how the courts are to compile their lists of approved mediators, nor what qualifications are required. Other than stating that a

587 Harges (n 518) 687.

588 cf MSB, 'NMAS Approval Standards' (March 2012a); MSB, 'NMAS Practice Standards' (March 2012b).

589 Lieberman, Foux-Levy and Segal (n 516) 250.

590 Syukur and Bagshaw, 'Judicial Mediation in Indonesia' (n 562) 278.

'certificate' is required for listed mediators, there is no clarification as to what is intended by that.[591] A somewhat disillusion situation which could easily be fixed with much certainty.

Another deficiency in the area of mediator training in Indonesia is the lack of continuing education and its inadequate infrastructure to render such education. The present training programme only satisfies the second stage of Bowling and Hoffman's professional development model,[592] which is highly undesirable. Commentators have been suggesting that sufficient and ongoing mediation education and training should be provided[593] and self-assessment methods should be introduced in order to ensure continuing quality and competence to a level that society will embrace with open hands.[594]

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591 Karen Mills, 'Indonesia's New Regulation on Court-Ordered Mediation - a Critique' (2003) <www.arbitralwomen.org/DesktopModules/Bring2mind/DMX/Download.aspx?EntryId=71&Command=Core_Download&language=en-GB&PortalId=0&TabId=1117> accessed 8 July 2016.

592 Bowling and Hoffman (n 515).

593 For example, Syukur and Bagshaw, 'Judicial Mediation in Indonesia' (n 562) 284; SPIDR Commission on Qualifications (n 519) 52; Milne (n 539) 56.

594 Lieberman, Foux-Levy and Segal (n 516) 240.

4.8. CONCLUSION

Indonesia has a strong historical and cultural background of embracing harmony and well being, ingredients which are essential elements within a mediation process. However, mediator training in Indonesia is still at an infant stage, even though the government has attempted to introduce the training and accreditation aspects within the legal environment, it has failed short of actively prompting such to the community, which is crucial if mediation is to have a place firmly enshrined within Indonesian legal landscape. Nevertheless one cannot fault the government, as they have in many occasions spearheaded the concept, it merely needs a prominent individual within the community to take it one step further and continue to do so until the community actively embraces it. In this aspect, a possible solution would be for more reviews, research and studies to be carried out in order for Indonesia to have a unique mediation model that suits the culture of Indonesia and its people. With the implementation of PerMA 01/08 as well as the emerging area of mediation within environmental disputes, labour disputes and land disputes (which are not governed under PerMA 01/08), Indonesia should be able to strive towards greater success in the adoption of mediation within its society. It is simply a matter of time and commitment, which Indonesia has the ability to achieve.

CHAPTER 5. MALAYSIA

5.1. ATTITUDES TOWARDS MEDIATION

The concept of mediation is not alien to Malaysians. The fundamentals of mediation, ie the encouragement of settlement by the assistance of a third party, has been a practice of the Malaysians for centuries and the roots can be traced back to the teachings of Islam, Hinduism, Buddhism, Christianity and the teachings of Confucius.[595] For example in Islam, mediation is indispensable and is represented by the word *shafa'a* (meaning intercession and equality, or to even up).[596] Whilst in Hinduism, the mediation process is reflective in the text of its scriptures as well as in the concept of the *panchayat*.[597] This is a mediation process in villages where the *panchayat* comprises the village headman and senior villages.[598] Mediation is also evidenced in the rural areas of Malaysia by the determination of dispute by the '*penghulu*'. The *Penghulu*, is the chief or head of the village who is asked to preside over a dispute, in the capacity of a

595 Dato' Cecil Abraham, 'Alternative Dispute Resolution in Malaysia' (9th General Assembly of the Asean Law Association, 2006) <www.aseanlawassociation.org/9GAdocs/w4_Malaysia.pdf> accessed 8 July 2016.

596 Khutubul Zaman Bin Bukhari, 'Arbitration and Mediation in Malaysia' (8th General Assembly of the Asean Law Association, 2003) <www.aseanlawassociation.org/docs/w4_malaysia.pdf> accessed 8 July 2016.

597 Dato' Cecil Abraham (n 595).

598 Asian Mediation Association, 'Malaysia Mediation Centre' <http://asianmediationassociation.org/node/15> accessed 8 July 2016.

middleman.[599] Statutory mediation is also evidenced in the modern society of Malaysia. The insurance and banking industries had their own mediation centres – the Insurance Mediation Bureau and the Banking Mediation Bureau.[600] Both were established as non-profit companies.[601] Other industry specific mediation centres cover consumer claims and the housing industry.[602] Some legislation in Malaysia requires mediation, such as the Workman's Compensation Act 1952 and the Trade Unions Act 1959.[603]

599 Dato' Cecil Abraham (n 595).

600 ibid.

601 Asian Mediation Association (n 598).

602 ibid.

603 ibid.

5.2. PRACTICE DIRECTION NO.5 OF 2010 ON MEDIATION

Modern commercial mediation has been increasingly adopted in Malaysia for a variety of reasons.[604] One of which is attributed to the backlog of cases in the judiciary system.[605] Mediation is considered as an expeditious means to dispose of court cases. In October 2010, there were about 57,715 civil cases pending in the High Courts and 96,098 and 153,935 civil cases pending in the Sessions Courts and the Magistrates Courts respectively in Malaysia.[606] In this regard, on 13 August 2010, the Chief Justice of Malaysia issued a Practice Direction on mediation, which came into force on 16 August 2010.[607] Pursuant to this Practice Direction, all Judges of the High Court and its Deputy Registrars and all Judges of the Sessions Court and Magistrates and their Registrars may give such directions that the parties facilitate the settlement of the matter before the courts by way of mediation.[608] The objective of this Practice Direction is to encourage parties to arrive at an amicable settlement without going through or completing a trial or appeal.[609] The benefits of settling disputes by way of mediation include: parties are able to explore all options available; underlying issues and common grounds may be identified; good relationships are restored and maintained; terms agreed

604 ibid.

605 Mohammad Naqib Ishan Jan and Ashgar Ali Ali Mohamed, *Mediation in Malaysia: The Law and Practice* (LexisNexis 2010) 506.

606 Yaa Tan Sri Arifin Zakaria, 'Responsibility of Judges under Practice Direction No. 5 of 2010' (Seminar on mediation with Judge John Clifford Wallace, 1 October 2010) <www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/23062011/speech%20mediation%20jb.docx > accessed on 8 July 2016.

607 Federal Court of Malaysia, Practice Direction No 5 of 2010 on Mediation.

608 ibid.

609 ibid.

upon would be acceptable to both parties; settlement is expeditious; no delays in court hearings; and terms of settlement are final.[610]

This Practice Direction is applicable to commercial and contractual disputes as well as intellectual property cases.[611] It also offers the following modes of referrals to mediation, whereby parties are given the options to select (a) Judge-led mediation or (b) by a mediator agreeable by both parties.[612]

However, mediation is a voluntary process in civil proceedings in Malaysia. The mechanism to initiate mediation relies on the Judge's power to direct. If a Judge is able to identify issues arising between the parties that may be amicably resolved, he / she will highlight those issues to the parties and suggest how those issues may be resolved.[613] The Judge can request to meet in his / her chamber in the presence of the parties' counsels, and suggest mediation to the parties.[614] If they agree to the mediation then they will be asked to decide whether they would wish the mediation to be the judge-led or to be referred to a mediator.[615] The procedures how these two options are conducted are also given in this Practice Direction.

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610 Ragunath Kesavan, 'Practice Direction No 5 of 2010 on Mediation' (The Malaysian Bar, 20 August 2010) <www.malaysianbar.org.my/notices_for_members/practice_direction_no_5_of_2010_on_mediation.html> accessed 8 July 2016.

611 Federal Court of Malaysia (n 607).

612 ibid.

613 ibid.

614 ibid.

615 ibid.

5.2.1. Option A (Judge-led Mediation)

This option allows for a process whereby, if agreed by the parties, the Judge hearing the case will refer the case to another Judge who acts as a mediator.[616] The Judge-led (or so-called Court annexed) mediation provides a less intimidating process in which the parties have control over the decision and can explore a range of options.[617] In order to observe the confidentiality and natural justice, the Judge has to ensure that all disclosures, admissions and communications made under a mediation process are strictly 'without prejudice'.[618] By doing so, the disputants are more willing to express their interests without fear that their legal rights will be compromised or their relationships jeopardised by the process.[619] In the event the mediation fails, the matter will then be referred to the original Judge to hear and complete the case. However, if mediation is successful, the Judge mediating shall record a *consent judgment* on the terms as agreed by the parties.[620]

5.2.2. Option B (Mediation by any other Mediator)

This option allows the parties to appoint a mediator either chosen from the list of certified mediators furnished by the Malaysian Mediation Centre (MMC) or any other mediator chosen by them.[621] Such a mediator shall adopt the facilitative

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616 ibid.

617 John North, 'Court Annexed Mediation in Australia – an Overview' (Malaysia Law Conference, 17 November 2005) <www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/speeches/20051117CourtAnnexedMediationinAustralia.pdf> accessed 8 July 2016.

618 Ragunath Kesavan (n 610).

619 North (n 617).

620 Federal Court of Malaysia (n 607).

621 ibid.

model with an aim of finding a mutually acceptable solution to the dispute.[622] Under this option, the parties may, if so desire, appoint more than one mediator to resolve their dispute.[623] Any agreement consequent upon a successful mediation may be reduced into writing in a *Settlement Agreement* signed by the parties but in any case the parties shall record the terms of the settlement as a *consent judgment*.[624] This option also provides that all disclosures, admissions and communications made under a mediation session are strictly on a 'without prejudice' basis. Such communications do not form part of any record and the mediator shall not be compelled to divulge such records to testify as a witness or consultant in any judicial proceeding unless the parties' consent to its inclusion.[625]

622 ibid.

623 ibid.

624 ibid.

625 Mohammad Naqib Ishan Jan and Ashgar Ali Ali Mohamed (n 605) 497.

5.3. MEDIATION ACT 2012

The Mediation Act 2012 came into operation on 1 August 2012. The objective of the Act is to promote and encourage mediation as a method of ADR by providing for the process of mediation, thereby facilitating the parties in disputes to settle disputes in a fair, speedy and cost-effective manner and to provide for related matters.[626] 'Mediation' is defined under the Mediation Act to mean a voluntary process in which a mediator facilitates communication and negotiation between parties to assist them in reaching an agreement.[627] However, the Mediation Act does not oblige parties to mediate before litigation or arbitration.[628] Also, parties may choose to mediate simultaneously with any civil court action or arbitration.[629] Where proceedings have already commenced, mediation does not act as a stay or extension of proceedings.[630]

Article 7 of the Act provides that only a person who (1) possesses the relevant qualifications, special knowledge or experience in mediation through training or formal tertiary education; or (2) satisfies the requirements of an institution in relation to a mediator, can be appointed as a mediator. A mediator is also required to disclose, before accepting the appointment, any known facts that a reasonable person would consider likely to affect his / her impartiality as mediator, including a financial or personal interest in the outcome of the mediation.[631] In addition,

626 Malaysia Mediation Act 2012.

627 ibid.

628 Kher Huan Lee, 'Mediation Act 2012: Not So Bad After All' *The Sun Daily* (Petaling Jaya, 7 January 2013)

629 ibid.

630 ibid.

631 Malaysia Mediation Act 2012 (n 626).

Article 9 of the Act requires a mediator to act independently and impartially, with a view to assisting the parties to reach a satisfactory resolution of the dispute and suggest options for the settlement of the dispute. However, the Act does not regulate the standardisation of competency requirements with minimum qualifications for mediators, whether or not through an accreditation system where an authority is given the power to revoke or confer accreditation.[632]

[632] ibid.

5.4. ACCREDITATION OF MEDIATORS

The Mediation Act 2012 does not stipulate any licensing requirement for mediators to practice in Malaysia. However, accreditation through an institution is increasingly being used to enable one to mediate in a particular setting.[633] For example, the MMC, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) and the Construction Industry Development Board (CIDB) would require a certificate from an acceptable training programme before one can be involved in mediation services.[634] This means that if one wishes to get referrals through these types of centres or institutions, he/she will have to be accredited or certified.[635] However, there is no system or law that regulates the accreditation, the quality or standards of mediators, nor a law regulates the practice of mediation in Malaysia.[636] In fact, the aforesaid centres / institutions have each developed their own system of mediator training and accreditation, as they maintain a list of mediators on their respective panels.[637]

The MMC was established under the auspices of the Bar Council of Malaysia in 1999.[638] It required all its mediators to be practicing members of the Malaysian Bar with at least 7 years' standing.[639] To become a member of the Malaysian Bar,

633 Mohammad Naqib Ishan Jan and Ashgar Ali Ali Mohamed (n 605) 510.
634 ibid 509-510.
635 ibid 510.
636 ibid.
637 ibid.
638 Dato' Cecil Abraham (n 595).
639 Asian Mediation Association (n 598).

one must obtain a law degree ie LLB (Hons) from the recognised universities.[640] Thereafter, he/she may sit for a qualifying exam in order to obtain a Certificate in Legal Practice.[641] Then, he/she is expected to undergo a 9 months training commonly known as pupillage.[642] While serving the 9 months chambering, he / she will still need to sit through some exams conducted by the Malaysian Bar and participate in Malaysian Bar legal aid programme before he / she can be called to the Malaysian Bar and become a qualified lawyer.[643] In addition, accredited mediators must have completed 40 hours of training under the MMC and must also pass a practical assessment.[644] Since February 2010, the Bar Council has decided to open up the panel of mediators of the MMC to mediators who are not advocates and solicitors.[645] However, the membership requirements for potential mediators remained stringent and so far there were only 21 out of total 307 mediators on the MMC's panel who were non-members of the Malaysian Bar as of 20 August 2014 as shown in Table 5.1.[646]

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640 Eddie Law, 'How to become a Qualified Lawyer in Malaysia?' (*LawEddie.com*, 7 December 2007) <www.laweddie.com/wordpress/how-to-become-a-qualified-lawyer-in-malaysia/> accessed 8 July 2016.

641 ibid.

642 ibid.

643 ibid.

644 Khutubul Zaman bin Bukhari (n 596).

645 George Varughese, 'New Criteria for Empanelment of Mediators on the Panel of the Bar Council Malaysian Mediation Centre (MMC)' (2010) Circular No 056/2010.

646 The Malaysian Bar, 'Details for List of Mediators on the Malaysian Mediation Centre's Panel of Mediators' <www.malaysianbar.org.my/index.php?option=com_docman&task=doc_details&gid=3791&ltemid=332> accessed 8 July 2016.

State / Federal Territory	**Number of Mediators on MMC's Panel**
Kuala Lumpur	126
Johor	23
Kedah	5
Kelantan	1
Malacca	5
Negeri Sembilan	4
Pahang	6
Penang	44
Perak	27
Selangor	44
Terengganu	1
Sub-total:	286
Non-members	21
Total:	**307**

Table 5.1: List of Mediators on the MMC's Panel and their Geographical Distribution

However, any mediator chosen by the parties may agree to be bound by the MMC Code of Conduct and the MMC Mediation Rules.[647] The Rules provide the process of initiating mediation, appointment of mediators, disqualification of mediators, vacancies, representation, authority of mediator, mode of settlement agreement, confidentiality, termination of mediator and the interpretation of the Rules.[648] As of 20 August 2010, the MMC rates are: mediator's fee = RM1,500 per day (regardless of the quantum of claim); administrative fees = RM300 per

647 Federal Court of Malaysia (n 607).

648 Khutubul Zaman bin Bukhari (n 596).

case; room rental = RM350 per day (if utilised); and pre-mediation conference: free of charge (if conducted).[649]

The KLRCA was established in 1978 under the auspices of the Asian-African Legal Consultative Organisation.[650] It provides administrative assistance to the Mediator and the parties by making available facilities, appointment of mediators, and by providing fees and costs accounting relating to the proceedings.[651] The KLRCA has its own panel of mediators. There are total 238 mediators on the KLRCA's panel who are from all over the world.[652] Admission to the KLRCA's panel is by invitation from the Director of the KLRCA or by application subject to the consideration and approval of the Director of the KLRCA.[653] To become a mediator on the KLRCA's panel, one must demonstrate: a fellowship from the CIArb or equivalent qualifications; experience as a mediator; or experience in any other specialist fields; and not having been found guilty by a Court or Tribunal for misconduct such as fraud, corruption and any other disciplinary misconduct.[654]

The KLRCA has published its own Mediation Rules. Any mediator chosen by the parties may agree to be bound by these Rules. The Roles provide that the mediator shall assist the parties in an independent and impartial manner to reach an

649 Ragunath Kesavan (n 610).

650 Kuala Lumpur Regional Centre for Arbitration (KLRCA), 'About KLRCA' <http://klrca.org/about/> accessed 8 July 2016.

651 KLRCA, 'Dispute Resolution' <http://klrca.org/dispute-resolution/> accessed 8 July 2016.

652 KLRCA, 'Panellist' <http://klrca.org/panellist/> accessed 8 July 2016.

653 KLRCA, 'Becoming a KLRCA Panellist'<http://klrca.org/panellist/becoming-klrca-panellist/> accessed 8 July 2016.

654 KLRCA, 'Policy on Appointment of Panellist' <http://klrca.org/wp-content/uploads/2014/01/KLRCA-APPOINTMENT_POLICY.pdf> accessed 8 July 2016.

amicable settlement of the dispute.[655] Parties are also free to agree with the mediator on the mediator's fees.[656] Unless otherwise agreed, the fees as given in Table 5.2 shall apply.[657]

Type of Fee	**Domestic Mediation**	**International Mediation**
Registration Fee	RM150 (payable by the party initiating mediation)	US$50 (payable by the party initiating mediation)
Administrative Costs	RM500 per case	US$250 per case
Mediator's Fee	RM3,500 per day; and RM450 per hour for review of documents and related works	US$6,000 per day; and US$750 per hour for review of documents and related works

Table 5.2: Schedule of Fees in Mediation Rules of KLRCA

The CIDB was established under the Construction Industry Development Board Act (Act 520).[658] Its main objective is to develop the capacity and capability of the construction industry through the enhancement of quality and productivity by placing great emphasis on professionalism, innovation and knowledge, in the endeavour to improve the quality of life.[659] The CIDB has produced the Standard Form of Contract for Building Works (2000) and the Standard Form of Sub-

655 Mediation Rules (KLRCA 2014) 8.

656 Mediation Rules (KLRCA 2014) 15.

657 Mediation Rules (KLRCA 2014) 15, 18-19.

658 CIDB Malaysia, 'Corporate Information' <www.cidb.gov.my/cidbv4/index.php?option=com_content&view=article&id=257&Itemid=202&lang=en> accessed 8 July 2016.

659 CIDB Malaysia, 'About Us' <www.cidb.gov.my/cidbv4/index.php?option=com_content&view=article&id=391&Itemid=184&lang=en> accessed 8 July 2016.

Contract for Nominated Sub-Contractor (2002).[660] These standard forms provide for a two-tier dispute resolution mechanism whereby mediation is compulsory and the disputing parties must attempt to resolve any dispute arising out of or in connection with the contract by mediation first before arbitration in resorted to.[661] The CIDB also published the CIDB Mediation Rules (2000). These Rules are used in conjunction with the CIDB Standard Forms of Contract / Sub-Contract or any other contracts that specify the use of these Rules. The parties to a dispute are free to choose any person accredited in the CIDB Panel of Accredited Mediators in whom they have trust and confidence to act as the mediator.[662] The CIDB trains and accredits construction industry mediators.[663] It also maintains a panel of suitably trained individuals all of whom have achieved the status of CIDB Accredited Mediators.[664] However, the CIDB's requirements for memberships into the CIDB Panel of Accredited Mediators remain stringent.[665] This strict posture recognises the importance of proper training of mediators and reaching a certain standard before they are allowed to mediate in the disputes in the CIDB arena.[666]

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660 Chee Kheng Oon, 'Standard Construction Contracts in Malaysia: Issues and Challenges' (Innovations in Construction Contracts seminar, 31 May 2002) <www.ckoon-law.com/Paper/STANDARD%20CONSTRUCTION%20CONTRACTS.pdf> accessed 8 July 2016.

661 CIDB Malaysia, 'Standard Form of Contract for Building Works' (2000) Clause 47.2.

662 CIDB Mediation Rules (2000).

663 Oon (n 660).

664 CIDB (n 662).

665 Mohammad Naqib Ishan Jan and Ashgar Ali Ali Mohamed (n 605) 509.

666 ibid.

5.5. MEDIATION TRAINING

The Bar Council of Malaysia organises mediation skills training programmes on a regular basis.[667] For example, they have teamed up with the external service provider (The Accord Group) to conduct a 40-hour core mediation course to the members of the Bar.[668] This training course is recognised by the MMC.[669] The main topics covered include: communication skills – questioning, active listening, reframing, summarising, acknowledging and dealing with different behaviours; technical skills – managing expectations, forming an agenda, identifying needs, identifying common ground, breaking impasses, doubt creation, reality testing, dealing with walkout, dealing with apparent power imbalances, option generation and creative problem solving, communicating offers, managing lawyers and other advisors and drafting an agreement; process knowledge – understanding the benefits and risks of each stage of the mediation process, how to set up a mediation, preparatory steps for the mediator and the parties in dispute, designing an effective process, managing the process, ethical issues, confidentiality, liability of the mediator, mediator appointment agreement and confidentiality agreement; and developing as a mediator – local mediation marketplace, local jurisdiction issues, how to build a mediation profile and way to develop as a mediator.[670]

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667 The Malaysian Bar, 'Mediation Skills Training Course' (2014) Circular No 206/2014 <www.malaysianbar.org.my/index.php?option=com_docman&task=doc_details&gid=4731&Itemid=332> accessed 8 July 2016.

668 The Accord Group, 'Training Overview' <http://accordgroup.com.au/tr_overview.html> accessed 8 July 2016.

669 The Accord Group, 'Core Mediation Training' <http://accordgroup.com.au/tr_cmt.html> accessed 8 July 2016.

670 ibid.

The CIArb and KLRCA have also teamed up with the ACDC to organise a 6-day mediation course for their members in Kuala Lumpur.[671] The first five days comprised theory and workshop exercises to educate participants in the theory and practice of mediation, while the sixth day was for participants wishing to become accredited mediators.[672] Upon successful completion of this course including the accreditation day, participants were entitled to apply to become members of the KLRCA mediation panel.[673] They would also satisfy the requirements of the CIArb to join their local branch in the mediation stream.[674]

671 Chartered Institute of Arbitrators, 'ACDC Mediation Course' (Kuala Lumpur, 11-16 November 2013) <http://ciarb.net.au/mediationtraining2013> accessed 8 July 2016.

672 ibid.

673 ibid.

674 ibid.

5.6. CODE OF CONDUCT IN MEDIATION

The MMC has published its Code of conduct. It has a specific provision on impartiality where the mediator is required to be:

> [I]mpartial and fair to the parties, and be seen to be so. Following from this, he will disclose information which may lead to the impression that he may not be impartial or fair, including that (a) he has acted in any capacity for any of the parties; (b) he has a financial interest (direct or indirect) in any of the parties or the outcome of the mediation; or (c) he has any confidential information about the parties or the dispute under mediation derived from sources outside the mediation.[675]

Further, under the MMC Mediation Rules, the mediator is required to abide by the terms of the Mediation Agreement and the Code of Conduct.[676] Neither the mediator nor any member of his firm or company should act for any of the parties in connection with the subject matter of the mediation.[677]

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675 Christina SS Ooi, 'The Role of Lawyers in Mediation: What the Future Holds' (*The Malaysian Bar*, 22 August 2005) <http://malaysianbar.org.my/adr_arbitration_mediation/the_role_of_lawyers_in_mediation_what_the_future_holds.html#f> accessed 8 July 2016.

676 Malaysian Mediation Centre Mediation Rules r 5 (3).

677 ibid r 5 (4).

5.7. DISCUSSION

Mediation is still very much at its infancy stage in Malaysia. Before launching the Practice Direction No.5 of 2010 and the Mediation Act 2012, mediation was not progressing at the same pace as arbitration; it was evident by the number of mediation cases registered with various centres / institutions as shown in Table 5.3.[678]

Item	Source	No. of Mediation Cases
1	Malaysian Mediation Centre	155
2	Malaysian Institute of Architects	Nil
3	Kuala Lumpur Regional Centre for Arbitration	126
4	Construction Industry Development Board	5
5	Institution of Engineers Malaysia	Nil

Table 5.3: Mediation Cases Registered between 2000 and 2008

However, the launch of Practice Direction in August 2010 was a turning point. As at December 2010, the percentage of cases disposed by mediation was relatively high.[679] At the High Court, 38% of cases fixed for mediation were successfully

678 Zulhabri Ismail, Jamalunlaili Abdullah, Padzil Fadzil Hassan and Rosli Mohamad Zin, 'Mediation in Construction industry?' (2010) 1 (1) Journal of Surveying, Construction & Property 5.

679 Yaa Tun Dato' Seri Zaki Bin Tun Azmi, 'Opening Address' (2nd Asian Mediation Association Conference, Kuala Lumpur, 24 February 2011) <http://barcouncil.org.my/conference1/pdf/0.openingaddress.pdf> accessed 8 July 2016.

mediated while the Sessions Courts achieved a successful rate of 51%.[680] At the Court of Appeal, the percentage of successful cases mediated was 38%.[681] Although the benefits of mediation have been appreciated in Malaysia, the quality of mediators is extremely important to the success of promoting mediation.[682] The training and accreditation of mediators will ensure a higher success rate in resolving disputes via mediation and consequently the acceptance of the use of mediation by members of the public, members of the legal profession and the judiciary.[683] It is noticed that the requirements for memberships into the Panels of MMC, KLRCA and CIDB remain stringent since mediation practice is relatively new in Malaysia. However, with the proliferation of mediation bodies since the launch of the Act, there has been a question of the quality of mediators. Although many mediators in Malaysia belong to professional institutions, there is no uniformity and consistency of accreditation, qualification and standards between these organisations.[684] The Government's failure to introduce legislative consistency concerning accreditation, qualification and standards may be viewed as a missed opportunity to promote and encourage mediation in Malaysia.[685] Therefore, there is a need to develop a common benchmark in Malaysia for accreditation of mediators.[686] In addition, the Act preserves the voluntary process of mediation and it falls short of making mediation a mandatory process. By giving parties the right to commence mediation simultaneously with any civil

680 ibid.

681 ibid.

682 ibid.

683 ibid.

684 Shannon Rajan, 'Much Ado About Nothing?' (*SKRINE*) <www.skrine.com/much-ado-about-nothing> accessed 8 July 2016.

685 ibid.

686 Yaa Tun Dato' Seri Zaki Bin Tun Azmi (n 679).

action or arbitration, it allows parties to explore multiple simultaneous dispute resolution routes without promises of having disputes resolved expediently, which does not make economical sense and defects the purpose of alternative dispute resolution.[687]

The use of mediation in the construction industry is unpopular in Malaysia. The Standard Form of Contract promulgated by the Malaysian Institute of Architects provides for a dispute resolution clause whereby mediation is merely an *option* available to the parties.[688] In order to promote mediation in the Malaysian's construction industry, this Standard Form of Contract needs to be revamped to allow for a two-tier dispute resolution mechanism similar to what the CIDB has adopted.

In terms of training, it is recommended mediation be made as a subject in the legal education curriculum for all undergraduate law students (either optional or compulsory), as well as to postgraduate law students in their continuing legal education.[689] Currently, the Master of Laws programme in University of Malaya offers 'Alternative Dispute Resolution' as a subject in which mediation skills workshops are conducted by mediation practitioners from the MMC.[690]

687 Lee (n 628).
688 Oon (n 660).
689 Ooi (n 675).
690 ibid.

5.8. CONCLUSION

In Malaysia, there is still a lot of room for mediation to spread its wing within the society. There is a need to unify the accreditation, qualification and standards of mediators who are from all walks of life and different institutions. In order to promote mediation, the universities may offer mediation training to their law students both in the undergraduate and postgraduate levels. The Malaysian Parliament may also consider legislating mediation as a mandatory process in all civil proceedings. With these measures, mediation will become a firm establishment within the structure of Malaysian Legal System which in turn will benefit the community as a whole.

CHAPTER 6. INDIA

6.1. INTRODUCTION

With a population of over a billion people, India is one of the most densely populated democracies in the world.[691] Despite various provisions presently in place diverging particular cases to arbitration and conciliation, litigation in India remains on the rise.[692] Currently, about thirty million cases are pending in the various courts in India[693] and it will take approximately 320 years for Indian Courts to clear the backlog.[694] Referencing Shri Pranab Mukherjee, the President of India described:

> [T]here is a high degree of public frustration over the complexity of the laws, long delays and unproductive use of their resources in litigations. Many social conflicts have also got transformed into legal disputes which accentuate the problem rather than resolve them.[695]

691 Janet Martinez, Sheila Purcell, Hagit Shaked-Gvili and Mohan Mehta, 'Dispute System Design: A Comparative Study of India, Israel and California' (2013) 14 Cardozo Journal of Conflict Resolution 807, 808.

692 ibid.

693 Neeta Lal, 'Huge Case Backlog Clogs India's Courts', *Asia Times Online* (Dehli, 28 June 2008) <www.atimes.com/atimes/South_Asia/JF28Df02.html> accessed 8 July 2016.

694 Nilopher D'Souza, 'Mediation in Indian Courts' *Forbes India* (28 September 2010) <www.forbes.com/2010/09/28/forbes-india-judiciary-encouraging-mediation-reduce-baclog.html> accessed 8 July 2016.

695 Shri Pranab Mukherjees, 'Alternative Dispute Resolution Mechanism Imperative: Pranab' *The Hindu* (New Delhi, 11 November 2012) <www.thehindu.com/news/national/alternative-dispute-resolution-mechanism-imperative-pranab/article4085761.ece> accessed 8 July 2016.

Against this background, the President suggested a 'promotion and popularization of alternate methods of dispute settlement is therefore the need of the hour'.[696] One possible solution is to adopt mediation as an alternative method of dispute resolution. Like many Asian countries, mediation is not a new concept in India as it was a tool deeply rooted from historic times.[697] In India, evidence of mediation may be traced in Indian mythology, scriptures as well as religious texts.[698] While there is no indication eluding why modern-day mediation has only become recognised in India in the past decade,[699] it is without a doubt the movement to consider mediation as a viable form of ADR is on the rise.

In light of India's economic development, businesses should recognise the benefits of mediation in managing commercial conflicts. In a survey conducted by BDO Stoy Hayward, it identified the direct costs to a commercial dispute could vary from £75 000 to £500 000.[700] Furthermore, these disputes may also have a negative impact on a company's reputation. In brief, some notable benefits of mediation are that in all circumstances, it provides significant savings in terms of time, legal fees and manpower.[701] In addition, mediation is also private in nature as the parties are bound to keep matters raised confidential and the proceedings

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696 ibid.

697 Rajesh Sharma, 'Access to Justice for All through Mediation in India' in Wang Gui Guo & Yang Fan (eds), *Mediation in Asia Pacific: A Practice Guide to Mediation and Its Impact on Legal Systems* (Wolters Kluwer 2013).

698 ibid.

699 Anil Xavier, 'Mediation: Its Origin and Growth in India' (2006) 27 Hamline Journal of Public Law & Policy (2006) 275.

700 Deepak Malhotra 'Business as Usual: Managing Disputes Without Jeopardizing the Company' in Manju Manglani (ed), *ADR in Asia: Solution for Business* (Asia Law & Practice 2005).

701 Seng Onn Loong and Sally Campbell, 'The Importance of Mediation to the Business Community and the Mediation Landscape in Singapore' in Chris Bisogni (ed), *Dispute Resolution Guide 2008* (Asia Law & Practice 2008).

are not publicised.[702] Thus, the company's reputations are protected. Based on these reasons, it is likely that the demand for commercial mediators in India will increase in the near future.

This chapter was written with the purpose to highlight the current training required to become a commercial mediator in India. While an overview of ADR rules and the development of mediation are provided in this chapter, a focus is placed on how and to what standards mediators are qualified in India and the available options for CPD. In addition, a mediator's ethical codes of conduct will also be discussed.

[702] ibid.

6.2. TRACING THE ORIGINS OF MEDIATION IN INDIA

6.2.1. Panchayat

While the current Indian judicial system has roots from British common law, for centuries prior to the British's arrival, Indians relied on the Panchayat, which were arguably precursors to modern-day mediation.[703]When disputing parties could not resolve their own disputes, the concerned parties met with a respected male elder, known as the 'pancha' to present their grievances and attempt to reach a settlement. If unsuccessful, the dispute was submitted to a forum of five people, recognised as the 'Panchayat', which consisted of a group of panchas whom commanded respect and recognition in the community to resolve the dispute by designing a solution satisfying all parties.[704] Hence, the use of Panchayat was arguably one of the earliest forms of mediation in India.[705]

6.2.2. Lok Adalat

Due to the backlog of cases, the Legal Services Authority Act introduced another dispute resolution process, known as Lok Adalat, meaning the Peoples' Court.[706] Developed from the Panchayat system, Lok Adalat courts were designed to

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703 Xavier (n 699) 275

704 ibid 13-14.

705 Kimberly A Klock, 'Resolution of Domestic Disputes through Extra-Judicial Mechanisms in the United States and Asia: Neighborhood Justice Centers, the Panchayat, and the Mahalla' (2001) 15 Temple International and Comparative Law Journal 275, 275-277.

