CHAPTER FIFTEEN

MEDIATION – AN EMERGING ADR MECHANISM IN LATIN AMERICA

Horacio Falcão and Francisco J. Sánchez **

I. Introduction

Mediation as an alternative dispute resolution (ADR) method has become increasingly accepted as a peaceful means to solve international conflicts. Its adoption worldwide has increased in both private and public forums, and has been implemented by numerous countries with great speed and flexibility.[1]

Latin American countries began to discuss mediation as a viable option or alternative to litigation in the past decade. Initially confronted with great scepticism and resistance to change,[2] international experience and pilot project initiatives

---

* Horacio Falcão is a mediation and negotiation consultant with CMI International Group. He is a mediator trained through the Harvard Mediation Program. Mr. Falcão is a lawyer in Brazil and graduated from the Pontifícia Universidade Católica do Rio de Janeiro. He is co-founder of the Harvard Latin American Law Society and received his Master in Law (LL.M.) from Harvard Law School, where he concentrated in dispute resolution methods.

Francisco Sanchez is a Senior Advisor to CMI International Group. In 1999, he became a Special Assistant to the President of the United States in the Office of the Special Envoy for the Americas, and was later appointed as the U.S. Assistant Secretary of Transportation. Prior to his work in the federal government and at CMI, he practiced corporate and administrative law with the law firm of Steel, Hector & Davis LLP in Miami, Florida. Mr. Sanchez received his undergraduate and law degrees from Florida State University and holds a master's degree in Public Administration from the Kennedy School of Government at Harvard University.

The authors would like to recognise the collaboration of APENAC – Dr. Eduardo Moane (Peru), Cámara de Comercio de Bogota – Dra. Monica Janer & Dra. Adriana Polanía (Colombia), Dra. Elena I. Highton (Argentina), Geoff Groesbeck (U.S.), MEDIARE, Dra. Adriana Achuí and Dr. Tito Amaral de Andrade (Brazil).

[1] See Mark Visnic, Discurso Inaugural, 1st Inter-American Meeting On Alternative Dispute Resolution, Final Report 13 (Nov. 1993).

[2] See William E. Davis, *Informe Para El Banco Interamericano De Desarollo – Resolución Alternativa De Conflictos En América Latina*, 14, 42 (1997).

N. Blackaby, D. Lindsey, A. Spinillo (eds.), *International Arbitration in Latin America*, 415-438

prompted the institution of mediation in the 1990s. Along with changing cultural norms,[3] many other elements played a role in building trust around this ADR method in Latin America. In this chapter, we address the current status of mediation in several Latin American countries: Argentina, Brazil, Colombia, Mexico and Peru.[4]

II. Mediation In Latin America

A. What Is Understood By Mediation?

Every institution or organisation that deals with mediation in Latin America has its own definition of mediation. Most countries have largely similar definitions and value many of the same principles, as many were influenced by international organisations or mediation practices of other countries. Some countries use different words to describe mediation, or even define it in slightly different ways. The reasons for these differences include the historical evolution of the concept, international influence on how it is understood, the role of legal institutions shaping mediation under each country's own cultural constructions and needs, and the political initiatives which guarantee the adaptability of mediation within the internal power structure.

Definition – Despite these differences, the core concept for mediation in most Latin American countries derives from the U.S., where mediation is a third-party assisted negotiation. In most Latin American countries, mediation can be roughly defined as the process in which a third neutral party assists two or more parties in establishing a non-adversarial communication, with the goal of reaching a mutu-

[3] See *id.* at 3; Jorge Luis Maiorano, Discurso Inaugural, 1st Inter-American Meeting On Alternative Dispute Resolution – Final Report 13 (Nov. 1993).

[4] These countries were chosen by population size as the five most populous Latin American countries. See Inter-American Development Bank, *Latin America After a Decade of Reforms* 219, (1997). The criteria for selection proved difficult and was decided based on population, not on any issue related to mediation. This selection criterion provides a varied sample population, as these countries are in different stages of mediation development. This sample also illustrates how mediation impacts the largest aggregate number of people in Latin America, as well as in countries with some of the largest gross domestic products in Latin America. See Inter-American Development Bank, *supra.*

ally-acceptable solution for resolving conflicts of interest through a voluntary, flexible and informal process.[5]

Neutral Third Party – This "neutral third party" is known as the mediator or conciliator. In Latin America, there are many different requirements to become a mediator. In countries where there are mediation or conciliation laws, such as Argentina, Colombia and Peru, there may be a requirement for mediators to belong to a specific professional group[6] (most are lawyers or judges) and attend between twenty and sixty hours of training; in other cases, the position is less regulated, perhaps requiring only some form of community training. Some countries that have no mediation law, such as Brazil[7] and Mexico, ignore the issue from a legal point of view, neither recognising the mediator as an official professional, nor laying down any requirements to become one.

Different from a judge or an arbitrator,[8] a mediator cannot make decisions for the parties, as complete neutrality is an extremely important requirement.[9] Neutrality is required to avoid the appearance or chance that the mediator will manipulate the process to favour one of the parties because the mediator is responsible for the overall process.[10]

Non-Adversarial – This non-adversarial approach does not exclude the possibility of conflict, nor does it require that parties be on friendly terms. A non-adversarial approach starts from the standpoint that the parties do not have agreement on

---

[5] See Rebecca Iverson, R.A.D. y Comunidad, 1st Inter-American Meeting On Alternative Dispute Resolution – Final Report 49 (Nov. 1993); Néstor Humberto Martínez, R.A.D. y Sistema Judicial, 1st Inter-American Meeting On Alternative Dispute Resolution – Final Report 37 (Nov. 1993).

