Mediations in Brazil: Overview

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This Practice Note provides an overview of the key legal issues that need to be considered, from a Brazilian-law perspective, when mediating a civil dispute.

Mediation is a flexible, voluntary, and confidential form of alternative dispute resolution (ADR). In a mediation a neutral third party assists parties to work towards a negotiated settlement of their dispute, with the parties retaining control of the decision on whether or not to settle and on what terms. Given its nature, the way mediations are conducted across jurisdictions will vary, depending on different factors such as the local approach to mediation, the applicable law, complexity of the issues involved, the characters of the parties, and the value of the dispute. For a counsel engaged in mediation, a deeper understanding of these factors is critical for a successful outcome.

This Note explains the key issues that need to be considered, from a Brazilian-law perspective, when mediating a civil dispute. In particular, it covers:

- The attitude of the courts towards mediation.
- Whether mediation is perceived as an effective means of dispute resolution by the business community.
- The laws on meditation, including pre-action requirements for parties to mediate before initiating litigation (regardless of any contractual obligation to refer their disputes to mediation).
- The disputes considered suitable for mediation.
- Whether the limitation period stops running when parties attempt to settle their disputes through mediation.
- How the mediation process works (including issues related to costs, confidentiality obligations of the parties and the mediators, timing of mediation, selecting a mediator, agreement to mediate, time frame for mediations, and legal representation at mediations).
- Whether judges (retired or serving, or both) can act as mediators.
- Court-annexed, judicial, and online mediations.
- The main institutions providing mediations services, including appointment of mediators.

For more on the key challenges and considerations in cross-border mediation, see *Practice Note, Cross-border mediations: overview*.

Judicial Attitude Towards Mediations

Our experience, research, and analysis of the available statistics on mediation in Brazil all indicate that mediation is not commonly used as an ADR mechanism in Brazil or in cross-border disputes involving Brazilian parties. Statistics provided by forums that specialize in mediation, for example, the Center for Arbitration and Mediation of the Chamber of Commerce

Brazil-Canada and Chamber for Conciliation, Arbitration, and Mediation of CIESP/FIESP, one of the top specialized forums, show that a very limited number of disputes are submitted for mediation, especially when compared with those brought before arbitration and judicial courts. According to the Center for Conciliation, Arbitration, and Mediation of CIESP/FIESP, from 2011 to date fewer than 30 mediations have been conducted, and in none of them did the parties reach a settlement.

It is important to distinguish mediation procedures conducted by specialized forums from those conducted by judicial courts. In addition, since this type of procedure has only recently been regulated, there are no reliable statistics regarding the mediations conducted by judicial courts.

Mediation is now specifically prescribed in the Civil Procedure Code (*Código de Processo Civil*) (Law No. 13.105/2015) (see *Mediation as a Pre-Condition to Litigation*). In addition, the Mediation Act came into operation through Law No. 13.105/15 and Law No. 13.140/15. This recent regulation has resulted in mediation developing as a field of study (doctrine) among ADR mechanisms and this is likely to expand the use of mediation in Brazil.

The use of mediation, particularly as a method to resolve commercial disputes, has been growing and has created an environment where mediation is an efficient and appropriate method for resolving disputes between private and public parties.

If a party agreed to enter into mediation but fails to comply with the mediation clause, the other party can seek a court order for specific performance to oblige the first to enter mediation (*Civil Procedure Code and Law No. 13.140/15*) (see *Documenting a Settlement* and *Disposal of Court Proceedings*).

Costs Consequences of Refusing to Mediate

Under the Civil Procedure Code, Law No. 13.105/15, and Law No. 13.140/15, the first measure to be taken by a court is to schedule a hearing for the parties to conciliate or mediate (see *Mediation as a Pre-Condition to Litigation*). If a party delays in consenting to that hearing or if only one of the parties refuses to participate in mediation, the court will still schedule the hearing. The only scenario where the court will not schedule a mediation or reconciliation hearing is where both parties expressly request the hearing not to be scheduled (*Article 334, section 4, Civil Procedure Code*).

The local courts cannot impose costs for any delay in consenting to mediation. However, where any party fails to attend or refuses to participate in a scheduled hearing, without an appropriate reason for doing so, this behaviour is considered contempt of court, and the court will impose a fine of up to 2% of the claim amount (*Article 334, section 8, Civil Procedure Code*).

Commercial Attitude Towards Mediation

Commercial parties in Brazil do not view mediation as an effective method for resolving disputes, which explains the very limited number of mediation proceedings conducted to date (see *Judicial Attitude Towards Mediations*).

