

TEN TRENDS IN INTERNATIONAL MEDIATION

In this article, the author offers an international overview of mediation developments in the 21st century and identifies contemporary influences such as artificial intelligence and third-party funding. With a focus on mediation of cross-border disputes, the author identifies ten trends in international mediation. These include the changing profile of cross-border disputants and corresponding developments in international mediation practice and law. The role of mediators and lawyers is analysed in the context of the professionalisation of the field through credentialling initiatives and the new specialisation of mediation advocacy. With the growing internationalisation of mediation, there has been greater appreciation of diverse practice models and the cultural assumptions underpinning them. These developments are explored along with the increasing and differentiated use of mediation in mixed mode procedures and a consideration of how technology is challenging conventional understandings of face-to-face mediation. Finally, two topics not traditionally associated with mediation, namely apology legislation and third-party funding, are examined with a view to how they may influence the future of mediation.

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I. What is “trending” in international mediation?

1 In this article the author identifies and explores ten trends in international mediation, that is, mediation of cross-border disputes. The article begins with outlining the diverse demographic of cross-border disputants who engage in mediation, the evolving practice areas of international mediation and the accompanying institutional developments, before moving on to consider the progress made towards an international legal framework for cross-border mediation. The professionalisation of mediators and the emerging specialisation of mediation advocacy are then explored, followed by variations on

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international mediation practice models, the use of mediation in multi-tiered dispute resolution (“MDR”), and the growing sophistication of online dispute resolution (“ODR”). The final two trends consider the impact of apology legislation and third-party funding on mediation internationally. The terms “cross-border” and “international” are used interchangeably.

II. Trend 1: Changing profile of cross-border disputants

2 The profile of cross-border disputants is changing, and with it the nature of international dispute resolution and the growth of mediation in this area. The increasing accessibility of the Internet and the corresponding growth of micro and small business enterprises engaging in international commerce have contributed to a significantly higher volume of international transactions and, as a result, international disputes. Consider for example, the Pandora’s box of cross-border disputes, which have emerged as a result of business-to-consumer (“B2C”) and business-to-business (“B2B”) online transactions. Consumers increasingly purchase goods online from the comfort of their own homes, blissfully unaware of the place from where the goods are shipped, and when and where in time, space and geography they have entered into the purchase contract. When a problem arises and small business owners or consumers seek redress, they may – unexpectedly – find themselves engaged in an international dispute.

3 Small business owners and consumers are not the only new kids on the cross-border mediation block. Separated parents residing in different parts of the world may find themselves caught up in deeply complex family conflict, as evinced by cases of international child kidnapping.¹ Today’s global mobility has seen an increase in these types of disputes; here mediation may be used to support dialogue and negotiation between parents.

4 In yet another illustration of this changing demographic, the profiles of stakeholders in the international investment community have diversified to include e-traders, women and small-business entrepreneurs. The nature of ownership of major industry players – such as in health, utilities and public transport services – have broadly been transformed from mostly State-owned or State-run departments into private (or partially privatised) businesses. Moreover, political and legal changes in some parts of the world have provided traditional people with a degree of self-determination. This has in turn given them a voice

1 Cf Theresa Tan, “Hide and Seek: Heart-breaking Tales of Child Abduction by a Parent When a Marriage Sours” *The Straits Times* (1 February 2019).

in making decisions about their future, particularly in relation to how the resources attached to their land and seabed areas are used and by whom. Here village chiefs can find themselves sitting across the negotiating table from mining executives, venture capitalists and government ministers as they sort through complex issues connecting law, economics, employment, housing, environmental and resource issues, public policy, culture, human rights, and customary law.

5 This first trend highlights how all sorts of people are finding themselves engaged in cross-border disputes, including (online) consumers, small business operators, parents and chiefs in remote indigenous villages. Increasing diversity in the characteristics and needs of disputants in cross-border disputes has enhanced the appeal of mediation as a flexible, informal and relatively cost-effective forum.

III. Trend 2: Opening up of international mediation practice

6 As international mediation continues to gain traction especially in the commercial sphere, we observe the development of institutional capacity to serve the needs of disputants and professional mediators operating in this changing dispute resolution landscape. The mid- to late 1990s signalled the beginning of the institutionalisation of cross-border mediation services. International commercial arbitration institutions – such as the International Chamber of Commerce (“ICC”) in Paris,² the London Court of International Arbitration³ and subsequently the Asian International Arbitration Centre⁴ – began to offer international mediation, while national organisations – such as the Resolution Institute in Sydney,⁵ Alternative Dispute Resolution (“ADR”) Centre in Rome, Centre for Effective Dispute Resolution in London, International Institute for Conflict Prevention and Resolution in New York and JAMS in California – began to extend their existing mediation services and facilities across borders. A more recent development has been the establishment of organisations dedicated to the provision of international mediation services, such as the Singapore International Mediation Centre (“SIMC”),⁶ the Japan International Mediation Centre-Kyoto⁷ and new organisations focusing on both international mediation

2 See the International Chamber of Commerce website <https://iccwbo.org>.

3 See the London Court of International Arbitration website <https://www.lcia.org>.

4 See the Asian International Arbitration Centre (“AIAC”) website <https://www.aiac.world/>. AIAC was formerly the Kuala Lumpur Regional Centre for Arbitration.

5 See the Resolution Institute (“RI”) website <https://www.resolution.institute>. In Australia RI was formerly known as LEADR.

6 See the Singapore International Mediation Centre website www.simc.com.sg.

7 See James Claxton & Luke Nottage, “*Wa* and the Japan International Mediation Centre-Kyoto” *Kluwer Mediation Blog* (1 February 2018).

and arbitration services such as the Bali International Arbitration and Mediation Centre.⁸

7 In most cases, international commercial mediation is founded upon flexible and mutually derived contractual arrangements, and can take place on an *ad hoc* or institutional basis. International commercial mediation has been successfully used in a range of sectors including manufacturing, mining, construction, intellectual property, and insurance and reinsurance.⁹

8 In addition to institutions that offer *commercial mediation* for cross-border disputes, institutions specialising in specific practice areas of international mediation are emerging. Specialisation areas include consumer e-disputes, family, intellectual property (“IP”), investor–State disputes and State-to-State disputes. A number of illustrations follow.

A. *Mediation of consumer e-disputes*

9 E-commerce and e-conflict have contributed to a proliferation of institutional ODR service providers across borders serving B2B and B2C disputes. Consumer e-mediation for cross-border disputes has increased dramatically in recent years especially with frameworks such as the European Union (“EU”) online dispute resolution platform. Trend 8¹⁰ on ODR addresses online consumer mediation.

B. *Family mediation*

10 Cross-border family disputes about parenting and property division are increasingly deliberated in alternative venues to the courts, especially in relation to child kidnapping cases. The issues which may arise from cross-border family disputes are complicated, owing in part to the advent of modern communication and transport technology. Further, they emerge from deeply embedded conflict behaviour between the parents that cannot be addressed within the confines of international legal proceedings.¹¹

8 See the Bali International Arbitration and Mediation Centre website <http://www.baliarbitrationsummit.com/index.php>.

9 Alastair Henderson & Anita Phillips, “Mediation in International Commercial Disputes: Current Trends” in *Mediation in Singapore – A Practical Guide* (Danny McFadden & George Lim SC eds) (Sweet & Maxwell, 2nd Ed, 2017) at paras 19.024–19.044.

10 See paras 59–71 below.

11 Take, for example, this rather dramatic scenario which was recently reported in Singapore. With the help of his immediate family a father (Singapore national) seizes custody of a young autistic child from London (British national) through legal proceedings in Singapore whilst holidaying in Singapore from the mother,

(cont'd on the next page)

11 Mediation is well suited as a dispute resolution mechanism for these and other kinds of international family disputes.¹² Numerous organisations have been established to support the mediation of such cross-border family disputes. They include Reunite (UK),¹³ Mission d'aide à la médiation internationale pour les familles (MAMIF) (France),¹⁴ Médiation familiale binationale en Europe (MFBE) (Germany/France),¹⁵ Lawyers in Europe on Parental Child Abduction,¹⁶ and the International Social Service ("ISS") based in Geneva.¹⁷ At the time of writing ISS has convened a series of meetings called the Collaborative Process, the work of which has generated a set of core principles for the conduct of international family mediation. The Collaborative Process continues to work on establishing a global network of international family mediators with accompanying terms of reference and oversight bodies.¹⁸

12 In terms of cross-border regulatory instruments,¹⁹ the Hague Conference on Private International Law has produced three relevant Conventions. The first is the Hague Child Protection Convention of 1996²⁰ ("1996 Hague Convention") that promotes the use of mediation

who in turn abets assistance from an international non-profit child abduction agency to enter Singapore illegally to kidnap their child: this was what happened in the case of *TSF v TSE* [2018] 2 SLR 833.

- 12 On cross-border family mediation see, eg, the European Code of Conduct for Mediators, Recommendation No R(98)1 on Family Mediation in Europe (Council of Europe 1998), and the European Charter for Training in Family Mediation for Separation and Divorce (1992).
- 13 See the Reunite (UK) website www.reunite.org.
- 14 See the Mission d'aide à la médiation internationale pour les familles website www.enlevement-parental.justice.gouv.fr.
- 15 See the Médiation familiale binationale en Europe website www.mfbe.eu.
- 16 The Lawyers in Europe on Parental Child Abduction website may be accessed at <https://www.lepca.eu>.
- 17 The International Social Service website may be accessed at <http://www.geneve-int.ch/international-social-service-iss-0>.
- 18 This is reported by Sir Matthew Thorpe in Sir Matthew Thorpe, "Mediation to Resolve Child Abduction Issues for Hague and non-Hague Convention Countries" (2018) 30 SAclJ 575 at 584–585, paras 27–28. The work of the International Social Service seems to be tackling issues of lack of harmonisation in international family mediation highlighted by the Hague Conference on Private International Law, *Feasibility Study on Cross-Border Mediation in Family Matters* (General Affairs and Policy, 2007) at pp 21–28. See Hague Conference on Private International Law, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Part V – Mediation* (May 2011).
- 19 On the international regulatory framework for cross-border family mediation, see Christoph Paul & Sybille Kiesewetter, *Cross-border Family Mediation: International Parental Child Abduction, Custody and Access Cases* (Berlin: Wolfgang Metzner Verlag, 2nd Ed, 2014).
- 20 Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (19 October 1996; entry into force 1 January 2002).

with respect to matters that fall under the Convention.²¹ The Hague Adult Protection Convention of 2000²² is a sister convention reflecting much of the 1996 Hague Convention in the context of vulnerable adults. Finally, the Hague Child Abduction Convention of 1980²³ also makes provision for mediation. In addition, council regulations, directives and recommendations have been adopted that specifically relate to cross-border family mediation, reinforcing support for mediation in family disputes.²⁴

C. *Intellectual property mediation*

13 In terms of intellectual property (“IP”) mediation, World Intellectual Property Organization (“WIPO”) and the European Union Intellectual Property Organisation are the primary institutional providers.²⁵ Service providers for the Internet Corporation for Assigned Names and Numbers²⁶ Uniform Domain Name Dispute Resolution policy include the Asian Domain Name Dispute Resolution Centre,²⁷ the National Arbitration Forum²⁸ based in the US and WIPO. In Singapore,

21 See Art 31 of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (19 October 1996; entry into force 1 January 2002).

22 Hague Convention of 13 January 2000 on the International Protection of Adults (1 January 2009; entry into force 1 January 2009).

23 Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (25 October 1980; entry into force 1 December 1983).

24 See Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility; Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes; and Recommendation on Family Mediation and Equality of Sexes (Recommendation 1639 (2003)) adopted 21 June 2004, Recommendation No R(98)1 of the Committee of Ministers to Member States on Family Mediation (adopted 21 January 1998).

25 The World Intellectual Property Organization (“WIPO”) has an Arbitration and Mediation Centre. WIPO has also been partnering with intellectual property offices worldwide to promote alternative dispute resolution schemes. WIPO has a database of over 1,500 independent WIPO arbitrators, mediators and experts. The List of Neutrals is not made public but comprises a range of highly specialised international practitioners and experts with specialised knowledge in the areas of patents, trademarks, copyright, designs or other form of intellectual property that is the subject of the dispute, and seasoned commercial dispute resolution generalists. The WIPO Neutrals webpage is available at <http://www.wipo.int/amc/en/neutrals/index.html> (accessed June 2019).

