

Kluwer Mediation Blog

Latest developments associated with a new draft mediation law in Brazil

Andrea Maia (Mediar360 – Dispute Resolution) · Thursday, September 5th, 2013

According to the National Council of Justice, there are close to 90 million lawsuits currently in course in Brazil. On average, it takes around 10 years for a lawsuit to reach closure after all appeals have been exhausted.

In an effort to face this almost unbearable situation, the Brazilian court system has been fostering several forms of partnerships with entities such as the Brazilian Bar Association, Law Schools, NGOs, among others. These initiatives seek alternatives to expedite the resolution of these backlogged cases. One of the pillars of this new problem solving approach is to stimulate the use of mediation, negotiation, arbitration, and conciliation.

In order to also improve the legal framework of the alternative dispute resolution mechanisms, the Brazilian Senate has created several Commissions aiming at creating a law authorizing mediation – something non-existent in Brazil at the moment – including a specialized Commission for reviewing the Arbitration Law and drafting a specific Extrajudicial Mediation Law, i.e. mediation conducted outside the auspices of the judiciary, whether through ADR centers or ad hoc. The combined results and proposals of these Commissions will be presented at the end of September.

Although not enough, this is, no doubt, a step forward towards a new sustainable model which will not only decrease the number of disputes in the courts, but will also help the parties involved to reach a resolution to their differences in a more cost effective and quicker manner.

The Commission Chair, Dr. Luis Felipe Salomão, a Minister (High Level Judge) of the Superior Court of Justice (Brazil's highest court for non-constitutional cases), in a highly democratic display, has given voice to representative institutions as members of the society to express their views and opinions in relation to the subject (Extrajudicial Mediation Law) in order to help shape the draft law. Among others, representatives of the Brazilian Bar Association, Arbitration Chamber of the Stock Exchange, National Association of Brazilian Banks, Government Agency for Consumer Affairs, [International Mediation Institute](#) (IMI – Brazilian Section) and several Brazilian ADR Centers provided their contributions. These public hearings took place between August 26 and 29, 2013.

Overall, these organizations freely expressed their view points, without the obligation to focus on a specific topic. As far as Extra-Judicial Mediation is concerned, the IMI* made the following comments:

– The new legislation can be a good manner to legitimate extrajudicial mediation, but it must be short, flexible, and not over-regulating,

(p.s.: this aspect is very well addressed at a recent article by Kathleen Bryan and Mara Weinstein from [CPR – The Case Against Misdirected Regulation of ADR](#));

– It must clearly define the meaning and scope of the term “Mediation” and clearly deal with the confidentiality issue, where mediators, their teams, as well as the parties involved, must not, unless otherwise expressly agreed by the parties holding the information, disclose any kind of information in relation to the mediation;

– Regarding any Official (legally recognized) Mediators Roster: required by the government, considering that two of the main principles governing mediation are informality and autonomy, in Extrajudicial Mediations, official roster is not needed, as Mediation must be kept as flexible as possible in order to maintain its intended nature. There is a similar point of view regarding any attempt by the government to impose licensing requirements on extra-judicial mediators where we believe that the profession can best self-regulate via ADR institutions and the market of users.

– Types of Authorized Mediation – there are some proposals for the new Legislation to clearly specify that only “Facilitative Mediation” must be allowed, where mediators cannot personally suggest alternatives to end the disputes. Although facilitative mediation is the cultural norm in Brazil at the moment, the IMI does not actually agree with this, as such a limitation would certainly diminish the mediators’ chances to fulfill their overall goal of bringing the disputes to an amicable end. In this sense, it would be better for the new legislation to avoid addressing issues related to mediation types and techniques.

(For more about differences between the two styles , please refer Leonardo Riskin’s important article [Understanding Mediators’ Orientations, Strategies, And Techniques: A Grid For The Perplexed](#)).

– Prescription period for cases in court should be interrupted during the term of mediation.

Two open questions before the Commission deal with whether an attempt at mediation should be compulsory (at least in court cases), and whether the participation of a lawyer should be required at any particular stage of a mediation with values exceeding a certain amount.

Finally, we are obviously very excited with the latest developments associated with a new draft mediation law in Brazil as it can give legitimacy to this tool and help to spread the idea in the country. However, a law by itself will not be enough as, undoubtedly, there is still a need to spread the mediation culture so that it is recognized as a useful and efficient tool to resolve conflicts. Regulation may be an option, but not the only one, since by itself it may prove to be ineffective and create a new bureaucratic obstacle. Regulation must be followed by educational programs and publicity campaigns, which aim to encourage and inform about the appropriate use of mediation.

I hope that it helps corporate mediation go along with the international tendency of growing steadily, following the numbers shown in the recent research: [Living with ADR](#)

* The IMI is a not-for-profit entity headquartered in The Hague with primary objectives of certifying high quality mediators, and serving as a think tank to share best practices in mediation across borders. It was founded in 2007 and has certified 400 mediators in 45 countries. The IMI –


Brazil was represented at these hearings by Coordinator Paul Eric Mason and Co-Coordinator Andrea Maia.

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