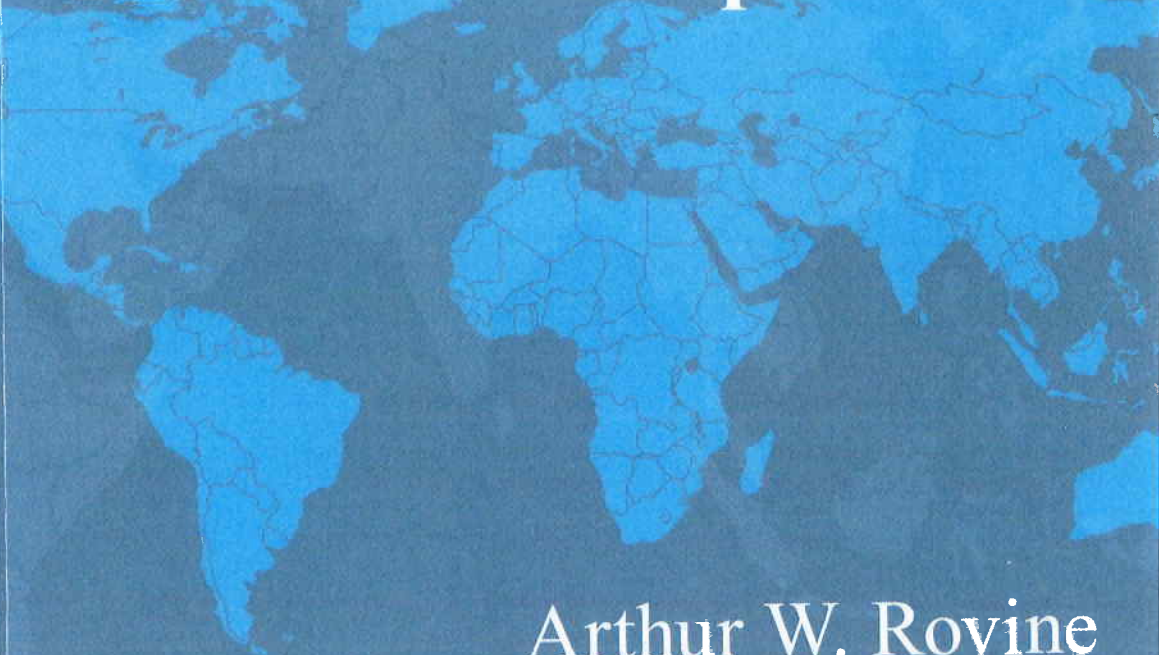


# Contemporary Issues in International Arbitration and Mediation

## The Fordham Papers 2010



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*Editor*



FORDHAM  
LAW SCHOOL

MARTINUS NIJHOFF PUBLISHERS

## Lessons from Russian Mediators

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### INTRODUCTION

In December 2009, I had the good fortune of traveling to Moscow, with Magistrate Judge Robert Levy, as guests of the Department of Justice Office of Prosecutorial Development and Training (OPDAT) and the State Department. We were originally charged with providing a training of Commercial Mediators for the Russian Chamber of Commerce. The training later evolved into an International Conference on Commercial Mediation held on December 3, 2009 at the Chamber of Commerce's ceremonial building, the former Moscow Stock Exchange. The commercial mediation training was restructured as a "Master Class" for roughly 30 mediators, and held the following day.

In advance of our trip, we were asked to comment on a proposed Bill on Mediation that was supported by the Russian Chamber of Commerce and being submitted to the Duma. This author's comments on the Mediation bill were translated into Russian, and reviewed by the Chamber of Commerce proponents—a number of whom were lawyers—in advance of our arrival. The day before the International Commercial Mediation Conference, we met at the Chamber of Commerce to discuss the Bill and our Comments. The seriousness with which the Comments were considered and the Russian response were impressive.

This paper reports on the three elements of this trip: the Conference, the Commercial Mediation Training, and the Bill. We have been informed that, in the wake of these events, the Bill, in amended form, was adopted by the Duma. The Bill has been signed by the President and comes into effect on January 1, 2011.<sup>1</sup>

<sup>1</sup> A copy of the amended Bill (referred to herein as the "Amended Bill") may be found in Russian at <http://www.mediacia.com/files/Documents/zakon%201.pdf>, and in expedited English translation (subject to correction) at [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf). Readers fluent in Russian and English

Enforceability of mediation settlement agreements seemed to be a serious concern that we heard expressed with some frequency during our visit to Moscow. The Bill and the Amended Bill address this concern, making it plain that a settlement agreement is enforceable, and providing that it can be confirmed by a court or arbitral tribunal.<sup>61</sup>

## **PARTING SHOTS**

Enactment of the Mediation Bill contains tremendous promise for the growth and development of mediation in Russia, and for the values of freedom and self-determination that the Bill zealously guards and promotes. It is interesting whether the degree of regulation and governmental power that is behind the Bill will be the paradoxical use of force that lets flower an entirely non-coercive and creative modality, supporting harmony and resolution.

involving mediator shall be considered as mediation clause *provided that the agreement is concluded in writing.*" Amended Bill, Article 7.1 (emphasis added).

<sup>61</sup> Bill, Article 18; Amended Bill, Article 12.3.

a mediation unless authorized by the Court.<sup>53</sup> That provision did not remain in the Amended Bill. The Amended Bill contains fuller and more detailed elaboration of various types of privileged communications, including: willingness to mediate, opinions or offers, declarations (admissions), and readiness to accept an offer to settle.<sup>54</sup> It is also possible that the Amended Bill has curtailed protections of the original Bill against mediators' or organizations' being summonsed or interviewed as witnesses about facts learned in mediation.<sup>55</sup> The Amended Bill appears not to mention subpoenas and witnesses directly and qualifies limits on learning information from mediators by providing: "[i]t is not allowed to request information on mediation procedure from a mediator and from the organization carrying out activity on provision of mediation procedure, save for the cases provided by federal laws and unless the parties have agreed otherwise."<sup>56</sup>

### **WRITINGS REQUIRED: AGREEMENTS TO MEDIATE, PROPOSALS TO MEDIATE, SETTLEMENT AGREEMENTS**

The need for a writing is seen at nearly every key stage: in the creation of agreements to mediate,<sup>57</sup> in proposals to mediate,<sup>58</sup> and to obtain an effective, enforceable settlement agreement arising out of the mediation.<sup>59</sup> Interestingly, Article 5.1 of the original Bill not only stated that an agreement to mediate needed to be in writing, but went further *expressly to invalidate* oral agreements to mediate. Laudably, the Amended Bill appears to have deleted the provision that expressly invalidates oral agreements to mediate.<sup>60</sup>

<sup>53</sup> Bill, Article 14.5.