[6] See Maria Luzabel Perez Villarreal & Juan Carlos Varon Palomino, *Tecnicas De Conciliacion* § (TAL), Ministerio da Justicia y del Derecho (Colom.) (1st ed. 1996) 18.

[7] It should be noted that a draft law on mediation was presented to the Brazilian Congress in Spring of 2002.

[8] See Ana María Salazar, *Introducción a la conciliación: ventajas y técnicas*, 80 *Revista da Cámara de Comercio de Bogota* 18 (1991).

[9] See Adriana M. Polanía, *Aspectos prácticos de una conciliación*, 80 *Revista da Cámara de Comercio de Bogota* 11 (1991).

[10] See *id.*

certain issues. Then, instead of assuming that the parties will try to take as much as possible from each other, mediation seeks to change the focus of the dispute from the parties to the problem. This change of focus makes the parties concentrate on solving the issue jointly, as a common problem, eliminating the unproductive tension found in an adversarial game. The adoption of a non-adversarial mentality demonstrates a trend in Latin America toward extra-judicial conflict resolutions.[11]

Mutually Accepted Outcome – A mutually accepted outcome complements the idea of a neutral third party. If this party is not going to decide for the other parties, then the parties must decide for themselves. If the disputing parties are responsible for the outcome, it does not make sense to try to get them to agree to an outcome on which they cannot agree.[12] It is true that many times agreements cannot reach optimal results for all parties. Yet, most of the time, a decision in which the parties have some input will satisfy their interests better than one imposed by a third party. A mutually accepted outcome seems to be a natural consequence of the process and its goal. Insofar as a mutually accepted outcome has not been reached, the parties should either search for an agreement that better satisfies their interests or stop the mediation.

Voluntary – The process should be voluntary.[13] This differentiates mediation from litigation, as the outcomes in litigation are the product of a mandatory process. Mediation puts people at ease and in control of the process and makes them more responsible for the outcome. If any party believes the mediator is not neutral, the aggrieved party can terminate the process at any time. Once disputants realise they can halt the mediation, and that they can still appeal to litigation or other binding dispute resolution means such as arbitration, they can — and usually do — put more effort into making mediation work. If the parties believe that there is no room for negotiation, however, forcing mediation may only cause them to have an unproductive experience and discourage them from trying it when it may prove useful.

[11] See Salazar, *supra* note 7, at 19.

[12] See *id.* at 18.

[13] See *id.*

Informal – The process is informal[14] because it does not have a legislatively prescribed procedure or one imposed by the government or its judicial authorities. While some Latin American governments have passed legislation on mediation and may suggest parameters, they do not impose a specific process on the parties. This informality allows mediation to be fast and cost effective.[15] Without the formalities that are so often unnecessary in resolving many disputes, the process will not be as slow and expensive as litigation, and will probably be more efficient.[16] Informality also allows for fewer written documents and more conversations, the latter making the parties interact, rescuing the "human side" of any dispute.

Flexibility – Mediation's voluntary and informal[17] nature make it extremely flexible.[18] The parties "own" the dispute, and should not have someone impose a process on them. On the other hand, the disputing parties may trust a third party to help them get to an agreement, based on his or her neutrality and expertise. Still, the parties and the mediator together are responsible for designing a process that best suits their needs and accommodates the parameters of the dispute. Yet, flexibility does not mean chaos or the complete absence of procedure; rather, it means that the procedure can be tailored to the dispute and changed at any time if all parties agree.

The Differences – Many Latin American countries had been adapting third-party assisted negotiation processes for years, with different levels of success, before encountering the modern concept of mediation. The original use of third-party assisted negotiation was intended to reduce the formalism of these countries' court systems.[19] These efforts were not that different from pure negotiation, under the encouragement and presence of judges. These varied experiences begged for unique solutions in each country. When a particular country tried to apply the concept of modern mediation, it drew elements from its past experiences, creating different institutional versions of mediation.

---

[14] See *id.*, at 18-19.

[15] See *id.*; see also Martínez, *supra* note 5, at 37.

[16] See Salazar, *supra* note 7, at 18; Perez Villarreal & Varon Palomino, *supra* note 6, at 15.

[17] See Martínez, *supra* note 5, at 37.

[18] See Salazar, *supra* note 7 at 19; Perez Villarreal & Varon Palomino, *supra* note 7, at 15.

[19] See Salazar, *supra* note 7, at 18.

B. Beyond Mediation

Traditional concepts that need to be distinguished from mediation in most Latin American countries include negotiation ("transación"/"transação"[20]), intermediation contract ("contrato de mediación"/"contrato de mediação"), arbitration ("arbitraje"/"arbitragem") and conciliation ("conciliación"/"conciliação"). These terms exist in most of these countries' legal codes and present some similarities with the modern concept of mediation, but also include significant differences.

Negotiation – The basic distinction between negotiation and mediation is the presence of a neutral third party. In mediation, the neutral third party helps the parties establish a productive communication process, whereas in a routine negotiation the parties take all the initiative with no involvement of a third party.

