

BRAZIL'S NEW MEDIATION LAW AND THE IMPACT ON INTERNATIONAL BUSINESS DISPUTES

Paul E. Mason and Alexandre P. Simões***

INTRODUCTION

On June 26, 2015 the President of Brazil sanctioned a new Mediation Law (law no. 13.140/2015) approved by the congress which will take effect in 180 days. This is the first complete law passed on mediation in Brazil, although various unsuccessful attempts have been made by congress since the late 1990s. The main issue hampering prior passage was whether mediation should be obligatory, as it is in neighboring Argentina.

The new Mediation Law (“the Law”) deals with at least three different dispute resolution mechanisms: mediation of court cases (“Judicial Mediation”); mediation of cases outside the courts (“Extra-Judicial Mediation”); and self-resolution of the dispute when one party is a legal entity governed by public law (“Self-Resolution of Disputes”). Most provisions of the Law deal with Judicial Mediation and Self-Resolution of Disputes involving public entities. Since public entities play such a large role in the Brazilian economy and society, the express legal authorization for them to engage in mediation and/or self-resolution of disputes will be important. Depending on how it will be implemented, judicial mediation has the potential to play a role in helping to decongest the Brazilian court system of the almost 100 million cases simmering there now, many involving public entities.

The Law contains different sections dealing with Judicial and Extrajudicial Mediation respectively as well as some sections dealing with both aspects jointly. However, curiously, the Law does not specifically define either Judicial or Extrajudicial Mediation. “Judicial

* **Paul E. Mason** is International Counsel, Arbitrator and Mediator based in Brazil and Miami. As founder and Co-Coordinator of the International Mediation Institute (www.IMImediation.org) in Brazil, Mr. Mason testified before the Senate Commission drafting the Mediation Law. He is a Mediator and Arbitrator with the ICDR as well as other ADR institutions (including Brazilian ADR institutions) and former Legal Director/Latin America for IT multinationals Digital Equipment, Oracle and 3Com. For more information see www.paulemason.info.

** **Alexandre P. Simões** is a Mediator, Professor and Attorney of the Law firm Ragazzo, Simões, Spinelli, Lazzareschi e Montoro Advogados, São Paulo, Brazil.

Mediation” could be when a case has already reached the courts, whether the mediator comes from there or not (public court administered mediation). If the mediator comes from outside the courts, it would be “Extrajudicial Mediation”. Or “Judicial Mediation” could be more narrowly defined as when a case reaches the courts and the mediator comes from there as well. This latter definition is the one most likely used in the Law. And if a case has not been filed with the court, we would have “Extrajudicial Mediation” (privately administered by ADR institutions or even private “*ad hoc*” mediation).

In any event, in terms of the effect of this new Law on business, most of the relevant provisions are the ones dealing with Extrajudicial Mediation because the majority of cases now being mediated—at least the ones with international commercial parties—come through so-called “Med-Arb” contract clauses where mediation is tried first by the parties and if that fails, they go to private arbitration, rather than the courts, to settle their dispute. Or they may arise in another way driven by so-called “Arb-Med-Arb” contract clauses where arbitration is commenced first, and held in abeyance at the request of parties and arbitrators, to allow some time for an attempt at mediation, returning only if an agreement on the dispute is not reached or if the agreement reached does not cover the entire dispute (partial agreement). These Arb-Med-Arb clauses are now being used by ADR centers in Singapore which has become an international dispute resolution hub for cases with Chinese parties, among others. A further advantage of Arb-Med-Arb is that any agreement reached in the intervening mediation may be taken to the arbitration panel for ratification as an arbitral award which in turn gains international recognition and enforceability via the New York Convention. However Arb-Med-Arb is not the norm in Brazil, at least not yet.