26 Internet Corporation for Assigned Names and Numbers (ICANN) website www.icann.org.

27 Asian Domain Name Dispute Resolution Centre (ADNDRC) website www.adndrc.org.

28 National Arbitration Forum (NAF) website www.domains.adrforum.com.

the Singapore Mediation Centre also offers the Singapore Domain Name Dispute Resolution Service, by which parties are invited to consider mediation; otherwise, the dispute is resolved by an Administrative Panel pursuant to the Singapore Domain Name Dispute Resolution Policy.²⁹ The WIPO Centre has administered more than 580 mediation and arbitration cases between 2009 and 2017;³⁰ for mediation, it boasts a settlement rate of 70%.³¹ Further, in the US, intellectual property showed the highest growth in mediation use of any specialty area between 1997 and 2011.³² From a legal perspective, the territorial nature of IP rights contrasted with the international character of disputes renders litigation and arbitration highly unpredictable and costly modes of dispute resolution.³³ Further, challenges pertaining to the arbitrability of IP disputes³⁴ have increased interest in IP mediation for cross-border disputes. In international commercial relationships involving IP rights, it is common for parties to collaborate in the research and development process of novel products or technologies, or work together to exploit the fruits of their research and development process.³⁵ When conflicts emerge, issues typically involve highly technical information, access to know-how, knowledge management, innovations and trade secrets generated from a cross-border business relationship that has broken down.³⁶ Through mediation, creative and business-smart solutions such

29 Singapore Mediation Centre, “Singapore Domain Name Dispute Resolution Service” <http://www.mediation.com.sg/business-services/singapore-domain-name-dispute-resolution-services/> (accessed June 2019).

30 See World Intellectual Property Organization, “WIPO Caseload Summary” <http://www.wipo.int/amc/en/center/caseload.html> (accessed 4 November 2018). For mediation case examples, see World Intellectual Property Organization, “WIPO Mediation Case Examples” <http://www.wipo.int/amc/en/mediation/case-example.html> (accessed 4 November 2018).

31 See World Intellectual Property Organization, “WIPO Caseload Summary” <http://www.wipo.int/amc/en/center/caseload.html> (accessed 4 November 2018).

32 Thomas Stipanowich & J Ryan Lamare, “Living with ‘ADR’: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations” (2014) 19(1) *Harv Negot L Rev* 1.

33 Nick Gardner, “Mediation and Its Relevance to Intellectual Property Disputes” (2014) 9(7) *Journal of Intellectual Property Law & Practice* 565 at 566.

34 Jacques De Werra, “Arbitrating International Intellectual Property Disputes: Time to Think beyond the Issue of (Non-)Arbitrability” (2012) *Int’l Bus LJ* 299 at 301; Ignacio de Castro & Panagiotis Chalkias, “Mediation and Arbitration of Intellectual Property and Technology Disputes – The Operation of the World Intellectual Property Organization Arbitration and Mediation Center” (2012) 24 *SAclJ* 1059.

35 Ignacio de Castro & Panagiotis Chalkias, “Mediation and Arbitration of Intellectual Property and Technology Disputes – The Operation of the World Intellectual Property Organization Arbitration and Mediation Center” (2012) 24 *SAclJ* 1059.

36 Nick Gardner, “Mediation and Its Relevance to Intellectual Property Disputes” (2014) 9(7) *Journal of Intellectual Property Law & Practice* 565 at 571.

as the negotiation of genuine co-existence agreements in trademark infringement cases that do not breach anti-trust laws are possible.³⁷

D. Investor–State mediation

14 Since the investor–State dispute settlement (“ISDS”) regime emerged in the 1960s, changes in the environment in which the resolution of international investment-related disputes takes place have been nothing short of transformational. As indicated previously, the profile of parties has shifted, signalling a need for greater flexibility, diversity and accessibility in dispute resolution forums. Moreover, a discernible increase in dissatisfaction with investor–State arbitration has emerged, fuelled by concerns about the cost and length of proceedings, as well as the unpredictability of outcomes and problems with compliance.³⁸

15 Against this background, the United Nations (“UN”) Commission on International Trade Law (“UNCITRAL”) Working Group (“WG”) III has commenced deliberations on possible reforms of the ISDS system,³⁹ which include considering the role mediation can play in the multiparty, multi-interest context in which investors and states often find themselves.⁴⁰ Other institutionally led mediation initiatives include the International Bar Association Rules for Investor–State Mediation,⁴¹ the International Centre for Settlement of Investment Disputes’ proposed new set of mediation rules,⁴² the Guide

37 Mary Vitoria QC, “Mediation of Intellectual Property Disputes” (2006) 1(6) *Journal of Intellectual Property Law & Practice* 398 at 401.

38 See Rachel L Wellhausen, “Recent Trends in Investor–State Dispute Settlement” (2016) 7 *Journal of International Dispute Settlement* 117 at 134.

39 See, eg, United Nations Commission on International Trade Law (hereinafter “UNCITRAL”), *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-fourth Session* (Vienna, 27 November–1 December 2017) (A/CN.9/930/Rev.1) (19 December 2017) Part I at p 11.

40 This is particularly significant given the nature of Investor–State Dispute Settlement, which often involves constellations in which rights protected under an investment treaty collide with public policies taken in order to advance interests protected by other international legal regimes, for example, human rights treaties or treaties protecting the environment and public health. See Gus Van Harten, “Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law” in *International Investment Law and Comparative Public Law* (Stephan W Schill ed) (Oxford University Press, 2010) Part IV, ch 20 at p 627.

41 International Bar Association, Mediation Committee, State Mediation Subcommittee, *IBA Rules for Investor-State Mediation* (4 October 2012).

42 See the International Centre for Settlement of Investment Disputes website <https://icsid.worldbank.org/en/amendments> (accessed June 2019) and Ana Ubilava & Luke Nottage, “ICSID’s New Mediation Rules: A Small but Positive Step Forward” https://icsid.worldbank.org/en/Documents/Ubilava_Nottage_10.17.2018.pdf (accessed June 2019).

on Investment Mediation endorsed by the Energy Charter Conference 2016⁴³ and the International Mediation Institute's ("IMI's") Investor-State Mediation Taskforce set up in 2013.⁴⁴ In addition, treaties are increasingly incorporating mediation into their dispute resolution clauses as the following examples show. The ASEAN Comprehensive Investment Agreement⁴⁵ contains provisions for investment disputes to be resolved through litigation or arbitration⁴⁶ and also "encourages prompt management of conflicts through efficient techniques such as conciliation and mediation."⁴⁷ The EU-Canada Comprehensive Economic and Trade Agreement⁴⁸ includes provisions⁴⁹ that encourage the use of mediation at any time⁵⁰ and without prejudice to parties' rights or legal positions.⁵¹ The Investment Agreement of the Mainland and Hong Kong Closer Economic Partnership Arrangement includes a mediation mechanism for the settlement of investment disputes, which can be initiated by the investor. Finally, the Indonesia-Australia Comprehensive Economic Partnership Agreement⁵² contains a dispute settlement mechanism and includes requirements for consultation and mediation.⁵³

E. State-to-State mediation

16 The increasing activity in cross-border mediation is not limited to investment disputes, extending to State-to-State disputes. In the Asia-Pacific region, there is interest in the creation of a new permanent dispute settlement mechanism of the Asia-Pacific Regional Mediation Organisation for the mediated resolution of State-to-State disputes in

43 See Energy Charter Secretariat, "Decision of the Energy Charter Conference" (CCDEC 2016, 12 INV) (19 July 2016).

44 International Mediation Institute, Investor-State Mediation Taskforce, *Response to the European Commission Public Consultation on a Multilateral Reform of Investment Dispute Resolution* (15 March 2017).

45 26 February 2009.

46 See ASEAN Comprehensive Investment Agreement (26 February 2009) Section B.

47 ASEAN, *ASEAN Comprehensive Investment Agreement: A Guidebook for Business and Investors* (March 2013) at p 23.

48 30 October 2016.

49 EU-Canada Comprehensive Economic and Trade Agreement (30 October 2016) Art 8.20.

50 EU-Canada Comprehensive Economic and Trade Agreement (30 October 2016) Art 8.20(1).

51 EU-Canada Comprehensive Economic and Trade Agreement (30 October 2016) Art 8.20(2).

52 4 March 2019. See Kevin Elbert, "The Indonesia-Australia Comprehensive Economic Partnership Agreement: The Good, the Not-So-Good and the In-Between" *Kluwer Arbitration Blog* (27 April 2019).

53 See Indonesia-Australia Comprehensive Economic Partnership Agreement (4 March 2019) ch 20 (Consultations and Dispute Settlement).

the region.⁵⁴ This proposal may gain further traction given the successful conciliation (conducted under the auspices of the Permanent Court of Arbitration) between Australia and Timor-Leste in relation to their long-running and bitter maritime boundary dispute over the Timor Sea.⁵⁵ The conciliation process concluded in September 2017 with an agreement between the two countries, thereby demonstrating the power of consensual dispute management in relation to State-to-State disputes.⁵⁶

IV. Trend 3: International legal framework for mediation

17 The gradual and steady growth of international mediation practice and its institutionalisation has been accompanied by calls for a more robust legal framework to support mediation of cross-border disputes. International rules that regulate mediation for commercial disputes (or conciliation, as it was often referred to last century) are not new. To illustrate, the UNCITRAL introduced conciliation rules in 1980.⁵⁷ After the turn of the 21st century, a wave of international mediation instruments emerged, the most significant of which are the EU Mediation Directive on Civil and Commercial Aspects of Mediation (2008)⁵⁸ (“EU Directive on Mediation”), the UN Convention on International Settlement Agreements Resulting from Mediation⁵⁹ (“Singapore Convention”) and the UNCITRAL Model Law on International Commercial Mediation (2018).⁶⁰ Each of these legal instruments will be outlined, beginning with the EU Directive on Mediation.

18 First, the EU Directive on Mediation establishes a regulatory framework within which EU member states are required to address the

54 Chang-fa Lo *et al.*, “Concept Paper on the Creation of a Permanent ‘Asia-Pacific Regional Mediation Organisation’ for State-to-State (Economy-to-Economy) Disputes” (2017) 10(2) *Contemp Asia Arb J* 321.

55 Ben Doherty, “Australia and Timor-Leste to Negotiate Permanent Maritime Boundary” *The Guardian* (9 January 2017).

56 Paul Karp, “Australia and Timor-Leste Strike Deal on Maritime Boundary Dispute” *The Guardian* (3 September 2017).

57 UNCITRAL Conciliation Rules GA Res 35/52, adopted at the United Nations General Assembly, 35th Session (23 July 1980).

58 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 (hereinafter “EU Directive on Mediation”).

59 GA Res 73/198, adopted at the United Nations General Assembly, 73rd Session (20 December 2018).

60 Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation GA Res 73/199, adopted at the United Nations General Assembly, 73rd Session (20 December 2018).

following aspects of cross-border civil and commercial mediation law throughout the EU region.

- (a) triggering mechanisms for mediation;⁶¹
- (b) quality of mediators and mediation processes;⁶²
- (c) operation of limitation periods during mediation;⁶³
- (d) status of international mediated settlement agreements (“iMSAs”) within the EU;⁶⁴ and
- (e) admissibility of mediation evidence in subsequent judicial proceedings.⁶⁵

While the Directive requires regulation of these aspects of cross-border mediation within the EU, it does not require the relevant laws to be uniform among EU member states. The aim of the Directive is to promote harmonisation without compromising the diversity of mediation practice. Consequently, variations in national rules may, and do, emerge within the framework of the Directive. For example, while the Directive does address enforcement of iMSAs within the EU, it does not establish a uniform mechanism for expedited enforcement.

19 Next, we turn to the Singapore Convention, which was adopted by the UN General Assembly in 2018.⁶⁶ While the Convention is analysed in detail in other contributions to this journal,⁶⁷ it is useful to make a number of comments here. The Singapore Convention is the first UN multilateral treaty focused on mediation. It seeks to address a major critique of the international mediation system, namely the

61 EU Directive on Mediation Art 5.

62 EU Directive on Mediation Art 4.

63 EU Directive on Mediation Art 8.

64 EU Directive on Mediation Art 6.

65 EU Directive on Mediation Art 7.

66 United Nations General Assembly, *Resolution Adopted by the General Assembly on 20 December 2019 (A/RES/73/198)* (11 January 2019). See United Nations Information Service, “General Assembly Adopts the United Nations Convention on International Settlement Agreements Resulting from Mediation”, press release (UNIS/L/271) (21 December 2018) <<http://www.unis.unvienna.org/unis/en/pressrels/2018/unisl271.html>> (accessed 12 January 2019).