Intermediation Contract – This term can be confusing. It refers not to a standard mediation but rather to a broker/agency relationship, pursuant to a contract. This "contrato de mediación" is independent of any conflict, and the mediator's tasks are unrelated to those of any ADR-type mediator. For instance, the mediator in a "contrato de mediación" may assist a party to develop a business with someone else by putting the two camps together, or acting as an intermediary in a business. The idea of a third party facilitating the communication remains the same. In addition to the absence of a conflict in a "contrato de mediación", the mediator need not be neutral and the end goals may be different.

Arbitration – Despite the fact that both arbitration and mediation utilise a neutral third party, the role of this party is completely different in each process. In arbitration, the neutral third party decides the case for the parties, and this decision is binding and final; in mediation, the mediator helps the parties to arrive at and craft their own resolution. Unlike the arbitrator, the mediator has no authority to impose a decision on the parties.

Conciliation – Conciliation and mediation are closely related concepts. The word "conciliation" in most English-speaking countries means the same as the term "mediation". But despite some exception in U.S. labour disputes, the word "mediation" is usually preferred over "conciliation" and more broadly used. In

[20] The terms are presented first in their Spanish forms and then in Portuguese.

Latin American countries, however, "mediation" and "conciliation" carry distinct meanings.

Conciliation and mediation in Latin America are usually differentiated by being either court-annexed or not, facilitative or evaluative,[21] and conducted by a judge or by a third party. For most Latin American countries, the use of the term "conciliation" is predominant for different reasons. Brazil and Mexico have dated regulations on court-annexed processes. Colombia was the first Latin American country to enact a "Conciliation Law"[22] and many attribute the spread of "conciliation" as the official term in other Latin American countries, such as Bolivia and Peru, to this Colombian law. Argentina is the exception, with a new law adopting the term "mediation".

In Argentina, conciliation is the method where a judge is the facilitator and can propose solutions, as a part of the litigation process. Mediation, including the mandatory court-annexed mediation before initiating litigation,[23] can be conducted by any professional mediator in the private sector.

In Brazil, Conciliation Labour Courts have had judges conciliating disputes since at least 1932[24] and the term "conciliation" has been used since 1973[25] to refer to a judge's effort to get parties to agree before initiating litigation. In the 1990s, conciliation has become a mandatory preliminary step, separate from the litigation. "Mediation" has been used to describe unsuccessful collective bargaining or private initiatives, and the services provided by most private organisations offering neutral third party facilitation.

In Mexico, conciliation is a court-annexed process and mediation a non-court-annexed one, usually carried out by private organisations. The word "conciliation" in Mexico has been used since before 1937, as indicated by the Conciliation and Arbitration Court. In Mexico, the Spanish version of the North American Free Trade Agreement (NAFTA) adopted the expression "mediation".

Colombia and Peru use "conciliation" as the official term, as stated in each country's law. It refers to court-annexed facilitative processes, though the term has also been largely applied to private procedures as well. "Mediation" is rarely used, and is generally construed to mean "conciliation".

---

[21] See Leonard L. Riskin, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed", 1 *Harv. Neg. L. Rev.* 23 (1996).

[22] See Davis, *supra* note 2, at 34 (1997).

[23] This mandatory system began with the new Argentine Mediation Law of 1995.

[24] See Decree No. 22,132, 25 November 1932 (Bra.) and Decree No. 21,396, 12 May 1932 (Bra.).

[25] See Law No. 5869 of 11 January 1973 (Bra.)

C. Mediation and Arbitration: competition or synergy?

Mediation and arbitration work together. Part of the same ADR movement, mediation and arbitration are commonly presented as the main methods of ADR.[26] Many centres throughout Latin America offer arbitration and mediation/conciliation services, sometimes as complementary services. Arbitration and mediation are reemerging as alternatives to litigation in most Latin American countries[27] and the efforts to promote one method are helping to promote the other, as they condition the public for a new approach to extra-judicial conflict resolution.[28]

In Brazil, Colombia, Mexico and Peru, arbitration is now reemerging in countries where it has over a century of troubled history. At first seen as a threat to the state's monopoly on justice and to the judiciary's power, arbitration has been revisited in the past decade and tailored to work more effectively through the introduction of modern techniques. With the resurgence of arbitration, several countries began once again to discuss ADR and to search for ways to expand its advantages beyond arbitration. The natural next step was mediation. The government and private sector have been funding a proliferation of mediation projects. Interestingly, a different scenario occurred in Argentina. The order in which the institutions of arbitration and mediation were renewed was reversed: the mediation movement preceded the arbitration movement, probably because of the intervention of very active pro-mediation groups.

Brazil enacted a law on arbitration in 1996, and soon afterward many mediation centres were established. Several mediation courses and seminars are now held in different cities; even university classes are offered on the topic. Colombia passed an arbitration law in 1989, and a conciliation law in 1991. In Mexico, arbitration centres have existed since before 1990, and most of them append the term "mediation" to their names, or at least practice mediation in addition to arbitration. Peru embraced the ADR movement in 1997 by enacting both an arbitration law in January and a conciliation law later that year.

---

[26] See Salazar, *supra* note 7 at 18; Martínez, *supra* note 5, at 37.

[27] See Visnic, *supra* note 1, at 13.

[28] See José María Cier, Discurso Inaugural, 1st Inter-American Meeting On Alternative Dispute Resolution – Final Report 12 (Nov. 1993).

III. The Emergence of Mediation

Mediation was already practiced in Latin America before the beginning of the twentieth century.[29] Many early mediation initiatives are well documented, but mediation was abandoned to make room for the emergent formalism of the state and obtuse legal procedures that dominated the twentieth century.

