

PRIVATE MEDIATION IN PORTUGAL: WHAT FUTURE?

A COMPARATIVE LAW ANALYSIS, APPLIED TO THE PORTUGUESE REALITY

by

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1. INTRODUCTION

Mediation is usually described as a dispute resolution method, an alternative to the judicial system like arbitration and conciliation – also called alternative dispute resolution methods (“ADRM”).¹

In recent years, the Portuguese legal order has seen several legislative advances towards acknowledging and regulating mediation as an ADRM, particularly through the insertion of a provision for mediation as a cause for a stay of proceedings in the Civil Procedure Code² and, in addition, through the enactment of Law No. 29/2013, of 19 April, which establishes the general principles applicable to mediation conducted in Portugal and the legal provisions governing civil and commercial mediation, mediators and public mediation (“Mediation Act”).

Yet today private mediation – the only mediation addressed in this article – is still a very little-known and poorly-disseminated procedure in Portugal, even among the legal community; it is very often perceived as the *poor cousin* of arbitration and is still therefore not much used in this country. This situation is particularly intriguing when one considers either the countless advantages that mediation has over the judicial system and even over the other non-judicial dispute resolution methods (or more accurately the resolution of disputes or mere disagreements at a pre-contentious stage), or the recognition, use and success of mediation in numerous countries on a worldwide scale. It was this consideration of ideas, experiences and realities that motivated this article.

For this very reason, in the lines below, we shall begin by analysing and seeking to suggest reasons why private civil and commercial mediation is not yet more widely accepted and used in Portugal, despite all these advantages and the very favourable experience in comparative law. We aim to show the main obstacles which mediation appears to face in this country, to mull these over and, at the very least, to cast doubt on their *raison d'être* and actual justification.

Next, as we cannot content ourselves with simply stating the problem – a useful exercise but one which on its own is somewhat fruitless and frustrating – we shall attempt to advance possible avenues for mediation to become a reality in Portugal today, and not several years from now, as is so often said to be the case in Portugal (*i.e. 10 years later than in more developed countries*).

In summary, the ideas we would like to have been able to convey by the end of this article are as follows: (i) mediation is a very effective structured process for dispute resolution, with advantages that are not found in the other ADRM; (ii) mediation must not be seen as a threat to the livelihood of lawyers, who must be very present in the process and only stand to gain from obtaining the loyalty of truly satisfied clients; (iii) the active involvement of lawyers and mediation centres set up at reputable institutions is vital to earn the trust of the more traditional legal world; and, lastly, (iv) if mediation is so effective in so many countries worldwide, why not here and why not now?

It is well known that the existence of resolution mechanisms which are effective and swift at the same time is an important factor in attracting international business to any country. This point was long stressed in respect of arbitration and it applies *a fortiori* to mediation, which in our opinion will inevitably become a reality in the near future for the even swifter, more effective and more efficient resolution of (certain) disputes in Portugal.

2. MEDIATION AS AN ALTERNATIVE (OR MORE APPROPRIATE) METHOD OF DISPUTE RESOLUTION

¹ The English term which is very often used even in this country: *ADR* (*Alternative Dispute Resolution Method*).

² See Article 273 of the CPC, inserted by Law No. 29/2009, of 29 June, which *en passant* transposed into the national legal order Directive 2008/52/EC of the European Parliament and of the Council, of 21 May 2008, on certain aspects of mediation in civil and commercial matters. This legislation was later repealed by Law No. 13/2013, of 5 March, Article 6 of which excepted the above-mentioned provision, which thus remained in force as Article 279-A until the 2013 reform of the Civil Procedure Code and is still in force today.

2.1. THE ADVANTAGES OF MEDIATION

According to the definition in Directive 2008/52/EC, of the European Parliament and the Council, on certain aspects of mediation in civil and commercial matters (“Mediation Directive”), mediation is “*a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator*”.³

Mediation differs from arbitration because it is not a process in which one or more arbitrators decide on a dispute but a flexible negotiation process assisted by a neutral third party, where the parties themselves trace out the best way of settling the dispute, and because it is an absolutely voluntary process in the sense that the parties can abandon it at any time. Moreover, despite its greater likeness to conciliation, the mediator’s function is fundamentally facilitative⁴ of dialogue between the disputants, seeking to dissuade them from positional negotiation (i.e. based on what they believe is their entitlement and on their interpretation of the other’s behaviour) and to direct their discourse towards a discussion focused on their true interests, specifically through a combination of techniques of which the mediator must have a command, such as querying, reformulation, and fostering reciprocal listening. However, unlike what is expected in conciliation, the mediator must not suggest a solution for the problem that divides the parties, even when such a solution seems obvious given what they have said. Instead, the mediator’s role in this aspect is perhaps more difficult because she is asked to lead the parties, through the techniques learnt during her training, to comprehend their true interests and the possible fallacies or shortcomings in their discourse (without ever addressing them negatively in front of the other party) and to have the parties themselves formulate options and arrive at solutions. It is a more laborious path, but experience – particularly in terms of comparative law – shows that this strategy is more effective in the long run because the parties are truly able to identify with the solution reached and, for that very reason, tend to follow through on what has been agreed.

It should not be thought that given her role as a “mere facilitator”, the function of a mediator is easier than that of a judge, arbitrator or conciliator, especially when this task is carried out by a jurist. Firstly, because while during the course of the trial the judge or arbitrator may in practice limit themselves to hearing the parties, their legal counsel and the witnesses and at the end study the legal issue or issues raised by (and only by) the disputants and taking a position on the same – put simplistically – the mediator must take a very active role from the beginning of the procedure. Without this active intervention on the part of the mediator, dialogue between the parties will remain at the level of mutual aggression and threat, of negotiation based on their rights (or what they are convinced they are entitled to), and will not even be possible in certain cases. Secondly, though not having as active a role as a conciliator, in terms of formulating and selecting possible solutions for the case, the mediator intervenes actively, whether in defining the rules of the procedure and for channelling dialogue (and in systematically controlling compliance with them) or in managing the procedure itself, its suitability given the attitudes and willingness of the disputants, and any deadlocks which may call for a private session (“caucus”) to be held at any time during the

³ This definition is to a certain extent mirrored in Article 2, subparagraph a), of our Mediation Act, where it is defined as a “*form of alternative dispute resolution held by public or private entities, whereby two or more disputing parties voluntarily seek to reach an agreement with the assistance of a dispute mediator*”, without reference to the structured nature of the process unfortunately.

⁴ The term is an Anglicism often used to differentiate between two possible approaches to how mediation should be conducted: (i) **facilitative** - where the mediator limits herself to channelling dialogue between the parties without ever suggesting or imposing solutions, as suggested by the Harvard school linear model, and (ii) **evaluative** - where the mediator, in a model much closer to that of a conciliator, is more actively involved in the dispute resolution process, being able to suggest solutions and even being expected to do so. For a better explanation of the distinction between these models, see among others JEREMY LACK and FRANÇOIS BOGACZ, *The neurophysiology of ADR and process design: a new approach to conflict prevention and resolution?* 2012, available at <http://www.neuroawareness.com/wp-content/uploads/2016/02/Lack-Bogacz-2012-The-Neurophysiology-of-ADR-and-Process-Design-A-New-Approach-to-Conflict-Prevention-and-Resolution.pdf> (accessed on 03.05.2016), pp. 50-64. However, as the facilitative model appears to be the one which most closely respects the very nature of mediation, it is the one discussed here and which we shall therefore take as our reference throughout this article.

procedure, or in exploring the true interests of the parties, in contrasting these interests with their BATNA/WATNA,⁵ and in carrying out reality checks prior to the signing of any agreement.⁶

All of this falls to the mediator, notwithstanding her more neutral presence. Without this active intervention on her part, it will be difficult for the mediation process to reach a successful conclusion and it may not even serve any function. Further, the function of mediator poses two significant challenges for any jurist; firstly, the need to switch off a purely technical legal reasoning so as to commit to the pursuit of the parties' true interests and needs which lie behind their very often over-emotional and positional discourse, to the pursuit of solutions that are not envisaged in the letter of the law but can best satisfy the parties' interests; secondly, the need to moderate our argumentative impetus and our desire to speed up the process and to suggest legal remedies which may seem obvious to us but may not be the most appropriate for the parties and which, most of all, will not be viewed as "their own".