706 Tameem Zainulbhai, 'Justice for All: Improving the Lok Adalat System in India' (2011) 35 Fordham International Law Journal 248, 249.

provide speedy and informal resolution of disputes at the local level.[707]

In a nutshell, Lok Adalat is a public settlement process where a neutral or a panel of neutrals, who are members of the Bar Council of India, act as evaluators.[708] After hearing the facts to a dispute, the neutrals propose a monetary settlement.[709] Compared to today's mediation processes, which encourages communication between conflicting parties, there is little direct communication between parties because the Lok Adalat process is neutral-centred and the primary focus is to present the factual and legal background of a dispute to the Lok Adalat judge.[710]

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707 Xavier (n 699) 277.

708 ibid 9.

709 Gregg Relyea and Niranjan J Bhatt, 'Comparing Mediation and Lok Adalat: Toward an Integrated Approach to Dispute Resolution in India' (*Mediate.com*, June 2009) <www.mediate.com/articles/relyeaGbhattN1.cfm?nl=215> accessed 8 July 2016.

710 ibid.

6.3. LEGAL FRAMEWORKS SUPPORTING ALTERNATIVE DISPUTE RESOLUTION

6.3.1. Arbitration and Conciliation Act

India[711], along with Japan and the Philippines, was one of the few countries in the world that embarked on a statutory regime directly addressing ADR. [712] Specifically, Part III of the Act is analogous to the UNCITRAL Conciliation Rules and is the main legal framework governing ADR in India.[713] In addition, section 30(1) also seeks to promote the use of ADR procedures during arbitral proceedings, and provides for Arbitration and Mediation.[714] Accordingly, if the parties manage to settle their dispute during arbitral proceedings through ADR processes, the arbitral tribunal should terminate the proceedings and may record the settlement in the form of an arbitral award on agreed terms.[715]

6.3.2. Legal Services Authorities Act

Under section 4, it provides that the Central Authority, which consists of the Chief Justice of India, and one present or retired judge, should encourage settlement of disputes by way of ADR processes.[716] One method of doing so is provided in Section 20(1)(i)(a), through the Lok Adalats. Lok Adalats may carry out ADR

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711 In the year 1996

712 Michael Hwang, Seng Onn Loong and Chuan Tat Yeo, 'ADR in East Asia' in J C Goldsmith, G H Pointon and A Ingen-Housz (eds), *ADR in Business* (Kluwer Law International, 2006) 164.

713 ibid.

714 Arbitration and Conciliation Act s 30(1).

715 ibid s 30(2).

716 Legal Services Authorities Act s 4(f).

proceedings in one of the three situations: (1) if the parties so agree;[717] (2) if one of the parties submits an application to the Court to refer the dispute to a Lok Adalat for settlement and the Court is prima facie satisfied that there are chances of settlement, then the Court will refer the case to a Lok Adalat[718] and (3) if the Court is satisfied that the case in question is one that is appropriate to be handled by a Lok Adalat, it will refer the matter to a Lok Adalat.[719] Lok Adalats often consists of but are not limited to retired judges, and they are to be guided by the principles of justice, equity fair play when seeking to reach a settlement.[720] An award by a Lok Adalat is deemed to be a decree of a civil court.[721] However, if no settlement could be reached, then the case shall be returned to the Court, which the reference was made.[722]

6.3.3. Code of Civil Procedure 1908

In 2002, the Indian Parliament amended the Civil Code, providing the Courts with another avenue to refer disputes to ADR processes. Section 89 states that, 'where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give the draft settlement to the parties for observations.'[723] Having conferred the party's observations, the Court may reformulate the terms of a possible settlement and direct the Parties to arbitration, conciliation, settlement through Lok Adalat,

717 ibid s 20(1)(i)(a).

718 ibid s 20(1)(i)(b).

719 ibid s (20)(1)(ii).

720 Hwang, Loong and Yeo (n 712) 165.

721 Legal Services Authorities Act (n 716) s 21.

722 ibid.

723 Civil Procedure Alternative Dispute Resolution and Mediation Rules (2003) pt I, Alternative Dispute Resolution Rules, s 89.

or mediation.[724] Moreover, where the dispute is referred for mediation, the Civil Procedure Alternative Dispute Resolution and Mediation Rules (2003) Part II, Civil Procedure Mediation Rules are to be applied.[725]

[724] *Salem Advocate Bar Association, Tamil Nadu v Union of India* [2005] Writ Petition (Civil) 496 of 2002.

[725] Hwang, Loon and Yeo (n 712) 166.

6.4. THE RISE OF MEDIATION IN INDIA

In 1994, the use of mediation in India took a dramatic leap forward when the Supreme Court of India initiated the India-US exchange of information to discuss case management issues and the backlog in Indian and American courts.[726] An international study team was formulated to examine probable solutions and in a report delivered to the Indian government, it suggested procedural reforms in India, including legislative changes authorising the use of mediation.[727] In 1999, the Indian legislature adopted the recommendations and officially recognised mediation as a form of ADR with the insertion of Section 89 in the Civil Procedure Code of 1908. [728] However, the amendment was limited in that it only provided courts with the discretion to refer disputes to arbitration, conciliation, and mediation, but it fails to provide a framework outlining the parameters for mediation. [729]

Thus, in 2003 the Law Commission of India organised the International Conference on Alternative Dispute Resolution and Case Management to examine the operation of mediation in India. It was concluded that the role of the mediator in India takes a passive role and is restricted to that of a facilitator.[730] Following

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726 Xavier (n 699) 279.

727 ibid.

728 ibid 15.

729 Vyapak Desai and Sahil Kanuga, 'Mediation Proceedings are Confidential Says Supreme Court' (*India Law Journal*, 2007), <www.indialawjournal.com/volume4/issue_1/article_by_desia_kanuga.html> accessed 8 July 2016.

730 Mediation and Conciliation Project Committee Supreme Court of India Delhi, 'Mediation Training Manual of India' ch 1 § 8 <http://supremecourtofindia.nic.in/MEDIATION%20TRAINING%20MANUAL%20OF%20INDIA.pdf> accessed 8 July 2016.

the conference, the Indian Supreme Court formulated the Mediation and Conciliation Project Committee to draft a comprehensive mediation-training manual for Indian mediators.[731] This gave rise to the 'Mediation Training Manual of India' and its contents will be discussed further in the later sections of this Chapter.

[731] Puja Parikh, 'Scheinman Scholars Modern Mediation in my Bharat' (2013) 68 (2) Dispute Resolution Journal 75.

6.5. TRAINING OF INDIAN MEDIATORS

6.5.1. Required Topics to be Covered in Training

All mediation training programmes in India are mandated to include the following topics: (1) Evolution and Legislative History of Indian Mediation; (2) Conflict Management and Resolution in Mediation; (3) Concept and Processes of mediation; (4) Types of mediation (5) Advantages of Mediation; (6) Differences between Mediation and other modes of Dispute Resolution; (7) Stages of Mediation; (8) Methods of negotiation and communication, managing an impasse; (9) Roles of the mediator; (10) Ethics and Code of Conduct for Mediators, role of referral judges and (11) Enforceability of Settlement Agreements.[732]

6.5.2. Private v Court Ordered Mediation

There are two types of mediation in India: Private Mediation and Court Ordered Mediation. Private mediators, whom operate on a fee-for-service basis, are required to complete at least 40 hours of mediation training before receiving certification as a recognised Indian mediator by the Indian judiciary.

Court-ordered mediation applies to cases, which the Court refers to mediation under section 89 of the Code of Conduct Procedure 1908. Court Ordered mediators must be either: (i) a retired judge; (ii) a legal practitioners with at least fifteen years of standing in the Bar; (iii) retired public officials, or be referred to the judiciary by an institute of mediation.

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[732] ibid.

6.6. INDIAN INSTITUTE OF ARBITRATION AND MEDIATION

6.6.1. Background

Commenced in 2001, The Indian Institute of Arbitration and Mediation (IIAM) is a non-profit organisation registered under the TC Literary, Scientific and Charitable Societies Act 1955.[733] Being one of the pioneer organisations in India providing institutional ADR services, IIAM was the first institution in India to be approved by the IMI as a 'Qualifying Assessment Programme' for IMI certification for mediators aiming to obtain international exposure.[734] ADR training programmes offered candidates with the opportunity to become an effective and skilful mediator.

6.6.2. International Training Programme – 5-7 days/ 40-50 hours

The International Training Programme is taught by internationally acclaimed professionals and candidates will be trained according to international standards.[735] This training provides candidates with the knowledge necessary to accept instructions to act not only to resolve disputes among local parties, but also between international and national companies.[736]

The structure of the training combines the theory of ADR and practical 'hands-on'

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733 Indian Institute of Arbitration and Mediation, 'IIAM Brochure' <www.arbitrationindia.com/pdf/brochure.pdf> accessed 8 July 2016.

734 ibid.

735 Indian Institute of Arbitration and Mediation, 'Training Programs' <www.arbitrationindia.org/htm/training.html> accessed 8 July 2016.

736 ibid.

techniques applied in negotiation, mediation, and meeting facilitations.[737] The programme will enhance the candidate's ability to negotiate and resolve conflicts, as well as providing experience to serve as practitioners and neutrals.[738] The programme examines the skills and dynamics of the negotiation process in the context of international business transactions.[739] Through discussions, simulations and role-play, candidates will be trained on the structure and goals of the mediation process and the skills and techniques used.[740] Candidates will further gain experiences from practical tools used commonly by international mediators to deal with psychological and merits-based obstacles in the context of international business relationships.[741] Furthermore, candidates will learn from presentations by representatives from prestigious ADR organisations and be given opportunities for exposure beyond the courtroom.[742]

Following IIAM's Mediator Accreditation System, a candidate having successfully completed this programme is categorised as Grade B Mediator.[743]

6.6.3. Mediation Training Programme – 5 days / 40 hours

The Mediation Training Programme combines the theory of ADR with skill-based techniques often applied in negotiation and mediation.[744] Candidates will be trained in deal-making negotiations, such as various bargaining styles, setting

737 ibid.
738 ibid.
739 ibid.
740 ibid.
741 ibid.
742 ibid.
743 ibid.
744 ibid.

specific goals in negotiation, nurturing relationships, and maximising leverage to close a deal.[745] Candidates will gain practical experience from role-plays discussions; simulations and exercises to learn the mediation process and the techniques mediators use to overcoming barriers to dispute resolution.[746]

As per IIAM Mediator Accreditation System, a candidate having successfully completed Mediation Training Programme is categorised as Grade B Mediator.[747] Accredited Grade B Mediators of IIAM are eligible to be certified from the IMI.

6.6.4. Certificate in Dispute Management (CDM) – Distance Education Programme (6 months/15 hours)

CDM is a distance-learning course that provides candidates with the basic knowledge to mediation, arbitration and negotiation.[748] The programme is structured into 2 modules: Module 1 covers the basics to negotiation and mediation by highlighting the styles and process of effective negotiation, while also providing an overview on mediation based on evaluative and facilitative methods.[749] Module 2 discussed differences between mediation and conciliation and the various mediation methods. The systems of mediation and arbitration will also be analyzed.[750]

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745 ibid.

746 ibid.

747 ibid.

748 Indian Institute of Arbitration and Mediation, 'Certificate in Dispute Management' <www.arbitrationindia.org/cdm.html> accessed 8 July 2016.

749 ibid.

750 ibid.

Participants will be assessed based on four written assignment and each assignment consists of a problem evaluation and should be no more than 2500 words.[751] Upon successfully completing the course, participants will be treated as Grade C mediators.[752]

751 ibid.

752 ibid.

6.7. IIAM CERTIFICATION & ACCREDITATION SYSTEM

After completing an IIAM programme, mediators are accredited under: (1) Grade A; (2) Grade B and (3) Grade C.[753] Mediators will be assessed based on various levels of Qualifying Assessment Programmes (QAP). In accordance with IMI's global mediator competency certificate scheme, accredited Grade B mediators of IIAM are eligible for IMI certification, which entitle mediators to upload personal information on the IMI web portal and thus, be searchable by users worldwide.[754]

6.7.1. Grade C Mediators

As noted, Candidates who have undergone the basic level mediation training/orientation programme consisting of at least 10 hours of mediation training by IIAM will be accredited as IIAM Grade C Mediators. As per IIAM norms they will be entitled to act as Community Mediators.[755]

6.7.2. Qualifying Assessment Programme (QAP-1)

IIAM Grade C Mediators that have accumulated 50 hours of community mediation and whom would like to be accredited as Grade B Mediators may apply to the QAP-1.[756]

Mediators will be evaluated based on their mediation knowledge via submitting

753 Indian Institute of Arbitration and Mediation, 'IIAM Mediator Accreditation Sytem and Qualifying Assessment Programs' <www.arbitrationindia.com/pdf/mas_qap.pdf > accessed 8 July 2016.

754 Indian Institute of Arbitration & Mediation, 'IIAM Brochure' (n 733).

755 Indian Institute of Arbitration & Mediation, 'IIAM Mediator Accreditation System' (n 753).

756 ibid.

an assignment, which cover topics such as mediation theory, mediation rules, professional code and ethical standards.[757] Candidates must score a minimum of Grade B (55 – 70%) and on failure to get the minimum grade; candidates will be eligible to apply again, only after a period of 3 months.[758] QAP-1 evaluations will be accompanied by assessing the Feedback forms of at least 10 mediations conducted by the candidate. The mediator should have at least a minimum of 60% '3' rating or above in the Feedback forms.[759]

6.7.3. Grade B Mediators

To be accredited as IIAM Grade B Mediators, candidates must successfully complete an IIAM Mediator Training Programme that consists of a minimum of 40 hours.[760] Grade B mediators are entitled to mediate all types of disputes, including commercial disputes, and will be graded based on mediation knowledge evaluation (QAP-2).[761]

6.7.4. Qualifying Assessment Programme (QAP-2)

Candidates who have successfully completed mediation training from other institutions other than IIAM that is equivalent to a minimum of 40 hours or has successfully completed a Postgraduate Diploma in mediation and would like to be

757 ibid.
758 ibid.
759 ibid.
760 ibid.
761 ibid.

accredited as IIAM Grade B Mediators may apply to QAP-2.[762]

Mediators will be evaluated based on their level of mediation knowledge via submitting an assignment covering mediation theory, mediation rules, professional code and ethical standards.[763] Candidates must score a minimum of Grade B (55 – 70%) and on failure to get the minimum grade; candidate will be able to apply again after a period of 3 months.[764]

6.7.5. Grade A Mediators

To be qualified as IIAM Grade A Mediator, candidates must be accredited as IIAM Grade B Mediator and have at least completed 200 hours of mediation, spread over 20 mediations and successfully complete the Qualifying Assessment Programme (QAP-3).[765] Upon completion, participants will be entitled for IMI Certification.

6.7.6. Qualifying Assessment Programme (QAP-3)

IIAM Grade B Mediators who have completed a total of 200 hours of mediation, spread over at least 20 mediations and would like to apply for IMI Certification and be upgraded as Grade A Mediators are eligible to apply for QAP-3.[766]

Before commencing in QAP-3, applicants are required to provide documentary

762 ibid.
763 ibid.
764 ibid.
765 ibid.
766 ibid.

evidence to prove the mediator experience such as logbooks showing records of dates and duration of mediations, capacity or supporting evidence such as references, feedback forms.[767] Applicants will be evaluated under 2 categories: (1) mediation knowledge and (2) mediation skills.[768]

In assessing the applicant's mediation knowledge, the applicant must provide proof of having completed at least 40 hours of training in mediation theory and skills in one or more training programmes with at least 10 hours in CPD.[769] Any articles or presentations given by the Applicant on Mediation will be counted as the equivalent of 2 CPD hours and the applicant can declare a maximum of 4 CPD hours under this category.[770] The applicant will submit an assignment, covering negotiation theory, mediation theory, mediation rules, professional code and ethical standards.[771] In order to pass, the candidate must score a minimum of Grade B (55 – 70%).

Applicants who successfully complete the mediation knowledge assessments will be evaluated for mediation skills under the three criterions, namely Role Play or Real Mediation Evaluations; Client Feedback - Assessor will evaluate based upon feedback forms of at least 10 mediations conducted by the applicant; [772] and Third Party Witnesses: Assessor will also consider the Mediator Skills Evaluation forms

767 ibid.
768 ibid.
769 ibid.
770 ibid.
771 ibid.
772 ibid.

collected from 5 individuals who have witnessed the Applicant acting as a mediator.[773]

[773] ibid.

6.8. PROCEDURES IN PLACE PROVIDING FOR CONSISTENT QAP EVALUATIONS

In order to ensure for consistency in terms of evaluation standards, the assessors of QAP programmes must fulfil certain requirements. Assessors of both QAP-1 and QAP-2 shall be IIAM Grade A or Grade B Mediators and the Guidelines to Assessors for Mediation Knowledge will be identical to that of QAP-3.[774]

Assessors for QAP-3 shall be Grade A Mediators empanelled with former Judges.[775] To provide for validity, two assessors will be assigned to assess each evaluation.[776] Furthermore, to prevent issues such as conflict of interest, the Mediators and Retired Judges whom are empanelled are independent of the Institution.[777] In cases where the Mediators or retired Judges are members of the Institution, they will be employed as Assessors only along with another Assessor who is independent of the Institution.[778]

All assessors will be provided with the same guidelines for evaluating mediation knowledge and mediation skills.[779] Assessors will evaluate Applicants based on their written documentation and role-play performance as per the Guidelines given to them.[780] To ensure for transparency, IIAM will monitor the performance and practice of the Assessors based on their (i) responsiveness, (ii) timeliness, (iii)

774 ibid.
775 ibid.
776 ibid.
777 ibid.
778 ibid.
779 ibid.
780 ibid.

meticulousness, and (iv) impartiality.[781]

[781] ibid.

6.9. GUIDELINES PROVIDED TO ASSESSORS FOR QAP EVALUATIONS

Mediation Knowledge Evaluation:

✓ Knowledge of negotiation / mediation theory:	25%
✓ Knowledge of mediation rules:	20%
✓Knowledge of mediation ethics & code:	20%
✓Fairly & accurately presenting the matter & assessment of the issue:	25%
✓confirming with time schedule and number of words:	10%

Mediation Skill Evaluation:

✓Ingenuity and ability to communication and facilitate dialogues:	20%
✓Styles, Poise, Courtesy & Demeanor:	10%
✓Understanding of mediation theory & practice:	10%
✓Covering the topics pertaining to the dispute:	20%
✓Reflection of experience as a Mediator	10%
✓Time Management & Organization:	10%
✓Structuring the mediation process including plenary & caucus sessions in a logical manner:	20%

Table 6.1 - Guidelines provided for Assessors for QAP Evaluations [782]

[782] ibid.

6.10. IIAM'S MEDIATORS' CODE OF PROFESSIONAL CONDUCT

As adopted based on the Codes of Conduct provided by the Mediation Training Manual of India, IIAM Mediators' Code of Professional Conduct provides parties of mediation services with a concise outline of the ethical standards they can expect from its Mediators.[783] IIAM Mediators are under the obligation to make known to the parties that the Code governs their professional mediation practice.[784]

6.10.1. Mediator Appointment

Mediators are required to promote their practice in a truthful way by advising the parties on his or her profile such as professional experience, procedures to apply and the relevant codes of conduct.[785]

6.10.2. Diligence, Independence, Neutrality, Impartiality

As long as the mediator feels competent to serve in the required capacity, the mediator may accept the assignment.[786] However, mediators will not accept an appointment without first declaring any relevant information that may affect their independence to the dispute.[787] Furthermore, Mediators are required to act in an

783 Indian Institute of Arbitration and Mediation, 'IIAM Mediation Rules 2009' <www.arbitrationindia.com/pdf/rules_mediation.pdf> accessed 8 July 2016.

784 ibid.

785 ibid.

786 ibid.

787 ibid.

unbiased manner, treating all parties with fairness, quality and respect.[788]

6.10.3. Conflict of Interest

Mediators have the duty to conduct reasonable inquiries to determine if any interests, conflicts of interests or potential biases exist.[789] Furthermore, mediators must disclose any interests, conflicts of interests or potential biases that may become apparent during the mediation process.[790]

6.10.4. Mediation Process

The mediator must ensure that the parties have understood and agreed to the terms and conditions governing the mediation process.[791] Mediators are required to provide the parties with equal opportunities to raise issues and to be heard.[792]

6.10.5. Termination of the Process

The mediator shall notify the parties of their rights to withdraw from the mediation at anytime.[793]

6.10.6. Feedback

At the end of the mediation, mediators should invite parties to provide feedback

788 ibid.
789 ibid.
790 ibid.
791 ibid.
792 ibid.
793 ibid.

by completing a feedback request form.[794]

6.10.7. Fees

Before accepting appointment, the mediator must agree with the parties how his or her fees and expenses will be calculated.[795]

6.10.8. Confidentiality

Mediators are required to keep confidential all information acquired in the course of serving as a mediator unless for the circumstances provided.[796]

6.10.9. Professional Conduct Issues and Complaints

The Mediator must follow and observe the Code strictly with due diligence and shall not participate in any activity or conduct which could reasonably be considered as conduct unsuitable of a mediator.[797]

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794 ibid.
795 ibid.
796 ibid.
797 ibid.

6.11. CONTINUING PROFESSIONAL DEVELOPMENT

IIAM encourages Mediators to participate in various CPD courses. Upon completing and attending recognised CPD programmes, such as mediation/conciliation workshops, seminars, conferences, training programmes, courses, IIAM mediators will be entitled to count those hours in lieu of their hours of mediation requirement.[798]

6.11.1. Meta-Culture

Founded in 2005, Meta-Culture is India's only full service conflict resolution consulting business.[799] Similar to IIAM, Meta-Culture has been recently QAP approved in 2011 and offers ample of mediation training. Furthermore, Meta-Culture also provides various CPD courses for mediations of all experience levels such as conflict management, collaborative negotiation and decision-making and problem solving.[800] All of the training programmes range from 2-4 days.[801]

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798 ibid.

799 International Mediation Institute, 'Meta Culture Consulting: Dispute Transformation and Dialogue' <http://imimediation.org/qap-profile-meta-culture> accessed 8 July 2016.

800 Meta Culture, 'Training' <www.meta-culture.in/training> accessed 8 July 2016.

801 ibid.

6.12. MEDIATION TRAINING MANUAL OF INDIA

The Mediation Training Manual of India provides specifically the skills and knowledge that are required to be trained in a mediator. This section will discuss these topics in brief.

6.12.1. Nature of Conflicts

Using the 'continuum of conflicts' as a foundation, Indian mediators will be trained in 3 broad dimensions: (1) The Conflict Core – outlines the sense of threat which drives it; (2) The Conflict Spiral – outlines what happens when a threat escalates and (3) The Conflict Triangle – explains three primary aspects of conflict that mediation needs to address.[802]

6.12.2. Concepts of Mediation

In order to be a successful mediator, it is necessary to know the advantages to mediation and why parties should rely on it.[803]

6.12.3. Comparison between Judicial Processes

Mediators shall know the similarities and differences between arbitration, mediation, conciliation and Lok Adalat.[804]

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802 Mediation and Conciliation Project Committee Supreme Court of India Delhi (n 730).

803 ibid 16.

804 ibid 20.

6.12.4. Process of Mediation

In order to assist the parties to negotiate a settlement, Indian mediators are trained in using four functional stages of mediation for resolving disputes.[805] These include: (1) Introduction and Opening Statement; (2) Joint Session; (3) Separate Session; and (4) Closing.[806]

6.12.5. Qualities of a Mediators

Indian mediators are trained to act as both facilitative and evaluative roles to assist parties in resolving disputes.[807] Hence it is necessary for mediators to possess certain basic qualities such as: sensitivity, high standards of honesty, neutrality, attentive, patient listener, good communication skills, empathy and open-mindedness, just to name a few.[808]

6.12.6. Communication Skills

Communication is the cornerstone of mediation. Thus, it is necessary for Indian mediators to be trained in effective communication techniques.[809] In particular, certain communication skills are crucial in mediation, these include: active listening, listening with empathy, body language and to ask the right questions.[810]

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805 ibid 24.
806 ibid.
807 ibid 37.
808 ibid.
809 ibid 44.
810 ibid.

6.12.7. Negotiation and Bargaining Skills

During mediation, negotiation is the process of communication aimed at reaching a settlement between the parties to the dispute.[811] Indian mediators are trained in implementing different negotiation styles including: avoiding, accommodating, compromising, competing and collaborating.[812]

6.12.8. Impasses

In mediation, impasses are deadlocks or hindrances between the parties and could ultimately jeopardise the progress of mediation.[813] Thus, Indian mediators are trained to recognise different types of impasses such as emotion, substantive and procedurals impasses and the suitable techniques break impasses.[814] Some of these include reality test, brainstorming and acknowledging the parties, just to name a few.[815]

811 ibid 53.
812 ibid.
813 ibid 62.
814 ibid.
815 ibid.

6.13. CONCLUDING REMARKS

The Republic of India has taken an astonishing leap forward in purporting an extensive regime that not only promotes ADR but also establishes a high quality standard for training mediators. In the face of the daunting judicial backlog, it is admirable that the Indian courts and the legal community have managed to react promptly to formulate probable solutions to handle this matter. This includes amending the Civil Code, formulating the 'Mediation Manual of India' and the establishment of various Mediation Centres across the nation.

By partnering with international organisations such as the IMI, India has achieved a global standard in its mediator training, mediator accreditation and code of conducts provided to mediators. As highlighted in this chapter, the training programmes offered by the IIAM offers comprehensive training opportunities ranging from role play and simulations, where participants play the role of both mediator and disputants, to theory and skills development exercises. In light of India's economic development, it is vital to ensure that commercial disputes are managed efficiently and effectively. A certified Commercial Mediator can assist in resolving disputes that arise during the course of a corporate transaction and effectively close the deal.

CHAPTER 7. HONG KONG

7.1. DEVELOPMENT OF MEDIATION IN HONG KONG

The profession of mediation in Hong Kong compliments the underlying principles of the judicial system. As Justice Lam stated in *Paul Y Management Limited v Eternal Unity Development*, 'it should be recognized by those conducting litigation in Hong Kong and their professional advisers that very often commercial disputes can be resolved more satisfactorily through means other than litigation.'[816] From a business perspective, there are often cases in civil litigation where the final outcome does not in fact end favourably for either party. Thus, rather than wasting money on civil litigation, disputes can be resolved directly between the parties with the guidance of a mediator.

The underlying objectives of the High Court and District Courts emphasise the need to increase cost-effectiveness of any practice and procedure,[817] to deal with cases expeditiously,[818] to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings[819] and to facilitate the settlement of disputes.[820] Thus, for the courts, it is of utmost importance to keep in mind the potential time and cost considerations when proceeding to litigation. The

816 *Paul Y Management Limited v Eternal Unity Development* [2008] CACV 16/2008.

817 Rules of the High Court and District Court Order 1A r 1(a).

818 Rules of the High Court and District Court Order 1A r 1(b).

819 Rules of the High Court and District Court Order 1A r 1(c).

820 Rules of the High Court and District Court Order 1A r 1(e).

informality of mediation means procedural judicial mechanisms can be ignored and as a result time and resources can be saved. This inevitably fulfils the underlying objectives of the courts and led to the introduction of Practice Direction 31 (PD.31).

7.2. INTRODUCTION TO PRACTICE DIRECTION 31

Following the implementation of PD.31, as of January 2010, lawyers are obligated to explain to their client the availability of mediation. Mediation is a mechanism utilised to settle the entirety or parts of a dispute, as well as the costs incurred from the mediation process in lieu of litigation costs. The necessity of such a mechanism is best characterised by the case *iRiver Hong Kong Limited v Thakral Corporation (HK) Limited*,[821] in which the total amount of legal costs incurred totalled 4.7 million, when the amount in dispute was only 1 million. The judges stated in their judgment that this was a 'typical case where parties should have explored resolution of their disputes by mediation.' If however, even after the lawyer's recommendation, the parties to the litigation choose to ignore mediation as a solution without a justifiable reason to do so, the courts have the right to order an adverse costs order. 'Mediation has now become part of the process which the court approves of to the extent that parties may even be penalised in costs if they are not prepared to embark upon a mediation process'.[822] In doing so, the court must take into account the court resources and litigation costs incurred as a result of deferral from mediation. Thus, following the introduction of PD.31 the necessity for accredited mediators has become more important than ever before.

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821 *iRiver Hong Kong Limited v Thakral Corporation (HK) Limited* [2008] 6 HKC 391 [98]-[106].

822 *S v T* [2010] 4 HKC 501 [3] (Rogers VP).

7.3. HONG KONG MEDIATION ACCREDITATION ASSOCIATION LIMITED

Following the well-established national scheme for mediator standards in Australia, Hong Kong has followed suit by establishing the HKMAAL, a non-statutory industry-led accreditation body, in pursuit of one day developing a single system of accreditation. The NMAS in Australia is an industry-based scheme that relies on voluntary compliance by other mediator organisations to accredit mediators in line with the standards described by the system. Following the consultation period of the Report of the Working Group on Mediation published by the Department of Justice, [823] there was a high demand for a national accreditation body to be established as soon as possible. HKMAAL was successfully incorporated in August of 2012 and was welcomed as a 'significant step in the development of mediation in Hong Kong' The HKMAAL body has also set up a Mediation Accreditation Committee and a Working Group on Accreditation Standards as a means of regulating and improving its current framework. In addition, the Steering Committee on Mediation chaired by the Secretary for Justice and the Accreditation Sub-committee will continue to monitor the developments of the accreditation and training of mediators. By establishing the HKMAAL as an umbrella body who's focal role is to evaluate detached accrediting bodies, this constructs a relationship where the HKMAAL may be held accountable for the standards of mediators whom have graduated

[823] The Hong Kong Special Administrative Region Department of Justice (DOJ), 'Report of the Working Group on Mediation' (2010) 5 <www.doj.gov.hk/eng/public/pdf/2010/med20100208e.pdf> accessed 8 July 2016.

from the said bodies. Taken in accordance with the Mediation Ordinance,[824] the hope of one day unifying the accreditation system promises to ensure the sustainability and more importantly the credibility of the profession in the future.

'Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve'.[825] The essential component here is the skilled mediator. As such, confidence and credibility in the profession can only be maintained if good quality service is consistent. To filter out weak mediators through trial and error would put users of the service at unnecessary risk as well as damage the reputation of the profession as a whole. Therefore, through the training process and accreditation of mediators a certain standard will be set that ensures inactive sub-par mediators will be filtered out and competent and diligent mediators will be accredited for their exemplary efforts. The policy of the HKMAAL puts emphasis on the regulation of accredited mediators and personnel involved in the provision of such courses. As potential mediators can come from diverse backgrounds unlike professions such as law and medicine, it would be more effective to police rather than provide training services for potential and existing mediators. Therefore, an effective disciplinary system must be in place to streamline and effectively equip candidates.

As of 11 July 2016, HKMAAL has a total of 2,109 registered accredited mediators, 1,990 of which have migrated from other previous individual

824 Hong Kong Mediation Ordinance (Cap 620).

825 *Pacific Long Distance Telephone v New World Telecommunications Ltd* [2012] HCA 1688/2006 [12] (Houghton J SC).

accrediting bodies, the remaining of which are accredited under HKMAAL accreditation policies. Due to the rising prominence of the HKMAAL, 10 other organisations within the mediation industry have joined the HKMAAL as Corporate Members.[826] Currently, there are 15 training course providers who have successfully attained HKMAAL Stage 1 Accreditation for their general mediation training courses and 2 further training course providers whom have obtained HKMAAL accreditation for their course that converts general mediators into family mediators.[827] Currently, the HKMAAL has on its panels over 90% of the total number of accredited mediators in Hong Kong, following the incorporation of all Corporate Members. It is essential that more bodies accept regulation under the framework of the HKMAAL in the hopes of one day unifying the system. To do so it is important to convince the Judiciary and Mediation Helpline Office to only provide mediators accredited under the HKMAAL to potential users of the service.

The HKMAAL has a set of guidelines available on its website for organisations seeking approval to provide stage 1 mediation course training.[828] The course is required to provide participants with the education of basic principles, theory as well as practical knowledge on mediation. Thus, allowing them to apply the relevant facilitative mediation skills and ethics to resolve real life scenarios.

826 CEDR Asia Pacific, Hong Kong Bar Association, Hong Kong Institute of Arbitrators, The Hong Kong Institute of Architects, Hong Kong Institute of Construction Managers, The Hong Kong Institute of Engineers, Hong Kong International Arbitration Centre, Hong Kong Mediation Centre, The Hong Kong Institute of Surveyors and The Law Society of Hong Kong.

827 Panel on Administration of Justice and Legal Services, 'Progress Report from Hong Kong Mediation Accreditation Association Limited for the Meeting on 22 July 2014' (22 July 2014) LC Paper No CB(4)939/13-14(02).

828 Hong Kong Mediation Accreditation Association Limited, 'Application for Course Accreditation' <www.hkmaal.org.hk/en/trainingcourse_app.php> accessed 8 July 2016.

During the training programme the mediator must take part in at least 8 role-plays. Each role-play should last for at least an hour and two of which should last at least an hour and a half. In these role-plays the coach to participant ratio should be 1:3 or 1:4. This 40-hour training course should be conducted within 8 weeks and the number of participants should not exceed 36.