In the context of globalisation, mediation is finding renewed life in Latin America and is regaining importance through local interpretations of the U.S. model and modern mediation techniques.

A. Why Is Mediation Emerging?

Social and economic factors have played an important role in the increase of mediation in Latin American countries. Economic reasons are those that consider the efficiency and effectiveness of mediation in relation to business goals. Social reasons include mediation's added value to society-wide concepts like justice and democracy.

1. Economic Reasons

a) Economic Growth

After a decade of poor economic performance in the 1980s, Latin America has experienced numerous economic and structural reforms as well as a generally more solid growth pattern through much of the 1990s (although the new decade has started on a less promising note). The figures were not as impressive as those seen in the 1970s, but important economic lessons have been learned and old mistakes were being avoided on the way to more sustainable development. Together with an increasing democratisation of their institutions, most Latin American countries entered an era of economic openness in the 1990s and have increasingly benefited from foreign investment and entrepreneurship.[30]

The initiatives of international organisations are helping to spread the concept of ADR, in particular arbitration and mediation. Organisations such as the World

[29] See Davis, *supra* note 2, at 54.

[30] See Inter-American Development Bank, *supra* note 4, at 31-33.

Bank and the Inter-American Development Bank are placing increased value on judicial reform initiatives to provide the necessary dispute resolution framework to allow for economic growth.

Most of these internationally funded projects consider ADR not only an accessory in judicial system reform, but also as a vital stand-alone benefit that provides distinct value in economic terms. Mediation is being introduced by these organisations as a means of peaceful and efficient dispute resolution for businesses that value long lasting commercial relationships, so necessary for the long-term growth of any economy.

b) Globalisation

Most Latin American economies have to compete fiercely with other developing markets, such as Southeast Asia and Eastern Europe. This international market pressure to constantly expand and keep open their economies, in order to remain competitive to foreign investment, influenced several Latin American countries to ally themselves. Trade blocs, such as NAFTA, Mercosur, the Andean Group and more than 100 bilateral trade and investment protection agreements were created or revitalised.[31] Several of these agreements adopted ADR as a means to avoid national courts.

At the same time, local businesses experiencing international business practices started to see themselves and their countries under a different light. As a result, they began to identify one of the national and structural obstacles for growth: the judiciary. Most Latin American judiciaries are simply not responsive to their economies' fast-growing needs and evolving business culture. Conflicts continue to emerge in both the international and the national economic arenas, and they are not being efficiently addressed by the legal systems. Thus, Latin American corporations are demanding and searching for better dispute resolution mechanisms so that they can grow and compete in a globalised market.

c) Reduced Legal Risk

Deep liberalisation measures and effective economic strategies have helped bring Latin American countries back into the international markets. Until the recent Argentine crisis, most Latin American economies enjoyed higher international credibility and consequently attracted more overseas money, despite the risks

[31] See Inter-American Development Bank, *supra* note 4, at 43-44.

traditionally associated with investing in emerging markets.[32] Most of Latin America, unfortunately, is renowned for its slow, bureaucratic, inefficient and corrupt judicial systems.[33] Thus, if a dispute arises involving an international investment, the prospect of profit immediately diminishes due to legal costs and unpredictable and uncontrollable results.

Although international organisations have not funded judicial reform projects in all Latin American countries, they were one of the important actors in pushing and transferring technology for the implementation of ADR in this region. Pilot projects and other initiatives have influenced neighbouring countries to give mediation a try, due to competitive pressures. No country wants to fall behind and allow others to become more attractive to foreign investment because of reduced legal risk.

2. Social Reasons

a) Increased Access to Justice

The transition to democracy and the free market has led to a rapid increase in the volume of commercial conflicts. The outdated judicial systems of these countries has not been able to support the increase in the number of claims.[34]

Clearly, the judiciaries' obsolescence becomes an obstacle to access to justice, since their inability to decide cases timely prevents true justice from being delivered. Even victors may have to wait years before receiving the fruits of their claims. They are often left unsatisfied. Many cannot even afford to litigate due to the lack of structure to pursue a case for years. Economic actors are therefore denied access to justice because of the imperfections of the various judicial systems.

As a consequence, many are reluctant to go to the state courts.[35] The judiciary is perceived as inefficient, corrupt,[36] slow and costly. In other words, it is not only a matter of expanding the judiciary, but of implementing innovative structural reforms. Some countries like Argentina, Peru and Colombia found part of the answer in mediation as a way to increase access to justice.

---

[32] See *id.* at 77.

[33] See Davis, *supra* note 2, at 1.

[34] See Salazar, *supra* note 7, at 17.

[35] See Martínez, *supra* note 5, at 34.

[36] See Davis, *supra* note 2, at 1.

b) Reduced Workload for the Judiciary

The judiciaries of most Latin American countries suffer from case overload. As a result a single case may take over a decade to be decided. Even at the supreme court level, judges have to decide over 2000-4000 cases a year. There is also a problem of decaying quality of judicial decisions as no judge has enough time to devote to any particular case. It becomes a matter of the number of cases they decide and not how they are decided. Indeed many judges may be evaluated based on their productivity and not on the quality of their output. In light of the increasing volume of cases and decreasing quality of the decisions, Latin American courts must find a way to reduce each judge's workload.