67 See, eg, Natalie Morris-Sharma, “Constructing the Convention on Mediation: The Chairperson’s Perspective” (2019) 31 SAclJ 487; Khory McCormick & Sharon Ong, “Through the Looking Glass: An Insider’s Perspective into the Making of the Singapore Convention on Mediation” (2019) 31 SAclJ 520; and Shouyu Chong & Felix Steffek, “Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective” (2019) 31 SAclJ 448.

absence of an expedited enforcement system for iMSAs.⁶⁸ Absent circumstances in which iMSAs may be endorsed as consent arbitral awards⁶⁹ or court orders⁷⁰ – and consequently have access to international recognition and enforcement systems for foreign arbitral awards⁷¹ and court judgments⁷² respectively – iMSAs may face significant enforcement delays and legal obstacles in foreign jurisdictions.⁷³

20 The Singapore Convention aims to change this situation by effectively elevating iMSAs to a *sui generis* instrument recognised by international law.⁷⁴ The Convention establishes a minimalist and efficient framework for the recognition and enforcement of iMSAs internationally. It does this by offering to parties of iMSAs that fall within its scope the possibility to proceed to a relevant court of a State to seek relief.⁷⁵ The party seeking relief will file an application before that court and submit as evidence the iMSA containing parties' signatures and an attestation by the mediator or mediation institution that the

68 Stacie Strong, "Realizing Rationality: An Empirical Assessment of International Commercial Mediation" (2016) 74(4) Wash & Lee L Rev 1973 at 2014; see also Jacqueline Nolan-Haley, "Mediation: The 'New Arbitration'" (2012) 17 Harv Negot L Rev 61 at 88–89.

69 See Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed, 2014) at pp 3021–3027 and see Art 30 of the UNCITRAL Model Law on International Commercial Arbitration (A/40/17, Annex I; A/61/17, Annex I) (21 June 1985; amended 7 July 2006).

70 Consider the Singapore Mediation Act 2017 (Act 1 of 2017); and the following commentary in Dorcas Quek Anderson, "A Coming of Age for Mediation in Singapore? Mediation Act 2016" (2017) 29 SAclJ 275.

71 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS 3) (10 June 1958; entry into force 7 June 1959).

72 Consider, for instance, enforceability of judicial settlements or *transactions judiciaires* under Art 12 of the Hague Convention of 30 June 2005 on Choice of Court Agreements (30 June 2005; entry into force 1 October 2015) ("2005 Hague Convention"). Of course, one has to bear in mind that in order for such a judicial settlement to be enforceable under the 2005 Hague Convention, there must be a relevant written choice of court agreement in the settlement agreement document, and that the subject matter of the settlement agreement must fall outside of the Art 2 exclusions from that Convention's scope.

73 See James R Coben & Peter N Thompson, "Disputing Irony: A Systematic Look at Litigation about Mediation" (2006) 11 Harv Negot L Rev 43 at 47–48 and James R Coben & Peter N Thompson, "Mediation Litigation Trends: 1999–2007" (2007) 1 *World Arbitration & Mediation Review* 395.

74 On the Convention on International Settlement Agreements Resulting from Mediation GA Res 73/198, adopted at the United Nations General Assembly, 73rd Session (20 December 2018) (hereinafter "Singapore Convention on Mediation"), see generally Nadja Alexander & Shouyu Chong, *The Singapore Convention on Mediation: A Commentary* (Alphen aan den Rijn: Wolters Kluwer, 2019). The summary of the Singapore Convention on Mediation is adapted from the introduction of this work.

75 See Arts 1 and 3 of the Singapore Convention on Mediation.

settlement resulted from mediation.⁷⁶ Provided the iMSA does not fall foul of any of the grounds for refusal defined in Art 5 of the Singapore Convention, it will be directly enforced. Alternatively, issues resolved and contained in the iMSA may be administered as a complete defence to the commencement of litigation or arbitral proceedings where parties seek to contest issues already resolved and contained in the iMSA. Key to the direct enforcement method is that there is no requirement for an iMSA to undergo a review process at the place where it was concluded (the State of origin). In other words, there is no “seat” of mediation in the sense that there is a “seat” of arbitration. Court review in terms of the Convention only occurs in the State of enforcement.

21 The Convention explicitly excludes iMSAs which may be otherwise enforceable as an arbitral award or a court judgment or order.⁷⁷ Therefore, the Convention’s primary purpose is to fill the enforceability gap by facilitating the expedited enforcement of iMSAs when regulatory regimes such as the New York Convention, the Hague Convention on Choice of Court Agreements⁷⁸ and other cross-border enforcement arrangements do not apply.⁷⁹ Beyond being an instrument to facilitate enforcement of iMSAs, however, the deeper intention behind the Singapore Convention is to provide a regulatory foundation

76 See Art 4 of the Singapore Convention on Mediation. Article 4 further provides that other forms of suitable evidence may be submitted in the absence of the mediator’s signature on the international mediated settlement agreement or an attestation by the mediator or mediation institution that the settlement agreement resulted from mediation: see commentary to Art 4.

77 Singapore Convention on Mediation Art 1(3). For an example of international mediated settlement agreements that may be enforceable as a court judgement, see s 12 of the Singapore Mediation Act 2017 (Act 1 of 2017).

78 Consider the enforceability of judicial settlements or *transactions judiciaires* under Art 12 of the Hague Convention of 30 June 2005 on Choice of Court Agreements (30 June 2005; entry into force 1 October 2015).

79 Nadja Alexander & Shouyu Chong, “The New UN Convention on Mediation (aka the ‘Singapore Convention’) – Why It’s Important for Hong Kong” (2019) *Hong Kong Lawyer* 26 at 28. In context of judgments it is also useful to note the Standing International Forum of Commercial Courts (“SIFOCC”) consensus on a multilateral memorandum of understanding to enforce judgments – likely to include international mediated settlement agreements endorsed as court orders – of commercial courts across a wide range of jurisdictions: see the SIFOCC website <https://www.sifocc.org/about-us/> (accessed 1 February 2019). Additionally, the applicability of the Singapore Convention must also be de-conflicted with the forthcoming Draft Convention of the Special Commission on the Recognition and Enforcement of Foreign Judgments, which is at the moment of publication of this article currently in its drafting stages under the purview of the Hague Conference on Private International Law: see Francisco J Garcimartín Alférez & Geneviève Saumier, *Fourth Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments 24–29 May 2018, Judgments Convention: Revised Preliminary Explanatory Report* (May 2018).

to support the further development of mediation as a standalone dispute resolution mechanism in cross-border settings.⁸⁰

22 Finally, the UNCITRAL Model Law on International Commercial Mediation amends the Model Law on International Commercial Conciliation of 2002.⁸¹ Unlike the Singapore Convention, the Model Law on Mediation is not a treaty and cannot bind states directly. Rather, UNCITRAL model laws offer member and non-member states a regulatory model for adoption – with or without variation – into their domestic legislation. Notably, the Model Law was amended at the same time the Singapore Convention was drafted and finalised. For the first time in the history of UNCITRAL a working group developed two legal instruments in parallel, thereby giving states a choice to sign on to the Convention with its associated treaty obligations or alternatively to adopt Model Law provisions. Whereas the Singapore Convention focuses on the recognition and enforcement of iMSAs, the Model Law offers a regulatory template for states seeking to enact a comprehensive regulatory system for mediation.

23 The previous Model Law on Conciliation had been adopted in approximately 33 jurisdictions (including a number of states in the US).⁸² It offered a wide definition of conciliation consistent with that of the Singapore Convention, which included facilitative and advisory dispute resolution processes.⁸³ It addressed procedural mediation matters such as commencement⁸⁴ and termination of mediation,⁸⁵ and appointment of mediators;⁸⁶ it also contained provisions on rights and obligations of participants in mediation including the mediator such as confidentiality,⁸⁷ admissibility of mediation evidence,⁸⁸ parallel

80 Nadjia Alexander & Shouyu Chong, “An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore” (2018) 22(4) *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement* 37 at 38. On regulatory robustness of mediation practice and law, see generally Nadjia Alexander, “Introducing Regulatory Robustness Ratings for Mediation Regimes in the EU” in *EU Mediation Law Handbook – Regulatory Robustness Ratings for Mediation Regimes* (Nadjia Alexander et al eds) (Wolters Kluwer, 2017).

81 GA Res 57/18, adopted at the United Nations General Assembly, 57th Session (19 November 2002).

82 UNCITRAL, “Status: UNCITRAL Model Law on International Commercial Conciliation (2002)” <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html> (accessed June 2019).

83 Model Law on International Commercial Conciliation GA Res 57/18, adopted at the United Nations General Assembly, 57th Session (19 November 2002) (hereinafter “Model Law on Conciliation”) Art 1(3).

84 Model Law on Conciliation Art 4.

85 Model Law on Conciliation Art 11.

86 Model Law on Conciliation Art 5.

87 Model Law on Conciliation Arts 8 and 9.

88 Model Law on Conciliation Art 10.

proceedings,⁸⁹ impact of mediation on litigation limitation periods,⁹⁰ mediator impartiality⁹¹ and the limitations on mediators acting as arbitrators and legal counsel in relation to the same matter.⁹² Significantly, it addressed the issue of enforceability of iMSAs⁹³ but fell short of identifying a uniform or harmonised system for recognition and enforcement; rather, the Model Law on Conciliation left it open to states to insert their own enforcement mechanism when adopting the Model Law.

24 The amendments to the Model Law on Conciliation focused on inserting provisions on the enforceability of iMSAs that corresponded to the provisions in the Singapore Convention with a view to ensuring the compatibility of the two instruments. In addition, the Working Group II drafters changed the nomenclature from “conciliation” to “mediation” to reflect international developments in the field. Apart from these changes, the terms of the original Model Law on Conciliation remain largely unaltered.

25 In addition to these three significant legal instruments, there are numerous others that contribute to the rapidly developing international law of mediation in specific practice areas such as family disputes,⁹⁴ consumer dispute resolution⁹⁵ and online dispute resolution.⁹⁶

89 Model Law on Conciliation Art 13.

90 Model Law on Conciliation optional Art X.

91 Model Law on Conciliation Art 6(3).

92 Model Law on Conciliation Art 12.

93 Model Law on Conciliation Art 14.

94 The Hague Conference on Private International Law has produced three relevant Conventions. The first is the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (19 October 1996; entry into force 1 January 2002) (“Hague Convention 1996”), which promotes the use of mediation with respect to matters that fall under the Convention (Art 31). The Convention of 13 January 2000 on the International Protection of Adults (13 January 2000; entry into force 1 January 2009) is a sister convention reflecting much of the Hague Convention 1996 in the context of vulnerable adults. Finally, the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (25 October 1980; entry into force 1 December 1983) also makes provision for mediation. In the European Union, council regulations, directives, and recommendations have been adopted that specifically relate to cross-border family mediation, reinforcing support for mediation in family disputes.

95 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

96 Consider Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation

(cont'd on the next page)

As indicated in Trend 2, bilateral investment treaties increasingly include mediation as part of their dispute settlement provisions.⁹⁷ Such extensive regulatory activity signals shifting preferences in international dispute resolution.

V. Trend 4: Professionalisation of mediators

26 In most countries, professionalisation of the mediation field began in the 1980s or 1990s with institutional schemes to credential mediators.⁹⁸ These schemes are typically offered by dispute resolution organisations and professional bodies such as law associations, and local courts. Since 2000 there has been a significant growth in national mediator credentialling schemes around the world; these may be legislative (for example, in Austria), industry-based (for example, in Australia and Hong Kong) or a combination of both (for example, in Germany and Singapore).⁹⁹ Generally, national mediator credentialling schemes set uniform standards, assessment protocols and continuing training requirements for the formal recognition of professional mediators in that jurisdiction.

27 International mediation service providers place mediators from diverse countries on their panels. In doing so they effectively recognise a variety of national and institutional mediator credentials and, in some cases, professional standards. Parallel to this development, the past

on consumer ODR). Also consider that at the time of writing, the Asia-Pacific Economic Cooperation (“APEC”) is piloting a project to advance a governance structure and procedural rules to aid the growth of cross-border online dispute resolution of business-to-business disputes which involve APEC-member states: for more details, see “Annex A: APEC Cross-border e-Commerce Facilitation Framework”, Meeting Papers from the 2017 APEC Annual Ministerial Meeting https://apec.org/Meeting-Papers/Annual-Ministerial-Meetings/2017/2017_amm/Annex-A (accessed 4 November 2018).

