

Chapter 2

*Harmonisation and Diversity in the Private  
International Law of Mediation:  
The Rhythms of Regulatory Reform*<sup>\*</sup>

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### A. Introduction

On the international stage, regulatory reform is often associated with harmonisation initiatives and conjures up glamorous images of endless consensus-building sessions in diplomatic centres such as Vienna and New York and attended by actors from all over the world. Some mediation law reform processes such as those of the United Nations Commission on International Trade Law (UNCITRAL) may live up to this image. However, international mediation law reform is shaped by the iterative pull and push of a diverse pool of stakeholders, multiple process layers, and competing cultural and disciplinary ideologies—a reflection of the inclusive and democratic nature of the mediation process itself. As a result, mediation reform takes on a rhythm of its own, characterised by the negotiation rituals of relational positioning, exploring interests, concession-making and bargaining with constituencies.

Harmonisation initiatives—ie reform processes that aim to harmonise the legal effects of transactions in different countries—are not confined to inter-governmental activities. The private sector, less restricted by jurisdictional boundaries, is increasingly driving harmonisation in mediation practice and law. At the same time, the desire to innovate and be different among mediation interest groups is stronger than ever and there are those groups that challenge the conventional wisdom of harmonisation. The resulting tensions between harmonisation and diversity frame and shape cross-border mediation law reform.

This chapter explores regulatory reform in relation to cross-border mediation.<sup>1</sup> It begins by exploring the role of private international law in mediation and the extent to which harmonisation initiatives—as opposed to legal diversity—offer advantages or disadvantages to cross-border mediation law and practice. As applicable mediation law is often the same for cross-border and domestic applications, the chapter introduces a contemporary and broad definition of mediation law and offers a structure for thinking about the form and content of mediation law, and the multi-disciplinary factors that shape it, globally. Relevant international illustrations are presented throughout the chapter with specific sections on European and international instruments of private international law.

### B. Private International Law and Mediation

The increasing movement of people around the globe and the compression of space through time, primarily through the speed of global communications, have intensified contacts among legal systems. Rather than reducing the need for legislation regulating conflicts of law, accelerating economic globalisation has increased the focus on this area.

<sup>1</sup> Parts of this chapter are adapted from N. Alexander, *International and Comparative Mediation*, with kind permission.

Imagine the following scenario: An English mediator is asked to mediate a professional negligence dispute. The plaintiff (client) is based in England, the defendant accounting firm is in Hong Kong, and the defendant's insurer has its headquarters in the United States. All agree to attend mediation in New York City in the United States. The preliminary discussions and meetings, however, take place via email and video-conference with all parties in their home countries. The mediation occurs and the parties reach a settlement, which the parties' legal representatives draft into contractual form. Six months after completion of the mediation, one of the parties discovers that there are significant tax implications in relation to the settlement agreement that she had not been advised of at mediation. She files a claim against her lawyers, who are both European and US-based, for professional negligence. Her lawyer then joins the mediator as a defendant on the basis that the mediator provided both parties with legal advice and settlement proposals during the mediation and was therefore, at least, jointly responsible for the legal advice provided.

Let us consider the mediation laws that might be relevant to the conduct of the mediator. Are there applicable codes of conduct or other forms of regulation? Assuming the mediator is also a lawyer, are there other laws or professional rules that apply, and if so, which ones? Is the English mediator covered by professional indemnity insurance, and if so, does this extend to practice in the United States? And what of the online (email and video) mediation communications—are they considered to be part of the mediation? What role does the mediator's accreditation play, if any? Does it in any way prescribe the parameters of the mediator's role and the extent to which it covers giving advice? Finally, which laws will govern questions of admissibility of mediation evidence in any subsequent litigation?

Coben and Thompson refer to this type of scenario as 'disputing irony,'<sup>2</sup>—ie the paradoxical phenomenon of litigating in relation to a process designed to avoid litigation. The irony is accentuated in cross-border situations where forum-shopping issues arise and the choice of applicable mediation law becomes a point of contention between disputants. In a private international law context, the following categories of law may be relevant:

1. The law governing the parties' capacity to agree to a dispute resolution clause and enter into an agreement to mediate;
2. The law governing the dispute resolution clause;
3. The law governing the mediator contract;
4. The law governing the mediation process and the conduct of the mediator, the legal representatives and other participants in the mediation;
5. The laws of the jurisdictions in which the mediated outcome (for example, agreement, deed, consent award) is sought to be recognised and enforced, or set aside;

<sup>2</sup> J. Coben and P. Thompson, 11 *Harv. Negot. L. Rev.* 43 (2006).

6. The law of the jurisdictions in which competing judicial or arbitral proceedings are initiated;
7. The law applicable to the subject-matter of the mediation;<sup>3</sup>
8. The law of the jurisdiction in which provisional remedies or judicial assistance with the gathering of evidence or witnesses is sought.

Private international law, also referred to as conflict of laws, refers to the domestic law of a country that deals with how it manages disputes containing a foreign element. These are disputes between non-state actors, or involving states acting as private transactors, that cross geo-political borders. Such disputes are variously described as cross-border and international. There is nothing international about the laws themselves; they take the form of national legislation and case law.<sup>4</sup>

Private international law primarily deals with issues of jurisdiction, choice of law and forum, and the recognition and enforcement of foreign judgments. Mortensen explains these factors as follows.<sup>5</sup> Jurisdictional issues deal with the question of whether the local court (forum) has the power to hear and decide the matter or whether the case has sufficient connection with another state to warrant the local court restraining or limiting its own power. Forum clauses indicate the parties' choice of court or jurisdiction in relation to disputes arising out of a contract. Choice of law refers to the law to be applied by the court that has jurisdiction. Choice of law clauses are vehicles for parties to choose the law they wish to apply to identified disputes and are also referred to as proper law clauses. The following proper law clause is taken from the International Mediation Institute's (IMI) Professional Conduct Assessment Process:

'This Professional Conduct Assessment Process will be exclusively governed by the law of any applicable mediation agreement between the parties, but in the absence of such agreement will be governed by the law of the place where the IMI Certified Mediator who is the subject of the complaint maintains his or her principal place of business ("the Governing Law").'<sup>6</sup>

Issues relating to recognition and enforcement of foreign judgments occur where judgment has been rendered in another state and recognition or enforcement is sought in the local court. Subject to international agreements to the contrary, domestic courts are not required to recognise or enforce judgments of foreign courts. When parties select a specific legal system for dispute resolution, they risk

<sup>3</sup> In relation to arbitration, Bühring-Uhle et al. point out that the law applicable to the substance of the dispute need not be a national law as parties may agree that the dispute be determined according to the principles of international commercial or trade law (*lex mercatoria*): C. Bühring-Uhle, L. Kirchhoff and G. Scherer, *Arbitration and Mediation in International Business*, p. 44.

<sup>4</sup> D. McClean and K. Beevers, *The Conflict of Laws*, p. 4 and M. Reimann, in M. Reimann and R. Zimmermann, *The Oxford Handbook of Comparative Law*, p. 1364.

<sup>5</sup> See R. Mortensen, *Private International Law in Australia*, p. 3.

<sup>6</sup> See IMI website, available at <<http://imimediation.org/imicode-of-professional-conduct>>.

a judgment from that national court being unenforceable in other territories, for example in the country where the other party resides or their business is located.

The dominant approach to private international law—that used by most national jurisdictions—is called selectivism.<sup>7</sup> In selectivism, the paramount principle is party autonomy manifested through choice of legal forum and choice of law principles. However, selectivism is interpreted and applied in different ways by national courts, leading to inconsistent methodology and case outcomes. Different European and American approaches to choice of law illustrate this point. European choice of law principles highlight the concept of *conflicts justice*, ie choosing the seat of law with the better claim, irrespective of substantive content of the law. Here, a rule-oriented, multilateral approach based on pre-determined objective criteria, such as domicile and *situs*, is preferred. Art. 1(4) and (5) of the Model Law on International Commercial Conciliation 2002 (MLICC) illustrates this approach in relation to its test of whether a conciliation is ‘international’ or not.

Conversely, the traditional American approach aims to select the law that will better achieve a just result as between the parties (*material justice*). There is scope for local courts to take into account the content of the law and its underlying policies. According to this approach, private international laws are framed as general guidelines and are accompanied by broadly defined and even subjective criteria, providing the decision-maker with more latitude than in the traditional European approach. Such an approach is consistent with the concept of *interest analysis* espoused by American legal theorist Brainerd Currie.<sup>8</sup> Interest analyses effectively permit courts to favour the interests and policies of their own jurisdictions over those of foreign jurisdictions.<sup>9</sup> This unilateral approach contrasts with the multilateralism of the Europeans, who attempt to apply a more objective, and therefore arguably internationally acceptable, test.

Another layer of complexity is added to private international law by its sheer diversity in terms of the different forms, nature and scope of conflicts legislation throughout the world.<sup>10</sup> Even the task of locating the applicable conflicts rules in a particular jurisdiction can be challenging. As a response to these substantive and procedural complexities, international legal groups and intergovernmental organisations continue to work towards the harmonisation and unification of law initiatives through international conventions, treaties, regulations, directives, model laws and rules and declarations. These legal instruments constitute an increasingly significant source of international mediation law.

<sup>7</sup> See M. Reimann, in M. Reimann and R. Zimmermann, *The Oxford Handbook of Comparative Law*, pp. 1374, 1375. The other approach to private international law is substantivism based on Savigny’s seminal 1880 *Treatise on the Conflict of Laws*.

<sup>8</sup> B. Currie, *Selected Essays on the Conflict of Laws*, p. 183.

<sup>9</sup> See R. Mortensen, *Private International Law in Australia*, p. 14.

<sup>10</sup> See M. Reimann, in M. Reimann and R. Zimmermann, *The Oxford Handbook of Comparative Law*, pp. 1363, 1379.

### C. The Use of Mediation Clauses in Private International Law

Contracts can be used to manage—but not exclude—the risks associated with disputes that cross national borders. These risks include:

- Excessive costs and delay associated with determining jurisdictional issues before the substantive matters can be heard;<sup>11</sup>
- The unpredictability of law and forum and its impact on the subject matter of the dispute;
- Lack of clarity about preferred language and potential multilingual confusion; and
- The impact of unexpected economic changes and currency fluctuations.

The dispute resolution clause is an ideal vehicle to manage private international law issues in relation to mediation. Most professionally drafted international dispute resolution clauses include a choice of law sub-clause and a forum selection sub-clause.<sup>12</sup> Choices of forum and law encourage the export of legal and other services beyond borders and offer opportunities for increased access to justice where parties are able to negotiate their own dispute resolution terms. As the chapters in the volume show, courts around the world increasingly give effect to correctly drafted mediation and dispute resolution clauses.

Within a forum selection clause, parties can designate a court in a particular jurisdiction or a specific dispute resolution process such as arbitration or mediation. Where parties select a forum but no law, it is no more than an indication that the law of the selected forum is to apply. Forums may be selected for reasons that have little to do with the nature and content of their laws, such as interpersonal networks and familiarity with one's own courts.<sup>13</sup> For example, a contractor in country A supplying a manufacturer for the first time in country B might prefer to deal with the law of its own legal system with which it is familiar, even though enforcement might be sought in country B. Where parties have only inserted a forum selection clause into their contract, the choice of law question is left to the court of the forum to decide. Therefore, the distinction between these two types of clause is important for parties and their legal representatives. Where choice of forum or law issues are not clear, guidance may be found in cross-

<sup>11</sup> On different approaches to financing litigation, see J. Zekoll, in M. Reimann and R. Zimmermann, *The Oxford Handbook of Comparative Law*, pp. 1356–7.

<sup>12</sup> See, for example, the following decisions of The United States Supreme Court in relation to forum selection: in an international context *The Bremen v Zapata Offshore Co*, 407 US 1 (1972) and in a domestic setting *Carnival Cruise Lines, Inc v Shute*, 499 US 585 (1991). The Court has recognised the validity of such clauses, upholding them in both cases, and has strongly endorsed their use. See also *Vimar Seguros y Reaseguros SA v M/V Sky Reefer* 515 US 528 (1995), which involved an arbitration clause and has been applied by a number of District courts to choice of court clauses.

<sup>13</sup> J. Smits, in J. Smits, *The Need for a European Contract Law: Empirical and Legal Perspectives*, p. 171.

border legal instruments such as the Hague Choice of Court Convention, the Brussels I Regulation<sup>14</sup> and the Rome I Regulation<sup>15</sup> as discussed below.

Despite the advantages associated with the increased certainty and predictability that well-drafted choice of law and forum clauses bring, there are limits to contractual freedom in this regard. Forum shopping provides a practical illustration. The practice of *shopping* for a jurisdiction with substantive and procedural rules favourable to one's case, such as higher damages awards from the plaintiff's perspective, can increase the cost and time-frame for resolving a dispute and the uncertainty surrounding applicable law. The doctrine of *forum non conveniens*, or inappropriate forum, allows courts to decline jurisdiction on the basis that the choice of forum is an attempt to avoid the operation of a relevant mandatory law or because there is a more appropriate forum, such as a court in another jurisdiction.<sup>16</sup> In addition, the freedom of choice of forum may be limited by consumer protection legislation,<sup>17</sup> evidence of duress in the selection of the law and other factors.

Finally, in terms of the interpretation and enforcement of mediated settlements or settlement arbitral awards, inconsistencies can arise in the application of various national public policy exceptions.<sup>18</sup> Parties can never be entirely certain about the jurisdiction in which a legal claim will ultimately be made, the policies of that court in relation to mediation and how the court will deal with a dispute resolution clause.

#### **D. Diversity and Harmonisation**

Conventional wisdom suggests that legal harmonisation will reduce the challenges associated with diversity of laws, thereby increasing cross-border transactions including those related to the access and use of mediation. But, this assumption is open to challenge.

<sup>14</sup> Brussels I Regulation (Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters).

<sup>15</sup> Rome I Regulation (Council Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations).

<sup>16</sup> See C. Bühring-Uhle, L. Kirchhoff and G. Scherer, *Arbitration and Mediation in International Business*, p. 14.

<sup>17</sup> See, for example, Art. 17 and Art. 23(5) Brussels I Regulation.

<sup>18</sup> On the challenges of the diversity of public policy exceptions and attempts to harmonise them, see C. Abraham, 'How to Promote a Uniform Interpretation of Public Policy?' in *Modern Law for Global Commerce: Congress to celebrate the 40th annual session of UNCITRAL*, available at <[www.uncitral.org](http://www.uncitral.org)>.

### (1) On Harmonisation

International harmonisation initiatives are promoted on the basis that they further the goals of globalisation by reducing transaction costs often associated with legal uncertainty, thereby making cross-border transacting easier and more lucrative. Transaction costs may include the following:

- Collecting information about applicable mediation laws;
- Costs associated with the formal processing for legal disputes such as court costs, administrative procedures, enforcement issues;
- Costs in relation to the engagement of lawyers;
- Costs associated with using formal and informal mechanisms to accelerate legal claims such as direct negotiation or even bribes (particularly in some developing countries); and
- Other transaction costs such as opportunity costs, costs of making warranty claims and costs related to travel and cross-border communications.<sup>19</sup>

Moreover, uncertainty about applicable mediation laws may discourage use of the mediation process in cross-border disputes. The low level of use of mediation in cross-border European disputes would seem to support this argument. A 2010 survey of European Union (EU) corporations and lawyers indicates that 75% of mediations in relation to filed cases are successful and result in dispute resolution costs savings. However, only 0.5% of filed case cases go to mediation, despite the fact that the costs of disputing consume an appreciable portion of these corporations' budgets.<sup>20</sup>

Thus the issues at stake are not strictly legal or economic in nature; they also focus on the practical and psychological effects of the law on parties. For example, legal uncertainty may inhibit the behaviour of foreign investors, impacting negatively on economic growth dynamics and the spread of innovative products and services.<sup>21</sup> For these reasons, some commentators<sup>22</sup> argue that diversity is a trade barrier and discourages consumers and small to medium enterprises (SMEs), and to a lesser extent large multi-nationals, from entering into legal arrangements in foreign legal systems.

<sup>19</sup> See H. Wagner, *Fern Universität in Hagen Discussion Paper*, p. 4; H. Wagner, in J. Smits, *The Need for a European Contract Law: Empirical and Legal Perspectives*, pp. 25–51; J. Smits, in J. Smits, *The Need for a European Contract Law: Empirical and Legal Perspectives*, pp. 153 et seq.

<sup>20</sup> ADR Center, *The Cost of Non-ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation*.

<sup>21</sup> See, for example, the various studies cited and methodologies explained in H. Wagner, *Fern Universität in Hagen Discussion Paper*, pp. 5–8.

<sup>22</sup> H. Wagner, *Fern Universität in Hagen Discussion Paper*, p. 13; M. Del Gatto, G. Mion and G.I.P. Ottaviano, *CORE DP 2006/61*, 20 (2006) and R. Kneller, M. Pisu and Z. Yu, 41(2) *Can. J. Econ.*, 639–69 (2008).

Harmonisation initiatives aim to increase the attractiveness of foreign jurisdictions by facilitating accessibility to, and familiarity with, foreign legal systems, thereby addressing some of the issues associated with legal uncertainty. What was previously different, and therefore difficult and uncertain, gradually becomes familiar and predictable. Some empirical studies analysing the effects of cross-border legal uncertainty suggest that countries with similar legal systems tend to engage in a greater amount of trade with each other than countries that differ in this regard.<sup>23</sup> This has led some researchers to deduce that legal harmonisation creates a more competitive environment, which in turn leads to increased productivity.<sup>24</sup> Harmonised mediation laws aim to encourage the greater use of mediation in cross-border disputes by minimising jurisdictional disputes about the laws applicable to various aspects of the mediation process and the rights and obligations of the people who take part in them.

However, it is important to weigh the benefits of harmonisation against the risks associated with it. The process of legal harmonisation is itself not without significant costs. Wagner highlights the costs of transitioning and adapting to new structures and refers to the direct costs of developing new bureaucracies, such as mediation infrastructure and demolishing old structures.<sup>25</sup> In addition, he identifies costs associated with the loss of the advantages of competition among legal systems, ie legal diversity.

