Kluwer Mediation Blog

The Brazilian Mediation Wave – Will It Rise?

Paul Eric Mason (International Counsel, Arbitrator and Mediator) · Friday, October 21st, 2016

With the Rio 2016 Olympics still on some of our minds, mediation in Brazil may seem like a star shining far, far away. However this distance may be closer than we think as Brazil is a country where new approaches and modalities are starting to be used to deal with disputes because, among other things, the Brazilian court system has a backlog of over 100 million cases – this is NOT a typo!

Beyond the recent doping scandals, there are other Olympic and sports disputes about athletes' eligibility as well. Mediation has come to mind as a way to resolve some of these, although arbitration at the CAS (Court of Arbitration for Sport) is quite fast with a usual 24-hour on-site turnaround at sports events, as we have seen from the record number of CAS arbitrations decided in Rio. Even so, some prominent CAS members have suggested mediating sports disputes in the future. However as an avid fan of both sports and mediation, I digress from the main theme here.

Outside its own borders Brazil is well-known for mediation initiatives in diplomacy in places like Haiti, Andean South America and to a lesser extent, even the Middle East. So it is somewhat surprising that until recently, mediation within Brazil itself has not developed. One reason may be the informal, flexible nature of Brazilian society and how business is conducted here. Rather than setting up formal mediation structures with institutional lists of strictly neutral mediators, many Brazilians have dealt with their disputes via traditional "intermediation", using untrained third parties such as friends or relatives who are not neutral or impartial and *do* know at least one if not all of the parties well.

After many years of draft legislation "dying on the beach" as Brazilians say, a new Mediation Law and corresponding changes in the New Brazilian Civil Procedure Code were approved in 2015, taking effect this year. The 2015 Law gives mediation the legal stamp of approval, but still must be refined by implementing regulations which look to be on the way. The main benefit of the 2015 Law is that it gives mediation an express imprimatur of approval by the State, doing away with the old argument that mediation is not authorized by law. The 2015 Law also explicitly permits public sector entities to mediate their disputes, a most important measure in a country where much of the economy is controlled by public entities. The recent and very dramatic change of government in Brazil may have an effect on economic disputes with the public sector here as well, especially if the new government decides to cut public expenditures at the mid-contract stage.

This is not the place to analyze the 2015 Law and New Civil Procedure Code which would take up several blogs by themselves. Suffice it to say that Brazil is a country that prides itself on flexibility,

a quality necessary to survive here. And mediation is above all a flexible process. Therefore, laws regulating mediation need to take into account its inherent flexibility and not straitjacket the process. The 2015 Law makes a strong dichotomy between so-called “Judicial” vs “Extra-judicial” mediation (even though neither term is really defined), tightly regulating the former and leaving the latter very loose. The upcoming regulatory regime for mediation will be challenged to prevent “Judicial Mediation” from becoming over-controlled by the state while at the same time addressing the need to at least minimally regulate “Extra-Judicial Mediation” to prevent the type of abuses that were seen in arbitration in Brazil a few years ago. Nonetheless, as we say in negotiation, 65% of something is a lot better than 100% of nothing!

Although laws on the books in this part of the world do not always correspond to reality, the passage of the 2015 Law does seem to have propelled an energy wave around mediation. Brazilian ADR centers like the Brazil-Canada Chamber of Commerce (CCBC) in São Paulo, CAMARB headquartered in Belo Horizonte, CBMA in Rio and others have enthusiastically added mediation to their service menus. The CPR, ICDR and other foreign institutions have come to Brazil with business mediation conferences and training. Many local mediation training courses, seminars and conferences of all kinds abound.

Mediation is now being taught in some Brazilian law schools. Brazil sent four law school teams out of a worldwide total of 32 to this year’s IBA-VIAC International Mediation Competition in Vienna, and a National Brazilian Law School Negotiation & Mediation Competition is underway in Portuguese with its own distinctly Brazilian case problem, all this helping to bring the next generation of Brazilian lawyers onboard. Though most of the mediation activity is in São Paulo, Brazil’s largest city with the most commerce and overloaded court dockets, bar associations in other important places are also holding mediation conferences like the one this September in Brazil’s third largest city, Belo Horizonte, which attracted some 300 enthusiastic lawyers and judges.