Having said that, the main features and advantages of mediation over judicial courts or even other ADRM are, in our opinion, those discussed briefly below:

a) Voluntary character

Unlike other countries, private mediation in Portugal is absolutely voluntary in that the parties are free to decide whether or not to engage in mediation, even during the course of any judicial or arbitration proceedings. They may likewise decide to bring them to an end at any time, in principle, without any sanction or penalty.⁷

Even when faced with a court order directing that the case be referred to mediation and the proceedings thus stayed – which only became possible as from 2009 after the insertion of Article 273 of the Civil Procedure Code – the law itself stipulates that the parties may object to such a referral provided that they do so expressly.

b) Flexibility and informality

There is a certain prejudice in the legal world towards these two terms that to some extent castigates mediation. It is therefore important to begin by demystifying this prejudice and the common idea that only formal proceedings with an associated set of historical rituals (such as the use of robes and gowns and the employment of certain classical bromides in court, specifically before legal counsel takes the floor to question or make allegations), can assure serious proceedings and a proper decision.

Suffice it to look at the way most non-lawyers refer to our courts and the discredit into which these appear to have fallen. All the ritualism that still surrounds our judicial courts constitutes an element of intimidation for individual clients, which makes participation in the proceedings difficult and, consequently, prevents them from identifying with a decision handed down by a judge who

⁵ The acronyms stand for Best Alternative to a Negotiated Agreement (BATNA) and Worst Alternative to a Negotiated Agreement (WATNA), i.e. scenarios which must be envisaged by the disputants to better assess their likelihood of success in judicial/arbitration proceedings and to gain a better understanding of a good mediation agreement, one which is capable of avoiding uncertainty with regard to achieving their BATNA and to their WATNA materialising. This exercise of reflecting on each party's BATNA and WATNA is usually done in private sessions to enable greater sincerity and spontaneity and, where possible, before the option-formulating and negotiation stages. Where this is the case, experience tells us that these latter stages will be far more productive as the parties are more willing to envisage other options and to negotiate after having visualised the best and worst scenario outside of a mediation setting.

⁶ This is a very important point and one which is not always sufficiently emphasised. Carrying out a reality check on the arguments traced out by each party, either in relation to the options formulated or the agreement reached, is essential so that neither of the parties, after a night's sleep on the subject, will regret the agreement or realise its shortcomings and end up not complying with it or even trying to invalidate it.

⁷ In any case, some Mediation Regulations or even the Mediation Protocol that should be signed by the parties and the mediator before initiating the mediation process (see Article 16 of the Mediation Act) may establish penalties or, at least, provisions regarding payment of the mediation costs applicable to the party who decides to bring it to an end. In this respect, see Article 26(3)(b) and (c) of the Mediation Regulation of the Commercial Arbitration Centre of the Portuguese Chamber of Industry and Commerce ("CAC-CCIP") and Article 21(4) of the Dispute Conciliation and Mediation Regulation of Concórdia – Centro de Mediação, Conciliação de Conflitos e Arbitragem ("Concórdia").

showed no empathy whatsoever for their case and who very often did not even listen to what they had to say. This is all exacerbated by the usual delays in case handling and the high costs associated with access to the judicial courts.⁸ While such awe may not be so considerable for corporate clients,⁹ recourse to judicial courts always entails higher costs and more time, which are difficult to justify from the economic rationale standpoint of the company.

Another (erroneous) idea very often associated with these two labels also needs to be demystified: neither must be taken as a byword for disorganisation, arbitrariness or an absence of rules. Indeed, flexibility has been gradually, and increasingly, incorporated into the judicial system with each reform of the Civil Procedure Code, culminating in the current *duty of procedural management* laid down in Article 6 of the Civil Procedure Code by virtue of the 2013 reform (a more fleshed-out and incisive successor of the formal appropriacy principle). This flexibility is a requirement for the appropriacy of the proceedings to the case as opposed to the previous appropriacy of the case to the proceedings and, in our experience, is being employed ever-more frequently by our courts, much to the contentment of the parties. Yet another advantage associated with these two concepts is the possibility of the parties being able to express freely their opinions, intentions and emotions.

Moreover, neither flexibility nor informality are absolute in the mediation process. In fact, while the process tends to be flexible and informal, this does not mean that there is no set of rules and procedures to be adhered to right up to the final outcome. There are often those who state the opposite, even among lawyers, judges and arbitrators, supposing that mediation is nothing but a negotiation and there is no reason therefore why it should not be the lawyers themselves or the court itself conducting it. However, they fail to take into consideration, firstly, that mediation is a negotiation process assisted by a neutral party and that neither the lawyers nor the judge in the proceedings has this unbiased quality; and, secondly, that mediation follows a structured process established by the parties and the mediator or by the selected Mediation Regulation¹⁰ and is based on a set of fundamental principles defined by law¹¹ and by any applicable Mediation Regulation.¹²

Finally, still with regard to informality, a word as to online mediation. Unlike in a judicial setting where even recourse to video-conferencing and document projection or IT presentations runs into numerous problems of a technical and customary nature, the use of IT resources in arbitration is increasingly more frequent and is usually well-accepted by the tribunal. In mediation, requirements of speed and cost economy have fostered the use of platforms such as *Skype*, *VoIP* or *GoToMeeting* for online mediation, making it possible to conduct the entire mediation process without either the parties or the mediator having to do any physical travelling, and thus avoiding additional costs and arguments regarding the seat of mediation. This method is particularly useful in international mediation but has also been promoted internally in countries such as Brazil.¹³ The idea is certainly innovative but it has encountered some resistance since it defeats the personal character

⁸ Currently worsened by the absolutely unconstitutional terms of application of the court fee remainder, set down in Article 6(7) of the Procedural Fees Regulation approved by Decree-Law 34/2008, of 26 February.

⁹ Although there is very often a significant impact on even the highest-ranking company officers, who become quite distressed when seated on a court bench.

¹⁰ Specifically, mediation should begin with a preparation session with each of the disputants to explain the process and some fundamental rules, particularly when the parties or their legal advisers have no experience in mediation. A joint session is then held at which each of the parties presents their own version of the facts and of the issues that divide them from the other party, following which the mediator must make a summary and formulate an agenda with the main topics to be addressed (and negotiated) in the remaining stages. If necessary, the mediator may – and in our view must in almost every case – then hold one or more private sessions with each party, always on equal terms, so that in a setting of strict confidentiality they may raise issues they would not like to share with the other party, but which the mediator can help put into perspective, leading both parties to visualise their BATNA and WATNA and the likelihood of these materialising. Lastly, the mediator then returns to the joint session to formulate options regarding each point on the agenda and, subsequently, to mediate the negotiation between the parties, which should culminate in a reality check before the agreement is finally drafted and signed by the disputants.

¹¹ See Articles 3 – 9 of the Mediation Act.

¹² See, for example, among others, Articles 3 – 5 of the CAC-CCIP Mediation Regulation and Articles 3 and 4 of the Concórdia Dispute Conciliation and Mediation Regulation.

¹³ Under Article 334(7) of the 2015 Brazilian CPC, “[t]he conciliation and mediation hearing may be held using electronic means, in accordance with the law”. Online mediation in federal justice had already been available since 2012.

of the negotiations (*face-to-face mediation*) and makes it difficult for the mediator to read the parties' body language. Nor does it help the parties to relax or enable the mediator to control their concentration on the process and on the other party's discourse. Nevertheless, it may be very convenient when international disputes are at issue as it reduces operating costs considerably.

c) Speed and efficiency

Despite the flexibility of mediation, which calls for a case-by-case adaptation of the process, it is a far quicker procedure as a rule, designed to be over in days – not months as in arbitration, or years as is very often the case in the court system.

According to the Sixth Mediation Audit of 22.05.2014, conducted by the Centre for Effective Dispute Resolution (“CEDR”),¹⁴ which analyses mediation results in the UK – where mediation is at a more advanced stage and may thus serve as a paradigmatic example of what to expect from the functioning of this dispute resolution method - approximately 75% of cases are settled by agreement in a single day, or a little longer, with a very small number of billable preparation hours by the mediator.¹⁵

In addition, while mediators' fees are not (and must not be)¹⁶ different from those of arbitrators, at least within the scope of institutional arbitration and mediation – where these fees are set according to a table – the procedure is always shorter. This in itself makes mediation less costly, whether owing to the smaller number of hours spent by the mediator, the disputants and their lawyers or to the lower travelling costs of those involved, not to mention the savings on witness presentation and travelling and all the associated personal and institutional fuss which can thus be avoided.