## (2) On Diversity

The following positive aspects of legal diversity are frequently ignored by those promoting harmonisation. In the context of dispute resolution, tolerance of diversity encourages experimentation and innovation in the search for mediation rules that:

- Encourage the use of mediation;
- Make the process itself attractive for disputants in terms of costs, time investment, flexibility, protection of legal rights, party autonomy and privacy;
- Increase confidence in relation to enforceability of mediated outcomes;
- Ensure the right balance between confidentiality and accountability; and

<sup>23</sup> See, for example, A. Turrini and T. van Ypersele, *CEPR Discussion Paper No. 5751* (2006) and F.A.G. den Butter and R.H.J. Mosch, *Tinbergen Institute Working Paper No. 2003-082-3* (2003). On the different methodological approaches to these empirical studies, see H. Wagner, *Fern Universität in Hagen Discussion Paper*, pp. 5–8.

<sup>24</sup> See, for example, M. Del Gatto, G. Mion and G.I.P. Ottaviano, *CORE DP 2006/61*, 20 (2006) and R. Kneller, M. Pisu and Z. Yu, 41(2) *Can. J. Econ.*, 639–69 (2008).

<sup>25</sup> H. Wagner, *Fern Universität in Hagen Discussion Paper*, p. 9.

- Are responsive to the changing needs of mediation interest groups, such as mediators, disputants, courts and dispute resolution organisations, as the field develops.

In international transactions, the ability to select the applicable law from a range of diverse laws allows well-resourced parties to choose a law tailored to their specific needs. Paradoxically, the availability of such choice permits powerful international actors to pursue standardisation through the same choice of law clause in all contracts. Although gathering information and making the choice of law increases transaction costs, these costs become less over time when the law of the same jurisdiction is repeatedly selected. In a survey of 175 businesses across Europe, two-thirds considered the ability to make a choice of law from diverse legal systems to be an advantage.<sup>26</sup>

However, each time one party succeeds in putting their standard preferred choice of law into the contract, the other may have a less preferred choice and have to bear associated transaction costs. For some—perhaps the one-third in the survey referred to above—the international harmonisation of contractual terms through large corporate repeat-player actions may create more costs than it reduces. It is therefore useful to distinguish between, on one hand, diversity and choice of law in a standardised repeat-player legal environment and, on the other, selecting from diverse laws on a contract-by-contract basis.

Finally, competition among law and policy makers may generate valuable know-how for those involved in the dialogues and debates associated with decision-making in relation to mediation laws. Thus full harmonisation may not only inhibit experimentation and learning processes, but may also prevent the reduction of transaction costs and stifle the role of the market in shaping the regulation of mediation practice. The paradox is that system competition may gradually lead to what Wagner calls ‘voluntary harmonisation’, at least in relation to certain types of mediation rules.<sup>27</sup>

### (3) Factors Affecting Harmonisation Efficacy

There are multiple factors that influence the efficacy of harmonisation initiatives, including the following two explored here in the context of mediation: the generalisation of norms through harmonisation processes and the role of behavioural psychology.

Formal harmonisation processes typically involve dialogue, negotiation and consensus-building processes among representatives from different jurisdictions. For example, decisions at UNCITRAL are typically taken by consensus, re-

<sup>26</sup> G. Wagner, in *Modern Law for Global Commerce: Congress to celebrate the 40th annual session for UNCITRAL: Studies, Proposals and Backgrounds Papers*, p. 21.

<sup>27</sup> H. Wagner, *Fern Universität in Hagen Discussion Paper*, p 10.

flecting the desire of the Commission to produce texts that are acceptable to, and therefore likely to be adopted by, the maximum number of participating countries, whether or not they are members. The final ‘harmonised’ texts of UNCITRAL and other international institutions are often characterised by generalised norms, many of which are capable of varied interpretation and application. Practitioners and courts in different countries are left to work through the tensions inherent in bringing ‘internationally harmonised’ legal norms to life within a local legal system and culture. The result is legal uncertainty and diversity in relation to the interpretation of laws and the manner of their application, leading to increased transaction costs—precisely that which harmonisation initiatives set out to minimise.

The UNCITRAL MLICC, while by no means unique, is a case in point. The Model Law has been criticised<sup>28</sup> for the compromises it accommodated in the consensus process. For example, the MLICC fails to set mandatory requirements in most of its provisions, thereby promoting party autonomy and diversity at the expense of standards and consistency—hardly a leap forward in terms of harmonisation. By way of illustration, parties can opt out of the provisions relating to confidentiality and admissibility of evidence (Arts. 8, 9 and 10); they can also opt out of the entire Model Law itself. In addition, the definition of mediation (Art. 1(3)) has been criticised as being too broad and thereby encouraging diverse mediation practices rather than a more defined and consistent practice. Then there is Art. 13, which recognises agreements to mediate and mediation clauses as *prima facie* enforceable ‘except to the extent necessary for a party, in its opinion, to preserve its rights’. This exception has been criticised for being too broad and subjective, thereby allowing parties to circumvent their contractual commitments at will. Finally, Art. 14 deals with enforceability of mediated settlement agreements and leaves it to enacting states to decide on legal mechanisms by which settlement agreements become binding and enforceable. The Model Law itself provides no guidance on this point, and so diversity continues to dominate current arrangements. It is conceivable that the legal uncertainty resulting from various enactments of the MLICC may hinder—rather than facilitate—that which it seeks to achieve, namely, the process of legal harmonisation and the benefits promised.

In general, UNCITRAL responds to the above criticisms by explaining that it takes a step-by-step approach towards consistency and standardisation and that future amendments of the Model Law will move towards greater harmonisation. For the time being, however, critics ask if it is worthwhile for nations to implement the terms of the MLICC, especially in relation to jurisdictions with existing legislation on mediation.

<sup>28</sup> For criticisms on the MLICC, see, for example, E. van Ginkel, 21 *J. Int. Arb.* 1 (2004); P. Sanders, *The Work of UNCITRAL on Arbitration and Conciliation*; P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* and N. Alexander, *International and Comparative Mediation*, chapters 8 and 9.

The US Uniform Mediation Act (2001) (UMA) offers another illustration. Like the MLICC, the UMA is a model law on mediation, but it targets the states of the United States. Compared to the MLICC, the UMA permits significantly less divergence for those states adopting its provisions. However, it is less ambitious than the MLICC in two ways. First, its target audience, the US states, have different state laws but belong to the same legal system. Therefore, there is less need to embrace systemic variation compared to the MLICC. Secondly, the UMA has a narrower substantive scope than the MLICC, focusing primarily on mediation confidentiality and privilege. As a result, its drafters achieved greater success in relation to specificity of provisions. However, as an incentive to enacting states, they are not required to repeal current state statutory provisions when they adopt the UMA. Thus state laws remain intact, except insofar as states wish to amend to achieve uniformity with the UMA, and this tolerates a certain level of continued diversity among enacting states.

Like the MLICC, the EU Directive on Mediation<sup>29</sup> is a cross-border legal text that seeks to promote legal harmonisation, this time within the EU. However, it avoids the consensus dilemma of the MLICC as it does not request enacting states to adopt specific Model Law provisions. Instead, it sets out a framework within which considerable diversity is permitted. Despite prescribing the detail of mediation law themselves, individual Member States will have restricted influence over the interpretation and application of private international law, as issues relating to directives fall within the jurisdiction of the European Court of Justice (ECJ). As a result, some of the risks associated with diverse national approaches may be moderated.

Another factor that affects the effectiveness of harmonisation initiatives is the subjective and not always predictable nature of human behaviour.<sup>30</sup> Behavioural psychology tells us that people do not always behave rationally.<sup>31</sup> Smits highlights some insights from behavioural psychology that are useful for exploring the effectiveness of harmonisation initiatives in relation to mediation laws. The first is the *status quo* principle, which states that parties are likely to stay with the *status quo*, ie with norms with which they are familiar, rather than with new provisions that are unfamiliar, even if these provisions maximise benefits to them. Thus parties are more likely to choose existing mediation rules and a legal system with which they are familiar than to opt for a new harmonised or uniform sys-

<sup>29</sup> 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.

<sup>30</sup> J. Smits, *Maastricht Faculty of Law Working Paper* 2005/9, 4, pp. 24–5, available at <<http://mpra.ub.uni-muenchen.de/8192/>> and G. Wagner, ‘Transaction Costs, Choice of Law and Uniform Contract Law’, both papers presented at *Modern Law for Global Commerce: Congress to celebrate the 40<sup>th</sup> annual session for UNCITRAL: Studies, Proposals and Backgrounds Papers* (Vienna 2007).

<sup>31</sup> See R.B. Korobkin and T.S. Ulen, 88 *Cal. L. Rev.* 1051 et seq. (2000) and C.R. Sunstein, *Behavioural Law and Economics*, pp. 3–5 and 137–9.

tem.<sup>32</sup> The next finding from psychology is that where it is difficult to calculate the costs and benefits of an alternative, parties tend to simplify their thinking by looking to the outcome of past cases and decide by analogy. As there will be fewer cases relating to new legal regimes such as those relating to mediation, a pattern of risk aversion emerges. As a result, parties may be hesitant to make use of new mediation laws and may try to find ways to opt out of the new laws in order to stay with the status quo.

These two principles are premised on the existence of norms about mediation with which parties are familiar. However, in the case of mediation this assumption does not always apply. Mediation is a new and developing dispute resolution process, and in numerous jurisdictions the introduction of harmonised legislation and other rules on mediation represent some of the first formal rules on mediation. For example, the first mediation legislation in Honduras, Nicaragua and certain Eastern European countries, such as Albania, Croatia and Slovenia, draws on the MLICC.<sup>33</sup> Thus, in the absence of familiar mediation rules and past cases to aid decision-making parties, the aversion to newness and change suggests that parties may be reluctant to engage in cross-border mediation at all. Empirical research on the low level of use of inter-European mediation seems to support this view<sup>34</sup> and indicates lack of awareness about the law of mediation generally and an absence of corporate Alternative Dispute Resolution (ADR) policies negatively affecting parties' decisions to engage in mediation with foreign partners.

However, parties are not only likely to be risk averse: behavioural psychology also suggests that they are loss averse and will do more to avoid loss than to make a gain. Therefore, contracting parties may be less willing to take legal advice on how to draft their contract to include provisions relating to mediation or to inform themselves about the applicable mediation provisions and instead just wait until a conflict arises. This is consistent with the previous principles that indicate a theme of inertia and reluctance to embrace change and newness.

From a policy perspective, the above principles from behavioural psychology suggest that new harmonised legal regimes that are optional in nature or easy to opt out of are less likely to be used by parties than existing rules. The previous discussion of the MLICC highlighted its optional nature insofar as its default rules are easily displaced by the use of contractual terms to the contrary. Thus parties are likely to continue to use rules they are familiar with and have previously used, for example the mediation rules of international dispute resolution organisations such as the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) or the World Intellectual

<sup>32</sup> J. Smits, *Maastricht Faculty of Law Working Paper* 2005/9, 4, p. 24.

<sup>33</sup> See the comparative table of mediation laws based on the MLICC in N. Alexander, *International and Comparative Mediation: Legal Perspectives*, Appendix C.

<sup>34</sup> See ADR Center, *The Cost of Non-ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation*.

Property Organisation (WIPO). In the case of large multi-national organisations, they may have their own mediation policies, rules and precedents to which they would revert. Mandatory legislative provisions would address this dilemma and require parties to comply with the new rules. In the absence of mandatory provisions, parties may be more likely to embrace new laws where the provisions are familiar and bring with them more certainty than the current *status quo*.

#### (4) Is Partial Harmonisation an Answer?

The diversity–harmonisation dilemma is real and ongoing. Diversity among legal systems will always exist by mere virtue of the fact that they are separate legal systems, procedurally and substantively, rather than a single legal system. Add into the mix differences relating to language, culture, political and social structures, and the irrationality of human behaviour, and the multi-dimensional nature of ‘legal’ diversity becomes apparent. Legal diversity is generally considered to inhibit cross-border trade and the spread of new ideas and associated economic growth. Against this background, harmonisation is offered as an antidote to diversity, but it comes with its own costs and risks. It is a process requiring a significant long-term economic and political investment by participating states and does not result in immediate and easily quantifiable benefits. It requires participation not just by law and policy makers but also by mediation users, legal advisers, service-provider organisations and other interest groups to implement harmonised rules. If pursued rigorously by all participating states, harmonisation may result in the gradual loss of systemic competition benefits associated with diversity in a dynamic global market. Certain analysts suggest that in certain circumstances specific harmonisation initiatives in a delineated geographic area such as the EU or the Association of Southeast Asian Nations (ASEAN) may be an effective strategy and outweigh the costs of legal diversity in that region.<sup>35</sup>

Therefore, some commentators reject full harmonisation in favour of partial harmonisation, advocating a step-by-step approach to harmonisation with maximum party autonomy during the first step—that is, small non-mandatory changes with the parties maintaining possibility to resort to local law if desired. Such an approach, reflected in the UNCITRAL Model Law referred to previously, allows corrections to be made along the way, parties to become familiar with the new provisions on an incremental basis, and professionals and institutions to develop soft regulatory measures to support the formal law. Importantly, this approach recognises the multiplicity of actors and social–political forces involved in the harmonisation process and offers a conceptual and practical pathway for managing the tensions between diversity and harmonisation. It is suggested that both diversity *and* harmonisation are important and that the tensions between these

<sup>35</sup> See, for example, Z. Malang, *Mindanao Law J.*, 1, 34–53 (2007).

two values are vital to achieve sustainable and responsive international mediation practice.

### **E. Mediation Law: Form and Content**

Mediation continues to be promoted as an alternative to litigation—a form of ADR. It is an informal and flexible process that can be shaped to suit users' dispute resolution needs. Further, the process of mediation is multi-disciplinary and draws upon knowledge and skills from psychology, counselling, coaching, business, law, technical sciences and other sources of professional wisdom. In some parts of the world, such as the United States and Germany, there has been much discussion about whether or not mediators should also be lawyers and whether non-lawyer mediators are conducting an unauthorised practice of law.<sup>36</sup> In Germany, advertising about mediation, which highlighted the lack of lawyer involvement and resulting financial savings for disputants, has been the subject of litigation.<sup>37</sup> These debates have waned, and by and large mediation is recognised as a practice not reserved for lawyers or any other professional group.

Despite many policy debates on the suitability of regulating mediation for fear of over-legalising the process and curbing its elasticity,<sup>38</sup> law and policy makers around the world have managed to promulgate thousands of laws, codes and standards on mediation. Maintaining the flexible and democratic nature of the mediation process continues to create challenges for regulators on both domestic and international levels. This section examines the relationship between law and mediation in terms of two regulatory dimensions: form and content.

#### **(1) Forms of Mediation Law**

In this chapter, 'law' is understood in a broad and inclusive sense and is used interchangeably with the term 'regulation'. It includes positivist notions of law

<sup>36</sup> See, for example A. Hoffmann, 9 *Eur. J. L. Reform* 505, 533 (2007) and F. Furlan, E. Blumstein and D. Hofstein, 14 *J. Am. Acad. Matrimonial Law* 267 (1997).

<sup>37</sup> See the German court decisions: OLG Rostock 20 June 2001, *ZKM* 2001, 192 and LG Hamburg 29 February 2000, *NJW-RR* 2000, 1514.

<sup>38</sup> See, for example, *The Report of the Working Group on Mediation* (Department of Justice, Hong Kong DOJ) at 7.8 and 7.18. See also the debate within the Japanese ADR Study Committee on whether regulation by legislation was consistent with the essence of ADR: A. Yamada, *Session III: Conference Proceedings of the International Arbitration Conference: Mediation, Arbitration and Recent Developments*, 2–16 (2008). See also the debates of the UNCITRAL Working Group on Conciliation, *Report of the Working Group on Arbitration on the work of its thirty-fifth session* Document No. A/CN.9/506, p. 6, available at <www.uncitral.org> and see the debates leading up to the enactment of the Uniform Mediation Act (2001): The United States National Conference of Commissioners on Uniform State Laws, *Uniform Mediation Act*, pp. 5–6.

such as legislation, ordinances, case law and practice directions, and it extends to forms of soft regulation such as codes of conduct for mediators and other professionals, industry standards, ADR pledges and precedents for mediation, dispute resolution clauses and agreements to mediate. In addition, regulation by private contract and the market laws of supply and demand play an important role in shaping national and international mediation landscapes. This approach to understanding and defining law reflects the significant presence of participatory regulation, which shapes the still-developing landscape of cross-border mediation law and practice. In Chapter 1 of this book, Hopt and Steffek point out the unusually high number of regulatory actors representing different groups playing their part in regulating mediation; these include referring bodies such as courts and mediation providers, mediators, professional advisors, repeat users of mediation such as corporates, government departments of justice, the judiciary, policy makers, politicians and legislative lawmakers.<sup>39</sup>

Moreover, law so defined is consistent with contemporary regulatory theory, which has shifted its focus from government rule-making to include the role of institutions and interest groups. Regulation in the 21st century embraces pluralistic thinking and views law as a system featuring a range of regulatory instruments, institutions and interest groups engaged in the democratic processes of dialogue, deliberation and decision-making.

There are five primary regulatory forms associated with mediation:

- (a) Regulation by the market and private contractual arrangements (Market)
- (b) Industry-based regulation, including standards, codes of conduct and court practice directions and internal policies (Industry)
- (c) Framework legal instruments, such as the EU Directive on Mediation, which establish parameters within which states are required to regulate certain aspects of mediation (Framework)
- (d) Model Laws, such as the MLICC, which invite states to adopt the terms of the Model Law within their own jurisdiction, ideally with no or minimal variation (Model Law)
- (e) Legislation passed by a domestic lawmaker such as parliament. The terms include delegated legislation such as regulations (Legislation).

#### *(a) Market Regulation*

In the mediation marketplace, the primary regulatory mechanisms are the potential of repeat deals, reputation power, and individualised arrangements available through private contracting.<sup>40</sup> Where consumers have access to accurate information about mediators, it is thought that reputations will influence the choice of mediator and those with poor performance track records will gradually be pushed

<sup>39</sup> Also see K. Hopt and F. Steffek, *Mediation – Rechtstatsachen, Rechtsvergleich, Regelungen*, pp. 89–90.

