

# TITLE: INTERNATIONAL MEDIATION LEGISLATIONS AND THE PRACTICAL USE

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I personally believe that when you build bridges to bring something new into a new country or a new setting you need to deal first with the culture and what is going on in that new setting. I had to deal with various cultures, different legal systems and just ignorance on mediation when I started to introduce mediation in a new country. As a result, I decided to build bridges to bring mediation as a tool to resolve conflicts. Alternatively, I wanted to implement mediation in the other countries for the benefit of individuals and businesses.

I believe that when you build bridges by bringing something new into a country or setting you must first understand how culture shapes different countries and settings. When I began to introduce mediation into new countries, I had to deal with various cultures, legal systems and a general lack of knowledge about mediation. As a result of my experiences, I decided to build bridges between cultural differences, by introducing mediation as an alternative tool to resolve conflicts. In addition, I believe mediation can benefit both individuals and business alike.

Mediation is a method of dispute resolution that can benefit any country. Mediation is less expensive, faster, and more confidential than traditional litigation. This is especially true in the international business context, where transaction costs are high and disputes over choice of law and choice of forum are both challenging and time consuming when an international conflict arises. Likewise, confidentiality is essential for corporations, as any publicized lawsuits or negative business relationships have the potential to significantly harm a company's reputation.

In my experience I have found culture to be the biggest challenge to the mediation process. However, the fact that I knew and understood cultures of different countries allowed me to patiently and effectively communicate and implement this tool. Cultural differences appear not only in customs, values and languages, but also within legal systems themselves. For instance, civil and common law systems emerged from and continue to function in cultural spheres quite different from one another. While it is true that mediation can be effectively applied anywhere, one may face different challenges depending on the legal culture of the country in which mediation is being applied. For instance, common law countries and civil law countries respond differently to innovation.

The main characteristics of civil law systems are extensively integrated codifications and a moralistic and dogmatic approach to legal reasoning. In civil law countries, where the principle source of law is the code, the legal culture is such that practitioners wait for the legislature to pass a law before trying a new method of dispute resolution. Consequently, civil law countries, like Italy, are less likely to use mediation for dispute resolution until the legislature has acted. Further, even if civil law

countries adopt legislation that provides for the use of mediation, it does not necessarily follow that such countries will practice mediation.. (Maybe add a “for instance” example where mediation failed to be used in practice)

In contrast, the legal systems of common law countries are characterized by the use of the case method, precedent, and the jury system. Since cases are the principle source of law, the common law tradition is more dynamic and open to innovation. Accordingly, courts may send cases to mediation at their discretion, even without legislation– as is the case in the San Diego Superior Court in the United States – Therefore, while a different approach is taken in common law countries, the same problem exists as in the civil law countries: the law in practice is not the same as the law on the books.

My international colleagues and I wrote this article to familiarize people from different cultures with how various legislative and legal entities around the world have developed and implemented the mediation process. In addition, I asked well-known ADR practitioners and mediators from the USA to share their experiences with mediation. Hopefully, this will give countries where mediation is now starting to take hold ideas and suggestions on how to implement mediation as a practical tool to prevent and manage conflicts.

In order to promote the use and recognition of mediation in every country, common law and civil law countries need to learn from one another so that each can better benefit from mediation. Part I of this article, explores the status of mediation in the European Union , two European Union member states (Spain and Italy), Eastern Europe, Brazil, and the United States by examining: (1) existing legislation, (2) how mediation is being implemented, (3) who is using mediation, and (4) who is advocating for new mediation legislation. Part two of this article provides suggestions on how each of these five regions can promote mediation by borrowing from each other. This can be achieved by establishing mediation institutions, applying mediation in particular industries, getting attorneys involved, and engaging volunteer organizations in the use of mediation.

### **The European Union Legislations, States members and Eastern Europe**

In civil law countries, in order for any new tool of conflict resolution to be effective and to generate enforceable results, it must be incorporated in the legal system by a legislative provision.

Mediation and Conciliation concepts are often confused with arbitration, especially in civil law European countries. In contrast some common law countries such as the United Kingdom, and other countries with advanced legal systems such as Catalonian, better understand the concepts of Mediation and Conciliation.

### **European Union**

In 2004, the European Union Council decided to take a position on mediation when they adopted a proposal of Directive. The purpose of the proposal was to enhance the use of mediation within the Member State's legal systems. However, It wasn't until

May 2008 that Mediation finally got its renaissance in the old continent. In May 2008, The European Parliament and the Council of European Union adopted a Directive on certain aspects of mediation in civil and commercial matters. The Directive applies to cross-border disputes, and civil and commercial matters. Although the Directive only applies to the said disputes, it encourages application of mediation to internal disputes as well. Further, the Directive has no affect on any previous mediation developed by the Member State's.

One of the most important issues of the Directive is the obligation of the Member States to provide training to the mediators who provide services in cross border disputes.. In addition, the directive creates an obligation on Member States to establish long-term quality controls over mediation services. This can be done by adopting a code of conduct for mediators or by any other means considered appropriate.