97 See, for example, the Mediation Mechanism for Settlement of Investment Disputes under Arts 19 and 20 of the Investment Agreement of the Mainland and Hong Kong Closer Economic Partnership Arrangement, and other examples offered in the discussion of investor–State mediation in Trend 2 at paras 14–15 above.

98 The terms “credentialling”, “certification” and “accreditation” are used variously in the professional mediation community.

99 On national mediator accreditation systems in Europe, see *EU Mediation Law Handbook – Regulatory Robustness Ratings for Mediation Regimes* (Nadja Alexander, Sabine Walsh & Martin Svatos eds) (Wolters Kluwer, 2017). In Australia, Hong Kong and Singapore, the accreditation of mediators is primarily regulated by soft law in the form of industry regulation. See the websites of the relevant accreditation bodies that promote the regulatory frameworks within the professional mediation community: in Australia, see www.msb.org.au; in Hong Kong, see www.hkmaal.org.hk; in Singapore, see www.simi.org.sg.

decade has seen initiatives to enhance professionalisation of mediators move beyond the national level to the international.

28 Business leaders such as Deborah Masucci, former Head of the American International Group Inc's Employment Dispute Resolution Program and Co-Chair of the IMI, have publicly endorsed the need for a pool of internationally recognised mediators who carry with them a trust mark of competence, skill and experience, and the backing of reputable organisations.¹⁰⁰ Here, "best practice" means that users mediating in a given jurisdiction have access to an internationally recognised pool of local and foreign mediators, who are appropriately qualified and skilled and permitted to work across mediation services in the jurisdiction.

29 This trend manifests itself in four primary ways, namely through:

- (a) recognition of prior (foreign) mediator credentials and/or experience;
- (b) systems of cross-recognition of national or institutional mediator standards;
- (c) requirements that foreign and local mediators must undertake the same credentialling procedure; and
- (d) development of international standards for mediator credentialling.

30 In relation to (a), most mediator credentialling organisations offer an experience-based path to recognition as a professional mediator which includes recognition of prior mediation credentials.¹⁰¹ The criteria vary but typically involve candidates putting together a portfolio of their training and experience verified by institutional and client attestations and a log book of mediation cases.

31 In terms of cross-recognition identified in (b) above, the IMI and the Singapore International Mediation Institute ("SIMI") have a

100 See, for example, International Mediation Institute, "Ten Good Reasons to become IMI Certified" <https://www.imimmediation.org/practitioners/ten-good-reasons-become-imi-certified/> (accessed 3 March 2019).

101 See, for example, the experience-based path to mediator accreditation offered by the International Mediation Institute (www.imimmediation.org), the Hong Kong Mediation Accreditation Association (<http://www.hkmaal.org.hk/>), Resolution Institute (Australia) (<https://www.resolution.institute/accreditations/mediation-australia>) and the Singapore International Mediation Institute (<http://www.simi.org.sg/What-We-Offer/Mediators/The-Experience-Qualification-Path>) (accessed June 2019).

cross-recognition arrangement in relation to mediator certification. In Europe, cross-recognition of mediator standards between Austria and Germany at an institutional level¹⁰² has facilitated the movement of professional mediators throughout those two jurisdictions.

32 Numerous jurisdictions permit foreign mediators to apply on an individual basis to have their mediator credentials recognised and this addresses the third path ((c)) to international professionalisation of mediators. These credentialling systems have generally been set up to support local mediators; however, they may permit foreign mediators to become credentialled and practice in their jurisdiction, provided they meet the local organisation's criteria.

33 In relation to (d), the public interest initiative, IMI, referred to above, was the first institution that set out to establish international standards for mediator credentialling. IMI continues to work with mediator credentialling institutions around the world to establish an international certification for experienced professional mediators. The certification of mediators is based on IMI's competency certification scheme ("IMI Certification Scheme"). In addition, IMI certifies mediation training programs. Through these initiatives IMI offers a trust mark of high-quality mediators and mediation training, not by requiring uniform standards, but through harmonising mechanisms, such as mediator peer and client review, and a code of professional conduct for mediators based on the overarching principles of transparency, trust, competence, confidentiality and impartiality. IMI's goal is to offer a framework for diverse mediator certification requirements in different countries and in public and private sector service-provider organisations around the world, rather than unify relevant national regulatory instruments. IMI continues to consult widely with mediators, mediation users, mediator credentialling bodies, mediation service providers, government representatives and others with an interest in the development of an internationally recognised mediation profession.

34 SIMI was formed in 2014 and was tasked with introducing the highest international standards for professional mediators. SIMI's role is to certify the competency of mediators, set standards of professional mediator ethics, require continuing professional development for SIMI accredited mediators, increase awareness about mediation, and develop tools available to assist parties to make basic decisions about

102 For example, the arrangement between the German, Swiss and Austrian credentialling organisations. See <https://www.bmev.de/ueber-den-verband/koooperationen/anererkennung-verbaende.html> (accessed June 2019).

mediation.¹⁰³ SIMI has developed a four-tier accreditation and certification system which is designed for local and foreign mediators and relevant to both domestic and international mediation practice. In other words, SIMI aims to operate locally and internationally and sets its standards accordingly. As with IMI, SIMI recognises diverse approaches to mediation.¹⁰⁴ SIMI's credentialling scheme, while institutional in nature, is recognised and supported by legislation. The Mediation Act¹⁰⁵ in Singapore recognises mediations conducted by SIMI credentialled mediators and offers a pathway to expedited enforcement of iMSAs resulting from approved mediation processes such as those conducted by SIMI mediators.¹⁰⁶ Foreign mediators not credentialled by an organisation recognised under the legislation may still conduct mediations in Singapore; however, they and their mediation will not be covered by the provisions of the Mediation Act. Such an approach, combined with tax exemptions for foreign mediators,¹⁰⁷ aims to encourage foreign mediators to work in Singapore through designated institutions and apply for the appropriate SIMI credentialling, thereby contributing to the development of harmonised standards in international mediation.

35 In addition to setting standards for credentialling, professionalisation is also about setting ethical standards for mediation practice and ensuring compliance with them. Most international mediation service providers offer codes of conduct for mediators. Depending on the jurisdiction, disgruntled mediation parties seeking redress in the form of civil law remedies or legal proceedings could commence an action against a mediator for breach of the mediator's code of conduct.¹⁰⁸ In a world first, the Singapore Convention expressly

103 Joel Lee, "Singapore Developments – the Singapore International Mediation Institute and the Singapore International Mediation Centre" *Kluwer Mediation Blog* (14 November 2014).

104 On mediation models see generally Peter Coleman, Katharina Kugler & Ljubica Chatman, "Adaptive Mediation: An Evidence-based Contingency Approach to Mediating Conflict" (2017) 28(3) *International Journal of Conflict Management* 383; see also Nadja Alexander, "The Mediation Meta-model: Understanding Practice" (2008) 26(1) CRQ 97.

105 Act 1 of 2017.

106 See ss 12(1) and 2(1) of the Mediation Act 2017 (Act 1 of 2017). See also Designated Mediation Service Providers and Approved Certification Scheme (No 3760) (3 November 2017) <<http://www.mediation.com.sg/assets/downloads/eGazette-3760-Designated-Service-Provider.pdf>> (accessed 21 April 2018).

107 Ministry of Law, "Tax Exemption for Income Derived by Non-resident Mediators for Mediation Services Rendered in Singapore" (31 March 2015) <<https://www.mlaw.gov.sg>>.

108 See, for example, the Australian case of *Tapoohi v Lewenberg* (No 2) [2003] VSC 410 in which the Supreme Court of Victoria considered it arguable that a mediator owes a duty of care to the disputants. See also the Singapore case of *Chan Gek Yong v Violet Netto* [2018] SGHC 208 where allegations that the

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provides for iMSAs to be challenged on the basis of mediator misconduct,¹⁰⁹ thereby placing mediator credentialing and standards in the international spotlight. It remains to be seen how courts will respond to challenges to iMSAs based on alleged mediator misconduct and also the extent to which these provisions may encourage the internationalisation of professional mediator standards. In this regard, it is noteworthy that professional indemnity insurance is only required for professional mediators in certain countries, for example, Australia. Lawyers acting as mediators would typically be covered under their existing professional indemnity insurance.¹¹⁰

36 Finally, channels for users to offer feedback and make complaints is central to a professional system for mediation. By way of example, IMI has established a system to facilitate client feedback and peer review to mediators on a regular basis.¹¹¹ SIMI provides its mediators with feedback request forms to give to mediation parties and their representatives.¹¹² For lawyers acting as mediators, the complaint procedures of most law societies or bar associations offer parties a channel for feedback.¹¹³ Mediation institutions may expressly reserve the right to dismiss mediators who run afoul of applicable ethical practice codes.¹¹⁴

VI. Trend 5: Mediation advocacy

37 Legal advisers play a key gatekeeper role in the development of mediation practice and law. The more experience lawyers have with

mediators pressured the plaintiff into signing a mediated settlement agreement were dismissed. These allegations were made in the course of litigation to which the mediators were not a party, and at the time of writing, no action against the mediator was pursued.

109 See Arts 5(1)(e) and 5(1)(f) of the Singapore Convention on Mediation. The Singapore Convention on Mediation is discussed in the context of Trend 3 (at paras 19–22 above).

110 The Law Society of Singapore, “Professional Insurance Cover” <https://www.lawsociety.org.sg/For-Public/Professional-Indemnity-Insurance> (accessed 3 March 2019).

111 International Mediation Institute, “Certification Process” <https://www.imimediation.org/practitioners/certification-process/> (accessed 3 March 2019).

112 Singapore International Mediation Institute, “SIMI Mediator Feedback Form” <http://www.simi.org.sg/Mediator-Feedback> (accessed 3 March 2019).

113 This applies generally to lawyers and not specifically to mediators. Presumably it would cover lawyers acting as mediators. In Singapore, see ss 75B and 85(1) of the Legal Profession Act (Cap 161, 2009 Rev Ed); The Law Society of Singapore, “Complaints” <https://www.lawsociety.org.sg/Lawyer-Regulation/Complaints> (accessed 3 March 2019).

114 See, for example, Loong Seng Onn & Deborah Koh, “The Singapore Mediation Centre” in *Mediation in Singapore: A Practical Guide* (Danny McFadden & George Lim eds) (Sweet & Maxwell, 2nd Ed, 2017) at p 282, para 10.041.

mediation, the more likely they are able to competently draft mediation clauses, mediation agreements and MSAs, to advise clients in relation to applicable mediation law, and to direct appropriate cases into mediation. This new skill set has emerged as a specialised form of legal practice known as mediation advocacy.

38 Increasingly, legal duties are placed upon lawyers and, in some cases, their clients to consider the use of mediation, and in certain circumstances to attempt mediation. Additionally, lawyers may be obliged to inform clients in relation to the latter's mediation-related duties as well as to prepare their clients appropriately for mediation. These obligations are variously located in statutes, court rules practice directions, and lawyers' professional rules of conduct.

39 Illustrations of regulatory provisions directed at lawyers include ss 14 and 15 of the Mediation Act 2017 of Ireland.¹¹⁵ Pursuant to this Act, a solicitor is obliged to advise clients to consider mediation and to provide them with information on the mediation process and mediation services. Compliance with this obligation is to be evinced by a statutory declaration to the effect that the advice has been given. Failure to comply will result in the court adjourning the litigation proceedings until the declaration is sworn and filed with the court. Barristers have corresponding obligations. Similar regulatory provisions exist in Germany.¹¹⁶ Professional conduct rules for lawyers may also include mediation-related duties. For example, in Singapore, the Legal Profession (Professional Conduct) Rules 2015¹¹⁷ require lawyers to ensure that they have not previously acted as mediator for the parties they currently represent with respect to the same mediation and that they inform their clients of all possible dispute resolution options that are reasonably available. In yet another illustration, the Law Council of Australia has issued Ethical Guidelines for Lawyers in Mediations, which comprise ethical obligations for lawyers acting as mediation advocates.¹¹⁸

115 No 27 of 2017.

116 See Kristina Osswald & Gustav Flecke-Giammarco, "Germany" in *EU Mediation Law Handbook – Regulatory Robustness Ratings for Mediation Regimes* (Nadja Alexander et al eds) (Wolters Kluwer, 2017) at p 381.