7.4. HONG KONG INTERNATIONAL ARBITRATION CENTRE

Using the Hong Kong International Arbitration Centre (HKIAC)'s training course as a guideline,[829] to gain accreditation as a mediator, candidates must firstly have at least 2 years of full-time working experience to be considered for the course. Upon acceptance by the HKIAC Mediator Accreditation Committee the candidate is then required to satisfactorily complete a training course of 40 hours minimum for Stage 1 accreditation. For Stage 2 accreditation, the candidate must then successfully mediate at least two simulated general mediation cases. From these simulated exercises the candidate must obtain two MA4 forms,[830] which include the comments from the assessor. This is for the Accreditation Committee to ascertain the competence of the candidate. Following completion of stages 1 and 2, the candidate may apply for stage 3 accreditation. The application must be submitted along with form MA1,[831] two MA4 forms (along with two settlement agreements), the certificate for stage 1 completion, an application fee as well as an annual panel fee. Following this, the candidate should anticipate being called in to conduct a personal interview as well as the possibility for an additional simulated mediation to be evaluated by an accredited examiner appointed by the Accreditation Committee. The examiner will submit the relevant MA4 form in relation to this assessment. Candidates who successfully gain accreditation for Stage 3 may choose to have their names included on the relevant HKIAC Panel of Accredited Mediators subject to compliance with all the stated conditions.

829 HKMAAL adopted HKIAC procedures en bloc as a basis of its accreditation of mediators.

830 Hong Kong International Arbitration Centre, 'Download Forms MA4', <http://220.241.190.1/en/mediation/download-forms> accessed 8 July 2016.

831 Hong Kong International Arbitration Centre, 'Download Forms MA1', <http://220.241.190.1/en/mediation/download-forms> accessed 8 July 2016.

7.5. MEDIATOR'S ACCREDITATION

For mediators, by utilising accreditation as a means of distinction, this also opens up opportunities for potential and existing members of the profession to interact with one another. Due to the confidential nature of the profession it is not surprising for mediators to feel isolated. Accreditation courses mandate candidates to continually develop their communicative skills to allow them to adapt better in face of new scenarios. Peer review is also encouraged so mediators can adopt and practice new styles of mediating. By providing avenues for interaction this promotes the progressive and continual nature of the profession. Training only guarantees a minimum standard but accreditation provides the opportunity for the continual development of each and every mediator.[832]

However, it is argued that this system of certification is insufficient to determine the skill of any individual. Accreditation merely provides a rough indication of the basic skills level of that said individual. To determine the mediator's actual competence there are many other factors to take into consideration such as previous work experience, success in cases and general reputation. Therefore, the onus to maintain a general quality among practitioners of mediation falls upon the mediators themselves. The desire for self-improvement is an important quality for a mediator who seeks to improve their skills.

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832 Conrad C Daly, 'Accreditation: Mediation's Path to Professionalism' (2010) 4 American Journal of Mediation 39, 53.

7.6. CONTINUING PROFESSIONAL DEVELOPMENT

It is desired that even after HKMAAL accreditation the quality of a mediator's service is regulated and upheld. The standards attained via completion of all training courses are a bare minimum and accredited mediators are encouraged to exceed these expectations whenever possible. Mediator accreditation lasts for only a 3-year window in which to be eligible for an extension a minimum of 15 hours of CPD training[833] is required. There are strict regulation policies regarding attendance to CPD training courses that are specifically stated on the HKMAAL website. Each CPD participant must keep track of his or her training record in a CPD Training Record Form. This is to ensure a record of compliance with the HKMAAL Accredited Mediator CPD Programme Requirements, to provide each mediator with a personal development record and to allow the HKMAAL Mediation Accreditation Committee a document for review for the purposes of renewal of accreditation. In the event that renewal of accreditation is rejected, the CPD Training Record Form will be returned along with clear comments and advice specifying the necessary actions that would rectify the rejection. The purpose of the CPD programme is to compel accredited mediators to continue to enhance and broaden their skills, which is an underlying principle in the area of mediation.

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833 Hong Kong Mediation Accreditation Association Limited, 'Continuous Profession Development for a HKMAAL Accredited Mediator' <www.hkmaal.org.hk/en/CPDCriteria.php> accessed 8 July 2016.

7.7. MEDIATOR'S CODE

The accreditation and training sub-group were tasked with the challenge of reviewing accreditation and training methods for mediators in Hong Kong. In response to their findings, they considered the need to draft a mediator's code of conduct that would be applicable to all practicing mediators.[834] During the consideration process the mediation codes of several organisations were taken into account.[835] This culminated in the drafting of the Hong Kong Mediation Code,[836] which provided a framework for the code of conduct for mediators as well as a sample Agreement to Mediate form. The subgroup proposed for the code to be promoted and widely circulated to raise awareness of the service. By utilising the code as an indicator of the minimal standards required of a mediator, it was hoped that this would help to reinforce public confidence in the service. Although the code is voluntary in nature a number of organisations have already adopted its framework by joining the HKMAAL as a Corporate Member thus helping it enforce its guidelines through a complaints and disciplinary process.[837] The code itself is characterised into four parts, namely: General Responsibilities; Responsibilities to the Parties; Defining the Process; and Responsibilities to the Mediation Process and the Public.

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834 DOJ (n 823) s 7(65).

835 Australian National Mediator Standards, Centre for Effective Dispute Resolution, Chartered Institute of Arbitrators (East Asia Branch), HKIAC, Law Society of Hong Kong, Hong Kong Mediation Centre and Model Standards for Conduct of Mediators (America).

836 DOJ, 'The Hong Kong Mediation Code' <www.doj.gov.hk/eng/public/pdf/2010/med20100208e_annex7.pdf> accessed 8 July 2016.

837 Chartered Institute of Arbitrators (East Asia Branch), Hong Kong Bar Association, Hong Kong Mediation Centre, Hong Kong Mediation Council, Law Society of Hong Kong, Hong Kong Institute of Arbitrators, Hong Kong Institute of Architects and Hong Kong Institute of Surveyors

The Mediation Code states that the mediator has prerequisite responsibilities to the mediation process and the public. As a given, the mediator must be competent and knowledgeable in the process of mediation. Where the mediation involves specific fields such as separation or divorce the mediator must be trained and accredited accordingly in the area. Prior to accepting an appointment, the mediator must be certain that the case will be dealt with expeditiously and not be hindered in any way by any prior commitments. In regards, to the promotion of their services, mediators must endeavour to do so but only in a professional and respectable manner.

7.8. MEDIATOR'S RESPONSIBILITIES

The general responsibilities address the mediator's duty to act fairly and impartially to both parties. If there has been any previous affiliations or interests with either party this must be declared. However, it is a prerequisite that the mediator has no interest in the final outcome of the mediation. If during the course of mediation the mediator becomes aware of circumstances that may impinge on their duty to act impartially, the mediator must inform the parties of the situation. It is then up to the parties if they wish to proceed with the mediation or to appoint a new mediator to guide their case. If the parties still wish to proceed then the written consent of both sides must be obtained before proceeding with mediation. This instrument is known as an Agreement to Mediate.

The principle of party self-determination, the bedrock of mediation, leads to the voluntary nature of mediation. First of all for mediation to occur at all, consent must be given by both parties as exhibited by the Agreement to Mediate. Without consent, mediation would be inapplicable. Likewise, if a mediator were to conduct mediation where either party is under duress to participate then he/she would be acting beyond his/her capacity as a mediator.

The mediator is obliged to explain clearly the process of the entire mediation as well as their role in the entire operation. During the process of the mediation, the mediator merely plays an assisting role. 'At base, mediation rests on the premise that people have the capacity to make their own decisions about issues that

confront them'.[838] The aim is to help systematically isolate the issues at hand and assist the parties in developing amiable solutions that suit the interests and needs of all parties. Unlike most other processes which are rights based, this interest based approach enables parties to allocate and define the real issues for their dispute and tackle them directly. This is based out of a respect for the parties and the desire to provide mediation as an avenue to empower the involved parties to take control of their own dispute.

The mediator cannot provide legal advice or expert opinion to either party that may induce or impose a decision on the behalf of or for any party. If the mediator were to coerce any party then the profession and its purpose would be delegitimised. The concept of neutrality is integral in providing confidence to parties to utilise mediation as a means.[839] If a mediator were to have an interest in the dispute then it would be very difficult to build a trusting relationship between the parties and the mediator.

In addition, due to Hong Kong being a small business community it is not unreasonable to assume that a mediator may behave in a manner that would ensure future business. However, what does it truly mean to act impartially? If one party was less well versed in the dispute matter as the other, in providing additional assistance to the said party does this constitute a breach of impartiality? During the course of mediation, the mediator can meet with either party individually. How is the mediator to conduct his/herself in this situation? In

838 Robert A Baruch Bush and Joseph P Folger, 'Mediation and Social Justice: Risks and Opportunities' (2012) 27 Ohio State Journal on Dispute Resolution 48, 49.

839 Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16 Social and Legal Studies 221, 225.

reality, a mediator can only be guided by his/her own ethos and conscience in deciding what is fair or not in consistence with the rules and mediation code.

7.9. MEDIATION SETTLEMENT

Mediation places emphasis on voluntariness and compromise. Therefore, unlike judicial proceedings, mediation settlement is not subject to review as the entire premise is based upon the willingness of both parties. If the mediator were to influence that, then mediation would not serve its purpose. Likewise the principle of voluntariness can be seen in many other areas of the practice. At any point during the mediation, the parties may choose to settle provided they can come to an agreement. No agreement to settle is legally binding unless a written agreement is set out and signed by or on behalf of all parties to the agreement. Also, the mediator must inform his clients that at any point in the mediation if they feel the service is unsatisfactory they may withdraw from the process. As can be seen the principle of voluntariness is littered within the framework of the mediation rules and the law.

7.10. VOLUNTARINESS IN MEDIATION

However, there have been significant views within the industry based on the principle of voluntariness. Due to the enactment of Practice Direction 31 as discussed earlier, there is an argument that this mechanism actually forcibly 'encourages' parties to attend a mediation session rather than out of their own will. The parties may, as a result of PD.31 feel obliged to take part in mediation, keeping in mind the adverse costs order courts may adjudicate knowing they did not fully explore this option. Although the philosophy behind PD.31 is in no doubt enforced with good intentions and the promotion of mediation as a whole in mind, it contradicts with the principles of voluntariness as a whole.

7.11. CONFIDENTIALITY

As stated by Justice Riberio in the case *Champion Concord v Lau Koon Foo*:

> [T]he fundamental importance of confidentiality in mediation is universally acknowledged and it can only be in highly exceptional circumstances that evidence which invades such confidentiality will be permitted to be adduced.[840]

Mediation offers the opportunity for parties to negotiate disputes outside of public scrutiny. By offering a space that allows the parties to openly negotiate in confidence requires the confidence of the mediator as well. If parties were under the impression that the mediator may use the information against them then mediation cannot occur. In addition, any information accrued during the course of mediation cannot be unlearnt. While the information learnt is unable to be used during mediation it is possible that the information may give direction towards further inquiry or evidence. Thus, the nature of mediation also provides risks, as information must still be carefully and tactfully disclosed.

The nature of confidentiality also allows for potential for abuse:

> A corporation that wishes to cover up a potentially harmful product may choose mediation over litigation to prevent the disclosure of damaging facts, thus shielding itself from public scrutiny. A party may also mediate to avoid the creation of adverse precedent. Under

840 *Champion Concord v Lau Koon Foo* [2011] 14 HKCFAR 837.

> such circumstances the true cost to society is hidden by the shield of confidentiality.[841]

This is a genuine area of concern in the practice as nefarious parties may use mediation as a veil to isolate weaker parties away from the public eye. As there is currently no model for class actions in Hong Kong this is a further cause of concern. In addition, where the dispute in question is of sensitive nature to the general public, mediation may be exploited as a means of keeping information away from society. Whilst there are exceptions that allow for disclosure of information as stated under the Mediation Ordinance (Chapter 620), this merely provides a general guidance for practitioners. This area of mediation remains uncertain and the courts should seek to clarify the direction Hong Kong mediation law wishes to pursue in the area of confidentiality.

It is useful to note that under the current HKIAC mediation rules, there is no provision to protect the confidentiality of settlement disputes. It is argued that as the settlement agreement is another form of contract there is no need for such protection. However, if this were to be assumed then parties may seek enforcement of the settlement agreement through court action and thus the details of the agreement would be exposed. Although it is up to the parties to insert a clause protecting the confidentiality of the agreement this becomes another moot point and may be used as a bargaining chip for the party who deems it a necessity.

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841 Aseem Mehta, 'Resolving Environmental Disputes in the Hush-hush World of Mediation: A Guideline for Confidentiality' (1996-1997) 10 Georgetown Journal Legal Ethics 521, 522 - 523.

In a practical situation, the mediator is bound by the duty of confidentiality to his clients and is prohibited from discussing any information that arises out of the mediation. This also includes a duty internal to the mediation, meaning any information disclosed in confidence by one party to the mediator will be in confidence and cannot be disclosed to the opposing party unless permission is given. Information obtained is agreed to be without prejudice to any Party's legal position and cannot be brought before any judge, arbitrator, or any legal decision making body as evidence. This duty of confidence however, is subject to exceptions such as if the mediator is obliged to disclose under law or public policy or if the information poses an actual or potential threat to human life or safety.[842] The parties cannot call the mediator as witness or require him/her to produce any evidence, records or notes in relation to the mediation case in any litigation, arbitration or other formal processes that arises as a result of the case. The mediator also cannot agree to act in the capacity of a witness, expert, arbitrator or consultant in any process.

[842] Hong Kong Mediation Ordinance (n 824) ss 8(2) and (3).

7.12. FAIRNESS AND ACCOUNTABILITY

'Over time, the dominant view has moved in the direction of Susskind's 'accountability' view of best practices in mediation – that substantive fairness of outcome is indeed one of the mediator's key responsibilities'.[843] However, the Hong Kong model restricts mediators from having any influence over the outcome or to question any resolution between parties. Meaning mediators are unable to express reservations over the fairness of any settlement. Concerns have been raised that the emphasis on the principles of self-party determination and neutrality pardon the mediator from addressing any issues of inequality.[844] If the mediation was conducted voluntarily and properly there is no avenue for the mediator to impose judgment or give advice on any settlement. Furthermore, if a party has already agreed to the settlement then even if in the eyes of a mediator it is clearly a bad bargain, there is nothing he can do. Due to the principle of self-determination the parties clearly have their own intentions and reasons for agreeing to the settlement. In addition, as a neutral, the mediator should have nothing to gain from the mediation. By taking sides the mediator risks losing the appearance and actuality of neutrality.

This is an area which mediators in Hong Kong feel most unease with. Where there is clearly an imbalance of power between the two parties in dispute, the settlement manifested from the mediation will most likely reflect this. Under the Hong Kong model there is almost no room to manoeuvre for a mediator, as they are obliged to

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843 Baruch Bush and Folger (n 838) 11.

844 Leah Wing, 'Mediation and Inequality Reconsidered: Bringing the Discussion to the Table' (2009) 26 (4) Conflict Resolution Quarterly 388.

remain impartial. This is an area of frustration for Hong Kong mediators as power balancing 'is at the heart of the best practices'[845] for mediators.

Perhaps the most understated positive of the mediation process is its forward-looking nature. Mediation encourages parties to resolve conflict and not to determine a right or wrong. This may in fact preserve their relationship in the future allowing them to reconcile. By placing both parties in a space that is not combative, unlike that of a courtroom, this allows the parties to connect and understand one another. For example in family disputes, where the separation of parents may take importance over their obligations to their children, situations can turn ugly. By encouraging a collective mindset rather than that of winner takes all, this allows both parties to collaborate and come to an understanding over their dispute. While this may not apply to all circumstances, assuming victimised parties only want monetary compensation is not a healthy starting point. More often than not parties need to vent in order to heal, by allowing them the space to do so is the purpose of mediation.

845 Astor (n 839) 229.

7.13. CONCLUSION

Thus, the role of a mediator cannot be understated in any way whatsoever. The difference between a good and bad mediator can determine whether the mediation was even necessary in the first place and may in fact place the parties in a worse position than before it even started. The CPD programme ensures that accredited mediators continue to enhance their skills, as CPD is an essential characteristic for each mediator. This is in the hope that a certain standard can be maintained while enhancing the general quality of the profession thus improving the service provided to the public. While there are underlying principles that are subject to clarification the enactment of PD.31 ensures that the profession of mediation remains at the forefront of the legal sector in the hopes of one day emulating and achieving a single system of accreditation similar to that established in Australia.

CHAPTER 8. CALIFORNIA

8.1. INTRODUCTION

Mediation has become over the years one of the most popular and efficient ADR instruments. Derived from latin *mediare* – to be in the middle – it can be defined as 'a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute'.[846]

Mediation presents certain advantages when compared to litigation: it is a less adversarial process that generally leaves both parties satisfied with the outcome whilst saving valuable time and cutting costs[847]. In the corporate world, mediation has come to be an inevitable instrument for dispute resolution,[848] especially in the United State of America, which is one of the countries where mediation has met a wide support.

The Rule of Law, in the primary sense of protecting property and enforcing contracts, requires a Judiciary to resolve disputes between private parties; the

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846 American Arbitration Association, 'Model Standards of Conduct for Mediators' (2005) <https://adr.org/aaa/ShowPDF?doc=ADRSTG_010409> accessed 8 July 2016.

847 Dwight Golann and Jay Folberg, *Mediation: The Roles of Advocate and Neutral* (Wolters Kluwer Law and Business 2006) 102-103; A P Ordover and A Doneff, *Alternatives to Litigation: Mediation, Arbitration, and the Art of Dispute Resolution* (2nd edn, LexisNexis Butterworths 2002).

848 For example David B Lipsky and Ronald L Seeber, 'Patterns of ADR Use in Corporate Disputes' (1999) 54 Dispute Resolution Journal 66.

Judiciary as such has a direct impact in a State's economic development. Mediation has come with increased popularity to play *in some sense* a similar role to that of the Judiciary, and therefore deserves increased attention, both as a matter of Natural Justice, but also for its economic importance.

Mediators play a central role in ensuring that the parties benefit from due process and reach a satisfactory outcome. With great powers come great responsibilities, so it is naturally that debate has been focused on their training and accreditation.

8.2. CURRENT TRAINING AND PROFESSIONAL DEVELOPMENT REQUIREMENTS FOR COMMERCIAL MEDIATORS IN CALIFORNIA

8.2.1. Absence of formal training or accreditation

The two notions are inter-related: accreditation appears to be the finality of training, and occurs when an official body or authority recognises that official standards have been met by somebody, thus sanctioning or approving the training undertaken by that person, or the competence thus far acquired. The word accreditation originates from French '*accréditer*' – meaning giving credit to someone, and the notion of accreditation thus entails recognition of a common standard. Accreditation is therefore understood as being delivered by a public or an official body or organisation, most likely to safeguard the uniform understanding of that standard. Should accreditation be delivered by private entities, it would need to be according to a widely recognised and uniform standard in order to bear any weight.

In the State of California, no state or professional agency or department provides mediator accreditation. According to Bowers and Moffett, the ACR could be a credible organisation for providing such accreditation, yet they do not.[849] The authors continue to point out that '[a]nother likely source of certification would

[849] Richard Bowers and Nelle Moffet, 'Mediator Licensing and Certification in California: Conflict Resolution and Mediation Training Programs' (2010) 5 <www.mediation-consultants.com/articles/Mediator_Licensing_and_Certification_2.html> accessed 8 July 2016.

be the court systems that use mediators. However, the California courts specifically state that they do not certify mediators that support the courts'.[850]

The practice of mediation thus remains very informal and more or less open to anyone wishing to present himself or herself as a mediator – the general rule appears to be that a mediator is a person who has a paying client.[851] This feature of mediation is subject to heated debate – whilst some advocate that it encourages competition, spurs innovation and keeps mediation costs to a minimum, others argue that training and accreditation of mediators would help maintain high standards of service, and eliminate incompetent mediators; that training and accreditation harmonisation would allow clients to make a better informed choice, which would be more likely to achieve satisfactory outcomes for all parties involved – and that this advantage outweighs the small increase in costs it would trigger.

As far as training is concerned, there are a variety of paths and backgrounds for a mediator to embark upon depending on his or her expertise. Several Universities offer degree programmes relating to conflict resolution and/or offer certificate programmes. There are also many courses in mediation offered by various groups, for example the ACR.

In any case, mediators are not obliged to put forward themselves for such training, and may prefer to rely on other various experiences or expertise, they have

850 California Rules of Court (CRC), 'Division 8: Alternative Dispute Resolution' r 3(858)(b).

851 R Birke and L E Teitz, 'US Mediation in the Twenty-first Century: The Path that brought America to Uniform Laws and Mediation in Cyberspace' in N M Alexander (ed) *Global Trends of Mediation* (2006) 376.

obtained over the years. In the absence of any formal training or accreditation, the reputation of a mediator appears therefore paramount to getting new clients[852]. One might say that this unregulated industry is therefore quite hard to penetrate for newcomers, who have to compete against established practitioners. Thankfully, private dispute resolution organisations may partially counterbalance the advantage given to experienced and established practitioners, by providing training, as well as a code of conduct or ethics, and a directory/panel.

8.2.2. Mediators are held to a standard of ethics

The Association for Conflict Resolution represents itself as 'a professional organization enhancing the practice and public understanding of conflict resolution' [853] and imposes that its members, who are *inter alia* mediators, abide to a certain standard of ethics: 'an ACR Neutral must adhere to the highest standards of integrity, impartiality and professional competence in rendering her or his professional service'.[854]

The ACR has also taken part in drafting the Model Standard of Conduct for Mediator,[855] along with the American Arbitration Association, and the American

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852 Mandy Zhang, 'To Certify, or Not to Certify: A Comparison of Australia and the US in Achieving National Mediator Certification' (2008) 8 (2) Pepperdine Dispute Resolution Law Journal 307, 309.

853 The Association for Conflict Resolution (ACR) <www.imis100us2.com/ACR/ACR/Default.aspx?hkey=6d51647b-e4cd-49d5-bc8a-36a4773a9054&WebsiteKey=a9a587d8-a6a4-4819-9752-ef5d3656db55> accessed 8 July 2016.

854 ACR, 'ACR Standards of Practice and Ethical principles' <www.imis100us2.com/acr/ACR/About_ACR/StandardsPrinciples/ACR/About_ACR/Standards_of_Practice.aspx?hkey=6b45cbc5-753f-45b8-87d4-f5dfb962002f> accessed 8 July 2016.

855 American Bar Association, American Arbitration Association and Association for Conflict Resolution, 'Model Standards of Conduct' (*Mediate.com*, August 2005)

Bar Association (ABA)'s Section of Dispute Resolution, laying down a list of Standards relating *inter alia* to:

> Self-determination: 'the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome';[856]
>
> Impartiality: 'A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favouritism, bias or prejudice';[857]
>
> Competence: 'A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties';[858]
>
> Confidentiality: 'A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law', and 'A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation';[859]

<www.mediate.com/pdf/ModelStandardsofConductforMediatorsfinal05.pdf> accessed 8 July 2016.

856 ibid 3.

857 ibid 4.

858 ibid 5.

859 Ibid 6.

> Quality of the process: 'A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants';[860]
>
> Advertising and Solicitation: 'A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees';[861] and
>
> Fees and other charges: 'A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation'.[862]

It is to be noted that preamble of the Model Standards of Conduct for Mediators contains the following note regarding its construction:

> These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the

860 ibid.
861 ibid 8.
862 ibid.

> Standards might be viewed as establishing a standard of care for mediators. [863]

Thus, parties who claim to have been misled by their mediator or that their mediation has been mishandled in regards to any of the above standards may bring a contractual claim (depending on the contents of the agreement to mediate) but more importantly a tortious claim based on these Model Standards. Indeed, a mediator acting in breach of the guidelines laid down above could be in breach of his duty of care. There has only been one case in which the mediator was found liable to a party for mediation conduct ie in the case of *Lange v Marshall*.[864]

8.2.3. Mediators are held to confidentiality standards

One of the most widely appreciated and sensitive features in mediation is confidentiality; it is in that respect the object of the largest legislative effort. California has enacted some very protective confidentiality provisions, which can be found in the California Evidence Code (Sections 703.5 and Sections 1115 through 1128), and so have many states in the USA (over 2,500 separate statutes have been enacted in the USA[865]). A troublesome conundrum for parties to a cross-state mediation is often to determine which laws might apply to their mediation. Thus, in a joint effort in 2001, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the ABA's Section of

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863 ibid 3.

864 *Lange v Marshall* [1981] 622 S.W.2d 237 (Missouri Court of Appeal) [239].

865 Uniform Law Commission, 'Mediation Act Summary' <www.uniformlaws.org/ActSummary.aspx?title=Mediation%20Act> accessed 8 July 2016.

Dispute Resolution promulgated the UMA, which aims to harmonise the patchwork of confidentiality statutes that have been enacted in the different states. The UMA is intended as a statute of general applicability that will apply to almost all mediations, except in some very specific cases unrelated to the commercial field. The UMA's prime concern is keeping mediation communications confidential. The central rule of the UMA is that a mediation communication is confidential, and if privileged, is not subject to discovery or admission into evidence in a formal proceeding (see Section 5(a)). The UMA is meant to have broad application, while at the same time preserving party autonomy. While a mediation proceeding subject to the Act can result from an agreement of the parties, or be required by statute, a government entity, or as part of an arbitration proceeding, the Act allows parties to opt out of the confidentiality and privilege rules contained in UMA. Also, the Act does not prescribe qualifications or other professional standards for mediators, allowing parties (and potentially states) to make that determination.

8.2.4. An official training and accreditation system in the Legislator's drawer?

It is interesting to note that Senator Russell was the author in 1994 of the California Senate Bill 1428, which aimed to protect the public and acknowledged that 'there was an urgent need to establish a system that will allow the public to choose mediators with certificates that verify they meet minimum standards of training and experience'.[866] Although the Bill failed to get out of the Senate

[866] California S B 1428, § 2.

Business and Professions Committee, it does not fail to illustrate the debate that has been growing since mediation emerged in the court-crammed and litigation-hungry 1960s United States of America.[867]

[867] Alexander Hoffman, 'Mediation in Germany and the United States – A Comparison' (2007) 9 European Journal of Law Reform 505, 512-513.

8.3. AN ASSESSMENT OF THE EXISTING LIBERAL APPROACH

8.3.1. 'If Rembrandt had set the standard, Picasso would not have met it'[868]

The increasing popularity of mediation means it plays a more and more important role in dispute resolution, triggering in return a logic need for reliability.

The field of mediation is not the first one to face the debate of accreditation (or certification): law, medicine, and in particular psychology have already been subject to this debate. Bowers and Mofett report an opinion put forward by Carl Roger and, who was one of the most influential psychologists of the 20th century (he is the 5th most frequently cited psychologist and is considered the 6th most eminent psychologist of the 20th century[869]), resonates with particular strength:

> I have slowly come to the conclusion that if we did away with 'the expert', 'the certified professional', 'the licensed psychologist', we might open our profession to a breeze of fresh air, to a surge of creativity, such as it has not known for years. […] In every area, medicine, nursing, teaching, bricklaying, or carpentry, certification has tended to freeze and narrow the profession, has tied it to the past, and has discouraged innovation. […]

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868 Stanley Rodbell, 'Building a Resolutionary Future" Mediator Excellence' (Future Search Conference, Maryland, July 2003).

869 Steven J Haggbloom et al, 'The 100 Most Eminent Psychologists of the 20th Century' (2002) 6 Review of General Psychology 139, 142.

> As soon as we set up criteria for certification...the first and greatest effect is to freeze the profession in a past image. This is an inevitable result. What can you use for examinations? Obviously, the questions and tests that have been used in the past decade or two. Who is wise enough to be an examiner? Obviously, the person who has 10 or 20 years of experience and who therefore started his training 15-25 years previously. I know how hard such groups try to update their criteria, but they are always several laps behind. So the certification procedure is always rooted in the rather distant past and defines the profession in those terms. [870]

This view seems to have prevailed thus far in regards to mediation, and conveys well the general reluctance of mediators and observers to formalise the profession's requirements.

There are of course many other arguments to be found against accreditation: opponents to accreditation, certification or even licensing (which is an even more stringent process, as licensing generally entails that only licensed practitioners are allowed to practice) generally bring forward the following arguments, which carry more or less force.

First, an important axiom to a succession of arguments against accreditation is that it would create a barrier for the newcomers wishing to enter the field. In reality, the opposite may be argued – who is to say that a reputation is acquired

[870] Bowers and Moffet (n 849) 10-11.

with more ease than a certificate? As we have seen above, a completely unregulated, barrier-free mediation practice means that well-established mediators relying on their network of clients and on their extensive experience will be most likely to attract new clients, or at least the most interesting, and complex cases – in other words, those that count as impressive experience to be put forward on a resume, and help gain further clients. Thus it might be argued that in reality, the lack of accreditation creates an even bigger hurdle for new practitioners, who if certified, would at least be represented to have the same skills, if not the same experience, as the more established mediators.

Another argument based on the said axiom is that such barriers would limit the diversity of mediators and impede innovation. This is well illustrated by the view of Carl Rogers in the field of psychology. However, it is arguable that in reality, diversity of mediators is effectively reduced. In fact, it would very much depend on whether accreditation were to be mandatory or not (in which case it would be closer to 'licensing'), and on the difficulty of getting accredited. Were the accreditation to be a non-mandatory, or accessible process to a vast majority of competent practitioners, there is little or no chance that it would drastically reduce the number of practitioners and thus impede innovation.

A further contention is that a smaller pool of mediators, added to the cost of accreditation for those who have managed to benefit from it, would inevitably trigger an increase in mediation costs. As argued above, it is very arguable that the pool of mediators would in fact decrease. In addition, the costs of accreditation would depend on the system, the length and difficulty of the process, and many

parameters; costs can be cut down and adapted, so much so that this argument carries little weight.

Also, opponents to accreditation argue that those in favour of it are practitioners who are only seeking improved status and higher income, but that such a system would be at the expense or at the detriment of the public; it goes without saying that there are numerous considerations of public interest which plead in favour of a smart accreditation system – the first one being that it would make life easier for consumers looking to assess the competence of their mediator prior to choosing him or her.

A last argument is that competition is the best way to guarantee competence, since competition only will ensure that the best mediators will continue to practice. This rather Darwinist view of mediation practice is not only doubtful but also in contradiction with the previously laid down argument that accreditation would be the cause of a decrease in the pool of mediators – is it competition or accreditation that results in a fewer number of mediators? It will be counter argued that a barrier-free profession enables anyone to practice it, especially in a field which can very well be practiced on a part-time basis, along with another profession.

8.3.2. What are the skills of a competent mediator? Can they be effectively taught and assessed?

Rather than a sterile debate on the abstract effects that an accreditation would trigger, it is best to examine the skills of a competent mediator, whether they are

best conferred through practice, training, a combination of both, and whether they can be assessed through an accreditation system.

State Bill 1428 detailed some of the basic knowledge and skills that would be expected of a mediator: *inter alia* knowledge of the structure of the California justice system, knowledge of dispute resolution theory.[871] The expected skills included communication and active listening, the ability to frame issues, coordinating the exchange between the parties to the dispute, the ability to manage conflict in an emotionally charged environment, and strategy planning.[872]

Knowledge of a justice system, and of dispute resolution theory are both capable of being taught and tested, as is already the case in all universities throughout the world delivering legal and/or dispute resolution focused degrees or certificates. The further skills laid down have more to do with the intrinsic 'talent' of each individual, but can always be taught and tested, through workshops, mock mediation, or even inferred from practice experience for established mediators. The real question is: would accreditation over such skills and knowledge prove to be relevant? Would it provide any added value to the existing flexible approach?

In her review of the issue of mediator credentialing, Teresa V. Carey lists a number of qualities that a mediator should possess:

> (1) Persistence, the ability to stay focused optimistically on a goal despite obstacles.

871 California S B 1428 (n 866).

872 ibid.

(2) The art of distinguishing between the stated positions of the disputants and their real interests, identifying those interests and exploring any number of constructive options in order to formulate a mutually satisfactory agreement.

(3) Maintaining a positive, constructive tone and influence over the mediation process as a whole with strict observance of the confidentiality entrusted in the mediator by the disputants.

(4) Thoroughness and discretion in the artful handling of private caucus sessions.

(5) The ability to handle difficult people in a positive, constructive manner.

(6) Sustained concentration and patience.

(7) The ability to set aside one's own biases and keeping an eye on the truth of the situation, as well as what solutions work best for all concerned under the circumstances.

(8) The ability to secure a resolution, which is truly satisfactory for the participants: substantively, procedurally, and psychologically. [873]

[873] Teresa V Carey, 'Credentialing for Mediators, To Be or Not To Be?' (1996) 30 University of San Francisco Law Review 635, 641.

As for State Bill 1428's skills and knowledge, it is doubtful whether an assessment of such qualities for a mediator would be of any added value. What then are the real benefits of an accreditation system?

8.4. A FLEXIBLE NATIONAL SYSTEM FOR TRAINING AND ACCREDITATION WOULD BE BEST

8.4.1. Consumer protection

When asking what the benefits of a training and accreditation system are, it is wrong to focus on the mediator, on their skills and competence. Indeed, it is unlikely that an *experienced* mediator will have anything to learn from such training, and that accreditation will in fact 'give him/her credit'. Such a mediator benefiting from tremendous mediation and life experience would find any course about the legal system, the ins and outs of mediation, or the various skills which he/she already surely has, rather useless.

On the contrary, the public, or their lawyers for that matter, would benefit tremendously from a bit of clarity into what makes mediation a safe and fair process, and what makes a reliable and competent mediator.

In 2002, the ACR created a 'task force' on mediator certification, with the purpose to design a national certification programme. The task force thought implementing a voluntary certification process would offer at least four important benefits:[874]

> First, the process would create a more uniform and minimum level of training, experience and study by mediators;

[874] ACR Mediator Certification Task Force, 'ACR Mediator Certification Task Force: Report and Recommendations' (*Mediate.com*, June 2004) <www.mediate.com/articles/acrcert1.cfm> accessed 8 July 2016.