In addition, it is important that mediation agreements are enforceable. According to the Directive, "Member States shall ensure that it is possible for the parties or for one of them, with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable". This provision gives mediation agreements the same force and enforceability of an arbitration award, which has always been a key issue for the development of a new ADR method in civil law countries.

The Directive establishes a general rule for confidentiality in mediation. This rule will be one of the pillars for spreading the practice of mediation in Europe, as it has been in the United States. It is very important for E.U citizens to trust the mediation process when transferred to national legislation of the Member States\_especially in commercial and business mediation.

Prescription periods are important when determining how mediation fits into procedural rules. In response, the Directive included a "soft imposing provision". This provision is characteristic of the E.U.'s general ruling style. The provision provides that the prescription periods do not prevent the Parties from initiating judicial proceedings or arbitration in relation to the dispute. Therefore, E.U. citizens can still utilize their legal options if they feel mediation is not working for them.

This new concept, gives member states an alternative means of resolving their conflicts in a faster and more effective way. This Directive constitutes a milestone in the development of mediation in Europe and in the diffusion of the pacific conflict resolution culture in the old continent.

### **Spain (Catalonia) and Italy**

According to the European Union Directive, Members must administer the laws, regulations, and administrative provisions necessary to comply with the Directive by May 21<sup>st</sup>, 2001. Spain (Catalonia) was the first of the Member States to take the Directive with full force. The new Catalan Mediation Law got its first approval from the Catalan Government just few months after the European Union Directive. However the Central

Spanish Government has yet to implement the E.U. Directive. In response, Catalonia, who already had a Family Mediation Law, decided to comply with the Directive's recommendations by stepping forward and extending the application of mediation to any civil law dispute.

The new law extends the application of mediation to all civil law disputes and to other family law disputes not included in the Family Mediation Law of 2001. Specifically, the new law extends the application of mediation procedures to a variety of disputes that range from community and family conflicts to intercultural and business conflicts.

The key factor, considering the social reality in Catalonia, is the possibility of solving intercultural conflicts by mediation. Catalonia is a very rich autonomous community and immigration has been growing at an incredible pace in recent years. Quite often the Catalan courts have to judge intercultural conflicts that could be easily managed by a trained mediator specialized in cultural diversity. Such conflicts are created by differing perspectives on life and reality within Catalonian society.

The old Family Mediation Center, established by the Family Mediation Law of 2001, has been adapted to the new law and now it is called "Catalan Civil Law Mediation Center". This is the main institution in Catalonia and it controls all public mediation in the civil law sphere.. It requires mediators who want to provide mediation services in the Center to be trained by the Center and to obtain an official certificate. Mediators must also have membership to any one of the Professional Associations that collaborate with the Center, such as The Bar Association, The Psychologists Association and The Social Assistants Association.

Nevertheless, the Autonomous Community Government encourages private initiatives and many private mediation centers are being developed throughout Catalonia. It should be noted that 76.2% of all the mediations not derived by the judicial authority and managed by the old Family Mediation Center since its beginnings have resulted in a positive agreement and a resolution of the conflict. In contrast, in mediations derived from the suggestion of a judicial authority, only 51% result in conflict resolution.

Catalonia is on a fast paced road to the implementation of mediation in its community. However, even with a supported framework, Catalonia needs the acceptance of its judges, legal professionals, and citizens. Together, they can identify different areas where mediation can be used and promoted.

Despite Spain's quick reaction to the Directive, other Member States need more time to accept and implement mediation legislation. This is a prime example of a country with formal legislation on mediation that has failed to make the effort to utilize mediation in its day-day disputes. Notwithstanding the fact that Italy still shows poor figures in the use of mediation, either before the judges, or out-of-court ( in 2006 the Italian Chambers of Commerce performed some 3,200 mediation over a total of 9,200 applications ), it is interesting to note that Italy has extensive legislation on this matter, either in general (

namely in the civil code or civil procedure code ) or in special items, as indicated below. Italy is an example of a country with a hyper-extreme approach to mediation, dictated by the civil code. For example, Italy has legislation covering most of the major industries within its borders from Family law to financial investments. However, the actual use of mediation in Italy is next to none. <sup>1</sup>

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<sup>1</sup> General Legislation

Art. 912 of Civil Code clearly explains what mediation ( *conciliazione* ) is in the controversy between two or more owners of “non-public waters and the role of the judge as a mediator ( year 1942 ).

Art. 185 of Civil Procedure Code ( recently amended ) provides with “attempt of mediation” before the judge only whether the parties agree to do so ( beforehand the “attempt” was compulsory for the judge, but the law was not applied since the parties simply didn’t attend the relevant hearing.

Art. 420 of Civil Procedure Code in the field of Labor Law obliges the plaintiff to file before a special Mediation Commission an “attempt of mediation” with the defendant, prior to go to the court in case the mediation fails. In case of lack of such previous step, the judge stops the procedure before him and orders the parties to try the mediation.

Art. 708 of Civil Procedure Code in the field of Family Law ( separation and divorce ) obliges the President of the Tribunal at the first hearing to try to mediate the controversy, which is often only a formality, since the parties have already decided to settle all the matter together with their lawyers.