From another perspective, mediation also enables the parties to avoid other, sometimes less evident, costs related to uncertainty regarding the final decision in judicial or arbitration proceedings (very often prolonged over several months or years) or to the client's having to allocate internal resources to monitor the case together with its lawyers and, in the case of corporate clients, possibly having to create and maintain a financial provision in case they are not successful, which naturally lies heavy on their accounts. For that very reason, as WOLF VON KUMBERG underscores,¹⁷ mediation is particularly useful when the cost of the internal resources involved is more important than the direct financial cost of the conflict and when, in the eyes of those in charge of the companies involved, there is a stain on the reputation of the traditional dispute resolution processes.¹⁸

d) Confidentiality and image

Confidentiality is one of the oft-praised features of arbitration but according to Article 5(1) and (4) of the Mediation Act is of especial application in mediation, “[t]he mediation procedure is confidential in nature and dispute mediators shall keep secret all the information they learn within the scope of the mediation procedure, and may not make use of it for their own benefit or for that of another”, such that “the content of mediation sessions may not [even] be weighed up in court or in

¹⁴ This study is available on the CEDR website at <http://www.cedr.com/docslib/TheMediatorAudit2014.pdf> (accessed on 09.07.2016).

¹⁵ Between 13.5 and 16.5 hours, depending on the experience of the mediators.

¹⁶ Firstly, to avoid the function of mediator being less attractive to good jurists and, secondly, to avoid this function being (or continuing to be) less important than that of an arbitrator. In our view, it is vital to elevate the status of mediators, which will not be possible if there is a discrepancy between mediators' fees and arbitrators' fees at arbitration and mediation centres.

¹⁷ WOLF VON KUMBERG, *The future of mediation in Europe*, at the 3rd European Mediation Congress on 26.09.2007, available at <http://www.cedr.com/articles/?item=The-future-for-mediation-in-Europe> (accessed on 28.04.2016).

¹⁸ For all of the above, HANNAH TUMPEL, head of the International ADR Centre of the International Chamber of Commerce, concludes that, except where the business relationship has been destroyed or the party has unlimited resources and is absolutely certain that he will be successful in the legal action and there are sufficient assets to satisfy his debt-claim (should this be the case), the parties always prefer a swift and efficient solution. This writer is cited by ANNA-MARIA TAMMINEM, Managing Associate at the Finnish law firm of *Hannes Snellman*, in an article available at <http://www.youngicca-blog.com/mediation-the-new-international-arbitration-for-our-generation>, under the name *Mediation – the new “international arbitration” for our generation?* (accessed on 28.06.2016).

arbitration proceedings”. Nevertheless, according to the following paragraphs of that article, this duty of confidentiality refers only to the content of the case and of the mediation sessions and not to the agreement obtained and may cease in the exceptional circumstances set down in Article 5(3) relating to the protection of a higher order of interests.

This principle is extended to include the parties by Article 16(3)(d) of the Mediation Act, which states that the duty of confidentiality of the mediator and the parties must be included in the Mediation Protocol, which must be signed by all of these before work begins.

Thus, except in the above-mentioned exceptional circumstances, all those involved in the mediation process are obliged to keep secret everything discussed during the course of the process, especially in the private sessions held with each party (which are designed precisely for communicating to the mediator aspects which, from the outset, neither of the parties would be willing to share with the other).

This point is particularly significant when public knowledge of the disputes at issue might be harmful to the personal or professional image of a given person or to the reputation and credibility of a given company or firm. In either of these cases, confidentiality will be a key tool for the preservation of that image or reputation.

e) Empowerment

There is no direct translation [in Portuguese] of this Anglo-Saxon term that would do justice to the breadth of the concept in question, which far exceeds the above-mentioned voluntary nature of mediation.

Mediation is a process of the parties, chosen by the parties (since they decide whether to initiate it either by means of a mediation clause or pact¹⁹ or a subsequent mediation commitment²⁰), controlled at all times by the parties (who take part and have the opportunity to talk and to be heard at any given time, and may indeed choose to end it at any time), in which the parties are heavily involved and which is conducted in their exclusive interest (even when this interest has no express basis in the letter of the law, provided that it does not offend against core public order principles²¹).²²

In light of the above, MARIANA FRANÇA GOUVEIA says that in mediation, unlike in a judicial court or – let us add – arbitration tribunal), “*the position is exactly the opposite: one starts off from the principle that the parties are the persons best placed to settle their dispute. There is an idea of personal responsibility which translates into the parties being given command of the problem and of the process*”.²³ Indeed, this characteristic is held up by many as one of the main advantages of mediation over the other ADRM and may account for the usual voluntary compliance with agreements reached in this setting.

f) Depth, creativity and reparation

The depth, creativity and capacity for reparation are probably the features that most differentiate mediation from the other dispute resolution methods. All of these, to a certain extent, are ultimately related to the empowerment of the parties and the voluntary and flexible nature of the process,

¹⁹ Without prejudice to the distinction embraced in the Voluntary Arbitration Act between a commitment clause and an arbitration pact as types of arbitration agreements (see Article 1(3) of Law No. 63/2011, of 14 December (“VAA”), we shall adopt in this context the terminology of Article 12 of the Mediation Act, which restricts – perhaps excessively – the concept of mediation agreement to the contract clause in which the parties agree to refer a given issue to mediation.

²⁰ It is also possible for mediation to be suggested by the courts, although this is still not current practice, primarily owing to lack of knowledge as to its terms and efficacy. However, even in this case, as the mediation is not compulsory, the parties are always free to accept the referral or otherwise.

²¹ See Article 9(1)(d) of the Mediation Act.

²² Nevertheless, for the comfort and ease of the legal system, under Article 11(1) and (2) of the Mediation Act, the only disputes that can be submitted to private, civil or commercial mediation are those related to pecuniary interests or to rights over which the parties can reach a settlement – in other words, matters in which the decision-making autonomy of the parties makes sense and, in principle, where there is less risk of endangering fundamental principles.

²³ MARIANA FRANÇA GOUVEIA, *Curso de Resolução Alternativa de Litígios*, 2014, p. 50.

which we have already discussed above, but warrant separate treatment owing to their extreme importance.

Unlike other dispute resolution methods, the main focus of mediation is the true interests and needs of the parties as opposed to the positions adopted by the same, very often based on their feelings and purported rights. Strictly speaking, it is the only method of dispute resolution that actually seeks to distance itself from or shake off the application of the strict letter of the law, which does not always best satisfy the parties' interests.²⁴ In this respect, MARIANA FRANÇA GOUVEIA says that "*only the composition of [the litigants'] interests will enable the agreement to endure and [their] continued understanding*".²⁵

In addition, owing to the depth to which the dispute is addressed and its focus on the parties' true interests, mediation strives for a solution that is satisfactory to the two parties (a win-win solution), which avoids the usual frustration felt in judicial proceedings, so that they both feel like winners on given points – ideally regarding the aspects that would be most important for that particular party.²⁶ This solution may involve an apology that one party may need to get over the offence he felt because of the situation that gave rise to the dispute, or may equally involve a more creative solution, such as the creation of a new partnership between the disputants that enables their business relationship to be re-established and the dispute to be left behind. Neither of these solutions would probably fall within the strict letter of the law and, therefore, despite the possibility of an appeal to equity on the terms permitted by law,²⁷ would be difficult to reach through another ADRM.

In fact, one very often finds when looking at the heart of the problem and its true causes and origins that the description of the dispute given by the parties is already very much shaped by a certain legal framework (which has been suggested to them or of which they have simply convinced themselves). Hypothetically, this explains why in so many cases, notwithstanding the damages claimed by a given party, he has other underlying interests, to which he attributes even greater importance but which the letter of the law does not envisage – such as the continuation of the business relationship or merely the desire for a speedy solution which enables him to avoid greater losses.

In order for these solutions *to come to the fore*, the mediator's work – of ascertaining the true interests and needs of the parties and exploring the causes of the dispute – is essential. Communication can be re-established between the parties so that they can listen to each other (and perhaps even understand the other party's behaviour) and recover the trust lost during the dispute. Obviously, this wonderful scenario will not always come about but even it does not, when the mediation work is done well and when the parties are not absolutely closed to this possibility, even when it is not possible or convenient to mend the business relationship, it will certainly be possible – or at least more possible than with other ADRM – to quell the dispute and avoid incurring additional costs.

Everything discussed above regarding the purpose of the business relationship between the parties also applies of course, *a fortiori*, to any personal relationship existing between them. Imagine two siblings or friends that are at odds over a division of property: no solution will be deeply satisfactory for the two if the relational issue is not at least discussed.

2.2. CASE-BY-CASE ASSESSMENT, TIME AND STATUS OF THE DISPUTE

²⁴ In this vein, Croatian Supreme Commercial Court judge SRDAN SIMAC includes among the advantages of mediation for the parties the fact that all the details of the dispute are taken into consideration and not just those of legal significance (see SRDAN SIMAC, "Attorneys and Mediation", taken from the book *Mediation in Action / A Mediação em Acção*, 2008, pp. 52-61).