> Second, a mediator certification process would give a more solid foundation of competency and professionalism, giving practitioners something to show for their commitment to one disciplined course of study. It would also allow scrutiny by their fellow practitioners, and be proof that the mediator was subject to 'a rigorous process of review by a credible and recognized national organization' much as it is with any other professional position.
>
> Third, consumers would be offered more protection because they would be able to gauge the qualifications of the mediators in the marketplace. While the report is careful to voice that certification is not an absolute indication of mediation competence, it suggests that it would be a useful factor to be considered when choosing a mediator.
>
> Last, the process would 'influence the future development and direction of the field'.

As we can see, all the benefits would directly or indirectly benefit the public – *those for whom mediation exists* – mainly because it would allow more transparency and clarity of the process, and standards to refer to.

A similar project was conducted in parallel during approximately the same period, by the ACR and ABA Dispute Resolution Section. However, in 2007, both projects were indefinitely put on hold, despite initial momentum and enthusiasm, prematurely putting an end to a few years of research and to the proposed

Mediator Certification programme. It is submitted that this quiet end to this project was caused by the results of market research before the implementation was carried out. This 'feasibility study' consisted of an online survey of 3100 individuals, and the results expressed mixed feelings, and it was concluded by ACR that such a project was not so urgent anymore. In a thorough review of this project an author came to the following conclusion: [875]

> One glaring problem with relying solely on the feasibility study to determine the fate of the mediator certification process is that the pool of individuals surveyed on the ACR and ABA websites are already somewhat involved in the mediation profession, whether as a student or as a practicing mediator. Unrepresented and overlooked by the survey are individuals and clientele who utilise mediation as a way of dispute resolution, whether individually or on behalf of a corporation or entity.

Most predictably, the concerns which were voiced were mainly that such a system would create barriers to entry in the field, an increase in cost of hiring mediators, loss of flexibility – all concerns which practicing mediators and future ones would have. It is natural for actors of the field to be concerned primarily about their condition, but it is a matter of public policy that mediation, whilst ensuring a certain degree of protection to mediators, should worry about consumer protection and service quality.

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875 Zhang (n 852) 328, citing ACR and ABA-DRS, 'Mediation Certification Feasibility Study' (2005) A C R REP 1.

There is no governing or regulatory body for mediation nor is there a uniform regulatory scheme in the United States of America governing the practice of mediation. California generally has no state requirements for mediators except for child custody mediation through the courts. Under Rule 5.210(f) of the California Rules of Court, it requires that mediators must complete a minimum of 40 hours of custody and visitation mediation training within the first six months of initial employment as a court-connected mediator; annually complete 8 hours of related continuing education programs, conferences, and workshops; and participate in performance supervision and peer review.[876]

[876] 2016 California Rules of Court, Rule 5.210 - Court-connected child custody mediation, <www.courts.ca.gov/cms/rules/index.cfm?title=five&linkid=rule5_210> accessed 8 July 2016.

8.5. CONCLUSION

The practice of mediation is a relatively new field and has remained thus far largely unregulated. Its growing popularity has put mediators under the spotlight, and concerns about protecting consumers from self-proclaimed mediators and malpractice has grown to the point where uniformity in training and accreditation have been seen as a plausible solution. As mediators are held to a duty of care, and to certain provision of the California Code of Evidence, it may appear *prima facie* that such an initiative would prove unnecessary and burdensome. However, a non-mandatory standard of accreditation that would comprise abiding to an official code of ethics and passing other practice orientated requirements, would allow clients and referrers to chose with more confidence their mediator, and new practitioners to have a better chance of competing, and thus advancing the field of mediation.

CHAPTER 9. CANADA

9.1. INTRODUCTION

Over the last decade, mediation, being one of the ADR methods, has grown significantly around the globe.[877] Particularly, more and more commercial disputes are being resolved by ADR. The significant increase in the use of mediation for resolving commercial disputes in turn demanded consideration attention to the issue of consumer protection, and therefore led to a huge debate regarding the question of how the quality of mediation can be assured.[878] While there is a consensus that mediation provides many advantages, despite the numerous attempts, the only concurring conclusion the literature could reach is that quality assurance is one of the obstinate issues in this field.[879] Fortunately, in the course of their exploration, some quality assurance options are generated. It is believed that accreditation and training are the two major ways to assure quality.[880] Given that the phenomenon of the rise in using mediation for resolving

877 Arthur W Rovine (ed), 'Contemporary Issues in International Arbitration and Mediation: The Fordham Papers' (Martinus Nijhoff Publishers 2010) 266.

878 See example Dorothy J Della Noce and others, 'Identifying Practice Competence in Transformative Mediators: An Interactive Rating Scale Assessment Model' (2003) 19 Ohio State Journal on Dispute Resolution 1005-1058; Michael L Moffitt, 'Four Ways to Assure Mediator Quality and Why None of Them Work' (2009) 24 (2) The Ohio State Journal on Dispute Resolution 191.

879 Noce and others (n 878).

880 W Lee Dobbins, 'The Debate over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence without Barring Entry into the Market' (1994) 7 U Fla JL & Pub Poly 95.

commercial disputes is also observed in Canada,[881] which may be evident by the enactment of Commercial Mediation Act 2010 in Ontario being the second province in Canada after Nova Scotia,[882] it can be foreseen that the credentialing approach[883] and training of commercial mediators in Canada will be under a closer scrutiny to an extent that it had never been.

Before a useful analysis of any accreditation approach and training programme can be generated, some criteria against which effectiveness of an accreditation approach and training can be measured should be identified first. Therefore, this chapter will begin with a brief review of literature in relation to the nature of mediation and previous discussions on what skills and competencies are necessary for quality mediation. The next part of the chapter will outline the accreditation approach of commercial mediators in Canada. A look at the accrediting body in Canada, requirements for professional designations and the accreditation process will follow. CPD requirements and regulatory codes adopted by the accrediting body will also be examined. Training of mediators will also be addressed. Lastly, the chapter will aim to provide some evaluative insights on how commercial

881 Paul Jacobs, 'Commercial Mediation Act, 2010' (2013) 20 (3) Alternative Dispute Resolution Law Section <www.oba.org/en/pdf/sec_news_adr_jan13_commercial_jacobs.pdf> accessed 8 July 2016.

882 Nova Scotia Commercial Mediation Act (SNS 2005) c 36.

883 See Margaret S Herrman and others, 'Supporting Accountability in the Field of Mediation.' (2002) 18 (1) Negotiation Journal 29, 33; Andrew Boon, Richard Earle and Avis Whyte, 'Regulating Mediators?' (2007) 10 (1) Legal Ethics 26, 41. The terms of 'accreditation' and 'credentialing' are used interchangeably in this essay to mean the process in which one's competencies and skills are assessed and assured its conformity to a specific sets of requirements set out by a regulator body, in this case, the ADR Institute of Canada. However, it should be noted that there is literature attempting to give different meanings each of these terms.

mediators are trained and accredited in Canada with the basis formed by the literature and referencing to approaches in other jurisdictions.

It should be noted that, unlike family and elder mediators which has separate accreditations,[884] at present there is no specialised accreditation for commercial mediators in Canada. Therefore, when examining the accreditation framework and training programme later in this chapter, the discussion relies mainly on the framework in relation to general mediators, while aiming to make references to commercial mediators wherever appropriate.

884 A nation-wide accreditation system for family mediators has been implemented by Family Mediation Canada (FMC) since 1999. See Linda C Neilson and Peggy English, 'The Role of Interest Based Mediation in Designing Accreditation Standards: The Canadian Experience.' (2001) 18 (3) Mediation Quarterly 221-248 <http://onlinelibrary.wiley.com/doi/10.1002/crq.3890180304/pdf> accessed 8 July 2016.

9.2. LITERATURE REVIEW

Mediation is a negotiation process facilitated by a neutral third party and accordingly commercial mediation is mediation conducted for resolving commercial disputes.[885] The obvious reason behind the increasing use of mediation is that it allows the parties to resolve the issue while avoiding enormous cost which other forums of dispute resolutions such as litigation and arbitration may involve. Particularly, in a commercial context, indirect cost such as diversion of administrative and managerial efforts and time from core business, disruption of business and harm to business relationships may have an even greater impact on the parties.[886] Another widely accepted advantage of mediation is that mediation is conducted in a private setting which preserves confidentiality.[887] However, since disputants have the right to choose their mediators, the quality of the mediators becomes a matter of concern. This is further complicated by the facts that mediation involves considerable instant interactions between the mediators and the disputants.[888] Accordingly, to identify a specific portfolio of skills a good mediator should possess is a perplexing task for the reason that techniques works for a mediation or a particular disputant may not work for another.

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885 This definition is coherent with that defined in the Ontario Commercial Mediation Act. See Ontario Commercial Mediation Act 2010 (SO 2010) c 16), sch 3.

886 See generally Judd Epstein, 'The Use of Comparative Law in Commercial International Arbitration and Commercial Mediation' (2000) 75 Tul L Rev 913 – 927 <http://heinonline.org/HOL/LandingPage?handle=hein.journals/tulr75&div=40&id=&page=> accessed 8 July 2016.

887 See generally Sue Bowers and others, in Marian Liebmann (ed), *Mediation in context* (Jessica Kingsley Publishers 2011).

888 See generally Conrad C Daly, 'Accreditation: Mediation's Path to Professionalism' (2010) 4 Am J Mediation 39.

In spite of the complexity of identifying what skills a mediator should possess to achieve quality mediation, intensive studies have been conducted by academics and professionals in the industry seeking to answer this question. More than two decades ago, Christopher Honeyman has developed some useful proxies of skills and qualities which a good mediator should possess, these include: information gathering, empathy, stress alleviation, problem solving, expression, persuasion, impartiality, generating options and agreements, managing interaction and substantive knowledge and so on.[889] Recent literature has also endeavoured to further elaborate and define other qualities of mediators such as patience, self-assurance, ingenuity, clarity of thought, ingenuity and stamina.[890] Moreover, there are attempts by the literature to construct components mediators training should encompass. According to Lieberman, Foux-levy and Segal, the fundamental parts of mediator training are: acquisition of theories and knowledge of mediation, skills development, formation of a philosophical approach as a mediator and examining suitability to be a mediator.[891] A similar theory is provided by Taylor and later adopted by Herrman contending that credentialing of mediators as an approach to generate legitimacy and accountability, it is like a house with four pillars namely, the practice, knowledge, skills and ethics of mediation.[892] Other models based on different theories for assessing mediators' skills and competencies for the purpose of accreditation are also proposed such as the

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889 Dobbins (n 880) 104.

890 Bowers and others (n 887) 17.

891 Etty Lieberman, Yael Foux-Levy and Peter A Segal, 'Beyond Basic Training: A Model for Developing Mediator Competence' (2005) 23 (2) Conflict Resolution Quarterly 242 <www.nottingham.ac.uk/research/groups/ctccs/projects/translating-cultures/documents/journals/beyond-basic-training-a-model-for-developing-mediator-competence.pdf> accessed 8 July 2016.

892 Herrman and others (n 883) 45.

'Interactive Rating Scale Assessment Model'.[893] Although the richness of the literature in this field may enable a more astute approach for credentialing and training programme to be constructed, this also reflected the complexities of mediation and the challenges it pose on developing a truly useful credentialing approach and training.

[893] Noce and others (n 878) 1005 - 1058.

9.3. THE ACCREDITATION REGIME

9.3.1. Accrediting body

Unlike family mediators and elder mediators,[894] there is no separate accrediting body to accredit commercial mediators in Canada. Therefore, the following discussion will focus on the nationally recognised accrediting body for mediators in general practice in Canada, the ADR Institute of Canada (ADR Canada).[895] It is a private non-profit organisation with seven affiliates in Canada.[896] Regional accreditation committees are established in these affiliates in order to facilitate the accreditation process.

Two professional designations are awarded: Qualified Mediator (Q. Med) and Chartered Mediator (C. Med).[897] Highly experienced applicants may apply for the C. Med designation while those with less experience may apply for the Q. Med designation which is an intermediate level designation. Requirements for accreditation include: Membership, education, practical experience, skill assessment,[898] ongoing education and engagement etc.

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894 Neilson and English (n 884).

895 ADR Institute of Canada, 'About Us' < http://adric.ca/about-adr/> accessed 8 July 2016.

896 ibid.

897 ADR Institute of Canada, 'Professional Designations' <http://adric.ca/resources/professional-designations/> accessed 8 July 2016.

898 ADR Institute of Canada, 'National Qualified Mediator Requirements' <http://adric.ca/wp-content/uploads/2015/11/NationalQMedRequirementsFinal.pdf> accessed 8 July 2016; ADR Institute of Canada, 'Principles, Criteria, Protocol, Competencies required for the Designation of Chartered Mediator' <http://adric.ca/wp-content/uploads/2015/05/CMed-Criteria-Sept-2011-Modified-Feb-2016-1.pdf> accessed 8 July 2016.

9.3.2. Membership

To be accredited as a Qualified Mediator or Chartered Mediator, an applicant must be a full member of a regional affiliate.[899] Generally, the requirements of membership as a full member encompass certain education and experience related requirements.

9.3.3. Education

In order to obtain the professional designations awarded by ADR Canada, applicants must demonstrate the completion of training as required by the institute. Training requirements for Qualified Mediator and Chartered Mediator differ.[900] To be a Qualified Mediator, the applicant must complete at least 80 hours of 'Conflict Resolution Training' which is composed of basic mediation training and specialised mediation related training.[901] The basic mediation training must be at least be 40 hours long covering four areas, namely, interest-based mediation process and skills, conflict resolution, negotiation and communication skills.[902] On the other hand, the applicant must attend another 40 hours of 'Specialised Mediation and Related Training' covering certain topics listed by ADR Canada such as advanced mediation, ethic in dispute resolution, influence of culture on conflict resolution approaches etc.[903] Applicants may also submit details of

899 ADR Institute of Canada (n 898).
900 ibid.
901 ibid.
902 ibid.
903 ibid.

training on other topics which are not on ADR Canada's list for approval from ADR Canada.[904]

Training requirements for Chartered Mediator are more stringent than those of Qualified Mediator. Firstly, applicants of Chartered Mediators are required to complete at least 80 hours of mediation theory and skills training offered by mediation training programmes approved by ADR Canada or Regional Chartered Mediator Accreditation Committee (RCMAC).[905] Secondly, in addition to the 80-hour requirement, applicants must complete an additional 100 hours of study or training in different areas including dispute resolution in general, the psychology of dispute resolution, negotiation etc.[906] Study or training in other specific substantive areas such as law, psychology, social work and counselling are also accepted.[907] This 100-hour requirement shall be left to the discretion of each RCMAC.[908] Waivers for this 100-hour requirement may be granted if an applicant is able to prove his/her skills, competency and experience to the RCMAC that he/she has satisfied the education requirements.[909]

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904 ibid.

905 ibid.

906 ibid.

907 ibid.

908 Additional training requirements may be required by regional affiliates. For example, to be a member of ARD Ontario, applicant must complete an online course in addition to the basic 80-hour mediation training and the 100-hour specialised training. See ADR Institute of Canada (n 898); ADR Institute of Ontario, 'Becoming a member' <www.adrontario.ca/resources/becoming_a_member.cfm> accessed 8 July 2016.

909 ADR Institute of Canada (n 898).

9.3.4. Practical Experience

With respect to the Qualified Mediator designation, an applicant must have conducted 2 actual or supervised and assessed practice mediations.[910] Assessor is required to fill in a questionnaire upon observation. Questions in relation to the effectiveness of the mediation, communication skills of the mediations and other aspects are included. To be accredited as a Chartered Mediator, an applicant is required to demonstrate his/her practical experience by proving he/she had conducted at least 15 actual and paid mediations, whether as a sole mediator or the mediation chairperson, if there is more than one mediator involved.[911]

9.3.5. Skills assessment

While applicants for Chartered Mediators need to fulfil skills assessment requirements, there is no equivalent requirement for applicants of Qualified Mediators.[912] Applicants for Chartered Mediators must complete a competency assessment module which consists of a mediation where the applicant is acting as the sole mediator to be observed by at least three approved Chartered Mediators.[913] The mediation to be assessed can be an actual mediation, a video recorded mediation, a role play mediation or other forms of mediation approved by National Appeal and Audit Committee (NAAC) which is appointed by ADR Canada.[914] ADR Canada has set out two parts of skills which will form the basis

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910 ibid.
911 ibid.
912 ibid.
913 ibid.
914 ibid.

for assessment.[915] Part One covers nine basic skills of which competency must be demonstrated, and Part Two covers twelve skills of which half of them must be rated as effective.[916] Interviews instead of assessed mediation may also meet this requirement under exceptional circumstances where the applicant is able to show that his experience and recognitions from peers to the RCMAC will satisfy this requirement. [917]

9.3.6. The Accreditation Process

Upon the completion of the educational, practical experience and skill assessment requirements, the application for designation will be reviewed by the RCMAC who will prepare forms and assessments for further review by ADR Canada staff.[918] Where the ADR Canada is satisfied that all requirements for designations are fulfilled, the designation will be awarded the necessary qualifications accordingly.[919]

9.3.7. Continuing Professional Development

Chartered Mediators and Qualified Mediators are required to accumulate certain number of points from their participation in the Continuing Education and Engagement Programme within a three-year period for maintaining their credentials.[920] The Continuing Education and Engagement Programme sets out

915 ibid.
916 ibid.
917 ibid.
918 ibid.
919 ibid.
920 ibid.

detailed guidelines as to the number of points one can gain from different categories of activities.[921] Also, ADR Canada also supplements the Programme with Competencies Guidelines.[922] Qualified and Chartered Mediators are required to demonstrate that activities taken as part of their development must be related to the competencies articulated in the Competencies Guidelines.[923]

9.3.8. Regulatory codes and rules

ADR Canada has established a set national mediation rules and code of conducts which member mediators should adhere to.[924] In addition, ADR Canada also set out 10 codes of ethics.[925] The National Mediation Rules sets out requirements which mediators must follow during the mediation process, covering areas from pre-mediation stages such as initiating mediation, appointment of mediator and pre-mediation session to the mediation stage such as time and place of mediation to be conducted and suspension or termination of mediation.[926] General issues such as privacy, confidentiality and exclusion of liability are also covered. On the other hand, the code of conduct for mediators cover some guiding principles which mediators should adhere including the principle of self-determination, potential disqualification, and other obligations which mediators are expected to

921 ADR Institute of Canada, 'Designated Mediators: Continuing Education and Engagement Program Instructions and Point System' <http://adric.ca/wp-content/uploads/2015/11/CEE_Instructions.pdf> accessed 8 July 2016.

922 ADR Institute of Canada (n 898).

923 ibid.

924 ADR Institute of Canada, 'National Mediation Rules and Code of Conduct for Mediators: As amended August 3, 2012' <http://adric.ca/pdf/ADRMEDIATIONRULES2014.pdf> accessed 8 July 2016.

925 ADR Institute of Canada, 'Code of Ethics' <http://adric.ca/rules-codes/code-of-ethics/> accessed 8 July 2016.

926 ibid.

know such as professional fee arrangements and the agreement to mediate. The Code of Ethics articulates the general duties mediators should meet and adhere to.

9.4. TRAINING OF COMMERCIAL MEDIATORS

Many different organisations provide mediation training in Canada. While the training can take different forms from a 'Conflict Management Certificate Program'[927] to 'Master of Arts in Dispute Resolution',[928] the Ministry of Justice (previously the Ministry of Attorney General) of British Columbia has laid down some principles in the training and qualifications of mediators. In the publication, 'Reaching Resolution - A Guide to Designing Public Sector Dispute Resolution Systems'[929] by the Dispute Resolution Office (DRO), the Ministry of Attorney General recognised the training needs and stated that 'The importance of training dispute resolution providers cannot be overemphasized'.[930] It further stipulated that 'All dispute resolution providers should adhere to some minimum qualification standards. Such standards could be set by the government agency itself or by an established roster or professional body'.[931]

One document that is very important in this regard is the 'Assessment of Courses in Mediation & Conflict Resolution' published by the Mediate BC Society.[932]

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927 University of Waterloo, 'Conflict Management Certificate Program: Conrad Grebel University College' <https://uwaterloo.ca/conflict-management/about-conflict-management-certificate-program/certificate-conflict-management-and-mediation> accessed 8 July 2016.

928 University of Victoria School of Public Administration, 'Master of Arts in Dispute Resolution' <www.uvic.ca/hsd/publicadmin/graduate/future-students/grad-programs/dispute-resolution/index.php> accessed 8 July 2016.

929 British Columbia Ministry of Attorney General Dispute Resolution Office, 'Reaching Resolution – A Guide to Designing Public Sector Dispute Resolution Systems' (June 2003) <www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/dro/policy-design/design.pdf> accessed 8 July 2016.

930 ibid 22.

931 ibid.

932 Mediate BC Society, 'Assessment of Courses in Mediation and Conflict Resolution' <www.mediatebc.com/PDFs/Info-Regarding-Training---Education-Requirements/Course-Assessment-Criteria-2015-05-21.aspx> accessed 8 July 2016.

Because the Mediate BC Society has a Civil Roster, institutes have an incentive to match their courses to the requirements set forth by the Society so that students having completed their studies would qualify, at least partially, for admission to the Roster. Having said that, the Society only sets out a framework of training (eg experience prerequisite; qualifications of instructor and coach) with a wide margin of flexibility in the course content and the method of instruction.

It can be seen that the mediation courses offered are very diversified, ranging from a certificate course in the Justice Institute of British Columbia, to an intercalated program of the Law School of University of British Columbia, and to a master's degree course in Master of Arts in Dispute Resolution provided by University of Victoria. Nonetheless, many post-secondary education institutes do not provide the mediation course on their own; rather, they offer the course in partnership with Justice Institute of BC.

Despite the difference in the packaging, the core study of mediation will always conform to the framework prescribed in the 'Summary of Qualifications for Admission: Civil Roster' specified by the Society so as to facilitate students to apply for admission in the Roster.

There are many ways an individual could enrol into a training course leading to the award of 'Certificate in Conflict Resolution: Specialization in Mediation / Third-party Intervention'. Figure 9.1 is a suggested pathway for someone who is interested to pursue a career in mediation.

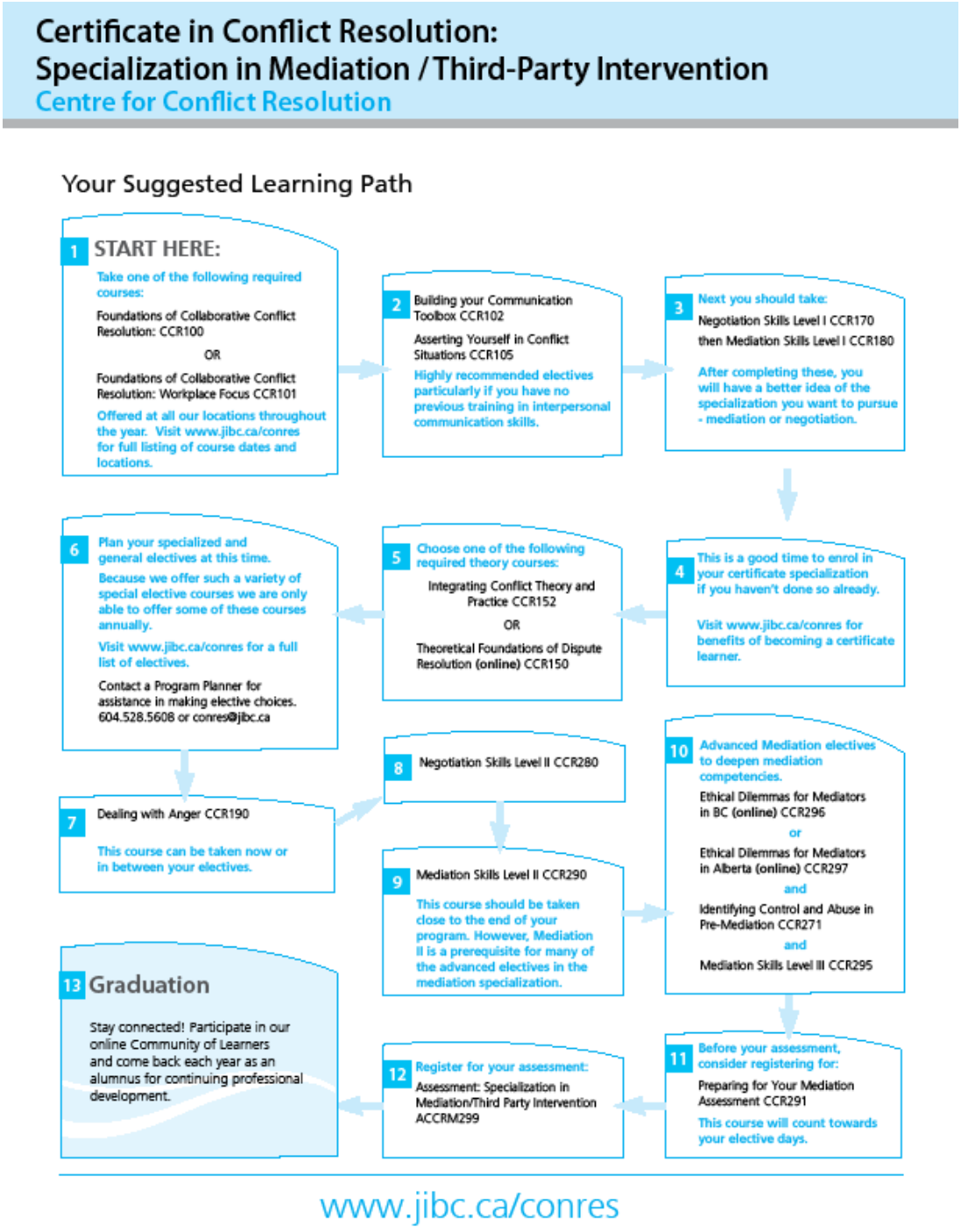

Figure 9.1 – Suggested Learning Path Leading Towards a Certificate in Mediation[933]

933 Justice Institute of British Columbia, 'Certificate in Conflict Resolution: Specialization in Mediation/Third-Party Intervention' <www.jibc.ca/programs-courses/schools-departments/school-community-social-justice/centre-conflict-resolution/programs/certificate-conflict-resolution-specialization-mediationthird-party-intervention> accessed 8 July 2016.

9.5. EVALUATIONS

9.5.1. At a macro level - How far has Canada gone for the accreditation and training of commercial mediators?

As previously mentioned, at present everyone is free to practise mediation and call themselves a 'mediator' or 'commercial mediator' in Canada. Although ADR is a nationally recognised body, ADR Canada's accreditation scheme is a voluntary scheme for mediators who wish to obtain the professional designations. It is argued that despite the existence of ADR Canada, consumers are still exposed to the risk of choosing incompetent mediators, given that anyone in Canada can call themselves a mediator.

With respect to commercial mediators in particular, while the recent enactment of the Commercial Mediation Act in Ontario following that of Nova Scotia may be regarded as a significant step forward in the attempt to regulate mediators, it is believed that there is still a long way to go before equivalent or similar law is enacted on a national scale.[934] Furthermore, in fact, the Commercial Mediation Acts in Ontario and Nova Scotia do not include provisions particularly addressing accreditation and training requirements of mediators. Moreover, due to the absence of a nationally recognised accrediting body for commercial mediators which is similar to Family Mediation Canada (FMC), an inherent problem of the

[934] Not to mention there are criticism from the legal profession in relation to the effectiveness of the Commercial Mediation Act itself. See Rick Weiler, 'Good Intention Gone Bad - Ontario Commercial Mediation Act 2010' (*Kluwer Mediation Blog*, 22 January 2012) <http://kluwermediationblog.com/2012/01/22/good-intentions-gone-bad-ontario-commercial-mediation-act-2010/> accessed 8 July 2016.

present credentialing approach for commercial mediators is the lack of requirements which particularly address skills and competencies which a commercial mediator should demonstrate. Although it is noted that, under the ADR Canada credentialing regime, applicants for Qualified Mediators and Chartered Mediators may submit details of training in substantive areas for ADR Canada's consideration as part of the educational requirement of accreditation, it is undeniable that the emphasis placed on knowledge and skills needed for commercial mediations is insufficient, given the increasing demand for commercial mediators.

9.5.2. At a micro level - given the absence of other nationally recognised accrediting bodies, how is the accreditation and training regime of ADR Canada accomplished?

(a) As to the types of accreditations awarded

In assessing an accreditation system, a useful perspective which we should look through is the balance between ensuring mediators from different backgrounds, whether they possess professional knowledge or expertise or not, are able to get into the industry and the protection of consumers through the use of quality mediators. A convenient and accurately adopted term by Professor Nadja Alexander to describe this tension is the diversity-consistency dilemma.[935] The diversity-consistency dilemma has sparked continuous debates among the

[935] See generally Nadja Alexander, 'Mediation and the Art of Regulation' (2008) 8 (1) Queensland University of Technology Law and Justice Journal 1.

practitioners over the years.[936] On one hand, there are concerns about the risk of exclusivity and reduced innovation resulted from high thresholds for those wishing to enter the practice.[937] On the other hand, it is generally accepted as there is an urging need for establishing a consistent and reliable standard for quality assurance due to the significant increase in the use of mediation.[938]

In this respect, the accrediting approach of ADR Canada seems to have achieved a sensible balance between these opposing needs. By establishing two levels of professional designations, ADR Canada offers an opportunity for people without any legal background to enter the industry by first applying to be accredited as a Qualified Mediator. Moreover, applicants are welcomed to submit details of previous training they have attended which are not listed by ADR Canada but may satisfy the educational requirements, to the institute for their consideration which in turn encourages people from different backgrounds to enter into the practice. Furthermore, the two-part educational requirements (ie the 40 plus 40 hours requirement for Qualified Mediator and the 80 plus 100 hours requirement for Chartered Mediator) also ensure applicants are at least equipped with certain basic mediation skills while recognising knowledge a candidate previously gained from other backgrounds.

(b) As to the training of mediators

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936 See Alexander (n 935) 2; Dwight Golann, 'New Policy on Mediator Credentialing, A.' (2012) 19 Dispute Resolution Magazine 38; Eileen Carroll and Karl Mackie, 'The Cadillac of Certification' (2005) 12 Dispute Resolution Magazine 18.

937 See generally CJ Pou, 'Assuring Excellence, or Merely Reassuring-Policy and Practice in Promoting Mediator Quality' (2004) 2 Journal on Dispute Resolution 303 - 354.

938 Alexander (n 935) 2.

Training lies in the centrality of an accreditation regime.[939] ADR Canada has set out a rather stringent requirement of at least 80-hours and 180-hours of training are required for Qualified Mediators and Chartered Mediators respectively, comparing to educational requirements for accreditation of mediators in other jurisdictions. For example, training programme of at least 38 hours in duration will satisfy the training requirement in Australia[940] and training of minimum 40 hours is required in Hong Kong.[941] Moreover, to ensure continuous improvement and to keep training contents and outlines up to date, regional affiliates have set up committees to regularly review approved courses.[942] However, it seems that there is no overseeing committee set up by ADR Canada setting out requirements in relation to the qualifications of the trainers.[943] Also, guidelines setting out specific requirements as to the structure of the approved courses is seemingly absent. As suggested by Stulberg and others,[944] guidelines on limitation on student-to-faculty ratio, allocation of training time among the different components are fundamental, as quality assurance should embrace both dimensions of reliability and consistency. It is believed that consistent quality is a consequence of consistent training. Furthermore, as previously discussed, a quality mediation should endorse a portfolio of skills and competence, yet there must be certain skills which are of more significance for a quality mediation than

939 Boon, Earle and Whyte (n 883) 42.

940 MSB, 'NMAS Approval Standards' s 5(3)(a) and s 5(3)(b).

941 Hong Kong Mediation Accreditation Association Limited, 'How to Become a Mediator' <www.hkmaal.org.hk/en/HowToBecomeAMediator.php> accessed 8 July 2016.

942 For example ADR Institute of Ontario, 'Approved Course' <www.adrontario.ca/resources/approved_courses.cfm> accessed 8 July 2016.

943 In Australia, a peak body, the National Mediators Standard Board, is established for the development of mediator standards and the implementation of the National Mediator Accreditation System.

944 See generally Joseph B Stulberg and others, 'Creating and Certifying the Professional Mediator-Education and Credentialing' (2004) 28 Am J Trial Advoc 75 - 100.

another. Therefore, it is suggested that guidelines which prioritised certain training components should be devised for reference. It is also observed that programmes offered by approved institutes only require attendance which raise concerns about the ability of the training programme, in terms of assuring quality, in certifying whether one attended the training has actually instilled knowledge from the training as there is no mark or a 'pass or fail' is given upon the completion of the course.[945]

(c) As to the structure of the accreditation regime

The challenge Canada is facing is not an accidental occurrence but a phenomenon which can be observed in other jurisdictions.[946] Attempts made by regulatory body in the United States of America may lend us some useful insights into the matter that we may take a look into when assessing the Canadian approach. It is suggested some criteria which should be met by an accreditation programme include clearly defined skills, knowledge and values and training adequate to make sure candidates are able to digest the knowledge and skills.[947] It is suggested that a training regarded as adequate should embody substantial teaching of theories, observations of actual mediations and practical experience. In this regard, the Canadian approach seems to have achieved these ends. A 5-page-long detailed

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945 See generally Mandy Zhang 'To Certify, or Not to Certify: A Comparison of Australia and the U.S. in Achieving National Mediator Certification' (2008) 8 (2) Pepperdine Dispute Resolution Law Journal 307 - 329.

946 Effort are made by regulatory bodies in other countries. See The Government of the Hong Kong Special Administrative Region Department of Justice (DOJ), 'Report of the Working Group on Mediation' (2010) <www.doj.gov.hk/eng/public/pdf/2010/med/20100208.pdf> accessed 8 July 2016.

