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BUSINESS MEDIATION IN BRAZIL: KEY REGULATORY CHALLENGES

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ABSTRACT

What are the regulatory barriers, pitfalls, and challenges in Brazilian business mediation? In this article, we investigated the Brazilian Mediation Law no.13.140/15, to provide scholars, mediators, and other practitioners with a wide view on the legal issues involving the Brazilian Mediation Law, through an extensive literature review on the regulatory aspects of the Alternative Dispute Resolution, regarding the aforementioned Law. Case analysis and further implications are presented. Finally, conclusion and future research recommendations compile the present study.

KEYWORDS

Business negotiations, mediation, alternative dispute resolution

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Introduction

Mediation, a form of Alternative Dispute Resolution (ADR), has attracted scholars' attention over the past decades (Raiffa, 1982; Fisher, Ury& Patton, 1981; Sebenius, 1992; Ury, 2015; Susskind & Field, 1996; Salacuse, 2008; Duzert &Zerunyan, 2015; Susskind & Cruikshank, 1987; Dias, 2020, 2020b, 2019; Moore, 2003; Zartman, 2008).Alternative Dispute Resolution (ADR) is defined as a "method of resolving disputes without litigation" (Cornell Law School, 2020, p.1). Other forms of ADR include (i) conciliation; (ii) mini-trials; (iii) arbitration, as well as (iv) mediation. However, the two most usual forms of ADR are Mediation and Arbitration (Cornell Law School, 2020). These methods emerged as faster, more efficient and economical mechanisms to meet the interests of those involved in the face of the overload of demand and slowness of the Brazilian judiciary.

Mediation is defined as "the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power, which assists the involved parties to voluntarily reach a mutually acceptable settlement of the issues in dispute." (Moore,
2008, p.15). It is also defined as a "third-party diplomatic intervention that enables conflicting parties to conduct negotiations that they are unable to do alone." (Zartman, 2008, p.305). The mediation process involves a Mediator, defined as "a third party, generally, a person who is not directly involved in the dispute on the substantive issues in question." (Moore, 2008, p.15).

Four-Type Negotiation Matrix in According to Dias (2020), the mediator acts in the Negotiation Types III and IV (see Figure 1), as follows:

Figure 1. The Four-Type Negotiation Matrix
Source: Dias, 2020 (reprinted under permission)

Observe in Figure 1 that Types II and IV involve multiple parties to deal with (i) a single issue (Type III Negotiation), or (ii) multiple issues (Type IV Negotiation). In the present work, the mediation committee, its object, its guiding principles, the relevant legislation, and its applicability in the judicial and extrajudicial sphere will be addressed, in addition to some aspects related to the mediator and the obligation to use the mediation or not.

Regulatory Background: Mediation Law in Brazil

According to the Mediation Law (Law No. 13,140/2015), mediation is a means of resolving disputes between individuals, exercised by an impartial third party, without decision-making power, chosen or accepted by the parties involved, to assist them in the identification of consensual solutions.

The Code of Civil Procedure, in §3 of Article 165 (Brasil, 2015b), states that it is up to the parties involved to identify, with the help of a mediator, the consensual solutions that generate benefit to both. In

addition, Dalla (2019) observes that "mediation is a conflict resolution mechanism in which the parties themselves jointly build a decision-making system, satisfyingall involved and oxygenating social relations." (p.68, our translation).

It is also under Article 3 of Law 13.140/2015 (Brasil, 2015), which provides for mediation between individuals as a means of conflict resolution, that conflict may be mediated, or part of the dele, that deals with available rights or unavailable rights that admit transaction, the latter must be approved in court, the public prosecutor's office heard.

Mediation, in addition to avoiding judicialization, makes the process of solution of the conflict faster, allows the control of the situation by the interested parties, and significantly reduces the costs involved.

Principles of Mediation in Brazil

Mediation, as a method of conflict resolution, is based on some general principles, among which stand out: the principle of autonomy of will, impartiality, isonomy between the parties; orality, informality, consensuality, confidentiality, good faith, informed decision (judicial mediation).

According to the principle of autonomy of the will, it is up to the parties, and only to them, the choice of mediation as a means of resolving their conflicts, as well as choosing the mediator, what will be defined in the process and what will be the procedure adopted. This principle reflects the leading role of the parties in the pursuit of the satisfaction of their interests.

The principle of impartiality is more directed at the mediator. It guides that the mediator must be neutral and impartial, should not privilege or favor any of the parties, should not have a particular interest in the demand, nor interfere in the solution of the issue, under penalty of derailing the mediation process.