²⁵ MARIANA FRANÇA GOUVEIA, op. cit. p. 46.

²⁶ SRDAN SIMAC, *ibid.* pp. 52-61.

²⁷ See Article 4 of the Civil Code, Article 594(3) of the Civil Procedure Code and Article 39 of the VAA.

Despite the numerous advantages pointed out above, the success of mediation in Portugal depends, in our view, not only on more (and better) promotion of the mediation process and of these advantages, but also on the understanding that not all cases should be referred to mediation.

In other words, despite the broad concept of mediatability envisioned in Article 11 of the Mediation Act, there are cases that are not suitable for mediation even if theoretically they could be referred to this dispute resolution process. If such cases are referred to mediation, they will not have a great likelihood of success and will ultimately undermine the image of mediation and its high success rate.

In summary, in our view, any case involving the following should not be referred to mediation:

- (i) the dispute level is so high that dialogue is rendered unviable, or one of the parties vehemently rejects the possibility of negotiation or dialogue²⁸;
- (ii) one or both of the parties needs to establish a judicial precedent²⁹ or obtain *res judicata* in respect of certain facts which are essential for a subsequent application for a judgment against a third party in the exercise of the right of return;
- (iii) one of the parties is in a position of weakness which requires a more interventional stance than that of a mediator to restore material justice;
- (iv) one of the parties can only be bound by the decision of two or more persons and its representatives have diametrically opposed views as to how the dispute should be settled or as to the solution they consider acceptable.

Conversely, we believe that mediation will be very useful in cases where³⁰:

- (i) the parties have a conflicting view of the facts or law;
- (ii) the parties, or one of the parties, need(s) the other to listen to him and apologise;
- (iii) the parties are unable to communicate without an intermediary but there is still some possibility of or willingness for dialogue, or dialogue is being stymied by misunderstandings or preconceptions that can be dealt with by a trained neutral party;
- (iv) the parties view their interests as incompatible but there appears to be some leeway for compatibility;
- (v) the parties disagree as to the venue for the resolution of the dispute;
- (vi) the parties have difficulty in commencing a negotiation process or negotiations have reached a deadlock;
- (vii) it is necessary to protect trade secrecy issues;
- (viii) it is necessary to ensure or safeguard (insofar as possible) the relationship between the parties;
- (ix) the parties are dedicated to and interested in avoiding a) a lengthy and costly dispute, b) disruption caused by the monitoring and course of the same, as well as uncertainty about the outcome of judicial/arbitration proceedings, and c) seek to retain a certain degree of control over the final outcome.

In most cases, the parties themselves will not be in the best position to understand whether a given matter or dispute should or should not be referred to mediation as they are too involved in the matter. This filtration work should therefore be carried out by someone who is less involved in the dispute, such as the lawyers, judge or arbitrator(s) to whom the question is posed or the mediator that receives a certain case for mediation. The final decision as to whether to go ahead with the

²⁸ In this sense, PAULA YOUNG stresses the importance of recourse to mediation in the early stages of the dispute, before it reaches more advanced levels of contentiousness, by which time dialogue will probably not be an option, as the will of the parties will be driving them to litigation (See PAULA YOUNG, *The "What" of Mediation: When is mediation the right process of choice?* Available at <http://www.mediate.com/articles/young18.cfm> (accessed on 28.04.2016)).

²⁹ This example operates fundamentally for common law countries.

³⁰ This list closely follows PAULA YOUNG, op. cit. in the part citing HALL ABRAMSON, in *Mediation Representation: Advocating in a Problem-Solving Process*.

mediation process or otherwise will remain in the hands of the parties, but at least it will be a more informed choice. Especially in these first years of private mediation starting off in Portugal, it seems essential that mediators should also play this pedagogical role.

That said, provided that the filtration work is also carried out, there is no doubt that mediation will not only be an alternative dispute resolution method, in certain cases, but it will be *the most suitable means*³¹ for resolution of that dispute.

2.3. THE COMPARATIVE LAW EXPERIENCE

Private mediation, as we understand it today, appears to have begun in the United States of America at the beginning of the 1970s and is currently one of the main methods of dispute resolution.³² It is frequently included in the contracts of the largest US corporations and usually suggested by the courts.³³ However, as the USA is a federation of states, mediation is not implemented in an identical manner across its various states but diverges primarily with regard to the level of regulation³⁴ and even with regard to its compulsory or optional character.³⁵ Nevertheless, irrespective of the mediation model employed in each state, mediation has become an insurmountable reality, to the extent that most cases in the USA today are settled without needing to go to trial.³⁶

In the United Kingdom (particularly in England and Wales), mediation has been one of the main commercial dispute resolution mechanisms in the last ten to fifteen years³⁷ and has become increasingly more popular in settling disputes of any size. Despite the absence of any legislation or regulations on mediators or the functioning of mediation, the benefits of this dispute resolution method have been widely recognised³⁸ and it is becoming increasingly more frequent for the courts to suggest mediation. There are even several court decisions imposing fines on parties that fail to comply with or unjustifiably refuse to comply with this suggestion.³⁹ Whether owing to this persuasion factor or simply to a cultural issue or to the need to find alternatives to an expensive and heavily overburdened judicial system, mediation certainly appears to be considered in almost every case at present⁴⁰ and has seen an annual growth rate in the region of 15% since 2010.^{41 42}

³¹ The term “Adequate Dispute Resolution Method” as an option for the acronym ADRM instead of “Alternative Dispute Resolution Method”, is used by, among others, CARLOS ALBERTO CARMONA, in *A Arbitragem como Meio Adequado de Resolução de Litígios*, in PELUSO, Min. Antonio Cezar (org) RICHA, Morgana de Almeida (org) Conciliação e Mediação: Estruturação da Política Judiciária Nacional, Editora Forense, 2011, p. 298. In the same vein, but making use of the adjective *Appropriate*, see JEREMY LACK, in “Appropriate Dispute Resolution (ADR): The Spectrum of Hybrid Techniques Available to the Parties”, op. cit. pp. 334.

³² In some states, it is even said that mediation is more popular than arbitration.

³³ DANNY MCFADDEN, LL.M., FCIArb, *Developments in International Commercial Mediation: USA, UK, Asia, India and the European Union*, p. 11, available at <http://www.cedr-asia-pacific.com/cedr/uploads/articles/pdf/ARTICLE-20151015103818.pdf>, (accessed on 04.07.2016), p. 1 / *Chambers Legal Practice Guides – Litigation*, various authors, edited by Evan R. Chesler, Cravath, Swaine & Moore LLP, 2014, p. 1362.

³⁴ For example, unlike the case in New Jersey, mediation in Wisconsin and Arizona is completely informal and has no rules.

³⁵ See, as to this, on the one hand, at federal level, the 1998 Alternative Resolution Dispute Act, which requires the federal court to implement alternative dispute resolution methods and attributes to judges the power to refer on a compulsory basis certain cases to alternative dispute resolution procedures (including mediation) and, on the other hand, at state level, some specific laws of California, Delaware, Illinois, among others – See *Getting the Deal Through 2016, United States*, Law Business Research Ltd, London, p. 98.

³⁶ Although this resolution may not necessarily involve mediation but a negotiating process or a judicial mediation (sometimes closer to conciliation than to mediation).

³⁷ See *Chambers Legal Practice Guides – Litigation*, op. cit. p. 1313.

³⁸ It should be stressed that, according to the Sixth Mediation Audit of 22.05.2014 conducted by the Centre for Effective Dispute Resolution (CEDR), 71% of the users expressed a very positive attitude to the use of mediation, and that the value of the cases has been rising, currently nearing 9 billion pounds per year.

³⁹ *Dunnet v. Railtrack plc*, [2002] EWCA Civ 303, *PGF II SA v. OMFS Company 1 Limited*, [2013] EWCA Civ 1288 – both cited in *The Dispute Resolution Review*, various authors, edited by Jonathan Cotton, 2014 p. 233. In this last case, the court refuses to award the defendant its costs because it had initially refused to mediate the dispute. In the same vein, *Mediation in the UK today*, by Sir Henry Brooke, President of the Civil Mediation Council, on 02.02.2010, available at <http://www.cedr.com/articles/?item=Mediation-in-the-UK-today-by-Sir-Henry-Brooke> (accessed on 28.04.2016).

⁴⁰ See *Chambers Legal Practice Guides – Litigation*, 2014, op. cit. p. 1330.