<sup>40</sup> D. Charney, 104 *Harv. L. Rev.* 375, 392–4 (1990).

out of the market. The opportunity for repeat mediations referred from ADR organisations, courts or other referral bodies is said to encourage quality and consistency in mediation. Private contractual arrangements between individuals, such as agreements to mediate and mediated settlements, play a central role in the mediation marketplace with the legal system offering the remedy of rectification in relation to breaches of contract. Market regulation encourages competition and innovation and therefore promotes diverse legal arrangements.

Successful market regulation is premised on the belief that mediation users will make economically rational decisions informed by accurate information about the mediation market. However, research indicates that awareness of mediation and mediators remains low, whether or not at a consumer<sup>41</sup> or corporate level.<sup>42</sup> As a result, mediation users may not have sufficient information to make wise market choices. Further, as indicated previously, as with other human interactions mediation users are motivated by more than economic imperatives. For these reasons, other forms of regulation are introduced to supplement the rules of the free market.

In many countries, particularly those of the common law tradition, a market-based regulatory approach has been evident in much of the early life of mediation before collectively organised and more formalised approaches to regulating mediation emerged. Despite the accelerated growth of harmonisation initiatives, a market approach continues to flourish in countries such as Australia and the United States and remains available in other jurisdictions, thereby promoting diversity through self-regulation.<sup>43</sup> Here, parties choose to opt out of co-existing regulatory instruments such as mediation codes of conduct, approval standards and legislation (see below) in order to tailor terms and conditions of mediation to their individual needs. Generally, this practice is associated with high-end commercial mediation where the stakes are high and parties have the power and resources to invest in creating their own mediation rules. In mediation speak, they are exercising party autonomy by engaging in an individualised form of self-regulation (private contract) to resolve their dispute.

#### *(b) Collective Self-regulation*

Collective self-regulation refers to industry- and community-led initiatives to set norms for mediators and for mediation practice and is characterised by reflexive and responsive processes of regulatory decision-making. *Reflexion* means that actors have the opportunity to identify issues, reflect upon them and negotiate

<sup>41</sup> T. Sourdin, ‘An Alternative for Whom? Access to ADR Processes’ (2007), *NADRAC Research Forum*, available at <[www.nadrac.gov.au](http://www.nadrac.gov.au)>.

<sup>42</sup> See ADR Center, *The Cost of Non-ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation*.

<sup>43</sup> See NADRAC, *A Framework for ADR Standards: Report to the Commonwealth Attorney-General 2001*, p. 22.

their own solutions. *Responsiveness* refers to collaboration between the regulators and the group or collective being regulated. In their purest form, collective self-regulatory approaches embrace collaborative, consultative and reflective processes, as distinct from top-down policy regulation. For example, gaps in state regulation may be filled with industry regulation where it exists, such as well-established business or professional practices, industry or professional codes of conduct, and complaint and disciplinary mechanisms.

Collective self-regulation is associated with reduced costs in relation to information collection, reduced monitoring and enforcement and less formality compared with legislative regulation. Many of these costs are absorbed by the industry or community itself.<sup>44</sup> It is also said to achieve a high level of ‘buy-in’ and legitimacy from industry or community members and experts, as they have the opportunity to participate in decision-making on regulation issues. In a world of global villages with growing access to affordable telecommunications and other technologies, collective self-regulation occurs increasingly on an international scale, thereby offering opportunities for harmonisation. However, the responsive nature of this regulatory approach equally has the potential to encourage diversity.

In relation to the mediation of cross-border disputes, collective self-regulation is thriving. Most cross-border dispute resolution makes use of institutional rules, and mediation seems to be no exception. International arbitration institutes such as the ICC have begun to introduce separate mediation rules, to provide for mediation processes in their arbitration rules, and to produce recommended or standard mediation and hybrid dispute resolution clauses.<sup>45</sup> In relation to mediator certification and practice standards, a prominent international example is the IMI mediator certification initiative, discussed later in this chapter, and the IMI Code of Professional Conduct for Mediators.

### (c) Framework Regulation

The framework approach to regulation establishes formal and legally recognised parameters within which a variety of forms of regulation can fill in the details. The EU Directive on Mediation<sup>46</sup> illustrates this approach well. It defines mediation, thereby establishing its scope, and goes on to identify the aspects of mediation that require regulation by EU Member States. The Recitals clearly

<sup>44</sup> Consider, for example, the proposed resourcing of the self-regulatory Australian mediation standards through a combination of fees from RMABs (registered mediation approval bodies) and funding from government sources: T. Sourdin, *Australian National Mediator Accreditation System: Report on Project*, p. 5, available at <[www.nswbar.asn.au/docs/professional/adr/documents/AccreditationReportSept07.pdf](http://www.nswbar.asn.au/docs/professional/adr/documents/AccreditationReportSept07.pdf)>. See also the postings on the ICC International Commercial Mediation Competition on the Kluwer Mediation Blog available at <[www.kluwermediationblog.com](http://www.kluwermediationblog.com)>. The competition is based on the ICC ADR Rules.

<sup>45</sup> See the ICC ADR Rules (2001).

<sup>46</sup> Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters.

recognise different forms of regulation of mediation including community and industry-based regulation (Recital 14), specifically referring to the European Code of Conduct for Mediators and market-based solutions (Recital 17). Recital 16 encourages Member States to ensure that appropriate quality control mechanisms for mediation services are in place. Article 4 of the Directive requires Member States to encourage mediators and mediation organisations to adhere to voluntary codes of conduct and other quality control mechanisms.

Formal framework approaches can accommodate diverse interest groups while still pursuing common, or at least harmonised, policies. In terms of harmonisation, they are most effective and enhance the robustness of the framework itself where a single body, such as the ECJ, has the power to interpret and enforce regulatory issues as they arise. Conversely, the absence of uniform, or at least harmonised, interpretation and application of regulatory issues would serve to dilute the strength of the shared framework in favour of diversity.

*(d) Regulation Through Model Laws*

Model laws are legal texts that are produced as a model for enacting states to adopt as part of their domestic legislation. UNCITRAL model laws such as the MLICC have been adopted by United Nations (UN) General Assembly resolution and are offered to member and non-member states for adoption. Model laws may be adopted without amendment by enacting states. Alternatively, enacting states may elect to amend parts of a model law so that it better suits local substantive and procedural legal requirements and complies with national public policy.<sup>47</sup> Thus UN model laws are flexible instruments, and strict uniformity among national provisions, while an ideal, is not expected. The more realistic aim is harmonisation in a particular legal area.

To this end, enacting states contemplating amendments to the original text are encouraged to maintain the basic principles of the law and to make as few changes as possible. In terms of interpretation, Art. 2 MLICC contains a provision frequently found in UNCITRAL model laws, namely, that in interpreting the Law, ‘regard is to be had to its international origin and to the need to promote uniformity in its application [...].’ In this way, courts from different jurisdictions are more likely to interpret their national laws in a similar way where similar terms are used, thereby enhancing harmonisation.

*(e) Regulation Through Legislation*

For the purposes of this chapter and the differentiation of various forms of mediation regulation, legislation refers to laws made by primary formal law-

<sup>47</sup> See the restrictions on amendments (reservations) to UN conventions: United Nations, *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002* referred to as the *Guide to Enactment* at para. 14, available at <[www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf)>.

making bodies, such as national parliaments, with the primary purpose of setting specific and definitive norms for a regulatory topic, such as mediation, and establishing clarity and certainty in relation thereto. Here legislation is to be distinguished from framework regulation, which may also take the legislative form. For example, while the EU Directive can be considered a piece of European legislation, its primary aim is to establish a framework within which nation-states can regulate the details of certain aspects of mediation, for example through legislation. Therefore the Directive is considered here within the context of framework regulation and not in this section under (specific and definitive) legislation.

In relation to the interpretation of legislation, the judiciary can also play an important role, particularly in case law jurisdictions such as Australia, England and the United States. In the course of exercising their judicial function, courts may fill gaps in the law left by legislators and lend clarity and case-specific meaning to imprecise terms such as good faith.<sup>48</sup> To the extent that courts take into consideration decisions from other jurisdictions, they may contribute to harmonisation, known as juridification.

A significant issue in mediation law reform is the extent to which a rigid, highly legalised form of regulation such as legislation is suited to the needs of the mediation process and those who use it. Mediation is promoted as a flexible process that supports party autonomy, legal and non-legal approaches to problem-solving and creative tailor-made solutions. Legislative mechanisms, however, are restricted in their capacity to deal with non-legal perspectives and high levels of generality, complexity, unpredictability and innovation. This mismatch goes some way to explain why some mediation statutes of general scope and application deal with specific aspects of mediation practice only, such as admissibility of mediation evidence issues, leaving other mediation issues to more responsive and potentially diverse forms of regulation.<sup>49</sup> For cross-border practice, this means that lawyers need to look beyond legislation when identifying and examining the applicable private international law.

<sup>48</sup> See, for example, the Australian case of *Aiton Australia Pty Ltd v Transfield* [1999] NSWSC 996 where the court indicated that good faith connotes something more than mere attendance at mediation and *United Rail Group Services Ltd v Rail Corporation New South Wales* (2009) NSWLR 618 on good faith; see also the US case of *Gilling v Eastern Airlines Inc* 680 F Supp 169 (DNJ 1988), where a court upheld sanctions against a party for merely ‘going through the motions’ and therefore failing to act in good faith in mediation.

<sup>49</sup> See, for example, the UMA as enacted in the following US states: Illinois, Iowa, Nebraska, New Jersey, Ohio, Vermont and Washington State, Washington DC, South Dakota and Utah. See also The Report of the Working Group on Mediation (Department of Justice, Hong Kong, February 2010) and the Mediation Bill (Hong Kong), which is before the Hong Kong Legislative Council at the time of writing.

(f) *Diversity in Regulatory Form: Towards Best Practice?*

In terms of achieving best practice in relation to cross-border mediation, the World Bank Group recommends a combination of private and public regulatory mechanisms with a high level of responsiveness to the needs of interest groups and changing circumstances.<sup>50</sup> Reflexive and responsive processes—associated with industry-based regulatory initiatives and formal framework approaches—are said to encourage performance *beyond compliance*.<sup>51</sup> In other words, stakeholder participation in determining regulatory measures is considered to do more than enhance awareness, understanding and compliance by supporting aspirations to achieve best practice in a regulated market. The World Bank Group recommendations are reflected in legal reform projects promoting mediation as a dispute management mechanism that provides benefits for cross-border trade and investment and economic growth and stability.

A useful international policy illustration of this approach to regulatory best practice is found in the Organisation for Economic Co-operation and Development (OECD) *Guiding Principles for Regulatory Quality and Performance*. Adopted by the OECD Council in 2005, the Principles endorse a regulation mix that promotes ‘innovation through market incentives and goal-based approaches’ and is compatible with ‘competition, trade investment-facilitating principles at domestic and international levels’.<sup>52</sup> The EU Directive on Mediation also supports regulatory diversity through its framework approach.

To the extent that regulatory diversity is promoted as a policy for cross-border mediation practice, it appears to fly in the face of harmonisation processes. How can these two apparently antithetical policy directions be reconciled? Here, the challenge is to separate the form of mediation law from its content. Whereas diversity is encouraged in relation to the form of mediation regulation, the next section suggests that cross-border harmonisation processes are effectively matching certain regulatory forms with certain mediation issues.

(2) Content of Mediation Laws

The content of laws can be usefully categorised in terms of their functions. In the context of dispute resolution, mediation laws can serve a number of different functions. They can:

- (a) Facilitate access to, and trigger, the mediation process (triggering laws);

<sup>50</sup> World Bank Group, *Alternative Dispute Resolution Guidelines 2011*, referred to as *ADR Guidelines* (2011).

<sup>51</sup> N. Gunningham, P. Grabosky and D. Sinclair, *Smart Regulation*, p. 391.

<sup>52</sup> OECD (Organisation for Economic Co-operation and Development), *The Guiding Principles for Regulatory Performance and Quality 2005*, available at <[www.oecd.org/data/oecd/24/634976533.pdf](http://www.oecd.org/data/oecd/24/634976533.pdf)>.

- (b) Regulate the conduct of the process (procedural laws);
- (c) Support the recognition and accreditation of mediators by establishing standards (standard-setting provisions);
- (d) Protect mediators and users of mediation processes by clarifying their respective rights and obligations (rights and obligations).

*(a) Triggering Laws*

Globally, the supply of mediators continues to exceed the demand for mediation services. There are too many mediators and not enough clients. Many freelance mediators keep themselves in business through a combination of private professional advisory work (for example, as legal, financial or other adviser), mediation training and offering mediation services. Anecdotal evidence from numerous jurisdictions indicates that many qualified mediators have never conducted a single mediation on a professional basis. The use of mediation in traditionally adversarial and legalistic dispute resolution contexts requires a cultural change, and such a shift takes time. Accordingly, triggering mechanisms are required to encourage the use of mediation with a view to shifting the demand–supply ratio over time.

In general, common law jurisdictions have a longer history with triggering laws than civil law jurisdictions and especially with laws that mandate mediation. Civil law jurisdictions have traditionally tended towards the view that mediation users should and will access the process voluntarily, but infrequent mediation usage<sup>53</sup> in some of these jurisdictions has led to a subsequent introduction of triggering laws.

Triggering laws come in many different forms. They may take the form of primary or delegated legislation, court rules, practice directions and orders. In addition, triggering laws manifest themselves through a softer form of regulation such as private sector initiatives or joint public-private efforts.

The MLICC does not deal with the issue of triggering. However, Art. 1(1) of the EU Directive on Mediation specifies its objective as being, *inter alia*, to ‘facilitate access to alternative dispute resolution.’ Article 5 contemplates a variety of mediation-triggering mechanisms, including court information sessions on mediation, court referrals to mediation and legislative or court-based pre-filing requirements to mediate. The Article specifically recognises the power of courts to require parties to attend mediation (mandatory referral).

Other triggering mechanisms include legislative requirements for lawyers and parties to reasonably consider the use of mediation and financial sanctions for failure to do so, such as a cost order that takes into account pre-action conduct of

<sup>53</sup> For possible reasons behind infrequent mediation usage, see section D(3) of this chapter, entitled ‘Factors Affecting Harmonisation Efficacy’.

the parties.<sup>54</sup> Legal aid and other government subsidies are also increasingly available for mediation. Examples are found in various forms in Australia, England and the United States. Finally, mediation clauses in commercial contracts are recognised and enforceable in most jurisdictions where mediation is practised. In relation to cross-border mediation practice, such clauses are usually drawn from international precedents available through ADR organisations such as the ICC, the LCIA and many others. Here, the private sector has a strong harmonising influence not just in relation to the form of the trigger but also the content of the clause, which usually incorporates terms about appointment of mediators and how the process is to be conducted.

From a lawyer's perspective, it is important to recognise that most jurisdictions recognise and enforce a variety of triggering mechanisms from both the private and public sectors. Thus the applicable law for cross-border disputes may encourage or trigger mediation in one or more ways and clients will need to comply with triggering requirements before going to court. From a harmonisation perspective, triggering mechanisms need not be the same; however, they need to be effective in generating mediations that comply with the overall regulatory framework for mediation.

(b) *Procedural Laws*

The next area of mediation subject to regulation is process and procedure, ie the manner in which the process is conducted and the procedures employed for the appointment of mediators, payment and administrative matters. These are referred to as procedural laws. Examples can be found in Arts. 4, 5, 7 and 11 of the MLICC and in legislation enacting these provisions. These provisions are non-mandatory in nature so that parties can contractually agree to manage procedural points in a manner different from the MLICC. However, more frequently, procedural mediation laws are found in the mediation rules of dispute resolution organisations such as the ICC, law societies, bar associations and other professional bodies. These rules are regularly incorporated into agreements to mediate and mediation clauses and are therefore binding on the parties to those agreements.

A global review of mediation regulatory practice has shown that most jurisdictions prefer to use collective self-regulatory (ie non-legislative) forms in relation to procedural aspects of mediation.<sup>55</sup> In other words, there appears to be a harmonising trend towards regulating procedural aspects of mediation by contractual provisions based on standards set by major private sector dispute resolution bodies. Contractual provisions can be easily changed with the agree-

<sup>54</sup> See, for example, Rules of Practice 114, the United Kingdom Civil Procedure Rules 1998, Hong Kong's Practice Direction 31 on Mediation and Australia's Civil Dispute Resolution Act 2011.

<sup>55</sup> See F. Steffek, *ZKM* 2009, 21, 23.

ment of the disputing parties, thereby ensuring party autonomy and flexibility of the actual process of mediation. The resulting paradox is that the harmonising trend towards non-legislative regulation of the internal mediation process encourages diversity in terms of how the process is conducted. In relation to process, however, the potential for diversity is generally acknowledged as a fundamental characteristic of mediation. It seems therefore fitting that regulatory approaches around the world permit, and even encourage, process diversity in mediation.

*(c) Accreditation Standards*

Accreditation standards address issues such as qualifications, competency standards for, and certification or registration of, mediators. Accreditation standards aim to offer mediators who comply with them a trust mark of quality and users an assurance that their mediator has met a certain standard of competence. Accreditation standards around the world vary dramatically in terms of duration, cost and content, with civil law systems in Europe setting significantly more onerous requirements for mediator accreditation training (often with several hundred hours of training) than most of the common law world (typically a 40-hour course).

Against this diverse background, international business leaders and potential mediator users such as Erik Pfeiffer, Chairman of the Board of Paranova Gruppen in Copenhagen, and Wolf von Kumberg, Legal Director, Assistant General Counsel, Northrop Grumman Corporation, have publicly endorsed the development of a pool of internationally recognised mediators who carry with them a trust mark of skill and experience and the backing of reputable organisations.<sup>56</sup> It is here that the international harmonisation of mediator standards through the work of institutions such as the IMI can be particularly valuable. Given that mediation is still a developing profession, the adaptable nature of institutional guidelines permits amendments to be made with relative ease to suit changing needs. At the same time, IMI's global reach aims to achieve an internationally harmonised standard of mediator quality.