According to the principle of isonomy, the parties should be treated equally, having the same opportunities for participation in the orality and informality allow mediation to be a speedy process. Informality frees the parts from plastering formalities, allowing them to take the procedures that best suit the issue, without, however, forgetting the limits laid down in the relevant legislation and the guiding principles. Orality allows sessions to be conducted informally, and only the initial and final terms of the procedure are written (Brasil, 2015).

The search for consensus or consensus states that the parties must seek, through constructive dialogue, the consensus in the solution of their conflicts, although sometimes it is not achieved. The principle of confidentiality advocates that parties should feel protected to expose any type of information in the field of media without the fear of seeing such information being misused (Brasil, 2015).

According to Tartuce (2021), the principle of good faith is of the utmost relevance in mediation: participating with loyalty and a real willingness to talk are essential ways for the consensual pathway to develop efficiently. After all, if one of those involved fails to take mediation seriously, his stance will generate a pitiful waste of time for all. The Code of Civil Procedure informs that mediation is governed by the principle of informed decision (art. 166). Moreover, Tartuce (2021) clarifies that the principle of informed decision requires clarification by mediators about the rights to accept to participate in the consensual route and to continue participating in the sessions. The entire procedure should be voluntary; if someone wants to interrupt or suspend their performance, this is possible.

Mediation Purposes

According to Tartucce (2021), there are some objectives of mediation the restoration of communication, the preservation of the relationship between the parties, the prevention of conflicts, and social inclusion. The re-establishment of the communication concerns the actors of the process (the parties) being able to implement efficient communication, discussing possible lasting solutions to the issue. The Mediation process also enables the preservation of the relationship between the parties to the extent that a third party can favor a dynamic of understanding and mutual respect among the litigants. The mediation should prevent conflicts since the emergence of new disputes due to the original discussion should be avoided.

The social inclusion cited by Tartucce (2021) concerns the participation of other sectors of society in the distribution of justice, to the extent that citizens collaborate with the exercise of jurisdiction.

Extrajudicial Mediation

Law 13.140/2015, known as the legal framework of mediation in Brazil, provides for mediation among individuals as a means of a solution to conflicts. This is out-of-court mediation (Brasil, 2015), as illustrated in Article 1:

> This Law provides for mediation as a means of resolving disputes between individuals and on the self-composition of conflicts within the public administration.
> Single paragraph. Mediation is considered the technical activity performed by an impartial third party without decision-making power, which, chosen or accepted by the parties, helps and encourages them to identify or develop consensual solutions to the controversy. (Brasil, 2015, Art. 1)

In extrajudicial mediation, informality and speed predominate. Thus, the procedure is restricted according to the expectations of conciliation of the parties involved, and minimum organization requirements provided for in the mediation law must be observed. Examples of this are mentioned in Article 21:

> The invitation to initiate the extrajudicial mediation procedure may be made by any means of communication and shall stipulate the proposed scope for the negotiation, the date and place of the first meeting.
> Single paragraph. The invitation made by one party to the other shall be considered rejected if it is not answered and within thirty days of the date of receipt.
> Art. 22. The contractual mediation forecast shall contain at least:
> I - minimum and maximum period for the first mediation meeting, counted from the date of receipt of the invitation;
> II – location of the first mediation meeting;
> III - criteria for choosing the mediator or mediation team;
> IV - a penalty in case of non-attendance of the invited party to the first mediation meeting. (Brasil, 2015, Art. 21, our translation)

As a statement, no formality is required as to the means of communication used for the invitation, which should essentially contain the subject matter of the negotiation, the date, and the place of the meeting. As for non-agreement to be promoted to mediation, it must be demonstrated that the party was aware of the invitation and that it worked the period of 30 days provided for in the sole paragraph of art. 21 of the mediation law (Brasil, 2015).

It is also possible that the invitation to out-of-court mediation has already been agreed in a contract, including the requirements set out in Art. 22 transcribed above. It is also possible to opt for the definition in the contract of a mediation service provider institution, which will conduct the process according to its guidelines.

The invited party shall choose one of the mediators indicated in the invitation. If you remain silent when you choose, you will mediate the first on the list.

The law also provides for a penalty for the invited party in the event of your no-show to the first meeting. According to Art. 22, §2, IV, as follows:

> IV - the non-attendance of the party invited to the mediation meeting shall result in the assumption by this party of fifty percent of the costs and fees succumbed if it becomes a winner in a subsequent arbitration or judicial proceedings, involving the scope of the mediation for which it was appropriated. (Brasil, 2015, Art.22, our translation)

According to Dalla (2019), the penalty is justified because, although the solution of the conflict through mediation should be something voluntary, it is necessary to constrain the invited party to attend the first mediation meeting at least, so that it can become aware of the conflict, the mediator's techniques and the

advantages and disadvantages of the procedure. This possibility encourages the practice of out-of-court mediation.