Mediation appears one of the best options to reduce the huge volume of claims. With fewer cases, judges will be able to focus on the quality of their decisions. The volume of decisions per judge may decrease, but the parties will be able to bring more cases and obtain more resolutions because of the increase in dispute resolution service offerings.

B. Who Is Driving This Approach?

1. International Organisations

International organisations may promote general regional development or focus on specific countries. The Inter-American Development Bank (IADB), for example, encourages the development of mediation in a country through loans for justice reform projects. Large sums have been invested, such as the US$450 million allocated to a justice reform program in Argentina by the IADB.[37] Other initiatives involve funding international conferences on judicial reform methods, such as those organised by the National Centre for State Courts in 1993[38] and 1995. These fora were particularly important in disseminating mediation ideas in Latin America.

A current trend is to fund not only projects carried out by governments, but also private-sector initiatives aligned with the goals of these international organisations. Through the selection of local partners, international organisations seek to

[37] See IADB web page, available at http://www.iadb.org/EXR/doc97/apr/ar871e.htm, visited 29 May 2001.

[38] See Cier, *supra* note 27, at 5.

increase the impact of their development initiatives and expand the possibilities of promoting their points of view. Consequently, national mediation promoters can obtain funds to support initiatives that may not be congruent with government plans for mediation.

Private sector international organisations are also working to promote mediation in Latin America. As an example, the authors of this chapter are associated with the Commercial Mediation Centre created by CMI International Group. The work of the Centre is to provide a similar service to that offered by some of the most prominent international arbitration courts in the world, such as the ICC, the LCIA, and the AAA. This Mediation Centre focuses on delivering international mediation to international transactions in Latin America or with Latin Americans. Several similar mediation initiatives are bound to follow.

2. International Treaties

Mediation provisions in international treaties are a positive influence, showing that mediation is a serious dispute resolution option. In the cases of Argentina and Brazil with Mercosur and Mexico with NAFTA, ADR organisations began to flourish, even when mediation was not regulated.[39] Multi-country organisations collaborated with national organisations and shared their support for mediation, sometimes breaking new ground in a given country.[40]

3. Bar Associations

Interestingly, some local bar associations take a sceptical or lukewarm approach to mediation. Although they join forces with other national organisations to advance mediation, it appears that their effort is directed principally to keeping mediation as a service to be performed solely by lawyers.

4. National Organisations

In most Latin American countries, non-profit organisations and chambers of commerce are some of mediation's most enthusiastic supporters. As an example, the

[39] For example, the Argentine experience is forcing Brazil to face the issue anew as is the US experience with Mexico.

[40] This is the case with Colegio y Ordenes de Abogados del Mercosur (COADEM) and the Commercial Arbitration and Mediation Centre for the Americas (CAMCA), which support and offer mediation services.

IADB named the Chamber of Commerce of Bogotá, Colombia as the most important dispute resolution centre in Latin America and the CPR Institute—an American non-profit organisation—awarded a prize to Fundación Libra for its contribution to implementing mediation in Argentina. Other equally important organisations in promoting mediation throughout Latin America are Asociación Iberoamericana para la Resolución Alternativa de Disputas (AIRAD) in Argentina; Instituto Peruano de Resolución de Conflictos, Negociación y Mediación (IPRECONM) and Asociación Peruana de Negociación y Arbitraje y Conciliación (APENAC) in Peru; Instituto Nacional de Mediação e Arbitragem (INAMA) and Associação Brasileira de Mediação (ABRAME) in Brazil; Centro Internacional de Arbitraje y Conciliación Ambiental (CIACA) and the National Chamber of Commerce of Mexico City in Mexico.

Like international organisations and often in partnership with them, these national organisations provide many of the same mediation services. They promote and publish, train people, establish centres throughout the country and work together with their legislatures to improve mediation efforts in their countries. As an example, APENAC carried out IADB activities related to the development of conciliation centres in Peru and received funds from USAID to extend its initiatives to marginal sectors and indigenous communities.

Unlike international organisations, these national organisations provide mediation services directly to a client. They operate as local or regional mediation service providers. These are "hands-on" organisations which face the challenges of mediation daily, and which are aware of both their role in the local market and of the rules and regulations that may (or may not) govern their practice. These national mediation organisations are customarily a meeting point for law professors, lawyers, judges and other professionals to debate ideas and join efforts in complicated cases. The national organisations are the epicentres of the mediation movement in Latin America.

C. The Government's Role In The Development Of Mediation

1. The Cultural Resistance

Mediation should be an "easy sell" given some of its advantages over litigation. Still, mediation has not been accepted as easily as expected, despite the inherent fit between Latin American culture and mediation. In general, Latin American businesses share a traditional approach to dispute resolution and are wary of

change.[41] Many will prefer an old unsatisfactory system to a new one for fear of surprises and of not being able to justify their choices internally. Among other reasons for the resistance is the lack of significant data regarding mediation's efficacy (although this situation is changing in the countries where mediation is mandatory). The most convincing data of course, would be a successful personal experience with mediation by a trusted colleague. Further, because of the lack of a law sanctioning mediation, many may fear the lack of enforceability of mediated agreements. Several things could be done to help overcome this resistance towards mediation and one of them is some support from the government to increase mediation's credibility.