In terms of regulatory form, accreditation standards for mediators are mostly found in institutional guidelines such as those of IMI and numerous other international and national accrediting institutions. However, they sometimes appear in legislation, as is the case in Austria.<sup>57</sup>

The extent to which accreditation standards are recognised by other mediation laws varies greatly from jurisdiction to jurisdiction, and in certain circumstances may affect the applicable law in cross-border situations. In Austria, for example, mediators who meet required accreditation standards are offered the benefit of a

<sup>56</sup> See comments by international business leaders available at <[www.imimediation.org](http://www.imimediation.org)>.

<sup>57</sup> See the Austrian Mediation Act (*Zivilrechts-Mediations-Gesetz 2001 – ZivMediatG*) and Regulations on the Training of Mediators (*Zivilrechts-Mediations-Ausbildungsverordnung 2004 – ZivMediat-AV*) BGBl I No. 29/2003.

regulatory framework that sets out, *inter alia*, their rights and obligations. Conversely, mediators who are not registered are not covered by the legislation. This approach links accreditation with other areas of mediation regulation and promotes an integrated mediation system. It also recognises mediation as a profession in its own right. In other jurisdictions, such as Australia, there is a set of voluntary national industry-based accreditation standards—an example of collective self-regulation—that government departments, corporates and courts are increasingly requiring of mediators whom they engage. Through increasing user buy-in, the non-legislative norm is developing into a de facto national set of standards for mediators. The Australian national accreditation standards commit mediators to a set of practice standards—a move that represents a step forward in integrating accreditation standards with other mediation laws and in recognising the professionalisation of the field. In yet other jurisdictions, such as England and the United States, there is no national accreditation system but rather organisational or court-based accreditation schemes, which permit much diversity in mediator standards.

Thus the issue of accreditation standards remains a developing regulatory area, with national jurisdictions adopting different approaches to the issue. In a cross-border context, most clarity seems to be available from the international public interest initiative, IMI.

*(d) Rights and Obligations*

The last content category of mediation laws sets out rights and obligations of those involved in mediation processes, thereby protecting the integrity of the mediation process and its participants. Examples of these are provisions relating to confidentiality and admissibility of mediation evidence, enforceability of mediated settlements, impartiality of mediators, disclosure requirements, mediator liability, and impact on court limitation periods.

Examples of provisions on rights and obligations in cross-border mediation texts can be found in the EU Directive on Mediation and the MLICC. Articles 6, 7 and 8 of the EU Directive on Mediation contain provisions on enforceability of mediated settlements, admissibility of evidence and the operation of limitation periods. The UNCITRAL Model Law on Conciliation also addresses similar issues in Arts. 10, 13, 14 and in the optional Art. X.<sup>58</sup> In addition, rights and obligations are usually included in agreements to mediate and mediator codes of conduct, even where there are applicable statutory provisions. Such contractual provisions can be useful in a number of circumstances. Where applicable law is contained in a newly minted piece of legislation, there may be uncertainty surrounding how it will be interpreted and applied to practice. Here, parties may wish to include clear contractual provisions that either:

<sup>58</sup> Art. X on limitation periods is found in the footnote to Art. 4 of the MLICC.

- In the case of default legislative provisions, show that they are opting out of the legislation; or
- In the case of mandatory legislation, seek to clarify and confirm what they consider to be the meaning and effect of the legislative terms.

Laws dealing with rights and obligations of mediation participants and mediators—especially in relation to the admissibility of mediation evidence in subsequent judicial and arbitral proceedings—are most commonly the subject of legislation. In common law jurisdictions, it is not unusual for the focus of mediation legislation to be on the confidentiality and admissibility issue. For example, the UMA in the United States, a model law with the aim of harmonising certain aspects of mediation law among the US states, primarily deals with the admissibility of mediation evidence. Similarly, this issue is the focus of the Hong Kong Mediation Bill, which is before the Legislative Council at the time of writing. In terms of international harmonisation, confidentiality and admissibility issues are most frequently the subject of legislation, but the issues are dealt with using a variety of legal mechanisms, such as statutory prohibition of mediator testimony, right of refusal to testify, statutory or contractual evidentiary exclusion provisions and various types of privilege.

In terms of the impact of these provisions on mediation practice, the main differences relate to:

- Whether or not parties can contract out of the legislative provisions; and
- Whether or not non-admissibility is absolute or subject to exceptions.

In the common law jurisdictions, there is a trend towards mandatory legislative provisions on this issue, subject to a number of notable exceptions that relate to the enforceability of mediated settlements, claims of professional negligence against mediators or other professionals involved in the process, threats to life and liberty, and where it is considered necessary in the interests of justice.<sup>59</sup>

### (3) Bringing Form and Content Together: The Mediation Mix

It has been suggested that effective regulation extends well beyond the pages of formal legal instruments such as model laws and statutes. Differentiation among various categories of form and content is useful in terms of understanding how regulation can and does influence the practice of (cross-border) mediation. Figure 1 (see following pages) brings together form and content in a visual structure referred to as the Mediation Mix. It is illustrated with examples from cross-border regulatory instruments on mediation.

<sup>59</sup> See, for example, the UMA, the Hong Kong Mediation Bill and the MLICC.

#### **F. The Shifting Tensions Between Diversity and Harmonisation**

There are many forces at play shaping how contemporary mediation practice is regulated. Many of these factors, such as institutionalisation, codification, co-ordination and internationalisation, contribute in sometimes complementary, sometimes overlapping, ways to the harmonisation of international mediation practice within and among legal systems. For example, soft forms of codification such as codes of conduct, accreditation standards and referral policies usually support the introduction of programs into courts and other institutions and organisations. Internationalisation and co-ordination initiatives frequently follow periods of significant codification at national, local and/or organisational levels. Other factors such as regionalisation, juridification and innovation can work to encourage diversity and effectively resist harmonisation. Here, seven factors contributing to the shifting tensions between diversity and harmonisation are explored:

- (1) Institutionalisation
- (2) Codification
- (3) Co-ordination
- (4) Internationalisation
- (5) Regionalisation
- (6) Juridification
- (7) Innovation.

##### **(1) Institutionalisation**

Institutionalisation refers to the role of institutions in (cross-border) mediation practice, in particular the co-option of mediation into court programs, government agencies, business and community organisations and the cross-border proliferation of institutional mediation service providers. In the context of courts, there are two primary models of court mediation: the justice model and the market model. The distinction relates to whether the provision of mediation services is considered to be (i) an integral part of the justice system and therefore a function of the court (the justice model), or (ii) an emerging private sector market for dispute resolution (the market model).

The market model of court-related mediation represents a privatised form of mediation in which the court outsources mediation services. Mediators are typically external to the court and form part of a list or panel of court-approved mediators who set their own fees. The marketplace model promotes a ‘user-pays’ system, which means that fees are payable by the parties. The market place model of court-related mediation originated in common law jurisdictions such as Canada, Australia, England, Hong Kong and the United States, but it is also practised in some civil law jurisdictions.

*Figure 1: The Mediation Mix*

Forms of Mediation Law				
Triggering mechanisms	Market Individually drafted mediation clauses, agreements to mediate, mediator contracts	Industry ICC <sup>2</sup> ADR Rules, Art. 1	Framework EU Directive Art. 2(1) <sup>3</sup> (range of triggers recognised), Art. 5 (court referral), Art. 9 (increasing awareness of mediation)	Model Law MLICC Art. 1(8) (recognition of triggers) <sup>4</sup> UMA s. 3(1) (recognition of triggers) <sup>5</sup>
Process and procedure	As specified by the agreement to mediate or mediator contract	ICC ADR Rules Art. 1 (party autonomy), Art. 2 (commencement of process), Art. 3 (appointment of mediator), Art. 4 (registration for mediation and costs), Art. 5 (language and place of mediation, nature of process), Art. 6 (termination of process)	EU Directive Arts. 3 (definition) and 4(1) (quality of mediation)	MLICC Art. 1(3) (definition), Art. 4 (commencement of process), Art. 5 (appointment of conciliators), Art. 6 (conduct of conciliation), Art. 7 (mediator- party communications), Art. 11 (termination of mediation), Art. 12 (mediator as arbitrator) UMA s. 2(1) (definition), s. 10 (participation of non-parties in mediation)
Mediator accreditation	No formal accreditation requirements	IMI Qualifying Assessment Program (QAP) approves	EU Directive Art. 4(2) (training of mediators)	Austrian Law ss. 8—14 (accreditation / registration requirements, list of mediators,

		organisations around the world to certify mediators: <www.intimediation.org>		removal from list), s. 20 (continuing education and training), ss. 23—28 (approval of training organisations, certificates, list of organisations, removal from list)
Rights and obligations	As specified by the agreement to mediate or mediator contract according to the applicable law as interpreted by the relevant court, Applicable general law	ICC ADR Rules Art. 3(2) (mediator duty of disclosure), Art. 5(5) (good faith), Art. 7 (admissibility of mediation evidence), Art. 8 (limitation periods)	EU Directive Art. 6 (enforceability of mediated settlements), Art. 7 (admissibility of mediation evidence), Art. 13 (access to court), Art. 14 (enforceability of mediated settlements) UMA ss. 4—8 (admissibility of mediation evidence, confidentiality), s. 9 (mediator's duty of disclosure)	MLJICC Arts. 8 and 9 (confidentiality), Art. 10 (admissibility of mediation evidence), Art. 13 (access to court), Art. 14 (enforceability of mediated settlements) UMA ss. 4—8 (admissibility of mediation evidence), ss. 31—32 (consequences of breach of s. 18), s. 19 (mediator liability), ss. 21, 22 (limitation periods)

<sup>1</sup> Regulation by legislation is illustrated using the Austrian Law on Mediation in Civil Cases 2001 and Training Regulations 2004 (Austrian Law) which applies to domestic and cross-border mediations under Austrian law.

<sup>2</sup> International Chamber of Commerce is abbreviated as ICC.

<sup>3</sup> The EU Directive on Mediation: this provision does not set out triggering mechanisms for mediation. Rather it recognises various pathways to mediation and confirms the application of the Directive to mediations occurring as a result of these.

<sup>4</sup> The Model Law on International Commercial Conciliation (MLJICC); this provision does not set out triggering mechanisms for mediation. Rather it recognises various pathways to mediation and confirms the application of the MLJICC to mediations occurring as a result of these.

<sup>5</sup> The Uniform Mediation Act in the United States (UMA); this provision does not set out triggering mechanisms for mediation. Rather it recognises various pathways to mediation and confirms the application of the UMA to mediations occurring as a result of these.

In contrast, typical features of the justice model are as follows. The parties are referred to mediation by the court. The mediation process usually takes place in the court building and with court-based mediation practitioners. Mediators are drawn from the judiciary, court personnel and panels of mediators attached to the court or an external ADR organisation. Moreover, mediators are chosen and appointed by the court and the costs of the mediation are borne by the justice system. The justice model originated in civil law countries, such as Slovenia, Germany, the People's Republic of China and parts of Scandinavia. It is also found in some courts and tribunals of common law jurisdictions, such as Australia and Canada.

Thus these two models of institutionalising mediation into courts dominate the court-mediation landscape worldwide. Justice models have now ventured into common law jurisdictions and market models into civil law countries. Hybrids of both models are also evident, for example, in certain instances in Australia and Germany where external mediators are appointed by the court and provided at the court's expense to the parties. In this way, institutionalisation initiatives are gradually harmonising how mediation is regulated in courts across the world. In another example, traditional customary forms of mediation have been co-opted into certain courts. For example, the New Zealand Pasifika Youth Court seeks to apply traditional mediation-like principles from a range of Pacific jurisdictions to cases before the court.<sup>60</sup> Thus where, for instance, the defendant is of Samoan heritage and lives in a Samoan community in New Zealand, traditional Samoan mediation principles may be applied by the court. Although the traditions will vary from culture to culture, their application by one court has the effect of harmonising them in relation to interpretation issues and application. Other examples of institutionalisation can be found in medium to large organisations, from banking corporations to universities and hospitals, which increasingly offer internal mediation for workplace grievances. These examples of organisational harmonisation are frequently the starting points for industry-based initiatives that may be incorporated into international practice.

Large international organisations have the advantage of economies of scale. In relation to the establishment of procedural and contractual precedents for mediation, they are arguably a leading force in cross-border harmonisation, establishing internationally recognised standard forms for mediation clauses, agreements to mediate and the like. Thus harmonisation processes are not limited to government or court initiatives but may also include private sector activities.

In relation to mediation service providers, the mid to late 1990s signalled the beginning of a cross-border phase of the institutionalisation of mediation. International commercial arbitration institutions—such as the ICC in Paris and the LCIA in London—began to offer cross-border mediation, while national organi-

<sup>60</sup> On the Pasifika Youth Court, see <<https://www.msd.govt.nz/about-msd-and-our-work/publications-resources/corporate/regional-plans/2010-12/auckland/reduced-reoffending/index.html#PasifikaYouthCourt6>>.

sations, such as the Australian Commercial Disputes Centre (ACDC) in Sydney, ADR Center in Rome, the Centre for Effective Dispute Resolution (CEDR) in London, the International Institute for Conflict Prevention and Resolution (CPR) in New York and JAMS in California, began to extend their existing mediation services and facilities across borders. In addition, international organisations that offer international mediation services in specialised fields include WIPO for intellectual property disputes<sup>61</sup> and the International Ice Hockey Federation in relation to its own sporting disputes.<sup>62</sup> E-commerce and e-conflict have contributed to a proliferation of online dispute resolution services (ODR) across borders. ODR service-providers for the Uniform Domain Name Dispute Resolution policy of the Internet Corporation for Assigned Names and Numbers (ICANN)<sup>63</sup> include WIPO, the Asian Domain Name Dispute Resolution Centre (ADNDRC),<sup>64</sup> and the National Arbitration Forum (NAF)<sup>65</sup> based in the United States. The European Commission has established two networks dealing with consumer mediation and ODR: ECC-NET and FIN-NET. In relation to cross-border family mediation, numerous organisations, projects and working groups have been established to facilitate and mediate disputes involving alleged international child abduction, usually by one of the child's parents. These include Reunite (UK),<sup>66</sup> Mission d'aide à la médiation internationale pour les familles (MAMIF) (France),<sup>67</sup> Médiation familiale binationale en Europe (MFBE) (Germany/France),<sup>68</sup> and the US–German Bilateral International Parental Abduction Working Group.

## (2) Codification

Codification in relation to cross-border mediation encompasses a broad range of written instruments with varying levels of legal status that offer structure and standards for different aspects of mediation practice. Typical forms of mediation codification include mediator codes of conduct (also referred to as practice standards and mediation rules), mediator accreditation standards (also referred to as credentialing), court rules and directions, and legislation.

Mediation law reform is usually supported by research about how other jurisdictions have regulated mediation. At the time of writing, Hong Kong has a Mediation Bill before the Legislative Council. The Bill is the culmination of

<sup>61</sup> WIPO has an Arbitration and Mediation Centre; see <[www.wipo.int](http://www.wipo.int)>.

<sup>62</sup> I. Blackshaw, *Mediating Sports Disputes: National and International Perspectives*, p.170.

<sup>63</sup> See <[www.icann.org](http://www.icann.org)>.

<sup>64</sup> See <[www.adndrc.org](http://www.adndrc.org)>.

<sup>65</sup> See <[www.domains.adrforum.com](http://www.domains.adrforum.com)>.

<sup>66</sup> See <[www.reunite.org](http://www.reunite.org)>.

<sup>67</sup> See the MAMIF website at <[www.enlevement-parental.justice.gouv.fr](http://www.enlevement-parental.justice.gouv.fr)>.

<sup>68</sup> See <[www.mfbe.eu](http://www.mfbe.eu)>.

several years of consultation and research and is based largely on the Recommendations in the Report of the Hong Kong Working Group on Mediation.<sup>69</sup> The Report indicates that the Working Group was well informed about international developments in mediation legislation and was able to base its decisions on its view of international best practice in the Hong Kong context. The Hong Kong experience is not unique. Mediation reform proposals and laws in one country are electronically posted around the world in less than a millisecond, with the result that local policy and lawmaking decisions are globally informed.<sup>70</sup> While this does not ensure the harmonisation of mediation laws, it is a significant step towards encouraging harmonisation processes.

In terms of cross-border legal instruments that promote harmonisation, notable European examples include the EU Directive on Mediation, the European Code of Conduct for Mediators, Council 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). International examples include the UNCITRAL's MLICC, the IMI's Code of Professional Conduct for Mediators and the ICC's ADR Rules.

There has been considerable codification activity in Europe in relation to cross-border consumer ADR. In 1998 and 2001, the European Commission issued Recommendations reinforcing its support for the use of mediation in cross-border consumer disputes.<sup>71</sup> Proposals released in 2011 for a European Directive on Consumer ADR<sup>72</sup> and a Regulation on Consumer ODR<sup>73</sup> offer examples of co-ordinated attempts to work towards harmonised solutions for offering consumers access to effective and reliable online and offline dispute resolution. The proposed Regulation aims at establishing an EU-wide ODR system that will facilitate the resolution of disputes related to the cross-border online sale of goods or provision of services between traders and consumers.<sup>74</sup>

<sup>69</sup> See the HKSAR *Department of Justice Report of the Working Group on Mediation*, February 2010, available at <[www.doj.gov.hk/eng/public/mediation.htm](http://www.doj.gov.hk/eng/public/mediation.htm)>.

<sup>70</sup> See, for example, <[www.mediationworld.net](http://www.mediationworld.net)> that makes available mediation laws, codes and other standards from around the world.

<sup>71</sup> Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes (98/257/EC) 30 March 1998. Recommendation on the Principles for Out-of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes (C(2001) 1016) 4 April 2001.

<sup>72</sup> Directive of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (2011) (Directive on consumer ADR).

<sup>73</sup> Proposal for a Regulation of the European Parliament and of the Council on Online Dispute Resolution for Consumer Disputes (2011) (Regulation on consumer ODR).