<sup>54</sup> Amended Bill, Article 5.3.

<sup>55</sup> Bill, Article 14.4.

<sup>56</sup> Amended Bill, Article 5.4.

<sup>57</sup> Bill, Article 5.1; Amended Bill, Articles 7.1, 8.1.

<sup>58</sup> Amended Bill, Article 7.5. The original Bill does not appear explicitly to have required a writing for a proposal to mediate; *see, e.g.*, Bill, Article 7.2, 7.3.

<sup>59</sup> Bill, Article 17.1; Amended Bill, Article 12.1. Both versions require that the Settlement Agreement contain certain information identifying the parties, the subject matter of the dispute, the mediation procedure, the mediator, along with the settlement agreement's obligations, terms and conditions of performance.

<sup>60</sup> Article 7 of the Amended Bill appears to be where one would find any provision expressly invalidating oral agreements to mediate; yet, fortunately, no express invalidation clause remains in the Amended Bill. Of course, it still includes terms stating affirmatively that the mediation agreement is in writing, *e.g.*: "... Any reference in the agreement to the document containing conditions of dispute resolution

party freedom to bind oneself—this is the nature of freedom of contract. Accordingly, pre-mediation agreements to mediate—even for a given period of time or until the mediator declares an impasse—can also be an expression of party self-determination that should be upheld.

With these thoughts on self-determination in mind, we can take a look at the Mediation Bill's efforts to protect voluntariness in the termination of the mediation. Article 16 provides that a mediation may be terminated by: the parties' concluding a settlement agreement, the mediator's declaring an impasse, the parties jointly applying to the mediator to terminate the mediation, any party's written statement refusing to continue in mediation, or the expiration of the date provided by the parties for mediation.<sup>48</sup> Thus, any party at any time can call a halt to the mediation under the Bill and under the Amended Bill, as well.<sup>49</sup> Again, there is an open question what this provision does to mandatory mediation agreements which require the parties to mediate in good faith for a minimum time or those which provide that the parties must mediate until the matter is settled or the mediator declares an impasse.

## CONFIDENTIALITY

The Bill<sup>50</sup> and Amended Bill<sup>51</sup> contain admirably comprehensive provisions protecting the confidentiality of mediation communications and providing for a mediation privilege. It should be noted that, unlike the provisions of the Uniform Mediation Act, there is no express language permitting the mediator to own the privilege. The mediator is bound not to disclose confidential mediation communications *unless the parties agree to the disclosure*.<sup>52</sup> The original Bill had provisions expressly protecting mediators and organizations from being targets of detective operations or investigations concerning

<sup>48</sup> This final provision appears to contemplate a mediation term defined by the writing pursuant to which the parties are participating in mediation.

<sup>49</sup> Amended Bill, Article 14.4. Interestingly, the Amended Bill provides that the mediation is terminated under this provision when the mediator receives the written statement of refusal to continue. This can be helpful in determining the end point of the time for which a mediator can bill. It is conceivable that a mediator can be caucusing with one party while the terminating party's termination notice is "in the mail." Under this provision, the mediator should be paid for that final caucus time.

<sup>50</sup> Bill, Article 14.

<sup>51</sup> Amended Bill, Article 5.

<sup>52</sup> Bill, Article 14.1, 14.2; Amended Bill, Article 5.1, 5.2.

an international treaty<sup>44</sup> providing for alternate rules concerning mediation.<sup>45</sup> Interestingly, the corresponding provision in the Amended Bill, Article 1.2, omits identification of the groups covered.<sup>46</sup> Accordingly, it is possible that the Amended Bill is limited to activities within Russia and might not affect mediation clauses relating to international transactions. It will be interesting to see how broadly Russian courts interpret the scope of this Amended Bill, and whether mandatory mediation clauses in international agreements will be honored and effected independently from this 30 day default provision.

The concerns on the 30 day default provision extend further in considering other provisions of the Bill that protect the typically laudable value of party choice and self-determination.<sup>47</sup> There has been interesting discussion in the U.S. and elsewhere over the last two decades of whether mandating mediation is inconsistent with the principle of party self-determination. In real practice, however, the use of court mandated mediation and of pre-dispute mediation clauses has been widespread. A working distinction seems to have been drawn, however, between requiring the horses to be led to water (by mandate or agreement), but then letting them decide how, whether, and how much they choose to drink. Self-determination within the process has been key. Moreover, the majority would no doubt agree that it is a part of

<sup>44</sup> Article 1.2 provides: "Where an international treaty to which Russia is a party stipulates for rules other than those specified by the Russian Federation legislation on mediated conciliatory procedure, the international treaty provisions shall prevail."

<sup>45</sup> If the Bill had not been amended, given the impact of this 30 day default provision on mandating mediation, there would be an open question whether non-Russian parties who would like to preserve meaningful mediation clauses should seek to develop an international treaty overriding the Bill, or to lobby for a technical amendment to the Bill in this regard.

