

New framework for mediation – Vieira de almeida



Over the last decade, Portugal has progressively promoted mediation as a means of alternative dispute resolution by adopting specific legislation for different subject matters, such as family, labour and criminal law. Civil and commercial mediation has been used mostly for small claims submitted to specialized courts called *Julgados de Paz*.

Following other legislative measures aiming at promoting alternative means of dispute



resolution a Mediation Law was adopted on April 19th, 2013.

The Mediation Law is in force since May 20th, 2013 and introduces for the first time provisions of general applicability, setting out the general principles applicable to all types of mediation taking place in Portugal, and establishing the status of the mediator, including

the required qualifications, professional training and public registration.

Under these rules, mediation is subject to the principles of voluntary recourse, confidentiality, equal treatment of the parties, neutrality and independence of the mediator. Submitting a dispute to mediation is entirely dependent on the will and consent of the parties, who may, at any time during the mediation process, withdraw their consent to participate in mediation.

Furthermore, the Mediation Law establishes the legal framework of civil and commercial mediation. The key innovations introduced to this area of mediation, and the following should be highlighted.

Agreement to mediate: Disputes falling within the scope of civil or commercial matters and relating to interests of a patrimonial nature can always be subject to mediation. 'Non-patrimonial' disputes may nevertheless be subject to mediation if the parties are entitled to settle a disputed right. In any case, a mediation clause should be executed in writing.

Enforcement of agreements reached through mediation: Agreements reached through mediation conducted by a mediator officially registered by the Ministry of Justice may be granted immediate enforceability without the need for judicial confirmation provided that the following requirements are met: the dispute may be the subject of mediation and no specific provisions require a specific court approval; the parties have capacity to enter into it; it

was reached through mediation conducted in accordance with the terms set out in the law; and, its content is not against the public order.

Conduct of the mediation process: After a pre-mediation session of an informative purpose, parties shall sign a protocol setting out the rules and the time-table of the mediation process, which may be amended at a later stage.

Pre-judicial mediation: Parties can resort to mediation prior to submitting their dispute to court. The main effect of pre-judicial mediation is the suspension of the expiration and lapse periods running from the date of signature of the mediation protocol.

Impact

While agreements settled through mediation are expected to be implemented voluntarily, one of the crucial innovations introduced by the Mediation Law concerns the enforceability of a mediation settlement without the need for court approval. In addition, the adoption of specific rules for civil and commercial matters is likely contribute to establish mediation as a real alternative to the traditional methods of dispute resolution.

In summary

Mediation is increasingly perceived in Portugal as an effective conflict management tool for business transactions as well as an important alternative method to judicial court proceedings.

Together with other recent legislation adopted in the context of the judicial reform that the Portuguese Government undertook to carry out in May 2011 under the Memorandum of Understanding with the Troika, including the approval of a new Arbitration Law, the Mediation Law is intended to confer a greater role for ADR in Portugal and also to contribute to resolve the backlog of court case.

However, it is still premature to assess whether these measures are sufficient and adequate to promoting mediation in Portugal, particularly considering the lack of experience of Portuguese mediators and lawyers in civil and commercial mediation.

Frederico Gonçalves Pereira is Head of Litigation and Arbitration, and Maria Eliseu and Filipe Rocha Vieira are Associates at Vieira de Almeida. They can be contacted at fgp@vda.pt, mpe@vda.pt and frv@vda.pt

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