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Mediation for commercial disputes: a relief for costly and time-consuming litigation

A costly and time-consuming litigation system is not a privilege of Brazil. On the contrary, many countries have faced the same problem and adopted sustainable and alternative methods for resolving disputes.

In the United States, the high cost of the conflict and the uncertainty of the outcome led to the emergence of mediation. Indeed, many corporations have embraced the method and provided for its continuing use for a wide spectrum of disputes. This is one of the perceptions provided for the landmark survey of Fortune 1,000 on 2011².

Through Directive 2008/52/EC³, the European Union spread the use of mediation for cross-border disputes in civil and commercial matters, as well as encouraged its use by the European Union Member States for domestic conflicts.

In Brazil, the Alternative Dispute Resolution (ADR) movement has been keenly increasing due to the clear benefits of the problem-solving approach.

The Brazilian Mediation Bill⁴ is pending review by the National Congress and will probably be voted upon in 2015. Furthermore, for the first time ever, representatives of leading industries, commercial companies, financial institutions, and business and law schools committed themselves to explore ADR and mediation methods before resorting to Court. The Mediation Pledge was signed on November 2014 in a ceremony at the São Paulo Industries Federation (FIESP).

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² Stipanowich, Thomas and Lamare, J. Ryan, Living with 'ADR': Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations (2013). 19 Harvard Negotiation Law Review 1; Pepperdine University Legal Studies Research Paper No. 2013/16. Available at SSRN: <http://ssrn.com/abstract=2221471> or <http://dx.doi.org/10.2139/ssrn.2221471>.

³ The European Parliament adopted in 2008 Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF>.

⁴ Bill No. 7169/2014.

In a litigious society with 95,14 millions⁵ of lawsuits overburdening the Brazilian Federal and State Courts, the perspective of being treated as just another case resembling a drop in the ocean is not an option anymore. The chance of solving disputes beyond the public judicial system is an economically rational decision chosen by more and more entrepreneurs nowadays.

Mediation has many more benefits than adjudicated decisions. Its process consists in a voluntary way to solve commercial disputes facilitated by a third-party mediator who will assist the parties to reestablish communication and possibly reach an agreement. A faster and less costly process that enables parties to move on and reach their own solution. Therefore, it definitely seems more suited to the parties' needs.

Economical consideration constitutes a further significant advantage. Mediation is a cost-saving measure. It is significantly less expensive than litigation or arbitration. The costs involved are the mediator's fees and management costs usually shared by the parties in equal terms. The process can be ad hoc or managed by an institution, such as a Mediation Chamber or Centre.

Mediation is faster and flexible. The parties agree on an agenda that often varies from 30 to 90 days, renewable by mutual agreement. The process is designed to be as comfortable as possible for parties or multi-parts. Individual meetings or joint sessions may be held according to the parties' needs.

An experienced mediator is a key point for success. Knowing his or her backgrounds and experience are cautions to be carefully adopted. Specialized lawyers who know the method and have previous experience are highly recommended to ensure the effectiveness of the mediation and to balance expectations. Parties, lawyers and the mediator play different roles during the process.

Mediators do not make judgments, give legal advice or take sides. They are responsible for developing the communication between the parties, helping them to identify their underlying interests and to reach a reasonable result for both sides.

Any evidence or information arisen from the mediation process may be privileged and confidential. The secrecy assures a comfort environment to share views and discuss options without binding the parties.

Another advantage is the control of the outcome. Different from other adversarial methods, no final decision is awarded by a third party. The solution depends only on the parties.

⁵ According to the 10th Report of the National Council of Justice, 2014-2013, Brasília, Brazil, 2014 (*Relatório Justiça em Números 2014: ano-base 2013*). Available at: ftp://ftp.cnj.jus.br/Justica_em_Numeros/relatorio_jn2014.pdf.

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Mediation is not a solution for all commercial disputes. Its use should be weighed up to arrive at an appropriated choice. Any unresolved issue with a gap in communication, unbalanced economic interests or an underlying reason such as a psychological back-ground might be good candidates for mediation.

The reason which is most frequently given for the non-use of the mediation is lack of awareness. A surprising number of lawyers and disputants know very little about mediation. Disseminating the method is the best way to promote and enhance its use.

Its effective use for commercial disputes envisages a change of culture. It takes time and demands planning, to spread the concept and develop a different mind-set based on a problem-solving approach.

Brazil seems to be on the right track. The ADR movement is an important step to evolve towards a collaborative culture.

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Alle Inhalte dieses Newsletters obliegen der Verantwortung der jeweiligen Autoren und wurden von diesen sorgfältig recherchiert.

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