What might this be? Depends what one fears or wishes for.
Where one sees the great balance, another sees a threat...

Skin in the Game: Dissenting Opinion in Defence of the Mediator's Success Fee

The draft IMI Code of Conduct for Mediators puts a flat ban on outcome-related fees.

Here is the straight talk on why that is a dogma, not ethics.

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I. STRAIGHT TALK

The International Mediation Institute (IMI) is weighing a new draft Code of Conduct for Mediators. Ambitious, thoughtful, overdue in places. In one paragraph at least, though, it takes a step backwards. Practice Rule 1.3.2 of the draft provides that "mediation fees shall not be contingent upon the outcome or amount of the mediated outcome."[1] No exceptions, no consent cure, no daylight. IMI Certified Mediator and Mediation Advocate I am, and IMI in high regard I hold, which is exactly why I refuse to nod this one through. Rules meant to govern a worldwide profession deserve a critical debate, not applause.

II. THE BAN THAT FIXES NOTHING BROKEN

The Code we have practised under for years contains no flat ban on success fees. Article 4.5.2 of the current IMI Code stops the mediator from *suggesting* outcome-based remuneration, and stops there.[2] A success element proposed by the parties has never actually been outlawed. Mediation lived for decades, worldwide, under liberal rule. Where are the casualties? One scholar went looking: fewer than 100 lawsuits against mediators in over two decades, against millions of mediations, and virtually none ended in a finding of liability.[3] If the success fee were the landmine we are warned about, two decades of relatively liberal rule should have left some trace of it in the dockets or disciplinary records, as the theory predicts. None has surfaced. Say confidentiality hides the evidence, and you have conceded the point: those who would ban carry the burden of proof, and an invisible harm is not proof. If precaution is the real worry, it argues for guardrails rather than prohibition. The draft proposes to outlaw a practice with no demonstrated harm. That is not prudence; that is dogma wearing prudence's clothes.

III. THE CONSENSUS THAT ISN'T

We are told the ban reflects settled international ethics. Settle in. Italy, home of Europe's flagship mandatory mediation programme, writes the success fee into a ministerial decree: the state-regulated schedule raises the fee upon success.[4] Germany's Mediation Act is permissively silent.[5] The European Code of Conduct for Mediators calls for transparency and all-party acceptance of the remuneration terms, and no more.[6] The celebrated American Model Standards say a mediator "should not" enter into a contingent fee agreement, and in the Standards' own grammar "should" marks a practice that is "highly desirable, but not required": guidance, not command.[7] Yes, some jurisdictions ban the practice outright; for example, Florida does, in three blunt words: contingency fees prohibited.[8] That makes a patchwork. A patchwork is not a consensus, and a worldwide code should not canonise one local orthodoxy and call it ethics.

To call Western scepticism of success fees a "universal consensus" is to ignore the map. The ban's champions treat it as the gold standard, dismissing German, Italian and British flexibility as mere aberrations, while burying the regulatory frameworks of the East in silence. This is no local deviation; it is a global reality. The jurisdictions that permit success-contingent models, from China and India to Russia, Kazakhstan and the UAE, and onward across Europe, account for roughly two-fifths of the human population and over one-fifth of the planet's landmass.

And the geography of difference is wider still; the unstudied part of the map belongs in the research, not in the silence.

Labelling much of the world, highly civilised on its own, as an ethical deviant is not just condescension; it is a misreading of the "International" in IMI. A code designed to govern a worldwide profession cannot be written by mistaking a parochial orthodoxy for global ethics, nor by pretending the rest of the world simply does not exist.