The legislation found to encourage the use of mediation in disputes arising from commercial/corporate contracts was foretold that, in cases of no mediation clause in these contracts, the costs with the mediator will only occur if the parties decide to sign the initial term of mediation and remain in the procedure.

Concerning the duty of non-judicialization and emergency measures, Article 23 of the Mediation Law states:

> Art. 23. If in the contractual provision of mediation clause, the parties undertake not to initiate an arbitral procedure or judicial proceedings for a certain period or until the implementation of a certain condition, the arbitrator or judge shall suspend the course of arbitration or action for the period previously agreed or until the implementation of that condition.
> Single paragraph. The provisions of caput do not apply to urgent measures in which access to the judiciary is necessary to prevent the perishment of law. (Brasil, 2015, Art. 23, our translation)

On the issue, Dalla adds (2019): we also understand that the party that automatically judicializes the conflict by nominating the mediation clause, without relevant justification, may even be convicted of litigation in bad faith (arts. 80, V, and 81 of the CPC) (Brasil, 2015b).

Tartuce (2021) says that mediation can be composed of the following steps: pre-mediation, opening, research, agenda, creation of options, choice of options, and solution. Steps that meet the aforementioned in the Mediation Manual of the National Council of Justice (CNJ), which provides for pre-mediation, information gathering, identification of issues, clarifications, resolution of issues, and solutions.

Pre-mediation is the time when the parties are informed about the procedure that will be adopted, as well as their respective responsibilities in the process. It is the stage where we seek to build a relationship of cooperation and trust between those involved to build a solution to the issue.

The opening phase is very important for the entire mediation procedure. It is at this moment that the mediator will demonstrate to the parties the various forms of the satisfactory outcome of the process in addition to formal agreements. The principles of confidentiality, autonomy, and isonomy are reinforced. The parties will combine timelines (Tartuce, 2021)[1]

The investigation is the stage in which the parties are opportunistic to expose their views on problematics so that their respective interests and the corresponding clarifications are identified.

The agenda stage consists of the organization of the issues at issue, not only those more obvious issues but also other subliminal issues.

In the creation of solution options, efficient solutions are sought for the delinquent of the issue.

The solution phase consists in choosing the path to be followed by the parties about the demand presented at the beginning of the process. It may be a full, partial agreement, no agreement, or another choice that the parties find most appropriate.

According to Law 13140/2015 (Brasil, 2015), in the event of conclusion, the final term is an extrajudicial enforcement order.

In out-of-court mediation, the mediator may be any capable person who has the confidence of the parties. That is, in out-of-court mediation, the mediator is not required to have any specific training, only the confidence of the parties involved:

> Art. 9 º May act as an out-of-court mediator any person capable of having the trust of the parties and can mediate, regardless of whether to integrate any type of board, class entity, or association or to register in it. (Brasil, 2015, Art. 9, our translation)

By way of information, in the State of Ceará, there are currently four specialized private conciliation and mediation chambers providing conciliation and mediation services

Judicial Mediation

Judicial mediation is governed by the code of civil procedure, Law 13.140/2015, and Resolution 125/2010 of the National Council of Justice. According to the CPC (Brasil, 2015b):

> § 2 - The State shall promote, whenever possible, the consensual settlement of conflicts.
> § 3 - Conciliation, mediation, and other methods of consensual settlement of conflicts shall be estimated by judges, lawyers, public defenders, and members of the Public Prosecutor's Office, including in the course of the judicial proceedings.
>
> Art. 165. the courts will establish judicial centers for consensual conflict resolution, responsible for holding sessions and conciliation and mediation sessions, and for the development of programs to assist, guide, and stimulate self-composition. (Brasil, 2015b, Art. 3, our translation)

In turn, law 13.140/2015 (Mediation Law) issues:

> Art. 24. The courts will create judicial centers for the consensual solution of conflicts, responsible for holding sessions and conciliation and mediation hearings, pre-procedural and procedural, and for the development of programs aimed at assisting, guiding, and stimulating self-composition. (Brasil, 2015b, Art. 24, our translation).

In the judicial mediation, the judge, upon receiving the application, verifying that it meets the essential requirements and is not the case of preliminary dismissal of the request, will designate mediation hearing In judicial mediations is not necessary the participation of the judge (art. 334, CPC, and art. 24 of Law 13140/2015) (Brasil, 2015, 2015b).

Unlike out-of-court mediation, the mediator of judicial mediation must be a capable person, with a degree of at least 2 years of higher education, must have training in a school of mediators (art. 11 of Law 13.140/2015).(Brasil, 2015, 2015b).