There is a misconception that Brazilian society is generally not culturally inclined towards handling disputes through mediation. This is unfounded. Mediation is not widely known as an ADR path. Awareness of the benefits of a consensual solution that offers parties quick, cost-efficient, and practical results to their disputes must be increased. The Civil Procedure Code, Law No. 13.105/15, and Law No. 13.140/15 attempt to do this.

There are no reliable statistics about parties choosing ad-hoc mediation, but judging from our research and experience, individuals tend to opt for ad-hoc mediation, while companies prefer institutional mediation forums.

Mediation and Arbitration

It is more common for parties to mediate prior to initiating arbitration proceedings, as an alternative way to resolve the conflict. However, the parties can mediate alongside arbitration proceedings (*Article 16, Law No. 13.140/15*).

Laws on Mediation

Law No. 13.105/15 and Law No. 13.140/15 are the main statutes that regulate the conduct of mediations in Brazil. They lay down the general rules that apply to any mediation.

Other legislation also contains provisions that regulate mediation, notably the Civil Procedure Code, which is the main procedural law for the regulation of disputes in the judicial courts.

International Treaties on Mediation

Over the past decades Brazil has been advancing and stepping up efforts to become a signatory to international arbitration treaties. However, there is no record of an international treaty specifically on mediation to which Brazil is a signatory.

Mediation as a Pre-Condition to Litigation

There is no provision in Brazil that requires mediation as a pre-condition for a party to file a formal lawsuit in a judicial court. However, the Civil Procedure Code has been tailored to encourage mediation as a method of dispute resolution alongside conciliation. The first measure to be taken by the court is to schedule a conciliation or mediation hearing that must be held before the defendant presents its defense and the lawsuit proceeds (*Article 334, Civil Procedure Code*) (see *Cost Consequences of Refusing to Mediate*).

Effect on Limitation Period

Limitation periods for civil and commercial disputes in Brazilian courts are prescribed in the Civil Code (*Código Civil*) (Law No. 10406/2002). The limitation period for filing civil and commercial claims varies from one to ten years (*Articles 205 and 206, Civil Code*). The limitation period will depend on the cause of action of the matter in dispute. For example, tort, personal injury, and negligence claims must be filed within a period of three years (*Article 206, section 3, V, Civil Code*).

The limitation period for filing a judicial claim will be suspended while the mediation is in process (*Article 17, Law No. 13.105/15 and Law No. 13.140/15*). This effect is automatic and does not depend on a ruling from the court. Therefore, the first mediation meeting is considered the beginning of the stay (commencement date of the interruption).

Article 204 of the Civil Code stipulates that parties cannot agree to suspend the limitation period.

Disputes Unsuitable for Mediation

Conflicts that concern available rights or unavailable rights that are not inalienable can be mediated (*Article 3, Law No. 13.140/15*). Therefore, disputes concerning consumer law, contractual relationships, and family issues that do not involve the custody of minors can be mediated. Disputed inalienable rights (that is, rights that a person cannot give up, for example the right to life, liberty, health, and dignity) cannot be mediated.

Mediation Agreement

When conducting mediation before a specialized forum, parties usually execute a written mediation agreement before the start of any proceeding to safeguard their rights, prevent liabilities arising, and record the rights and obligations of the parties and the mediator.

When the mediation is conducted by a local court, the parties do not execute any written agreement before the start of the hearing. The parties will sign the record of the hearing only after the hearing is finished.

Standard Clauses for Mediation Agreement

In Brazil, it is standard practice for parties to set out and agree clauses including:

- A request clause (opening mediation, choosing the mediator, and the details of the first meeting).
- A role of the mediator clause and method of conduct clause (including mediation conditions and further meetings).
- A confidentiality clause.
- A non-binding agreement clause.
- An authority and representation clause.
- A language clause.
- A termination clause including the exclusion of liability, indemnification, and the agreement conditions.
- A costs, fees, and expenses clause.

Timing of Mediation

Commonly, parties consider submitting their disputes for mediation before instituting court proceedings if there is a previous agreement to mediate.

In the absence of a mediation agreement, it is commonplace for the courts to encourage the parties to participate in a consensual dispute solving method, for example, mediation or conciliation. This kind of court order is usually given at two different stages during a court proceeding:

- Before the defendant presents its defense.
- Before judgment is delivered on an appeal before the Court of Appeals.

In addition, parties can request a stay of the court proceedings to engage in a mediation process at any time (*Article 16, Law No. 13.105/15 and Law No. 13.140/15*). In this case, parties can request the stay of the main proceeding for the period of time needed for the conclusion of the mediation process.

Choosing a Mediator

In an institutional mediation, the parties cannot choose their mediator. The mediation center will provide a mediator in accordance with the requirements of the particular dispute. However, if both parties successfully petition, by duly justified demonstration of their reasons, they can have a mediator disqualified from that specific dispute.