IV. LOOK EAST, LOOK WEST, LOOK EVERYWHERE

The other mediation rulebooks tell the same story. India's Mediation Act, 2023, leaves the costs of mediation, including the mediator's fee, to the parties' agreement, with equal sharing by default, and schedules for institutional mediation left to regulation; not a word against an outcome-related element.[9] Its court-annexed schedules embrace the uplift outright: the Punjab and Haryana High Court pays the mediator more than twice as much for a settled case as for an unsettled one.[10] The UAE's Federal Decree-Law No. 40 of 2023 defines the mediator's fees simply as the remuneration payable for the mission and leaves their design to the parties' mediation agreement and the centre's framework. Again, no ban.[11] Kazakhstan[12] as well as Russia[13] grant full freedom of contract on this matter, with no restrictions on the form of fees. In China, outcome-based remuneration of mediators is a norm: the new Regulations on Commercial Mediation, in force since May 2026, allow organisations to charge and set their own fee standards based on fairness and reasonableness, with not a word restricting the design of the fees.[14] The ethics code for mediation under the auspices of the US–China Business Mediation Center states the default, fees "shall not be linked to the result", and then supplies the opt-out: where the parties themselves request the arrangement after full disclosure, it "may be used without it being considered unethical."[15] In China's court-attached practice, success-geared pay is not merely the habit but the design itself. The courts remunerate their invited mediators on a case-by-case basis, on the "subsidy set by the case" principle, and the subsidy is typically earned upon successful mediation and scaled to its difficulty.[16]

And before anyone files this under Eastern exotica, look West once more. In England and Wales, the Civil Mediation Council, gatekeeper of the accredited profession, has put forward for public consultation its own draft of the Code of Professional Practice for Mediators, and it reveals no provisions, restrictions, or bans against success fees or outcome-based remuneration; current Professional Standards for all CMC Regulated Mediators prescribe effectively the same liberal standard with reference to the European Code of Conduct for Mediators as good enough.[17] CEDR, Britain's flagship mediation house, asks its neutrals exactly two things about fees: make the basis of charging clear before the process starts, and do not prolong the process unnecessarily.[18] Read that second undertaking again. The fee mischief CEDR chose to legislate against is the hourly one, and the cure it chose was a conduct rule. Across these legal orders, common law and civil law, post-Soviet, Gulf and East Asian alike, legislators have not outlawed the mediator's success fee. What is not forbidden is permitted; the maxim is old, and it is good law wherever freedom of contract means anything. The flat ban is not the world's rule. It is a club rule — and the club is smaller than it thinks.

V. THE HOURLY MIRROR

The stated fear is familiar: a mediator paid upon settlement will push for settlement. Now, honestly, look at the model that so many treat as if beyond a reasonable doubt. The hourly mediator earns more the longer the parties stay apart. An impasse is billable; a deadlock is a revenue stream. Mirror, mirror on the wall, who is the fairest of them all? Not, it turns out, the one doing the accusing. If we truly believed fee structures corrupt neutrality, hourly billing would be first against the wall. Nobody proposes that, and rightly so: we police mediators, like other professionals, through conduct rules, not just their invoices. And those who fear an invisible tilt toward settlement might first audit the incentives we already tolerate: courts openly prefer and retain panel mediators on their record of successful mediation, an outcome stake that no party signs and few ever notice.[19] The draft Code itself carries the cure: its Practice Rule 2.1.1 forbids settlement pressure, full stop, whatever the fee model. Scott Peppet made the deeper point two decades ago in the Texas Law Review: fee ethics should operate as default rules that informed parties may contract around, rather than immutable commandments.[20] The remedy for feared misconduct is the misconduct rule, not a ban on a payment trigger. And the outcome-based fee carries a virtue its critics never mention: it advertises mediation itself. What promotes the process to a doubting public better than the mediator's own bet that it works?