Articles 14 to 20 of the Mediation Law have contained the procedures common to out-of-court and judicial mediation. Detain them, the possibility of having a comediator, depending on the complexity of the case, the possibility of suspension of the ongoing arbitration or judicial proceedings, although the possibility of granting urgent measures by the judge or arbitrator remains. The procedure will be23 terminated with the drafting of its final term. If the agreement is reached, it shall be approved by the judge and shall be included in a judicial enforcement order.

Specifically, on judicial mediation, Law 13.140/2015 provides that mediators will be designated by the court and not chosen by the parties, they must necessarily be assisted by lawyers or public defenders and the duration of the mediation procedure is up to sixty days.

The Mediator

The figure of the mediator is provided for in Article 165 of the New Code of Civil Procedure (Brasil, 2015b). According to the legal provision, the mediator will assist stakeholders in understanding the issues and

interests in conflict, so that they can identify consensual solutions that generate mutual benefits. In the same vein, Article 1 of the Mediation Law informs that the mediator will assist and encourage the parties to identify consensual solutions to the controversy. It is important to clarify that it is not up to the mediator to give an opinion or to propose a solution for the treatment, but rather to help those concerned to lead the construction of the most appropriate outcome.

According to Dalla (2021), the mediator should be an active listener and a participatory discourse, should be patient, impartial, and autonomous, should foster an environment of safe and peaceful discussion, must have the confidence and credibility of the parties, and not be prevented to assume the function.

In out-of-court or extrajudicial mediation, the parties are autonomous to define the mediator who will conduct the mediation process. In the judicial sphere, the practice is that judges already refer the case to a mediator registered to the court, not allowing the part can choose it. The Mediation Law (Brasil, 2015) provides for the mediator the same impediment and suspicion hypotheses provided for the judge, and the person designated to act as mediator must reveal any situation that may compromise his impartiality in the process.

The doctrine discusses arguments about mandatory mediation or not. On the subject, Dalla (2021) points out that our legislation has devices that guide compulsory mediation, for instance, Art. 334 of the NCPC (Brasil, 2015b), which places the conciliation and mediation hearing as a preliminary stage of the procedure. There is also Article 2, §2, of Law 13.140/2015 (Brasil, 2015), which states that no one will be obliged to remain in the mediation procedure, suggesting that there needs to be the first session of mediation and then the person involved decide whether or not to continue in the process. And also art. 23 of the same law, which provides for the suspension of arbitration proceedings and judicial proceedings if there is a mediation clause in the contracts.

However, Dalla (2021) argues that the mediation institute is essentially voluntary. The obligation to carry out mediation can contaminate the outcome of the process. “The principle of autonomy of the will is the first basis of mediation, encompassing the freedom to decide whether and when it will be established, according to the interests and agreement of wills of those involved.” (p.74, our translation)

Discussion

The present article investigated the Mediation Law in Brazil, regarding regulatory aspects. The case has implications in several fields of research, not limited to (i) Business Negotiations (Dias, M.,2020b, 2020, 2019c; Dias, M., & Navarro, R., 2018). (ii) Contract negotiation (Dias, M.; 2012); (iii) civil constructions (Dias, M., 2018, 2016; Dias, M., & Lopes, R., 2019); (iv) retail business (Dias, M. et al., 2015); (v) industry negotiations (Dias, M., & Davila Jr., E., 2018); (vi) e-business negotiations (Dias, M., & Duzert, Y., 2017); (vii) credit recovery negotiations (Dias, M., Ribeiro, A., & Lopes, R., 2019); (viii) higher education litigations (Araújo, C. R; Dias, M.,2021), among others.

Mediation is also an alternative means of conflict resolution very important in the current scenario of demand overload and reduced operational reach of the judiciary. It is an instrument that allows the leading role of stakeholders in the construction of solutions to their problems, increasing the predictability of the result. It allows the reduction of time and procedural cost, generating benefits for the mediated. It is transparent, reliable, and confidential, and should be increasingly promoted both in the extrajudicial and judicial spheres.

Study Limitations

The work is limited to Mediation as one of the forms of ADR. Other forms, such as (i) arbitration, or (ii) mini-trials, for instance, are not the scope of the present research. The article is also limited to the Brazilian Mediation Law 13.140/15 (Brasil, 2015). Other countries and regulations may also differ in results. Finally, the negotiations are limited to Types III and IV negotiations (Dias, 2020). The negotiations Types I and II may present distinct performances (Dias, 2020).

Future Research

Future research is encouraged to address the outcomes of the mediation on the negotiations Types III and IV (Dias, 2020) Other types of Negotiation are encouraged to be addressed in the future. Other forms of ADR, such as arbitrations and minitrials performances, should also be investigated. Finally, the study should investigate the mediation law in other countries, which case should be compared to the Brazilian Mediation Law shortly.

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