

Brazil on the Edge of Making Lawyers Mandatory for Mediation

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Brazil is on its way to making lawyers mandatory on mediation procedures. Last month the House of Representatives approved a bill (PL 5.511/2016) that reads, in a free translation, "it is mandatory the presence of Lawyers in consensual dispute resolution procedures, such as mediation and conciliation". Now the Senate will analyze the subject before it goes for the final approval of the President. Let me give you a small note on Brazilian Legislative procedures. Every bill contains the first draft and the justification for the intended change. Depending on the subject, it goes to some specialized committees. The most important committee is the Committee for Constitution and Justice, which analyzes whether the project is constitutional or not. A rapporteur is nominated and presents a vote. After approval from all committees, with or without changes, the bill goes for the plenary. However, when no representative presents any appeal, it is possible for it to go straight for the other house, without a larger discussion and voting. This is what happened in this case.

One of the most important stakeholders behind the bill is the Brazilian Bar Association (Ordem dos Advogados do Brasil), which sent its regional leaders to Brasilia in order to speak with representatives and present their point of view. The justification for this change is that mandatory presence of lawyers in mediation procedures will enable the constitutional principle of Access to Justice and Due Process. Both the author and the rapporteur of the project of law presented this argument. In addition, they both reference only to the Brazilian Civil Procedural Code, which regulates mediation when it occurs within a trial. Here an important note: mediation professionals still do not have a level of organization and a comprehensive national association, which can make the case in the political scenario in Brasilia. This might explain why there was no larger opposition to this bill in the Lower House.

The intended change will not achieve what it is aiming for. Making lawyers mandatory in mediation procedures will not increase access to justice. The principle of Access to Justice does not mean access to the Court, in a traditional trial. It is a wide concept that embarks many other ways of giving parties what they consider fair and what satisfies their best interest. By making lawyers mandatory in mediation, the Brazilian system will understand that individuals are not able to pursue themselves what they consider important in a negotiation assisted by mediators. Therefore, it actually goes against the principle of Access of Justice, as we understand it.

Another important fact is that the representatives who analyzed the bill did not mention anywhere the Law of Mediation (Law 13140/2015), which is the broadest legislation in Brazil, when it comes to this matter. It is true that the Procedural Civil Code sets some rules for mediation, when it happens in courts. However, the Law of Mediation is the fundamental norm, which sets broad and cohesive rules and principles to mediation in the Brazilian system. Today, the Mediation Law already enables parts to seek assistance from lawyers or public defenders in any type of mediation. However, it is not a mandatory assistance but a possible option for the parties. The sole requirement this law states is that both parties shall have the same type of assistance. If one part appears to mediation with a lawyer, the mediator should stop the process until both parts have lawyers. This is an adequate way of guaranteeing the support of lawyers (who are very important actors for mediation) without disfiguring the institute.

This project represents a misunderstanding on what mediation is and how the Brazilian system should treat it. If the Senate approves this, instead of promoting access to justice, it will build another obstacle for this mechanism of dispute resolution.