

Italian businesses, mediation, could it be?

The mediation bridge: An idea becoming reality.

by
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Introduction

When a “bridge” exists between two countries, an exchange of knowledge, attitudes, and ideas can have positive impact and can create business for both countries. My vision is to develop a concrete plan for the transfer of the concept of mediation to Italy and to build an ideal mediation “bridge” for the benefit of business communities in both San Diego (US) and Milan (Italy). The “bridge” will be an inter-active medium that allows people and information to cross in either direction. The objective of this bridge will be to exchange mediation knowledge, information, and experience between the two cultures. Specifically, the goal of the “bridge” will be to develop a pathway and create a resource for companies to efficiently resolve disputes while they save money, conserve resources, increase productivity, and cultivate stronger business relationships. The “bridge” will instantly create practical business solutions for a broad spectrum of business problems.

Background

A new chapter is opening up in my life. In March 2001, I arrived in San Diego, California, to study mediation and to explore different career paths. As a lawyer in Milan, Italy for the preceding four years, I had grown restless with the traditional judicial system, which seemed to be cumbersome, conservative, overly expensive and time-consuming; in other words, it was not failing to hold my interest anymore. I needed to explore new forums to solve legal conflicts. During my early times in San Diego, I was introduced to the promise and power of mediation to help individuals and organizations resolve their disputes. I immediately became deeply involved with the mediation field, it has been my life-long passion to work together with others to understand their differences and to find a way to bridge the gap in understanding what divides them. With mediation, I believe I will be able to build a bridge that allows parties to understand each other and find friendly and effective solutions to conflict rather than being bogged down in difficult, expensive, and lengthy litigation (or arbitration).

Studying mediation in America and immersing myself in the mediation field was the only way to secure a broad exposure to the field that intrigued me. My involvement in the field has included extensive academic training, private mediation training, direct observation of mediators and arbitrators, and hands-on experience as a mediation practitioner. This multi-faceted exposure to mediation has given me the tools that were necessary to create a vision for developing and implementing a “mediation information superhighway” of sorts, between the U.S. and my home country.

Exploring the current status and practice of mediation in the United States and Italy, along with relevant historical and legislative development, were the objectives of a business trip to New York and Italy in June/July, 2003. I considered the trip to be primarily a research expedition to determine the current status of mediation in America and the current levels of mediation usage in Italy, to identify consumer interest levels, and to develop strategies for introducing the mediation process on a wide scale in Italy.

First Impressions

During my New York /Milan research trip, everyone expressed a high level of curiosity about my reason for creating a bridge to bring to Italy the concept of mediation which is so successful in U.S. Due to my training and education in both Italy and in the U.S., looking back, I now see the reason was simple, and there all along. I was able to understand the differences in their legal systems and appreciate the positive and negative aspects of the Italian and American legal communities. I also was able to identify the needs of both legal systems. These early perceptions were confirmed again and again during my research trip.

Since my introduction to mediation, I have come to adamantly believe in the principles underlying the mediation process. Those principles include providing people with prompt and affordable access to justice, allowing the parties the opportunity to directly participate in the process of resolving their own disputes, encouraging the development of creative, non-traditional, business-oriented solutions to disputes, and promoting commerce by providing a safe venue for the private resolution of disputes. In exploring all the possible solutions to a dispute, it is possible to also promote the development of new commercial relationships outside traditional and conservative courtrooms.

With the help of experienced professional mediators and lawyers, I am now ready to start the process of building a mediation bridge by training key people in the Italian business community (trade, insurance, banking, accounting, etc.). For the past year, I have worked with Baker & McKenzie in San Diego, during which time I also earned my LL.M. (Master's degree in law) at California Western School of Law (international law and dispute resolution). I enrolled in and completed formal mediation training programs and private mediation internship with the Mediation Office of Gregg F. Relyea, Esq., both of which exposed me to numerous methods for resolving a broad range of disputes, including civil and commercial disputes, insurance claims, litigated disputes, property disputes, and employment cases. In addition, I have had the opportunity to practice as a mediator in a wide variety of disputes, including family disputes, juvenile justice disputes, civil and commercial cases. As a result of all these activities, I have concluded that mediation is the future of problem solving, not only in the domestic arena, but also in the commercial and international arenas.

