

Benchmarking of the code-of-conduct provisions on conflict of interest and related principles

supplementing 2.3 – Conflict of interest, Chapter 2 – Arbitrators
and mediators of *Benchmarking of mediation and arbitration
rules of institutions comparable to the UPC's Patent Mediation
and Arbitration Centre*

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The following supplementary benchmarking aims to compare the conflict-of-interest provisions in the first version of the draft Code of Conduct for Mediators accredited at the Patent Mediation and Arbitration Centre (PMAC CoC) with the other benchmarked ADR centres¹ and to highlight provisions that may be further developed for the PMAC CoC according to the conclusions of the benchmarking. The principles of neutrality, independence and impartiality, currently included in Article 11 of the draft PMAC Mediation Rules, by defining a mediator as *“a neutral, impartial and independent third person”*, are addressed as well.

In the PMAC CoC, the principle of **impartiality** is set out as a standalone provision. The draft PMAC Mediation Rules also include a provision which gives an overview of the principles a mediator should follow, including impartiality. Separately from the standalone principle of impartiality, the PMAC CoC groups together the principles of independence and neutrality in one provision. In the benchmarked mediation centres' codes of conduct (CoC), impartiality is often a standalone provision (EUIPO, SAC, AAA). In other centres, impartiality is addressed alongside the obligation to disclose a conflict of interest (JAMS, HKIAC) as the two concepts are closely linked. The stressed aspects of the impartiality provisions are the equal treatment of the parties (EUIPO, SAC, AAA, JAMS), the prohibition of bias or prejudice (AAA, JAMS), and the prohibition of favouritism and accepting gifts (AAA, JAMS). All these aspects are mentioned in the PMAC CoC, in which the disclosure of any information that could affect impartiality is additionally mentioned under the independence and neutrality principle. However, the benchmarked centres' CoC typically also include an additional conflict-of-interest provision (see section below). The AAA and JAMS CoC also provide a provision requiring that the mediator withdraw if they cannot perform their tasks impartially. This is also mentioned in the PMAC CoC under the principle of impartiality.

In other mediation centres' CoC, the principle of **neutrality** is typically mentioned in the scope of other provisions and not as a standalone provision. While it is not always a part of the CoC, those centres nevertheless refer to it (EUIPO, WIPO, HKIAC). In the HKIAC, WIPO, AAA and EUIPO CoC provisions, neutrality is combined with the principle of

impartiality. In the WIPO CoC, it is additionally combined with the principle of independence. The latter approach is also taken by the PMAC CoC as the principle of neutrality is handled together with the principle of independence of the mediator.

Regarding **independence**, in the mediation rules and/or the CoC, the benchmarked centres usually mention this principle in the provision on the behaviour of mediators (AAA, JAMS, EUIPO, JIPAC, WIPO) and sometimes combine it with the rules on conflict of interest (European CoC for mediators). When independence is combined with conflict of interest, the focus of the provision is on the conflict-of-interest content. A similar approach is also currently taken in the PMAC CoC as it includes the rules on conflict of interest under the principle of independence, although the conflict-of-interest content is not as extensive.

Conflict of interest is one of the most important provisions in the mediation rules and/or the separate CoC of the benchmarked mediation centres (EUIPO, SAC, HKIAC, JAMS, AAA, ICC, LCIA, DIS, JIPAC). The ICC, DIS and LCIA mediation rules state that the mediator must disclose circumstances which could raise doubts about independence and impartiality. In some centres' CoC, conflict of interest is described separately from other principles (HKIAC, AAA). EUIPO and SAC both follow the example of European CoC for mediators, which refers to neutrality, independence and impartiality. Both centres also have an extensive standalone provision on conflict of interest in their mediation rules.

The PMAC CoC includes rules on conflict of interest under the principle of independence and neutrality. However, certain aspects of conflict of interest are only described in the commentary to the principle. Based on the above benchmarking, it may be considered to flesh out further aspects of conflict of interest as it appears to be a key element of the other benchmarked centres' CoC. In the draft PMAC Mediation Rules, conflict of interest is not mentioned at all. In order to align with the common approach of other benchmarked centres that have extensive rules on conflict of interest, it could be considered to include a dedicated provision in the PMAC CoC.

¹ European Union Intellectual Property Office (EUIPO), World Intellectual Property Organization (WIPO), International Chamber of Commerce (ICC), German Arbitration Institute (DIS), London Court of International Arbitration (LCIA), Hong Kong International Arbitration Centre (HKIAC), Japan Intellectual Property Arbitration Centre (JIPAC), Swiss Arbitration Centre (SAC), Singapore International Mediation Centre (SIMC), American Arbitration Association (AAA), Judicial Arbitration and Mediation Services (JAMS).

Key elements of the conflict-of-interest provisions of the benchmarked centres are listed below, with many already included in the PMAC CoC:

- no prior involvement of the mediator in the case at hand (EUIPO, DIS, JIPAC, AAA)
- no personal interest of the mediator in the case or the parties of the case (EUIPO, HKIAC, JAMS, SIMC, AAA, PMAC)
- no financial interest of the mediator in the case (HKIAC, JAMS, PMAC, PMAC)
- no previous representation of one of the parties by the mediator (EUIPO, PMAC)
- disclosure of circumstances that could raise doubts about independence (SAC, ICC, LCIA, SIMC, DIS), impartiality (AAA, SAC, HKIAC, ICC, LCIA, SIMC, DIS, PMAC) or availability (SAC, ICC, LCIA, PMAC (mediation rules))
- other actual and potential circumstances that could lead to a conflict of interest (AAA, JAMS, LCIA, SIMC, PMAC)

How a conflict of interest must be **declared** by the mediator differs from centre to centre. In EUIPO, SAC, ICC, LCIA and SIMC, the mediator must declare any possible conflict in writing. Other centres (HKIAC, AAA) do not prescribe how a conflict of interest should be disclosed. The PMAC CoC mentions disclosure but does not specify how it should be done. It could be considered to incorporate this aspect into the conflict-of-interest provision to make it more detailed.

In conclusion, from the above analysis, all the principles that apply to the conduct of the mediators in mediation centres around the world tend to overlap as they are all **interlinked**. However, they do not always overlap in the same way. For example, sometimes the principle of independence is linked to conflict of interest and sometimes to the principle of impartiality. Nevertheless, all principles are often linked in some way to the provisions on conflict of interest. The latter tend to be detailed, outlining many of the aspects concerned, for example, what circumstances can create an actual or potential conflict of interest and how they should be disclosed.

Overall, the PMAC CoC contains all the relevant elements of the conflict-of-interest provisions that the other benchmarked centres' CoC/mediation rules also cover. Nevertheless, the possibility of expanding this coverage and setting it out in a more extensive and detailed

provision could be explored, to align with the practice of other centres.

One possible approach may involve separating the principles of independence and neutrality from the rules on conflict of interest. The existing commentary to the principle of independence and neutrality could be maintained but reorganised to reflect this division. The principles may be complemented with further details, if deemed necessary. In particular, it might be pertinent to include a short paragraph defining the notion of independence, so each principle has a short explanation, besides the already existing extensive explanations.

Regarding the rules on conflict of interest, it could be considered that these should include the mediator's obligation to disclose any actual or potential circumstances that could seem to affect the mediator's impartiality, independence and neutrality before accepting to act as a mediator. If additional precision is desired, the rules could also include the manner in which the information should be disclosed, for example in writing.

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