2. Four Roles

The government's role in the promotion of mediation has been extremely important, since most Latin American countries do not rely on market forces as much as they do on officially sanctioned initiatives. The government's support for mediation was crucial for its successful implementation in several countries.[42]

There are mainly four levels in which governments may express their support for mediation. First, a government encourages the use of mediation and allows some of its own organisations to use it. Second, it enacts a law on the applicability of mediation, allowing certain cases or pilot projects[43] to be carried on by specific sectors of society. Third, it enacts a mediation law to regulate the activity and the profession. Finally, it enacts a law that makes mediation a mandatory preliminary step for filing a judicial claim.

3. Mediation Laws

Argentina, Colombia and Peru faced this resistance a few years ago and decided actively to encourage the movement toward mediation instead of waiting for the slow pace of social change. The enactment of their mediation laws immediately

---

[41] See Cier, *supra* note 27, at 12.

[42] Before the intervention in Colombia by the Minister of Justice, mediation had no significant support; after its intervention 150 conciliation centres were created. See Davis, *supra* note 2, at 5, 34.

[43] Elena I. Highton & Gladys S. Alvarez, "¿Qué debe reglamentarse para poder implementar razonablemente la ley de mediación?", 9 *Antecedentes Parlamentarios* 359 (1995).

obliged society to respond to the new institution. Mediation rapidly gained great exposure through newspaper editorials, public debates and law courses.[44] The new laws made it easier for judges and lawyers to accept mediation, which was extremely important since the acceptance of mediation by the legal community is crucial to its success.[45]

Some countries now have laws mandating court-annexed mediation for civil or commercial law claims.[46] When the process is mandatory, everyone who files a claim must first attempt mediation, although the voluntary aspect of mediation is respected as the parties retain their right not to agree to a solution. Family and labour disputes are increasingly being recommended as suitable for mediation. Public interest or fundamental rights disputes cannot be mediated. Latin American governments can be unpredictable, however, drawing the line between public- and private-interest spheres, making it hard at times to know in advance which disputes involve the public interest.

After the enactment of the laws, governments were obliged to provide nationwide support for mediation. Such support included training mediators, keeping a list of officially accredited mediators and mediation centres, building and maintaining a database, making people responsible for coordinating efforts and reviewing the process periodically, and many other administrative tasks. In most Latin American countries, this structure could not be created with the necessary speed and reach without the cooperation of government. These mediation structures were put together in collaboration with the nation's leading private ADR organisations (Colombia – Commerce of Chamber of Bogotá; Peru – APENAC; Argentina – Fundación Libra).

---

[44] An interesting procedure is to mandate court-annexed mediation, despite its apparent contradiction with mediation's voluntary nature. Supporters of mandatory court-annexed mediation argue that it is necessary to try to reach a solution, while reserving for the parties the right to agree or not. In this case, parties have to go through the process, even if at the end the mediation process does not reach a mutually agreeable solution. The voluntary element is respected, although at an institutional level there is an obligation to attempt mediation.

[45] "But it is becoming increasingly clear that the success of such [ADR] programs will depend upon assessing and addressing the legal community's attitude toward ADR in each country..." Christine Cervenak *et al.*, "Leaping the Bar: Overcoming Legal Opposition to ADR in the Developing World", *Dispute Resolution Magazine* 6 (Spring 1998).

[46] See Perez Villarreal & Varon Palomino, *supra* note 6, at 19.

4. Mediation Without a Law

The Brazilian and Mexican governments have taken a much more limited role in mediation. They have some limited legislation on conciliation as a pre-trial step in labour and civil courts, where the judge is the conciliator.

Interestingly, the number of people and organisations dedicated to dispute resolution has been growing steadily and rapidly,[47] under the influence of international treaties and an increasing interest among professionals in ADR. Members of all professions are debating and publishing ideas on mediation. University graduate courses, mediation organisations, national umbrella organisations and specialised centres concerning issues as diverse as construction or environment. The progress is not as impressive as in the countries that have mediation laws, but the advancement of mediation in Brazil and Mexico cannot be ignored.

5. Mediation Law: To have it or not?

Argentina, Colombia and Peru seem to have achieved the initial goals of: (a) implementing mediation and (b) getting people to use mediation as quickly as possible to alleviate the number of cases in the courts.[48] Mandatory court-annexed arbitration was one of the measures that contributed to achieving this goal.[49] Statistics indicate that more people are using mediation and that the number of mandatory court-annexed mediation cases reaching agreement is about 75 percent.[50] And yet, in Argentina, private mediation is still not a common practice and there have been complaints about the quality of the mediators. These complaints may be the result of more than 2,000 mediators being quickly trained to comply with the law, without opportunities for more extensive professional development.

Argentina, Colombia and Peru have also amended their mediation systems. For example, Colombia changed its original ADR law in 1998[51] and Argentina enacted

---

[47] Brazil's development of mediation was rated after only Argentina, Colombia and Peru in an analysis that included South and Central American countries (Mexico was not included in the analysis since it is outside of the research's scope). See Davis, *supra* note 2, at 28-29.

[48] These countries were rated as having developed mediation the most in comparison with other Latin American countries. See *id.*

[49] Argentina was the only country among those included in the study that had adopted this measure as of May 1997.

[50] See Davis, *supra* note 2, at 32.

[51] Law 446 of 1998 (Arg.) changed the original ADR Law 23 of 1991 (Arg.).

a labour mediation law. These initiatives demonstrate a serious commitment to mediation. On the other hand, these same initiatives may create more limits and obstacles for the healthy expansion and use of mediation,[52] as a consequence of the slow decision-making commonly associated with governments. Mediation might also suffer if people mistrust governmental initiatives and thus avoid using mediation.[53] Unfortunately, the private sector in these countries must prove its ability to advance mediation as well as the government.