<sup>74</sup> Regulation on Consumer ODR, at 2.

### (3) Co-ordination

Co-ordination at organisational, institutional and governmental levels is of significant practical importance in the harmonisation of mediation laws and practice. As the mediation field evolves and matures, rivalries tend to emerge among professions, service providers and organisations over qualifications, practices and approaches to mediation. This development frequently results in fragmentation, duplication and inconsistency in practice and confusion in the marketplace. Eventually, a move towards increased co-ordination and collaboration in relation to infrastructure and mediation services takes place in an attempt to address common challenges and achieve joint objectives.<sup>75</sup>

There are many illustrations of co-ordination occurring in relation to cross-border mediation. For example, the first transatlantic alliance of mediation organisations, the Mediation Services Alliance (MEDAL), was established in 2005.<sup>76</sup> In 2009, JAMS in the United States and the ADR Center in Italy announced an agreement to form the JAMS International ADR Center to provide mediation and arbitration of cross-border disputes and training services worldwide. Illustrations of industry co-ordination and collaboration in relation to mediator accreditation are found in the establishment of the National Mediator Accreditation and Practice Standards in Australia and the IMI's Certification Scheme discussed below. International inter-governmental co-ordination and collaboration is evidenced by the development and subsequent adoption of the EU Directive on Mediation, the UNCITRAL MLICC, and within the United States on an inter-state governmental level with the adoption of the UMA.

### (4) Internationalisation

Internationalisation refers to initiatives designed with the primary purpose of harmonising aspects of mediation practice across geo-political borders. In relation to accreditation standards, for example, IMI is a public interest initiative, which operates with the support of national mediation organisations around the world to certify mediators based on its competency certification scheme (IMI Certification Scheme) and standards for training and assessment. IMI aims to offer a trust mark of quality mediation not by requiring uniform standards but through 'har-

<sup>75</sup> The developments described here have not been subject to formal empirical research. However, they can be discerned in the vast majority of jurisdictions that introduce mediation. In Australia, the National ADR Advisory Council has recognised four stages of mediation development: 1. Pioneering work; 2. Mediation increasingly accepted and adopted; 3. Fragmentation, duplication, inconsistency; 4. Increased co-ordination and collaboration: NADRAC, *A Framework for ADR Standards: Report to the Commonwealth Attorney-General (2001)*, p. 15. See also the *ADR Guidelines* (2011), p 45.

<sup>76</sup> International News, 16 *World Arbitration and Mediation Report* 178 (2005).

monising' 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. Thus IMI's goal is to harmonise mediator certification requirements in public and private sector service-provider organisations around the world, rather than unify relevant national regulatory instruments. It is an example of an industry-led harmonisation process. IMI continues to consult widely with mediators, mediation users, mediator credentialing bodies, mediation service providers, government representatives and others with a stake in the development of a mediation profession.

Related to the phenomenon of internationalisation is the *export* of mediation structures, systems, knowledge and skills primarily from first to third world nations. Thus, western mediation models are frequently introduced to reforming countries by well-intentioned consultants as culturally inclusive processes,<sup>77</sup> which, of course, they are not. However, even where effort is put into acknowledging and drawing upon cultural norms as appropriate, the results are generally variations to a western construct rather than genuinely different mediation models derived from local culture and traditions. In this way, many developing countries are absorbing international mediation regulatory standards.

#### (5) Regionalisation

Linked to internationalisation is the harmonising driver of regionalisation.<sup>78</sup> Global trade and increasing economic interdependence play an important role in economic development in most countries. Regional trading blocs such as the EU, the North American Free Trade Association (NAFTA), Mercosur, the Southern African Development Community (SADC), Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA), ASEAN, or Asia-Pacific Economic Cooperation (APEC) are significant players in the harmonisation of business environments to enhance trade between the member states.<sup>79</sup> A typical requirement for membership in such trading blocs is the inclusion of ADR as part of the justice system.<sup>80</sup>

For example, Art. 2022 of the North American Free Trade Agreement provides for a committee with the mandate to advise the Commission in its efforts to develop ADR in Canada, the United States and Mexico. Among its numerous proposals, the Committee has recommended to the Commission that the three member states should adopt the UNCITRAL Model Law on Commercial

<sup>77</sup> On the value crisis and confusion in mediation, see D.J. Della Noce, 17 *Ohio St. J. on Disp. Resol.* 545 (2002).

<sup>78</sup> This section is adapted from the *ADR Guidelines* (2011).

<sup>79</sup> See comments on some of these regional agreements by N. Antaki, in J.C. Goldsmith, A. Ingen-Housz and G.H. Pointon, *ADR in Business*, pp. 33–7.

<sup>80</sup> See, for example, OHADA's Uniform Act of 11 March 1999 in relation to arbitration.

Conciliation. Similarly, the EU Directive on Mediation aims to facilitate access to mediation and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.

From a human perspective, factors such as interpersonal connections, business relationships, trust and culture may exert a greater influence over the decision of whether or not businesses will engage in international trade than questions of applicable law. This view is consistent with research referred to previously suggesting that countries with similar legal systems engage in greater amounts of trade with one another rather than with countries with different legal systems. There are likely to be more informal connections among people from similar legal cultures, and these countries are more likely to form trade groups, particularly when they are in the same region.

#### (6) Juridification

Juridification refers to the development of a body of court decisions and case law on aspects of mediation. Juridification is relevant not only in common law jurisdictions where judicial decisions form legal precedent or case law, but also in other jurisdictions where judicial decisions are influential and signal how courts are likely to decide similar matters in future. Litigation in connection with mediation is on the rise.<sup>81</sup> As mediation practice continues to grow, US research indicates an increase in the number of cases dealing with aspects of mediation.<sup>82</sup> Similar trends are evident in Australia and other common law countries, although the volume of litigation varies considerably in each jurisdiction. While there is generally less litigation relating to mediation in civil law countries, it too is increasing with the growth of mediation. Some of the more frequently litigated aspects of mediation include:

- Enforceability of mediation clauses;
- Mediation referral criteria;
- Non-compliance with requirements to attend or reasonably consider the use of mediation;
- Breach of various duties of participants in mediation such as parties' and lawyers' duties to participate in good faith;
- Professional negligence claims against mediators, lawyers or other professionals attending mediation;

<sup>81</sup> However, relative to the increasing number of mediations taking place in jurisdictions such as Australia and the United States, litigation in connection with mediation remains minimal.

<sup>82</sup> J. Coben and P. Thompson, 11 *Harv. Negot. L. Rev.* 43, 51–5 (2006) and J. Coben and P. Thompson, 1 *WAMR* 398 (2007). Research findings by the authors are also available at <[http://law.hamline.edu/files/V\\_1.3\\_Coben\\_Thompson\\_TRENDS.pdf](http://law.hamline.edu/files/V_1.3_Coben_Thompson_TRENDS.pdf)>.

- Admissibility of mediation evidence in subsequent determinative proceedings such as court adjudication or arbitration;
- Enforceability of mediated agreements.

Over time, the juridification of mediation issues tends to have a harmonising effect on the interpretation of mediation law within the applicable jurisdiction. Beyond that, juridical decisions from similar but foreign legal systems may have an influential effect on local courts from time to time. For example, Hong Kong courts often look to English and Australian cases for guidance in mediation matters.<sup>83</sup> While such practices may encourage gradual harmonisation, they are sporadic in nature and dependent on the attitudes of local courts and judges towards the decisions of foreign courts.

In relation to international mediation law, Art. 2(1) of the MLICC provides that: ‘In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.’ Thus Art. 2 encourages national courts to look to the international character and origin of the Model Law, which may include how other countries have understood and interpreted their enactment of the Model Law. In addition, there are databases and other systems that support harmonisation through the structured communication and dissemination of judicial decisions on cross-border mediation and ADR. One of these is UNCITRAL’s Case Law on UNCITRAL Texts (CLOUD) system. The former Secretary of UNCITRAL, Jernej Sekolec, explains how CLOUD promotes the harmonisation of judicial decisions on arbitration and mediation:

‘One way in which UNCITRAL works on promoting harmonisation and unification is through the CLOUD system, which stands for ‘Case Law on UNCITRAL Texts’. After the Model Law on Arbitration was published, UNCITRAL gathered court decisions and arbitral decisions dealing with the Law. The published results are available in the six languages of the United Nations and show how judges and other interpreters of different jurisdictions have applied the law. This system has worked very successfully with the Model Law on Arbitration. UNCITRAL has published a large number of cases and now a digest of case law is about to be launched. The CLOUD system reaches many people – lawyers, arbitrators, dispute resolution providers, policy makers and lawmakers. It influences the future development of international arbitration and I have every reason to believe it will extend similar guidance to the development of international commercial conciliation and mediation.’<sup>84</sup>

<sup>83</sup> See, for example, references to English case law in the following Hong Kong cases: *Supply Chain & Logistics Technology Ltd v NEC Hong Kong Ltd* (unreported, HCA 1939/2006, 29 November 2009), [2009] HKCU 123, in which Lam J approved the comments of Dyson LJ in *Halsey v Milton Keynes General NHS Trust and Steel v Joy and Halliday* [2004] EWCA Civ 576; *iRiver Hong Kong Ltd v Thakral Corporation (HK) Ltd* [2008] 6 HKC 391, in which the English decision of *Dunnett v Railtrack* [2002] 2 All ER 850 was cited and quoted.

<sup>84</sup> Interview with Jernej Sekolec in N. Alexander, *International and Comparative Mediation*, p. 383.

Thus CLOUT offers easy accessibility of judicial decisions interpreting enactments of the MLICC. Together with the operation of Art. 2(1) of the MLICC, these two factors increase the likelihood that lawyers and judges will refer to relevant CLOUT cases when working their way through litigation about cross-border mediation.

#### (7) Innovation

As the mediation field develops and benefits from the cross-fertilisation of know-how and know-why, so too the need to be different, unique or better intensifies. Competition feeds innovation, which manifests itself in diverse and creative systems and practices. Moreover, innovative and entrepreneurial impulses sit well with the characteristically flexible nature of mediation and its ability to procedurally shift in ways that address users' specific needs. Anecdotal evidence suggests that the desire for differentiation and the motivation for innovation intensify in the face of strong moves towards standard or harmonised approaches. Here, the concern is that rule consistency may stifle the growth of mediation, inhibit its opportunities for innovative development and lead it down the highly legalised path that arbitration has travelled.<sup>85</sup>

Sometimes, innovation is deliberately encouraged by legal instruments that set up a framework for mediation regulation, such as by prescribing the issues that are to be regulated but not *how* they are to be regulated. The EU Directive on Mediation offers an illustration of a framework approach to mediation regulation. While it requires all Member States to address certain aspects of mediation, it falls short of specifying the approach that states should take in terms of both regulatory form and content. Another example is found in s. 15a of the German Introductory Law of the Code of Civil Procedure,<sup>86</sup> which permits German states to introduce mandatory court-related ADR (*aussergerichtliche Streitschlichtung*) with respect to certain civil disputes. German state parliaments have the option to legislate to require participation in an ADR process in relation to the identified disputes. Section 15a EGZPO has been referred to as the experimentation clause (*Experimentierklausel*) because it was intended to encourage different models of mediation and ADR design among German states.

Thus innovation, whether it be the result of legal stimulation or market competition, continues to shape mediation practice. Mediation innovations tend to generate diversity rather than harmonisation, at least in the short term. In the long

<sup>85</sup> See T. Altobelli, 4 *Macarthur L Rev* 106 (2000) and R. Carroll, 30 *UWA Law Journal* 167, 195 et seq. (2002). See also comments in relation to the adoption of the Uniform Mediation Act (2001) in the United States, for example, R. Benjamin, 'The Uniform Mediation Act: A Trojan Horse?' (2001) and the 'Uniform Mediation Act Working Reporter's Notes', both available at <[www.mediate.com](http://www.mediate.com)>.

<sup>86</sup> *Einführungsgesetz zur Zivilprozessordnung*, EGZPO, 2000.

term, it is conceivable that innovation and system competition will result in the most effective and efficient mediation laws dominating the international legal landscape. This is consistent with Wagner's notion of 'voluntary harmonisation' referred to previously.<sup>87</sup>

#### **G. Private International Law on Mediation (PIL): European and International Legal Instruments**

We now turn to specific cross-border European and international legal instruments that contribute to the procedural and substantive private international law of mediation.

##### **(1) PIL on Mediation: European Legal Instruments**

The EU has begun a transition from national to regional (European) private international law rules in relation to contractual and non-contractual obligations. The European cross-border legal instruments most relevant to the private international law of mediation are the Brussels I Regulation and Rome I Regulation.<sup>88</sup>

###### *(a) Brussels I Regulation*

The Brussels I Regulation deals with court jurisdiction and judgment recognition issues in virtually all civil and commercial matters within the EU. It aims to harmonise the rules on jurisdiction and prevent parallel litigation. This Regulation is likely to play a significant role in the development of European mediation law to the extent that:

- Courts make decisions about the recognition and enforcement of mediation clauses, agreements to mediate and mediated settlement agreements in their various contractual forms;
- Mediated settlement agreements take the form of a court order, court consent award or judgment; and
- Courts make decisions about other aspects of mediation such as confidentiality and admissibility of mediation evidence.

<sup>87</sup> See H. Wagner, *Fern Universität in Hagen Discussion Paper*, p 4, referred to in section D(2) of this chapter.

<sup>88</sup> Note also the Rome II Regulation in relation to non-contractual obligations such as tort and Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007).

The Brussels I Regulation, which came into force on 1 March 2002, supplants two other conventions: the Brussels Convention<sup>89</sup> and the Lugano Convention.<sup>90</sup> Together, these three instruments constitute the Brussels Regime, which applies to legal disputes of a civil or commercial nature.<sup>91</sup> There are some exceptions limiting this scope, for instance where the principal matter of a dispute is one of family law, bankruptcy or insolvency, social security or relates to arbitration. The Brussels I Regulation changes some aspects of the Brussels Convention, but is in general similar.

According to the Brussels I Regulation, a person, either legal or natural, may only be sued in the Member State in which he or she is domiciled.<sup>92</sup> Domicile is determined by the law of the national court hearing the case, so a person can be domiciled in more than one state at the same time. The traditional rules for defendants who are not domiciled in a Member State are maintained.<sup>93</sup> Thus, if a defendant is domiciled elsewhere, the Regime does not apply and the national court hearing the case is left to determine jurisdiction based on the traditional rules governing such questions in their legal system.

The Brussels Convention and the Brussels I Regulation are both subject to the jurisdiction of the ECJ on questions of interpretation, which promotes a uniform interpretation within the region. The Lugano Convention does not have a protocol governing references to the ECJ. The interpretations of other national courts, and of the ECJ in the case of Lugano Convention contracting states, are influential; however, they are not binding, so differences have arisen between Member States in the interpretation of the instruments.

The Regime applies only in the courts of signatory states, so nothing stops a non-party state from allowing parallel proceedings in their courts, but this could contribute to a finding of *forum non conveniens*, which would stop the action.

#### (b) *Rome I Regulation*

The Rome I Regulation offers a uniform set of rules and one court—the ECJ—to interpret and enforce it. This development will significantly simplify conflicts of legislation in EU Member States. Rome I aims to create a harmonised, if not a unified, choice of law system in contracts within the EU. It is based upon and replaces the Convention on the Law Applicable to Contractual Obligations 1980. Rome I differs from the Brussels I Regulation in that it determines which *law* the court should apply to interpret contracts with an international element, as opposed to which *court* can hear a given dispute.

<sup>89</sup> Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

<sup>90</sup> Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

<sup>91</sup> Art. 1 Brussels I Regulation.

<sup>92</sup> Art. 2 Brussels I Regulation.

<sup>93</sup> Art. 4 Brussels I Regulation.

In the context of cross-border mediation, Unberath identifies three types of contract in mediation settings:

- An agreement between the parties to engage in mediation: this may take the form of a mediation clause in a commercial contract or a separate agreement between the parties referred to as an agreement to mediate.
- An agreement between the mediator(s) and the conflicting parties referred to as a mediator contract, which regulates the rights and obligations of the signatories in relation to the mediation process.
- A mediated settlement agreement between the parties, which contains the terms of settlement of their dispute.<sup>94</sup>

It is important to note that Rome I preserves freedom of choice of law: if the parties have articulated the law which is to govern a dispute, then that law is to be applied (subject to limited exceptions – see Art 3.3). In the absence of any clear selection, Rome I establishes various rules which apply to different types of contracts, such as those concerning services, sale of goods or franchise agreements. If those rules cannot resolve the conflict of laws dispute, then the court must consider certain objective criteria, such as where the party required to effect the characteristic performance usually resides (Art. 4.2). Again, certain exceptions apply (Art 4.3). In relation to agreements to mediate, the effect of Rome I will be that *usually* the law of the country in which the mediator resides will apply (Art 4.1). Rome I thus aims to provide a degree of certainty for those embarking on cross-border mediation.<sup>95</sup>

### (c) Harmonising Potential of the Regulations

In terms of the harmonising potential of the Regulations, it is noteworthy that regulations of the EU are self-executing legislative instruments and do not require any implementing measures. They are *prima facie* directly applicable in all member countries. Therefore, the provisions of the regulations are interpreted and enforced in a uniform manner by the European Court of Justice. The case law of the Court in relation to the Brussels I and Rome I Regulations provides an illustration of the use of the comparative law method to develop an internationally uniform interpretation of its terms. The Court in its determination of cases uses a comparative approach, drawing on and comparing case law from different Member States.<sup>96</sup> Accordingly, the decisions and interpretations of the European Court of Justice draw from the jurisprudence of multiple jurisdictions

<sup>94</sup> H. Unberath, in H. Kronke and K. Thorn, *Festschrift für Bernd von Hoffmann: Grenzen überwinden – Prinzipien bewahren*, p.503.

<sup>95</sup> However, on the complexity and uncertainty that persists in relation to the applicable law on the various types of mediation contracts in Germany, see Unberath *ibid*.