<sup>46</sup> Article 1.2 provides: "This Federal law regulates the relations connected with application of mediation procedure regarding disputes, arising out of civil matters, including situations connected with realization of enterprise and other economic activities, as well as regarding disputes arising out of labor relations and family relations." [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf). Notably, this provision entirely omits the identification of these "activities" as those "by Russian and foreign corporations, citizens of the Russian Federation, foreign nationals, and stateless persons." (Bill, Article 2.1)

<sup>47</sup> Standard 1 of the Model Standards of Conduct for Mediators, prepared in 1994 and revised in 2005, by the American Arbitration Association, American Bar Association, and then SPIDR (later ACR), *e.g.*, identifies party self-determination as a "fundamental principle of mediation practice." Nevertheless, it recognizes that "a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards." [http://www.abanet.org/dispute/documents/model\\_standards\\_conduct\\_april2007.pdf](http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf)

textually indicated, reading might stretch Article 2.3 to include the scenario of a court's or arbitration tribunal's "proposal" that a matter go to mediation. The broad construction is even less likely since, by its terms, Article 2.3 states that the Bill does not apply. If it did not apply, it would make no sense to provide for Court or arbitration tribunal proposals of mediation, as contemplated by Article 7.1 at all.

Returning to the impact of the original Article 7.2 on pre-dispute mediation clauses, we must observe that this provision could have had an adverse impact on domestic transactions as well as on international transactions over which the Mediation Bill might be deemed to govern. In the U.S. for a good number of years, companies have been inserting mediation clauses into a wide variety of contracts. Since 1984, CPR has promoted the CPR Corporate Pledge, in which at least 4,000 signatories, including most major U.S. corporations, accounting for half the U.S. gross national product, recognize that litigation has its costs and drawbacks, and that there are superior alternatives which should be considered when disputes arise.<sup>43</sup> Companies who have recognized litigation's drawbacks have also found fault with the costs and lack of control associated with arbitration, and routinely insert mandatory mediation provisions as a first step in the dispute resolution spectrum when negotiations break down. One wonders what these companies would do if they know that the Mediation bill's 30 day default provision can gut the mandatory nature of a mediation clause.

To understand the potential impact of the original Bill on relations with foreign parties, we turn to Article 2.1, which provides that the Bill applies to "relations associated with the settlement of disputes arising in civil circulation and in connection with entrepreneurial and other economic activities by Russian and foreign corporations, citizens of the Russian Federation, foreign nationals, and stateless persons." Hence, foreign corporations and foreign nationals engaged in commerce with Russian corporations or citizens come within the scope of the original Bill, unless the Bill is trumped by

<sup>43</sup> Commenting on the pledge, in a piece entitled "Why a Corporate Policy Statement on Alternatives to Litigation?" CPR's former President, James F. Henry, reports: "The CPR Corporate Pledge has been actively supported by the Business Roundtable, the National Association of Manufacturers, the American Corporate Counsel Association and leading industrial organizations. More than 4,000 operating companies have committed to the CPR Corporate Pledge, including most of the largest corporations—a broad cross-section of American business that accounts for about one half of the aggregate of the gross national product." See, <http://www.cpradr.org/Portals/0/corporatepledge.pdf>.

**INITIATING THE MEDIATION, VOLUNTARINESS, AND IMPACT ON DOMESTIC AND FOREIGN TRANSACTIONS**

The Bill appears to contemplate a mediation's initiation by a proposal of a Court or Arbitral tribunal,<sup>39</sup> or, upon a party's request, by proposal of a mediator or an Organization.<sup>40</sup> The proposal may be made before or after a case has been filed with a Court or an Arbitral tribunal.<sup>41</sup> The Bill protects the voluntariness of mediation by providing that unless a written notice of acceptance of a proposal to mediation is received by the proposing party within 30 days, or within such other term that is specified in the proposal, the proposed conciliatory procedure (mediation) shall be deemed rejected.<sup>42</sup>

The 30 day default provision can significantly limit the force of pre-dispute mediation clauses. To some degree, it might also impede the development of mandatory, court-annexed mediation in Russia. Turning first to the court-mandated arbitration issue, we should note that Article 7.1 contemplates judicial or arbitral tribunal proposal of mediation. While we know that a court's "suggestion" is often honored under fear of consequence, nevertheless, if any party is empowered to demur by not accepting the proposal within 30 days, there would be greater limits on the power of courts to mandate mediation than exist in many forums in the United States. There is some question whether Article 2 creates an exception, preserving the possibility of mandatory Court annexed mediation in Russia. Article 2.3 provides: "This Federal Law shall not apply where the parties are *assisted in their dispute settlement* by a judge or an arbitrator in court of justice or arbitration proceedings." (emphasis added) A plain reading of this provision suggests a more narrow construction—that it applies only where a judge or arbitrator is directly involved in settlement conferencing. Under that narrow reading, Article 7.2 would apply to most scenarios where a court might consider referring a matter to mediation; hence, it does create an impediment to the development of mandatory mediation in Russia. A broader, and less

<sup>39</sup> Bill, Article 7.1; Amended Bill, Article 7.2.

<sup>40</sup> Bill, Article 7.3; Amended Bill, Article 7.7.

<sup>41</sup> Bill, Article 7.1; Amended Bill, Article 7.2.

<sup>42</sup> Bill, Article 7.2; Amended Bill, Article 7.5. It is somewhat difficult to understand the translation of provisions in Articles 7 and 8 that might create other means of initiating and compelling conduct of mediation, and whether these mechanisms operate without requiring the use of a written proposal—that is subject to the 30 day default rule—in order to initiate a mediation. If they do, then the 30 day rule may be narrowly construed as a provision dealing with the offer and acceptance phase of the formation of a mediation agreement, only where no agreement is formed. Further clarification of the meaning of these provisions is needed.



While some states, like Maryland, have well developed mediation schemes, others have maintained the "let 1,000 flowers bloom"<sup>36</sup> approach. In a recent study on mediator qualifications, the New York State Bar Association's Dispute Resolution Section concluded that, at least in the New York scene, it was preferable to promote quality in mediation through means other than regulation, by fostering but not compelling: skills training, mentoring, user feedback on mediation experiences, forums, peer discussion groups, reflective feedback opportunities, and developing a mediator registry.<sup>37</sup> While the creation of the SROs under the Amended Bill in Russia promises to lead to the development of initiatives that might enhance mediator quality, the concern is that the field not become overly bureaucratized with "cookie cutter" requirements and a mentality that does not encourage creativity and openness among mediators and in the mediation process.