Being raised in Libya, Angola, Nigeria and Italy during my father's career, I had the opportunity to become familiar with the skills needed to respect and to observe numerous cultural differences while watching my father work. I clearly remember my father negotiating and managing interpersonal, corporate, and political conflicts during these difficult times. I understood the importance of analyzing the psychological dimensions of a dispute and to understand the parties' emotional issues, because they are often a driving force in a negotiation. Observing my father's work was invaluable to my own personal growth, while helping me to recognize effective methods for solving problems.

Businesses Need Mediation

We are in a time of litigation crisis, in many countries, including Italy and the United States. The high cost and time delays associated with the traditional judicial system make litigation an impractical, costly, and time-consuming method of resolving disputes. All segments of society, and particularly the commercial sector, are demanding a new approach to resolve disputes more efficiently and affordably. I have no doubt that the answer is mediation.

Alternative dispute resolution (ADR) refers to a wide spectrum of dispute resolution processes other than trial. Two frequently used ADR processes in the United States are mediation and arbitration – plus a number of more specialized procedures, such as early evaluation, med-arb, mini/trial, summary jury trial, and judicial settlement conference. Parties

use these ADR processes because they are generally prompt, affordable, and in most cases, private. In addition, mediation allows the parties to express frustrations, feelings, and important personal and business interests that are not admissible or relevant in a court of law.

Mediation is a peaceful instrument that enables parties to find a solution to seemingly irresolvable conflicts. Mediation is a structured, voluntary and non-binding process for resolving disputes and serves as a complementary alternative to the court. Mediation is a dynamic conflict dispute resolution process featuring different stages in which a neutral third party (the mediator) assists the parties in resolving their dispute(s) and working out a realistic solution in a private, controlled setting that is comfortable for all parties. The mediation process often succeeds because it offers parties the opportunity to directly express and fully convey their needs/concerns and to create their own solutions to a dispute. The mediator does not render a decision and is considered neutral and impartial. S/he assists the parties in identifying their true interests and needs in order to develop different options to find an agreement that is satisfactory to everyone. The mediator does not render a decision, but may become actively involved in analyzing the dispute, evaluating claims, and helping the parties generate solutions that promote their interests.

Mediation helps to identify and separate the parties' positions from the true underlying problems. Mediation almost always results in substantial cost benefits, the time it takes to reach agreement is significantly reduced, and usually the parties themselves succeed in their efforts to find a solution. Thus, mediation generally saves parties both money and time and it produces results.

Confidentiality is also an important feature of the mediation process. Maintaining confidentiality in mediation creates an environment where business parties can discuss sensitive issues privately. At the same time, mediation enhances mutual understanding and strengthens the commercial relationship between the parties.

Exploration

To determine the interest level in ADR/mediation and to identify the ways the Italian legal community and business people perceive mediation, it was necessary to conduct a survey of potential consumers of this mediation "bridge." On June 10, 2003, I left San Diego to meet with dispute resolution professionals and business people in New York where I had arranged at least two meetings each day of my visit. I proceeded to meet with numerous leaders and practitioners in the dispute resolution community who were impressed with the idea of a

“bridge” and gave generous advice and constructive suggestions to help my project in every aspect.

I met with the representatives of the Center for Public Resources, a well-known non-profit organization and world leaders in conflict resolution. They are very interested in collaborating to introduce the concept of mediation in Italy, as well as in Europe, and to know more about the current status of mediation in Italy. I also met with a former high-level negotiator from the United Nations, academics, lawyers and ADR practitioners.