<sup>96</sup> See M. Reimann, in M. Reimann and R. Zimmermann, *The Oxford Handbook of Comparative Law*, p. 1388. See also J. Zekoll, in M. Reimann and R. Zimmermann, *The Oxford Handbook of Comparative Law*, pp. 1340–1. Zekoll provides further examples of initiatives towards the Europeanisation of procedural rules applicable to cross-border disputes.

and contribute to a uniform interpretation and application of the Regulations in Member States. Conversely, they also influence the development of domestic laws of Member States and thereby encourage harmonisation. The reconciliation of different European common and civil laws at a regional level, the so-called Europeanisation of law, has been cited as evidence for a rising acceptance of a jurisprudence of tolerance.<sup>97</sup> At a national level, the legal comparativist, Glenn, refers to a new role for courts in mediating between local law and regional European legal instruments in an attempt to balance local needs and global goals.<sup>98</sup>

(d) *The EU Directive on Mediation*

Whereas the Brussel I and Rome I Regulations deal with choice of forum and law issues respectively, the European Directive on Mediation<sup>99</sup> focuses on the content of cross-border civil and commercial mediation law throughout the Member States of the EU and does not deal with issues of conflicts of law. The EU Directive on Mediation was adopted in 2008 by the European Parliament, and Member States were given until 2011 to implement its provisions into national law. The Directive does not aim to create uniform mediation law within the EU; rather, Art. 1(1) makes clear that its intention is to facilitate access to, and encourage the use of, ADR and in doing so to harmonise pan-European commercial dispute resolution. These objectives are part of a broader initiative to homogenise commercial transacting within the region.<sup>100</sup> A 2011 Report states that the Directive has also been of ‘interest to neighbouring [non-EU] States and has had a demonstrable influence on the introduction of similar legislation in some of these countries.’<sup>101</sup>

<sup>97</sup> See F. Snyder, ‘The Europeanisation of Law: The Legal Effects of European Integration’ and J. Ziller, ‘The Europeanisation of Law: From the Enlargement of the Areas of European Law to a Transformation of the Law of the Member States (L’Européisation Du Droit: De L’Élargissement Des Champs Du Droit De L’Union Européenne À Une Transformation Des Droits Des États Membres’ *EUI Working Paper Law No. 2006/19* 2006), available at <[www.ssrn.com](http://www.ssrn.com)>.

<sup>98</sup> See H. Glenn, *Legal Traditions of the World*, p. 257.

<sup>99</sup> See Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters, proposal as adopted by the European Parliament and the Council of the European Union on 21 May 2008, L 136/3, 24.05.2008.

<sup>100</sup> See F.P. Phillips, *The European Directive on Commercial Mediation: What It Provides and What It Doesn’t* (2008), available at <[www.businessconflictmanagement.com](http://www.businessconflictmanagement.com)>.

<sup>101</sup> European Parliament, *Report on the Implementation of the Directive on Mediation in the Member States, Its Impact on Mediation and Its Take-up by the Courts* (2011/2026(INI))A7-0275/2011, item E.

*(i) Nature of the Directive and Implications for the Form and Content of Mediation Law*

Directives are legislative acts of the EU that require Member States to achieve a particular result without dictating the means of achieving it.<sup>102</sup> Member States are normally granted considerable flexibility in relation to the type of regulatory instruments they select and the exact rules they adopt.<sup>103</sup> As indicated previously, the EU Directive on Mediation establishes a regulatory framework within which Member States are required to address various aspects of mediation law—in other words, the general content of mediation law is specified. At the same time, the Directive allows Member States to choose how the various aspects of mediation law are to be regulated, ie in the form of mediation law. As a result, differences in national rules may, and do, emerge within the framework of the Directive. However, the single jurisdiction of the ECJ means that risks associated with diverse national approaches are reduced and a uniform approach to European private international law is promoted.

This European framework aims to offer a level of predictability in relation to certain aspects of mediation law, while at the same time ensuring that a primary benefit of mediation, namely its flexibility, is maintained. The Directive recommends that Member States be guided by these principles of predictability and flexibility when drawing up national laws to comply with its terms.<sup>104</sup>

*(ii) Scope of the Directive*

According to Arts. 1(2) and 2, the Directive applies to European cross-border disputes only and not to disputes within any one Member State. However, the intention behind the Directive goes beyond cross-border, with Recital 8 in the preamble stating that nothing should prevent Member States from applying its provisions to domestic mediation processes. A number of EU States have taken advantage of the momentum created by the Directive and seized the opportunity to regulate mediation for domestic and cross-border disputes. For example, in Slovenia, Italy and Germany many of the Directive's principles are being applied to the domestic dispute arena. In other jurisdictions, such as England and Wales, existing domestic law on mediation automatically applied to cross-border situations and so there was pre-existing partial compliance with the Directive, and

<sup>102</sup> Art. 249 Treaty Establishing the European Economic Community, opened for signature 25 March 1957, 298 UNTS 11, Art 249 (entered into force 1 January 1958), also known as the Treaty of Rome. Although binding on states and not individuals, in exceptional cases where the terms of a directive are unconditional and sufficiently certain it can have 'direct effect'. See European Court of Justice Decision, ECJ Case 41/74 – *Yvonne van Duyn v Home Office* [1974] ECR 1974 I-01337.

<sup>103</sup> See generally P. Craig and G. de Burca, *EU Law: Text, Cases and Materials*.

<sup>104</sup> European Parliament, *Report on the Implementation of the Directive on Mediation in the Member States, Its impact on Mediation and Its Take-up by the Courts* (2011/2026(INI)) A7-0275/2011, item D.

compliance-related additions to the English private international law of mediation were completed in 2011. Similarly to England and Wales, Ireland implemented Regulations in 2011<sup>105</sup> in relation to cross-border disputes to which the Directive applies and draft legislation relating to domestic mediation is under review.

Article 1(2) further confines the Directive's application to civil and commercial matters. However, the Directive does not apply in relation to rights and obligations that parties are not free to decide themselves under the applicable law, ie mandatory non-dispositive law. The Directive expressly excludes administrative, revenue and customs matters and issues involving *acta iure imperii* (acts of government) from its application.

The Directive applies to all Member States with the exception of Denmark as per Art. 1(3).

### *(iii) Definition of Mediation*

In Art. 3 of the Directive, mediation is defined broadly as a 'structured process', however labelled and however triggered, in which parties attempt to resolve their dispute on a voluntary basis with the assistance of a mediator. As part of this definition, the Directive distinguishes between two judicial practices. The first practice is referred to as judicial settlement and involves trial judges attempting to settle cases before proceeding to determine them. Judicial settlement has a long tradition in much of civil law Europe. The second practice is referred to as judicial mediation and involves a mediating judge (not the trial judge) mediating a case before the court and, in the event of non-settlement, referring it back to the trial judge for hearing. This practice is said to maintain the integrity of the mediation process by separating the person of the mediator from the person of the judge.<sup>106</sup> The Directive acknowledges the latter practice but not the former practice as a form of mediation.<sup>107</sup>

### *(iv) Five Themes in the EU Directive on Mediation*

The following five broad themes emerge from a reading of the Directive:

- Triggering mechanisms for mediation.
- Quality of mediators and mediation processes.
- Operation of limitation periods during mediation.
- Status of settlement agreements.
- Admissibility of mediation evidence in subsequent judicial proceedings.

*Triggering mechanisms for mediation*—Article 1(1) of the Directive identifies facilitating access to ADR as one of its objectives. To this end, the definition of

<sup>105</sup> See the European Communities (Mediation) Regulations 2011, S.I. No. 209 of 2011.

<sup>106</sup> See P. Robinson, *2 Journal of Dispute Resolution* 335, 379–80.

<sup>107</sup> See Recital 12 and Art. 3 EU Directive on Mediation.

mediation in Art. 3(a) acknowledges that strong incentives and even mandatory requirements may be used to get disputants to the mediation table. Article 3(a) provides ‘This [mediation] process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.’

Further, Art. 5 sets out different mediation-triggering mechanisms that Member States may consider in their regulation policy, including court information sessions on mediation and voluntary and mandatory referrals. It seems, therefore, that the concept of voluntariness in the mediation definition does not necessarily refer to attendance at mediation but to the nature of participation and decision-making within the process.

The issue of mandatory mediation was considered by the ECJ in relation to an Italian telecommunications case in which a legislative requirement to mediate was challenged by one of the parties.<sup>108</sup> In its decision, the ECJ accepted as settled law that the principle of a right to a fair trial may be subject to restrictions, which are themselves proportionate and part of a legitimate public interest aim of improving access to justice.<sup>109</sup> The aims of the relevant Italian provisions were twofold: improved service delivery of dispute resolution in terms of time and cost; and improved access to justice by relieving the burden on the Italian courts.

In the context of these objectives, the court considered that a mandatory out-of-court mediation procedure was appropriate and proportionate. More generally, the ECJ stated that the national law of EU Member States may establish out-of-court mediation as a pre-litigation requirement, provided that:

- The process does not result in a third-party imposed binding decision effectively ousting the jurisdiction of the courts;
- There is no resulting substantial delay in bringing court proceedings;
- Parties are not time-barred from pursuing litigation; and
- There are no significant cost implications for parties to engage in mediation.

From a practice perspective, international experience has shown that the supply of mediation services continues to outweigh the demand for them, especially in jurisdictions without regulatory requirements or strong incentives to mediate. Dutch research shows that many parties would never find their way to mediation without encouragement and direction from a third party.<sup>110</sup> In this context, Pel suggests that referrers have influential roles in the success of mediation.<sup>111</sup>

<sup>108</sup> ECJ Joined Cases C-317/08 and 320/08 - *Alassini v Telecom Italia SpA* [2010] ECR I-02213.

<sup>109</sup> See *Ashingdane v The United Kingdom*, 28 May 1985, Series A, no 93, 24–5, 57.

<sup>110</sup> See M. Pel, *Referral to Mediation: A Practical Guide for an Effective Mediation Proposal*, p. 161 and the Netherlands Project on Court-Connected Mediation, available at <[www.Mediationnaastrechtspraak.nl](http://www.Mediationnaastrechtspraak.nl)>.

<sup>111</sup> See M. Pel, *Referral to Mediation: A Practical Guide for an Effective Mediation Proposal*. Support for this view is also found in the German judgment of the OLG Rostock 26 September 2006 at II 6 and the Australian decision of *AWA Ltd v Daniels t/as Deloitte Haskins and Sells and Ors* [1992] 10 ACLC 933 at para. 9.

Furthermore, experience suggests that court-referred ADR only begins to develop as a real alternative to court proceedings when it is subject to some degree of mandating.<sup>112</sup> There is also some evidence to support the view that, as experience with mediation increases, the need for mandating the process decreases.<sup>113</sup>

As the contributions to this book show, mandatory referrals and strong mediation incentives, such as cost penalties for unreasonable refusal to mediate, have traditionally been used in common law jurisdictions to stimulate mediation practice but appear less frequently in the largely civil law EU. The result is significantly greater use of, and experience with, civil and commercial mediation in the United States, Australia, Canada, England and New Zealand, compared with many civil law EU jurisdictions. In relation to Europe, Phillips comments:

‘The challenge to the growth of commercial mediation in Europe [...] is that commercial mediation itself is not practiced. Commercial enterprises in Europe have a comparatively poor understanding of the mediation process as a management tool, and are unaware of the benefits that accrue from its systematic use.’<sup>114</sup>

This statement is backed up by empirical research, which shows that within the EU commercial mediation ‘has been underutilized and vastly misunderstood in the cross-border commercial context’, with companies continuing to use court and arbitration processes at a significant cost.<sup>115</sup> Furthermore, 45% of small businesses have indicated that they would not pursue a claim in another EU court if the money owed was less than €50,000. Collectively and cumulatively, over a period of years these losses represent a significant financial cost to EU small businesses. As a result, the cost of *not* using mediation is high and, in many cases, is an unnecessary economic burden borne by EU businesses. In these circumstances, the EU Directive on Mediation offers Member States an impetus to rethink issues around pathways to ADR by using different triggering mechanisms to increase the use of mediation.

<sup>112</sup> See N. Alexander, *Global Trends in Mediation*, p. 25.

<sup>113</sup> See N. Alexander, 22 *Law in Context Special Issue: Alternative Dispute Resolution and the Courts* 8 (2004).

<sup>114</sup> F.P. Phillips, *The European Directive on Commercial Mediation: What It Provides and What It Doesn’t* (2008), available at <[www.businessconflictmanagement.com](http://www.businessconflictmanagement.com)>. See also the Response of the CPR Institute to Questions Posed by Arlene McCarthy, MEP, concerning the Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters (2005), available at <[www.cpradr.org/Portals/0/EU%20Parliament%20Questionnaire%20Response.pdf](http://www.cpradr.org/Portals/0/EU%20Parliament%20Questionnaire%20Response.pdf)>. Compare a 2009 study by the Irish Commercial Mediation Association showing a high awareness of mediation processes, but with little practical uptake of commercial mediation prior to the commencement of commercial proceedings: see Law Reform Commission of Ireland, *Report on Alternative Dispute Resolution: Mediation and Conciliation*, p. 159 and the website of Irish Commercial Mediation Association (ICMA), available at <[www.icma.ie](http://www.icma.ie)>.

<sup>115</sup> ADR Center, *The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation*.

*Quality of mediators and mediation processes*—Article 4 of the Directive is concerned with quality in terms of both mediator training and accreditation standards, and standards for the practice of mediation. While this provision does not expressly address mediator accreditation, its terms are wide enough to encompass accreditation issues insofar as Member States are directed to develop and encourage adherence to ‘effective quality control mechanisms for the provisions of mediation services’. In addition, Art. 4(2) encourages ‘the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.’ In 2011, a European Parliament Report on the implementation of the Directive expressly acknowledged ‘the importance of establishing common standards for accessing the profession of mediator in order to promote a better quality of mediation and to ensure high standards of professional training and accreditation across the Union.<sup>116</sup> Mediator training and accreditation programs are experiencing high growth at organisational and national levels around the world, but the challenge remains in relation to how to harmonise the professional standards they establish.

Mediator training and accreditation can be considered in terms of:

1. Threshold/eligibility requirements to be a mediator;
2. Training and assessment requirements for mediator accreditation; and
3. Requirements for maintaining accreditation into the future.

Generally speaking, threshold requirements are minimal throughout the EU, with some variations; for example, the Austrian requirement is that accredited mediators be at least 28 years of age. As indicated previously, the greatest variation is found in relation to duration of training requirements, even within the EU. Overall, England and Wales seem to have the lowest training requirements in terms of hours with a 24-hour or three-day course being acceptable with mediation role-plays as assessment.<sup>117</sup> At the other end of the spectrum, Austrian legislation requires more than 350 hours of training with more complex and rigorous assessment requirements.<sup>118</sup> Requirements for mediators to maintain their accreditation usually involve continuing education and practice hours.

In terms of regulatory form on training and accreditation issues, there is considerable diversity within the EU, with collective self-regulation by the mediation industry (for example, England and Germany) and legislation (for example, Austria and Slovakia) being the most popular forms.

In relation to standards for the practice of mediation (referred to as practice standards or codes of conduct), Art. 4 of the Directive expressly requires Member States to adopt standards to ensure the quality of mediation, and reference is made to the European Code of Conduct in Recital 17. The European Code of

<sup>116</sup> European Parliament, *Report on the Implementation of the Directive on Mediation in the Member States, Its Impact on Mediation and Its Take-up by the Courts*, item K20.

<sup>117</sup> See, for example, the CEDR Workplace Mediation Training: available at <[www.cedr.com](http://www.cedr.com)> and mediator training offered at <[www.colindavidruss.com/training](http://www.colindavidruss.com/training)>.

<sup>118</sup> See the Austrian Regulations for Mediator Training.

Conduct for Mediators was developed by a group of stakeholders with the assistance of the European Commission in 2004. The industry-based regional Code sets out a number of principles to which individual mediators can commit on a voluntary basis. These principles deal with issues such as mediator competence, mediator independence and impartiality, mediator appointment and fees, the promotion of mediation services, agreements to mediate, and confidentiality.

While the Directive focuses on education in relation to mediators, it fails to adequately address the issue of enhancing knowledge and awareness of mediation among end-users, courts, the legal profession and the broader community. The only relevant provision in this regard is Art. 9, which requires Member States to encourage the availability of information to the public about how to contact mediators and mediation services. This shortcoming is identified in the 2011 *Report on the Implementation of the Directive*, which calls for further action relating to education, growing awareness of mediation, and enhancing mediation uptake by businesses.<sup>119</sup>

*Operation of Litigation Limitation Periods*—Mediation is often recommended to parties on the basis that they have nothing to lose in terms of their legal rights and remedies; aggrieved parties can always pursue their rights in court should mediation not result in resolution. Such promises assume, *inter alia*, that permitted time periods for parties to lodge their claims do not expire during the course of the mediation, with the result that the claim cannot be heard in post-mediation proceedings.<sup>120</sup> In addition, where parties are compelled to comply with mediation clauses, there is a strong argument that this compliance should not prejudice them in terms of the time available to prepare and lodge documents to initiate legal proceedings and comply with other relevant time periods.<sup>121</sup> Finally, allowing limitation periods to run during mediation could have the effect of encouraging respondent parties to participate in, or even initiate, mediation for the primary purpose of delaying initiation of court proceedings, in the hope that the limitation period expires before the mediation does. For these reasons, the European Directive on Mediation specifies in Art. 8(1) that mediation parties are not to suffer any detriment with respect to any limitation periods that apply to their claim.

There are different approaches to dealing with the operation of limitation periods in Europe. In most jurisdictions, the limitation period is suspended, which means that the limitation period does not run for the duration of the mediation and resumes where it left off once the mediation process has been terminated. In jurisdictions such as Austria and Germany, suspension of limitations periods are provided for, whereas in other jurisdictions, such as Hungary and Poland, the

<sup>119</sup> European Parliament, *Report on the Implementation of the Directive on Mediation in the Member States, Its Impact on Mediation and Its Take-up by the Courts*, item K 18.

<sup>120</sup> S. Grünberger, *ÖJZ* 2000, 50, 55; H. Eidenmüller, *SchiedsVZ* 2005, 124, 127.