VI. AN INSULTING ARITHMETIC

The same parties who sign a lawyer's contingency of up to half the win and at times effectively even more (a fee that grows with every unit of value extracted from the other side) are presumed incapable of understanding a flat, fixed bonus that a mediator earns only if both sides sign. Think about that asymmetry for a moment. The lawyer's contingency is aligned with one side's victory. The mediator's success fee is aligned with the parties' shared objective, the reason they both walked into the room. And note what that interest is not: partiality. The mediator's impartiality is owed to all parties, and a fixed success fee is perfectly symmetric: earned from both or from neither, it cannot tilt the mediator toward either side. What it creates is an interest in settlement as such, the very interest the parties jointly hire a mediator to serve; the residual danger, a mediator nudging parties toward a deal they do not want, is a question of self-determination, not impartiality, and the draft already polices it with its no-pressure rule. Nor is it hidden: an incentive the parties themselves put in writing is not a bias smuggled in; it is an instruction handed over. If people can be trusted with the first, they can surely be trusted with the second. To insist otherwise is not protection; it is paternalism with a straight face.

VII. SELF-DETERMINATION, TAKEN SERIOUSLY

The crown principle of mediation and accordingly the draft Code is, rightly, party self-determination, the parties' right to make their own informed choices about process and outcome. So why not take the principle all the way? When informed, advised parties design their mediator's incentives to match their own goal, they are exercising precisely the autonomy the Code enthrones. A flat ban answers them: your process, our rules. The fallback defence, that the ban protects not the parties but public trust in the institution, fares no better: the states

that pay their own court mediators upon success, from Rome to Chandigarh to Guangzhou, have either somehow failed to notice the institutional damage, or found none to notice.

And the ban's favourite alibi, "do it pro bono", is not a fee policy; it is a charity appeal. Charity is a fine thing; an access policy that depends on it is not. Nor need the generosity be all-or-nothing: the American Model Standards themselves accept unequal fee payments from the parties, provided impartiality holds.[21] If one party may fairly pay more than the other, or nothing at all, then one party assuming the fixed success element is no heresy either. In practice, I have met parties able to fund a fight yet unable to fund a peace. A fixed success element, assumable by one party or shared as all agree, is a bridge to the table, not a trap.

VIII. The composite, not the casino

What does the defensible success fee look like in practice? Not a mediator on pure contingency, hungry and hurried. The workable design is composite: a fixed base fee that keeps the mediator fed and unhurried, plus a fixed success element earned only when the parties sign. The base defuses the desperation risk; the fixed bonus defuses the amount risk; together, they leave exactly one incentive standing: bringing the parties to their own agreement. Nothing exotic about it: it is Italy's schedule (a base plus an uplift upon agreement), the Punjab and Haryana table (a fee for the effort, double for the deal), and the plain logic of the Chinese court subsidy.[22] In some parts of the world, the composite model is already up and running. It just isn't called by its name.

IX. The bright line worth considering

Let me be just as straight about the other side of the coin. The sharpest objection lives with fees calculated on the *amount* of settlement: a percentage gives the mediator a stake in the number, and a stake in the number is a stake against one of the parties. I take that objection seriously, seriously enough that the rule I would write today reads: no fee contingent on the amount, value or terms of the outcome; a fixed element contingent solely on whether agreement is concluded, permitted only upon written, informed, all-party consent; unrepresented parties pointed to independent advice on the arrangement before consenting; the no-pressure rule untouched; and in case of doubt, the mediator declines. Guardrails, not gates. But I will practise what I preach: that line, too, is a default, not a dogma. If someone can show how a percentage squares with impartiality (sophisticated parties, symmetric stakes, eyes open), my door is open. Bans should earn their keep in debate; mine included.

X. Place your bets

Mediation asks parties to bet on peace, the best win-win bet in dispute resolution. All I argue is that the mediator may be allowed, with everyone's eyes open, to put a chip on the same square. If the IMI Ethics Committee is confident the flat ban is right, the argument will survive contact with debate. If it can survive only as a taboo, it was never ethics, just habit in a robe. Let's talk.