947 Alternative Dispute Resolution Section of the American Bar Association, 'Task Force on Mediator Credentialing: Final Report' (2012) <www.americanbar.org/content/dam/aba/images/dispute_resolution/CredentialingTaskForce.pdf > accessed 8 July 2016.

competencies guideline that categorises various types of skills is devised by ADR Canada. In order to avoid the criticism contending that over-reliance on one form of assessment for accreditation process only connotes minimum competence of an applicant, [948] ADR Canada includes also a skill based assessment for the accreditation of Chartered Mediators. It should be highlighted that, although the correlation between skill-based assessment such as a mock mediation and the success of one acting in a real mediation as a mediator is often called in question,[949] it is still considered at least a relevant way to predict the competence of a person as a mediator.[950] Moreover, the educational, practical experience and continuing development requirements for the award of Chartered Mediators and Qualified Mediators have also matched the multi-stages approach suggested by the literature previously mentioned.

(d) As to how mediators are assessed, in particular, in the respect of the skill assessment in the accreditation regime

With respect to the skill assessment component, which is applicable to applicants of Chartered Mediator only, ADR Canada has set out a portfolio of skills divided into two parts to be assessed by the observer. For the first part of skills to be assessed, applicants need to demonstrate their ability to achieve nine goals including explaining the mediation process to the disputants, separating mediator's personal values from issues under consideration, ensuring disputants' participation in the process and uncovering parties' needs.

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948 Connie Reeve, 'The Quandary of Setting Standards for Mediators: Where Are We Headed' (1998) 23 Queen's Law Journal 448.

949 For example Dobbins (n 880); Art Hinshaw and Roselle L Wissler, 'How Do We Know that Mediation Training Works' (2005) 12 Dispute Resolution Magazine 21.

950 Dobbins (n 880) 103.

It is argued that although the Part One skills have an appropriate coverage of abilities to be assessed, the classification of skills to be assessed is not sufficiently distinct. For example, the first one is the 'ability to establish and describe to the disputants key mediation processes and ground rules, such as confidentiality, role of the mediator, caucusing, authority to settle and respectful behaviour'. [951] Although it covers the essential aspects which should be explained to the disputants, with everything classified under one heading, it may be difficult for a candidate who unfortunately fails to identify what had gone wrong in the assessment. Also, candidates are only rated 'meets or exceeds', 'not competent' and 'did not observe' in the assessment and the assessment form to be filled by the observer does not provide an assessment framework which allows all Part One and Part Two skills to be assessed during each session of a mediation.[952] It is recommended that a more detailed assessment form should be devised in order to allow reflective process which is suggested to be more helpful for the learning of mediators. [953]

Moreover, it is noted that for Part One skills, it is assessed 'regardless of style or approach used'.[954] Imagine a situation where the candidates adopt a relatively forceful style in the mediation with two relatively timid disputants, the candidate may have met all requirements under Part One and Part Two and may even have reached a settlement agreement at the end, nevertheless, it should be asked

951 ADR Institute of Canada (n 898).

952 This is a comparison with the Mediator Assessment Form 1 of HKMAAL, a mediators accrediting body in Hong Kong. See HKMAAL "Download Forms" <www.hkmaal.org.hk/en/DownloadForms.php> accessed 8 July 2016.

953 Nielson and English (n 884) 231.

954 ADR Institute of Canada (n 898).

whether this is a quality mediation in a sense that it generates genuine consumer satisfaction. One of the major advantages of mediation is the informal sphere in which it is held which allows more innovative options to be generated and future relationship to be preserved.[955] By indirectly placing disputants under stress due to the style of the mediator in an extreme scenario, it is questionable whether this will in fact frustrate some of the cardinal purposes for choosing ADR. It is recommended that styles and approaches should be taken into account yet not too narrowly specified.

Furthermore, while all Part One skills must be 'met or exceeded', only 6 out of the 12 Part Two skills must be rated effective.[956] Skills under Part Two are specific techniques which are considered essential for a good mediation such as actively listening, earning trust and rapport, ability to deal with strong emotions. Although the Part Two list seems to have reflected the qualities developed by the literature as previously mentioned. It is observed that only half of them need to be rated 'effective' to pass the assessment, it is argued that it does not assess all competencies a candidate should possess and seems to suggest that some competencies are more important than the others which can be ignored. In addition, it should be highlighted that a training programme which allows candidates to reflect are essential.[957] It seems that the design of the form does not provide space for comments and feedback by the observer for the candidates. Whether the candidate failed or succeeded, such feedback will be useful for the future practise of the candidate.

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955 Nielson and English (n 884) 231.

956 ADR Institute of Canada (n 898).

957 Pou (n 937).

(e) As to the regulatory approach of accredited mediators

A quality assurance mechanism is not a subject in a vacuum which only comes into light during an assessment for the credentials to be assessed; otherwise, the credentials may lose its meaning to sustain trust developed by one's credential. [958] Accordingly, a credentialing programme should include access for the consumer to complain and to provide feedback.[959] In this regard, ADR Canada has provided a complaints and discipline policy which lays down a process which complaints will be handled.[960] A hierarchy of authorities including a conduct review panel and hearing committee is also in place which allows a fair investigation to be conducted. However, while there is a code of practice to which accredited members voluntarily abide, appropriate means for the enforcement of such code should also be established. Further, in order to respond to the rapid development and changes in the field, it is suggested that ADR Canada should develop a mechanism which continuingly develop regulations for mediators to follow thus ensuring that mediators accredited by ADR Canada are competent and above all demonstrate the skills needs to conduct a mediation from start to finish with ease.

It is also suggested regulation of mediators should not only be done from the accrediting body end but also from the consumers end, as at the end of the day, the main purpose of regulation is to protect consumers. It is therefore

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958 Donald T Weckstein, 'Mediator Certification: Why and How' (1996) 30 USF L Rev 757.

959 Alternative Dispute Resolution Section of the American Bar Association (n 947).

960 ADR Institute of Canada, 'Complaints and Discipline Policy' <http://adric.ca/rules-codes/complaints-discipline-policy/> accessed 8 July 2016.

recommended that consumer awareness in relation to the entire concept of mediation should be enhanced through publications such as a user guide for consumers, which should include information on the training of mediators, disciplinary measures available for complaints and continuous professional training requirements. By doing so, regulation can be enhanced adding in market regulation[961] as consumers can be in a better position to assess a mediator with the increased knowledge and information.

According to Professor Nadja Alexander, there are different approaches to regulate mediators.[962] As each of them possesses different strengths, a multi-layered approach, which entails not only marketplace and self-regulatory elements, but also legislative elements, may be considered. In this respect, Canada still has not enacted a uniform mediation act. Given Nova Scotia and Ontario have enacted their mediation act and it is foreseeable that similar enactment may take place in other provinces in the future, it is suggested that it may be time for Canada to consider a uniform mediation act to avoid problems such as conflicting requirements among different states. Moreover, as Mr Jerry McHale suggested, a uniform mediation act may promote quality and public protection by including provisions which compel disclosure of credentials.[963] Furthermore, a uniform mediation act may also aid policy development in some provinces for the promotion of mediation.

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961 Alexander (n 935) 4.

962 ibid 11.

963 Jerry McHale, 'Uniform Mediation Act Discussion Paper: Civil Section' (Uniform Law Conference of Canada, Victoria, August 2000) 9 <http://cfcj-fcjc.org/sites/default/files/docs/hosted/17494-uniform_mediation.pdf> accessed 8 July 2016.

There are other observations on the Canadian accreditation regime, for example, the numbers of mediators entering the market each year has increased to a rate that some who have embarked on the training, have complained that they cannot find work as mediators. Moreover, while mediators in other countries such as Singapore,[964] are required to document their continuing development activities and satisfy certain amount of such every year, ADR Canada is only requiring such every three years. These differences between jurisdictions may be taken into account when aiming to generate recommendations in shaping the Canadian regime into a better one in terms of quality assurance, so that it is in line with international norms.

964 DOJ (n 946) 157.

9.6. CONCLUSION

In conclusion, although there are certain deficiencies in different components of the accreditation system and training programme as previously discussed, in general, ADR Canada has set up a structured accreditation system and training programme with a comprehensive coverage of skills and competencies that good mediators should possess as suggested by the literature. However, it should be highlighted that, despite all the debates, discussions and developments around the accreditation and training of mediators, one should not confine ourselves to the design and modification of these which may gradually become our hindrance in finding a creative solution, other than or in addition to credentialing and training, to address concerns and issues in relation to quality assurance and needs for diversity. After all, as widely agreed among learned authors who have dedicated their time to study the subject, mediation is an art but not a skill nor technique which can only be learnt by doing, but not by teaching.[965] Also, a useful, yet perhaps painful question should be asked is whether credentialing, in any forms, really assure real quality. [966]

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965 Pou (n 937).

966 For example Hinshaw and Wissler (n 949); Craig McEwen, 'Giving Meaning to Mediator Professionalism.' (2005) 11 Dispute Resolution Magazine 3.

CHAPTER 10. IS THE TIME RIGHT TO BEGIN REGULATING MEDIATORS?

10.1. INTRODUCTION

In the case of *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners*[967], Lord Denning expressed his view as to what are the expectations of a professional man:

> The law does not usually imply a warranty that [the professional man] will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case. But when the dentist agrees to make a set of false teeth for a patient, there is an implied warranty that they will fit his gums.

When a person enters a restaurant, or a doctor's office, or even a lawyer's office, they will often be greeted by a person who claims to provide a high quality service and will assure you to be in good hands. Whether you believe them or not, or whether you have received a referral or testimonial, you can often rest at ease by glancing towards one of the four walls in search of a license or certificate of qualification. Whether it be issued by a government body or private regulator, you

[967] *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners* [1975] 3 All ER 99.

are able to ease your mind that this service provider has at least been approved by someone. And perhaps there are some other clients or customers there to reassure you that you are among others who are satisfied by such a service.

Mediation, however, is a newer service, one without such standardised regulation or licensing. A profession so diverse that even if another recommends and refers you to a mediator, may have had a completely different outcome than you are about to receive due to the complexity, or perhaps, simplicity of one's case details. Mediation currently sits amidst the centre of two scales weighed down by consumer quality assurance and the freedom to grow uninhibited and develop as a profession.

This chapter will consider arguments for and against the regulation of mediation and a conclusion will then be drawn as to whether the time is right for mediation to be completely regulated, or left to continue to mature, or possibly somewhere in between.

10.2. A QUESTION ARISES

Mediation is a form of dispute resolution that has grown in popularity due to its expediency, cost effectiveness and confidentiality requirements. The ability to avoid lengthy and costly court appearances has provided a new avenue for disputants to solve their cases in a manner that reduces cost for themselves and society. Mediation removes much of the burden placed on the courts which tend to be overwhelmed with disputes that could be easily solved through mediation.

What arises from this form of dispute resolution, however, is the concern for quality assurance of the mediator. The idea of regulating the mediation profession has become a worthy topic of discussion as more and more disputants are turning to this time and cost-effective process. 'The expansion and maturation of mediation as a practice has understandably (and laudably) led many to begin to focus attention on questions of quality assurance.' [968]

Unlike litigation, mediation is a newly formed profession, at least in the sense in which it is tied to the legal system. Undoubtedly, mediation in some form or another has been around as long as disputes have been, eternity. But now as mediation is often performed as a precursor to litigation in an attempt to reduce the caseload on the court system, it requires a certain formality and quality assurance.

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[968] Michael L Moffitt, 'Four Ways to Assure Mediator Quality and Why None of Them Work' (2009) 24 (2) The Ohio State Journal on Dispute Resolution 191, 191.

What is deeply apparent at the outset in considering mediator quality assurance is the lack of ability to seek retribution in an unjust outcome. Andrew Boon summarises it best:

> In the case of litigation, in developed legal systems, quality assurance is provided by judicial selection and training, by the appeal system and by comprehensive rules of court. In the case of arbitration there are measures to protect the parties from their appointed arbitrator, powers to remove an arbitrator on specific grounds and power to challenge arbitrators' awards. However, in the case of mediation there is no equivalent route to the protection of the Court during or after mediation.[969]

However, it is not so simple to conclude that because of the lack of protection that mediation must then be completely regulated and ruled by a central governing body. It is a voluntary process whereby both disputants agree to attempt prior to litigation and are not legally bound by its outcomes. Either party is free to walk away at any time. Thus, it is crucial to consider both sides of the argument- to regulate or not to regulate?

Mediators, in any jurisdiction, are held up to high standards of practice and this is reflected in the strict training and accreditation systems. This reflects the reality that mediation is a new organ in the legal system of most countries. Thus high standards are required to protect the mediator when acting in this legalistic role. It

969 Andrew Boon, Richard Earle and Avis Whyte, 'Regulating Mediators?' (2007) 10 (1) Legal Ethics 26, 41.

is required to achieve immediate outcomes, to protect parties in mediations so that parties are both represented fairly, be it stronger or weaker-positioned parties. It is required in order to protect the reputation of the mediation profession which needs to be held in high esteem such that people continue to see the eminent value in its use. It is also a necessity so that mediators acquire the requisites skill sets for obtaining trust of parties.

10.3. ACHIEVING DESIRED OUTCOMES

The Hong Kong Mediation Code reveals the strict duties and standards to which a mediator is held. As a preface to the duties the General Responsibilities are that the Mediator shall firstly act fairly in dealing with the parties to the mediation, secondly have no personal interest in the terms of the settlement agreement, thirdly shall show no bias towards the parties, fourthly be reasonably available as requested by the parties and fifthly be certain that the parties have been informed about the mediation process.[970] This is very revealing of how the standards created for mediators have at their very core the plain and unassuming goal of resolving disputes. The mediator is key in not only facilitating this but also creating an environment that encourages parties to put pride and anger aside and work on positive-sum outcomes.

The first requirement, treating parties fairly, seems obvious in such an area as dispute resolution but often it is not as easy at is seems. For example most mediators have a background in law therefore favouring the party with the stronger legal case presents a common trap for mediators.[971] Or if the parties are a private citizen and a large multinational corporation there may be an inclination of working the mediation in the favour of the private citizen which may seem more sympathetic. Lastly a strongly feminist mediator (male or female) may show bias in a mediation dealing with sexual harassment claims. Mediators need to receive special training such that they can clearly identify their own biases, or the biases

970 DOJ, 'The Hong Kong Mediation Code: General Responsibilities' art 1.

971 See generally Alexander A Guerrero, 'Lawyers, Context, And Legitimacy: A New Theory Of Legal Ethics' (2012) 25 Geo J Legal Ethics 107 - 164.

that the conflict in front of them may trigger, and through actively identifying those biases they can work on eliminating them from affecting the manner in which they conduct their mediation. This is vital in any mediation because any hint of bias will create hostility on the part of the party not being favoured which will immediately throw up obstacles to amicably solving the dispute. Even the shadow of bias can create doubts in the parties' mind and obstruct the mediation.

The second standard is that the mediator has no personal interest in the mediation. This is similar to the conflict of interest fiduciary duty of lawyers[972] and presents a very strict duty for mediators to disclose any interests they may have in the dispute at hand. Even an indirect interest if undisclosed could create serious problems if revealed midway through the mediation. It is in fact preferable for both mediators, and lawyers for that matter, not to deal with cases where personal integrity is placed into question.

The third requirement plays into the first two and that is to show no bias. The interesting aspect of this standard is the manner in which bias can be displayed. Obviously giving one party more opportunity to speak is an apparent display of bias. However there are more subtle in ways bias can be shown that, given their subtle nature, will be hard for parties to explicitly identify, but could none the less create an environment of hostility or, perhaps, fear.[973] Fear of being prejudged and not having ones interests fully protected. For example eye contact is a manner in which people often communicate without fully realising that eye contact is an

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[972] Virginia P Shirvington B.A, 'Ethics And Conflict Of Interest And Duties' (2006) The Law Society Of New South Wales.

[973] See generally David A Hoffman and Richard N Wolman, 'The Psychology Of Mediation' (2013) 14 Cardoza Journal of Conflict Resolution 759 - 805.

extension of their words or their listening.[974] When listening to someone you dislike or disrespect you will make less eye contact in order to indicate disinterest. When trying to encourage someone to speak we make more eye contact often accompanied by a smile or an encouraging nod. When speaking, holding without breaking eye contact can be used in order to make someone feel smaller or less adequate. While making very little eye contact can indicate you do not care whether they are listening. Standards in mediation can help overcome the habits we develop unconsciously. Once mediators are aware of their own tendencies to use their hands when they speak, or hold their body to one side, they can learn to correct these behaviours so that no party can misinterpret their mannerisms for bias.

The fourth requirement to be reasonably available to the parties also seems like a typical requirement for someone in such a role. But this function presents such a striking contrast from the traditional litigation system that is worth discussing. Throughout the English legal tradition litigants have lacked one fundamental mechanism, and that is the chance to be heard. The courts, the judges, their lawyers would ask them questions with bounds and limits found in statutes and legal precedent, but the avenue to simply be heard, to tell a full story and to have people listen, to have your experiences acknowledged by someone who wants to help you resolve your problems. This access to the mediator finally creates this avenue and ultimately gives complainants a chance simply to be heard.[975] And this is valuable for people who sometimes are just frustrated not only the legal

974 ibid 763-764.

975 ibid 779.

dispute, but their inability to address it emotionally. And in order for mediators to really provide people with this incredible function of mediation they need to have training in ways to talk to people. To let them vent but also help them control their emotions so that they are not influenced too much by their feelings when seeking settlement.

10.4. ETHICAL REASONS

Aside from achieving the immediate goals, ie amicable dispute resolution, there are strong ethical arguments as to why mediators should be held to high professional standards. Most of these arguments can be distinguished with legal ethics. Charles Fried posed a question that every lawyer should contemplate in his or her career and that question was 'Can a good lawyer be a good person?' [976] Mainly legal ethics centres around this question and looks at how the integrating the norms of the legal profession with ordinary personal morality.[977] For the lawyer, the advocate, Bradley Wendal presented three core concepts of the standard conception of legal ethics: the idea of partisanship, (the lawyer should seek to advance the interests of the client within the bounds of the law), the principle of neutrality (the lawyer should not consider the morality of the client's case, nor the morality of the particular actions taken to advance the client's cause, as long as both are lawful) and the principle of non- accountability, 'if the lawyer adheres to the first two principals neither third party observers not the lawyer herself should regard the lawyer as a wrong doer, in moral terms'.[978] Therefore it is commonly understood that would be immoral if engaged in by a normal person. This standard concept presents us with the precise opposite of the ethical compass a mediator should be following. And given that most mediators were once

976 Alice Woolley, 'If Philosophical Legal Ethics Is The Answer, What Is The Question?' (2010) 60 University of Toronto Law Journal 983, 983.

977 Guerrero (n 971).

978 W Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton University Press 2010) 6; Gerald J Postema, 'Moral Responsibility In Legal Ethics' (1980) 55 NYU L Rev 63, 73-74.

practicing lawyers it is important that they understand the ethical distinctions between the role of the lawyer and the role of the mediator.

10.5. REPUTATION OF MEDIATION

Lastly, but certainly not least of all, the importance of high standards in mediation can be identified in the importance of promoting mediation to society in general as a valuable means of dispute resolution. In order for people to perceive mediation as a viable means of dispute resolution, and not something simply court mandated, people need to perceive it as a means for discovering successful outcomes, having their rights properly protected under the guise of the law but most importantly it must be a trusted process. Canadian mediator Alan Gold wrote that when it comes to mediations 'the key word is "trust". Without it, you're dead. Without it, stay home!'[979] Author Richard Salem sights three sources (1) a mediating organisation with a good reputation, (2) a mediator's personal reputation, and (3) most importantly, trust is earned through a mediator behaviour during the mediation process.[980] He says that an effective mediator pays close attention to the ways in which they are earning the trust, whilst weighing up the possible consequences before taking any action or saying anything that could be misconstrued therefore losing the trust of the parties. Because once that trust is lost it is impossible to restore. This trust is inextricably linked to the standards that mediators are required to attain in order to practice. Balancing mediation is achieved by making certain that parties understand the mediation process, by

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979 Alan Gold, 'Conflict in Today's Economic Climate' (1981) Proceedings of the Ninth Annual Meeting of the Society of Professionals in Dispute Resolution.

980 Richard Salem, 'Trust in Mediation' (*Beyond Intractability*, July 2003) <www.beyondintractability.org/essay/trust-mediation> accessed 8 July 2016.

permitting the parties to discuss the problem without interruption, by protecting the parties from threats, intimidation, or disrespectful behaviour during the mediation and by *always* demonstrating impartiality.[981] However how do we maintain standards with regards to earning trust? In order to answer this we must ask how does a mediator earn trust. Salem suggests that there are six main methods for obtaining trust from parties: (1) by treating the parties equally, with respect at all times; (2) by creating an environment that makes the parties feel comfortable and safe; (3) by letting each party know that the mediator is listening to them; (4) understand their problem; (5) how they feel, that they care about that problem; and (6) that they are a resource to help solve that problem. Other methods of obtaining trust are showing that the mediator has absolutely no stake in the outcome of the mediation that could be an obstacle for the parties reaching an agreement of mutual benefit, that they must never affix blame, put-down, or blame the parties and they must ask open ended questions.[982] This is a complicated and delicate task for the mediator which can only be achieved by maintaining high standards.

Therefore high standards in mediation profession are required for the short-term success of the mediation, for ethical reasons, and most importantly for the long-term success of mediation as a valuable tool for conflict resolution. In short any individual mediator must maintain high levels of professional conduct, for the benefit of both immediate goals and the future of mediation. Whether this calls for

981 ibid.

982 ibid.

a unified centralised regulation is another matter, which the author will now debate.

10.6. ARGUMENTS FOR REGULATION

As we consider mediation in terms of regulation, we find two sources of concern: serving the disputants and maintaining a valid social order.

> The former emphasizes the availability of the service, its efficiency, neutrality in the process, and the reduction of present and future conflict. The interests of social order emphasize reducing the caseload in the courts, protecting the public from poor services, maintaining a fair process, and fostering obedience to, and finality in, the agreements reached. [983]

By certifying or licensing mediators and establishing standards of quality, disputants and the courts will have a greater confidence in the process and its outcomes. [984] Alongside raising public confidence in mediation, certification is good in that it promotes use and can eventually raise mediator capabilities. [985] A centralised regulatory body and system which promotes furthering education and skill sets is likely to put forth a stronger pool of mediators who are constantly learning. Another key aspect is that a training programme can help the mediator 'identify the scope of his expertise. Knowing that he cannot give legal advice, is

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983 Deborah Sundermann, 'The Dilemma Of Regulating Mediation' (1985) 22 Houston Law Review 841, 842.

984 Teresa V Carey, 'Credentialing for Mediators – To Be or Not To Be?' (1995) 30 University of San Francisco Law Review 635.

985 ibid.

not an officer of the court system, and may claim a mediator-disputant privilege will do a great deal to protect the disputants and the public in general'.[986]

Proponents have therefore focussed on the importance of quality assurance and, by comparison, have pointed to the mechanisms available in arbitral proceedings, such as (but not limited to) the ability to protect parties from appointed arbitrators; grounds for removing arbitrators; and the ability to challenge arbitral awards and enforcement of such awards.

Daly, for instance, remarked that:

> Certification is a way of telling members of the public that they can trust the competency of the person providing a particular service, even if they themselves lack the ability to make such an assessment. Substantive knowledge lends credibility, which in turn builds trust, a value which is invaluable in any mediation or negotiation. Certification is a method of risk reduction, both for consumers and for practitioners.[987]

Without labouring the point, Zhang has also reiterated this sentiment, and the overarching public benefit to a community, in the context of Californian:

> While mediator accreditation should have positive benefits for mediators who would have to participate in the process and be

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986 Sundermann (n 983).

987 Conrad C Daly, 'Accreditation: Mediation's Path to Professionalism' (2010) 4 Am J Mediation 39, 51.

> certified, it is ultimately developed to protect consumers of mediation from mediators who are unqualified or too inexperienced to handle disputes. First time clients who try mediation may become disillusioned by an incompetent mediator, and turn away from mediation forever. Once in place, a mediation certification program would not only provide a more stable environment for new mediators to enter the field and develop the skills, and for experienced mediators to flourish in the profession, but also serve the public at large. Such a result would be very positive for the mediation community, as well as those who use this process, particularly because the public has increasingly turned towards mediation and other forms of ADR in recent years.[988]

By introducing regulation into this field, which can allow qualified practitioners to practise in mediation, this can provide a number of tangible benefits. This includes, in particular, providing greater confidence and credibility in the mediation system, which allows users and litigants to have greater recourse as opposed to resolving disputes through the litigation system. Boon et al picks up on this point stating:

> Furthermore, qualified, competent and ethical practitioners would enjoy enhanced status and find it easier to attract clients and funding to the field, thereby spurring the professional, legal and

[988] Mandy Zhang 'To Certify, or Not to Certify: A Comparison of Australia and the U.S. in Achieving National Mediator Certification' (2008) 8 (2) Pepperdine Dispute Resolution Law Journal 307, 328-329.

> financial growth of service providers and, perhaps, the take-up of mediation in preference to litigation.[989]

Daly further stated:

> Mediation is in the process of creating itself, and doing so as a bona fide profession, no less. Among other things, professions enjoy autonomy, a veritable principle of validity. … Credentialing, as the means of defining who is a practitioner or professional, is the first obvious step to identifying mediation as a profession. The creation of a professional identity serves at least two vital purposes: firstly, it serves to alert and inform the public about the profession's existence and its scope, and, secondly, it sets implicit standards for the profession's uniform and unified self-improvement. These aspects go to the heart of legitimizing a profession.
>
> Professions are by definition service industries. At the same time, however, a profession is much more than a service: it entails a group identity, and it implies mastery and proficiency of specific knowledge and skills.
>
> Credentialing plays a unique and important role in the process of 'professionalization': it speaks to the scope of practitioner's knowledge, defining what particular systematic knowledge the practitioner holds while also encouraging specialisation. Moreover,

[989] Boon, Earle and Whyte (n 969) 34.

> [c]ertification is a way of telling members of the public that they can trust the competency of the person providing a particular service, even if they themselves lack the ability to make such an assessment. Substantive knowledge lends credibility, which in turn builds trust, a value which is invaluable in any mediation or negotiation. Certification is a method of risk reduction, both for consumers and for practitioners.[990]

Shaw also points to this as being a crucial factor:

> Standardizing the process and establishing qualifications for mediators will encourage the growth of mediation as a legitimate practice. Qualifications will add to the stability of the mediation process and provide respect for the individuals who pursue careers as mediators. Likewise, the public will benefit because mediation will acquire direction leading to marketing mediation services that ultimately will educate potential consumers of the mediation process. Since most programs are drafted to include both lawyers and nonlawyers alike, without discrimination, advocates for certification cannot be accused of forcing lay people out of the mediation business. Therefore, professionalism merely means that

990 Daly (n 987) 50-51.

> all mediators have specific credentials and are held to an articulated standard which ensures quality.[991]

Weckstein puts forward a similar argument stating:

> Certification, along with the recognition of the social utility of the mediation process, also may help legitimize mediators' claims to professional status, which may further enhance the marketability of the process. Professional elitism, which implies that the professional practitioners are 'guardians of knowledge too mysterious to be shared with ordinary mortals,' and substitutes self-regulation for accountability, is not worthy of public support. A true sense of professionalism, however, involves a commitment to public service which is consistent with the interests of the general public. Professional status comes not from self-serving proclamations or regulations, but from the fulfilment of a societal function.[992]

Arguments put forth in favour of mediation are all valid and likely to improve the industry, however, it is the nature of profession which leads to many questions of necessity and feasibility when considering the arguments against regulation.

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991 Dana Shaw, 'Mediation Certification: An Analysis of the Aspects of Mediator Certification and an Outlook on the Trend of Formulating Qualifications for Mediators' (1998) 29 University of Toledo Law Review 327, 349.

992 Donald T Weckstein, 'Mediator Certification: Why and How' (1996) 30 USF.L Rev 757, 773.

10.7. ARGUMENT AGAINST REGULATION

Professional qualifications are often established based on hours of instruction, hours of mentorship or internship, and qualification tests. [993] However, as Carey points out in 'Credentialing for Mediators':

> [M]ediation has no method for effectively assessing skills. There is no criterion for uniform evaluation. There are no standardized courses or accreditation agencies. There are no uniform tests for knowledge and skills competency. Time served under a mentor or in an internship does not necessarily indicate competency. [994]

Another factor to consider when certifying mediators is the fact that such a credential could mislead the public into believing that a person with certification is necessarily an accomplished expert in the field, when they might only have the minimal requirements. Mediation can be simple or it can be extremely demanding in terms of case details and relative law. Not every mediator is qualified for every case. [995]

The diversity of cases requires a diversity of mediators and many believe that regulations would 'unjustifiably limit the diversity of practitioners at a time when the diversity is in demand and the profession is still developing'. [996] Mediation is

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993 Carey (n 984) 642.

994 ibid.

995 ibid.

996 ibid 636.

still a new profession and at this early stage, having minimal requirements, requires established standards which simply do not exist.

A common theme in argument against regulation is that it is premature and that it 'may serve to stifle' its development. Regulation requires commitment to one of the numerous models of mediation, some of which are seen to compete.[997] Similarly, the idea of regulation will likely inhibit development of an emerging market, and possibly bring mediation closer to the rule bound justice system to which it is supposedly alternative.[998]

By regulating the profession, you run the risk of homogenisation. A one-size-fits all approach would inhibit many excellent practitioners because they have no desire to become members of professional bodies or cannot meet the educational standards, or some other rational reason. [999]

However, opponents of accreditation contend that the advantage of competence is overstated. Scholars and commentators point to the fact that, at least with most jurisdictions, there does not seem to be an explosion in claims for malpractice and misconduct to suggest an urgent and necessary need for such a system. For example, in the context of California, opponents have pointed to the fact that there have been only a few claims filed for malpractice in relation to mediators every year, which suggest that there does not need for an accreditation system and that

997 Boon, Earle and Whyte (n 969).

998 ibid.

999 ibid.

the public is not in any danger.[1000] Further, it is erroneous to assume that competence necessarily follows from accreditation. Boon raises this as a legitimate consideration:

> A further ground for being cautious about regulation is that it is unnecessary. There are no reported cases in England, nor unreported cases on internet sites, in which dissatisfied parties have sued mediators for negligence, breach of confidentiality, breach of contract or breach of fiduciary duty. This may be linked to the fact that mediation is voluntary (parties are free to walk away from the mediation at any time, and retain their right to litigate), without prejudice (evidence generated for the purpose of the negotiations conducted as part of the mediation is not usually admissible in litigation) and intended to be confidential (parties should not usually have the fact or content of mediation revealed), so that the impact of failed mediations is not severe. Or it could be that the market provides sufficient control, particularly in the business, commercial and international fields where parties will only refer their disputes to reputable mediators.[1001]

Tony Willis has been a vocal opponent of accreditation on the basis of, among other grounds, he stated the following:

1000 Carey (n 984) 635-636.

1001 Boon, Earle and Whyte (n 969) 36.

> One of the greatest problems with most certification schemes is that there is little or no convincing evidence of a direct relationship between setting entry barriers through certification, and quality of practice as a result. Moreover, the more prescriptive the scheme, the more it will act as a barrier to entry—and the more it will impose additional layers of bureaucracy and cost on mediators, and therefore on those who appoint them.[1002]

Where there are difficulties in terms of establishing standards that apply across the national context, it is not difficult to imagine the breadth of issues that would arise regarding global accreditation. Should regulation be undertaken by organisations? If so, which international commercial mediation or ADR organisation(s) will be responsible for creating and maintaining the standards? Will it be one organisation or an umbrella of organisations? Will the standards be voluntary or involuntary? How will the standards be enforced across jurisdictions? What will be the underlying methodology for determining the content of such standards? How can the standards be updated to adapt with changing circumstances? These are just a number of issues which would need to be thoroughly reviewed and considered if there is a push towards a uniform and global accreditation standard for international commercial mediation.

Willis, for example, points to the diversity and variety of options that may be available, indicating the difficulties that would be encountered in establishing uniform standards:

[1002] Tony Willis 'Mediator Accreditation: Is It Risk? Or Quality Enhancement?' (2008) 26 (9) Alternatives to the High Cost Litigation 165, 173.

It is even worse if a scheme tries to mandate training mechanisms, assessment and content, and mediators' business plans irrespective of jurisdiction, local practice, and experience.

There are several different models of regulation. An interesting but not original classification is as follows:

- Control by Organizations—bureaucratic control involving hierarchy, supervision, rules, and accountability to superiors in line with the organization's goals.

- Market Control—letting the market decide but with sufficient information to ensure the market makes informed choices.

- Government Control—involving state agencies with licensing, inspection, and competency examinations.

- Collegial Control—what might be regarded as a counterpoint to the previous models, involving obligations to participate in professional meetings and conferences, training and networking events, mentoring and feedback schemes.[1003]

[1003] ibid.

Another disadvantage that opponents have put forward in relation to accreditation is that such a system would reduce flexibility, innovation and diversity for users of the mediation system. The argument is that if mediators are accredited under the same system, and provided training in a similar manner, then users are disadvantaged in circumstances where they may be seeking professionals with different backgrounds and styles. That has been stated as a reason for clients and mediation users may be seeking mediators, with diversity being valued as being significant in disputes which may require a degree of specialisation, such as in construction or pharmaceuticals. Different approaches, including the degree of facilitation, may also be required in certain circumstances. It is said that the standardisation of mediation practices, caused by accreditation, may make mediators similar to judicial officers.[1004] Boon summarises the broad arguments on this point:

> An allied objection is the propensity of regulation to inhibit development of an emerging market, in the case of mediation bringing it closer to the rule bound justice system to which it is supposedly alternative. Regulation, including professionalisation, might lead to escalating costs of qualification, leading to the exclusion of talented but unqualified lay people with excellent

[1004] W Lee Dobbins, 'The Debate over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence without Barring Entry into the Market' (1994) 7 U Fla JL & Pub Poly 95, 97.