We note here that the new Mediation Law may also, in time, have a positive effect on the Brazilian court system which is overloaded with more than 95 million cases. The courts in the state of São Paulo (TJSP) alone, where many multinational companies have their Latin American regional headquarters, are dealing with some 20 million cases using 360 high-level judges (*desembargadores*), 2,000 first-instance judges, and 45,000 judicial clerks and assistants.¹

¹ Information obtained at the I Conferência Nacional de Arbitragem na Administração Pública e Mediação, Brasília, 12 June 2015, sponsored by the Centro Brasil de Mediação e Arbitragem (CEBRAMAR).

The New Mediation Law's Impact on International Business Disputes

Here are the provisions of the new Law most likely to affect international business disputes:

- The public sector/administration in Brazil (at the federal, state and local levels) is explicitly authorized to mediate disputes (Article 1). And much of the Law deals with the capacity of public entities to devise their own dispute resolution mechanisms (*autocomposição*).
- If there is a contractual mediation clause, the parties must appear at the first mediation session (Art. 2, paragraph 1). It is only possible to derogate this requirement if all the parties expressly refuse to mediate.
- Mediation may deal with disputes over not only so-called “disposable rights” (*direitos disponíveis*—normally those which can be freely alienated or transferred, to which arbitration in Brazil is limited), but also non-disposable rights which can be negotiated (*direitos indisponíveis que admitem transação*) such as environmental or family rights (Art. 3). A mediated accord dealing with this latter type of rights must be approved by a judge with the Attorney General’s office being heard as well (Art. 3, para. 2). We mention environmental rights in the context of manufacturing and related activities, and family rights because a number of medium and large sized Brazilian companies doing international business are family-owned.
- The mediator, in a “Judicial Mediation” may not advise or represent any of the parties in the mediation for a period of one year as from the date of last mediation session (Art. 6)
- The mediator may not act as arbitrator in any arbitral proceeding pertinent to the conflict in which (s)he has acted as mediator (Art. 7). This runs contrary to the common practice of “Arb-Med” in China and used by many Chinese companies.²

² For more information on Arb-Med, see an article by P. Mason “The Arbitrator as Mediator, and Mediator as Arbitrator”, *Journal of International Arbitration* (The Hague), December 2011, with Follow-Up Note in *JOIA* 29(2), April 2012.

- Unlike Judicial Mediators who must meet training and registration requirements with the court (Arts. 11 and 12), anyone can serve as an Extrajudicial Mediator who “has capacity, has the confidence of the parties and is capable of conducting mediation”. There is no requirement for an extrajudicial mediator to belong to or register with any organization. Nor does the Law require any mediator training, ethical rules or guidelines, leaving this up to the various ADR chambers and the market (Art. 9) to set training requirements and/or ethical standards to be followed or observed by the mediators.
- A settlement agreement reached through mediation becomes an extra-judicially executable instrument (*título ejecutivo extrajudicial*) and when it is approved by a judge it becomes a judicially executable instrument (*título ejecutivo judicial*) (Art. 20, sole para.).³
- Specifically for Extrajudicial Mediations, if a formal invitation to mediate issued by one party to another is not replied to within 30 days, it is considered rejected (Art. 21, sole para.)
- A contractual mediation provision must contain at a minimum the following elements:
 1. Minimum and maximum time period to hold the first mediation session as from the date of receipt of the invitation to mediate.
 2. The locale (exact place)for the first mediation session
 3. Criteria for choosing the mediator or mediation team (for co-mediations etc.)
 4. Penalty in case of non-appearance by the party invited to the first mediation meeting (Art. 22)
- If there is no such “complete” contractual provision, the Law fills in the blanks by providing the following:
 1. Minimum time period of 10 business days and maximum time period of three months, as from the date of receipt of the invitation to mediate.

³ Approval of a settlement agreement by a judge forming a *título ejecutivo judicial* would be strongly recommended to enforce a settlement agreement against a recalcitrant party.