IV. ADR at an International Level in Latin America

There is also an increasing use of ADRs in international treaties and projects in the region.

A. ADR in International Investment and Integration Treaties

Under NAFTA and most BITs in force in the region, prior to the submission of a claim to arbitration, private investors shall first attempt to settle their disputes with the host state through consultation and negotiation. This is consistent with investment protection treaties' general pattern of encouraging preliminary consultation or negotiation before the initiation of any other binding dispute resolution procedure.[54]

The Mercosur integration treaties also provide for direct negotiation as a preliminary step to arbitration in state-to-state dispute resolution procedures. Interestingly, in certain cases, aggrieved private parties are allowed to participate in ADR mechanisms prior to arbitration.[55]

B. ADR in International Projects

ADR is being used in major infrastructure projects worldwide. It is also well-known that there is an urgent need for major infrastructure projects in Latin America.

---

[52] As two of the strongest supporters of mediation in Argentina warned, the excess of legislation could harm the future of mediation. See Highton & Alvarez, *supra* note 44 at 359.

[53] See Cervenak, *supra* note 45 at 6.

[54] For example, Art. 1118 of NAFTA and Art. 10(1) of the Chile-Spain BIT.

[55] Arts. 2, 3 and 25 of the Brasilia Protocol.

This includes roads, seaports, airports, waterways, power production and transmission, telecommunications, sewage, housing and healthcare.

The construction of the tunnel under the English Channel gives us a good example of a successful implementation of ADR as a method of dispute resolution complementary to arbitration. It provided a two-stage procedure. The first stage provided for any dispute to be referred to a "Panel of Experts" consisting of two engineers and a legally qualified chairman who were obliged to render a decision in writing within 90 days. In the meantime, parties had to continue to work on the project and abide by any decision of the Panel of Experts. If either party was dissatisfied with any unanimous decision of the panel, then within 90 days of receiving notice of the panel decision they had to refer the matter to arbitration under the rules of the ICC with a seat in Brussels. The benefit of such two-stage procedures is obvious: it filters claims to ensure that only the most contentious matters end up in full scale arbitration.

ADRs, under these circumstances, are at times considered or called "Intermediate Dispute Resolution" since ADRs are a step between the arising dispute and the final binding dispute resolution process by means of arbitration.

In some projects, contract drafters have contemplated the operation of more than one ADR mechanism prior to binding arbitration. For example, the dispute resolution mechanisms employed by the Hong Kong Government's contracts for the construction of the Hong Kong International Airport consisted of three filters prior to arbitration:

1) Engineer's decision,
2) Mediation, and
3) Adjudication.

Once the dispute has arisen, the parties had to submit the claim to the Engineer who would have to render a decision within 28 days. If the parties were dissatisfied with the Engineer's decision, they had the right to refer the matter to mediation, which was administered by the Hong Kong International Arbitration Centre. An attempt at mediation was a prerequisite to commencing the formal adjudication process. The adjudication process provides for a formal exchange of pleadings and the right to call witnesses and produce expert evidence, subject to a time limit of 42 days for the adjudicator to render his reasoned decision in writing. If either party was unhappy with the decision of the adjudicator, they had the right to commence arbitration proceedings by service of a Notice of Arbitration under an ad hoc arbitration procedure with the Hong Kong International Arbitration Centre acting as the appointing authority.

The dispute resolution mechanisms included by the governments or state agencies involved in the above described project contracts may very well be employed in major projects in Latin America. It is expected that the emerging movement in favour of ADR in the region and the recently-gained ADR capabilities discussed above will facilitate effective dispute resolution in the new infrastructure projects in the region. Interested parties may also turn for guidance to the well known UNCITRAL and ICC Conciliation Rules.

C. Regional Peace Initiatives – Good Offices

ADR is also applicable at the level of public international law. Good offices are a method that relies on a neutral third party to assist in resolving conflicts or negotiations involving governments. The good offices' process commonly resembles that of a conciliation or mediation, and at times it might even be similar to an arbitration. In such cases, the neutral third party is asked to give its recommendation or opinion over one or more issues when the parties cannot reach a total agreement.

One example of good offices is that of the Rio de Janeiro Protocol of 1942 between Ecuador and Peru in which any conflicts in the Protocol's interpretation would be decided with the help of four "guarantor countries", namely Argentina, Brazil, Chile and the US. The signature of the peace treaty between Ecuador and Peru in October 1998 illustrates the importance of the work of the "guarantor countries" in their good offices efforts.

V. Cross-Cultural Mediation

Cultural differences may be exacerbated during conflicts, making communication very difficult.[56] Most international investments or transactions in Latin America involve a great deal of cross-cultural interaction. It is particularly important to understand the very different cultural aspects surrounding relationships and the notion of conflict for most Latin Americans. With this understanding, cross-cultural challenges can be anticipated and an appropriate mediation procedures can be chosen to manage the conflict more effectively.

[56] See Stephen B. Goldberg, *et al., Dispute Resolution – Negotiation, Mediation, and other Processes*, 361 (1992).

A. The Differences

Most developed countries, where foreign investors usually come from, are considered "individualist" or "low context",[57] especially in comparison to developing countries.[58] Normally urbanised and industrialised, their citizens usually have an individualist mentality. The individualist way of thinking results in a stronger sense of responsibility on the part of individuals for their own economic destinies. As a consequence, conflict is assumed to be a natural by-product of an individual's social, political and economic struggle, having a positive connotation as a trigger for development.