Next comes Australia, which has been one of the main enthusiasts of mediation worldwide⁴³ for several years, probably followed by Canada⁴⁴.

In Europe, mediation gained a new impetus after the entry into force of the Mediation Directive in June 2008, although it only applies to international conflicts. The Mediation Directive has been transposed in nearly all of the European Union Member States (with the exception of the UK) and in some cases also applies to purely internal disagreements or disputes (for example, in the Portuguese legal order⁴⁵). Nevertheless, even prior to the approval of this Directive, important steps were taken in the 2002 Green Book and the 2004 European Code of Conduct to promote mediation in the European Union. The individual realities of each Member State are still very disparate although in most cases the judicial tradition remains very strong and there is a profound lack of awareness about mediation. This explains why, according to a 2014 study, 46% of the Member States, including Portugal, still have fewer than 500 mediations per year, in contrast to Germany, Italy, the Netherlands and the United Kingdom, with over 10,000 mediations per year.⁴⁶

In fact, despite the undeniable significance of the Mediation Directive, the Member States in which mediation has a more marked presence⁴⁷, such as the UK and the Netherlands⁴⁷, are countries that began to use it long before this Directive and in which institutional mediation has had an important role.

Mediation is on the rise in Norway, where there has been major state investment in mediation and where the courts may initiate judicial mediation or refer the case to non-judicial mediation at any time during the proceedings,⁴⁸ and this is seen as a very effective means of dispute resolution,⁴⁹ and in Sweden, despite the as-yet strong resistance from lawyers and the major importance of arbitration.⁵⁰

Outside of the European Union, though still in Europe, mediation has also been on the rise in Switzerland, largely due to the role played by the Swiss Chamber of Commerce.⁵¹

On the *other side of the world*, apart from Australia, the examples that stand out are those of Hong Kong, where mediation has gained a growing prominence since the implementation of the civil justice reform and the entry into force in 2010 of Practice Direction 31, which calls for a genuine attempt on the part of the disputants to settle the dispute through mediation;⁵² Vietnam, where mediation and conciliation are preferential ADRM, even being compulsory in certain disputes;⁵³ Malaysia, where recourse to mediation and the number of mediation centres have risen considerably;⁵⁴ and Singapore, which has invested heavily in positioning itself as a “venue for international mediation”.⁵⁵

Finally, in recent years, mediation has evolved very favourably in Latin America, particularly in Argentina, where it appears to be more in vogue than arbitration in almost every state of the federation;⁵⁶ and in Mexico, where mediation is optional but has been greatly encouraged by

⁴¹ GRANIA LANGDON-DOWN, *Commercial mediation: resolution revolution?*, 30.09.2013, available at <http://www.lawgazette.co.uk/law/commercial-mediation-resolution-revolution/5037884.fullarticle> (accessed on 03.05.2016).

⁴² See *Chambers Legal Practice Guides – Litigation*, 2014, op. cit. pp. 572, 587 and 588.

⁴³ *The Dispute Resolution Review*, 2014, op. cit. pp. 30-32 / DANNY MCFADDEN, LL.M., FCI Arb, *Developments in International Commercial Mediation: USA, UK, Asia, India and the European Union*, op. cit. p. 11-13.

⁴⁴ Mediation is much used in practically all the Canadian provinces and is actually compulsory in some, such as Ontario (See *The Dispute Resolution Review*, 2016 op. cit. p. 115; *Chambers Legal Practice Guides – Litigation*, 2014, op. cit. p. 221; *Getting the Deal Through – Mediation 2016, Canada*, op. cit. p. 29).

⁴⁵ See Article 1(2) of Directive 2008/52/EC and Article 2(a) of the Mediation Act.

⁴⁶ See DANNY MCFADDEN, *Developments in International Mediation: USA, UK, Asia, India and the European Union*, op. cit. pp. 7-8.

⁴⁷ *Chambers Legal Practice Guides – Litigation*, 2014, op. cit. pp. 877-878.

⁴⁸ *The Dispute Resolution Review*, 2014, op. cit. p. 611-612.

⁴⁹ *Chambers Legal Practice Guides – Litigation*, 2014, op. cit. p. 928.

⁵⁰ *Chambers Legal Practice Guides – Litigation*, 2014, op. cit. p. 1259.

⁵¹ *The Dispute Resolution Review*, 2014, op. cit. p. 753.

⁵² *The Dispute Resolution Review*, 2014, op. cit. pp. 330-331.

⁵³ *The Dispute Resolution Review*, 2014, op. cit. p. 842.

⁵⁴ *The Dispute Resolution Review*, 2014, op. cit. pp. 530-531.

⁵⁵ *Chambers Legal Practice Guides – Litigation*, 2014, op. cit. p. 1138 and 1148.

⁵⁶ According to the data from the *Comisión Nacional de Acceso a Justicia*, available at <http://www.cnaj.gob.ar/cnaj/docs/cuadro.jsp> (accessed on 11.07.2016).

CANACO, the Mexican Mediation Institute and local courts,⁵⁷ and offers very satisfactory success rates. Within this setting, Brazil too has seen a significant advance in the number of mediation procedures, which is expected to increase still further following the recent approval of the Brazilian Mediation Act and the amendments to the Brazilian Civil Procedure Code in 2015.⁵⁸

It is clear that the experiences and models adopted in each country are very different: some are more heavily regulated than others, some more voluntary than others, some more effective than others, some more entrenched than others. Nevertheless, in all of these countries, federations and states, a growing trend in the use of mediation can be detected, even greater than arbitration in some cases, and always accompanied by high success rates.⁵⁹ Faced with this empirical reality – corroborated by the studies and analyses that have been conducted in this respect – some of which are cited here, we have to ask ourselves why Portugal does not yet feature among this huge cast of private mediation actors.

3. CURRENT BARRIERS TO THE PENETRATION OF MEDIATION IN PORTUGAL

As stated above, despite all the unequivocal advantages that were listed in the previous chapter and this inspirational comparative law analysis, mediation is still not widely recognised, or at least widely used, in Portugal.

For this reason, before suggesting possible avenues for the development of mediation in Portugal, it seems vital to discuss in a little more depth the main barriers and difficulties it continues to face in order to envisage whether, and in what way, they can be overcome.

3.1. GENERAL LACK OF KNOWLEDGE (INSIDE AND OUTSIDE THE LEGAL WORLD)

Firstly, let us discuss the profound lack of knowledge that still exists in Portugal regarding mediation. From personal experience, this lack of knowledge exists, without any doubt, among the non-jurists and clients that contact us, but it also exists – which is perhaps more serious and requiring more urgent reparation – among many judges, jurists and lawyers. This lack of knowledge is usually aggravated by the age of the persons in question since mediation is a relatively new phenomenon in Western Europe and has only recently begun to be introduced into the curriculum (of some) of the national law faculties.

Moreover, with regard to lawyers in particular, the less closely connected they are with litigation (and especially with ADRM), the more tenuous their knowledge of mediation and how it functions. This aspect is particularly worrying because in larger law firms at least, it is not normally *litigation lawyers* that advise clients on contract drafting. The opportunity for making contractual provision for mediation clauses or pacts that has also proven to be essential to the rise in the use of mediation in Portugal, as we shall see below, is thus sometimes lost.⁶⁰

This lack of knowledge is very often justified with a historical or cultural argument relating to the naturally more bellicose or warlike profile of the Latin peoples. However, in a globalised and multicultural society such as our own, the cultural issue cannot be an impediment. It may certainly pose greater difficulties and explain a longer delay in its adoption, but it cannot be an impediment.

⁵⁷ *The Dispute Resolution Review*, 2014, op. cit. p. 561 / *Chambers Legal Practice Guides – Litigation*, 2014, op. cit. p. 846.

⁵⁸ *Chambers Legal Practice Guides – Litigation*, op. cit. 2014, p. 158.

⁵⁹ Success rates vary according to the penetration of mediation in each country and, naturally, as many have highlighted, the quality of the mediator and the commitment of the parties themselves. While not every country has compiled statistical data in this respect, some very positive and inspiring examples include Mexico, Singapore, the UK, and several US states, with success rates of between 70% and 95%.

⁶⁰ See Chapter 4.3 below.

The first major impediment is lack of knowledge – or, worse still, distorted knowledge – of what mediation is, its countless advantages and its growing use at international level.

3.2. CONFUSION WITH OTHER ADRM AND WITH OTHER MEDIATION EXPERIENCES (PUBLIC MEDIATION AND MEDIATION IN THE *JULGADOS DE PAZ*)

Continuing along the lines of the last section above, it is very common, especially among jurists, for there to be some confusion between mediation and other non-judicial dispute resolution methods, particularly conciliation and private negotiations between the parties.