In ad-hoc mediations, the mediator is usually chosen by the parties as a notably impartial third party. Very often, ad-hoc mediation is contractually agreed and the mediator specified in the contract.

In the event that parties cannot reach an agreement regarding the appointment of a mediator, the mediation will not continue, and will therefore be cancelled.

Conduct of Mediation

When conducted before a specialized forum, the initiating party will request that mediation be commenced and the forum will notify the other party and request that they attend an initial hearing, where the procedure will be explained to the parties.

In this initial hearing the parties will define by mutual agreement the mediator, the rules of the mediation, and its calendar. Before the meetings, the parties may exchange or provide to the mediator brief outlines of the matters in dispute and the documents they believe support their interests.

At the meetings, the mediator will use specialist techniques in order to encourage the parties to co-operate with each other and may refer to case precedents to guide the parties toward a positive outcome.

Usually, the parties do not set out the procedural aspects of the mediation within the mediation agreement. They adopt the procedural rules of the specialized forums.

Facilitative or Evaluative Mediation

The approach used in a mediation process depends on the mediator's perspective on the matter under dispute.

In a mediation conducted before a specialized forum, the mediator may use either the facilitative or the evaluative method to reach an agreement between the parties.

In a mediation conducted before a judicial court, the method adopted by the mediator also varies. In mediations involving civil and commercial claims, the mediator usually adopts the facilitative method. In mediations involving employment disputes, the mediator tends to adopt the evaluative method.

Time Frame for Mediations

In mediations conducted before specialized forums, the general time frame for a mediation to be completed is two to three months. This time frame is subject to the parties' availability to attend the meetings. The chance that the parties will reach an agreement more than three months after the mediation procedure has commenced is very low.

There is no specific legal provision that prescribes the period within which an out-of-court mediation must be concluded. This period varies depending on each forum's specific rules, and what the parties have stipulated in the contract.

Legally judicial mediation must be completed within 60 days from the date of the first mediation meeting, although both parties can request an extension (*Article 28, Law No. 13.105/15 and Law No. 13.140/15*). In practice, when conducted before a local court, the mediation is usually completed in one day.

Professional Advisers in Mediations

Parties engaged in mediation do not have to be represented by a lawyer and the mediator does not need to have a legal background (*Articles 9 and 10, Law No. 13.105/15 and Law No. 13.140/15*). However, Law No. 13.105/15 and Law No. 13.140/15 expressly stipulate that if one of the parties is represented, the entire proceeding must be adjourned until all the parties have acquired legal representation

In practice, when mediation is conducted before specialized forums, all parties are usually represented by lawyers. When mediation is conducted before a local court, parties must be represented by lawyers (*Article 103, Civil Procedure Code*).

Other Attendees at Mediations

If required by the parties or the mediator, and with the consent of all involved, other mediators can be brought in to work on the mediation, when this is advisable due to the conflict's nature and complexity. Third parties, for example experts or insurers, can also provide help and support to the mediation. There are no specific rules limiting who can attend.

Judges as Mediators

Judges can only act as mediators in mediations conducted before their local court, during a hearing held regarding proceedings on which they will rule. In these cases, even if the mediation is not successful, that judge will not be removed from participation in the case. The judge does not give any view on the merits of the case and focuses on facilitating the resolution of the conflict through a settlement.

Under Brazilian legislation, judges are not allowed to undertake any professional activity, other than acting as a judge. The only exception is that a judge can act as an academic (*Article 95, Federal Constitution*). For this reason, judges are not allowed to act as mediators in mediation proceedings conducted before specialized forums.

Under the Civil Procedure Code, Law No. 13.105/15, and Law No. 13.140/15, the courts must have specialized centers of mediation where judges cannot act as mediators.

Mediator’s Role After an Unsuccessful Mediation Attempt

A mediator who has represented or assisted a party in mediation cannot then act as an arbitrator and conciliator in relation to the same dispute within one year of the end of the mediation (*Articles 6 and 7, Law No. 13.105/15 and Law No. 13.140/15*).

Court-Annexed, Judicial, and Online Mediations

Brazilian courts are more likely to conduct conciliation hearings than mediation hearings. Although courts must have specialized centers where mediations can be conducted (*Article 165, Civil Procedure Code, Article 24, Law No. 13.105/15, and Law No. 13.140/15*), the professionals associated with the courts are not yet trained to manage a mediation process properly.

In addition, Brazilian courts do not have proper facilities to conduct mediation proceedings. Therefore mediation, whether judicial or online, is not popular in Brazil.