117 S 706/2015. See Pt 2 of the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015). In Singapore, the "Guidelines for Advocates and Solicitors Advising Clients about ADR" in Appendix I to the Supreme Court Practice Directions (<https://epd.supremecourt.gov.sg>) provides additional support by illustrating these alternative dispute resolution processes in greater detail for legal practitioners.

118 See Law Council of Australia, *Guidelines for Lawyers in Mediations* (updated August 2011).

40 Another type of regulatory provision places the obligation directly on the parties, which means there is a corresponding duty on lawyers to advise in relation to their clients' legal duties. These duties are typically accompanied by the possibility that adverse costs orders may be made against a party for non-compliance. By way of illustration, in Australia, the Civil Dispute Resolution Act 2011 requires lawyers to advise their clients of the requirement to file a statement to the effect that they, the clients, have taken genuine steps, such as mediation, to resolve the dispute; and assist clients in doing so. Similarly, in England,¹¹⁹ Hong Kong¹²⁰ and Singapore,¹²¹ court practice directions effectively require lawyers to advise and assist their clients in relation to the latter's obligation to engage in mediation where it is reasonable to do so. In these jurisdictions, the spectre of adverse costs orders is intended as an incentive to compliance. In the American case of *Doorstop Beverages of Longwood Inc v Collier*,¹²² the court imposed sanctions on the client's legal representative for the failure of the client to appear at a court-referred mediation in circumstances in which the lawyer had failed to advise his client that the client's attendance was required.

41 Beyond the legal requirements, the skill set of mediation advocacy is well developed and extends to specialised assistance before, during and after mediation. Pre-mediation that lawyers can offer relates to issues of appropriate timing of, and venues for, mediation, selection of mediators, suitable practice models of mediation, pre-mediation exchange of information and client preparation for the process. During mediation legal advisers can assist the mediator and the mediation process in a variety of ways: in managing their clients' expectations, in keeping lines of communication open, and in acting as constructive

119 See, for example, the UK Practice Direction to the Pre-action Protocols at para 8; UK Civil Procedure Rules 1998 (SI 1998 No 3132) r 1.4; and the case of *Halsey v Milton Keynes General NHS Trust* and *Steel v Joy and Halliday* [2004] EWCA Civ 576. See also r 44.3 of the UK Civil Procedure Rules providing that, in imposing costs orders, courts "must have regard to all the circumstances, including (a) the conduct of all the parties" before and during the proceedings and especially in relation to pre-action protocols.

120 See Hong Kong Practice Directions PD 31 (effective 1 November 2014).

121 In Singapore, see, for example, O 59 r 5(1)(c) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), which provides:

The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account ... the parties' conduct in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution.

See also PD 35B(5) of the Supreme Court Practice Directions. See also the procedural rules of specific courts such as Singapore International Commercial Court ("SICC") and the State Courts: see Form 10 of the SICC Practice Directions; for the State Courts see PD 26(2) and PD 35(9) of the State Courts Practice Directions.

122 928 So 2d 482 (Fla Dist Ct App, 2006).

negotiators and reality agents when they know their clients are being unrealistic. Experienced mediators know the wisdom of using the resource of lawyers in mediation to the greatest extent possible. Lawyers will be responsible for advising clients in relation to offers made by the other side, drafting settlement agreements and advising their clients on the meaning of the final terms and consequences of breach thereof.¹²³ Sometimes lawyers are involved in overseeing implementation of settlement terms. In situations where mediation does result in an agreement between the parties, lawyers may lead follow-up settlement negotiations and generally advise on the next course of action.

42 Hardy and Rundle¹²⁴ identify five different roles for lawyers and other professional advisers in mediation. The five roles are “absent adviser”, “adviser observer”, “expert contributor”, “supportive professional participant” and “spokesperson”, with each successive role entailing more active involvement. Each role is outlined below. As a matter of practice, advisers may vary the nature of their involvement at different stages throughout the mediation.

A. *Absent adviser*

43 Absent advisers are exactly that: absent. Professional advisers in this least interventionist role are tasked with ensuring that their clients can effectively and efficiently participate in the mediation process, but they do not attend actual mediation sessions. This means providing legal, technical and strategic advice before, during (by phone, e-mail or text) and after mediation, as well as teaching them how to participate in the mediation itself. Absent advisers are most frequently engaged in mediations, or parts thereof, in which an emphasis is placed on relational issues among parties. Here, direct client participation in the mediation allows for a focus on relationships and individual needs without the imposition of legal or technical jargon. The absent adviser approach may be attractive in multiparty contexts where there are already many people in the room (without adding professional advisers), where parties have the capacity and willingness to participate actively and effectively in the process, or where clients cannot afford the costs of adviser observers.

123 See, for example, the Australian case of *Studer v Boettcher* [2000] NSWCA 263, where the court explained the scope of certain duties of lawyers in mediation. See also the English case of *Cumbria Waste Management Ltd v Baines Wilson* [2008] EWHC 786 (QB).

124 Samantha Hardy & Olivia Rundle, *Mediation for Lawyers* (Sydney: CCH Australia, 2010).

B. *Adviser observer*

44 Adviser observers perform the same tasks as absent advisers, and they attend the mediation. As the word observer suggests, professionals in this role do not participate actively in mediation and do not interact with the mediator, any other party or any other adviser; they only observe and offer legal or other professional advice to their client when needed. Adviser observers are suitable for more complex mediations where parties still wish to speak for themselves during the mediation but wish to be supported by the presence of an adviser. In this role, professional advisers can assist clients in keeping track of the complexities of issues at hand and can offer advice based on new information heard first-hand during mediation. This prevents confusion that could arise in communicating with absent advisers, but it comes at an increased cost to clients.

C. *Expert contributor*

45 Expert contributors perform the same tasks as adviser observers, but instead of being silent observers, they participate directly in the process by sharing their professional opinions with the mediator, the other party and the other party's professional adviser. Here, an exchange of professional opinions is undertaken as a form of reality testing, in hope of narrowing the issues in question so that settlement can be reached sooner. However, expert contributors are still observers to the extent that they do not negotiate on behalf of their clients – as with absent advisers and adviser observers, clients must be prepared and able to conduct negotiations on their own. Professional advisers acting as expert contributors are suited to disputes where legal or technical issues are serious or complex enough to warrant the active presence and accompanying expense of an adviser.

D. *Supportive professional participant*

46 Supportive professional participants perform the same tasks as expert contributors, but instead of being limited to sharing professional opinions, they work collaboratively with clients as a team. This role maximises the advantages of bringing advisers to mediation because there are no restrictions on their participation. The precise division of roles between adviser and client varies and depends on their respective abilities and skills, the mediation circumstances and the strategy of the adviser–client team. For example, lawyers adopting the role of supportive professional participant could provide legal advice, assist with problem-solving and reality testing, and draft a mediated agreement. Their clients could offer their own views on what should be discussed at mediation, articulate their priorities, interests and concerns,

generate initial options, and make final decisions after consulting with the adviser. The supportive professional participant role works best when both advisers and clients are well prepared, work positively together and have similar views on desired outcomes.

E. Spokesperson

47 Professional advisers take on the most interventionist role of spokesperson when they speak on behalf of their clients throughout mediation. In a way, this role is the inverse of the adviser observer role. In that role, professional advisers only speak to their clients; with a spokesperson, clients only speak to their advisers to provide instructions as needed. The use of spokespersons is usually reserved for mediations where clients do not have the capacity to participate actively. A party's capacity can be affected by psychological disorders, mental disabilities and power imbalances between parties.

48 To conclude, lawyers and other professional advisers have a wide scope to provide advice in relation to mediation and suggest it to the other side without concerns about weakening their bargaining position. At the same time, mediation advocacy involves a significant paradigm shift for trial lawyers and may pose challenges to lawyers in terms of their role and skills as mediation lawyers. It is a multi-dimensional shift from:

- (a) the adversarial to the collaborative;
- (b) win-lose to win-win;
- (c) a past focus to a future focus;
- (d) a focus on lawyers in the trial process to a focus on parties in the mediation process; and
- (e) the need to convince a third-party umpire to the need to reach a consensus with the other side in relation to the resolution of the dispute.

49 The skills of mediation advocacy differ greatly from trial advocacy. Education and training are required to support the cultural shift needed in the legal profession. To this end, a body of literature¹²⁵ and training courses have developed around the specialisation of

125 See, for example, George Lim & Choo Jin Hua, "Advocacy in Domestic and International Mediations" in *Modern Advocacy: More Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC & The Honourable Justice Vinodh Coomaraswamy eds) (Academy Publishing, 2019) and Samantha Hardy & Olivia Rundle, *Mediation for Lawyers* (Sydney: CCH Australia, 2010).

mediation advocacy. For example, the IMI offers a certification for approved training programmes on mediation advocacy.¹²⁶

VII. Trend 6: Diversity in mediation practice models

50 This trend explores the increasing acceptance of diversity in professional mediation practice. Despite notable differences in approaches to mediation practice, many early mediator training and credentialling systems in the US, Canada and Australia, for example, promoted a facilitative mediation model, often to the exclusion of other approaches.¹²⁷ Facilitative mediation values place a premium on parties' self-determination. It is a client-centred dispute resolution process, in which a mediator supports parties through an interest-based negotiation process by facilitating the process but refraining from intervening in the content of the dispute (for example, by providing substantive advice to the parties). Facilitative mediation systems were promoted internationally, and today many credentialling systems around the world are premised on the facilitative mediation model, either explicitly or implicitly.¹²⁸ The facilitative paradigm is also reflected in much of the academic literature and education throughout the world. While other mediation models are also situated in theory and training contexts such as narrative, transformative and diagnostic mediation models, the facilitative model continues to dominate.¹²⁹ Yet the reality is that mediation practice continues to diversify with numerous approaches to mediating which vary according to:

- (a) **Goal(s) of the specific mediation.** Is it efficient and effective dispute resolution, access to justice, self-determination, relational transformation, perspective shifting and/or community restoration?

126 See the International Mediation Institute website www.imimediation.org.

127 Perhaps the most well known of these is the Harvard Mediation Program based on the bestseller book by Roger Fisher & William Ury, *Getting to Yes: Negotiating an Agreement without Giving In* (Random House, 1985).

128 For example, the mediation systems in Australia (www.msb.org.au), Germany (<https://www.bmev.de>), Austria (<https://www.oebm.at/ausbildung-eintragung.html>) and Hong Kong (www.hkmaal.org.hk), which are premised on the facilitative mediation model.

129 On training and credentialling in the member states of the European Union, see *EU Mediation Law Handbook: Regulatory Robustness Ratings for Mediation Regimes* (Nadja Alexander, Sabine Walsh & Martin Svatos eds) (Wolters Kluwer, 2017). On mediation training in Australia, see the Mediator Standards Board's Approval Standards at www.msb.org.au; in Singapore, see the training conducted by the Singapore Mediation Centre at <http://www.mediation.com.sg/workshops/mediation-skills-assessment/> (accessed June 2019); in Hong Kong, see training requirements of the Hong Kong Mediation Accreditation Association Limited at www.hkmaal.org.hk.

(b) **Nature of the mediator's intervention.** Is it more elicitive and moderating in nature, or rather guiding, directive or evaluative in nature?

(c) **Nature of the interaction between the parties and other participants in the mediation.** Can it be described as predominantly a positional negotiation, an interest-based negotiation or a dialogue?

51 The result has been significant gaps between theory and policy on one hand, and the reality of certain mediation practices on the other. In particular, the employment of mediation practices characterised by directive and evaluative mediator interventions – such as expert advisory mediation and wise counsel mediation – has encouraged a polarised debate between mediation “purists” who maintain that mediators cannot intervene in the content of a dispute by offering advice and those who maintain that advice-giving is an acceptable part of mediation practice. This debate has led to a facilitative–evaluative dichotomy in the international mediation discourse.

52 There are, however, signs of a shift. As the field of mediation grows in sophistication, there are indications of a growing recognition and acceptance of the complexity and diversity of mediation practice well beyond the facilitative *versus* evaluative debate. This development is due to a number of factors. First, as (international) mediation practice develops, mediators, mediation advocates and repeat player parties are able to share their experiences of mediation; these types of exchange are facilitated through “fireside chat” evenings where mediators share de-identified stories from practice and through instantaneous Internet communications and the ubiquitous “grapevine”. In addition to the anecdotal evidence, the growth of practice has made it easier for empirical researchers to capture what happens in the mediation room.¹³⁰ Dispute resolution scholars have developed new mental maps of mediation practice identifying a spectrum of mediation models that take the mediation field beyond the limitations of a facilitative–evaluative binary.¹³¹

130 On the limitations of the facilitative–evaluative dichotomy, see Javier Yeo, “The Facilitative–Evaluative Divide: Have We Lost Sight of What’s Important?” in *Contemporary Issues in Mediation* vol 1 (Joel Lee & Marcus Lim eds) (World Scientific Publishing Co, 2016) at p 36.