Art. 320 of Civil Procedure Code provides that the Justice of Peace ( *Giudice di Pace, formerly Giudice Conciliatore* ) must perform an “attempt of mediation” at the first hearing. Also this enactment is not so much applied, as is the case in out-of-court conciliations.

Art. 322 of Civil Procedure Code in the field of out-of-court conciliation before the Justice of Peace provides with this opportunity given to parties out of any litigation proceeding. In this case, the Justice of Peace acts like a mediator but if the settled matter is out of his judicial competence, the mediation agreement may not have any legal enforcement.

Special Legislation

*On line mediation*:. This procedure is regulated by legislative decree n. 70 of 2003, which has been enacted in accordance with European Directive 2000/31/CE on e-commerce.

*Agriculture Contracts*: Law n. 203 of 1982 obliges the parties to a previous attempt of mediation before going to the court, as is the case for Labor Law Litigation.

*Reorganization of the Chambers of Commerce*: Law n. 590 of 1993 has obliged all the 103 Chambers of Commerce of Italy to create Mediation and Arbitration services.

*Proceedings before the Public Administration and Public Works Contracts*: various laws provide for a “pro bono agreement” ( *accordo bonario* ) such as Presidential Decrees n. 109 of 1999 and n. 170 of 2005 and legislative decree n. 163 of 2006.

*Tourism*: a restatement of the national laws on tourism ( law n. 165 of 2001, art. 4 ) provides for mediation in the controversy arising out of misconduct of the tourism agency or tour operator.

*Consumer Code*: Legislative decree n. 206 of 2005, enacted under pressure of European Authorities, provides for mediation, mainly organized by the Chambers of Commerce or by Consumers’ Associations.

*Copyright*: Legislative decree n. 68 of 2003 which applies an European Directive on such field, provides for mediation especially in the use of reproduction rights of any kind by multimedial devices.

*Social Security*: Legislative decree n. 124 of 2004 providing for a rationalization of the inspection functions has approved in some circumstances the use of mediation for social cases.

*Financial Investments and Savings* : Law n. 265 of 2005 provides for several mediation procedures organized by banks together with Consumers’ Associations.

*Family Agreements on enterprise succession*: Law n. 55 of 2006 provides for mediation as regulated by the reform of Company Law ( see above ) with the purpose of preserving the management of a family enterprise in case of succession.

*Franchising*: Law n. 129 of 2004 provides for mediation as regulated by the reform of Company Law ( see above ).

Although there are organization that provides ADR and Mediation in Italy, the lack of enthusiasm for the mediation process is most likely a result of the fact that only a few people are aware of how the process works. Another likely reason is that there are so few people trained to conduct the proceedings that there is little chance for mediation to gain the trust of the Italian people.

### **Eastern Europe**

In the last several years, Eastern Europe has been developing its mediation program to conform to the practices of Western Europe and thus it is worth exploring. Although the term “Mediation” is a relatively new concept in Russia, the features of mediation have been used in Russian arbitration courts for quite some time.

Today, there is no legislative act covering mediation in Russia; there is only a bill of law that is being discussed in State Duma. Nonetheless, more and more people are becoming interested in this method of alternative dispute resolution and the ways in which it is implemented in the Russian legal environment. So far, the most widespread use of mediation in Russia has been in Russia’s insurance practices and in the juvenile system where mediators are sponsored by the State.

Currently, Russia has a few centers working to introduce mediation and teach its techniques. The leading center for mediation in Russia is the Mediation and Law Center (Центр Медиации и Права.) located in Moscow. “Development” is another institution in Moscow that offers information and training in mediation. “Development” mostly offers continuing education courses, including courses on mediation. The two centers provide seminars and trainings where people can become certified as mediators. These

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*Sport Law:* this field is very special in Italy, because any controversy is to be solved outside the ordinary courts either in mediation or in arbitration procedures before special Sport Chambers. The most recent law in this field is Law n. 280 of 2003.

*Harbour Pro Bono Agreement:* The Harbour Commander has authority for solving any dispute arising out within the Harbour area in the field regulated by art. 598 of Navigation Code.

*Public Utility Service, Energy and Gas:* Law n. 481 of 1995 and Authorities’ Regulations n. 127 of 2003 and n. 45 of 2005 provide for mediation in these matters before special mediation commission organized by the relevant Authorities.

*Company Law:* Legislative Decree n. 5 of 2003 has reformed the civil procedure rules for the controversy in Company law and other similar fields, and has provided for new rules concerning mediation and arbitration , creating special public and private organisms for training of mediators and offering mediation services, under the supervision of the Ministry of Justice.

*Outsourcing and Subcontractors:* Law n. 192 of 1998 has provided for a compulsory attempt of mediation and a subsequent non compulsory arbitration in such type of litigation cases.

*Telecom, Postal Services and Insurance:* such field in which controversy is widespread is regulated by autonomous Mediation Regulation, in accordance with Consumers’ Associations.

*Public Waters:* Royal Decree n. 1775 of 1933 provides for mediation in this field.