Another concern on the initial reading of the Bill's provisions on organizations was that the Organizations would essentially be gatekeepers for all mediations. This system could fail to support individual mediators who, in the U.S., can often be selected by parties without going through any organization or panel. The more likely reading of the Mediation Bill, fortunately, is that the list of Organizations is not the only authorized route to mediator selection and appointments. Article 10 seems to contemplate three ways in which a mediator may be selected: (a) directly by the parties (Art. 10.1), (b) on recommendation to the parties by an Organization (Art. 10.2), or (c) by direct appointment by an Organization, pursuant to the rules of conciliatory procedure, with the parties consent (Art. 10.3). Moreover, even if a mediator is not on an Organization's list, the Bill provides that an Organization may also recommend mediators not on its list of approved mediators.<sup>38</sup> By this reading, subject to the exceptions discussed above, the mediation field is fairly open.

<sup>36</sup> This was the express philosophy of Honorable Jonathan Lippman concerning the development of mediation in New York and in its state courts during his tenure as Chief Administrative Judge of the New York State court system.

<sup>37</sup> Report of the Mediation Committee of the New York State Bar Association (unanimously approved by Dispute Resolution Section May 12, 2010), [http://www.nysba.org/AM/Template.cfm?Section=Dispute\\_Resolution\\_Home&CONTENTID=39262&TEMPLATE=/CM/ContentDisplay.cfm](http://www.nysba.org/AM/Template.cfm?Section=Dispute_Resolution_Home&CONTENTID=39262&TEMPLATE=/CM/ContentDisplay.cfm)

<sup>38</sup> Bill, Article 9.2.

**REGISTRY OF ORGANIZATIONS**

The original draft Mediation Bill created a scheme under which the courts and arbitral tribunals act as registries for "organizations arranging for conciliatory procedures" (an "Organization"). Those organizations would approve rules of conciliatory procedure and lists of mediators.<sup>28</sup> The court or tribunal must add any applying Organization to its list within 5 days of application, free of charge. The Organization must renew its application for listing annually.<sup>29</sup>

The Amended Bill, by contrast, does not provide for registration of organizations with Courts and Arbitral tribunals. Instead the Amended Bill calls for "Self Regulated Organizations" (hereinafter "SROs") annually to file with a "state register" that is maintained by the executive branch of the federal government.<sup>30</sup> To qualify as an SRO, an organization must have at least 100 mediators or at least 20 organizations as members.<sup>31</sup> A mediator may not belong to more than one SRO,<sup>32</sup> and one SRO may not be a member of another SRO.<sup>33</sup> The SRO scheme is intended to support the professionalizing of the mediation field, developing standards, rules of conduct, and quality control.<sup>34</sup> The functions of SROs are developed further in Article 19 of the Amended Bill, as providing for membership conditions and discipline, maintaining a roster of neutrals, representing members to the public and government, developing standards of conduct and business ethics, development procedural rules for mediation, and other educational efforts.<sup>35</sup>

The legislative call for SROs contains promise and pitfalls. In the U.S. context, for many years, there has been discussion on whether the mediation field needs to be regulated, and on whether mediators need to be certified.

<sup>28</sup> Mediation Bill, Article 3.

<sup>29</sup> Mediation Bill, Article 6.

<sup>30</sup> Amended Bill, Article 18. [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf).

<sup>31</sup> Amended Bill, Article 18.4.1, [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf).

<sup>32</sup> Amended Bill, Article 18.8, [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf).

<sup>33</sup> Amended Bill, Article 18.7, [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf).

<sup>34</sup> Amended Bill, Article 18.1, [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf).

<sup>35</sup> Amended Bill, Article 19, [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf).

must be at least 25 years old, have vocational training, and pass a state approved mediation training course.<sup>24</sup>

Article 8.3 provides that Mediation is not an “entrepreneurial” activity. Initially, I took this to mean that neither mediators nor the Organizations that offer mediation panels may charge for their services. This would be a major impediment to the development of a mediation profession in Russia. I shared this view in my Comments. I was set straight by Tom Firestone, the Legal Advisor to the U.S. Embassy in Russia, who supported the International Conference and Master Class, and attended our meeting at the Chamber of Commerce concerning the Mediation Bill. “Entrepreneurship” has special legal connotations in Russia, and there is a mass of regulation governing entrepreneurial activity. The purpose of Article 8.3 is to exempt mediation from governmental interference that would occur through the regulatory scheme if it were deemed to be an entrepreneurial activity. Any doubt about the right of mediators or organizations to receive payment for mediation services is eliminated by the Amended Bill, which, while maintaining that mediation is not an “entrepreneurial activity,”<sup>25</sup> expressly provides in Article 10 for payment of mediators and mediation organizations.<sup>26</sup>

The Bill contains typical provisions that the mediator is independent and impartial, requiring disclosures of possible conflicts.<sup>27</sup>

<sup>24</sup> Amended Bill, Article 16.1. [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf).

<sup>25</sup> Amended Bill, Article 15.3, [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf).

<sup>26</sup> Article 10.1 of the Amended Bill contemplates that mediators might perform on either a paid or pro bono basis, but, interestingly, provides that organizations are presumed to be only on a paid basis. [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf). One wonders what the impact of this provision might be on a non-profit organization like The Scientific and Methodological Center for Mediation and Law. Of course, non-profits, like the American Arbitration Association, have historically charged administrative fees. Article 10.2. of the Amended Bill gives further detail on payment, providing that payment for mediator services will be split equally among the parties unless otherwise agreed. *Id.*

<sup>27</sup> Bill, Article 11. These provisions are dispersed in the Amended Bill to Article 3 (requiring impartiality and independence of the mediator), Article 15.6.3) (prohibiting the mediator from proceeding if he has a direct or indirect interest in the outcome of the negotiations or stands in blood relationship to one of the parties), and by implication in the provisions for organizations and SROs, which will develop their own standards of conduct for mediators, Articles 18 and 19. On blood relationship it is interesting to turn this into a bar rather than a waiveable conflict; and it theoretically prevents family members from mediating their own intra-family disputes.

criminal record. Take for example, former Chief Judge Sol Wachtler, who formed the mediation group CADRE after serving time for his unfortunate involvement in the Joy Silverman affair. Many would laud this distinguished jurist and politically astute man as a very able mediator.