131 See, for example, the models of mediation practice by Leonard Riskin: “Decision-Making in Mediation: The New Old Grid and the New New Grid System” (2003) 79(1) *Notre Dame L Rev* 1 at 30; “Mediator’s Orientations, Strategies and Techniques” (1994) 12 *Alt to High Cost of Lit* 111 and “Understanding Mediator’s Orientations, Strategies and Techniques: A Grid for the Perplexed” (1996) 1 *Harv Negot L Rev* 7. See also Laurence Boulle, *Mediation: Principles, Process, Practice* (Sydney: LexisNexis, 2011) at pp 44–45.

53 Further, the internationalisation of contemporary mediation, in particular its introduction into jurisdictions with customary forms of mediation, has highlighted the many rich traditions of mediation long predating the emergence of professional mediation in the US in the 1970s.¹³² Customary traditional forms of mediation continue to inform and influence developments in mediation today, challenging the facilitative paradigm. For example, it is utilised in legal and economic reform initiatives as policy makers draw on customary and traditional dispute resolution to shape contemporary mediation principles, process and practice. We see evidence of this in the Pacific, for example, in Papua New Guinea and Samoa, where customary dispute resolution is recognised under the umbrella of contemporary mediation accreditation schemes. The emergence of truth and reconciliation commissions in South Africa, Timor-Leste and South America and bodies set up to mediate land disputes between indigenous and non-indigenous stakeholders such as the National Native Title Tribunal in Australia¹³³ demonstrate the role of modern and traditional conflict resolution principles in contemporary cross-cultural conflict.

54 Finally, greater diversity in “accredited” mediation models characterises the new wave of development in the professionalisation of mediation and mediators as the following examples illustrate. The IMI’s worldwide mediator certification scheme expressly recognises that mediators approach their craft in different ways and are informed, at least to some extent, by different values. In Australia and Papua New Guinea, the National Mediator Standards are based on a facilitative mediation model, while at the same time recognising diversity of practice in what they refer to as a blended model. In Asia, jurisdictions such as Singapore and Hong Kong are questioning the cultural suitability of western facilitative mediation, as they seek to introduce diverse mediation models through research, education, credentialling and policy initiatives.¹³⁴

132 See, for example, Nabil N Antaki, “Cultural Diversity and ADR Practices in the World” in *ADR in Business: Practice and Issues across Countries and Cultures* (Jean-Claude Goldsmith, Arnold Ingen-Housz & Gerald H Pounton gen eds) (Alphen aan den Rijn: Kluwer Law International, 2006) ch 11 and *Conflict Resolution in Asia: Mediation and Other Cultural Models* (Stephanie Stobbe ed) (Lexington, MA: Lexington Books, 2018). See also the earlier anthropological literature of Simmel (Georg Simmel, *The Sociology of Georg Simmel* (USA: Free Press Paperback, 1964) at pp 146–149) and Gulliver (Phillip Gulliver, *Disputes and Negotiation: A Cross-Cultural Perspective* (New York: Academic Press, 1979) at pp 200–225).

133 For example, see the National Native Title Tribunal website www.nntt.gov.au.

134 See, for example, Ian MacDuff, *MediAsian: Explorations on Mediation and Dispute Resolution in Asia* www.mediasian.wordpress.com and George Lim SC, “Back to ‘MediAsian’” (July 2014) <<https://whoswholegal.com/news/features/article/31678/back-mediAsian/>> (accessed June 2019). See also Joel Lee, “Singapore: Cultural
(cont’d on the next page)

VIII. Trend 7: Mixed mode dispute resolution

55 Given the accelerated pace of its uptake in countries around the world, it is only a matter of time before mediation in cross-border settings matures in terms of the international legal framework, institutionalisation and professionalisation.¹³⁵ During this ongoing growth phase, change and uncertainty surround many legal issues relevant to (international) mediation. For example, how will courts in different jurisdictions interpret mediation laws on admissibility of mediation evidence in court proceedings in relation to the enforceability of a mediated settlement agreement? In many countries, the law on mediation is young and the jurisprudence on these issues limited, leading to legal uncertainty on such matters. Further, pending the ratification of a multilateral legal framework for the recognition and enforcement of iMSAs by a critical number of jurisdictions,¹³⁶ users have indicated a reluctance to engage in standalone mediation processes.¹³⁷

56 In these circumstances, arbitration processes involving mediation elements offer an interesting entry point to cross-border mediation. Mixed mode dispute resolution processes combine the opportunities associated with a flexible facilitative process such as mediation with the finality of a determinative process such as arbitration in addition to the regulatory predictability associated with the more legally-settled field of international arbitration. The 2018 edition of an annual survey on international arbitration indicated that user preference for arbitration was exceeded by a preference for “arbitration plus ADR”, in other words for mixed mode processes.¹³⁸ Such is the interest in mixed mode dispute resolution processes that IMI convened an International Task Force on Mixed Mode Dispute Resolution in 2016 to examine them.¹³⁹ Some of the more popular hybrid processes include the following:

Influences in the Historical and Institutional Development of Mediation” and Nadja Alexander, “Hong Kong: Mediation and the Future of Dispute Resolution” in *Conflict Resolution in Asia: Mediation and Other Cultural Models* (Stephanie Stobbe ed) (Lexington, MA: Lexington Books, 2018).

135 See Trends 2, 3 and 4 at paras 6–36 above.

136 See Trend 3 on the Singapore Convention on Mediation at paras 17–25 above.

137 Stacie Strong, “Realizing Rationality: An Empirical Assessment of International Commercial Mediation” (2016) 73 Wash & Lee L Rev 1973 at 2031.

138 White & Case LLP and Queen Mary University of London School of International Arbitration, *2018 International Arbitration Survey: The Evolution of International Arbitration* (9 May 2018) at p 9.

139 Thomas J Stipanowich & Véronique Fraser, “The International Task Force on Mixed Mode Dispute Resolution: Exploring the Interplay between Mediation, Evaluation and Arbitration in Commercial Cases” (2017) 40 Fordham Int’l LJ 839.

(a) **Med-Arb.** A combination of mediation and arbitration, Med-Arb is a hybrid process that may take a number of forms. Most often it involves mediation, followed by arbitration only on those issues, if any, not resolved at mediation. An alternative approach to Med-Arb involves parties agreeing to mediate certain issues in the dispute and to arbitrate other issues. In Med-Arb it is preferable to use a different practitioner as mediator and as arbitrator in order to maintain the integrity and confidentiality of both processes and comply with natural justice rules. Where mediation results in a settlement agreement between the parties, it is possible in some jurisdictions for such agreements to be converted into consent arbitral awards under the Med-Arb procedure. However, this remains a controversial issue in law, *inter alia*, on the basis that by the time an arbitration is commenced, there is no longer a dispute – it has been settled by mediation. Accordingly, the use of Med-Arb to convert mediated settlement agreements into consent arbitral awards represents a high-risk strategy in cross-border mediation. A solution to this issue can be found in mediation window procedures such as Arb-Med-Arb, outlined next.

(b) **Mediation windows.** This process refers to mediations conducted within an arbitration or other determinative ADR process rather than prior to it. Arb-Med-Arb is an increasingly attractive form of mediation window. Established in 2014, the Singapore Arb-Med-Arb Protocol (“AMA Protocol”) provides a useful illustration of a state-of-the-art streamlined procedure.¹⁴⁰ Under the AMA Protocol, parties who have commenced arbitration with the Singapore International Arbitration Centre (“SIAC”) are to refer their dispute to mediation with SIMC. Separate dispute resolution bodies and individuals (arbitrators and mediators) removes the possibility of structural bias. If the mediation results in a settlement agreement, parties can then record it before the (already established) arbitral tribunal as an enforceable consent award. This is generally accepted as an arbitral award and enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958¹⁴¹ (“New York Convention”). If the parties are unable to reach agreement during the mediation, the matter returns to arbitration. Under the Protocol, the arbitrator(s) and mediator(s) are separately and independently appointed by SIAC and SIMC respectively.

140 The Singapore International Arbitration Centre has collaborated with the Singapore International Mediation Centre to offer parties the Arb-Med-Arb Protocol, an attractive alternative dispute resolution option. See www.simc.com.sg.
 141 330 UNTS 3 (10 June 1958; entry into force 7 June 1959).

(c) “**Med-Arb *simultanés***”. This is a process offered by the Centre for Mediation and Arbitration, in Paris,¹⁴² according to which an arbitration process runs simultaneously with, and independently from, a mediation process. Generally, the parties set a time frame for the completion of the mediation. If the mediation does not result in a mediated settlement, the arbitration will result in an award binding on the parties eight days after the mediation deadline expires. During the parallel processes, the mediator and arbitrator are not able to communicate with each other about the case. However, at the end of each day or during breaks, the parties may consult with their legal representatives in each process in relation to the progress that has been made. This assists with the ongoing development and refinement of each side’s dispute management process strategy.

57 The trend towards use of mediation in arbitration settings is further reflected in contemporary arbitration regulation, which increasingly provides for mediation or other settlement opportunities within the framework of arbitration. For example, Art 24 of the ICC Rules of Arbitration¹⁴³ recognises ADR and mediation as part of a case management toolbox that can be drawn upon to shape dispute resolution to suit the parties’ needs. Arbitration rules and statutes that explicitly envisage that the same person may conduct arbitration proceedings as well as facilitate settlement discussions or mediation can be found in numerous jurisdictions including Australia, Germany, Hong Kong, Singapore, India, Taiwan and Japan.¹⁴⁴

58 Finally, mixed mode processes involving preventative, facilitative, advisory and determinative elements are also being used more frequently across a range of industries including energy and infrastructure. By way of example, SIMC established a “Singapore Infrastructure Dispute-Management Protocol”¹⁴⁵ specifically tailored to address disputes arising from large infrastructure or construction projects. The Protocol features a proactive dispute prevention approach.

142 See the rules for Med-Arb *simultanés* at <http://www.cmap.fr/notre-offre/les-autres-modes-alternatifs-de-resolution-des-conflits/> (accessed June 2019).

143 Entry into force 1 March 2017.

144 See s 27D of the New South Wales Commercial Arbitration Act 2010; § 1053 of the German Code of Civil Procedure (ZPO); ss 32–33 of the Hong Kong Arbitration Ordinance (Cap 609); ss 16–17 of the Singapore International Arbitration Act (Cap 143A, 2002 Rev Ed); s 30 of the Indian Arbitration and Conciliation Act, 1996 (Act No 26 of 1996); Arts 44–45 of the Taiwanese Arbitration Law 1961; and Art 38(4) of the Japanese Arbitration Law (Law No 138 of 2003).

145 *Singapore Infrastructure Dispute-Management Protocol: A Comprehensive Dispute Management Tool* (2018).

A dispute board is appointed from the start of the project, rather than only after disputes have arisen. It helps anticipate issues and prevent differences from snowballing and escalating into full-blown disputes which become difficult and expensive to resolve. In the event that disputes arise, it provides a diverse range of methods to address them. These include mediation, expert opinion and determination.¹⁴⁶

IX. Trend 8: Online dispute resolution

59 ODR refers to dispute resolution which occurs in part or in whole through online communications or proceedings. Traditional distinctions between mediation and other forms of dispute resolution can be difficult to apply in relation to ODR; thus, the term “ODR” will be used here rather than “online mediation” and the focus will be on ODR that involves mediative mechanisms.

60 Whereas mediators are referred to as the “third party”, in the world of ODR, technology is referred to as the “fourth party”. The concept of the fourth party suggests that technology changes the communication and power dynamics of the mediation process, opening up new and imaginative ways for mediators to intervene, and parties and lawyers to engage, in the process. It also introduces new risks for users around issues such as security of the online platform, authenticity of online participants and what to do with written records of text-based ODR processes. Forms of technology that have relevance to ODR applications and contexts include e-mail, web forums, instant messaging, chat rooms, video conferencing, mobile and smart phone technology, artificial legal intelligence, blogs, voice over Internet Protocol, avatars, social networking sites, wikis, web maps and robotics.