> skills, at the expense of community and neighbourhood schemes.[1005]

Shaw, for example, states the importance of experience and how standards can stifle creativity:

> Nothing can replace experience. No research has been conducted that supports the notion that specific qualifications make good mediators. However, research has been conducted on the success rate of mediators who have previously mediated cases. Results indicate that mediators who had formerly mediated six to ten cases had a 64% settlement rate, whereas new mediators had only a 30% success rate. Only experience has emerged as a qualification giving higher results. Furthermore, a good mediator is identified as one who has extensive experience in a particular field and is familiar with, or can gather, resources that will help the parties settle their dispute. Thus, detailed rules or standards will only restrict the mediator from being creative and using unique styles and theories in mediation. Experience is what allows mediators to be creative and attack problems from different angles, using their knowledge from previous disputes as a guide.[1006]

However, Austin et al have rallied against this argument, stating that there is no proper basis for this conclusion:

1005 Boon, Earle and Whyte (n 969) 19.

1006 Shaw (n 991) 347.

> [W]e fail to see how high requirements for mediator training, competency, continuing education and dedicated professional commitment will restrict creativity. The most creative performers in the arts, sciences and in every profession come out of backgrounds of intense disciplined study, training and practice. Creativity flows from preparation; inspiration is never unprepared.[1007]

Daly echoes a similar sentiment and goes further, stating that accreditation may in fact boost creativity:

> Nor need credentialing interfere with either mediation's 'wonderful capacity for self-criticism', or its much-lauded creativity. The structure of mediation allows for an inherent degree of creativity in its solution to disputes that neither arbitration nor litigation can match. Despite contentions otherwise, the absence of certification is not what has made mediation flexible and creative. Rather, that absence is indicative of mediation's nature, a nature which, if it is 'to be truly a valuable alternative to a strong, accessible trial system' will need 'to remain a flexible, adaptive, and spectacularly innovative'. As mediation does not require a specific professional background, credentialing, so long as it does not prevent the continued entrance of all walks into the field, will not stymie mediation's vital gift for either creativity or self-criticism.

1007 Kelly Austin and others, 'Mediator Certification: What Are Some Practitioners Afraid Of? ' (2008) 26 (10) Alternatives to the High Cost of Litigation 188, 188-189.

> Indeed, credentialing may well serve to further communication on three fronts, therein encouraging further creativity, self-criticism, and improvement. Firstly, it may further an 'internal' dialogue amongst mediators by giving mediators a common plane upon which to build and to communicate amongst themselves, just as other professions have done. As mediation is, in many ways, a solitary practice, the furthering of a dialogue can serve as invaluable means of personal sustenance, of encouraging continued learning, and of maintaining one's freshness. Secondly, credentialing will allow mediators to better respond to the needs of users. The communication inspired by discussion of user-specific needs may even advance the creation of diverse competencies and sub-specialization, already evident in the various models of mediation, by creating the professional organs for supportive and creative systems of vetting, complete with peer review. Thirdly, mandating continuing education in order to maintain one's credentials would help to ensure that a gulf does not develop between subsequent generations of mediators by creating dialogue and hopefully piquing interest in new aspects of mediation. In short, rather than detract from the creativity and insight of mediators, credentialing programs, properly implemented, create uniformity not homogeneity, commonality not conformity.[1008]

One additional disadvantage is that accreditation and licensing would virtually create a monopoly for lawyers, limited by the criteria required for qualifications:

[1008] Daly (n 987) 52-53.

> Another argument against regulation is the potential for homogenisation. A one-size-fits all approach would exclude many potentially excellent practitioners either because they are not content to become members of august professional bodies, or because they cannot meet the educational standards of professional bodies, or for some other rational reason.[1009]

This may lead to a much narrower selection of mediators available to clients which, in correlation with demand, may mean that prices for mediation usage may increase in price. This, in turn, would undermine one of the fundamental tenets for why mediation has been favoured over other forms of dispute resolution.

Shaw, for example, recognises this argument as a legitimate consideration:

> Certification requirements can prevent qualified individuals from becoming mediators. Just because mediation is a part of the legal system does not mean that the field should be restricted to lawyers. Mediation is a process that is dependent upon the parties since they determine the outcome of the dispute. In mediation, the mediator is the servant of the parties as opposed to a judge in formal adjudications. Thus, the participation of nonlawyers as mediators should be encouraged. … Thus, by restricting the field merely to lawyers, many competent and skilled individuals will be excluded.

1009 Boon, Earle and Whyte (n 969) 35.

> Additionally, nonlawyers bring two auxiliary purposes to the mediation field. First, nonlawyer mediators provide stability regarding fees. Allowing nonlawyer mediators to enter the field will create price competition which will guard against unreasonable prices for mediation services. … The second advantage of allowing nonlawyer mediators is that it will reduce the adversarial nature of the mediation process. Due to the nature of the law, lawyers tend to look at disputes in black and white. … Along with a fear of monopolization of the market by lawyers is the concern that lawyers will 'legalize' the process. Furthermore, lawyers tend to be more 'evaluative' in their style, which leads to the danger of steering parties into a resolution. Obviously, if the parties are directed to a resolution that only the mediator believes will work, the agreement will fail.[1010]

However, Daly disagrees that homogenisation is a necessary result from accreditation remarking that:

> Furthermore, credentialing sets up implicit standards for the profession's uniform and unified self-improvement. Professions are typically monitored and regulated by professional bodies, whose members are appointed from within, and that govern how and who may call herself a professional in that discipline. These bodies usually prepare both methods for certification or licensing as well as

[1010] Shaw (n 991) 345-346.

> establishing ethical codes of conduct. Without a uniform and reviewable process of credentialing it is impossible to guarantee responsible and uniform quality assurance. Uniformity, however, does not necessarily amount to homogeneity. As the world becomes increasingly globalized and interconnected, it is important that standards remain reliable and responsible at any corner of the world. Thus, credentialing is a means of maintaining the reputational equity of both practice and practitioners.[1011]

Finally, many simply argue that regulation is unnecessary. There are no reported cases in England, nor unreported cases on internet sites, in which dissatisfied parties have sued mediators for negligence, breach of confidentiality, breach of contract or breach of fiduciary duty. 'This may be linked to the fact that mediation is voluntary (parties are free to walk away from the mediation at any time, and retain their right to litigate), without prejudice'.[1012]

1011 Daly (n 987) 52.

1012 Boon, Earle and Whyte (n 969) 35.

10.8. AUTHOR'S ANALYSIS AND POINT OF VIEW

The variety of arguments which support and oppose the accreditation of mediators, which arise in numerous national jurisdictions, is equally as applicable in the context of whether there should be a uniform standard of accreditation for international commercial mediators. The debate in these circumstances is just as complex and vexed, considering that such a standard must take into account the differences which arise from national jurisdictions, which may range from having robust and strong frameworks for domestic and international mediation to those where mediation is struggling to obtain a foothold in the ADR landscape. Nonetheless, despite these differences which may vary from one jurisdiction to the other, the author takes the view that there should be a uniform accrediting standard for international commercial mediators. This position finds some support in some of the arguments which have been raised in the preceding paragraphs.

To provide additional context, one has to understand that when compared to different forms of mediation which may relate to various areas of law, such as family law, the process of international commercial mediation possesses some unique elements. In circumstances where there is a cross-border dispute involving commercial or contractual matters, the parties to the matter in dispute may have different perceptions on the nature of mediation, whether it is ad-hoc or institutional in nature. Further, and more significantly, they may have unaligned views on the role of a mediator, who may either be appointed by the parties or an independent third party, and the extent and manner to which he or she may

influence the resolution of the dispute. The disputing parties are usually sophisticated and multinational entities and often engage legal representation.

In these circumstances, it could be said that the quality of a mediator becomes a more important consideration for participating parties in a mediation. While parties may not always agree upon the identity of a mediator, there is a minimum standard that they do share – that is, that the mediator will be highly qualified and suitably appropriate to the dispute at hand, and to be able to assist the parties within the process with impartiality and independence. Parties in this context, therefore, require and need to have confidence in the quality of a mediator. If we assume that this is a fundamental premise, accreditation then has an important role in this debate.

Accreditation can be an effective and objective method of ensuring the upholding and maintenance of confidence in the integrity and quality of mediators in international commercial mediations. It would be a publicly available and transparency manner to allow parties to effectively determine the identity of a mediator, as there would be a minimum standard of quality assumed by the presence of accreditation. While parties may often select mediators based upon their previous experiences or word of mouth, that should not detract away from the fact that this is not an objective and widely available criteria to all parties who may seek a qualified person to facilitate the mediation process.

The author recognises that this factor should not be overstated in circumstances where, as mentioned above, the parties in a cross-border dispute are often

sophisticated companies or entities who often engage legal representation. These parties would naturally have a greater form of understanding of the nature of the mediation process. It is also acknowledged that reliable data or statistics may not be available in respect of the trends and quantity of malpractice or negligence claims brought against mediators who engage in international commercial mediation. In any event, as stated above, critics have stated that the extent of such claims is often exaggerated. However, in this respect, this should be a balancing of interests and it is the author's view that the maintenance of confidence in the quality of international commercial mediators is best upheld by the introduction of a uniform accreditation standard.

As will be discussed below, there will inevitably be difficulties arising from the need to establish the content of any relevant criteria in setting such standards. For instance, reasonable minds may come to different conclusions on what may constitute a qualified and competent mediator. In this respect, however, two points may be raised. First, it could be contended that while there may be disagreements on the scope and element of competence, there would often be large agreement or even unanimity on what the core content of competence is. Secondly, the fact that there are difficulties in describing and prescribing such standards should not, in itself, be a determinative factor in refusing to countenance accreditation. Difficulty in setting standards alone cannot and should not be used as a justification that accreditation in these circumstances should be opposed.

One of the major arguments against accreditation is that such a system would deprive clients of flexibility and diversity in the mediation process. In particular, it

is said that a uniform accreditation standard may homogenise the overall process and the persons who are appointed as mediator. In the context of international commercial mediation, it is recognised that diversity may have a role in certain disputes which require forms of specialisation about the subject matter, such as mining, oil and gas, pharmaceuticals, construction and engineering. However, the importance of this factor may be overstated. To the extent that clients require such diversity or specialisation about the factual circumstances of a dispute, there are often other forms of ADR which may be more appropriate and cater for these needs, including but not limited to expert determination.

However, such a process, which requires adjudication on technical details or information, is different from the needs and purpose of international commercial mediation where a mediator is sought to help facilitate options between disputing parties. In that case, the argument could be made that lawyers or judicial officers – who may actually better understand the need for parties to preserve commercial relationships and the role of non-financial factors – may be better suited to help facilitate international commercial mediations. In this regard, the concerns raised about accreditation, such as the reduction in diversity and an increase in homogeneity, may not be as applicable in this context as what they may otherwise be in traditional and domestic forms of mediation.

Perhaps a more compelling reason for the need for uniform accreditation of international commercial mediators is that the dynamics of contemporary dispute resolution requires it. Where the world is becoming more globalised, and disputes increasingly have a cross-border element to it, parties to such a dispute demand, at

a bare minimum, some form of uniform and set quality assurance. There needs to remain a constant, and that constant can be derived from having uniform accreditation which would be applicable across the world for all international commercial mediations. While it would be impossible to ensure complete quality assurance, international accreditation in this context is at least the best method of seeking to ensure and maintain confidence in the quality and integrity of the process of international commercial mediation.

10.9. ESTABLISHING AN ACCREDITATION STANDARD

Assuming that there should be some form of global accreditation for international commercial mediators, the issue then becomes how should the standard be formulated and established, and what elements should it contain. This is obviously a complex issue and guidance can and should be drawn from the experiences of a number of national jurisdictions which have encountered these questions. However, it is acknowledged that where a *global* standard is sought to be established, unique factors may be present which may otherwise limit the usefulness of the case studies of national jurisdictions.

Boon et al discusses, in the context of mediation in the UK, the 'control tools' that may be utilised by government or independent mediation bodies should there be a need to regulate mediation, including certification, registration and licensure. The authors, however, make a distinction between these processes and accreditation:

> Accreditation, narrowly defined, is a process whereby 'an independent agency both defines and monitors the standards of those institutions which voluntarily choose to participate in the scheme'.… It is posed as a solution to situations where the public, or a purchaser of services provided to the public, is in a poor position to judge the quality of those services or where State regulation is too cumbersome or lacks effective enforcement strategies. Accreditation is often confused with similar processes and terms like licensing, certification, authorisation, inspection and

> regulation. This terminological confusion emanates from the use of the term to describe different processes in different fields …
>
> Organisational accreditation is an increasingly familiar mode of regulation, particularly in higher education, where the Quality Assurance Agency oversees university standards. There are also a wide variety of other accreditation organisations, particularly among the professions and statutory bodies, created or growing organically, and with a range of missions. The two main models of organisational accreditation are concerned with either the verification of quality of services or the development of quality. The verification model tends to look at inputs (eg staff, and facilities) and therefore tends to be static. This is suitable for ensuring common standards. The development model looks at missions and is used for examining processes. This is intended to ensure that the organisation is conducting its own ongoing evaluation with a view to making changes leading to continually improving standards - 'evaluative and educative rather than inspectorial or judgemental'. The developmental model is more able to accommodate diversity and hence to encourage improvement and innovation.[1013]

Weckstein examines the criteria that should be used for certification in the context of mediation in California:

[1013] ibid 43-44.

Acquisition of professional skills and knowledge may be relevant to, but not highly predictive of, success as a mediator. Lawyers and others who possess the ability to spot issues, analyze problems, and clearly and persuasively communicate will have ample opportunity to apply these skills as mediators. On the other hand, lawyers who successfully litigate or negotiate in an adversarial manner, conduct confrontational cross-examinations, and have an inclination to control situations and dominate others, may find such attributes counterproductive in a mediation.

… In any event, specific professions have no monopoly on the acquisition of skills or knowledge generally associated with those professions. … there is impressive evidence that some individuals without the credentials of advanced degrees from professions such as law or mental health make excellent dispute resolvers, while formal degrees clearly create significant barriers to entry to practice as a neutral without any evidence that they are necessary to competent performance.

Accordingly, SB 1428 [the mediation certification legislation] appropriately relied on criteria that are more likely to correlate with success as a mediator-training, experience, and performance. There is some question, however, whether satisfactory compliance with these criteria in a variety of substantive mediation contexts, as judged by accredited certifying agencies with diverse orientations

> and specialties, can reliably evidence core competencies as a generic mediator …
>
> Obviously, the more specific these legislatively mandated standards are, the greater the likelihood of consistency in applied standards. However, specific legislative mandates create less discretion and opportunity for diversity for a certifying agency. Accordingly, any legislative certification standards need to be examined to determine their appropriateness for the purpose. Specifically, it must be determined whether a proposal allows desirable diversity for each certifying agency without sacrificing the level of competence which the public is likely to infer from certification of a mediator.[1014]

Shaw also briefly examines the processes in which attempts have been undertaken to define potential standards for mediators, recognising the balancing required between the 'qualifications of mediators without eroding the mediation process'.[1015] She points to, for example, how a number of organisations have tried to obtain this balance by establishing general guidelines and explores two notable examples:

> In 1989, SPIDR [Society of Professionals in Dispute Resolution] published a report pertaining to the qualifications of 'neutrals'. Since statutory requirements emerged within various states, the report was SPIDR's response to the growing concern of skilled

1014 Weckstein (n 992) 779-781.

1015 Shaw (n 991) 339.

> practitioners in the field. This initial report made three basic conclusions: (1) no single entity should establish qualifications; (2) there is a lesser need for qualifications when parties have more freedom of choice over the process; and (3) performance should be the criteria and not paper credentials. Since this initial report, SPIDR has engaged in subsequent reports on the issue of qualifications and standards for mediators, including developments of the Standards in 1994. …
>
> Due to the fact that mediation greatly affects the legal arena, the ABA [American Bar Association] has extreme motivation to impact the standards of mediators. As early as 1984, the ABA addressed the ethical concerns surrounding the mediation process. Six standards were developed which mirrored the canons found in the legal profession. Recently, the ABA has formed a permanent ADR committee, and has become proactive in trying to advance the certification of mediators.[1016]

It is interesting to note that, in respect of the report by the SPIDR, one conclusion was that no single entity should establish the relevant qualifications. As set out above, there will be a range of complex jurisdictional issues that arise in relation to the establishing of standards required for global accreditation.

[1016] ibid 339-341.

Should there only be one global organisation, perhaps comprising an umbrella of regional and domestic mediation organisations and bodies, which should establish and administer these standards? If so, the issue then becomes *how* the mechanics of actual process would be operated. No doubt that the formation of committees, which may investigate and report on certain case studies, would have a role in this process. But would the decision rest on the board of this organisation or should it be placed for a vote based on the members of the organisation? Alternatively, it could be the case that instead of having one global umbrella organisation, domestic and regional organisations may seek to discuss and issue accreditation guidelines which are consistent with each other but provide some leeway for autonomy.

Putting aside the issue of the mechanics of how such standards should be established, another crucial question will be the content of these accreditation standards. No doubt, as discussed above, any global guidelines will be drawn from the national experiences and standards of multiple jurisdictions. Accordingly, it would be highly relevant and useful to examine the relevant criteria used in a number of jurisdictions, especially on the notion of a competent mediator. For example, the Australian example of the NMAS, as discussed in Chapter 1, is currently the dominant accreditation provider for mediators, which any global accreditation standard could mirror or take guidance from.

10.10. COMPETENCE

On the issue of competence, by way of example, Section 5 of the Standards of Practice for California Mediators, issued by the California Dispute Resolution Council states that:

> Measurement of Mediator competence should be based upon dispute resolution training, experience and performance. Mediator competence is not defined by academic degrees or professional licenses. Use of any degree or license as a criterion for determining competence could restrict competent persons from serving as a Mediator. The freedom of disputants to select their own Mediator should not be denied by restricting that choice, as any restriction would be inconsistent with mediation's voluntary nature and would deprive disputants of access to Mediators with a rich diversity of occupational backgrounds and mediation styles. If asked by any participant, a Mediator should provide to all participants information on his or her mediation training, education, and mediation experience, as well as the guidelines proposed for the mediation.
>
> A Mediator shall mediate only when he or she has the necessary skills to satisfy the reasonable expectations of the parties. A Mediator should possess the skills, knowledge and ability to adapt to the context of the dispute, facilitate communication, assist the

> parties in developing options, and discuss alternatives with participants. A Mediator should possess the awareness and experience to assess when he or she (a) is unable to render adequate mediation services, or (b) cannot meet the participants' reasonable expectations. In those cases, the Mediator should decline the engagement or withdraw from the mediation.
>
> Every Mediator is personally responsible for his or her professional growth. A Mediator should endeavour to continually improve and increase his or her knowledge about the practice of mediation and developments in relevant substantive fields through continuing education, consultation, peer review, and user feedback.
>
> Assessing effective mediation should be a shared responsibility among practitioners, professional organizations, educators, programs and participants. No assessment should be limited to a single mode such as resolution rates.[1017]

Rule 9 of the Hong Kong Mediation Code, on the other hand, is less prescriptive but does provide an example to illustrate the point about competence:

> The Mediator shall be competent and knowledgeable in the process of mediation. Relevant factors shall include training, specialist training and continuous education, having regard to the relevant

[1017] Court Administered Dispute Resolution, 'CDRC Standards of Practice for California Mediators' (2012) s 5 <www.sbcadre.org/neutrals/ethicsmed.htm> accessed 8 July 2016.

standards and/or accreditation scheme to which the Mediator is accredited. For example, in the event the mediation relates to separation/divorce, the Mediator shall have attained the relevant specialist training and the appropriate accreditation.[1018]

[1018] DOJ, 'The Hong Kong Mediation Code: Responsibilities to the Mediation Process and the Public' (2010) r 9 <www.doj.gov.hk/eng/public/pdf/2010/med20100208e_annex7.pdf> accessed 8 July 2016.

10.11. WAY FORWARD

While it is extremely important to maintain public confidence in the mediation profession as to continue its growth and ability to ease the burden many courts face, there is great difficulty in implementing a successful regulatory regime from a global context at this time, as many jurisdictions are still grappling with introducing the basic notions of mediation into their respective regimes for people to understand as most still rely heavily on their mainstream resolution method - litigation.

Mediation is still so broad in scope that it is difficult for a state to draw an exclusive boundary around the practice area, and until state bodies have the abilities to exclude anyone from the general practice of mediation, they have no method to license effectively. [1019]

Perhaps the best method does not lie in the form of a public body but rather in the private realm. The best method might be to increase public education on mediation as well as bolster referral and reputational mechanisms. At this time these seem to be the best way to effectively reduce poor mediators from the pool while promoting those who are providing the highest quality service. Even still, a referral from one person does not guarantee a successful experience for another due to the variance of case details and scope.

[1019] Moffitt (n 968).

Given the diversity of accreditation regimes available in the international market, having one size fits all may not be feasible at this moment in time, perhaps more time is needed to consider the best avenues of regulation, if any are needed at all. For now consumers may need to spend the resources they plan to save from avoiding litigation to finding not only the more skilled mediators but also the more appropriate ones for their given case. Nevertheless it is the author's wish that one day in the near future we should really be aiming for one accrediting standard for mediators and in doing so we need to take reference to standards established in different jurisdictions as a starting point to formulate a truly global standard that all will embrace with open arms.

ANNEX A

Appendix 6 of the Guidelines on Process and Content of Legislation of New Zealand [1020]

APPENDIX 6

SOME EXISTING STATUTORY PROVISIONS FOR ADR

The New Zealand statute book contains clauses of various kinds to provide for resolution of disputes other than by, or in addition to, litigation in the courts. Leaving aside provisions prescribing arbitration under the Arbitration Act 1996, statutory provisions for ADR fall into 2 broad categories:

A Enactments providing for use of ADR, but without prescribing procedures

In this category, there are 3 subgroups:

(i) enactments that provide for the use of ADR, but without prescribing the procedure or giving guidance on how the process is to be conducted;[1] examples include:

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1 The statute may permit a decision-maker to refer a matter to ADR, as in s 99A Resource Management Act 1991; or it may include a discretionary prompt by requiring a decision-maker to have regard to the desirability of using a specified (or unspecified) method of ADR instead of legal proceedings, for example, Commonhold and Leasehold Reform Act 2002 (UK).

1020 Legislation Design and Advisory Committee, 'Guidelines on Process and Content of Legislation' (2001 edn, last updated in 2007) app 6 <www.lac.org.nz/guidelines/2001-edition/> accessed 8 July 2016.

- Education Act 1989, section 115
- School Trustees Act 1989, section 22
- Resource Management Act 1991, section 99A (pre-hearing) and Schedule 1, clauses 3A and 8AA
- Privacy Act 1993, sections 74, 76
- Injury Prevention, Rehabilitation, and Compensation Act 2000, section 296
- Local Government Act 2002, section 16
- Telecommunications (Interception Capability) Act 2004, section 19

(ii) enactments that provide for delegated legislation to prescribe dispute resolution:

- Police Act 1958, section 64
- Commodity Levies Act 1990, section 11
- Electricity Act 1992, section 172D
- Gas Act 1992, section 43G
- Industry Training Act 1992, section 48
- Modern Apprenticeship Training Act 1992, section 22 (code of practice)
- Bio-security Act 1993, sections 96, 142
- Animal Products Act 1999, section 118
- Wine Act 2003, section 89

(iii) enactments empowering a court or tribunal to propose, order, or assist with ADR, for example:

- Treaty of Waitangi Act 1975, Schedule 1

- High Court Rules, rules 429, 442
- Resource Management Act 1991, sections 267-268
- District Courts Rules 1992, rules 443, 434
- Te Ture Whenua Maori Act 1993, sections 26A-26ZA
- Employment Court Regulations 2000, regulation 54
- Family Courts Rules 2002, rules 52, 292-296, 349-351

B Enactments that are prescriptive

Enactments that set up a process for resolution of disputes that is, to varying degrees, prescriptive and more or less self-contained include the following:

- Sharemilking Agreements Act 1937, section 3 and Schedule
- Police Act 1958, Schedule 3
- Forest and Rural Fires Act 1978, sections 64-65
- Family Proceedings Act 1980, Part 2
- Residential Tenancies Act 1986, sections 86-90
- Children, Young Persons, and their Families Act 1989, sections 170-177
- Education Act 1989, section 10
- Human Rights Act 1993, Part 3
- Health and Disability Commissioner Act 1994, section 61
- Fisheries Act 1996, Part 7
- Employment Relations Act 2000, sections 144-155
- Injury Prevention, Rehabilitation, and Compensation Act 2001, Part 5
- Construction Contracts Act 2002, Part 3
- Weathertight Homes Resolution Services Act 2002, sections 13-55
- Maori Television Service Act 2003, section 17, clauses 13-20 Schedule
- Social Workers Registration Act 2003, sections 71-73

- Building Act 2004, section 398 (linked to Construction Contracts Act 2002 and Weathertight Homes Resolution Services Act 2002)
- Maori Fisheries Act 2004, Part 5 (linked to Te Ture Whenua Maori Act 1993)
- Maori Commercial Aquaculture Settlement Act 2004, sections 52-55 (linked to Te Ture Whenua Maori Act 1993)
- Health Practitioners Competence Assurance Act 2004, sections 82, 126

The examples listed above illustrate the variety of ways in which Parliament has provided for the resolution of disputes other than by recourse to litigation. Analysis of the relevant provisions also indicates that the development of statutory schemes for the use of ADR, though of fairly long standing, has been ad hoc. A number of problems have been identified, including the inconsistent use of labels to identify various forms of ADR, significant and misleading divergence among the various schemes, even when labelled by the same name, and a lack of substantive detail to guide the conduct of the ADR process.[2]

Boulle L and Wade J, *Masters Mediation Workshop*, Workshop Papers, Bond University, Dispute Resolution Centre, Queensland, 2002

Boulle L, Jones J, and Goldblatt V, *Mediation: Principles, Process, Practice*, Butterworths, Wellington, 1998

CDR Associates, "Developing Effective Dispute Management Systems" Training Manual for workshop delivered for LEADR NZ 19B21 June 1997, Colorado, 1997

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2 Claire Baylis, "Reviewing statutory models of mediation/conciliation in New Zealand: three conclusions", VUWLR 30.1 (June 1999), 270-294.

Folberg J and Taylor A, *Mediation-A Comprehensive Guide to Resolving Disputes Without Litigation*, Jossey-Bass, San Francisco, 1998

Legislating for alternative dispute resolution: a guide for government policy-makers and legal drafters, National Alternative Dispute Resolution Advisory Council (NADRAC), Department of Attorney-General, Canberra, Nov 2006 (website: http://www.nadrac.gov.au/agd/WWW/disputesresolutionhome.nsf/)

Sourdin Tania, *Alternative Dispute Resolution*, Lawbook Co, Sydney, 2002

Spiller P (Ed), Dispute Resolution in New Zealand, Oxford University Press, 1999

BIBLIOGRAPHY

Cases

Airey v Ireland [1979] 2 EHRR 305

Browning v Crowley [2004] NSWSC 128

Champion Concord Ltd v Kao Lee & Yip [2015] HKEC 412

Champion Concord Ltd v Lau Koon Foo [2011] 14 HKCFAR 837

Chu Chung Ming & Anor v Lam Wai Dan & Ors [2012] 4 HKLRD 897

Colin Wright v Michael Wright (Supplies) Limited & Turner Wright Investments Limited [2013]EWCA Civ 234

Day v Cook [2002] 1 BCLC1 [188]

Declourt v Belgium [1970] 1 EHRR 355

Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals) [1995] 183 CLR 10

Faith Bright Development Ltd v Ng Kwok Kuen [2010] 5 HKLRD

Farm Assist Ltd (in liquidation) v The Secretary of State for the Environment, Food and Rural Affairs (No 2) [2009] EWHC 1102(TCC)

Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand [2002] 2 NZLR 433

Forster v Friendland [1992] CAT 1052

Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners [1975] 3 All E.R. 99

Hak Tung Alfred Tang v Bloomberg LP [2010] HKEC 1227

Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576

Idoport Pty Ltd v National Australia Bank [2001] NSWSC 427

iRiver Hong Kong Limited v Thakral Corporation (HK) Limited [2008] 6 HKC 391

Lange v Marshall [1981] 622 S.W.2d 237

Manukau City Council v Fletcher Mainline Ltd [1982] 2 NZLR 142

Pacific Long Distance Telephone v New World Telecommunications Ltd, Unreported, [2012] HCA 1688/2006

Paragon Finance Plc v Freshfields [1999] 1 WLB 1183 (CA)

Paul Y Management Limited v Eternal Unity Development [2008] HKCU 1259

Pradeep Ramchandra Ghatge v Mukesh Kumar Adukia [2011] HKEC 463

Robert Samuel McCosh v David A R Williams [2003] CA275/02 (CA)

Resource Development Ltd v Swanbridge Ltd [2010] HKEC 841

S v T [2010] 4 HKC 501; [2010] HKCU 932

Salem Advocate Bar Association, Tamil Nadu v Union of India [2005] Writ Petition (Civil) 496 of 2002

Smith v Jones [1999] 1 SCR 455

Tapoohi v Lewenberg [2003] VSC 410

Three Rivers District Council v Governor and Company of Bank of England (No 4) [2004] UKHL 48, [2005] 1 AC 610

Unilever Plc v Procter and Gamble Co [2000] 1 WLR 2436

Union Cardide Canada Inc & Dow Chemical v Bombardier Inc [2014] SCC 35

Legislations

Australia

Aboriginal Protection Act 1869

ACT Civil and Administrative Tribunal Act 2008

Administrative Appeals Tribunal Amendment Act 1975 (Cth)

ADR Directorate, New South Wales (2010)

Civil Law (Wrongs) Act 2002

Civil Procedure Act 2005

Community Justice Centres Act 1983 (NSW)

Commercial Arbitration Act 1984 (NSW)

Commercial Arbitration Act 1986 (ACT)

Conciliation and Arbitration Act 1904

Dispute Resolution Centres Act 1990 (Qld)

Federal Court of Australia Act 1976

Immigration Restriction Act 1901

Legal Practitioners (Amendment) Act (No.2) 1997 (ACT)

Legal Profession Act 2004

Mediation Act 1997 (ACT)

Racial Discrimination Act 1975

Tasmanian Supreme Court Rules of 2000

Workplace Relations Act 1996 (Cth)

New Zealand

Arbitration Act 1996

Contractual Mistakes Act 1977

Evidence Act 2006

Health Practitioners Competence Assurance Act 2003

Human Rights Act 1993

Protection of Personal and Property Rights Act 1988

Resource Management Act 1991

Indonesia

Regulation of the Supreme Court of the Republic of Indonesia Number 01 of the Year 2008

Regulation of the Supreme Court of the Republic of Indonesia Number 02 of the Year 2003

Malaysia

Construction Industry Development Board (Amendment) Act 2011

Mediation Act 2012

Practice Direction No.5 of 2010 on Mediation

Trade Unions Act 1959

Workmen's Compensation Act 1952

India

Arbitration and Conciliation Act

Code of Civil Procedure 1908

Legal Services Authorities Act

Travancore-Cochin Literary, Scientific and Charitable Societies Registration Act 1955

Hong Kong

Arbitration Ordinance (Cap. 609)

Mediation Ordinance (Cap. 620)

Mediation Ordinance L.N. 167 of 2012

Practice Direction 31

Rehabilitation of Offenders Ordinance (Cap. 297)

Rules of the High Court

Rules of the District Court

Sale of Goods Ordinance (Cap. 26)

Supply of Services (Implied Terms) Ordinance (Cap. 457)

US

Alternative Dispute Resolution Act of 1998

California Rules of Court

Uniform Mediation Act

Canada

Nova Scotia Commercial Mediation Act (S.N.S. 2005)

Ontario Commercial Mediation Act (S.O. 2010 C.16)

Europe

Mediation Directive (2008/52/EC)

Directive on Consumer ADR (2013/11/EU)

Regulation (EU) No 524/2013 on Online Dispute Resolution

United Kingdom

Proceeds of Crime Act

Conventions

European Convention on Human Rights

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

International Convention on the Settlement of Investment Disputes

Books

Alexander NM, *Global Trends in Mediation* (2nd edn, Kluwer Law International 2006)

— *International and Comparative Mediation: Legal Perspectives* (vol 4 Global Trends in Dispute Resolution, Wolters Kluwer Law & Business 2009)

— *Mediation Process and Practice in Hong Kong* (LexisNexis 2010)

— *Hong Kong Annotated Statutes Mediation Ordinance (Cap 620)* (Wolters Kluwer Law and Business 2013)

Abramson HI, *Mediation Representation: Advocating as a Problem-Solver in Any Country or Culture* (2nd edn, National Institute for Trial Advocacy 2010)

Aun WM, *The Malaysian Legal System* (2nd edn, Longman 1999)

Bagshaw D and Porter E, *Mediation in the Asia-Pacific Region: Transforming Conflicts and Building Peace* (Routledge Advances in International Relations and Global Politics 2009)

Benton S and Setiadi B, 'Mediation and Conflict Management in Indonesia' in Leung Kwok and Tjosvold D (eds), *Conflict management in the Asia Pacific: assumptions and approaches in diverse cultures* (J. Wiley & Sons 1998)