Much ink has been spilled on the difference between these methods and therefore we shall limit ourselves in this respect to referring to MARIANA FRANÇA GOUVEIA's explanation in *Curso de Resolução Alternativa de Litígios*.⁶¹ However, it is common to find jurists who still view and treat mediation as a synonym of conciliation or are convinced that mediation is merely a negotiation with an unnecessary increase in costs. In certain circles, unfortunately, this is still the image that the judiciary and legal practitioners have of mediation, revealing, once again, a profound lack of knowledge about what mediation is and its advantages.

This confusion grows when we come across the existence of more evaluative – and thus far closer to conciliation – models of mediation and when we note the existence of foreign legal systems where the procedure classified locally as mediation appears, according to our canons, to be a conciliation process.⁶²

Moreover, public mediation (family, labour and criminal) and mediation in the *juizados de paz* very often has a negative influence on lawyers who have had contact with these forms of mediation, which are conducted in a less structured manner and perhaps by people with little training for the purpose. In this regard, the new Mediation Act also has the advantage of standardising the rules applicable to public and private mediation and of having set the tone for various mediator training and accreditation courses, held in particular by the *Instituto de Formação e Certificação de Mediadores Lusófonos* (“ICFML”).

3.3. RESISTANCE FROM LEGAL PRACTITIONERS

In a conflict situation, when the possibilities of dialogue with the other party have been exhausted (or this stage omitted), people usually turn to a lawyer before they decide how to proceed. They want to know their rights and likelihood of success before they make a decision, if for the only reason that in most judicial or arbitration actions parties must be represented by a lawyer. However, lawyers have been pointed to as the main barrier to the implementation of mediation in several legal systems.

According to HANNAH TÜMPEL,⁶³ head of the CCI's International ADR Centre, this resistance on the part of the lawyers is due, on the one hand, to their lack of knowledge about mediation and lack of preparation for accompanying and advising clients in a mediation procedure and, on the other, to the fee model usually applied by lawyers – still very focused on an amount/hour criterion – which can be penalising if it is not adjusted upwards in consonance with the greater efficiency and speed in the resolution of disputes through mediation.

Until such time as there is a generalised culture among lawyers regarding the benefits of mediation for the client and the essential role of the lawyer in the mediation process itself and until it is evident to them that it is satisfaction that keeps their clients loyal, it will be very difficult for

⁶¹ MARIANA FRANÇA GOUVEIA, op. cit. pp. 41-42, 47-50, 101-106, 119-123.

⁶² Examples of this appear to be Bahrain, China, Colombia, Dominican Republic, Italy, South Korea, Iceland and the United Arab Emirates.

⁶³ Cited by ANNA-MARIA TAMMINEM, in *Mediation – the new “international arbitration” for our generation?*, op. cit. available at <http://www.youngicca-blog.com/mediation-the-new-international-arbitration-for-our-generation> (accessed on 28.06.2016).

mediation to carve out a place for itself as a possible – and, in certain cases, more appropriate – method of dispute resolution.

3.4. NEED FOR JUDICIAL APPROVAL

Lastly, we should also highlight the issue of unenforceability of any agreement reached in mediation, which was expressed in Article 249.-B, inserted into the Civil Procedure Code by Law No. 29/2009, of 29 June (subsequently repealed by Law No. 13/2013, of 5 March) and which currently results from an *a contrario* interpretation of Article 9 of the Mediation Act.

Pursuant to the above-mentioned article of the Mediation Act, under the heading “principle of enforcement”, the only agreement made in a private mediation case conducted in Portugal that will be enforceable without the need for judicial approval⁶⁴ is one that meets the following requirements: *a)* it relates to a dispute which can be the subject of mediation and for which the law does not require judicial approval; *b)* it is an agreement which the parties have the capacity to enter into; *c)* it has been obtained through mediation conducted in accordance with the law; *d)* its contents do not involve a violation of public order and; *e)* it is one in which a dispute mediator from the list of mediators compiled by the Ministry of Justice has participated. In other words, unless one of the mediators included in the above-mentioned list of the Ministry of Justice has participated in the mediation case in question, any agreement obtained in mediation cannot be an enforceable instrument and will require judicial approval to be enforced.

This is undoubtedly a concern for any lawyer participating in a mediation process since it means that a client who had no desire to go to court and who decided to try mediation can later be faced with the need to apply to the courts to have the mediation agreement enforced.

However, the same holds true for most countries around the world, including for many where mediation is in vogue, but given the high success rate of mediation and voluntary compliance with the agreements reached through mediation it is not usually viewed as a problem. In fact, according to international experience, one of the greatest advantages of mediation, which stems fundamentally from its in-depth analysis of the case and the above-mentioned empowerment of the parties,⁶⁵ is precisely that it enables the parties to identify with the agreement reached, which they regard as having been chosen and accepted by themselves, thus reducing the probabilities of non-compliance and need for subsequent judicial (or arbitral) enforcement.

In any case, in order to mitigate this concern, as we have seen, immediate enforceability of the agreement is possible if the requirements of Article 9(1) of the Mediation Act, in particular, are fulfilled, guaranteeing the “*participation*”⁶⁶ of a mediator from the list compiled by the Ministry of Justice. Alternatively, as is the case with any non-judicial agreement, a mediation agreement may likewise count as an enforceable instrument if it entails the creation or recognition of an obligation or is drafted or authenticated by a notary or by other entities or professionals with the powers to do so,⁶⁷ as well as when credit instruments – even if these are only handwritten IOUs – are involved, provided in this case that the facts which constitute the underlying relationship are contained in the document itself or are alleged in the enforcement application.⁶⁸

⁶⁴ Even if there is nothing, in our view, to prevent this approval resulting from an arbitration award, given the equivalence between judicial and arbitration decisions by virtue of Article 48 of the CPC. This hypothesis is expressly provided for in Article 19(2) of Article 22(2) and (3) of the CAC-CCIP Mediation Regulation.

⁶⁵ See Chapter 2.1 above.

⁶⁶ In our view, this term permits the process to be conducted by a mediator that is not included in the above-mentioned list provided that he or she is accompanied in co-mediation, for example, by a mediator included in the Ministry of Justice’s list of mediators.

⁶⁷ See Article 703(1)(b) of the CPC and Article 38 of Law No. 76.-A/2006, of 29 May.

⁶⁸ See Article 703(1)(c) of the CPC.

4. POSSIBLE AVENUES OR SOLUTIONS

Once again, a comparative law analysis – extremely useful in a field where the avenue taken by the various countries has been much the same – reveals some common points among the factors mentioned by the different countries worldwide for the onset of mediation. From these, the following are particularly worthy of note: (i) the uncertainty and discredit of the judicial system, high judicial costs⁶⁹ and the need to reduce recourse to the judicial courts;^{70 71} (ii) the legal obligation for some cases to be referred to mediation or, at least, for participation in a mediation session, prior to instituting judicial or arbitration proceedings; (iii) the increasing number of suggestions made by the judicial courts regarding compulsory or optional mediation for the parties; (iv) the recognition and credibility of the mediation centres involved (v) the fact of mediation clauses being increasingly included in contracts entered into by the parties.

Naturally, the avenue taken in the Portuguese legal reality must be based on the pre-existing legal rules and the underlying legal, social and business culture. However, we believe that progress in mediation in Portugal will probably also involve some of the reasons highlighted above. Let us take a closer look:

4.1. COMPULSORY MEDIATION?

There are several countries where the recognition of mediation implied implementing legal rules that would make mediation compulsory, at least as a prior phase to filing a court action. This is the case in certain Canadian provinces such as Ontario, where mediation is a prerequisite for recourse to the courts, and British Columbia, which has a procedure whereby one of the parties can oblige the others to take part in mediation.⁷² In Hong Kong too, mediation has gained growing prominence since the implementation of the civil justice reform and the entry into force, in 2010, of the above-mentioned Practice Direction 31, which requires that the parties genuinely attempt to settle the dispute through mediation or risk a penalty for costs that could have been avoided. Likewise, in Australia, the 2011 Federal Court Rules oblige the parties to consider and take “*genuine steps*”, in the sense of using non-judicial dispute resolution methods, under penalty of both the parties and their lawyers being liable for the costs incurred (Section 12 of the Civil Disputes Resolutions Act).⁷³

This is also the model profiled in some of the states that make up the USA, including, for example, the state of Minnesota; in Argentina, in both Buenos Aires state law and at federal level; and in Brazil, by virtue of Article 334 of the new Brazilian Civil Procedure Code, as amended in the 2015 reform, which requires that the parties attend a prior mediation session under penalty of being liable for the costs of the proceedings, similarly to what happens in other Latin American

⁶⁹ In Canada, for example, where costs and the expenditure of time and money are held up as the reason for the strong uptake of mediation in the various provinces, which is even compulsory in some cases (See http://www.lexmundi.com/lexmundi/Guides_To_Doing_Business.asp. Canada, Ontario, p. 200, prepared by *Blake, Cassels & Graydon LLP / The Dispute Resolution Review*, 2014, op. cit. p. 137).