In addition, Article 8.2 disqualifies government officials or government employees of the Russian Federation or its subjects from serving as mediators.<sup>20</sup> A similar provision in the United States would seriously restrict the EEOC from conducting its mediation program. While the EEOC has an outside panel of mediators, at least in the New York Region, the bulk of its mediations are currently conducted by in-house mediators employed by the EEOC. The Environmental Protection Agency also uses its own employees to mediate certain environmental matters, and to facilitate Reg-Neg sessions, in which diverse community groups and constituents come together to discuss the need for, or impact of, developing or pending regulations. Similarly, the U.S. federal government has sponsored the use of mediators from one agency to handle matters within another agency.<sup>21</sup> While the Bill seems directed to non-governmental initiatives, it should be noted that Senator George Mitchell is renowned for his work as a mediator of the Northern Ireland conflict. The Amended Bill qualifies this limitation against service by government officials or employees as mediators by adding the proviso: "unless otherwise is provided by federal laws."<sup>22</sup> Hence, in the future, there might be legislation permitting mediation by government officials or employees.

The Amended Bill creates a distinction between "non-professional" and "professional" mediators. Anyone 18 years of age or older, without criminal record, may serve as a non-professional mediator.<sup>23</sup> Professional mediators

<sup>20</sup> This limitation is found in Article 15.5 of the Amended Bill, as well. [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf).

<sup>21</sup> This practice, and related multi-agency shared neutrals program, led to the formation of the Federal InterAgency Dispute Resolution Working Group, the Steering Committee of which, on May 9, 2006, issued a Guide for Federal Employee Mediators, building on the ABA/AAA/SPIDR Model Standards of Conduct for Mediators. See, e.g., [http://www.justice.gov/adr/pdf/final\\_manual.pdf](http://www.justice.gov/adr/pdf/final_manual.pdf). See also *ADR confidentiality guidance* promulgated by the U.S. Attorney General's Federal ADR Council published at 65 Federal Register 83085 (December 29, 2000) and the IADRWG website (<http://www.adr.gov>).

<sup>22</sup> Amended Bill, Article 15.5, [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf).

<sup>23</sup> Amended Bill, Article 15.2. [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf).

and the need for prompt resolution. This might afford greater flexibility and restore the potential for creativity in the mediation process.

In the conduct of mediation, the Bill prohibits the mediator from giving any party an advantage or from derogating the rights and interests of any party.<sup>17</sup> It is interesting to consider at what point a neutral mediator who shares evaluative feedback might be perceived as crossing the line and derogating a party's rights.

## THE MEDIATOR

The Bill's definition of mediator is subject to the same issues relating to transformatives and the understanding based school. Article 3 defined mediator as "an individual assisting the parties in reaching agreement in their dispute." Again, we see the focus on "dispute" and "settlement."<sup>18</sup> Still, the loose term "assisting," without more, is open to facilitative or even evaluative and directive approaches. The Bill contemplates single mediators and co-mediators, as well.

Not everyone may serve as a mediator under this Bill. Article 8.1 qualifies as a mediator "any individual having full legal capacity and no criminal record, who agrees to act as a mediator."<sup>19</sup> This definition excludes underage students who act as peer mediator in school programs. More significantly, it disqualifies from serving as a mediator any former resident of the Gulag, be it a Solzhenitsyn or the equivalent of a Gandhi. It also disqualifies any participants in a prison-based peer mediation program. There is any number of scenarios where the public might benefit from using a mediator with a

<sup>17</sup> Bill, Article 12.3; Amended Bill, Article 11.7.

<sup>18</sup> The mediacia.com translation of the Amended Bill presents the following definition in Article 2.3: "mediator, mediators—an independent physical person, independent physical persons involved by the parties as intermediaries in dispute resolution for the purpose of assistance rendering in development by the parties of the decision on the dispute matter." This might reflect a shift in emphasis from "settlement" to shared decision making. [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf).

<sup>19</sup> Interestingly, in the Amended Bill, the requirement of "no prior conviction" is included in requirements for non-professional mediators, who must also be at least 18 years of age. Article 15. This "no prior conviction" requirement is not expressly stated in the section laying out qualifications for professional mediators. Article 16 requires that professional mediators be at least 25 years old, have additional vocational training, and take a state approved mediation training course; but nowhere expressly excludes persons with any prior criminal conviction. [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf).

Interestingly, in the Amended Bill, “resolution” is used in place of “settlement,”<sup>10</sup> perhaps suggesting a broader reading more consistent with the perspective of Himmelstein and Freidman. Mediation is defined as “a means of dispute[ ] resolution involving a mediator on the basis of willful consent between the parties with a view of achievement of mutually acceptable decision by them.”<sup>11</sup>

The Amended Bill lays out a number of requirements for the mediation process.<sup>12</sup> First, it provides that the process is governed by the parties’ agreement or by rules to which their agreement might refer.<sup>13</sup> These rules, particularly as adopted by an Organization, should address (a) type of dispute subject to mediation, (b) mediator selection procedure, (c) information on standards and rules governing the mediator, (d) details on the procedure itself, including participants’ rights and obligations, any unique characteristics of mediation procedure for this type of subject area, and any other conditions.<sup>14</sup> There is a provision that seems to prohibit mediators from making suggestions or taking “directive” approaches absent party agreement.<sup>15</sup> It also expressly provides that mediation may involve both joint sessions and caucuses.<sup>16</sup>

It will be interesting to watch how these provisions are implemented and if they pose a danger of over-regulation of the mediation procedure. Article 11.4 contains a saving provision that the parties might state in their agreement that the mediator may determine the procedure that seems appropriate, taking into account the circumstances of the dispute, the parties’ wishes,

<sup>10</sup> This non-Russian reader notes this difference while understanding that it might simply be a difference between the Chamber of Commerce translation for the draft Bill and the mediacia.com translation of the Amended Bill.

<sup>11</sup> See, [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf), Article 2.2. (“mediation procedure—means of disputes resolution involving a mediator on the basis of willful consent between the parties with a view of achievement of mutually acceptable decision by them”).

<sup>12</sup> Amended Bill, Article 11. [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf).