India, Goa, Panaji,

15 July 2026

Endnotes

[1] Revised Public Consultation Draft IMI Code of Conduct for Mediators (IMI Ethics Committee, 2024) <https://imimediation.org/wp-content/uploads/2024/01/Consultation-Draft-IMI-Revised-Code-23.1.24-1.pdf> accessed 15 July 2026.

[2] IMI Code of Professional Conduct, art 4.5.2: 'Mediators will not suggest to the parties that their remuneration should be based on, or related to, the outcome of the mediation' <https://imimediation.org/docs/imi-mediators/professional-standards/code-of-professional-conduct/> accessed 15 July 2026.

[3] M Moffitt, 'No News (Read: Successful Lawsuits Against Mediators) Is Good News?' (2025) 12 Texas A&M Law Review 709 <https://doi.org/10.37419/LR.V12.I2.6> accessed 15 July 2026.

[4] Ministerial Decree No 150 of 24 October 2023 (Italy), implementing Legislative Decree No 28/2010, arts 30–32: the regulated mediation fees are increased upon conciliation, with no uplift where the procedure ends without agreement <https://www.gazzettaufficiale.it/eli/id/2023/10/31/23G00163/SG> accessed 15 July 2026. For an English overview of the predecessor scheme (MD 180/2010), whose fee table expressly included a 'Success Fee' column, see Mediators Beyond Borders, 'The Italian Mediation Law on Civil and Commercial Disputes' <https://mediatorsbeyondborders.org/wp-content/uploads/2017/09/The-Italian-Mediation-Law.pdf> accessed 15 July 2026.

[5] Mediation Act (Mediationsgesetz) of 21 July 2012 (Germany), Federal Law Gazette I p 1577, containing no fee restriction; official English translation <https://www.gesetze-im-internet.de/englisch_mediationsg/englisch_mediationsg.pdf> accessed 15 July 2026.

[6] European Code of Conduct for Mediators (2004), art 1.3 <https://e-justice.europa.eu/sites/default/files/2020-12/Code_of_conduct_EU_EN.pdf> accessed 15 July 2026.

[7] AAA/ABA/ACR, Model Standards of Conduct for Mediators (2005), Standard VIII.B.1: 'A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement'; and Note on Construction: 'The use of the term "should" indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion' <https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf> accessed 15 July 2026.

[8] Florida Rules for Certified and Court-Appointed Mediators, r 10.380(f) ('Contingency Fees Prohibited'): 'A mediator must not charge a contingent fee or base a fee on the outcome of the process' <https://www.flcourts.gov/content/download/216759/file/rules-certified-court-appointed-mediators.pdf> accessed 15 July 2026.

[9] Mediation Act 2023 (No 32 of 2023) (India), s 25: the costs of mediation, including the fees of the mediator, 'shall be borne equally by the parties' unless they agree otherwise, and shall otherwise be 'such as may be specified' <https://egazette.gov.in/WriteReadData/2023/248775.pdf> accessed 15 July 2026.

[10] Punjab and Haryana High Court, Mediation and Conciliation Rules, r 25(1), with the decisions of the High Court's Mediation and Conciliation Committee recorded therein: the mediator's fee has been success-weighted at every stage — Rs 10,000 against Rs 3,000 as enacted, Rs 15,000 against Rs 7,000 from 1 August 2019, and Rs 20,000 against Rs 7,000 from 1 February 2024 (successful and failed mediation respectively) <https://highcourtchd.gov.in/sub_pages/left_menu/Rules_orders/adr_rules/mediationrules.pdf> accessed 15 July 2026.

[11] Federal Decree-Law No 40 of 2023 on Mediation and Conciliation in Civil and Commercial Disputes (UAE), art 1 (defining 'Mediator's Fees' as 'the remuneration payable to the Mediator to perform their mission'), art 11(2) (the mediation agreement must determine the mediators' remuneration and who bears it) and art 15(3) (a private mediator 'may determine their fees in agreement with the Parties'); no provision restricts the structure of the fee <https://uaelegislation.gov.ae/en/legislations/2121> accessed 15 July 2026.