After a very challenging, but satisfying round of meetings, I knew I had to tear myself away from the enormous energy and inspiration of New York City. The excitement and energy seemed to seep from its pores. Continuing on to Milan, I met with attorneys and executives from various Italian companies to introduce the concept of mediation and to conduct simple research on the current status of mediation in Italy. I took the wisdom and experiences of all these people as the best thing that could happen to me.

Building the Bridge

The idea of the “bridge” came to me during my last two years of studying, observing, and practicing mediation, not to mention actually working with professional mediators.

The expanding global community and the development of the technology has brought the world closer together. Geographical boundaries that exist in the world today are not as important as before. One possibility is that American companies overseas will use mediation to resolve disputes with Italian partners. Italian companies based in the U.S., likewise, may use mediation because they will come to know the concept on a broad scale and to understand the benefits of mediation.

Building the “bridge” will involve many challenges. First, it will be necessary for Italian businessmen and lawyers to understand the concept of mediation. It will also be necessary to challenge traditional notions about effective dispute resolution, including arbitration and traditional litigation. Cultural issues may also be a central part of the transition.

- Addressing the cultural differences. I strongly believe, being an Italian lawyer with experience in U.S. mediation, that the Italian legal and business communities eventually will be open to this new method of dispute resolution. Of course, one can only lay a brick in the foundation of the bridge on brick at a time. Acceptance of the principles of mediation has to be gradual; it will take time for the Italian

business and legal communities to recognize the benefits of mediation. After this trip, however, I can promise that several prominent “Italian industrialists” and “general counsel of large companies” are ready to start this process by learning more about mediation and working to introduce their own ADR policies and agreements.

- Educating people about mediation skills and techniques is a necessary step for developing the mediation bridge. It will be crucial to provide formal mediation training for those people who will become mediators. There are specialized skills and techniques a mediator must use to consistently and effectively resolve disputes. In addition, it will be necessary to provide seminars and programs in a wide variety of business conferences and settings to introduce business people to the concept of mediation and its benefits for business.

One major challenge in the education process will be to face the skepticism of Italian lawyers. After talking with numerous lawyers, I found they often feared that offering to settle a dispute through mediation or otherwise, would be mistaken as a sign of weakness. They feared that offers could be used by the opposing party as a starting point for the next round of negotiations. On the contrary, mediation provides a safe environment for negotiation because the mediator can control and manage the parties’ communications, generate momentum toward agreement, and protect against exploitation of the process by one party. The larger firms will be the first to open up to the potential of mediation, even when the general legal community is still hesitant.

Another challenge I had to face during this trip was the cultural and technical lack of knowledge of the ADR field as a whole. I found myself explaining ADR methods and explaining the benefits of mediation to the Italian legal community and the Italian industrial corporations. After a few minutes of my presentation, everyone wanted to know more, asking questions and making suggestions about ways to work together to develop knowledge of ADR and mediation.

As an Italian lawyer now practicing mediation in the U.S., I can see that mediation will benefit not only the clients and their companies, but the lawyers as well. Lawyers are going to improve their advocacy by enhancing their communication and negotiation skills. Law firms will be able to renew their commitment to providing clients with the best service by being

prepared to advise their clients a full range of alternative dispute resolution processes. The sophistication of counsel has grown during the last two decades of involvement in mediation and ADR. I believe, for numerous reasons, but mostly from my personal experience, that lawyers will be at the forefront of this trend.

The “mediation bridge” will provide lawyers in Italy and the U.S. who are unfamiliar with ADR techniques a chance for settlements without unnecessary time or the expense of protracted litigation. It will provide clients with the opportunity to develop individually tailored solutions to their disputes, which leads to a higher level of satisfaction. Satisfied clients return to the same lawyers and refer more clients to them. On the other hand, I have to be honest and admit that there will always be some cases that may need to have judicial decisions from a third party, including those rare cases in which a party is attempting to establish legal precedent or where a party wants a dispute to be resolved in a public forum. Despite the existence of this small group of disputes that may not lend itself to mediation, there will be an ever-growing number of disputes, both pre-litigation and litigated, that will benefit from mediation. Conflict is a natural outgrowth of human interaction. As my long-time mentor has always reminded me, “Conflict is a growth industry.”