The parties are reasonably comfortable with meeting and discussing their problems and a neutral third party is called only as a last resort. During negotiations, parties from individualist cultures probably are more direct about their own interests. A neutral third party called to assist in a "low-context" culture is typically someone completely external and neutral, or even a capable professional. If a neutral third party is hired to help settle the dispute, she will probably have the parties meet in her office and have them negotiate or follow the chosen process with her assistance.

On the other hand Latin American cultures are more commonly categorised as "high context" or "collectivist". In high-context cultures, there are fewer chances to question authority and individuals normally seek support of their superiors for security. Conflict is a negative threat to the collective harmony. The parties themselves are commonly reluctant to meet and discuss their problems face-to-face and they normally take one of two courses of actions. The parties may seek to avoid the conflict or require the intervention of a trusted third party from the outset.

If a third party is invited, he or she will in all likelihood not be a professional mediator but rather someone known and trusted by all parties. The underlying interest of all the parties involved, and mainly of the neutral third party, is to restore the group's lost harmony, by all means necessary including helping the losing party save face. Because of the informality of the intervention of the third party, the negotiations normally take place outside a formal office. The mediator

---

[57] See Walter A. Wright, "Mediation Of Private United States-Mexico Commercial Disputes: Will It Work?", 26 *N.M. L. Rev.* 57 (1996).

[58] Needless to say, all generalisations are dangerous since countries will not only be different from each other, but within each country the differences can be enormous. Having said that, this model is used, in a generalised way, to raise the awareness of cultural differences and their impact on mediation.

has the role of a communication channel between the parties, which may not be talking to one another directly, and as a counselor who advises both parties separately.

B. The Impact

Due to the cultural differences explained above, it is fair to assume that to superimpose "individualist" or "low context" mediation models on a "high context" people would be a risky endeavour or even a complete failure. For people from different cultures, each other's behaviors may seem completely illogical, but after understanding the logic behind each culture, an appropriate mediation method can be chosen or designed to bridge the cultural particularities.[59]

Since most mediations based on an "individualist" model rely heavily on taking responsibility for the conflict and face-to-face meetings, most Latin Americans would not feel comfortable or know how actively to participate in such a process. Consequently, mediation would fail to achieve its objectives, i.e., keep disputes from formal dispute resolution mechanisms, develop a constructive working relationship between the parties, craft better outcomes, and increase the fairness of the solutions and of the process.

Indeed, Latin American parties may reject the perceived awkwardness of "individualist" mediation and prefer to go straight to arbitration. The relationship will most presumably suffer, since direct confrontation may expose them to embarrassment and raise emotional tensions to a higher and unworkable level. An "individualistic" third party may not know how to deal with this conduct.

Thus, Latin Americans may not feel comfortable participating in a "individualist" mediation that does not respect their cultural modes of expression.[60] They may face a knowledge barrier, as individualist methods are not an expression of their cultures, and feel disempowered or unable to participate effectively. Consideration must also be made for the consequences of globalisation, in which the economic elites of Latin America are developing a stronger "individualist" profile, considering they are increasingly seeking opportunities to study abroad, most of the time learning an "individualist" culture. Hence, there may be a reduced need

[59] See the Conflict Mediation Centre (CMC) example of blending two different mediation systems. Wright, *supra* note 55, at 69.

[60] See *id.* at 73.

for adapting mediation when dealing with the higher economic classes of these countries.[61]

VI. Lessons Learned And The Future

Mediation still has plenty of room for improvement in Latin America. It could profit from:

Strategic planning and research – Strategic planning will assist better targeting of efforts such as asking who the consumers of mediation services will be and which marketing strategies should be used. The Colombian example demonstrates that instead of large firms, medium and small companies were the ones suffering the most with litigation and were the best potential consumers of mediation services. Strategic planning also increases the chances of achieving pre-established social and economic goals .

Research – Research, linked to practice, would raise new and realistic questions, point to new directions and find solutions to the problems encountered. Comparative studies can help Latin Americans learn from successful experiences in other countries. CPR convinced a group of companies to agree to include mediation clauses in their contracts. This simple measure prevents any party, in the event of a conflict, from having to overcome the fear of looking weak by being the first to propose mediation.

Instructors – An increase in the number of public or private qualified instructors to teach mediation would be an important step toward creating a critical mass of highly qualified mediators. The instructors may become future scholars in the field of mediation and positively impact the study and development of mediation.

Mandatory court-annexed mediation – Making mediation mandatory would definitely increase awareness. On the other hand, many Latin American countries already have mandatory court-annexed conciliation, which is generally conducted by the judge. The same person acting as judge and conciliator creates problems

[61] See *id.* at 73.

relating to lack of confidentiality and confusion of roles. The suggestion is to take mediation more seriously and separate the mediator from the judge.

Professionalise – Several of the mediation service providers in Latin America undercharge or do not charge at all for their services in order to promote mediation, funded instead by the government or international organisations. But funding will probably not follow demand once mediation catches on, and in the near future the service providers will need to start charging more realistic rates for their services, which already happens in most commercial and international disputes.

VII. Conclusion

Although still in its formative stages, mediation is growing and generating positive results, especially in countries with a longer history of mediation like Argentina and Colombia. Mediation is no longer something to be disregarded, as it was as little as ten years ago, but is now a serious alternative method in most of Latin America.