<sup>13</sup> Amended Bill, Article 11.1, 11.2. [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf).

<sup>14</sup> Amended Bill, Article 11.3. [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf).

<sup>15</sup> Amended Bill, Article 11.5. [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf). It is possible this provision means something entirely different: that no offer may be made unless authorized by the offering party. But the plural use of “parties” in this provision makes this a less likely interpretation.

<sup>16</sup> Amended Bill, Article 11.6. [http://www.mediacia.com/files/Documents/Law\\_eng1.pdf](http://www.mediacia.com/files/Documents/Law_eng1.pdf).

Applying this principle of the need for inclusiveness in Russian legislative drafting to the Mediation Bill, there arise some questions on whether the Bill is inclusive enough, or whether there are salutary arrangements and variations in mediation processes that are implicitly excluded, and barred, by the Mediation Bill. We can keep this question in mind as we review key provisions of this Bill.

### **Mediation Defined**

The original draft Bill<sup>8</sup> defines mediation (termed “conciliatory procedure”) as a “procedure of dispute settlement between parties with the assistance of a mediator.” While not earth shattering, this definition requires a “dispute”—hence there is a question of whether it can be used in deal making before there is a “dispute”—and is settlement focused, which could depart from the approach of transformative mediators, and possibly even of Himmelstein and Friedman’s “understanding based” model. For transformatives, the mediator’s purpose is neither settlement nor “problem solving.” Rather, the purpose is twofold in fostering empowerment and recognition. Settlement of a dispute might be a natural consequence of the growth in empathy that occurs as parties, with a mediator’s help, see opportunities for choice making (empowerment) and then feel strong enough to permit the growth of empathy (recognition); but it is not a goal for the transformative mediator.<sup>9</sup> For Himmelstein and Friedman, the mediator is certainly seeking to resolve the parties’ conflict, but the focus is on building understanding of where the parties are, of themselves and each other, as well as of the broader context and the nature of their relationship and interaction. Again, resolution is a consequence of this deeper process.

Where mediations might have to fall within the ambit of the Bill to gain credibility, supporting confidentiality and the enforceability of the agreement to mediate and any resulting settlement agreement, it might make a difference whether a process is considered mediation or not.

<sup>8</sup> Mediation Bill, Article 3. A copy of the Bill is annexed in an English translation made by the Center of Arbitration and Mediation at the Russian Chamber of Commerce and shared with us in advance by OPDAT and the State Department to facilitate our comments prior to this trip.

<sup>9</sup> See, Bush, R.A.B. and Folger, J.P., *The Promise of Mediation: The Transformative Approach to Conflict*, (Jossey-Bass 2005) as the classic manifesto of transformative mediation theory.

some issues found in the original draft. The remarks in this article are based upon the original draft, but, where possible, reference is made to the version that passed the Duma, which also altered the order of the Articles within the Bill.

We had been provided with a translation of the proposed Mediation Bill in advance of our trip. Copies of this translation of the Bill and my comments on the Bill are appended to this article. My comments had been translated into Russian and the Chamber of Commerce proponents had taken the opportunity to review the comments and divide them among themselves for response and discussion. Two interpreters assisted in this effort.

An initial observation is that the openness demonstrated by this invitation of comments, preparation, and the meeting itself is noteworthy. There is plainly an opportunity for U.S. mediators to have a meaningful engagement with their Russian counterparts, and both to learn from and to have a constructive influence on the development of mediation in Russia. Conversely, while we had this opportunity, the limitations of language, time and agendas left this writer feeling that we had only scratched the surface in our discussions on the Bill. Nevertheless, it was a helpful start, and, hopefully, just the beginning of a longer and richer dialogue.

The first Russian response to our comments was a lesson in comparative law. We had begun our comments with the observation that mediation has developed and flourished in the United States without the need for any legislation, with the possible exception of the Uniform Mediation Act, which reinforces expectations of confidentiality and creates a mediation privilege. We asked why it was necessary at all to have a mediation statute. Why not, instead simply let a thousand flowers bloom, permitting the natural growth of mediation according to the needs of various sectors with a wide range of independently developed processes? This inquiry was coupled with the observation that the bill is written in language that appears to be a bit overbroad and vague.

The Russian response to this comment was eye opening. We in the U.S. live in a system where everything is permitted unless specifically forbidden. The Russia legal scheme, we were told, is a negative of this image; everything is forbidden unless specifically permitted. It was fascinating to see this general observation of comparative law play out in the specific context of mediation legislation. Under the legal default towards prohibition, all aspects of mediation need to be expressly permitted by enabling legislation. Where the aim is to include rather than to delimit or bar, vagueness, which can be seen as a flaw in U.S. legislation, might be a benefit in Russian legislation. The broader the lines, and, indeed, the vaguer the penumbra, the more this legislation makes possible.



legal culture in Russia, and he has dedicated some resources to developing mediation as a salutary alternative to the legal system.

Given the time limitations, we presented the basic Fisher-Ury Harvard Negotiation School theory found in *Getting to Yes and Getting Past No*, demonstrated a mediator's opening statement and had participants deliver their own opening statement, discussed active listening skills and the mediation process, and had participants engage in a mediation role play with time for feedback.

At one point in the program Olga Ivanchenko leaned over and quietly suggested that we open the program up to a Q and A on what really would interest the group: tips on building a mediation practice. It was amazing to see the interest level rise as we discussed the business of mediation, including what mediators get paid. Clearly, Russian mediators, like their U.S. counterparts, are eager to see mediation develop as a profession.

One step in that direction is the Duma's recent adoption of the Mediation Bill.

### **BRIEF ENCOUNTERS OF THE LEGAL CROSS-CULTURAL KIND, AND AN OVERVIEW OF THE FEDERAL MEDIATION BILL**

In advance of the International Commercial Mediation Conference and the Commercial Mediation Master Class, Judge Levy, Tom Firestone, Olga Ivanchenko and I met in the old Stock Exchange building with members of the Russian Chamber of Commerce, a law professor from MGU, a publisher of an ADR journal, and one or more people from the Duma, to discuss what was then one of three alternative mediation bills that were being promoted to the Duma.