[12] Law of the Republic of Kazakhstan No 401-IV of 28 January 2011 'On Mediation', art 22(3): the professional mediator's remuneration is determined by agreement of the parties with the mediator before the commencement of the mediation <https://adilet.zan.kz/eng/docs/Z1100000401> accessed 15 July 2026.

[13] Russian Federal Law No 193-FZ of 27 July 2010 'On Alternative Dispute Settlement Procedure with the Participation of an Intermediary (Mediation Procedure)', art 10: mediation is conducted on a paid or free basis; payment is made by the parties in equal shares unless they agree otherwise <http://pravo.gov.ru/proxy/ips/?docbody=&firstDoc=1&lastDoc=1&nd=102140445> accessed 15 July 2026.

[14] Regulations on Commercial Mediation (State Council Order No 827, China), adopted 19 December 2025, in force 1 May 2026, art 16: commercial mediation organisations may charge fees and shall set their fee standards on principles of fairness and reasonableness and make them public; nothing in the Regulations restricts the structure of the fee <https://www.gov.cn/zhengce/zhengceku/202601/content_7054050.htm> accessed 15 July 2026.

[15] CPR/CCPIT Mediation Procedure (US–China Business Mediation Center), Appendix D (Professional Ethics), r 4 and n 5: 'If the linking of fees to the result of the mediation is not prohibited by the rules of the Center and if the parties requested such an arrangement, after full disclosure by the mediator of the possible consequences … then such an arrangement may be used without it being considered unethical' <https://drs.cpradr.org/rules/international/mediation/cpr-ccpit-mediation-procedure> accessed 15 July 2026.

[16] The success-conditioning and difficulty-scaling appear in the local implementing schedules; see eg Guangzhou Intermediate People's Court, Measures on the Administration of Subsidies for Specially-Invited Mediators (7 May 2021), arts 2 and 4–5: subsidies follow the 'subsidy set by the case' principle; the core payment is expressly a 'successful-mediation subsidy' of RMB 500 per ordinary and RMB 1,000 per complex case; unsuccessful cases attract only minimal task-based allowances <https://www.gzcourt.gov.cn/other/yshj/sfwj/bhss/2021/07/27182254408.html> accessed 15 July 2026.

[17] Civil Mediation Council, draft Code of Professional Practice for Mediators (public consultation) <https://civilmediation.org/consultation-code-of-practice/> accessed 15 July 2026; Civil Mediation Council, Professional Standards for all CMC Regulated Mediators <https://civilmediation.org/wp-content/uploads/2026/03/CMC-Individual-Membership-Rules.pdf> accessed 15 July 2026.

[18] CEDR, Code of Conduct for Third Party Neutrals (2020), s 3 ('Fees and expenses'): the Neutral undertakes 'to make clear … the basis for charging fees and expenses … before the Process starts' and 'not to prolong the Process unnecessarily where there is, in the Neutral's opinion, no reasonable likelihood of progress'; the Code declares itself consistent with the European Code of Conduct for Mediators <https://learn.cedr.com/hubfs/Commercial%20Documents/Scheme%20Documents/Google/Google%20Play/CEDR-Code-of-Conduct-for-Third-Party-Neutrals-2023.pdf> accessed 15 July 2026.

[19] Punjab and Haryana High Court, Mediation and Conciliation Rules (n 10), r 6: in nominating mediators from the panel, the court 'shall give preference to those who have proven record of successful mediation/conciliation'.

[20] SR Peppet, 'Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation' (2003) 82 Texas Law Review 227 <https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1529&context=faculty-articles> accessed 15 July 2026.

[21] Model Standards of Conduct for Mediators (n 7), Standard VIII.B.2: 'While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator's ability to conduct a mediation in an impartial manner'.

[22] See the Italian, Indian and Chinese schedules cited at nn 4, 10 and 16.

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