Bennett GP, *Mediation Practice Guide: A Handbook for Resolving Business Disputes* (2nd edn, American Bar Association Section of Dispute Resolution 2003)

Berg H, 'Mediation in New Zealand: Widely Accepted and Successful' in Hopt KJ and Steffek F (eds), *Mediation: Principles and Regulation in Comparative Perspective* (OUP 2013)

Betto JG and Canivet A, 'France' in Giuseppe De Palo and Trevor BM (eds), *EU Mediation Law and Practice* (OUP 2012)

Birke R and Teitz L, 'US Mediation in the Twenty-first Century: The Path that brought America to Unifonn Laws and Mediation in Cyberspace' in Alexander N (ed), *Global Trends of Mediation* (2nd edn, Kluewer Arbitration 2006)

Blake SH and others, *A Practical Approach to Alternative Dispute Resolution* (3rd edn, OUP 2010)

Bleemer R (ed), *Mediation: Approaches and Insights* (Juris Publishinh 2005)

Boulle L, *Mediation: Principles, Process, Practice* (1st edn, Butterworths 1996)

— *Mediation: Principles, Process, Practice* (3rd edn, LexisNexis Butterworths 2011)

— and others, *Mediation: Principles, Process, Practice* (2nd New Zealand edn, LexisNexis NZ Limited 1998)

Bowers S and others, in Liebmann M (ed), *Mediation in context* (Jessica Kingsley Publishers 2011)

Brooker P, *Mediation Law: Journey through Institutionalism to Juridification* (Routledge 2013)

Brown H and Marriott A, *ADR Principles and Practice* (1st edn, Sweet and Maxwell 1992)

Bush RB, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications* (Washington DC National Institute for Dispute Resolution 1992)

— and Folger J, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass Publisher 1994)

Charlton R, *Dispute Resolution Guidebook* (LBC Information Services 2000)

— and Dewdney M, *The Mediator's Handbook: Skills and Strategies for Practitioners* (Lawbook Co. 1996)

Chern C, *Dispute Resolution Guides: International Commercial Mediation* (Informa 2008)

Chinkin C and Spiller P (eds), *Dispute Resolution in New Zealand* (2nd edn, OUP 2007)

Clark B, *Lawyers and Mediators* (Springer Science & Business Media 2012)

Cole S and others, *Mediation: Law, Policy and Practice – Chapter 11 – Fairness, Effectiveness and Access* (2nd edn, West USA 2012)

College of Law, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers, 2009, Volume 3* (Brill Academic Publishers 2010)

— *Non-judicial Processes: The Future of ADR*, vol 00/28 (Seminar papers / College of Law, The Continuing Professional Education Dept. of the College of Law 2000)

European Mediation Training for Practitioners of Justice, *A Guide to European Mediation* (Maklu 2012)

Folberg J and Taylor A, *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation* (Wiley 1984)

Gates RJ, *International Commercial Disputes: A Guide to Arbitration and Dispute Resolution in APEC Member Economies* (2nd edn, APEC Secretariat 1999)

Geert H, *Cultures and Organisations: Software of the Mind* (McGraw-Hill 1991)

Goldsmith J, Ingen-Housz A and Pointon GH, *ADR* in *Business* (Kluwer Law International 2006)

Gould N, King C and Britton P, *Mediating Construction Disputes: An Evaluation of Existing Practice* (Kings College London 2010)

Green P, *Employment Dispute Resolution* (LexisNexis Butterworths 2002)

Greenberg S, Kee C and Weeramantry JR, *International Commercial Arbitration* (1st edn, Cambridge University Press 2012)

Hardy S and Rundle O, *Mediation for Lawyers* (Wolters Kluwer Business CCH 2010)

Hilmer SE, *Mediation Theory and Practice in Hong Kong* (LexisNexis 2010)

Hiscock M and Van-Caenegem W, *The Internationalisation of Law: Legislating, Decision-Making, Practice and Education* (Edward Elgar 2010)

Hopt KJ and others (eds), *Mediation: Principles and Regulation in Comparative Perspective* (OUP 2013)

Hutcheson P and Hooper S, in P Spiller (ed), *Dispute Resolution in New Zealand* (2nd edn, OUP 2007)

Ishan Jan MN and Ashgar AAM, *Mediation in Malaysia: The Law and Practice* (LexisNexis 2010)

Kirchhoff L, *Constructive Interventions Paradigms, Process and Practice of International Mediation* (Wolters Kluwer Law and Business 2008)

Kolb DM, *The Mediators* (MIT Press 1983)

Kressel K and Pruitt DG, *Mediation Research* (Jossey-Bass 1989)

LeBaron M and Pillay V, *Conflict Across Cultures: A Unique Experience of Bridging Differences* (Intercultural Press 2006)

Leung HM, *Hong Kong Mediation Handbook* (2nd edn, Sweet and Maxwell 2014)

Li AKN, 'Opening Address Mediation in Hong Kong: The Way Forward' in Lynch K and Chan E (eds), *Mediation in Hong Kong: The Way Forward* (The University of Hong Kong 2009)

Lim PG and Xavier G, 'Malaysia' in Pryles M (ed), *Dispute Resolution in Asia* (3rd edn, Kluwer Law International 2006)

Limbury A, 'Chapter 21: ADR in Australia' in Goldsmith JC, Ingen-Housz A and Pointon GH (eds), *ADR in Business: Practice and Issues across Countries and Cultures II* (Kluwer Law International 2010)

Macfarlane J, *The New Lawyer* (UBC Press 2008)

Mattl C, Prokop-Zischka A and Ferz S, 'Chapter 3: Mediation in Australia' in Alexander NM (ed), *Global Trends in Mediation* (2nd edn, Kluwer Law International 2006)

Mayer B, *Dynamics of Conflict Resolution: A Practitioner's Guide* (Jossey-Bass 2000)

Mills K, 'Chapter 6: Indonesia' in Pryles MC (ed), *Dispute resolution in Asia* (3rd edn, Kluwer Law International 2006)

Moore C, *The Mediation Process: Practical Strategies for Resolving Conflict* (3rd edn, Jossey Bass 2003)

— *The Mediation Process: Practical Strategies for Resolving Conflict* (4th edn, Jossey Bass 2014)

Moses ML, *The Principles and Practice of International Commercial arbitration* (2nd edn, Cambridge University Press 2012)

National Working Party of Mediation, *Guidelines for Family Mediation* (LexisNexis NZ Limited 1996)

Ordover AP and Doneff A, *Alternatives to Litigation: Mediation, Arbitration, and the Art of Dispute Resolution* (2nd edn, LexisNexis 2002)

Palo GD and Trevor MB, *EU Mediation Law and Practice* (OUP 2012)

Ross SD, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (3rd edn, Butterworths 2001)

Rowe P, *Resolving Your Dispute by Mediation* (The Academy of Experts 2004)

Sandborg D, 'Mediation in Hong Kong: Past, Present and Future' in Lynch K and Chan E (eds), *Mediation in Hong Kong: The Way Forward* (The University of Hong Kong 2009)

Schonewille MA and Schonewille F (eds), *Variegated Landscape of Mediation: A Comparative Study of Mediation Regulation and Practices in Europe and the World* (Eleven International Publishing 2014)

Scragg R, *New Zealand's Legal System: The Principles of Legal Method* (OUP 2005)

Sihombing S, 'Confidentiality and Transparency in Mediation' in Sihombing S, To C and Chiu J (eds), *Mediation in Hong Kong: Law and Practice* (1st edn, Wolters Kluwer 2014)

— To C and Chiu J, *Mediation in Hong Kong Law and Business* (Wolters Kluwer Law and Business 2014)

— 'The ADR Spectrum' in Sihombing S, To C and Chiu J (eds), *Mediation in Hong Kong: Law and Practice* (1st edn, Wolsters Kluwer 2014)

Singer J, 'Mediation in France' in Tim Hardy and Graham Massie (eds), *The EU mediation atlas: practice and regulation* (LexisNexis 2004)

Society of Professionals in Dispute Resolution, *Ensuring Competence and Quality in Dispute Resolution Practice* (Society of Professionals in Dispute Resolution 1995)

Somerville K, 'The Hong Kong Government's Use and Experience of Mediation for the Resolution of Disputes in Public Works Contracts', in Lynch K and Chan E (eds) *Mediation in Hong Kong: The Way Forward* (The University of Hong Kong 2009)

Sourdin T, *Dispute Resolution Processes for Credit Consumers* (La Trobe University 2007)

— *Alternative Dispute Resolution* (4th edn, Lawbook Co NSW 2012)

— 'Chapter 2: Mediation in Australia: Impacts on Litigation' in Alexander NM (ed), *Global Trends in Mediation* (2nd edn, Kluwer Law International 2006)

— and Zariski A, *The Multi-tasking Judge: Comparative Judicial Dispute Resolution* (Thomson Reuters Professional Australia Ltd 2013)

Spencer D, *Principles of Dispute Resolution* (Thomson Reuters Professional Australia 2011)

— and Altobelli T, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Thomson Reuters 2005)

— and Brogan MC, *Mediation Law and Practice* (Cambridge University Press 2006)

— and Hardy S, *Dispute Resolution in Australia – Cases, Commentary and Materials* (2nd edn, Thomson Reuters 2009)

Tan PL, *Asian Legal Systems* (Butterworths 1997)

To C, 'Mediator's Qualification and Obligations' in Sihombing S, To C and Chiu J (eds), *Mediation in Hong Kong: Law and Practice* (1st edn, Wolsters Kluwer 2014)

To KC, *Hong Kong Mediation Practical* Guide (Butterworths 2010)

Tochtermann P, 'Mediation in Germany: The German Mediation Act – Alternative Dispute Resolution at the Crossroads' in Hopt K J and Steffek F (eds), *Mediation: Principles and Regulation in Comparative Perspective* (OUP 2013)

Tweeddale A and Tweeddale K, *Arbitration of Commercial Disputes* (OUP 2007)

Vermeesch RB and Lindgren KE, *Business Law of Australia* (Butterworths 2011)

Waldman E, *Mediation Ethics: Cases and Commentaries* (John Wiley & Sons 2011)

Wang G and Yang F, *Mediation in Asia Pacific: A Practical Guide to Mediation and its Impact on Legal System* (Wolters & Kluwer 2013)

Wilson C, *Mediation Ordinance* (Sweet and Maxwell 2013)

Wolski B and others, *Skills, ethics, and Values for Legal Practice* (2nd edn, Thomson Reuters 2009

Articles and Journals

Abd RMNTH, 'Enhancing maritime security cooperation' <www.iiss.org/en/events/shangri%20la%20dialogue/archive/shangri-la-dialogue-2005-5c47/fifth-plenary-session-c698/dato-sri-mohd-najib-tun-haji-abd-razak-05b2> accessed 8 July 2016

Abraham C, 'Alternative dispute resolution in Malaysia' (9th General Assembly of the Asean Law Association, 2006) <www.aseanlawassociation.org/9GAdocs/w4_Malaysia.pdf> accessed 8 July 2016

Abramson H, 'Selecting Mediators and Representing Clients in Cross-Cultural Disputes' (2005) 7 Cardozo J Conflict Resolution

Alexander H, 'Mediation in Germany and United States' (2007) 9 Eur. J.L. Reform 505

Alexander N, 'What's Law Got To Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions' (2001) 13 (2) Bond Law Review 5

— 'Mediation and the Art of Regulation' (2008) 8 (1) Law and Justice Journal

— 'Mediation and the Art of Regulation' (2008) 9 Queensland University of Technology Law and Justice Journal

— 'Mediation in Practice: Common Law and Civil Law Perspectives Compared' (2001) 5 International Trade and Business Law Annual Journal 1

— 'The Mediation Metamodel: Understanding Practice' (2008) 26 (1) Conflict Resolution Quarterly 97

— 'The Mediation Meta-Model-the realities of mediation practice' (2012) 12 (6) ADR Bulletin 5

American Arbitration Association, 'American Bar Association and Association for Conflict Resolution: Model Standards of Conduct for Mediators' (2005) <www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_010409&revision=latestreleased> accessed 8 July 2016

— 'American Bar Association and Association for Conflict Resolution: Preamble of the Model Standards Of Conduct For Mediators' (2005)

Ardagh A, Cumes G, 'Lawyers and Mediation: Beyond the Adversarial System?' (1998),

9 Australian Dispute Resolution Journal

Arthur WR (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Martinus Nijhoff Publishers 2010) 266

Aseem M, 'Resolving Environmental Disputes in the Hush-hush World of Mediation: A Guideline for Confidentiality' (1996-1997) 10 Georgetown Journal Legal Ethics 523

Astor H, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16 Social Legal Studies

Austin K and others, 'Mediator Certification: What Are Some Practitioners Afraid Of?' (2008) 26 Alternatives 188

Bagshaw D, 'Developing family mediation standards: An Australian experience' (1999) 16 (4) Mediation Quarterly 389

— 'Transforming mediation in the Asia-Pacific region' (2007) 10 (2) ADR Bulletin 10

— 'The Impact of Family Dispute Resolution (Mediation) on the National Family Law System in Australia' in Wang GG and Yang F (ed), 97 (2013)

Baylis C, 'Reviewing Statutory Models of Mediation/ Conciliation in New Zealand: Three Conclusions' (1999) 30 VUWLR 279

Beatrice S, 'Conflict Resolution Training Programs: Implications for Theory and Research' (1989) 5 Negotiation Journal

Bergin PA, 'The objectives, scope and focus of mediation legislation in Australia' (Mediate First Conference, Hong Kong, 11 May 2012) <www.supremecourt.justice.nsw.gov.au/Documents/Speeches/Pre-2015%20Speeches/Bergin/bergin_2012.05.11.pdf > accessed 8 July 2016

— 'The Objectives, Scope and Focus of Mediation: Legislation in Australia' (2013) 2 Journal of Civil Litigation and Practice 49

Betto JG and Canivet A, 'France', in Giuseppe De Palo and Trevor MB (eds), *EU Mediation Law and Practice* (OUP 2012)

Birke R and Teitz L, 'US Mediation in the Twenty-first Century: The Path that brought America to Unifonn Laws and Mediation in Cyberspace' in Alexander N (ed), *Global Trends of Mediation* (2nd edn Kluewer Arbitration 2006) 376

Black M, 'The Courts, Tribunals and ADR: Assisted Dispute Resolution in Australia' (1996) 7 ADRJ 138.

Black-Branch JL, 'The Professional Status of Mediators' (1998) 28 (1) Family Law 39.

Bobette W, 'An evaluation of the rules of conduct governing legal representatives in mediation: Challenges for rule drafters and a response to Jim Mason' (2013) 16 (1) Legal ethics 182

Boon A, Earle R and Whyte A, 'Regulating Mediators?' (2007) 10 Legal Ethics 26

Boulle L, 'A History of Alternative Dispute Resolution' (2005) 7 (7) ADR Bulletin Article 3

Bowers R and Moffet N, 'Mediator Licensing and Certification in California' (*Mediation Consultants*, January 2010) <www.mediation-consultants.com/articles/Mediator_Licensing_and_Certification.pd> accessed 8 July 2016

Bowling D and Hoffman D, 'Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation' (2000) 16 (1) Negotiation Journal 5

Boyatzis R, *The Competent Manager: A Model for Effective Performance* (John Wiley & Sons 1982)

Brenner M, Segal S and Serventy N, 'What is Transformative Mediation?' (2000) 11 Australian Dispute Resolution Journal 155

Bruni A, 'Mediation in Italy' (*Mediate.com*, November 2011) <www.mediate.com/articles/BruniA1.cfm> accessed 8 July 2016

— 'The New Law on Mandatory Attempt of Mediation in Italy' (*Business Conflict Management LLC*, 12 December 2012) <http://businessconflictmanagement.com/blog/2013/12/italy-update/> accessed 8 July 2016

Bryson D, 'Window Open to the World - International and Comparative Mediation: Legal

Perspectives Global Trends in Dispute Resolution series' (2010) 12 (3) ADR Bulletin Article 5

Bukhari KZB, 'Arbitration and Mediation in Malaysia' (8th General Assembly of the Asean Law Association, 2003) <www.aseanlawassociation.org/docs/w4_malaysia.pdf> accessed 8 July 2016

Bush RAB, 'The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications' (Washington DC National Institute for Dispute Resolution 1992)

Caldwell P, 'Dispute Resolution Mechanisms for the Airport Core Program' (International Dispute Resolution Conference, Hong Kong, 11-13 November 1998)

Callahan R, 'Mediation Confidentiality: For California Litigants, Why Should Mediation Confidentiality be a Function of the Court in Which the Litigation is Pending?' (2012) 12 Pepperdine Dispute Resolution Law Journal 63

Cannon A, 'Lower court pre-lodgement notices to encourage ADR' (2000) 2 (9) ADR Bulletin 1

Cantatore F and Marshall B, 'Businesses are people too? Anomalies in widening the ambits of consumer under consumer credit law' (2014) Australian Business Law Review

Carey TV, 'Credentialing for Mediators – To Be or Not To Be?' (1995) 30 University of San Francisco Law Review 635

Carroll E and Mackie K, 'Cadillac of Certification, The' (2005) 12 Disp. Resol. Mag. 18

Carroll R, 'Mediator Immunity in Australia' (2001) 23 Sydney L Rev 185

— 'Developments in mediation legislation' (2002) 5 (Number 5 ADR in Western Australia) ADR Bulletin 2

— 'Trends in Mediation Legislation' (2002) The University of Western Australia Law Review

Charles PJ, 'Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality' (2004) 2 Journal of Dispute Resolution 303

Clapshaw D and Freeman-Greene S, 'Do we need a mediation Act? Part 1' (2003) 6 (4) ADR Bulletin Article 1

— 'Do we need a Mediation Act? Part 2' (2003) 6 (5) ADR Bulletin Article 4

Condliffe P, 'Researching good process - what impact does it have on fairness perceptions?' (2011) 12 (6) ADR Bulletin Article 7

Currie C, 'Mediating off the Grid' (2004) 59 (2) Dispute Resolution Journal 11

D'Souza N, 'Mediation in Indian Courts' *Forbes India* (28 September 2010) <www.forbes.com/2010/09/28/forbes-india-judiciary-encouraging-mediation-reduce-baclog.html> accessed 8 July 2016

Daly C, 'Accreditation: Mediation's Path to Professionalism' (2010) 4 American Journal Mediation

David BL and Ronald LS, 'Patterns of ADR Use in Corporate Disputes' (1999) 54 Dispute Resolution Journal 66

Deleissegues C, 'Mediation Confidentiality: Has It Gone Too Far' (2011) 33 University of La Verne Law Review 123

Desai V and Kanuga S, 'Mediation Proceedings are Confidential Says Supreme Court' (*India Law Journal*) <www.indialawjournal.com/volume4/issue_1/article_by_desia_kanuga.html> accessed 8 July 2016

Dobbins W, 'The Debate over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence without Barring Entry into the Market' (1994) 7 U. Fla. JL & Pub. Poly 95

Engelfriet C, Reesink H and Lange G, 'Quality assurance, quality control and accreditation' (2000) 79 (4) Vox Sang 253

Epstein J, 'The Use of Comparative Law in Commercial International Arbitration and Commercial Mediation' (2000) 75 Tul. L. Rev. 913 <http://heinonline.org> accessed 8 July 2016

Espluges C, ‘New Trends for Cross-Border Litigation in Europe: The Directive of 2008 on Mediation in Civil and Commercial Cases’ (20 May 2012) Meiji Law Journal

— ‘Civil and Commercial Mediation in Europe: Cross-Border Mediation’ (2014) 2 Intersentia156

Faulkes W and Claremont R, ‘Community Mediation: Myth and Reality’ (1997) 8 Australian Dispute Resolution Journal 177

Fench R, ‘Role of the Native Title Tribunal’ (1994) 1 NTN 9

Field I, ‘Judicial mediation and Ch III of the Commonwealth Constitution’ (2010) PhD (ePublications@bond, Faculty of Law).

Field R, ‘A mediation profession in Australia: an improved framework for mediation ethics’ (2007) 18 (3) Australian Dispute Resolution Journal

— ‘Ethics for a Mediation “profession”: an answer to the neutrality dilemma’ (2007) 10 (2) ADR Bulletin

— ‘Ethics & Professional responsibility’ (2012)

— ‘Mediation ethics in Australia-a case for rethinking the foundational paradigm’ (2012) 19 James Cook University law review 41

Finlay R, ‘An Overview of Commercial Arbitration in Australia’ (1987) 4 J. INT'L ARB. 103

Folberg J, ‘Certification of Mediators in California: An introduction’ (1996) 30 University of San Francisco Law Review 609

French B, ‘Dispute Resolution in Australia – the movement from litigation to mediation’ (2007), 18 Australasian Dispute Resolution Journal 213

Gaillard E and Edelstein J, ‘Mediation in France’ (2001) 55 (5) DRJ 74

Gentry DB, ‘The Certification Movement: Past, Present, and Future’ (1994) 11 (3) Mediation Quarterly 285

Gibson K, ‘The Ethical Basis of Mediation: Why Mediators Need Philosophers’ (1989) 7 Mediation Quarterly

Giuseppe De Palo, Paola B and Cominelli L, 'Mediation in Italy: the legislative debate and the future' (2003) 6 (3) ADR Bulletin

Giuseppe De Palo and Carmeli S 'Mediation in Continental Europe: a Meandering Path Toward Efficient' (2005) Hamline University School of Law Ch 19

Giuseppe De Palo and Harley P, 'Mediation in Italy: Exploring the Contradictions' (2005) 21 (4) Negotiation Journal 469

Golann D and Folberg J, 'An Overview of Mediation' in *Mediation: The Roles of Advocate and Neutral* (Aspen Publishers 2006) 95

Gold A, 'Conflict in Today's Economic Climate' (1981) Proceedings of the Ninth Annual Meeting of the Society of Professionals in Dispute Resolution

Gottwald W, 'Inside an outsider's mind: perspectives on Australian ADR' (2002) 5 (6) ADR Bulletin Article 3

Grebe SC, 'Family Mediation Training Programs: Establishing Standards' (1988) 19 Mediation Quarterly

— 'Ethical Issues in Conflict Resolution: Divorce Mediation' (1989) 5 Negotiation Journal

— and Irvin K and Lang M, 'A Model of Ethical Decision Making in Mediation' (1989) 7 Mediation Quarterly

Guerrero A, 'Lawyers, Context, And Legitimacy: A New Theory Of Legal Ethics' (2011) New York University School Of Law Public Law & Legal Theory Research Paper Series Working Paper No. 11-65

Haggbloom S and others, 'The 100 Most Eminent Psychologists of the 20th Century' (2002) 6 Review of General Psychology 139

Harges BM, 'Mediator Qualifications: The Trend Toward Professionalism' (1997) Brigham Young University Law Review 687

Harper C, 'Mediator as Peacemaker: The Case for Activist Transformative-Narrative Mediation' (2006) 2006 (2) Journal of Dispute Resolution 599

Herman M and others, 'Supporting Accountability in the Field of Mediation' (2002) 18 (1) Negotiation Journal 29

Hikmahanto J, 'Dispute Resolution Process in Indonesia' (2003) 21 IDE Law Series

Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16 Social and Legal Studies 225

Hinchy R, 'Commercial mediators: do they have style?' (1999) 2 (6) The ADR Bulletin 53

Hiscock M and Van-Caenegem W (eds), *The Internationalisation of Law: Legislating, Decision-Making, Practice and Education* (Edward Elgar, Cheltenham 2010) 270

Hoffman A, 'Mediation in Germany and the United States – A Comparison' (2007) 9 European Journal of Law Reform 505

Hoffman D and Wolman R, 'The Psychology Of Mediation' (2013) 14 Cardoza Journal of Conflict Resolution 759

Honeyman C, 'Five Elements of Mediation' (1988) 4 (2) Negotiation Journal 149

— and Bee CG and Kelly L, 'Skill is not enough: Seeking connectedness and authority in mediation' (2004) 20 (4) Negotiation Journal 489

Hopt KJ and Steffek F, 'Mediation: Principles and Regulation in Comparative Perspective' (2012) Oxford Scholarship Online 457

Hung H, 'Neutrality and impartiality in mediation' (2002) 5 (3) ADR Bulletin Article 7

Hwang MM, Onn L and Tat Y, 'ADR in East Asia' in J C Goldsmith, Pointon GH and Ingen-Housz A (eds), ADR in Business (Kluwer Law International, 2006) 164

Ismail Z and others, 'Mediation in construction industry?' (2010) 1 (1) Journal of Surveying, Construction & Property 5

Jacobs P, 'Commercial Mediation Act, 2010' (2013) 20 (3) Alternative Dispute Resolution Law Section <www.oba.org/en/pdf/sec_news_adr_jan13_commercial_jacobs.pdf> accessed 8 July 2016

Justice Ipp D A, 'Reforms to the Adversarial Process in Civil Litigation' (1995) pt I 69 ALJ 705; pt II 69 ALJ 79, 705

Kalowski J, 'In a Manner of Speaking: A Cross-Cultural View of Mediation' (1996) 2 Commercial Dispute Resolution Journal 200

Kesavan R, 'Practice Direction No 5 of 2010 on Mediation' (*The Malaysian Bar*, 20 August 2010) <www.malaysianbar.org.my/notices_for_members/practice_direction_no_5_of_2010_on_mediation.html> accessed 8 July 2016

Keys B, 'Co-mediation: positives, pitfalls and lessons learned' (2009) 11 ADR Bulletin 4

Kovach KK and Love LP, 'Mapping Mediation: The Risks of Riskin's Grid' (1998) 71 Harvard Negotiation Law Review

Khan HB, 'Community mediation in Malaysia: a comparison between Rukun Tetangga and community mediation in Singapore' (2013) 3 (3) Journal of Literature and Art Studies 182

Kidner J, 'The Limits of Mediator "Labels": False Debate between "Facilitative" versus "Evaluative" Mediator Styles' (2011) 30 (167) Windsor Review of Legal and Social Issues 172

Klock K, 'Resolution of Domestic Disputes through Extra-Judicial Mechanisms in the United States and Asia: Neighborhood Justice Centers, the Panchayat, and the Mahalla' (2001) 15 Temple International and Comparative Law Journal 275

Lal N, 'Huge Case Backlog Clogs India's Courts', *Asia Times Online* (Dehli, 28 June 2008) <www.atimes.com/atimes/South_Asia/JF28Df02.html> accessed 8 July 2016

Law Council of Australia, 'Response to Who says you're a mediator? Towards a national system for accrediting mediators'

Law E, 'How to become a qualified lawyer in Malaysia?' (LawEddie.com, 7 December 2007) <www.laweddie.com/wordpress/how-to-become-a-qualified-lawyer-in-malaysia/> accessed 8 July 2016

Law SF, 'Culturally sensitive mediation: The importance of culture in mediation

accreditation' (2009) 20 ADRJ 162 <www.academia.edu/243509/Culturally_sensitive_mediation_The_importance_of_Culture_in_mediation_accreditation> accessed 8 July 2016

Leah W, 'Mediation and Inequality Reconsidered: Bringing the Discussion to the Table' (2009) 26 (4) Conflict Resolution Quarterly 388

Lee DW, 'The Debate Over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence Without Barring Entry in the Market?' (1996) 7 University Florida Journal of Law and Public Policy 106

Lempereur A, 'Negotiation and Mediation in France: The Challenge of Skill based learning and Interdisciplinary Research in Legal Education' (1998) Spring Harvard Law Review 151

Lewicki RJ, 'Challenges of Teaching Negotiation' (1986) 2 Negotiation Journal

— Astor H and Chinkin CM, 'Dispute Resolution as Part of Education' (1990) 1 Australian Dispute Resolution Journal

Li KNA, 'Opening Address Mediation in Hong Kong: The Way Forward' in Lynch K and Chan E (ed) *Mediation in Hong Kong: The Way Forward*, (The University of Hong Kong 2009)

Lieberman E, Foux-Levy Y and Segal P, 'Beyond basic training: A model for developing mediator competence' (2005) 23 (2) Conflict Resolution Quarterly 237

Liebert C, 'Banque de France: Quarterly Selection of Articles' (2009-2010) 16 Credit Mediation 4

Lim LT 'Chapter 11 Singapore' in Pryles M (eds), *Dispute resolution in Asia* (2nd edn Kluwer Law International 2002)

Linklaters, 'Commercial mediation – a comparative review' (2013) <www.linklaters.com/pdfs/mkt/london/mediation_2013_7053.pdf> accessed 8 July 2016

Loong SO and Koh D, 'Mediation in 18 jurisdiction worldwide: Singapore' (2014) Getting the Deal Through 83

Low J and Quek D, 'An Overview of Court Mediation in the State Courts of Singapore' in *Mediation in Singapore: A Practical Guide* (Sweet and Maxwell, 2015)

Lynne R, 'Theory and Practice: What Empirical Study Tells Us About the Future of the National Mediator Accreditation System (NMAS)' (10th National Mediation Conference, Adelaide, September 2010) <https://disputescentre.com.au/wp-content/uploads/2015/05/Old-Bulletin-Story-Transfer-v1-e1-_October-2010_.pdf>

Macfarlane J, 'Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation' (2002) 2 Journal of Dispute Resolution 241

Malhotra D, 'Business as usual: managing disputes without jeopardizing the company' in Manju M (ed), *ADR in Asia: Solution for Business* (Asia Law & Practice 2005)

Martinez J, Sheila Purcell, Hagit Shaked-Gvili and Mohan Mehta, 'Dispute System Design: A Comparative Study of India, Israel and California' (2013) 14 Cardozo Journal of Conflict Resolution 807

Mason J, 'How might the adversarial imperative be effectively tempered in mediation?' (2012) 15 (1) Legal Ethics 111

McFadden D, 'Developments in International Commercial Mediation: US, UK, Asia, India and EU' (2015) 8 (2) Contemporary Asia Arbitration Journal 299

McGruther J, 'Mediation developments in the Australia/Pacific region' (2014) 25 ADRK 73

Mediator Standards Board, 'National Mediator Accreditation System (NMAS) - A History of the Development of the Standards'

— 'National Mediator Accreditation System - Draft proposal for public consultation' (2005) 8 (4) ADR Bulletin Article 1

Meggit G, 'Civil Justice Reform in Hong Kong – Its Progress and its Future' (2008) 38 Hong Kong Law Journal 89

Maiese M, 'Neutrality' (Beyond Intractability 2005) <www.beyondintractability.org/essay/neutrality> accessed 8 July 2016

Milne AL, 'The Development of Parameters of Practice for Divorce Mediation' (1984) 4

(49) Mediation Quarterly

Moffitt M, 'Four Ways to Assure Mediator Quality (and Why None of Them Work)' (2009) 24 (2) The Ohio State Journal on Dispute Resolution 191

Mukherjee P, 'Speech of the President of India on the Occasion of Inauguration of the National District Mediation Conference' (*New Delhi*, 10 November 2012) <www.sify.com/mobile/news/there-is-public-frustration-over-tardy-litigation-pranab-mukherjee-news-national-mlku4ibacad.html > accessed 8 July 2016

NADRAC, 'Who says you're a mediator? Towards a national system for accrediting mediators' (2004)

Neilson L and English P, 'The role of interest-based facilitation in designing accreditation standards: The Canadian experience' (2001) 18 (3) Mediation Quarterly 221 <http://onlinelibrary.wiley.com> accessed 8 July 2016

Niedostadek A, 'Mediators become only spectators' (*Comparative Mediation*, 26 August 26) <https://comparativemediation.wordpress.com/2013/08/26/mediators-become-only-spectators-five-questions-to-carmine-oricchio-italy/> accessed 8 July 2016

Noce DJ, 'Beaten Path to Mediator Quality Assurance: The Emerging Narrative of Consensus and Its Institutional Functions, The' (2003) 19 Ohio St. J. on Disp. Resol. 937

— and others, 'Identifying Practice Competence in Transformative Mediators: An Interactive Rating Scale Assessment Model' (2003) 19 Ohio State Journal on Dispute Resolution 1005

Noone MA and Ojelabi LA, 'New Directions in Global Dispute Resolution: Ethical Challenges for Mediators around the Globe: An Australian Perspective' (2014) 45 Wash UJL & Pol'y 145

North J, 'Court Annexed Mediation in Australia- An Overview' (2005) Law Council of Australia 2

Nosworthy I, 'The future of arbitration and mediation' (2003) 22 (1) Arbitration Mediation 43

Nottage L, 'International Commercial Arbitration in Australia: What's New and What's Next?' (2013) 30 (5) Journal of International Arbitration 465

— and Garnett R, 'Top 20 Things to Change in or Around Australia's International Arbitration Act' (2010)

Onn L and Campbell S, 'The Importance of Mediation to the Business Community and the Mediation Landscape in Singapore' in Bisogni C (ed), *Dispute Resolution Guide 2008*, (Asia Law & Practice 2008)

Ooi C, 'The Role of Lawyers in Mediation: What the Future Holds' (*The Malaysian Bar*, 22 August 2005) <http://malaysianbar.org.my/adr_arbitration_mediation/the_role_of_lawyers_in_mediation_what_the_future_holds.html#f> accessed 8 July 2016

Parliamentary Counsel Office, 'Model Clauses for Alternative Dispute Resolution' (1999) 30 VUWL Rev 279

Pou CJ, 'Assuring Excellence, or Merely Reassuring-Policy and Practice in Promoting Mediator Quality' (2004) Journal on Dispute Resolution 303

Professor Lovegrove of Lovegrove Solicitors & Conjoint Professor University of New Castle, 'Virtues & the Limitations of Mediation' (2012)

Puja P, 'Scheinman Scholars Modern Mediation in my Bharat' (2013) 68 (2) Dispute Resolution Journal 75

Purser S, 'Promoting Australian ADR abroad' (2002)