61 ODR challenges one of the conventional claims of mediation, namely that face-to-face problem-solving is the most effective way to dealing with conflict, to uncover diverse interests and address relational aspects of the conflict. Empirical research casts doubt on the belief that parties need to sit physically in the same room for interest-based bargaining, deep listening and relational transformation to occur.¹⁴⁷ In

146 Ministry of Law, “New Singapore Dispute Protocol Launched to Minimise Time and Cost Overruns in Infrastructure Projects”, press release (23 October 2018) <<https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/launch-of-SIDP-reduces-time-and-cost-overruns-in-infrastructure-projects.html>> (accessed June 2019).

147 See, for example, Susan Raines, “Can Online Mediation Be Transformative?” (2005) 22(4) CRQ 437 at 437 and David Larson, “Technology Mediation Dispute Resolution (TMDR): A New Paradigm for ADR” (2006) 21(3) Ohio St J on Disp Resol 629 at 654.

fact, some studies suggest that parties may be less positional when they are negotiating via e-mail or online chatting compared to face-to-face scenarios.¹⁴⁸

62 Despite an initial focus on inexpensive and fast dispute settlement for e-commerce disputes, dispute resolution technology is no longer seen as a tool suitable only for settling e-commerce-generated B2C and B2B disputes; it is increasingly used to supplement or replace face-to-face mediation processes, especially through the use of tools such as tablets and smartphones.

63 In cross-border settings, ODR is considered to be affordable and convenient because it minimises, and in some cases eliminates, the need for participants to travel and reduces the costs associated with using physical meeting rooms. In terms of practice, ODR proceedings may be entirely *ad hoc*, as in the case of parties settling their dispute through an exchange of e-mails and Skype calls with the assistance of a mediator. Alternatively, they may be institutionalised, as in the case of parties submitting to a set of institutional mediation rules, selecting a mediator from a predetermined panel, and participating in remote sessions hosted by a centralised platform on the dispute resolution provider's server.

64 ODR offers a dispute resolution framework that encompasses local and cross-border conflicts and is accessible by diverse disputants including consumers, business operators, those involved in family disputes and those with a legitimate interest in environmental issues and other matters of public concern. The relative affordability of ODR compared to traditional forms of cross-border dispute resolution presents a valuable opportunity to expand access to commercial justice for micro, small, and medium enterprises in cross-border disputes.

65 A challenge for the international development of ODR is the lack of a coherent infrastructure within which service providers can operate. Given that many ODR providers operate independently (that is, they are not connected with a legal or professional association), there is fragmentation in relation to benchmarks and best practices. While diversity provides choices for users, the absence of some basic uniform standards and infrastructure might deter parties from using ODR.

66 To this end, a number of regulatory instruments and initiatives have been introduced both with an international and regional focus.

148 See, for example, Jaime Tan, Gregor Kennedy & Diane Bretherton, "Negotiating Online", presentation at the Third Annual Forum on Online Dispute Resolution, The University of Melbourne (2005) at p 8.

UNCITRAL initiated work to draft procedural rules for ODR in B2B and B2C. However, this work was terminated as no consensus could be reached on the content of the rules. Instead it was decided to settle on a non-binding descriptive document, namely the technical notes of the meetings, and these were adopted in July 2016. Since then, UNCITRAL has recognised the use of ODR in international mediation practice in its drafting of Art 2(2) of the Singapore Convention.¹⁴⁹ This provision establishes that the writing requirement for an iMSA may be met by electronic communication provided the information in the electronic communication is accessible for subsequent reference. What this means is that where a party seeks to enforce an iMSA resulting from an ODR procedure in a contracting State to the Singapore Convention, the iMSA, being electronic in nature, is unlikely to present an issue to its enforcement.

67 On a regional level, a European legal framework for consumer ADR and ODR has been established by the following legislative instruments:

- (a) the Directive on consumer ADR (“ADR Directive”);¹⁵⁰
- (b) the Regulation on consumer ODR (“ODR Regulation”);
and¹⁵¹
- (c) the Commission Implementing Regulation on consumer ODR¹⁵².

Further, 2016 saw the launch of the European platform for solving disputes arising out of online purchases. The platform was established in line with the above legal instruments and in particular the ODR Regulation, which provides for the EU Commission to establish a free, interactive website through which parties can initiate ADR in relation to disputes concerning online transactions. As international and regional ODR services and networks continue to grow, so too will the need for

149 The Singapore Convention on Mediation is discussed in the context of Trend 3, at paras 19–22 above.

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

151 Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

152 Commission Implementing Regulation (EU) 2015/1051 of 1 July 2015 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complaint form and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes.

regulatory vigilance as issues arise relating to legitimacy, access to justice, supply and demand, process standards, consumer protection, and practitioner accreditation.

68 In Asia, member economies of the Asia Pacific Economic Cooperation are working towards the adoption of a regional ODR platform for resolving commercial cross-border disputes. The platform would include a set of opt-in ODR procedures and rules, taking guidance from the UNCITRAL Technical Notes on Online Dispute Resolution, referred to previously.¹⁵³

69 To complete the overview of the Trend 8, two illustrations of ODR service providers, Modria and the Singapore Mediation Centre, follow.

70 Modria,¹⁵⁴ an example of a pioneering company in the field of ODR, is an ODR system for hire. Modria's ODR platform has been used by a number of e-commerce sites as well as by innovative sites designed to provide alternatives to litigation, such as the Rechtwijzer¹⁵⁵ site in the Netherlands, developed by the Hague Institute for Innovation of Law,¹⁵⁶ and the Dutch Legal Aid Board, to provide dispute resolution for divorce and separation, landlord-tenant and employment disputes. One of Modria's products is a "Fairness Engine"¹⁵⁷ that attempts substantive as well as financial settlement of disputes. It starts with a "diagnosis module" that gathers relevant information. A "negotiation module" summarises areas of agreement and disagreement and makes suggestions for solving the issue. If these do not result in settlement, a "mediation module" with a neutral third party begins, and the final step is arbitration. Modria claims that the "vast majority" of claims are settled in the first two steps without a human ever becoming involved.

71 In Singapore, the Singapore Mediation Centre ("SMC") has launched an ODR portal which takes potential parties through a Device and Compatibility Test and a Speed Test before making available features such as registering a new mediation case or tracking the

153 Asia Pacific Economic Cooperation Draft Collaborative Framework for Online Dispute Resolution of Cross-Border E-Commerce Business to Business Disputes (2018) (on file with author).

154 See Tyler Tech, "Modria" <https://www.tylertech.com/solutions-products/modria> (accessed June 2019).

155 See Rechtwijzer website <http://rechtwijzer.nl/>.

156 See the Hague Institute for Innovation of Law website <http://www.hiil.org>.

157 See Frederic Lardinois, "Modria Launches a 'Fairness Engine' for Online Dispute Resolution" *Tech Crunch* (19 November 2012).

progress of a mediation case and case appointments online.¹⁵⁸ As previously discussed in the context of Trend 3, SMC also offers the Singapore Domain Name Dispute Resolution Service, an ODR service.¹⁵⁹

X. Trend 9: Apology legislation

72 Apology legislation refers to legislation that aims to encourage the making of apologies without fear that the apology will be used as evidence of liability against the person offering the apology.

73 Apology legislation is not new.¹⁶⁰ It has its origin in the US in 1986. It is, however, the subject of renewed interest and regulatory activity, and is viewed as an opportunity to further develop amicable dispute resolution culture, consistent with mediation values.

74 Massachusetts was the first State to adopt an apology legislation. It came about after the senator of Massachusetts, William Saltontall, lost his daughter in a car accident. The injurious driver never expressed regret because he feared that an apology would be used against him as evidence. For this reason, when the Senator retired, he and his successor introduced a State apology law to encourage apologies by removing the fear of the apology being used as evidence in civil litigation.¹⁶¹ During the following years, other American states such as California and Texas¹⁶² enacted similar apology legislation, most of which were limited to motor vehicle or medical malpractice situations. Subsequent apology legislation in other parts of the world generally features a broader scope and is not limited to specific types of situations as in the early US

158 See the Singapore Mediation Centre's online dispute resolution portal website <https://smc.resolvedisputes.online/#/access/login> (accessed 18 May 2019).

159 See <http://www.mediation.com.sg/business-services/singapore-domain-name-dispute-resolution-services> (accessed July 2019).

160 Historically, apology legislation focused on medical malpractice claims and aimed to encourage apologies and expressions of regret by removing the fear of being incriminated: Jeffrey Helmreich, "Does 'Sorry' Incriminate? Evidence, Harm and the Protection of Apology" (2012) 21 *Cornell J L & Pub Pol'y* 567 at 575; Jonathan R Cohen, "Legislating Apology: The Pros and Cons" (2002) 70(3) *U Cin L Rev* 819 at 827; Lee Taft, "Apology Subverted: The Commodification of Apology" (2002) 109 *Yale LJ* 1135 at 1151; James Shing-ping Chiu, "The Beginning of Apology Legislation in Asia: The Fifth Wave Worldwide" [2018] *Asian JM* 33.

161 Massachusetts General Laws ch 233, § 23D (1986); Jennifer Robbenolt, "Apologies and Legal Settlement: An Empirical Examination" (2003) 102(3) *Mich L Rev* 460 at 471; Benjamin Ho & Elaine Liu, "Does Sorry Work? The Impact of Apology Laws on Medical Malpractice" (2011) 43 *Journal of Risk and Uncertainty* 141 at 142, para 2.

162 California Evidence Code § 1160 (2000); Texas Civil Practice and Remedies Code § 18.061 (2001).

legislation. For example, all Australian states introduced broader apology laws as part of the reform to the law of negligence.¹⁶³ Canadian states such as British Columbia and Saskatchewan¹⁶⁴ likewise followed suit by enacting broadly framed apology laws. Most recently, in 2015 and 2017, Scotland¹⁶⁵ and Hong Kong¹⁶⁶ respectively introduced apology laws and, for the first time, expressly linked their introduction to mediation and amicable dispute resolution.

75 Hong Kong's path to legislating apology legislation was linked to mediation from the start. Recommendation 43 of the Report of the Working Group on Mediation¹⁶⁷ stated:

The question of whether there should be an Apology Ordinance or legislative provisions dealing with the making of apologies for the purpose of enhancing settlement deserves fuller consideration by an appropriate body.

Seven years later, s 3 of the Hong Kong Apology Ordinance¹⁶⁸ sets out its aim to promote and encourage the making of apologies with a view to preventing the escalation of disputes and facilitating their amicable resolution. The Ordinance features a broad and inclusive definition of apology which includes an express or implied admission of fault.

76 Apology legislation is said to support mediation and amicable dispute resolution in the following ways. First, mediation legislation does not typically protect apologies made prior to mediation from being construed as admissions of liability. An early apology made without fear that it be used as evidence of liability may encourage settlement negotiations and the use of mediation, thereby reducing the risk of litigation. Next, apologies made in the course of mediation will usually be protected by legislation safeguarding the confidentiality of the mediation process and the non-admissibility of mediation evidence. However, legislative confidentiality provisions in most jurisdictions are subject to exceptions. Therefore, in exceptional circumstances, apologies may not be protected, and this may create doubt in the minds of parties contemplating making an apology. Furthermore, in the absence of a

163 See, for example, the New South Wales Civil Liability Act 2002.

164 Apology Act (SBC 2006, c 19) (British Columbia); Evidence Amendment Act (SS 2007, c 24) (Saskatchewan).

165 Apologies (Scotland) Act 2016 (2016 asp 5). See also John Sturrock, "Apologies Legislation Passed in Scotland [sic]" *Kluwer Mediation Blog* (2 February 2016).

166 Apology Ordinance (Cap 631) (Hong Kong). For an overview see Ting Kwok Iu, "Hong Kong Apology Ordinance 2017" *Kluwer Mediation Blog* (12 September 2017).

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

168 Cap 631.

confidentiality clause, apologies made as part of a mediated settlement agreement may not be protected by mediation legislation. Apology legislation is significant in this regard as it provides apologies with better protection and the apologise a broader safe harbour.