- Legislative support -Another “brick” that will be vital to the creation of a solid foundation for this “bridge” has actually already been started on the legislative side. Over the past few years, mediation has become an important issue across Europe and it has been the subject of legislation.

In Italy, the earliest use of mediation started only a few years ago in domestic disputes and there is a growing awareness of the benefits of ADR/mediation in terms of time, money, confidentiality, and creative solutions to disputes. The process of establishing mediation will take time, considering the judicial history and background of the civil law countries. In civil law countries, it is necessary to follow the statutes because all rights derive directly from the legislature, not from the case law. From this perspective, it will probably develop that ADR is regulated directly through legislation.

Today, in various member states of the European Union (E.U.) the codes of civil procedure allow judges to attempt conciliation. Conciliation is a process that explicitly encourages judges to intervene actively in the search for an agreement between the parties.

For a long time, Italian legislators observed the position of other countries around the world and how the E.U. was reacting to the ADR phenomenon. In 2002, the European Union published the Green Paper on alternative dispute resolution in civil and commercial law. The Commission handling the Green Paper has expressed interest in developing commercial mediation within the member States. The commission solicited information from member states of the E.U. regarding the current status of mediation and other ADR procedures in England, France, Netherlands, Italy and Belgium and contains recommendations for future development. After the Green Paper, the courts and the judicial ministers will initiate pilot projects, which encourage the use of ADR on an increasing basis.

In Italy, ADR has been the subject of judicial and political interest for years. It appears that the Italian legislative system is now ready to draft laws promoting the use of ADR and regulating it. The traditional legal culture and the lack of laws that regulate ADR are the principal obstacles slowing down growth of ADR in Italy.

In the Italian judicial system, it is still more common to talk about “conciliation” than mediation, especially for labor and consumer disputes. Italian judges have a duty to encourage conciliation in every dispute. On May 3, 2002, the Italian Chamber of Deputies issued bill n.2463 “Norme per la promozione della conciliazione stragiudiziale professionale” (Rule for professional extra-judicial conciliation). The new decree, with the force of law, “Definizione dei procedimenti in materia di diritto societario e di intermediazione finanziaria, nonché in materia bancaria e creditizia, in attuazione dell’articolo 12 della legge 3 ottobre 2001, n. 366” (Definition of the procedures in corporative law, financial, bank and collection law following article 12 of the law 03/10/01 n.366), is going to create a broad opportunity to use mediation in commercial disputes.

Who will build the Bridge?

After discussing mediation with business leaders in both the U.S. and Italy, it is now possible to define the actions and the future steps to transform the idea of the “bridge” into reality. The bridge will require a network of people to develop. I learned from this research/business trip that the Italian legal, business, and academic communities are ready to move toward mediation and ADR processes because all the elements to begin this project are already in place.

My recommendation is to allow time for the business and legal communities to familiarize themselves with ADR. They will be the first to use and receive all the benefits. The business community, the Italian legislature, public and private organizations are starting to use ADR more often in ordinary life now that the Italian parliament has drafted a comprehensive ADR law in harmony with the European Union. It is crucial that information be available about mediation through presentations to business groups/associations/law firms, seminars for consumer groups, and formal mediation training programs for future mediators. The “bridge” can be a primary resource of mediation information. In time, the benefits of mediation for business, lawyers, and consumers will become evident.

A Journey of Exploration When I started this trip, I believed it was important to research not only lawyers’ perceptions of mediation, but also to concentrate on the business people who will reap the benefits of mediation process. I learned a great deal about the perspective of Italian business people about negotiation, mediation, and the need for access to dispute resolution that is prompt, affordable, and private. I returned from this trip a completely different person – so full of knowledge and information about a wide a range of different views of mediation.