We also see seminars on specialized mediation modalities sprouting up in Brazil these days on Mediation in the Public Sector, Mediation and Compliance, Mediation in Agribusiness, Mediation in Family Business, Mediation in IP/Franchising, and Mediation to Reduce Costs in Insurance, to name a few. A question worth asking here is: what factors in each of these sectors could materially affect how mediation is conducted in disputes involving them? In the public sector it can be bureaucracy, a slower pace and relative inflexibility; in agribusiness, the opposite – a need for speed due to perishability of the products; in IP (patents & trade/service marks at least), the public interest in a given patent or mark outside the particular dispute over which of the parties may have a superior right; and in insurance, the presence of third or even fourth parties as insurers and reinsurers.

So now the question is: Will mediation ride atop a wave in Brazil like arbitration did over the last decade, or crest and fall soon, becoming just a passing fad? To look at an analogy, what caused arbitration to rise so dramatically in Brazil? We can pinpoint the insistence of large investors, many foreign, on arbitration clauses in multi-million dollar contracts to avoid the delay, uncertainty and possible bias of local courts; Brazil’s ratification of the New York Convention and its Supreme Constitutional Court (STF) declaring its 1996 Arbitration Law constitutional in 2002; the Superior Court of Justice (STJ) taking over and streamlining judicial treatment of arbitration cases in 2005; and last but not least, the rise of a sizable and powerful arbitration bar, members of the 1,000+ strong Brazil Arbitration Committee. Arbitration remains a private function.

Some of these propelling factors appear unique to arbitration and would not apply to mediation, while others may have parallels or equivalents in mediation.

One of the keys will be whether lawyers in Brazil accept mediation. This is because unlike the U.S. for example, once a court case goes to a lawyer in Brazil, the client practically loses control over it. So lawyers can make or break mediation in Brazil for disputes in the courts. While the lawyers generally control disputes once they are filed in court in Brazil, it is the clients who have more control over the pre-dispute contractual negotiating process where mediation or combined mediation-arbitration "step clauses" can be inserted.

Conferences like September's Minas Gerais state Bar Association (OAB-MG) Mediation Conference in Belo Horizonte provide encouraging signs. As speakers there, my colleague Gary Birnberg, my wife Nazareth Serpa and I were informed by OAB-MG Mediation Committee Chair Ronan Ramos, Jr. that the situation in this important state is very positive for mediation now, with most of the top court judges in favor.

In Brazil, many lawyers are paid with contingent fees, earning a percentage of what they make or save for the client. Then it is a fair question to ask them: which is better for you, 40% of a court judgment reached after 15 years of appeals run out – but only if your client wins – or say, 25% of a smaller settlement but which does not depend on a total client "win" and is payable within just a few months?

Big firm lawyers which handle most of the international cases are paid on a traditional hourly basis. The main benefit of mediation for them is to keep satisfied corporate clients who may come back to them for a variety of legal matters – not only litigation but also regulatory, compliance and transactions. Mediation of more high-value complex disputes often requires many hours of preparation before the mediation session itself, meaning substantial billable hours for the lawyers and the firm. This has been the practice with large firms in many other countries at least.

So a question to be asked and pondered is: what is needed to impel mediation beyond the "course industry" stage for it to be used regularly to resolve, prevent and/or manage disputes both in court and out-of-court? We have looked briefly at what made arbitration take off and grow in Brazil and asked if there are any lessons to be learned or parallels to consider. We can also ask what has made mediation viable in other countries/cultures which may have relevant similarities, perhaps Portugal or even Argentina (football fan rivalry notwithstanding). Both of these questions are important but beyond the scope of this blog. Hopefully they can be addressed in a more analytical research paper at the right time.

Finally, a soft yellow warning light may be in order since formal mediation is just beginning in Brazil. One must watch out for tendencies to simply copy arbitration concepts or otherwise limit mediation styles as was attempted, for example, in the Brazilian Draft Mediation Law (PL) of 2013 which tried to limit mediation only to disputes over so-called "disposable rights" – freely transferable rights and not restricted public rights, a concept which is a cornerstone of the Brazilian Arbitration Law. However unlike arbitration where laws of many countries limit subject matter arbitrability, almost any type of dispute is capable of being mediated although some involving religious, ideological or other core values are much more difficult. Some ADR institutions tried to copy their own arbitration rules and pricing tables for mediation services and even tried in their mediation rules to limit mediation to a so-called "facilitative model" only. Fortunately these deviations have been corrected so as to no longer diminish mediation's inherent advantage of

flexibility.

By riding a strong positive current, staying flexible and avoiding obstacles along the way we hope the mediation energy wave in Brazil will continue rising, lifting everyone along the way.

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