⁷⁰ In Brazil, for example, this purpose was in fact expressly taken on board by the lawmakers when approving the new Law No. 13.140, of 26 June 2015, which makes provision for mediation between private parties as a means of settling disputes and on the self-composition of disputes within the scope of the public administration – See the CONSELHO NACIONAL DE JUSTIÇA article available at <http://www.cnj.jus.br/noticias/cnj/79761-com-apoio-do-cnj-leida-mediacao-e-sancionada-pelo-executivo> (Translation: With the support of the CNJ, the Mediation Act is sanctioned by the Executive). (Accessed on 27.07.2016).

⁷¹ Nevertheless, in other countries such as Germany, for example, the same criterion is used to justify the still diminutive use of mediation, given the efficiency of the German judicial process and well-known impartiality of its judges. (See *Chambers Legal Practice Guides - Litigation*, 2014, op. cit. p. 488).

⁷² See http://www.lexmundi.com/lexmundi/Guides_To_Doing_Business.asp. op. cit. p. 200.

⁷³ *The Dispute Resolution Review*, 2014, op. cit. pp. 30-32 / *Chambers Legal Practice Guides – Litigation*, 2014, op. cit. pp. 43-44 and 66-67.

countries.⁷⁴ In Europe too, mediation is compulsory in Italy, for example, although the compulsory requirement initially raised issues of unconstitutionality.⁷⁵

In Portugal, compulsory pre-judicial mediation may or may not be an unreasonable restriction on the right of access to justice, depending on the type of dispute in question and the justification for and suitability of mediation as the most rational allocation of access to justice and/or as a new dispute resolution approach.⁷⁶ However, since the higher or lower success rate of compulsory mediation as opposed to optional mediation is not obvious, in our opinion, imposing a compulsory pre-mediation judicial/arbitration stage in the Portuguese legal order would probably be seen as a procedural stage that delays the resolution of the dispute.

4.2. PUBLICISING AND PROMOTING MEDIATION, ESPECIALLY TO THE LEGAL COMMUNITY

In the US, disseminating mediation involved teaching this non-judicial method of dispute resolution at law faculties, raising the awareness of the judges to its importance and, lastly, publicising it among clients.⁷⁷

In Portugal, this dissemination work is especially necessary as regards those involved in the law, particularly lawyers, judges and arbitrators who, as we have seen, continue to hamper growth in the use of mediation, owing to a lack of knowledge or concern, or both.

(i) The importance of lawyers in mediation (and their perception of this fact)

Under Article 18(1) of the Mediation Act, the presence of lawyers in the mediation process is optional. This means that the parties may in theory present themselves for mediation alone, without being accompanied by lawyers, and this is one of the main concerns of the latter with regard to mediation (i.e. the fact that they might become unnecessary or see their incomes diminished).

However, the presence of lawyers in mediation is very important and, to the extent that this is the case, clients will not give it up. Indeed, the presence of lawyers is even desirable in most cases and is thus encouraged by various mediation institutions. Firstly, it is for the safety of the party in question (who will feel more confident if he feels that his lawyer will be present to clarify any doubts and to make sure he does not accept an unfavourable decision); secondly, it is to monitor the mediator's activity, in particular with regard to compliance with the fundamental principles that make mediation credible and guarantee material justice (e.g. equal treatment of the parties, voluntariness and confidentiality and mediator independence and impartiality⁷⁸); and thirdly, it is to confirm the subsequent enforceability of the agreement reached. It must not be forgotten either that the lawyer can (and should) also have an important role in preparing the client for the mediation, in drafting the agreement between the parties, and in monitoring compliance with the same.

Nevertheless, as highlighted above, many lawyers are still unaware as to what mediation truly consists of, how it is processed and what are its advantages and drawbacks (or still have misgivings about these advantages), seeing mediation primarily as a threat to their own services, either from the potential decrease in the number of disputes, or from the fact that clients can appear alone. For this very reason, it appears that there is still a great deal of instruction to be provided for lawyers in this respect.

To this end, it is firstly essential to introduce the teaching of mediation in schools and universities by holding courses, training sessions, and post-graduate and master's courses where the

⁷⁴ The insertion of this article and its relationship with the positive experience of other Latin American countries some years earlier, which Brazilian law took as its basis, were especially pointed out by RODRIGO GARCIA DA FONSECA, in his presentation on Mediation in Brazil on 07.07.2016 at the 10th Commercial Arbitration Congress held by the CAC-CCIP in Lisbon.

⁷⁵ *Chambers Legal Practice Guides - Litigation*, 2014, op. cit. p. 636 / *The Dispute Resolution Review*, 2014, op. cit. 438-439.

⁷⁶ See, in this vein, PAULA COSTA E SILVA, *A Nova Face da Justiça – Os Meios Extrajudiciais de Resolução de Controvérsias*, 2009, pp. 71-72.

⁷⁷ STEPHEN GOLDBERG, *Segunda conferência de meios alternativos de resolução de litígios*, 2005, p. 93.

⁷⁸ See, in particular, Articles 3 – 9 of the Mediation Act.

topic is addressed, by including mediation in the compulsory contents for access to the [Portuguese] Bar Association, as well as on the agenda for arbitration training sessions, conferences and courses,⁷⁹ and by holding specific mediation-related conferences which involve renowned jurists or lawyers.

Moreover, much can (and should) also be done within the law firms themselves, particularly if we take into consideration that, at least in larger law firms, attendance at the events and courses suggested above is usually restricted to lawyers who are members of litigation and arbitration groups. However, apart from the undeniable importance of these lawyers, who are called upon to advise the client as to the advantages or drawbacks of referring a given dispute to mediation (either at a pre-litigation phase or during the course of a judicial or arbitration action), *corporate lawyers* are also essential for mediation to take off in Portugal, since it is very often these lawyers who participate in the drafting and revision of most of the business contracts entered into by their clients and who are thus in a better position to suggest the inclusion of mediation clauses.

In essence, for lawyers to be able to provide their clients better advice about mediation, helping them differentiate between which cases can (or should) be referred to mediation,⁸⁰ it is vital for them to realise (i) that mediation is far more than a negotiation supported by lawyers; (ii) that the mediator is a trained professional who follows a structured and usually swifter, more effective and satisfactory process for the clients; (iii) that the success rate in countries that have invested in mediation is in the region of 80%; (iv) that in Portugal mediation already has a specific legal framework which makes provision for referring a given case to mediation at the suggestion of the judge or the decision of the parties, thus staying the proceedings for a maximum period of 3 months provided that this does not imply postponement of the final hearing,⁸¹ and for the suspension of the limitation and expiry periods as from the time the mediation protocol is signed⁸²; (v) and that there are various mediation centres of undeniable reputation already operating in Portugal.⁸³

Furthermore, it should not be forgotten that mediation also carries several direct or indirect benefits for lawyers themselves, notable among which are: (i) good professional reputation owing to client satisfaction, (ii) speed in the payment of fees and lower risk of default by dissatisfied clients, (iii) more efficient time management, (iv) in-depth knowledge of the clients and of their interests, which is very often not explored in a judicial or arbitration backdrop⁸⁴ and (v) a broadening of the services offered to the client.⁸⁵

Lastly, let us emphasise yet another aspect that is not to be underrated in a lawyer's career: effective and positive participation in a mediation process represents an enormous professional challenge for lawyers and increased exigence in terms of creativity and taking a step away from the strict letter of the law. In this sense, KARL MACKIE, Executive Director of the CEDR, says that for lawyers the role in mediation and the very suggestion of mediation is a significantly more difficult task, since it calls for finer and more delicate advocacy, with the capacity to conduct a critical analysis of our own case, counterbalancing the interests and goals of our client, with a cost-benefit analysis associated with his satisfaction in court and with a reality check of our own position and that of the other party, together with a macro-analysis of the client's satisfaction with the obtained

⁷⁹ An example of this is the inclusion of the mediation module in the Law and Arbitration Master's Degree at the Faculty of Law of Universidade Nova de Lisboa and the inclusion of a panel on mediation at the 10th CAC-CCIP Arbitration Congress of 2016, at which Rodrigo Garcia da Fonseca was a speaker.