*Parental responsibility:* Law n. 54 of 2006, which has modified art. 155 sections of Civil Code provides for mediation services proposed by the judge for solving disputes concerning the parental responsibility ( joint education of minors ) in Family law.

*Agreement by adhesion and collaborative repent:* Legislative decree n. 218 of 1997 provides for pro bono agreement in the field of Taxation to solve disputes with the Income Tax Authorities.

*Pro bono agreement in International Fiscal Disputes:* Law n. 99 of 1993, ratifying Brussels Convention of 1990 on avoidance of double taxations, provides for mediation between the concerned Countries in matter of taxation.

trainings are held in association with American specialists and are based on European and American mediation practices.

In addition, “Mediation and Law” Center publishes “Mediation and law” a magazine that is aimed at informing practicing lawyers, managers and psychologists on mediation techniques. This center held two international conferences dedicated to mediation and its techniques in 2005 and 2007.

“Mediation and Law” Center is planning to introduce courses on mediation in schools and universities that would teach children, their parents and teachers how to interact with each other and prevent conflicts. So far, only one university in Russia, St. Petersburg State University, offers educational programs and degrees in mediation and even this course is still under development.

Further, many leading law offices offer mediation services. However, it should be noted that there is no law on mediation in Russia and no national program for training mediators. As an unfortunate result, these services are often illusory in that they far too often only appear on paper.<sup>2</sup>

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#### <sup>2</sup> Ukraine

In Ukraine, just like in Russia, there is no legislative act on mediation, there is only a bill of law that is being discussed. Unlike, in Russia, where mediation is being discussed as a method of dispute resolution in every sphere of law and life, in Ukraine, the bills of law on mediation concern only mediation and mediation process in Criminal Law. Such bills are aiming at establishing the relevant terminology, the procedures and the requirements for mediators, their classification, rights and obligations and who is to pay them. As leading scholars say, the main problem is financing the work of mediators. They point out that only if their work is sponsored by the State, then mediation a pretty good chance of development in Ukraine.

Another realm, where mediation is sought to be used is juvenile system which is under development now and is scheduled to start working in 2016.

Since 1994 a number of non-governmental organizations on promotion of mediation have been established in Odessa, Donetsk, Kharkov, Lygansk, Zakarpatiya and Crimea regions. With help of USAID, Mott Foundation, US State Department and other grant giving foundations these organizations are working on informing citizens of benefits of mediation, training mediations and using mediation in dispute resolutions. Among other activities, they conduct trainings for students and their teachers and professors, justice system officers and psychologist to help them use mediation techniques in their work.

In partnership with the Information Agency of the US, Kharkov region mediation group sends all volunteers to intern in 26 leading American governmental and non-governmental organizations that use mediation in their work. Moreover, in partnership with the Kingdom of the Netherlands, National Law Academy of Ukraine and Karazin National Kharkov University, Kharkov region mediation group has composed and is helping to implement a course on ADR at different universities around the country.

In addition, in May 2004, Kharkov region mediation group and Kharkov public center “ Youth for Democracy” have lodged a pilot project “Model juvenile court - a step to formation of juvenile justice in Ukraine” at the Dergachi district court (Kharkov region). The goal of the project is to create a model juvenile court on the basis of Dergachi district court and work out the principles of work of juvenile justice in Ukraine, including mediation.

In its turn, Odessa region mediation group, since the date it was formed, was focusing on involvement of judges and courts in usage of mediation techniques to resolve conflicts and creation of special trainings about mediation for judges. As a result, a number of disputes were resolved using mediation techniques. After that an agreement on using methods of ADR in civil cases in 2 courts in Odessa were signed. Thereafter, more and more people are getting access to mediation. In order to improve the quality of mediation, Odessa region mediation group holds annual meetings of Odessa district court judges with district court judges from the USA.

In addition, Odessa region mediation group has worked out and established special educational courses on mediation for schools, universities and families and is actively working on informing professionals and regular citizens on benefits of mediation.

#### Belarus

In Belarus, mediation was established as an official and legal method of dispute resolution by the act of the legislator in 2004 that aimed at regulation of economic disputes. The law describes the procedure and who can be a mediator. Under this law, a judge or his clerk can be a mediator only.

The only place in Belarus where one can be trained as a mediator, is a Center of international activity of Belarus State University. Their training program is created on the basis of the Russian training program, which is, in essence, an adaptation of the American model. Only people who have a higher education (a university diploma) can be trained as mediators.

Mediation was also approved by Belorussian legislators in the realm of employment law where the term “mediation” is given but not explained what it means. Others areas of law have not been subject to mediation...just yet.

Thus, although, mediation is “permitted” by the government, it is not really implemented or used in Belarus. The institute of private mediators has not really been created and the only place where it is actually used is arbitration courts.

