

Kluwer Mediation Blog

Mediation Can Be One of the Most Important Tools to Preserve Companies and Jobs

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Despite the beautiful summer sunshine outside the window, the end of holidays always bring us back to the unavoidable reality of the new year: hard work.

January is time to go through the large number of data and information that is published every year end, picturing not only the previous year (in this case, 2012), but also forecasting future trends.

Yes, I understand that crunching statistical data and trying to make sense of economic forecasts are not very much enjoyed in our profession. And I am no different. However, I recently came across an interesting and intriguing bankruptcy article (<http://www.boavistaservicos.com.br/boa-vista-servicos-pedidos-de-falencia-crescem-em-2012-apos-dois-anos-de-queda/>), from a survey conducted by a Credit Protection Bureau in Brazil.

According to the publication, for the first time since 2005, both the number companies filing for bankruptcy and those being formally liquidated have increased as compared to the previous year.

In a not so distant past, Brazilian bankruptcy regulations simply focused on the protection of the company's creditors. The main priority of the legislators was to make sure creditors were paid. Little, or no attention at all, was given to the role and importance that companies played in the overall community including employees, suppliers and other stakeholders. Preserving the companies was not a priority.

Company owners, after filing for bankruptcy, often offered to pay creditors with huge discounts and over a long period of time. Failure in this too late process normally meant that there was no other option than liquidation.

Brazil implemented a new Bankruptcy Law in 2005 which not only modernized the outdated regulation but also aligned it to the world best practices. All of sudden, courtroom protection and eventual liquidation were no longer the only options available. New, clear and easier procedural measures were brought alight with the intention of restoring the original balance of the system.

In this sense, the new Legislation opened the door to an extra-judicial possibility of solving the company's (and the creditor's) problems, without having to go through a lengthy and expensive judicial process.

The new bankruptcy regulation allows the negotiation process to take place in a much more, extra-

judicial, “amicable” environment; the possibility of achieving a quicker and more satisfactory solution to everyone’s problems became a more plausible reality.

Although sometimes viewed as too strict and generally feared by most, the bankruptcy legislation, especially after its improvement, plays a vital role from a social-economic view point.

Generally, through its correct application, it tries to restore the natural balance of a disrupted system, which could have been caused by bad managerial decisions, asymmetric information (adverse selection) and “incomplete contracts” (economic crises, new technologies, more intense competition etc...).

Company owners, employees, creditors, as well as the lawyers and Judges involved, must now focus on how to solve the problem in the best manner to benefit society and not on courtroom winning merits.

Avoiding bankruptcy legal procedures through negotiated settlements between the parties may bring significant social and economic positive impacts. For this reason, the trend towards resolving bankruptcy cases without court interference is apparently inevitable.

There is no doubt that there has been a worldwide progress towards the implementation of off-court, mediated solutions. Mediation can, after all, be one of the most important tools to preserve companies and jobs, while addressing stakeholders’ interests.

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