Costs

In light of the spirit of reciprocal conduct and co-operation expected from the parties in a mediation proceeding, parties usually share the expenses in equal measure. However, parties may come to a different contractual arrangement, agreeing specific terms regarding the expenses and costs of the mediation. Where there is a mediation agreement and one of the parties does not attend

the first meeting, that absent party must assume 50% of the costs and of the other party's attorney fees if the other party wins an arbitral or judicial proceeding (*Article 22, paragraph 2, No. 13.105/15 and Law No. 13.140/15)*.

Confidentiality

Mediation Proceedings

In accordance with Law No. 13.105/15 and Law No. 13.140/15, confidentiality is one of the principles on which mediation is based. All information obtained from the proceeding must be kept confidential from third parties and cannot be disclosed even in judicial or arbitral proceedings, unless agreed otherwise (*Article 30, Law No. 13.105/15 and Law No. 13.140/15*). Therefore, even in the absence of an express clause in a mediation agreement, the confidentiality of the mediation applies and is enforceable.

Mediator

The confidentiality obligation extends to the mediator, parties, lawyers, technical consultants, and whoever else has participated in the mediation procedure (*Article 30, Law No. 13.105/15 and Law No. 13.140/15*).

Although there is a statutory stipulation that the information obtained in mediation cannot be disclosed even in arbitral or judicial proceedings, parties usually still include and agree specific clauses to underscore that extension of the confidentiality obligation.

Parties

The parties are required to keep confidential the fact of the mediation and any information they learn in the mediation. Confidentiality is a principle of mediation (*Article 2, VII, Law No. 13.140/15*).

Although there is a statutory stipulation that the information obtained in mediation cannot be disclosed even in arbitration or judicial proceedings, parties usually still include and agree specific clauses to underscore that extension of the confidentiality obligation.

Exceptions

As a general rule, no information whatsoever obtained in the course of a mediation proceeding can be disclosed in a judicial proceeding (see *Mediator*). In addition, Article 166 of the Civil Procedure Code also expressly prescribes confidentiality as an intrinsic principle of the mediation procedure.

However, any information coming from the mediation relating to the occurrence of a prosecutable offense, or any information that should be submitted to the tax authorities, is not sheltered by confidentiality (*Article 30, sections 3 and 4, Law No. 13.105/15 and Law No. 13.140/15*).

Documenting a Settlement

Any settlement entered into between the parties must be in writing and must be signed by both parties and the mediator (*Article 20, Law No. 13.105/15 and Law No. 13.140/15*). In Brazil, the mediator is usually responsible for drafting the final agreement. Given that fact, the parties and their representatives (when applicable) will closely guide the mediator in the drafting of the final agreement.

Disposal of Court Proceedings

When mediation is conducted before a local court, the proceeding will be terminated once the parties reach an agreement, and the settlement agreement will be considered a judicial enforcement instrument.

When mediation is conducted out of court, the parties may or may not request that the court ratify the settlement, by a specific procedure for official approval of an out-of-court settlement. Where the court ratifies it, the settlement is considered a judicial enforcement instrument. Where the parties do not request that the court ratify the agreement, it will be considered an extrajudicial enforcement instrument.

Enforcing Settlements

The procedures for enforcing a settlement agreement reached at mediation depend on whether the mediation was conducted in court or out of court. An agreement reached in, and ratified by the court, has the same force as a final order made by the court. Therefore, the defenses that a debtor can raise are limited to procedural issues.

An agreement reached through mediation conducted out of court and not ratified by a court can also be enforced by both parties. However, this agreement does not have the same force as a final order and the defenses the debtor can raise are broader, for example, challenging the mediation agreement or presenting any defense on its merits (*Article 917, VI, Civil Procedure Code*).

In addition, a final mediation agreement can be filed with the court to enforce proceedings. A judge can issue a writ of execution under the provisions of the agreement.

This procedure mirrors that for settlements reached outside mediation.

Mediation Institutions and Centers

The main centers that provide mediation and other ADR services are:

- The Chamber of Conciliation, Mediation, and Arbitration (CIESP/FIESP).
- The Center for Arbitration and Mediation (CAM-CCBC).
- The Center for Arbitration and Mediation (AMCHAM) Brazil.

Accreditation Schemes for Mediators

The mediators that conduct judicial mediations must meet several requirements stipulated in Law No. 13.105/15 and Law No. 13.140/15. They must:

- Have legal capacity.
- Have graduated, at least two years before being appointed, from a higher education course.
- Have attended a specific and certified course to be a mediator.

To be a certified course, any course that teaches judicial mediators must meet the requirements established by the National Council of Justice and the Ministry of Justice (*Article 167, Civil Procedure Code*).

To be an extrajudicial mediator, mediators must satisfy other requirements, including:

- They must have legal capacity.
- They must have the parties' trust.
- They must be able to be a mediator, regardless of being a member of any kind of institution, center, or specialized forum (that is, the mediator does not have to be a member of any mediation forum to act as a mediator).

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