<sup>121</sup> See L. Cadet, *RDC* 2003, 182, 189.

operation of limitation periods may be interrupted when mediation commences. The interruption of limitation periods during mediation signifies that the limitation period is to run again from the beginning when the interruption is over. Thus, the difference between suspension and interruption can potentially be significant.

In England, the Cross-Border Mediation (EU Directive) Regulations 2011 were introduced as a compliance measure in relation to the Directive. Regulation 12 effectively postpones the effect of the expiry of the limitation period during mediation. In the event that parties proceed to cross-border mediation, and the limitation period expires in the meantime, the courts will treat that expiry as if it occurred on a date eight weeks after the end of the mediation. This mirrors the usual time frame applied by the courts when allowing parties to re-activate proceedings after they have been stayed pending the outcome of a domestic mediation. The situation in relation to domestic mediations in England remains the same, so that a party must either seek agreement from the other side to suspend the limitation period or issue a protective claim and then seek a stay from the court for mediation to be conducted.<sup>122</sup>

*Status of Mediated Settlement Agreements*—Article 6 of the Directive requires Member States to provide mechanisms through which mediated settlements can, with the consent of both parties, be made enforceable. The Directive envisages enforceability through courts, other competent authorities or specific types of legal instruments such as deeds.<sup>123</sup> The exceptions to Art. 6 are broad: mediated agreements may not be enforced where their content is either contrary to the law of the Member State in which the agreement is sought to be enforced or where that law does not provide for its enforceability. As a result, diversity in regulation of the enforceability of mediated agreements is likely to continue within the EU.

The Slovakian Law on Mediation expressly recognises different legal forms for mediated settlements.<sup>124</sup> Section 15(1) of the Law provides that mediated settlements must be in writing in order to be binding on the parties. In addition, the next subsection, s. 15(2), provides that where the agreement is executed in the form of a notarial deed and has been ‘approved as conciliation before a court [or] arbitration body’, then a party may apply to the court for judicial execution of the settlement. In the Netherlands, mediated settlements are statutorily accommodated by the legal mechanism of the declaratory settlement deed (*Vaststellingsovereenkomst*).<sup>125</sup> In France and Austria, the relevant laws on mediation in civil matters are silent on the legal form of mediated settlements, implicitly

<sup>122</sup> See Herbert Smith, *ADR e-bulletin*, 8 June 2011.

<sup>123</sup> See Art. 6(2) EU Directive.

<sup>124</sup> See s. 15 Slovakian Act of 25 June 2004 on Mediation and Amendment of Certain Acts.

<sup>125</sup> For a discussion of the declaratory settlement deed (author’s translation based on the German *Feststellungsvertrag*), see L. Schmiedel, in K. Hopt and F. Steffek, *Mediation – Rechtstatsachen, Rechtsvergleich, Regelungen*, p. 329, 363.

acknowledging parties' autonomy to choose one of a number of legal forms to enforce agreements resulting from mediation.<sup>126</sup> In Austria, this contractual liberty is accompanied by a duty on mediators to advise parties on the available legal mechanisms to implement the mediation outcome.<sup>127</sup>

In relation to England and Wales, Allen ponders the meaning of the term *enforceable* in the Directive and whether it requires immediate access to enforcement or whether the ability to sue on a mediated settlement according to general contract law principles suffices. In relation to cross-border enforcement of mediated settlements, the former option is likely to be more attractive for disputants and would put mediation on an enforceability par with arbitration. However, in England, this choice has been left in the hands of the parties who, generally speaking, may choose to incorporate their agreement in the form of an ordinary contract, a settlement deed, a consent arbitral award, or a Tomlin Order providing expedited court enforcement of terms of settlement as if they were embodied in a court judgment.

Mediated settlements sanctioned by courts that take the form of court orders may fall within the scope of cross-border legal instruments dealing with recognition and enforcement of court judgments. For example, Chapter 57 of the Brussels I Regulation is entitled *Authentic Instruments and Court Settlements* and provides that mediated settlements sanctioned by the court in the original country may be recognised as 'authentic foreign instruments' throughout the EU. In addition, the European Regulation on Enforcement Orders for Uncontested Claims would seem to include mediated settlements of disputes that have not been the subject of litigation.<sup>128</sup>

The Directive does not address the nature and extent of review available for mediated settlements. As a general rule, this will depend largely on the legal form and status of the instrument containing the settlement agreement.

The issue of enforcement of mediation clauses and agreements to mediate is not addressed by the Directive.

*Admissibility of mediation evidence*—In mediation law, there are three types of confidentiality:

1. Insider/outsider confidentiality, which refers to a general duty of confidentiality on participants in mediation vis-à-vis outside parties.
2. Insider/insider confidentiality, which regulates the flow of information among participants in mediation, especially in relation to private sessions.
3. Insider/court confidentiality, which involves the rights and obligations associated with protecting mediation communications from being legally

<sup>126</sup> See the Austrian Mediation Act, and in France, see the Civil Procedure Code (C pr civ).

<sup>127</sup> See s. 16(3) the Austrian Mediation Act.

<sup>128</sup> See Art. 3(1)(a) and (d), 24 and 25 Regulation EC No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for Uncontested Claims.

discovered or admitted in evidence in subsequent court and arbitral proceedings. This category of confidentiality is also referred to as admissibility of mediation evidence.

The Directive deals with insider/court confidentiality, which is one of the most litigated aspects of mediation. Article 7 requires Member States to ensure that mediators and those involved in mediation administration cannot be compelled to give evidence from the mediation in subsequent proceedings unless the parties otherwise agree. This provision directs its attention to mediators and neglects to address other mediation participants, such as parties and lawyers, and their obligations in relation to insider/court confidentiality. While there may be other existing protections in national law for parties and lawyers, such as the English common law ‘without prejudice’ and ‘lawyer-client’ privileges, these differ in nature to privilege and other statutory protections offered to mediators, and may permit potential gaps in, and the opportunity for challenges to, confidentiality.

Article 7 of the Directive extends to evidence ‘regarding information arising out of or in connection with a mediation process’. This is a very broad definition and would seem to cover documentation and conversations about the mediation that occur before, after or in-between mediation sessions as well as from the mediation sessions themselves. However, in line with civil and commercial parameters of the Directive, Art. 7 is restricted to evidence ‘in civil and commercial judicial proceedings or arbitration’. Therefore, Art. 7 does not require Member States to regulate admissibility of mediation evidence in relation to criminal proceedings. However, there is nothing to stop Member States doing so if they wish.

In terms of exceptions, Art. 7 provides that confidentiality is to be subject, *inter alia*, to public policy requirements and the need to establish the existence or otherwise of a settlement agreement. Thus, the Directive signals a qualified approach to insider/court confidentiality and the intention of balancing competing public policy needs.

Confidentiality provisions in EU Member States must as a minimum deal with mediators’ obligations in relation to insider/court confidentiality. Yet in numerous jurisdictions, provisions go beyond this and regulate:

- Obligations of other mediation participants in relation to insider/court confidentiality (for example, Slovakia<sup>129</sup> and the common law privileges in England<sup>130</sup>); and
- Other categories of confidentiality such as the positive duty of confidentiality referred to here as insider/outsider confidentiality (for example, France,<sup>131</sup> Germany<sup>132</sup> and Austria<sup>133</sup>).

<sup>129</sup> See s. 5 Slovakian Act of 25 June 2004 on Mediation and Amendment of Certain Acts.

<sup>130</sup> See *Farm Assist Ltd v Secretary of State for Environment Food and Rural Affairs (No.1)* [2008] EWHC 3079 (TCC) in relation to legal professional privilege in mediation and *Cumbria Waste Management Ltd and Lakeland Waste Management Ltd v Baines Wilson* [2008] EWHC 786 (QB) in relation to without-prejudice privilege.

As a result, there is still much diversity on the law of mediation confidentiality within the EU. Given the propensity to dispute around this aspect of mediation, legal advisers and parties are advised to examine the applicable law in this area carefully before entering into cross-border mediation arrangements.

(v) *After the EU Directive*

The EU Directive on Mediation has been implemented insofar as Member States have complied with its terms. In complying with the Directive, some Member States have chosen to comprehensively review their domestic as well as their cross-border law on mediation, and some have gone beyond the core requirements of the Directive. In the years following implementation of the Directive, the European Commission intends to examine areas where Member States have chosen to extend the measures of the Directive beyond its intended scope. In addition, the Commission will undertake an analysis of the main regulatory approaches adopted by Member States and how these have been received by practitioners with a view to identifying good practices and drawing conclusions about further action at a European level.

In relation to these follow-up measures, an official Communication on the Implementation of the Mediation Directive is expected in 2013.

(2) PIL on Mediation: International Legal Instruments

Various international legal instruments make a contribution to the private international law relevant to mediation: the Hague Convention on Choice of Court 2005,<sup>134</sup> the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, and the UNCITRAL MLICC. In relation to cross-border family mediation, the Hague Child Protection Convention 1996, the Hague Adult Protection Convention 2000 and the Hague Child Abduction Convention 1980 are relevant.

(a) *The Hague Convention on Choice of Court*

Signed by 64 countries, the Hague Choice of Court Convention deals with commercial agreements in which the parties identify their choice of court. The Convention of 30 June 2005 on Choice of Court Agreements was prepared by two meetings of a Special Commission of the Hague Conference on Private International Law in December 2003 and April 2004 and was unanimously adopted by

<sup>131</sup> See Art. 24 the Law of 1995.

<sup>132</sup> See s. 14 draft German Mediation Law.

<sup>133</sup> See s. 18—the Austrian Mediation Act.

<sup>134</sup> See the Hague Convention on Private International Law 20th Session (2005), available at <[www.hcch.net](http://www.hcch.net)>.

the Twentieth Diplomatic Session in 2005. The project was ‘resurrected’—after consensus had been initially too difficult to achieve—with support from the business community. A survey was conducted by the ICC among its members on the use of choice of court clauses and arbitration clauses that showed that an instrument complementing the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards would be welcome in the business community.

The original goal of the Hague Judgment Project was to achieve a truly supra-regional, international convention on jurisdiction and judgment recognition. Although it extends to a large number of countries—subject to ratification—it is limited in terms of the content it covers. Judgments in relation to the following matters are excluded from the Convention’s operation on the basis that they may interfere with national public policy or are matters of peculiar local regulation: wills, insolvency, personal injury, competition matters, intellectual property and disputes about rights *in rem* in relation to immovable property. The reasons for these exclusions are, in most cases, the existence of more specific international instruments, and national, regional or international rules that assert exclusive jurisdiction for some of these matters.

An exclusive choice of court agreement that falls within the parameters of the Convention is defined as:

‘an agreement concluded by two or more parties that meets the requirements of Art. 3, paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts in one Contracting State to the exclusion of the jurisdiction of any other courts.’<sup>135</sup>

*(b) The Hague Conventions and Other Instruments Relevant to Cross-border Family Mediation*

In relation to family disputes, there are numerous cross-border regulatory instruments.<sup>136</sup> The Hague Conference on Private International Law has produced three relevant Conventions. The first is the Hague Child Protection Convention of 1996 that promotes the use of mediation with respect to matters that fall under the Convention.<sup>137</sup> The Hague Adult Protection Convention of 2000<sup>138</sup> is a sister Convention reflecting much of the 1996 Hague Convention in the context of

<sup>135</sup> See Art. 3 a) Hague Convention on Choice of Court.

<sup>136</sup> On the international regulatory framework for cross-border family mediation, see C. Paul and S. Kiesewetter, *Cross-border Family Mediation: International Parental Child Abduction, Custody and Access Cases*.

<sup>137</sup> See Art. 31 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.

<sup>138</sup> Hague Convention of 13 January 2000 on the International Protection of Adults.

vulnerable adults. Finally, the Hague Child Abduction Convention of 1980<sup>139</sup> also makes provision for mediation. In the EU, Council Regulations, Directives and Recommendations have been adopted that specifically relate to cross-border family mediation, reinforcing support for mediation in family disputes.<sup>140</sup>

In 2007, the Permanent Bureau of the Hague Conference on Private International Law released a feasibility study on cross-border mediation in family matters. Among other things, the study suggests that the Hague Conference continues to work towards uniform or harmonised standards in relation to mediator approval and practice and laws regulating mediation, specifically those relating to incentives and requirements to mediate, confidentiality and the international recognition and enforceability of mediated agreements.<sup>141</sup>

(c) *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*

As the name suggests, The New York Convention of 1958 deals with the recognition and enforcement of foreign arbitral awards. In September 2011, 146 nations had acceded to or ratified it. The Convention is relevant to international mediation practice as mediated settlements are increasingly taking the form of arbitral awards. Such awards are called consent awards, awards on consent or awards on agreed terms.<sup>142</sup> In relation to mediated outcomes, it is generally thought that consent awards offer a higher level of cross-border enforceability than ordinary contracts and other settlement forms such as deeds.

Consent awards can occur in three primary forms: first, as a settlement in the course of an arbitral process; secondly, as a settlement between parties to an arbitral agreement prior to arbitration; or thirdly, where the law provides that a mediated settlement can be treated as an award, provided there is compliance with certain conditions.

By way of example, arbitration laws in Germany, Austria and England provide that an amicable settlement of a dispute within an arbitration procedure

<sup>139</sup> Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

<sup>140</sup> See the Regulation Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility (No. 2201/2003) adopted 27 November 2003, the Directive to Improve Access to Justice in Cross-border Disputes by Establishing Minimum Common Rules Relating to Legal Aid for Such Disputes (Directive 2002/8/EC) adopted 27 January 2003, Recommendation on Family Mediation and Equality of Sexes (Recommendation 1639 (2003)) adopted 21 June 2004, Recommendation on Family Mediation (Recommendation (98)1) adopted 21 January 1998.

<sup>141</sup> See Hague Conference on Private International Law, *Feasibility Study On Cross-Border Mediation In Family Matters* (General Affairs and Policy 2007), 21–28.

<sup>142</sup> See T. Wiwen-Nilsson, *Modern Law for Global Commerce: Congress to celebrate the 40th annual session of UNCITRAL*, p. 3, available at <[www.uncitral.org](http://www.uncitral.org)>. Art. 31 UNCITRAL Model Law on International Commercial Arbitration recognises consent awards and sets out the requirements as to form.

shall be recorded by the tribunal as an award on agreed terms if so requested by the parties.<sup>143</sup> Such awards have the same effect as any other award with respect to the merits of the case. In China, Art. 51 of the Arbitration Law of the People's Republic of China provides that conciliation may be conducted by an arbitral tribunal, and if settlement occurs, the tribunal may document it as either a written conciliation statement or an arbitration award in accordance with the settlement agreement.

In Bermuda and Hong Kong, parties to an arbitration agreement can appoint a conciliator to assist them settle their dispute, with the advantage that any resulting settlement is treated as an award on an arbitration agreement and, with the leave of the court, may be enforced in the same manner as a judgment to the same effect. Moreover, with leave of the court, judgment may be entered in terms of the agreement. Here, the disputants must be parties to an arbitration agreement, but it is not essential that an arbitration process has been initiated before the appointment of a conciliator.<sup>144</sup>

In jurisdictions such as France, Croatia<sup>145</sup> and Korea,<sup>146</sup> mediated settlements can still take the form of arbitral awards in the absence of an arbitration agreement or arbitration process. In France, for example, this is referred to as the *sentence d'accord-parties*. Here, the award can be issued at any time by either the mediator turned arbitrator or by another arbitrator brought in for that purpose.<sup>147</sup>

In this context, it is interesting to note that a draft version of Art. 14 of the MLICC relating to the enforcement of mediated settlements included two options involving arbitral awards. These were not adopted in the final version of the MLICC, but it is useful to address them briefly.<sup>148</sup> One variation would have given parties the option to appoint an arbitrator to convert the terms of settlement into an award. This variant is based on Art. 30 of the UNCITRAL Model Law on International Commercial Arbitration 1985 (MLICA). Article 30 in conjunction with Art. 31 of the MLICA provides a procedural framework for converting terms of settlement into awards.<sup>149</sup> The other relevant variation provided that signed settlement agreements would be immediately binding and enforceable as arbitral awards. Here, parties would need to do nothing more than sign an agreement and

<sup>143</sup> See s. 1053 German Civil Procedure Code (*ZPO*), s. 605(1) Austrian Arbitration Law Amendment 2006 (*SchiedsRÄG 2006*) and s. 52 English Arbitration Act 1996.

<sup>144</sup> See ss. 20, 48 Bermuda International Conciliation and Arbitration Act 1993 and s. 66 Hong Kong Arbitration Ordinance CAP 609.

<sup>145</sup> See Art. 10(2) Law on Conciliation in Croatia.

<sup>146</sup> See Art. 18 (3) Domestic Arbitration Rules of the Korean Commercial Arbitration Board. Note that the International Arbitration Rules differ in this regard.

<sup>147</sup> See K. Deckert, in K. Hopt and F. Steffek, *Mediation – Rechtstatsachen, Rechtsvergleich, Regelungen*, p. 183, 206.

<sup>148</sup> See *UNCITRAL Working Group II (Arbitration and Conciliation) Thirty-fifth session, Note by the Secretariat* (2001) UN Doc No. A.CN.9/WG.II/WP.116 paras. 66–70.

<sup>149</sup> See *UNCITRAL Working Group II (Arbitration and Conciliation) Thirty-fifth session, Note by the Secretariat* (2001) UN Doc No. A.CN.9/WG.II/WP.116 para. 69.

have the conciliator sign it also.<sup>150</sup> Either of these two arbitral award variants would have offered parties to conciliated settlement agreements a procedurally unified and expedited enforcement procedure and the benefit of the international legislative framework available to arbitration. Ultimately, however, they were both rejected, leaving the choice of enforcement form up to enacting states.