## South America and the Brazil experience

European Member States are not the only countries to have recognized the success and necessity of mediation. Over the last twenty years, Brazil has made a tremendous effort to embrace and promote mediation. Although not formally recognized, the ideas underlying the Institute of Mediation can be traced back to Brazil's Federal Constitution of 1988.. However, the indirect references to mediation in the Brazilian Federal Constitution and Brazilian Civil Code Procedure were insufficient to make mediation an effective institute to settle disputes in Brazil. Therefore, Brazil does not have a law specifically regulating the mediation institute. However, the lack of efficiency of Brazil's national courts, led Brazil on a chase to find alternative methods for dispute resolution. Consequently, the House of Representatives is currently in the process of passing a legislative bill on mediation..

While the Legislative Bill was under review by the House of Representatives, Brazil observed a mobilization of the Brazilian people around the search for an alternative to the judiciary's methods of dispute resolution. For example, a financial study conducted by the Brazilian Central Bank, established that mediation would be an effective instrument to diminish the extremely high number of lawsuits currently being analyzed by judges in Brazil.

As a result, in 2003, the Court of Justice of the State of São Paulo ("TJSP") created the Sector of Conciliation in Second Instance of Jurisdiction. These establishments were created to alleviate the workload of judges with activities related to mediation and conciliation during the analysis of lawsuits.

Subsequently, on August 23, 2006, the National Board of Justice ("CNJ") created the *Movement for Conciliation*, to spread a new culture of conflicts' resolution in Brazil. The movement aims to change the behavior of the agents of justice, of its users, lawyers and society in general. Furthermore, it intends to introduce the culture of mediation as the best and most profitable option to terminate lawsuits.

As per official data<sup>3</sup> published by the TJSP in 2006, the movement produced 84,000 hearings and 44,000 settlements all over Brazil, an index of success of approximately 55%. In 2007, the State of São Paulo had 7,275 hearings, and 2,922 settlements. These statistics demonstrate the favorable response to mediation in Brazil as well as the vast potential for widespread implementation of mediation in Brazil.

Although Brazil has responded favorably to mediation as an alternative dispute resolution process, there are political roadblocks to its implementation. As a result of the lack of legislation regulating the institute of mediation, there are FEW centers available to train and qualify mediators in Brazil.. Consequently, Brazil has few experienced and qualified mediators.

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<sup>3</sup> <http://www.tj.sp.gov.br/conciliacao/estatisticas.aspx>

As previously mentioned, many private and public entities have advocated the use of mediation in the past few years. Further, many economists defend the implementation of mediation in Brazil, believing that referred institute will possibly create an economical environment that stimulates investments and economical growth.

Although in recent years some articles and books have been published on mediation, mediation has yet to receive support by law schools, professors and lawyers. However, judges and courts have been extremely favorable to the implementation of mediation in Brazil, which will help to lower the number of lawsuits currently pending.

In addition, it is important to introduce the benefits of mediation to Brazilian law firms. This knowledge will give firms the ability to advise their clients to include mediation clauses in their agreements. However, we believe this could be made possible only if the Brazilian Congress approves Mediation Law

Brazil has made remarkable progress with its recent inclusion of mediation in its judicial system. But without the support of an approved legislation, it is difficult to implement a uniform mediation structure throughout the country. Once the legislative bill on mediation is passed, Brazil will have a sufficient framework to build on in order to further improve their legal system

### **United States of America & the practical experiences in mediation.**

While other countries around the world are just starting to recognize the many successes and usages of mediation, the United States is the world-leader in alternative forms of dispute resolution, especially mediation. I interviewed Gregg Relyea, a Mediator in San Diego, California, and a professor of Mediation at California Western School of Law and The University of San Diego as well as a personal mentor of mine. Mr. Relyea started off the interview with an important point. *“One challenge is to take the concept of mediation from tactical (planning) to practical (applied). It may seem easy to understand the concept of mediation practice. It is altogether more difficult to apply the concept of mediation and to develop and maintain a private mediation practice.”*

The development of mediation law in the United States is quite opposite to the development of mediation law in civil law countries. In the United States, there is a broad use of mediation in the legal world even though there is very little legislation that attorneys and mediators rely on. Instead of turning to the representatives to draft laws that govern alternative dispute resolution, mediation law has developed through an ad hoc mix of state and federal law as well as precedent without a uniform binding code to depend on.

*“First, the legislation has to catch up with the practice. People are using mediation and the legislator has to regulate it...In 1987, on the State program level: DPR (Dispute Resolution Program) portion of \$8 was given to the State as a portion for a filing fee and put in a fund for Community Mediation program.”* Don Fobian (Mediator)

Although there is no broad binding federal mediation law within the United States, there are some programs and laws that uniquely apply to particular industries or provide the resources for states and government agencies to pursue mediation options. For instance, the Department of Agriculture may allocate and request additional funding to states that wish to develop mediation programs in agricultural disputes, or to use the funds to settle isolated cases through mediation. It is not widely used, but it is open to every state should they choose to exercise the option. In a similarly arcane piece of legislation, Congress authorized the use of mediation in a dispute between a federal or state agency and another party involved in coastal or oceanic resource management, where the Secretary of Commerce has the power to supervise, act as a mediator in, or select a mediator for the dispute. Both laws are unique in that there was no prior history showing a proclivity for mediation in either area, and unsurprisingly, neither is used often.<sup>4</sup>

Traditionally, mediation in the United States has been used in resolving employment disputes. Perhaps the most widely used piece of federal legislation to this effect is the National Mediation Board that governs the railway and airline industries. Established in the 1930s, this entity was created to give the management of airline and railway companies the option of using federal mediators to negotiate with unions in work stoppages or labor disputes. Many other industries followed suit and established their own mechanisms for using mediation outside of any federal program. However, no other industry successfully lobbied Congress to promote a similar program to cover their disputes and Congress never took up another bill on its own accord.