77 Finally, beyond mediation, apologies have the potential to restore and build relationships and communities, offering insights and learning to those involved – values shared in mediation.¹⁶⁹

78 This can be the case with public apologies. Where a public apology would be desirable to assist in the resolution of a dispute, apology legislation can be particularly useful. In Hong Kong, one illustration relates to the tragic Lamma Island ferry collision in 2012, in which 39 people lost their lives. When a government representative, the Marine Department chief, finally offered a public apology, many families of victims retorted that it was too little too late. The public apology came more than six months after the incident and after numerous public calls for an apology to the victims' families had been ignored. When the apology was finally made, it was presented to the press rather than the victims' families and was criticised as “belated, insincere and involuntary”.¹⁷⁰

XI. Trend 10: Third-party funding of mediation

79 The practice of third-party funding involves “an entity that has no interest in the underlying merits of a dispute but provides funding or resources for the purpose of financing the legal costs and expenses of an international arbitration”.¹⁷¹ Third-party funding of dispute resolution proceedings, in particular, litigation and arbitration, has become part

169 For another illustration of a request for a public apology, consider the rejection by the Pope of the appeal from Canada's Justin Trudeau to issue an apology for the role of the catholic church in “cultural genocide” when they forced indigenous children into boarding schools. The importance of the apology is described here: Ian Austen & Jason Horowitz, “Pope Rejects Call for Apology to Canada's Indigenous People” *The New York Times* (28 March 2018).

170 Emily Tsang & Patsy Moy, “Plan to Make It Easier to Say Sorry” *South China Morning Post* (23 July 2013).

171 International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-party Funding in International Arbitration* (The ICCA Reports No 4, April 2018) (“ICCA-QM Report”) at p 1, fn 1, and pp 45–80 on definitions of third-party funding. For a detailed account of the state of third-party funding internationally, see the ICCA-QM Report. For a summary of its highlights, see Christine Sim, “8 Key Points from the ICCA-QM Task Force's 2018 Third-Party Funding Report” *Kluwer Arbitration Blog* (28 May 2018). On third-party funding generally, see Elayne Greenberg, “Hey, Big Spender: Ethical Guidelines for Dispute Resolution Professionals when Parties Are Backed by Third-Party Funders” (2019) 51 *Ariz St LJ* 131.

and parcel of dispute resolution practice in jurisdictions such as England, Australia and the US. By way of contrast, in parts of Asia, Latin America and Europe, it is only just emerging but quickly gaining traction.¹⁷² Internationally, third-party funding is experiencing a period of unprecedented growth.

80 The International Council for Commercial Arbitration-Queen Mary Report explains how the scope of third-party funding has developed over time:¹⁷³

Historically, third party funding was considered as being primarily a mechanism by which financially distressed claimants could obtain access to justice. However, much of the focus of the litigation finance market today is on the growing corporate utilization of funding by large, well-resourced entities. These entities may be looking for ways to manage risk, to reduce legal budgets, take the cost of pursuing arbitration off-balance sheet, or to pursue other business priorities instead of allocating resources to financing an arbitration matter.

In other words, claimants seek funding for a variety of reasons including access to justice and business risk management.

81 With the growth of the practice of third-party funding, it has developed as a business model in its own right with international dispute resolution funding firms across the US, Europe and Asia.¹⁷⁴ At the same time, the practice remains controversial due to the potential influence that third-party funders may have on how dispute resolution proceedings are conducted and on their outcomes, direct and indirect conflicts of interest, and lack of transparency in relation to funding arrangements. On one hand, third-party funders can facilitate access to justice or at least to a dispute resolution forum, where this may not otherwise be possible for financial reasons;¹⁷⁵ on the other hand, concerns about the extent to which third-party funders can promote

172 International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-party Funding in International Arbitration* (The ICCA Reports No 4, April 2018) at p 18.

173 International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-party Funding in International Arbitration* (The ICCA Reports No 4, April 2018) at p 20.

174 Examples of major third-party funding organisations include Bentham IMF (<https://www.benthamimf.com>), Burford Capital (<https://www.burfordcapital.com>) and Woodsford Litigation Funding (<https://woodsfordlitigationfunding.com>).

175 See, for example, the role of Michael Bloomberg's Tobacco Free Kids Foundation, as third-party funder in the investor-State case of *Philip Morris Brands Sàrl v Oriental Republic of Uruguay* ICSID Case No ARB/10/7 (formerly *FTR Holding SA v Oriental Republic of Uruguay*): International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-party Funding in International Arbitration* (The ICCA Reports No 4, April 2018) at pp 23–24.

their own strategic interests through funding selected dispute proceedings persist and some commentators have called for caution.¹⁷⁶

82 Attempts to address some of these concerns are apparent in recent changes to the law¹⁷⁷ to permit third-party funding in the two leading arbitral seats in Asia: Singapore and Hong Kong.¹⁷⁸ Amendments to the law in both jurisdictions have paved the way for third-party funding in dispute resolution, including, in certain circumstances, mediation. The new laws reflect a shift in international attitudes and practices in relation to third-party funding and, at the same time, a desire to keep a close eye on its development through regulatory measures. In Singapore, amendments to the Civil Law Act¹⁷⁹ permit third-party funding of international arbitrations and related court or mediation proceedings.¹⁸⁰ The Singapore legislation extends to mediation arising out of arbitral proceedings such as Med-Arb or Arb-Med-Arb but not standalone mediation. In anticipation of the amendments, the SIAC released the Investment Arbitration Rules of the SIAC on 1 January 2017, which includes a rule giving tribunals the discretionary authority to order the disclosure of the details of the such funding agreements.¹⁸¹ Guided by flexibility and party autonomy in

176 See, for example, Darius Chan, “Three ‘Pitfalls’ for the Unwary: Third-Party Funding in Asia” *Singapore Law Gazette* (November 2018) and Frank J Garcia, “The Case against Third-Party Funding in Investment Arbitration” *Investment Treaty News* (30 July 2018).

177 Traditionally the common law on maintenance and champerty forbids intermeddling in litigation. On maintenance, see *Hill v Archbold* [1968] 1 QB 686 at 693; on champerty, see *Otech Pakistan Pvt Ltd v Clough Engineering Ltd* [2007] 1 SLR(R) 989.

178 For Singapore, see ss 5A and 5B of the Civil Law Act (Cap 43, 1999 Rev Ed) and the Civil Law (Third-Party Funding) Regulations 2017 (S 43/2017). For Hong Kong, see the Code of Practice for Third Party Funding of Arbitration (GN 9048) and Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (Ord No 6 of 2017). See also White & Case LLP and Queen Mary University of London School of International Arbitration, 2018 *International Arbitration Survey: The Evolution of International Arbitration* (9 May 2018) at p 9.

179 Cap 43, 1999 Rev Ed.

180 The amendments took effect from 1 March 2017. See, for example, s 5B of the Civil Law Act (Cap 43, 1999 Rev Ed). Note: s 5A of the Civil Law Act abolished the tort of champerty and maintenance. Contracts affected by maintenance and champerty remain contrary to public policy or are otherwise illegal, but an exception is made for a third-party funding contract: Chan Leng Sun SC, “Third-Party Funding – Taking Stock” *Singapore Law Gazette* (November 2018).

181 Investment Arbitration Rules of the Singapore International Arbitration Centre (1st Ed, 1 January 2017) rule 24(l).

mind, the Singapore Institute of Arbitrators¹⁸² and the Singapore Law Society¹⁸³ released non-binding guidance notes on third-party funding.

83 Hot on the heels of the amended legislation in Singapore, Hong Kong passed the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance in June 2017.¹⁸⁴ As with SIAC, the Hong Kong International Arbitration Centre's ("HKIAC's") new Administered Arbitration Rules ("HKIAC Rules") entered into force on 1 November 2018, introducing, among others, amended provisions in relation to third-party funding.

84 The main distinction between the developments in the legislative frameworks in Singapore and Hong Kong on third-party funding for the time being is their scope. The Ordinance permits third-party funding in both international and domestic arbitrations *and mediations*, as well as in related proceedings including ancillary court proceedings. In comparison, Singapore's amended Civil Law Act permits such funding only for international arbitrations and related proceedings. At the time the amendments to the Civil Law Act were introduced, Senior Minister of State for Law, Indranee Rajah SC, indicated there was a possibility the framework would be expanded to other categories of dispute resolution proceedings – and these could conceivably include litigation and mediation.¹⁸⁵

85 A second distinction is with respect to the requirement of disclosure. In Singapore, pursuant to the amendments to the Legal Profession (Professional Conduct) Rules for lawyers that entered into force in March 2017, legal representatives of funded parties have obligations related to disclosure.¹⁸⁶ By way of contrast, and consistent with the Ordinance, Art 44 of the HKIAC Rules places a funded party itself under a continuing obligation to disclose to each party to the

182 Singapore Institute of Arbitrators, SIARB Guidelines for Third Party Funders (18 May 2017).

183 The Law Society of Singapore, "Third-Party Funding" (Guidance Note 10.1.1) (effective 25 April 2017).

184 Ord No 6 of 2017. The Ordinance was gazetted on 23 June 2017 but sections lifting the prohibition on third-party funding were operational only as of 1 February 2019, following the Code of Practice for Third Party Funding of Arbitration (GN 9048) issued by the Secretary of Justice and a concurrent notice published in the Gazette.

185 Indranee Rajah SC, Senior Minister of State for Law, "Third Party Funding – Reinforcing Singapore as a Premier International Dispute Resolution Centre" (24 January 2017). See also Marla Decker & Nicholas Lingard, "Third-Party Funding in Asia: Arrived, and Set to Thrive" *Above the Law* (12 December 2018).

186 See Pt 5A of the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015), added by the Legal Profession (Professional Conduct) (Amendment) Rules 2017 (S 69/2017).

arbitration, the tribunal and HKIAC the fact that a funding agreement has been made and the identity of the third-party funder.

86 While the immediate focus and impact of these new legislative provisions is on international arbitration, these amendments have opened the door to third-party funding of international mediation in the two top-ranking Asian dispute resolution jurisdictions. Compared to arbitration, however, third-party funding of mediation is a different risk proposition. Therefore, it must be assessed with a different lens.

87 As the practice of third-party funding for mediation develops, it is useful for regulatory bodies, lawyers, parties and mediators to consider the following issues. What role do third-party funders play in the mediation room? To what extent can and do they influence the strategy of the negotiations, the power dynamics between the parties, the substance of a settlement, and its timing? Can third-party funders veto a settlement to which the parties would otherwise agree? Regional and cultural differences are likely to emerge in the responses to the above questions; for example, the right of funders to veto settlements is included in standard funding arrangements in civil law jurisdictions Switzerland and Germany, but appears less widespread in other jurisdictions.¹⁸⁷ Certainly, mediation practice can benefit from appropriate third-party funding, and such arrangements must be carefully thought through on a case-by-case basis. Reflecting on the nascent development of third-party funding in international mediation, Sharp and Marsh point out, “In one sense, TPF [that is, third-party funding] changes nothing. But in another very real sense, it seats another stakeholder at the actual or metaphorical mediation table – and as all mediators know, that changes everything.”¹⁸⁸

XII. Conclusion

88 If the 20th century was the arbitration century then the 21st century, without a doubt, is the mediation century. The need for greater flexibility, diversity and accessibility in dispute resolution has challenged legal and arbitration systems and opened the door to dispute resolution mechanisms that feature co-operative, interest-based approaches to decision-making that can move easily across cultures,

187 See, for example, the New Zealand case of *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596 and the discussion of it in Geoff Sharp & Bill Marsh, “A New Seat at the Mediation Table? The Impact of Third-Party Funding on the Mediation Process (Part 2)” *Kluwer Mediation Blog* (1 April 2017).

188 Geoff Sharp & Bill Marsh, “A New Seat at the Mediation Table? The Impact of Third-Party Funding on the Mediation Process (Part 2)” *Kluwer Mediation Blog* (1 April 2017).

disciplines and geo-political borders. Around the world, mediation developments have influenced how corporations, courts, communities and countries engage in dispute resolution.

89 The ten trends presented in this article represent different threads that have emerged in the weaving of what is already a rich mediation tapestry. As this article reveals, in addressing the needs of an increasingly diverse pool of users, international mediation has embraced a range of different mediation models, mixed mode dispute resolution offerings as well as online dispute resolution. Mediation principles have also had an impact on recent developments in apology legislation. Further, as international mediation practice continues to grow, third-party funders have become interested in mediation as a new dispute resolution opportunity. Finally, international mediation is supported by international and local systems that regulate the professionalisation of mediators and mediation advocates, and a fast-developing international legal framework that protects the essential features of the mediation process and seeks to facilitate the international recognition and enforcement of mediated settlement outcomes.