At first glance, consent awards appear as an attractive option for parties in an international dispute as they promise a high level of enforceability associated with cross-border arbitral awards; however, they also raise a number of challenging questions.<sup>151</sup> One of the enforcement advantages of arbitral awards over settlement agreements is that the grounds for setting aside an award are more restrictive than those for setting aside a settlement agreement. Thus, once a mediated settlement has the force of an award, it is no longer open to one or other party to attempt to set aside the settlement using traditional contractual defences.<sup>152</sup> Arbitration proceedings are subject to certain legal checks and balances, such as rules of evidence, natural justice and a legally based decision from a qualified expert. This means that the process has undergone a certain level of quality assurance, which justifies the limited grounds of appeal on arbitral awards and the expedited enforceability associated with them. Generally speaking, mediated outcomes are not subject to substantive scrutiny by an independent expert and there are no equivalent quality assurance mechanisms as in the case of arbitration. However, in certain circumstances, arbitral tribunals may have the power to review a mediated settlement agreement before issuing it as an award.<sup>153</sup> An alternative view suggests that, by agreeing on terms and applying for a consent award, the parties have waived their rights to challenge an award on some of the grounds available in relation to regular arbitral awards.<sup>154</sup>

<sup>150</sup> The Working Group refers to Arts. 30, 35 and 36 MLICA for guidance on the meaning of the words ‘enforceable as an arbitral award’: UNCITRAL, *Report of the Working Group on Arbitration on the work of its thirty-fifth session*, (19–30 November 2001) UN Doc No. A/CN.9/506, para. 43.

<sup>151</sup> Note the view of Steele that consent awards are a ‘trick of legal fiction’. The US commentator does not deny that there are benefits to consent awards, but argues that they are not arbitral awards *per se*, but are just treated as such. See B. Steele, 54 *UCLA Law Rev.* 1397 (2007).

<sup>152</sup> For the limited grounds on which awards can be set aside, see Art. 34 MLICA.

<sup>153</sup> See, for example, Arts. 30 and 31 UNCITRAL Model Law on International Commercial Arbitration and s. 51(2) English Arbitration Act 1996.

<sup>154</sup> Suggestions were made during the UNCITRAL Working Group sessions on Arbitration and Conciliation to reduce the grounds on which the recognition and enforcement of mediated settlements in the form of consent awards could be refused to: (1) incapacity of a party, (2) violation of public policy and (3) non-arbitrability of the dispute: see *Report of the Working Group on Arbitration and Conciliation on the work of its thirty-second session* A/CN.9/468, s. 4. Enforceability of settlement agreements reached in conciliation proceedings. T. Wiwen-Nilsson, *Modern Law for Global Commerce: Congress to celebrate the 40th annual session of UNCITRAL*, p. 7, available at <[www.uncitral.org](http://www.uncitral.org)>, cites s. 1053 ZPO as an example of limited review of consent awards.

The New York Convention does not expressly address the issue of awards on agreed terms; however, Wiwen-Nilsson argues that the majority view endorses the application of the Convention to settlement awards.<sup>155</sup> At the same time, he identifies the following uncertainties and queries in relation to mediated settlements adopting the legal form of consent awards:<sup>156</sup>

- Should the consent award contain the entirety of the terms of the mediated settlement or should the terms of the agreement be reframed as orders and written into the award by the parties' representatives or the arbitrator? Wiwen-Nilsson suggests that the terms of the consent award should be sufficiently certain so as not to require reformulation for inclusion into the award.
- Where the mediated settlement deals with matters not covered by the arbitration agreement or the submission to arbitration, then it is unlikely that the tribunal has jurisdiction to render the award, unless an agreement between the parties and arbitrators is made to extend the terms of the arbitration agreement or to introduce the matters covered in the settlement into the arbitration submission.
- It seems that, where part of a consent award lies outside the jurisdiction of the arbitral tribunal, it may be possible to sever that part from the rest of the consent award that has been validly issued, thereby saving the latter part of the award.<sup>157</sup>
- Mediated settlements may be conditional upon certain events occurring or may contain other terms—for example, conferring rights on a third party—which cannot be transformed into consent awards.
- Whereas most settlements contain dispute resolution clauses, consent awards do not. Wiwen-Nilsson queries whether such a provision would be inconsistent with the notion of a final and binding award.
- Are parties entitled to settle their dispute and then commence arbitration for the purpose of converting the settlement contract into a consent award? Art. 30 of the MLICA applies where the dispute is settled during—and not after—arbitral proceedings and therefore seems not to extend to this type of situation.

#### *(d) The UNCITRAL Model Law on International Commercial Conciliation*

The UNCITRAL MLICC provides a model for the regulation of mediation in international commercial matters. In this section, the terms 'conciliation' and

<sup>155</sup> See T. Wiwen-Nilsson, *Modern Law for Global Commerce: Congress to celebrate the 40th annual session of UNCITRAL*, p. 4, and G. Lörcher, 17 *Arbitration International* 275 (2001).

<sup>156</sup> These are examined by T. Wiwen-Nilsson, *Modern Law for Global Commerce: Congress to celebrate the 40th annual session of UNCITRAL*, pp. 5–7.

<sup>157</sup> See Art. V(c) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

‘mediation’ are used interchangeably. As a model law, the MLICC has no legal force until enacted as a law of a nation state. Legislation based on the MLICC has been enacted in Albania, Afghanistan, Bosnia-Herzegovina, Canada, Croatia, Ecuador, Honduras, Kosovo, Hungary, Nicaragua, Romania, Russia, Serbia, Slovakia, Slovenia, Turkey, and the US states of Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, Washington and the District of Columbia.

(i) *The MLICC and Harmonisation*

The MLICC is the first legislative text that offers an international legal framework for mediation with the aim of harmonising the cross-border law on this topic. The former Secretary of UNCITRAL, Jernej Sekolec, explains UNCITRAL’s approach to harmonisation as follows:

‘The UNCITRAL approach is a step-by-step approach to the development of a harmonised system of international dispute resolution. It starts with a minimal interference approach and then works with nation states, NGOs and international service-providers to further improve the rules and to increase harmonisation, whilst still maintaining flexibility in the future.<sup>158</sup>

Art. 2(1) of the MLICC, provides that ‘In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.’

This mandatory provision offers national courts a guideline for interpretation that favours international harmony. Further, Art. 2(2) provides that where the answer to an issue governed by the Model Law is not expressly settled in the law, national courts should look to the general principles of the MLICC and its international character and origin, which may include a consideration of how other countries have interpreted their enactment of the Model Law. Thus, the message to all national courts of enacting states is to think globally and look to the philosophy underlying the MLICC. This same principle has been adopted in other legal instruments, such as the United Nations Convention on Contracts for the International Sale of Goods, and is increasingly familiar to practitioners and judges around the world.

(ii) *The Structure of the MLICC*

The MLICC can be considered in three parts. The first part, comprising Arts. 1 to 3, establishes the scope of the MLICC. It provides definitions of important terms (Art. 1), guidelines on interpretation (Art. 2), and establishes the majority of the Articles in the Model Law as default provisions, rather than mandatory ones (Art. 3). The second part of the MLICC consists of Arts. 4 to 11 and deals with the period during the conciliation proper. This covers procedural aspects of

<sup>158</sup> N. Alexander, *International and Comparative Mediation*, p. 383.

conciliation, namely the commencement and termination of the conciliation (Arts. 4 and 11), the appointment of conciliators (Art. 5) and issues of conduct (Art. 6), communication (Art. 7) and confidentiality (Arts. 8, 9 and 10) in the conciliation. It also addresses the suspension of legal proceedings (optional Art. X). The third and final part of the Model Law—Arts. 12 to 14—addresses post-conciliation issues such as the role of the conciliator in subsequent processes (Art. 12) and enforcement issues relating to mediation clauses, agreements to mediate (Art. 13) and mediated settlements (Art. 14).

#### *(iii) The Content of the MLICC*

In terms of the categories on mediation law introduced earlier in this chapter, the Model Law regulates aspects of mediation relating to procedural laws (Arts. 4 to 7 and 11 generally), standards of conduct for conciliators (Arts. 5(3) and 6(3)) and rights and obligations of mediators and others in mediation (Arts. 10, 12 to 14 and optional Art. X). While the Model Law covers a broad range of matters, it does not cover aspects of mediation such as the triggering or initiation of the mediation process and accreditation issues.

#### *(iv) Five Themes in the MLICC*

An analysis of the Model Law reveals five main themes that characterise its approach to mediation and conciliation and provides a useful orientation for users of the MLICC.<sup>159</sup>

The first theme relates to how conciliation is defined. The MLICC describes the process of conciliation broadly, which seems to encompass all facilitative and advisory—in other words, non-determinative—dispute resolution processes. Broad descriptive definitions encourage diversity in practice, which in turn offer challenges in terms of establishing a common understanding of what mediation is and, importantly, what it is not.

The second theme is the principle of party autonomy—a core characteristic of mediation and conciliation processes and a pillar of the Model Law. Article 1(7) provides that the parties may elect to opt out of the Model Law as a whole. In other words, the entire Model Law is optional, and parties can choose a different set of rules to apply to their mediation should they so desire. Conversely, parties can voluntarily opt into the MLICC where there is doubt as to its applicability (Art. 1(6)). Where the Model Law applies, there remains much scope for party autonomy. The principle of party autonomy can apply to decisions to enter into and participate in the conciliation process, to choices made in relation to the outcome of a conciliation and, in the event that an agreement is reached, to the legal form of the agreement. There are only two mandatory provisions in the

<sup>159</sup> For an Article-by-Article commentary of the MLICC, see, N. Alexander, *International and Comparative Mediation*, chapter 9, and E. van Ginkel, 21 *J. Int. Arb.* 1 (2004).

entire Model Law—Arts. 2 and 6(3). Article 2 deals with interpretation of the MLICC, while Art. 6(3) creates one of the exceptions to the principle of party autonomy in the mandatory requirement that mediators treat parties fairly.

The principle of fair treatment in Art. 6(3) is the third defining theme of the Model Law. It sets a standard of procedural fairness that must be maintained by mediators. Failure to do so may leave the process and the practitioner open to criticism and provide a basis for judicial review of the mediated outcome. The principle of fair treatment attempts to set outer parameters for the otherwise ubiquitous concept of party autonomy by providing a non-negotiable quality standard for the conduct of the process.

Confidentiality is one of the hallmarks of contemporary mediation processes and is the next theme of the Model Law. The three types of confidentiality introduced earlier—insider/outsider, insider/insider and insider/court—are addressed in Arts. 8, 9 and 10 respectively. Together, these provisions deal with confidentiality in a more comprehensive manner than Art. 7 of the EU Directive in terms of both the categories of confidentiality addressed and the mediation participants beyond the mediator on whom confidentiality obligations are imposed. However, like most other aspects of the MLICC, the confidentiality provisions are subject to the overarching objective of enhancing party autonomy, which means that parties can vary the level of confidentiality protection by mutual agreement.

The fifth and final theme of the Model Law relates to the enforceability of settlements, which is addressed in Art. 14. In this context, the MLICC provides neither a mandatory nor a default standard enforcement procedure for mediated settlements. Instead, the provision requires enacting states to import their preferred enforcement procedures into their domestic version of the Model Law. Thus, the enforceability issue is left to each country to deal with in the context of the enacting state. In doing so, Art. 14 effectively entertains the adoption of diverse national enforcement procedures for international mediated settlements and is likely to result in a lack of consistency and certainty in relation to enforcement issues.

These five themes of the Model Law offer a sense of UNCITRAL's approach to regulation in this field and, in particular, how the diversity–harmonisation tension is likely to be played out. While the mandatory Art. 6(3) of the Model Law, relating to procedural fairness, offers some consistency in the form of a standard of conduct, other provisions such as those on confidentiality, enforceability and limitation periods can be overridden by agreement of the parties, such as by choosing to use an institutional set of mediation rules. The dominant principle is party autonomy, which is subject only to the mandatory requirement of fair treatment. On balance, therefore, retaining legal diversity seems to have been favoured over the inclusion of mandatory rules to ensure a minimum level of harmonisation.

(v) *The MLICC: Comment and Critique*

While the legislative take-up of the MLICC by domestic jurisdictions is less than that of the extensively integrated MLICA, perhaps this is explicable in terms of the short duration of its existence and the less normative domain of conciliation compared with arbitration. As domestic legislation preceded the MLICA, different jurisdictions tended to coalesce around common principles in this field. This led to less variation when the MLICA had been drafted. It can be assumed that the MLICA drew on settled principles across jurisdictions. In comparison, there was less settled doctrine on which UNCITRAL had to draw in creating the MLICC, and when introduced into the relative regulatory vacuum of many domestic systems, it has been adapted—sometimes with significant changes—to suit both local domestic and international situations. Although the MLICC has provided an important starting point for an ongoing international dialogue on reconciling different approaches to mediation and working towards a common standard in the regulation of the field, the above factors have led to inevitable criticisms.

The primary criticism of the MLICC concerns the dominance afforded to the principle of party autonomy. The MLICC fails to differentiate between the importance of party autonomy and procedural flexibility, on the one hand, and the need, on the other, to set clear international standards for regulating interactions between conciliation and the legal system in which it operates. In offering default, as opposed to mandatory, standards, the MLICC arguably fails to provide a robust legal framework for international disputes and disputants in its deference to party autonomy and procedural flexibility. Some commentators are critical of the MLICC's lowest common denominator approach to standards, a function of its complex negotiation dynamics, and express disappointment that UNCITRAL did not take the opportunity to set best practice standards to which the international community could aspire.<sup>160</sup>

Another criticism of the MLICC relates to the breadth of matters it regulates. The regulatory principles of the Mediation Mix, introduced earlier in the chapter, suggest that not all aspects of mediation are best regulated by legislation. Different regulatory approaches, such as market, industry or framework regulation, may be preferable depending on the aspect of mediation being regulated. Many provisions in the MLICC are drawn from UNCITRAL's Uniform Conciliation Rules (UCR) and deal with procedural aspects of mediation that are generally covered by industry rules, such as those of international bodies like the ICC. Van Ginkel argues that the inclusion of procedural and standard-setting rules in the MLICC is potentially confusing both for policy makers and for lawyers advising mediation parties.<sup>161</sup> He argues that the Model Law should have restricted itself to rules dealing with rights and obligations that require legislative

<sup>160</sup> See, for example, E. van Ginkel, 21 *J. Int. Arb.* 1, 7–8 (2004).

<sup>161</sup> E. van Ginkel, *J. Int. Arb.* 1, 8–9.

enforcement, such as those dealing with confidentiality, litigation limitation provisions and enforceability of mediation settlement agreements. Furthermore, the UCR was drafted and adopted more than 20 years prior to the existence of the Model Law and was intended primarily for use within an arbitration-focused framework. Some of its Rules appear out-of-date and do not have the benefit of the wealth of ADR and mediation experience that has emerged since that time.

For example, Art. 10 of the UCR regulates the confidentiality aspects of private sessions in mediation by requiring the conciliator to disclose information received from one party to another party, except where it is given with the specific condition that it be kept confidential. This approach to confidentiality in private sessions is referred to as the ‘open communication approach’ and is adopted in Art. 8 of the MLICC. It is distinguished from the more widely accepted ‘in-confidence approach’, whereby private sessions are treated as confidential unless the party to the private session specifically requests that particular information be passed on to others outside the session.<sup>162</sup> Similarly, provisions in the UCR expressly permitting conciliators to make settlement proposals (Art. 7(4)) and to draft or assist in the drafting of settlement agreements (Art. 13(2)) are controversial in today’s mediation world and not in line with legislation and case law in some countries.<sup>163</sup> Yet these provisions influenced the formulation of the MLICC in various respects.

From the perspective of UNCITRAL, however, the approach taken in relation to the MLICC has been a considered one. It reflects the reality that many long-term members of UNCITRAL who had previously debated, developed and adopted the Model Law on International Commercial Arbitration [emphasis added] and made use of the UCR in this context continued to be heavily influenced by these texts. Some members felt that the Model Law on International Commercial Conciliation would be more attractive to countries if it was consistent with the familiar UCR. It is suggested that this line of thought is consistent with the insights from behavioural psychology discussed above. Moreover, UNCITRAL considered a broad legislative text containing default process rules useful to deal with situations where parties had elected to mediate but had not agreed on procedural rules. As with most provisions of the MLICC, the parties can opt out of procedural provisions by simply agreeing to another set of procedural rules such as the ICC’s ADR Rules.

The result is a model law on mediation that offers choice and flexibility to informed users who have the time and negotiating power to adapt the provisions

<sup>162</sup> For examples of the in-confidence approach, see Art. 5 Mediation Procedure of the London Court of International Arbitration 2010, Art. 7(5) of the NMI Mediation Rules 2008 in the Netherlands and Art. 11 Mediation Rules 2002 of the World Intellectual Property Organization (WIPO).

<sup>163</sup> See, for example, the Australian National Practice Standards, which *prima facie* do not permit mediators to make settlement proposals and the case of *Tapoohi v Lewenberg* [2003] VSC 410, which takes a similar view.

of the MLICC to suit their needs. For others, the Model Law offers a starting point for managing their international mediation. It may also harbour some unexpected risks.

In creating MLICC, UNCITRAL has been successful in producing a unified document acceptable to many legal jurisdictions and cultural traditions and in focusing on some of the key issues pertaining to contemporary mediation. Its creation has been in itself a ‘mediative’ exercise in finding compromise among competing legal rules and world-views and in disseminating it for transnational use. Nonetheless, the judicious use of succinct yet broadly framed provisions renders the MLICC open to diverse interpretations by national courts, but this is a feature of many cross-border legal instruments that have a harmonising objective.

#### H. Conclusion

Private international law on mediation is an emerging dispute resolution field and the subject of considerable regulatory reform. The process of legal harmonisation is challenged by some of the benefits of legal diversity, especially in relation to mediation—a dispute resolution process known for its inherent flexibility. In conceptualising ‘law’ in the mediation field, it is important to look beyond black letter law to the influential role that stakeholders, institutions and industry play in shaping how cross-border mediation practice is regulated. To this end, political, economic, organisational and behavioural-psychological perspectives have been examined together with more traditional legal considerations. These and other factors add real-life texture to cross-border legal instruments relevant to mediation and are vital to achieve a balanced and informed perspective on the private international law of mediation. International illustrations throughout this chapter have highlighted the accelerated regulatory reform in this area with significant implications for cross-border law and practice.

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