Another government agency in the United States that uses mediation is the EEOC (Equal Employment Opportunity Commission). The EEOC is a federal Agency that gets its authority from Congress' 964 civil right acts, American with disability act equal pay act, age discrimination in employment acts, pregnancy discrimination, and sex discrimination. The procedure is that the charging party (plaintiff or complainant) files a complaint to the EEOC against the respondent (defendant).

*“For 23 years I was an Enforcement supervisor where I was enforce the laws that we are mandate to enforce and since 1999 a mediator. In my mediation practice I bring 23 years*

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<sup>4</sup> USA Mediation Legislation

Federal level:

7 CFR 785.1 et seq. provides that states meeting conditions specified under these provisions may have their mediation programs certified by the Farm Service Agency (FSA) and receive Federal grant funds for the operation and administration of agricultural mediation programs.

7 USCS § 5101 specifies the qualifications needed to participate in the agricultural mediation program.

15 CFR 930 et seq. provides that the Secretary or other head of a Federal agency, or the Governor or the State agency, may notify the Secretary in writing of the existence of a serious disagreement with respect to ocean and coastal resource management, and may request that the Secretary seek to mediate the disagreement. It also provides instruction for how to do so.

29 CFR 1202.1 discusses the mediation services available through the National Mediation Board for labor disputes.

29 CFR 1400.75-3 et seq. discusses the organization of the Federal Mediation and Conciliation Service for labor disputes.

45 USCS 101 was repealed, but dealt with mediation for railroad carriers and their employees.

*of experience in the enforcement EEOC laws. I was investigating and enforce the laws, so I already had tools to negotiate situations to avoid litigation.”-- Jose’ J. Dennis (Equal Employment Opportunity Commission Mediator):*

On occasion, individual states have attempted to implement various uses of mediation absent a strong federal mandate. In particular, Texas, Florida, and California have developed mediation within their borders to a greater degree than any other state. Acting independently of one another, all three developed widely different practices of mediation in dispute resolution, namely in deciding how to treat the confidentiality of the proceedings.

These disjointed approaches by the different states led the U.S. Congress to pass a broad, non-binding legislation to offer the states a set of mediation guidelines that each may choose to adopt. The Uniform Mediation Act (UMA) of 2001 established a set of base rules that have been widely accepted in many states, and addressed the confidentiality concerns that many states differed on. The trend has been that as states have become aware of UMA and the benefits of mediation, they have chosen to adopt the legislation completely; seven states have already incorporated UMA into their state law and many other state legislatures are considering adopting the UMA.

In addition to the examples listed above, mediation is being used in a variety of different ways. Two examples stand out in particular because of their scope; efficacy and application:

#### USPS REDRESS

The United States Postal Service (USPS) is the second-largest employer of any private or government organization in the United States. There are 685,000 career employees working for the postal service, and the sheer number of employees means that the USPS also has a large number of employment disputes to contend with. In 1994, postal employees in the Northern District of Florida filed a class action lawsuit against the USPS. Among their complaints was that the Equal Employment Opportunity Office’s (EEO) complaint process that is required to resolve work disputes was slow, remote, and ineffective. After reviewing the alternatives, all parties agreed that a workplace mediation program could be a very effective way to address these concerns. As a result, REDRESS (Resolve Employment Disputes Reach Equitable Solutions Swiftly) was established as a pilot program in three Florida locations. The program was so effective that it is now offered to all Postal employees.

REDRESS is a completely voluntary, free program that any employee of the Postal Service may use if they feel they have been subject to illegal discrimination on the basis of race, sex, color, national origin, disability, or retaliation. REDRESS operates differently than most court-ordered mediation session in that the parties in dispute are encouraged to play a more active role in the process than the mediators themselves. The parties tend to speak for themselves more than through their representatives and are free to make opening statements rather than having the mediator open the session. Parties are also encouraged to determine the issues to discuss themselves, and may establish their

own ground rules for the process, which includes discussing issues that go beyond the dispute at hand. The mediators for the session(s) are external from the USPS and are instructed to act as facilitators of the communication rather than directors of the session. If the parties reach a settlement, the agreement is binding. If not, then the parties are required to go through the more formal process of filing a complaint with the EEO and pursue the matter through other means. This program boasts a closure rate of 75%, and over 90% of the people who used the program reported they were very satisfied with the process. This success has given the USPS General Counsel the impetus to further engage in preventative employment law and pursue new avenues of ADR within the organization. *“I have worked for the Post Office mediation program for about eight years and continue to do so. They require use of a transformative model and their mediators have to go through their REDRESS training before they can work with them. The focus is on restoring the relationship, rather than settlement.”* -- Don Fobian