Rajan S, 'Much Ado About Nothing?' (*SKRINE*) <www.skrine.com/much-ado-about-nothing> accessed 8 July 2016

Raymond A 'Mediator Expectations and Professional Training: Implications for Teaching Dispute Resolution' (1985) 1 Missouri Journal of Dispute Resolution 73

Redfern M, 'ADR: Where did the 'Alternative' Go? A Response' (2011) 12 ADR Bulletin 90

Reeve C, 'The Quandary of Setting Standards for Mediators: Where Are We Headed' (1998) 23 Queen's Law Journal 448

Relyea G and Bhatt N, 'Comparing Mediation and Lok Adalat: Toward an Integrated Approach to Dispute Resolution in India' (*Mediate.com*, June 2009)

<www.mediate.com/articles/relyeaGbhattN1.cfm?nl=215> assessed 8 July 2016

Riskin LL, 'Mediator's Orientations, Strategies and Technique' (1994) 12 Alternative to High Cost Litigation 111

— 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) Harvard Negotiation Law Review 1

— 'Decision making in Mediation: The New Old Grid and the New New Grid System' (2003) 79 (1) Notre Dame Law Review

Robert A, Bush B and Folger J, 'Mediation and Social Justice: Risks and Opportunities' (2012) 27 Ohio State Journal on Dispute Resolution 48

Roberts KM, 'Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement' (2007-2008) 39 Loyola University Chicago Law Journal 187

Robinson M, 'Mediator: Certification: Realising its Potentials and Coping with its Limitations' (2007) 1 American Journal of Mediation 51

Rodbell S, 'Building a Resolutionary Future: Mediator Excellence' (Future Search Conference, Maryland, July 2003)

Ron K, 'Mediation Act Summary' <www.uniformlaws.org/ActSummary.aspx?title=Mediation%20Act> accessed 8 July 2016

Shaw D, 'Mediation Certification: An Analysis of the Aspects of Mediator Certification and an Outlook on the Trend of Formulating Qualifications for Mediators' (1998) 29 University of Toledo Law Review 327

Sheppard HH, 'The Art and Science of Mediation' (Book Review) (1988) 4 Negotiation Journal 161

Shirvington V, 'Ethics And Conflict Of Interest And Duties' (2006) The Law Society Of New South Wales

Society for Professionals in Dispute Resolution Commission on Qualifications, 'Ensuring Competence and Quality in Dispute Resolution Practice' (1994) 1 CDRJ 14

Somerville K, 'The Hong Kong Government's Use and Experience of Mediation for the Resolution of Disputes in Public Works Contracts' in Lynch K and Chan E (ed), *Mediation in Hong Kong: The Way Forward* (The University of Hong Kong 2009)

Sordo B, 'Australian Mediation Initiatives to Resolve Matters Awaiting Trial' (1994) 5 ADR Journal 62

Sourdin Tania, 'Commentary on Approval Standards' (Australian National Mediator Standards 2007)

— 'From accreditation to quality mediation practice — next steps?' (2009) 11 (1) ADR Bulletin Article 2

— 'Poor quality mediation — a system failure?' (2010) 11 (8) ADR Bulletin Article 2

SPIDR Commission on Qualifications, 'Qualifying Neutrals: The Basic Principles' (1989) 44 (3) The Arbitration Journal 48

Standard Australia, 'Customer Satisfaction-Guidelines for complaint handling in organisations (AS/ISO 10002-2006)' (2006) Standards Australia, NSW

Stulberg J and others, 'Creating and Certifying the Professional Mediator-Education and Credentialing' (2004) 28 Am. J. Trial Advoc. 87

Sundermann D, 'The Dilemma Of Regulating Mediation' (1985) 22 Houston Law Review 841

Svantesson D and Clarke R, 'The Trade Practices Act: A hard act to follow? Online consumers and the new Australian consumer law landscape' (2013) 20 James Cook University Law Review

Syukur FA, 'Community Mediation Training In Bali & Papua: Access To Justice In Indonesia' (1st Asia Mediation Association Conference: Mediation Diversity - Asia & Beyond Asia Mediation Association, Marina Mandarin Singapore, 4 - 5 June 2009)

— and Bagshaw DM, 'Judicial mediation in Indonesia: Challenges and opportunities' (2012) 23 ADRJ 274

— and Bagshaw DM, 'Court Annexed Mediation in Indonesia: Does Culture Matter?' (2013) 30 (3) Conflict Resolution Quarterly 369

Tan OB, 'CJ Transformed Entire Legal Culture' *Straits Times* (9 August 1999)

Tang Houzhi, 'Mediation is Developing around the World' (2009) 17 Asia Pac. L. Rev. 31

The Malaysian Bar, 'Circular No 206/2014 - Mediation Skills Training Course' (26 to 30 Nov 2014) <www.malaysianbar.org.my/index.php?option+com_docman&task=doc_details&gid=4731&ltemid=332> accessed 8 July 2016

The Standard Newspaper, 'Minibond investors urged to try mediation' *The Standard Newspaper* (Hong Kong, 26 March 2009)

Ting EYC, 'Recent Mediation Developments in Hong Kong' (2013) 22 (10) Surveyors Times 48

To C, 'Mediator's Qualification and Obligations' in Sihombing S, To C and Chiu J (eds), *Mediation in Hong Kong: Law and Practice* (1st edn, Wolsters Kluwer 2014)

To KC, 'Hong Kong Mediation Practical Guide' (Butterworths 2010)

Tochtermann P, 'Mediation in Germany: The German Mediation Act – Alternative Dispute Resolution at the Crossroads' in Hopt KJ and Steffek F (eds), *Mediation: Principles and Regulation in Comparative Perspective* (OUP 2013) 523

Trenczek T and Loode S, 'Mediation "made in Germany" – a quality product' (2012) 23 ADRJ 61

Tweeddale A and Tweeddale K, *Arbitration of Commercial Disputes* (Oxford University Press 2007)

Tyler MC and Bornstein J, 'Accreditation of on-line dispute resolution practitioners' (2006) 23 (3) Conflict Resolution Quarterly 383

Varughese G, 'Malaysian Bar Council: New criteria for empanelment of mediators on the Panel of the Bar Council Malaysian Mediation Centre (MMC)' (2010) Circular No. 056/2010

Vaugon I and Dary M, 'Les modes alternatifs de reglement des conflicts: une strategie gagante pour les entreprises' (2012) 113

Vert F, 'L'experiementation du rapport Magendie sur la mediation dans le resot de la Court d'appel de Paris' (2010) 117 Gaz Pal 7

Wade J, 'My Mediator Must be a QC' (1994) 5 ADRJ 161

— 'Current Trends and Models in Dispute Resolution Part II' (1998) 9 ADRJ 60

— 'Judicial mediation and competition for clients and government funding among dispute resolution providers' (2013)

Wall JA, Stark JB and Standifer RL, 'Mediation, A Current Review and Theory Development' (2001) 45 (3) Journal of Conflict Resolution

Walker GB, 'Training Mediators: Teaching About Ethical Concerns and Obligations' (1988) 19 Mediation Quarterly

Weckstein DT, 'Mediator Certificate: Why and How' (1996) 30 University of San Francisco Law Review 757

Weiler R, 'Good Intention Gone Bad - Ontario Commercial Mediation Act 2010' (*Kluwer Mediation Blog*, 22 January 2012) <http://kluwermediationblog.com/2012/01/22/good-intentions-gone-bad-ontario-commercial-mediation-act-2010/> accessed 8 July 2016

White S, 'Directive 2008/52 on Certain Aspects of Mediation in Civil and Commercial Matters: A New Culture of Access to Justice?' (2013) 79 (1) Arbitration 52

Wiliams S, 'Confidentiality in Mediation: Is it Encouraging Good Mediation or Bad Conduct?' (2005) Journal of Dispute Resolution 209

Willis T 'Mediator Accreditation: Is It Risk? Or Quality Enhancement?' (2008) 26 Alternatives to High Cost Litigation 165

Winslade J, Monk G and Cotter A, 'A Narrative Approach to the Practice of Mediation' (1998) 14 (1) Negotiation Journal 41

Wissler RL and Rack RW Jr, 'Assessing Mediator Performance: The Usefulness of Participant Questionnaires' (2004) Journal of Dispute Resolution 229

Wolski B, 'ADR ethics: regulating disclosure in mediation' (2012) 5 (2) International Journal of Private Law 185

Woolley A, 'If Philosophical Legal Ethics Is The Answer, What Is The Question?' (2010) 60 University of Toronto Law Journal 983

Xavier A, 'Mediation and Case Management' (2003) Dispute Resolution Magazine 13

— 'Mediation: Its Origin and Growth in India' (2006) 27 Hamline Journal of Public Law & Policy 275

Yong PH, 'Speech delivered at the Asia-Pacific Intermediate Courts Conference' (20 July 1995)' in Hoo SP, Lee SD, Phang HC and See KO (eds), *Speeches and Judgments of Chief Justice Yong Pung How* (Singapore: FT Law & Tax Asia Pacific, 1996) 175

Young S, 'Cross-Cultural Negotiation in Australia: Power, Perspectives and Comparative Lessons' (1998) 9 Australasian Dispute Resolution Journal 41

Zainulbhai T, 'Justice for All: Improving the Lok Adalat System in India' (2011) 35 Fordham International Law Journal 248

Zhang M, 'To Certify, or Not to Certify: A Comparison of Australia and the U.S. in Achieving National Mediator Certification' (2008) 8 (2) Pepperdine Dispute Resolution Law Journal 307

Others

ACR Mediator Certification Task Force, 'Report and Recommendations' (*Mediate.com* 2004) <www.mediate.com/articles/acrcert1.cfm> accessed 8 July 2016

Alternative Dispute Resolution Section of the American Bar Association, 'Task Force on Mediator Credentialing: Final Report' <www.americanbar.org/content/dam/aba/images/dispute_resolution/CredentialingTaskForce.pdf> accessed 8 July 2016

Altobelli T, 'Mediation in the Nineties: The Promise of the Past' (5th National Mediation Conference, Brisbane, May 2000)

American Arbitration Association, 'Commercial Mediation Rules' (1986)

Australian Dispute Resolution Association, 'Application for ADRA Members for National Accreditation through LEADR'

Australian Government Training, 'Qualification details: CHC42312 - Certificate IV in Mediation (Release 1)' <https://training.gov.au/Training/Details/CHC42312> accessed 8 July 2016

Australian Law Reform Commission, 'Alternative or assisted Dispute Resolution: Background Paper 2' (1996)

Australian Standard, 'Guide to the Prevention, Handling and Resolution of Disputes AS 4608-1999' (Sydney, 1999)

Azmi Y, 'Opening Address' (2nd Asian Mediation Association Conference, Kuala Lumpur, 24 February 2011) <http://barcouncil.org.my/conference1/pdf/0.openingaddress.pdf> accessed 8 July 2016

California Dispute Resolution Council (CDRC), 'Standards of Practice for California Mediators' < https://cdrc.memberclicks.net/adr-practice/> accessed 8 July 2016

CIDB Malaysia, 'Mediation Rules' (2000)

CIDB Malaysia, 'Standard Form of Contract for Building Works' (2000)

Clapshaw D and Freeman-Greene S, 'A Mediation Act – Do We Need One?' (AMINZ Conference, Auckland, February 2003)

Construction Industry Council, 'Reference Materials for Application of Dispute Resolution in Construction' (2015) 2 <www.hkcic.org/WorkArea/DownloadAsset.aspx?id=10019&langType=1033> accessed 8 July 2016

Department of Foreign Affairs and Trade (Australia), 'The land and its People' <www.dfat.gov.au/aib/the-land-and-its-people.html> accessed 8 July 2016

Department of Immigration and Border Protection (Australia), 'Fact Sheet: Abolition of the "White Australia" Policy' <www.border.gov.au/about/corporate/information/fact-sheets/08abolition> accessed 8 July 2016

DOJ, 'The Hong Kong Mediation Code' (2010)

European Parliament, 'Study – "Rebooting" The Mediation Directive: Assessing The Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU' (2014)

Federal Court of Australia, 'Mediation' <www.fedcourt.gov.au/case-management-services/ADR/mediation> accessed 8 July 2016

'Full text of Kevin Rudd's speech' *Herald Sun* (Melbourne, 13 February 2008) <www.heraldsun.com.au/news/full-text-of-kevin-rudds-speech/story-e6frf7jo-1111115541155 > accessed 8 July 2016

Green P, 'A Question of Ethics' (AMINZ Conference, 21 July 2002)

Hong Kong International Arbitration Centre, 'Hong Kong International Arbitration Centre Mediation Rules' (1999) <http://hkiac.org/en/mediation/mediation-rules> accessed 8 July 2016

Hong Kong Rules of the High Court and District Court

Hutcheson F, 'Current Trends, Process and Practice in Mediation and Alternative Dispute Resolution' (The New Zealand Department of Labour 2008) <www.dol.govt.nz/PDFs/mediation-resolution.pdf> assessed 8 July 2016

India Civil Procedure, 'Alternative Dispute Resolution and Mediation Rules' (2003) Part I

Kheng O, 'Standard construction contracts in Malaysia: issues and challenges' (Seminar on Innovations in Construction Contracts, Melaka, 31 May 2002) <www.ckoon-law.com/Paper/STANDARD%20CONSTRUCTION%20CONTRACTS.pdf> accessed 8 July 2016

Law Council of Australia, 'Ethical Standards for Mediators' (2006)

Law Council of Australia, 'National Mediator Accreditation System: Draft Proposal for Public Consultation' (2004) <www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/LCA_ADR_Cte_sub_re_National_Mediator_Accreditation_System.pdf> accessed 8 July 2016

Law Council of Australia, 'Submission on Draft Accreditation Standards for Mediation, To Professor Tania Sourdin' (2007) <www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/DraftAccreditationStandardsforMediation.pdf> accessed 8 July 2016

Law Council of Australia, Submission on National Mediator Accreditation System Revised Draft Approval Standards (2013)

Law Reform Commission Committee (Dublin), 'Alternative Dispute Resolution: Mediation and Conciliation' (2010)

Law Society of NSW, 'Report of the EDR (Early Dispute Resolution) Task Force' (1999)

Lee K, 'Mediation Act 2012: Not So Bad After All' *The Sun Daily* (Petaling Jaya, 7 January 2013)

Legislation Advisory Committee, 'Guidelines on Process and Content of Legislation' (2001 edn, last updated in 2007) Appendix 6 <http://www.lac.org.nz/guidelines/2001-edition/> accessed 8 July 2016

Letter from Geoffrey Provis to Professor Tania Sourdin (6 September 2007) <www.liv.asn.au/getattachment/171ff2a4-9f3a-447c-a254-ce59acaf910e/Draft-Accreditation-Standards-for-Mediation.aspx> accessed 8 July 2016

Linklaters, 'Commercial Mediation – A comparative review' (2013).

LIV, 'Accredited Specialisation Application Guidelines 2015: Family Law' <www.liv.asn.au/PDF/Professional-Development/Accredited-Specialisation/Family-law/Family-Law-App-Guidelines.aspx> accessed 8 July 2016

Malaysian Mediation Centre Mediation Rules

McHale J, 'Uniform Mediation Act Discussion Paper' (2000) Uniform Law Conference of Canada <http://cfcj-fcjc.org/sites/default/files/docs/hosted/17494-uniform_mediation.pdf> accessed 8 July 2016

Mediator Standards Board, 'National Mediator Accreditation Standards: Approval Standards' (March 2012)

Mediator Standards Board, 'National Mediator Accreditation Standards: Practice Standards' (March 2012)

Meredith Griffiths, 'Australia Second Most Multicultural Country' *ABC News* (17 November 2010) <www.abc.net.au/news/2010-11-17/australia-second-most-multicultural-country/2339884> accessed 8 July 2016

Moore CW and Santosa AM, 'Developing Appropriate Environmental Conflict Management Procedures in Indonesia' (1995) 19 (3) Culture, Resources and Conflicts <www.culturalsurvival.org/ourpublications/csq/article/developing-appropriate-environmental-conflict-management-procedures-indo> accessed on 8 July 2016

MSB, 'National Mediator Accreditation System (NMAS) – A History of the Development of the Standards' <http://msb.org.au/sites/default/files/documents/A%20History%20of%20the%20Development%20of%20the%20Standards.pdf> accessed 8 July 2016

MSB, 'NMAS' Part II, r 2 (1) <www.msb.org.au/sites/default/files/documents/NMAS%201%20July%202015.pdf> accessed 8 July 2016

MSB, 'National Mediator Accreditation Standards: Approval Standards' (March 2012)

MSB, 'National Mediator Accreditation Standards: Practice Standards' (March 2012)

NADRAC, 'Alternative Dispute Resolution Definitions' (1997)

NADRAC, 'Dispute Resolution Terms: The use of terms in (alternative) dispute resolution' (2003) 4 <www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Dispute%20Resolution%20Terms.DOC> accessed 8 July 2016

NADRAC, *Annual Report 1996-1997* <www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/1996-1997%20Annual%20Report.pdf > accessed 8 July 2016

NADRAC, 'Report to the Commonwealth Attorney-General: A Framework for ADR Standards' (2001) <www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Framework%20for%20ADR%20Standards%20Body%20of%20Report.pdf> accessed 8 July 2016

National Alternative Dispute Resolution Advisory Council, 'National Mediator Accreditation System' (2015)

National Mediation Conference Party Limited Accreditation Sub-Committee, 'Report to the 8th Australian National Mediation Conference in Hobart' (2006)

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

New Zealand Law Commission, 'Delivering Justice for All: A Vision for the New Zealand Courts and Tribunal' (2003)

NMC Proposal

North J, 'Court annexed mediation in Australia – an overview' (Malaysian Law Conference, 17 November 2005) <www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/speeches/20051117CourtAnnexedMediationinAustralia.pdf> accessed 8 July 2016

NSWBA, 'Accreditation and re-accreditation of mediators in 2010' (2010) <www.nswbar.asn.au/circulars/2010/march/accreditation.pdf> accessed 8 July 2016

Panel on Administration of Justice and Legal Services, 'Progress Report from Hong Kong Mediation Accreditation Association Limited' (2014) LC Paper No CB(4)939/13-14(02)

The 14th Biennial National Mediation Conference <www.mediationconference.com.au/past-conferences/> accessed 8 July 2016

The Government of the Hong Kong Special Administrative Region Chief Justice's Working Party On Civil Justice Reform, , 'Interim Report and Consultative Paper on Civil Justice Reform' (2001) <www.info.gov.hk/archive/consult/2002/FullReport.pdf> accessed 8 July 2016

The Government of the Hong Kong Special Administrative Region Department of Justice (DOJ), 'Report of the Working Group on Mediation' (2010)

The Supreme Court of Republic of Indonesia, 'Code of Conduct of Mediator' (2010)

The Supreme Court of Republic of Indonesia, 'Code of Conduct of Mediator' (2010)

Tillett G, 'Conflict Resolution: Training and Education' (Conflict Resolution Trainers' Conference, Sydney, November 1989)

UNCITRAL Model Law on International Commercial Conciliation

United Nations, 'UNCITRAL Model Law on Commercial Conciliation with guide to Enactment and Use 2002' (2004)

Welch D, 'Kevin Rudd says sorry' *Sydney Morning Herald* (Sydney, 13 February 2008) <www.smh.com.au/news/national/rudd-says-sorry/2008/02/13/1202760342960.html> accessed 8 July 2016

Woolf L, 'Access to Justice: Interim Report' (1995)

Zakaria Y, 'Responsibility of Judges under Practice Direction No 5 of 2010' (seminar on mediation with Judge John Clifford Wallace, 1 October 2010) <www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/23062011/speech%20mediation%20jb.docx> accessed on 8 July 2016

Websites

ADR Institute of Canada, 'About Us' <http://adric.ca/about-adr/> accessed 8 July 2016

ADR Institute of Canada, 'Code of Ethics' <http://adric.ca/rules-codes/code-of-ethics/> accessed 8 July 2016

ADR Institute of Canada, 'Complaints and Discipline Policy' <http://adric.ca/rules-codes/complaints-discipline-policy/> accessed 8 July 2016

ADR Institute of Canada, 'Designated Mediators: Continuing Education and Engagement Program Instructions and Point System' <http://adric.ca/wp-content/uploads/2015/11/CEE_Instructions.pdf> accessed 8 July 2016

ADR Institute of Canada, 'National Mediation Rules and Code of Conduct for Mediators: As amended August 3, 2012' <http://adric.ca/pdf/ADRMEDIATIONRULES2014.pdf> accessed 8 July 2016

ADR Institute of Canada, 'National Qualified Mediator Requirements' <http://adric.ca/wp-content/uploads/2015/11/NationalQMedRequirementsFinal.pdf> accessed 8 July 2016

ADR Institute of Canada, 'Principles, Criteria, Protocol, Competencies required for the Designation of Chartered Mediator' <http://adric.ca/wp-content/uploads/2015/05/CMed-Criteria-Sept-2011-Modified-Feb-2016-1.pdf> accessed 8 July 2016

ADR Institute of Canada, 'Professional Designations' <http://adric.ca/resources/professional-designations/> accessed 8 July 2016

ADR Institute of Ontario, 'Approved Course' <www.adrontario.ca/resources/approved_courses.cfm> accessed 8 July 2016

ADR Institute of Ontario, 'Becoming a member' <www.adrontario.ca/resources/becoming_a_member.cfm> accessed 8 July 2016

AMINZ, 'About AMINZ' <www.aminz.org.nz/Category?Action=View&Category_id=641> accessed 8 July 2016

AMINZ, 'AMINZ Code of Ethics' <www.aminz.org.nz/Folder?Action=View%20File&Folder_id=4&File=CodeofEthicsfina

l1December2011.pdf> accessed 8 July 2016

AMINZ, 'Education Syllabus for Associateship' <www.aminz.org.nz/Folder?Action=View%20File&Folder_id=79&File=EducationSyllabusforAssociateship19Jan2011.pdf> accessed 8 July 2016

AMINZ, 'Fellowship' <www.aminz.org.nz/Category?Action=View&Category_id=708> accessed 8 July 2016

Australian Government Training, 'Qualification Details: CHC42308 - Certificate IV in Mediation (Release 1)' <http://training.gov.au/Training/Details/CHC42308> accessed 8 July 2016

Australian Government Training, 'Qualification Details: CHC42312 - Certificate IV in Mediation (Release 1)' <https://training.gov.au/Training/Details/CHC42312> accessed 8 July 2016

Bond University, 'Accreditation as a Mediator in Australia' <http://bond.edu.au/about-bond/academia/faculty-law/dispute-resolution-centre/dispute-resolution-centre-accreditation > accessed 8 July 2016

Chartered Institute of Arbitrators, 'ACDC Mediation Course' (Kuala Lumpur, 11-16 November 2013) <http://ciarb.net.au/mediationtraining2013> accessed 8 July 2016

CIDB Malaysia, 'About Us' <www.cidb.gov.my/cidbv4/index.php?option=com_content&view=article&id=391&Itemid=184&lang=en> accessed 8 July 2016

CIDB Malaysia, 'Corporate Information' <www.cidb.gov.my/cidbv4/index.php?option=com_content&view=article&id=257&Itemid=202&lang=en> accessed 8 July 2016

Community Mediation Centre, 'How to become a CMC Mediator' (2015) <www.mlaw.gov.sg/content/cmc/en/cmc-mediators/how-to-become-a-cmc-mediator.html> accessed 8 July 2016

Confidentiality and "Without Prejudice" in Mediation'<www.grantbrittain.co.nz/downloads/Confidentiality%20and%20Without%20Prejudice.pdf> accessed 8 July 2016

Court Administered Dispute Resolution, 'CDRC Standards of Practice for California Mediators' (2012) s 5 <www.sbcadre.org/neutrals/ethicsmed.htm> accessed 8 July 2016

Courts of New Zealand, 'The Structure of the Court System' <www.courtsofnz.govt.nz/about/system/structure/overview> accessed 8 July 2016

Department of Foreign Affairs and Trade (Australia), 'Australian in Brief' <www.dfat.gov.au/aib/the-land-and-its-people.html> accessed 8 July 2016

Department of Immigration and Border Protection (Australia), 'Abolition of the "White Australia" Policy' <www.border.gov.au/about/corporate/information/fact-sheets/08abolition> accessed 8 July 2016

FAQs for Lawyers, (*Singapore Institute of Legal Education* 2015) <www.silecpdcentre.sg/Lawyer/FAQs/> accessed 8 July 2016

Federal Court of Australia, 'Mediation' <www.fedcourt.gov.au/case-management-services/ADR/mediation> accessed 8 July 2016

Ganesh W, 'Subpoena of Mediator' (Hong Kong Lawyer) <www.hk-lawyer.org/en/article.asp?articleid=2849&c=85> accessed 8 July 2016

Harris S J, 'Mayer Brown JSM Legal Updates - Recent Developments in Mediation' (The Mayer Brown Practices, 2 September 2013) <www.mayerbrown.com/publications/detailprint.aspx?publication= 9524> accessed 8 July 2016

Herbert Smith Freehills, 'Hong Kong – The Why, What, When And How Of Mediating' (11 May 2015) <www.conventuslaw.com/archive/hong-kong-the-why-what-when-and-how-of-mediating/> accessed 8 July 2016

Homepage of the New Zealand Qualifications Authority <www.nzqa.govt.nz> accessed 8 July 2016

Hong Kong Development of Justice <www.doj.gov.hk/eng/public/mediation.html> accessed 8 July 2016

Hong Kong International Arbitration Centre, 'Download Forms MA1' <http://220.241.190.1/images/stories/mediation/Form_MA1.pdf> accessed 8 July 2016

Hong Kong International Arbitration Centre, 'Download Forms MA4' <http://220.241.190.1/images/stories/mediation/Form_MA4.pdf> accessed 8 July 2016

Hong Kong Mediation Accreditation Association Limited, 'Application for Course Accreditation' <www.hkmaal.org.hk/en/trainingcourse_app.php> accessed 8 July 2016

Hong Kong Mediation Accreditation Association Limited, 'Continuous Profession Development for a HKMAAL Accredited Mediator' <www.hkmaal.org.hk/en/CPDCriteria.php> accessed 8 July 2016

Hong Kong Mediation Accreditation Association Limited, 'How to Become a Mediator' <www.hkmaal.org.hk/en/HowToBecomeAMediator.php> accessed 8 July 2016

Hong Kong Mediation Accreditation Association Limited, 'Mediation in Hong Kong' <www.hkmaal.org.hk/en/MediationinHongKong.php> accessed 8 July 2016

IMI, 'CONCILIA Conflict Management and ADR IMI Qualifying Assessment Program' <https://imimediation.org/qap-profile-concilia> accessed 8 July 2016

IMI, 'Criteria for Assessment Programs Qualifying Mediators to be IMI Certified' <https://imimediation.org/criteria-for-qualifying-assessment-programs> accessed 8 July 2016

IMI, 'How to become IMI Certified' <https://imimediation.org/how-to-become-imi-certified> accessed 8 July 2016

IMI, 'IMI Code of Professional Conduct' <https://imimediation.org/imi-code-of-professional-conduct> accessed 8 July 2016

Indian Institute of Arbitration & Mediation, 'Certificate in Dispute Management' <www.arbitrationindia.org/cdm.html> accessed 8 July 2016

Indian Institute of Arbitration & Mediation, 'IIAM Brochure' <www.arbitrationindia.com/pdf/brochure.pdf> accessed 8 July 2016

Indian Institute of Arbitration & Mediation, 'IIAM Mediator Accreditation System & Qualifying Assessment Programs' <www.arbitrationindia.com/pdf/mas_qap.pdf> accessed 8 July 2016

Indian Institute of Arbitration and Mediation, 'IIAM Mediation Rules 2009' <www.arbitrationindia.com/pdf/rules_mediation.pdf> accessed 8 July 2016

Indian Institute of Arbitration & Mediation, 'IIAM Training' <www.arbitrationindia.org/training.html> accessed 8 July 2016

International Mediation Institute (IMI), 'IMI in a Nutshell' <http://imimediation.org/imi-in-a-nutshell> accessed 8 July 2016

International Mediation Institute, 'Meta Culture Consulting: Dispute Transformation and Dialogue' <http://imimediation.org/qap-profile-meta-culture> accessed 8 July 2016

KLRCA, 'About KLRCA' <http://klrca.org/about/> accessed 8 July 2016

KLRCA, 'Becoming a KLRCA Panellist' <http://klrca.org/panellist/becoming-klrca-panellist/> accessed 8 July 2016

KLRCA, 'Dispute Resolution' <http://klrca.org/dispute-resolution/> accessed 8 July 2016

KLRCA, 'Panellist' <http://klrca.org/panellist/> accessed 8 July 2016

KLRCA, 'Policy on Appointment of Panellist' <http://klrca.org/wp-content/uploads/2014/01/KLRCA-APPOINTMENT-POLICY.pdf> accessed 8 July 2016

LawFirms, 'Legal Information - Mediation Disadvantages' <www.lawfirms.com/resources/lawsuits-and-disputes/mediation/mediation-disadvantages.htm> accessed 8 July 2016

Law Institute of Victoria, 'Accredited Specialisation: Application Guidelines (Mediation)' (2015) <www.liv.asn.au/PDF/Professional-Development/Accredited-Specialisation/2015-Mediation-Law-Subject-Guidelines> accessed 8 July 2016

LEADR & IAMA <www.resolution.institute/> accessed 8 July 2016

LEADR & IAMA, 'About LEADR & IAMA' <www.resolution.institute/about-us/about> accessed 8 July 2016

LEADR & IAMA, 'Accreditation' <www.resolution.institute/accreditation/accreditation > accessed 8 July 2016

LEADR & IAMA, 'Accreditation' <www.resolution.institute/accreditation/apply-for-leadr-and-leadr-advanced-accreditation> accessed 8 July 2016

LEADR & IAMA, 'Code of Ethics' <www.resolution.institute/about-us/code-of-ethics/code-of-ethics> accessed 8 July 2016

Letter from Geoffrey Provis to Professor Tania Sourdin (6 September 2007) <www.liv.asn.au/getattachment/171ff2a4-9f3a-447c-a254-ce59acaf910e/Draft-Accreditation-Standards-for-Mediation.aspx> accessed 8 July 2016

Mediation and Conciliation Project Committee, 'Mediation Training Manual of India' ch 1 § 8 <http://supremecourtof india.nic.in/MEDIATION%20TRAINING%20MANUAL%20OF%20INDIA.pdf> accessed 8 July 2016

Meta-Culture, 'Training' <www.meta-culture.in/training> accessed 8 July 2016

MSB, 'National Mediator Accreditation System (NMAS)' <www.msb.org.au/mediator-standards/national-mediator-accreditation-system-nmas> accessed 8 July 2016

MSB, 'National Mediator Accreditation System (NMAS) – A History of the Development of the Standards' <http://msb.org.au/sites/default/files/documents/A%20History%20of%20the%20Development%20of%20the%20Standards.pdf> accessed 8 July 2016

NADRAC, 'ADR Terminology—Responses to NADRAC Discussion' <www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/ADR%20Terminology%20Responses%20to%20NADRAC%20Discussion%20Paper.doc> accessed 8 July 2016

NADRAC, 'Dispute Resolution Terms: The use of terms in (alternative) dispute resolution' (September 2003) <www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Dispute%20Resolution%20Terms.DOC> accessed 8 July 2016

NSWBA, 'Accreditation and re-accreditation of mediators in 2010' (2010) s 3 <www.nswbar.asn.au/circulars/2010/march/accreditation.pdf> accessed 8 July 2016

Oxford Dictionary, 'Accreditation'

<www.oxforddictionaries.com/definition/English/accredit?q=accreditation#accredit_6> accessed 8 July 2016

Oxford Dictionary, 'Competence' <www.oxforddictionaries.com/definition/american_english/competence?region=us&q=competency> assessed 8 July 2016

Pusat Mediasi Nasional, 'Training' <http://pmn.or.id/pmn/training/> accessed 8 July 2016

The Accord Group, 'Core Mediation Training' <http://accordgroup.com.au/tr_cmt.html> accessed 8 July 2016

The Accord Group, 'Training Overview' <http://accordgroup.com.au/tr_overview.html> accessed 8 July 2016

The Association for Conflict Resolution (ACR), 'Who We Are' <www.imis100us2.com/acr/ACR/About_ACR/About_Us/ACR/About_ACR/About_US.aspx?hkey=c52a2d0d-d1c3-4279-a03a-b4b98db0ffe4> accessed 8 July 2016

The Malaysian Bar, 'Details for List of Mediators on the Malaysian Mediation Centre's Panel of Mediators' <www.malaysianbar.org.my/index.php?option=com_docman&task=doc_details&gid=3791&ltemid=332> accessed 8 July 2016

Tourism Malaysia, 'Fast facts – General – Country' <www.tourism.gov.my/en/hk/about-malaysia/fast-facts> accessed 8 July 2016

Tourism Malaysia, 'In Brief - About Malaysia' <www.tourism.gov.my/en/hk/about-malaysia> accessed 8 July 2016

Welch D, 'Kevin Rudd says sorry' *Sydney Morning Herald* (Sydney, 13 February 2008) <www.smh.com.au/news/national/rudd-says-sorry/2008/02/13/1202760342960.html> accessed 8 July 2016

Wikipedia, 'Malaysia' <http://en.wikipedia.org/wiki/Malaysia> accessed 8 July 2016

Wikipedia, 'Mediation in Australia' <http://en.wikipedia.org/wiki/Mediation_in_Australia> accessed 8 July 2016

Wikipedia, ‘States and Federal Territories of Malaysia’ <http://en.wikipedia.org/wiki/States_and_federal_territories_of_Malaysia> accessed 8 July 2016