Well after both this meeting and the date of our Fifth Fordham Conference on International ADR, on or about July 14, 2010, the Duma passed a Mediation Bill based upon the draft on which we had commented. The draft Bill was developed by the Center of Arbitration and Mediation at the Russian Chamber of Commerce and was based on the Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law (UNCITRAL). The amendments to this bill were introduced by Tsitsana Shamlkashvili's Scientific and Methodological Center for Mediation and Law and promoted by the Legal Department of the Presidential Administration. The amendments produced more stringent regulation of the mediation process, the formation and terms of mediation agreement, and mediator qualifications. But they also might have eliminated

same decision: \$325. When I asked why they all came to the same result, the answer was that Russia has a Civil Code system, and that it is black letter law that, without express consent there is no obligation to make payment for the additional service. The monolithic uniformity provided a stark contrast to the anecdotal tales with which I had been filled concerning the unreliability and hazards of the Russian judicial system. While the law might be super clear, variable application of the law and the possibility of influence remains a widely expressed and tangible concern. Thus, the point remains that mediation can be a useful alternative to uncertainties and delays with the judicial system.

Overall, it was wonderful to take part in this gathering as one of the few non-Russian voices. One other voice was that of Michele de Meo, and Italian mediator who has been working actively through the Italian Society for the Mediation of Disputes (SIMED) to develop international mediation affiliations and development of mediation in the participating home countries, with particular emphasis on Russia.<sup>6</sup> SIMED entered into a cooperation agreement with the Chamber of Commerce and Industry for the Russian Federation in 2006. The signatories to this agreement formed a group of mediators to handle Italian-Russian disputes,<sup>7</sup> many of whom attended this International Conference on Mediation, and some of whom, on the Russian side were active in forming not only the conference and subsequent Master Class in Commercial Mediation, but also in promoting the Mediation Bill supported by the Chamber of Commerce.

### **MODEST MEDITATIONS ON THE MASTER CLASS ON COMMERCIAL MEDIATION**

The day following the International Conference, Judge Levy and I presented a "Master Class" for roughly 30 Commercial Mediators on the Chamber of Commerce panel. We were cognizant of the limitations imposed by a one day session, compounded by delays attendant to simultaneous interpretation. We were aided by their having translated my PowerPoint presentation in advance, and by the insights of Olga Ivanchenko, assistant to Tom Firestone, the Legal Advisor to the U.S. Embassy who arranged for our participation in these events. Mr. Firestone's overall role included promoting U.S.

<sup>6</sup> See, <http://www.simed-italia.com/eng/descrizione.html>

<sup>7</sup> The list of mediators can be found at: <http://simed-italia.com/eng/files/grupporusso.pdf>

have gotten the trick and played cooperatively, or done variations like simply agreeing to split the m&ms even without moving their hands at all.<sup>5</sup> Interestingly, the program participants showed a range of variations, including cooperation and splits similar to approaches taken in the U.S. today. Thus, under the m&m litmus test, albeit one administered mid-day in a mediation conference, the participants' sensibilities seemed attuned to ADR culture.

The second exercise was also instructive. In the Judge/Friend game, participants are divided into groups of four: a small claims Judge, a service station owner, a car owner and a court clerk. The clerk distributes confidential instructions to each of the participants. They are all instructed to engage in a five minute small claims proceeding in which the service station owner seeks compensation for work done on a car. The car owner complains that he authorized only \$325 worth of work. The service station owner seeks \$525 for the authorized work and for additional work to repair a problem discovered during the course of the original servicing. The service station owner had been unable to reach the car owner for authorization and just proceeded with the work in order expeditiously to get the job done and on the assumption that any rational owner would authorize the work.

The plaintiff and defendant make their case and the Judge is instructed to write down his or her decision but not to show it to anyone else. Next, the participants are told that their roles have changed. Now the Judge is no longer a judge, but rather a trusted friend who has been approached by his or her friends—the car owner and service station owner—to help them solve their problem. The Court Clerk becomes an observer and the parties are given five more minutes to work out their problem.

Polling of the groups and reflective feedback after the exercise typically generates a number of helpful observations to differentiate evaluative and facilitative processes for dispute resolution. After putting a dozen or more resolutions up on a flip chart, one of the observations I have enjoyed making to U.S. audiences over the last decade or so has been that, despite the myth of ideal justice, judicial determinations are not very predictable. Typically there are a number of judicial decisions at \$325 and a number of others at \$525, with a couple of variations as well. To my great surprise, the 150 participants in the Moscow conference—the vast majority of whom were lawyers, judges, legal academics or law students—with just one exception all arrived at the

<sup>5</sup> As owner of the m&ms and master of the game, the instructor has reminded those who simply split the m&ms without moving that they did not meet the condition for obtaining an m&m: having the counterparty's hand hit the table. But one cannot heavily fault a cooperative approach given the didactic intent of the exercise.

experience generated a fair amount of concern on whether agreements arising out of mediation would be enforceable and effective. By extension, concern with enforcement might be one of the reasons for the drive to enact the legislation authorizing and providing for mediation in Russia that is discussed further, below.

During the Conference's afternoon session this author led the participants through two exercises. Responses to these exercises offered windows into the current Russian mediation and legal culture. The first exercise was the "m&ms" game, which owes attribution to Professor Carol Liebman, of Columbia Law School. In this game, participants are instructed to divide themselves into pairs. In front of each pair is a cup containing about 50 m&ms. Each pair is instructed to hold one of their counterpart's hands, with their elbows on the table, in the form that is usually used for arm wrestling. They are told that each time the back of one's hand hits the table, the counterpart gets one m&m. Each time the back of the counterpart's hand hits the table, one gets an m&m. The object of the game is to get as many m&ms as one can. Using a stopwatch, the instructor tells them to begin, and gives them one minute to perform.

This game provides a very effective object lesson in the benefit of cooperation over competition, graphically demonstrating the gains that can be had with a win/win approach. If the participants actually conduct an arm wrestle, the winner will generally gain just a few m&ms at most in the space of a minute, even if the parties are of significantly different strength, weight and size. By contrast, if the parties cooperate, they can agree to use no opposing force, and simply move their hands swiftly back and forth, touching the table at least 50 times in the space of the minute—thus splitting all of the m&ms. The cooperative approach generates greater gains for each than could be gained by one with a competitive approach. The exercise provides an excellent opportunity to reflect on our tendency to interpret situations through a competitive prism.