2. A locale (exact place) adequate for a meeting which may involve confidential information
 3. A list of five names, contact information and professional references of capable mediators. The invited party may choose expressly which of the five mediators it wants and if it does not so choose, the first name on the list will be chosen as the mediator.
 4. An invited party to the first mediation meeting who does not appear will bear 50% of the loser's costs in case they win a subsequent arbitral or judicial proceeding that involves the scope of issues in the mediation to which it was invited. (Art. 22, para. 2).
- In litigations⁴ coming from commercial or corporate contracts which do not contain mediation clauses, the extrajudicial mediator may only charge for his/her services if the parties decide to sign the initial terms of mediation document⁵ and voluntarily remain during the mediation process (Art. 22, para. 3).
 - Confidentiality of information revealed in the mediation, including settlement proposals, is protected in the new Law (Arts. 30 and 31). This information may not be used in judicial or arbitral proceedings. These strictures apply to the parties, their attorneys and supporting staff, and the mediator. This changes prior Brazilian practice where information in settlement discussions could be used by the other party in litigation, unless specifically excluded by a non-disclosure agreement. The only exceptions to the confidentiality provisions deal with report of a criminal act and requirement to inform the tax authorities of relevant information after the terms of mediation are executed. The tax authority employees are likewise bound by this Law to keep such information confidential.

⁴ The Law explicitly uses the words "in litigations" ("*nos litígios*"), leaving open the question of what happens in a subsequent arbitration as opposed to court litigation.

⁵ "Terms of Mediation" refers to a document in which the parties, issues, mediator, ADR institution (if any) and locale are expressly identified. Similar to the Terms of Reference in arbitration used by the ICC and some other institutions, this document is prepared and signed by the parties before the actual mediation begins.

- There is a detailed chapter of the Law (Chapter II) containing many articles covering ways to settle disputes where a public entity is a party.
- One thing the Law does not do is include labor disputes within its ambit of disputes which may be mediated, something commonly done in many other countries. Instead, it avoids the question by stating that “mediation in labor relations shall be regulated by its own law”, meaning that the specialized parallel labor law and court regime will remain unchanged (Art. 42, sole para.). To many, this is an unfortunate omission because the Brazilian labor court system is also overburdened with thousands if not millions of cases.

CONCLUSION

While nothing in today’s world is perfect, there is much to commend in this new Brazilian Mediation Law. First and foremost, it sweeps away the old objection of some to mediation in Brazil as not being legally authorized. It also expressly allows the Brazilian public sector to engage in mediation, something which has international commercial significance because so much of the Brazilian economy is controlled by public or quasi-public bodies. The Law adroitly deals with the long-standing question of whether mediation should be compulsory or not, making it compulsory when the parties have expressly provided for it previously in their contract. And the Law involves the judiciary, making it directly responsible for court-annexed mediations. It expands the scope of questions which can be mediated to include environmental and family issues which are mediated in many other countries, and which may have an effect on international business disputes. But unfortunately, the Law does not expressly allow mediation of labor issues, at least until the current parallel labor law system somehow undergoes change to allow mediation of these disputes.

One other area of concern is that while the Mediation Law sets forth strict qualifications and requirements for Judicial Mediators, it does not do so for Extra-Judicial Mediators, leaving it to the marketplace and local ADR centers. When mediations are administered by legitimate, reliable ADR centers with their own standards for mediator qualification and conduct, codes of ethics, etc.,

this approach can work. However, it may not work very well in some *ad hoc* mediations or those administered by unknown entities.

Of course a law on the books is one thing and how it is implemented in practice is often quite another. As the neighboring Argentines sometimes say with respect to their laws etc.: “*Entre el dicho y el hecho hay mucho trecho.*” (“Between word and fact there is a large gap.”). Although Brazil and Argentina are quite different from each other in many respects, this saying may apply in both countries. Even so, this Law appears to be a good start to resolving international business disputes more quickly and expeditiously with a greater possibility to preserve relationships.