### SAN DIEGO (CA) SUPERIOR COURT CIVIL MEDIATION PROGRAM

California has the most advanced mediation programs in the U.S., with specific legislation providing funding for mediation services for industries ranging from farming and agriculture to backstretch horse racing workers. Among the most innovative of these programs is the civil mediation program in the Superior Court of San Diego, CA. As a case proceeds to trial, the parties are required to meet for a case management conference in the judge’s chambers relatively early in the litigation process. This conference is required in some manner in all courts throughout the country, but unlike other courts the San Diego Civil division requires the judge to encourage the parties to consider mediation or other ADR methods if the parties haven’t already attempted to do so. In other words, the San Diego program has internalized mediation as a preferred method of resolution.

The San Diego program maintains a panel of over 100 mediators who must meet qualifications based on experience and area of expertise, any of whom may be chosen by the parties to mediate at anytime before or at the case management conference to resolve the conflict. The mediator’s qualifications are made available to the parties, and their experiences cross into every area of the law (banking, intellectual property, real estate, environmental, insurance, construction defect, etc.). The program also offers mediators who speak a variety of languages, and may be chosen based on what part of San Diego County they are most familiar with. The mediators are compensated directly by the parties in equal shares and the court sets a low rate (\$150/hour) for the first few hours, after which the mediators are free to charge their personal rate.

These are just a few of examples of how mediation can potentially change how law and business is conducted. According to Gregg Relyea, *“Mediation is being used equally in small, simple motor vehicle accident cases and in complex, multiparty-cases, intellectual property, and international disputes. Even the federal courts turned to mediation to resolve the Microsoft antitrust case a few years ago.”* Relyea also noted how the field of mediation evolved over time: *“First, private industry started to support*

*and use mediation in the 1980's. The insurance industry was one of the first to decide that the business benefits of mediation were significant, including: reduced cost of litigation, reduced time to resolve insurance claims and reduced legal fees. Second, lawyers and Bar Associations started to use mediation. Private companies and other groups started to recognize the benefits of mediation. It was beneficial for parties on both sides of the table, as well as lawyers, because mediation proved to be economical and efficient. It also produced more satisfied clients and litigants. In terms of settling cases, mediation provided a private forum for parties to resolve their disputes and it provided businesses with an opportunity to create business solutions for business problems. The third wave in the evolution of the field took place largely in the 1990's when courts started to establish court-annexed mediation programs on a wide-scale basis, which had been studied since 1976.*

## PROMOTION OF MEDIATION IN CALIFORNIA

California is at the forefront of promoting new avenues to apply mediation to legal and social contexts.<sup>5</sup> *The California Dispute Resolution Council is an organization that monitors legislation and legal decisions at the appellate court level. Currently, California has what I consider to be the most progressive legislation regarding mediation, particularly mediation confidentiality in the country. Our current statutes, which went into effect on January 1, 1998, consider confidentiality as a public policy issue, rather than as a privilege.”* Don Fobian

Listed below are a just a few of the areas where the state continues to lead the way for growth in the field of mediation.

(1) It is very important to educate attorneys on the benefits of mediation and teach them how mediation techniques can be used in dispute resolution. The Los Angeles Bar Association has a Dispute Resolution Services (DRS). DRS is a nonprofit corporation of the Los Angeles County Bar Association committed to promoting and providing accessible and effective conflict resolution services. DRS is a premier provider of mediation and conflict resolution services in Los Angeles County, as well as an advocate of community efforts to foster non-violent, peaceful resolutions to interpersonal conflicts. We asked a mediator how prepared attorneys are when coming into mediation and how many times he found himself educating his clients on mediation: *“Most attorneys are in what I refer to as “trail mode”, which means they are ready to attack. One has to learn over time not to be on the attack mode 24/7.” “It is standard operating procedure to open with everyone in the same room. I explain the ground rules of mediation and what mediation and the mediator are here to accomplish. I do this in case the attorney has not prepared their client for the process.”* Ivan Stevenson (mediator)

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<sup>5</sup> CA Labor Code 1164 provides for mandatory mediation and conciliation through the Agricultural Labor Relations Board for employee disputes and explains the procedures for doing so.

CA Bus & Prof. Code 19455 provides for mediation services between for backstretch horse racing employees.

(2) Many government agencies have established committees to promote awareness about mediation and teach its techniques. Among others, there are: Dispute Resolution Program of the Health and Human Services Agency, Los Angeles County Dispute Resolution Program, Los Angeles County Department County of Consumer Affairs, and many more.