I have administered this test in commercial mediation and negotiation trainings and in law school classes a good number of times in the U.S. over the last decade. Years ago, most participants engaged in arm wrestling. As the years have gone on, with ADR alive in the ambient culture, more participants

*Case), Are Russian Commercial Courts Becoming More Cooperative (and Predictable) in Aid of Foreign Arbitration and Litigation?* (August 31, 2010), published on <http://kluwarbitrationblog.com/blog/2010/08/31/are-russian-commercial-courts-becoming-more-cooperative-and-predictable-in-aid-of-foreign-arbitration-and-litigation/>, and at <http://kluwer.practicesource.com/blog/2010/are-russian-commercial-courts-becoming-more-cooperative-and-predictable-in-aid-of-foreign-arbitration-and-litigation/>.

that have been developed in different regions, and discussed the benefit of mediation training.

Among the speakers at the conference was Tsisana Shamlikashvili. Ms. Shamlikashvili is President of the Scientific and Methodological Center for Mediation and Law ([www.mediacia.com](http://www.mediacia.com)), and has served as a visiting JAMS Fellow in the U.S. In manner similar to CPR's role in the U.S., this non-profit organization actively promotes the development and use of mediation and alternative dispute resolution in Russia.

While many of the participants' observations and aspirations were remarkably similar to those expressed in connection with the development of mediation in the U.S., certain issues and emphases seemed unique to the Russian scene. Seeing mediation as a helpful alternative to litigation is certainly not unique; yet viewing it as a way around extrajudicial influence on the judicial process is unique to some of the concerns that have been expressed about the conduct of legal proceedings in Russia.<sup>2</sup> Some have, with humor, hypothesized that the judicial system's susceptibility to influence might have contributed, years ago, to the practice of vigilante mediation in the form of the "avtoritet."<sup>3</sup> The *avtoritet* is a mob boss to whom disputing parties come for relief. The *avtoritet* initially attempts to help the parties arrive at a consensual resolution. If they cannot come to their own agreement, then the *avtoritet* makes a recommendation, which, in light of his normal business function and reputation, is generally followed. Commercial mediation discussed in the conference and proposed by the Mediation Bill represents an alternative to the *avtoritet* model, in which voluntariness in all phases of the process is sacrosanct.

In addition, Russian courts have expressed mixed views on arbitration— at times making it difficult to enforce arbitral awards.<sup>4</sup> This mixed arbitration

<sup>2</sup> For a light example of this perception, see *The Sunday Times, Traffic Incident Gives Insight into Russia's Corrupt Legal System*, June 29, 2008, <http://www.timesonline.co.uk/tol/news/world/europe/article4231219.ece>. A slideshow dedicated to the theme of corruption affecting the Russian judiciary, entitled: "*The State of the Russian Arbitrazh Court System: Are We Being Too Unrealistic in our Expectations?*" presented at the Davis Center, Harvard University, by Ethan S. Burger, Esq., American University and Georgetown University Law Center, can be found at: <http://www.slideshare.net/ethansb/corruption-in-the-russian-judiciary-presentation>.

<sup>3</sup> The function of mob boss as mediator is not limited to Russia. See, e.g., A. Shvartz, *Russian Maffia: The Explanatory Power of Rational Choice Theory*, <http://www.yorku.ca/irjs/Archives/R20/R204.pdf>; J.O. Finkenauer, E.J. Waring, *Russian Mafia in America: Immigration, Culture and Crime* (Northeastern University Press 1998), at 77, 94 (and references to *avtoritety* at pages 92, 94, 97, 99, 100, 122, 293).

<sup>4</sup> For a ray of light, yet revealing this concern that Russian courts historically have not been friendly to arbitral awards, see D. Goldberg, E. Levine (both of White &

## **REFLECTIONS ON THE INTERNATIONAL CONFERENCE ON MEDIATION**

The International Conference on Commercial Mediation was attended by approximately 150 participants. The majority appeared to be lawyers, judges, legal academics, or law students who traveled from a wide cross section of the former Soviet Union. At least one speaker was a member of the Duma and advisor to the Russian President, and other speakers included the Chief Judge of the Russian Arbitral Court—essentially the commercial court of Russia—and Deans of more than one Russian law school. In addition there were some business people and a number of mediation professionals (also primarily lawyers) from other countries, including Italy and the United States. As with the U.S. experience, the program seemed to draw both an older crowd, looking to draw upon their life experience and accomplishments, and a younger crowd, inspired by the mediation process alternative. The program ran a full day, and featured approximately twenty speakers.

### **International Commercial ADR Conference**

Both in tone and substance, the conference was reminiscent of meetings in the U.S., from about 15 years ago, of subcommittees of the ABA litigation Section, prior to the formation of the Dispute Resolution Section and then later of the newly formed Dispute Resolution Section, or of CPR gatherings from the time when CPR (now the “International Institute for Conflict Prevention and Resolution”) was an acronym for the Center for Public Resources. Now, as then, there was tremendous enthusiasm for the potential of mediation and a recitation of the benefits of mediation. The cited benefits included saving time and cost, reducing or avoiding disharmony, and preserving business relationships. Avoiding lengthy, disruptive and uncertain court engagements was recognized as a meaningful benefit. Improved communications and enhanced relationships were also attributed to mediation. Speakers at the conference explored the question of how to spread the use of mediation in the courts and by the public, with a particular focus on business organizations. Speakers shared success stories, described ADR programs

are welcome to check this translation and to let the author know (at [SimeonHB@disputeResolve.com](mailto:SimeonHB@disputeResolve.com) or [SimeonHB@mediators.com](mailto:SimeonHB@mediators.com)) if there is any preferred translation. A translation of the draft Bill which this author reviewed and commented on, predating the amendments, is annexed to this article. References herein to the “Bill” or the “Mediation Bill” are to the earlier draft, unless otherwise indicated.