I believe that international businessmen are starting to realize the importance of maintaining their existing commercial relationships, instead of fighting protracted legal battles over numerous years, they value the opportunity to secure creative and better solutions for their clients. I believed, and will always believe, that mediation is the future of problem-solving in Europe, as it is already beginning to mirror American development. It has served the business community well in America. Based upon that evidence, I believe that it is only a matter of time until Europe will follow in America’s footsteps and fully appreciate the effectiveness of mediation.

One of my first meetings in Italy was with an important businessman who is the representative of the Italian Company (ENI), and I had to face the first big issue: the cultural impact and lack of knowledge about mediation. During our meeting, I simply explained my vision and provided some basic definition. Even though I was talking with an international businessman, I had to start from the beginning and explain what mediation was and the benefits. I knew that, even though I had 25 meetings waiting for me, each one was crucial. After my first meeting, the Italian businessman looked me in the eye and said, “Lets see if I understand this, it’s

a private, fast, and economical process! It is a good idea. I want to know more.” I think anyone would have agreed that his response was exactly what I was looking for. His insight was obvious. He had clearly grasped the prime benefits of mediation in just a short meeting. He was not a lawyer or mediator, but he easily understood the advantages mediation could deliver to his company. Looking back, every one of the 25 business people I met with on this business trip had the same positive attitude toward mediation. Every one of them requested more information about mediation.

In New York, I had the chance to meet not only with mediation practitioners and business people, but also with representatives of the international organizations such as the United Nations, the International Peace Academy and the International Crisis Group. I found out that the mediation concept is the same whether you practice it as a diplomat or as a member of an international organization or as an independent private mediator. Mediators are like soldiers of peace, all working to reach a peaceful, positive and durable solution.

After an eight-hour flight from New York, I was in Milan for 20 more meetings to research the status of mediation in Italy and to find out which steps were necessary to build the foundation of the “bridge” brick by brick.

I found out that business people were seriously interested in ADR policies, mediation clauses, and in knowing more about mediation and how it could help each company individually.

In Italy, I met with the general counsel of Italian companies, Italian businessmen, lawyers, and the owner of a nation-wide accounting firm. All of them were openly anxious to hear about ADR and mediation in order to introduce mediation clauses into their own agreements. They all would like to know more about mediation, especially for cost and time savings and to create “win-win” solutions not available in court. They are willing to cross this “bridge” and learn about mediation in the U.S. and see with their own eyes how powerful the mediation process really is. It does not necessarily mean they will become mediators, but it does mean they will use these proven skills to provide better service to their clients as lawyers and become better businessmen.

The mediation culture is expanding rapidly all over the world, in part due to one principal characteristic –mediation provides individuals and organizations with an opportunity to promote their business interests and to focus on the future in a totally safe, confidential environment. Mediation may be slow to start in Italy, but the fact remains that it has already started. I found

mediation to be the gateway to crossing the bridge. I know that mediation is the key to improving the future legal environment in Italy. The needs of all countries, multinational companies, and ordinary people have changed over the last decade and mediation is one example of their changing needs. Business people understand it is better to reach practical and private agreements rather than to fight for years and to spend huge amounts of money over court battles.

In Italy, it is very common to say: “There is an ocean between saying something and doing something.” In my opinion, it is only a matter of time before mediation is not only talked about, but also practiced in Italy. It is a question of taking careful steps to encourage and cultivate understanding of the mediation process. In some areas, this transition has already begun, while in other areas, the process of introducing mediation must be initiated.

I am in the process of building a team that believes in the “bridge”, and I look forward to expanding this team with members from Italy and the United States as the project develops.

I would like to express my gratitude to each and every one of you who have assisted me.

The author would like to acknowledge the important contribution to this article by Gregg F. Relyea, Esq., a private mediator, mediation trainer, and professor of mediation at California Western School of Law, San Diego California.