For example, *“the San Diego Superior Court was part of a mediation pilot program initiated by the State Judicial Council, where the judges were “mandating” certain cases to mediation. The goal was to see how such a program would be received by attorneys and their clients.”*

*Certain disputes involving Home Owners’ Associations also require the use of mediation due to legislation. Real Estate Contracts have mediation clauses. More law schools are teaching mediation theory and process.*

*Many other disciplines are discovering the value of mediation – business, human resources, customer relations, probate, health care, to name a few.-- Don Fobian*

(3) Lawyers and mediators establish community mediation groups that are dedicated to the promotion of mediation as a means of dispute resolution. Such organizations are aimed at helping to resolve community issues through mediation and teach professionals mediation techniques they can use in their daily life. Law schools have also begun to create their own mediation clinics and programs to educate and provide services to their local communities. Below are just some examples of why mediation training is so important:

*“In law school I took classes in mediation and I got interested in resolving family cases. I think that it is very important to have classes in ADR and mediation in law school. As an attorney, you need to know alternative ways to resolve conflicts. An attorney who is exposed to mediation during his or her legal career will be more likely to recommend it to clients. It is important to know the tools to resolve conflicts especially to help poor people who are scared to get involved with attorneys and the courtroom.”*  
--Sara Raffer (Legal Aid staff attorney)

(4) Mediators themselves have created local organizations to develop their practice. The California Coalition for Community Mediation is a group of mediation centers who have been working together since spring, 2004. The purpose of the group is to increase statewide collaboration of community mediation organizations in order to develop and present a clear and compelling voice in all areas where decisions are made that affect community mediation.

(5) The government of California, including Governor Arnold Schwarzenegger, the Board of Governors of the State Bar of California, and the Judicial Council of the California Administrative Office of the Courts have proclaimed the week of March 23<sup>rd</sup> “California Mediation Week”. California Mediation Week was established many years ago to recognize the continuing contribution of mediators and the mediation process in reducing the caseload of the Courts and providing litigants with a potential means for a prompt and cost effective resolution of their disputes. It’s important to see how

mediation can be applied to so many fields from the perspective of professional mediators we have interviewed. Here are a couple of fields where mediation has been successfully applied.

*“I primarily handle litigated matters. I handle issues involving everything from admiralty matters to personal injury to products liability, construction defects, business matters, contractual issued, trademark, insurance cases, real estate cases, and worker’s compensation matters.” Ivan K. Stevenson (mediator)*

(6) The following are views on the future of mediation from the eyes of professionals with decades of mediation experience.

*“Originally, the agency (EEOC) did not use mediation. Rather, it used negotiation on the enforcement side- evaluative non neutral negotiation, neutral finding, conciliation are all methods to resolve disputes. In 1995 the EEOC started a Pilot project in mediation which ultimately grew to become very successful. Mediation became very popular in the federal government for the participation of the parties. What has been consistent with time is my passion to continue to be a middleman between the parties and to make the difference in the life of people. Passion and method are unique among each mediator. I am able to mediate two to three cases each day. Unfortunately, what have also remained consistent over the years are the unrealistic expectations that the charging parties bring into the disputes. On the other hand, what has changed is that the participation rate has increased as well as the successful rate. On the employers side a large number of law firm have advocated for the program and have encouraged mediation. Also the plaintiff’s attorney today more frequently advises mediation as a method of dispute resolution for their client.” --Jose’ J. Dennis (mediator)*

(8) Many non-profit nongovernmental organizations, such as Legal Aid Society in San Diego, also contribute to promoting mediation in the community. San Diego Legal Aid Society offers peer mediation services for schools.

What is Peer Mediation? We asked Sara R. Raffer Esq. Staff Attorney, pro bono Program, Legal Aid Society of San Diego Inc to help answer this question.

*“Peer mediation is an alternative dispute resolution process used to compliment regular disciplinary procedures. Peer mediation is successful because it empowers students, and motivates them to behave more responsibly. At the mediation, the disputants discuss the facts as they see them, and their feelings about the problem. Each disputant listens to the other and repeats what they hear, so as to open their eyes to the other’s point of view. Aided by the mediators, the disputants devise possible solutions for resolving their conflict to ensure that the problem will not occur again.*

*Studies show the vast majority of schools with a peer mediation program reported a significant reduction (83-86%) in student violence and harmful l behaviors since*

*implementation of the mediation program. This program helps students resolve conflicts and helps teachers prevent conflicts before they arise. .--Sara Raffer (Legal Aid staff attorney)*

*“Mediation has proven itself to be a valuable alternative to the adversarial process. It provides opportunities otherwise lost in litigation, especially for continuing relationships. The fact that it is confidential and voluntary contributes to its success. Savings in time, money and emotional cost are added bonuses.” --Don Fobian*

## **Conclusion:**

There are no rules to follow when dealing with new concepts and trying to adapt new concepts to different cultures. We all believe that the best way to introduce a new concept is to be able to *share experiences and learn from each other*. In order to do this, we must respect new and different cultures and adjust our understanding in the best way possible to fit other cultures.

The essence of mediation is working together, with this article we worked together internationally because we understand that cooperation is the only way to make mediation a reality in the modern era as an alternative to resolve conflicts.

In our opinion, it is important to learn the stories of well-known mediators who are currently using these tools to help individuals and businesses to resolve their disputes and come up with new solutions.

The full article, including interviews can be found at [www.bridge-mediation.com](http://www.bridge-mediation.com)

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