⁸⁰ Stressing once again that not all cases should be submitted to mediation (See Chapter 2.2 above) and that the lawyer has an important role in explaining this to the client and in analysing whether or not mediation is suitable in each specific case.

⁸¹ See Articles 273, 272(4) and 276(1)(c).

⁸² See Article 13(2)-(6) of the Mediation Act. See also, in this respect, Article 7 of the CAC-CCIP Mediation Regulation, which develops a little further (or ultimately contradicts) the above-mentioned provision of the Mediation Act concerning when the stay of these time limits begins.

⁸³ We will address this point in greater detail in the next chapter but let us emphasise here, owing to their particular importance in civil and commercial matters, the mediation centres set up at the CCI, the CAC-CCIP and Concórdia.

⁸⁴ In the same vein, see HANNAH TÜMPEL, cited by ANNA-MARIA TAMMINEM in *Mediation – the new “international arbitration” for our generation?* Op. cit. Available at <http://www.youngicca-blog.com/mediation-the-new-international-arbitration-for-our-generation> (accessed on 28.06.2016).

⁸⁵ SRDAN SIMAC, “Attorneys and Mediation”, op. cit. pp. 61–69.

result (when there has been one, in terms of time, cost and gain).⁸⁶ Such intellectual stimulus and effort can only be extremely positive for those who work towards the satisfaction of their clients' interests on a daily basis.

That said, and irrespective of the best way of conveying this message, this situation is in need of urgent repair because, as accurately noted by MARIANA FRANÇA GOUVEIA, it is only when lawyers embrace the mediation cause that it will have a successful uptake in Portugal.⁸⁷

(ii) The importance of referral to mediation during judicial or arbitration proceedings

Under Article 273(1) of the Civil Procedure Code, “[a]t any stage of the proceedings, and whenever the judge deems it convenient, he may refer the case to mediation and stay the proceedings, except when either of the parties expressly opposes such a referral” but, to date, the VAA has no equivalent provision.

It is true that the simple insertion of this article into the Civil Procedure Code already represents a major advance in the acknowledgement of mediation in Portugal. However, it is also true that, prior to the 2013 reform, the wording of the Civil Procedure Code included three mediation-related articles, inserted, at the time the Mediation Directive was transposed, by Law No. 29/2009 of 29 June, which are currently integrated, with some alterations, in our Mediation Act. While it is easy to comprehend this measure from a legislative policy perspective in order to bring together all the mediation provisions into a single legislative instrument, from a standpoint of the legal training and education in mediation still required in this country, we are not sure that this was the most appropriate option, as it makes generalised knowledge of the same difficult.⁸⁸ Nevertheless, this is a *iure condendo* issue, which lies outside the objective and scope of this article and of the analysis we propose to carry out herein.

Accordingly, in this context too, the holding of more training sessions and courses is essential, but this time specifically targeting the judiciary and the arbitrators. The latter, who are very often law professors or lawyers, may of course be included in the training sessions and events referred to in the preceding chapter. However, a training programme specifically targeting arbitrators registered with the main national arbitration centres would perhaps be more effective, particularly at those where mediation centres are (or provision is made for them) to be in operation.

It is imperative that both judges and arbitrators should know more about mediation, that they can see the advantages of mediation for reducing litigation and diminishing the number of pending court cases, and that they are aware that in many countries it was due to the intervention of their peers that mediation attained the status it holds today⁸⁹.

4.3. THE INCREASING NUMBER OF CONTRACTS CONTAINING MEDIATION PACTS

Together with these initiatives of a more informational or promotional content and in order for mediation to finally begin to make its mark on the Portuguese business world and the day-to-day of

⁸⁶ See KARL MACKIE, “Are lawyers falling short in mediation?” *The Barrister*, 2006, available at <http://www.cedr.com/articles/?item=Are-lawyers-falling-short-in-mediation> (accessed on 28.04.2016).

⁸⁷ MARIANA FRANÇA GOUVEIA, op. cit. pp. 52-53.

⁸⁸ Another possibility, for example, would be that traced out in the new Brazilian Civil Procedure Code of 2015 (Law 13.105, of 16 March 2015), in which the lawmakers do not limit themselves to making provision for the possibility of recourse to mediation but actually discuss mediation and its principles, going so far as to exhort those involved in the law to make use of it and to demand that the claimant should state in the statement of claim whether or not she opts for the holding of a mediation or conciliation hearing (See, in particular, Articles 3(3), 165-175, 319.-VII and 334). Once again, from the standpoint of a systematic organisation of legislation, this increase in information may not be convenient, but it will certainly be very useful in the dissemination and growing use of mediation in Brazil and compel persons to consider it.

⁸⁹ This was the case in England, Ireland, Australia, Mexico, Argentina, Canada, and in the vast majority of the US state courts, by virtue of the frequent referral of cases to mediation by the local courts. The system in Ghana should also be highlighted, owing to its particularity, as it is very frequent for the courts to refer certain actions to mediation, subject to the proviso of the parties' acceptance, in which case any agreement reached has the force of an arbitral award (and constitutes in that case a final decision not subject to appeal) – See *The Dispute Resolution Review*, 2014, op. cit. p. 295.

its lawyers, increasing the number of contracts that contain mediation clauses would also appear to be essential.

In effect, despite recourse to mediation not being compulsory in Portugal (and while we do not even believe that such a legal obligation would be beneficial since it would subvert the voluntary nature of the figure⁹⁰), if the parties agree in the contract that any dispute will be settled by *ad hoc* or institutional mediation – preferably elaborating on the relevant terms or inserting a reference to a given mediation regulation – , mediation will increasingly become the *order of the day*. The solution may involve a clause that combines different dispute resolution methods, for example, mediation followed by arbitration (usually referred to as *med-arb* clauses).

Moreover, as parties show some reluctance in accepting a contractual provision for compulsory referral of the case to mediation as a sole dispute resolution method,⁹¹ or even in accepting an obligation to engage in mediation prior to instituting any judicial or arbitration proceedings, intermediate and creative solutions capable of satisfying the interests of our clients may be found. These could include (i) compulsory referral of the case to mediation prior to instituting any judicial or arbitration proceedings and immediately stipulating a maximum period at the end of which the parties can move on to litigation, or even (ii) a stipulation that recourse to mediation, though recommendable, will always be optional. Even in this latter hypothesis, the inclusion of mediation has a pedagogical and informational relevance in the immediate term which may be developed or gone into more depth at a later stage, specifically through comparative law statistics, for a given dispute, providing support for the client in pondering and quantifying their *BATNA* and *WATNA*.⁹² Who knows whether by the time there is any dispute, mediation will be so rooted in the Portuguese legal order that the parties themselves, faced with the clause they caused to be included in the contract years earlier, will have not the slightest doubt as to their intention to settle the matter at issue between them in this way?

Lastly, let us make a brief note regarding the consequence of instituting proceedings in a judicial court or arbitration tribunal in disregard of a contract clause providing for prior referral of the case to mediation, which of course depends on the wording of the mediation clause in question. However, under Article 12(4) of the Mediation Act, “[t]he court in which an action regarding a matter covered by a mediation pact is instituted shall, at the application of the defendant filed up to the time the latter files his first pleading regarding the basis of the claim, stay the proceedings and refer the case to mediation”. This means, on the one hand, that the judicial court or arbitration tribunal is not obliged – and, in our view, cannot be obliged – to raise the issue if the parties did not do so and, on the other, that breach of such a clause can never result in the dismissal of the case against the defendant but, at the very most, in a stay of the proceedings for the above-mentioned maximum period of three months.⁹³ Nevertheless, even this penalty should only operate if the mediation clause in question makes provision for compulsory recourse to mediation, at least as a prior step to judicial or arbitration proceedings. If this is not the case, breach of a clause which makes provision, on an optional basis, for prior referral of the case to mediation is unlikely to result in any kind of consequence for the infringer.

For this very reason, in these early stages of mediation in Portugal, the introduction of a costs rule that would benefit/reward the prior use of mediation and, conversely, penalise the non-use of

⁹⁰ As we had the opportunity to explain in Chapter 4.1 above.

⁹¹ A solution which we do not advocate either.

⁹² The parties’ difficulty in calculating their chances of success and failure (*BATNA/WATNA*) is highlighted by JOAQUIM PAIVA MUNIZ as precisely one of the main obstacles faced by mediation in Brazil in the recent past (See *Por que a mediação empresarial ainda não faz sucesso no Brasil?* *Swisscam Magazine* 73, 09/2013, pp. 9 and 10).

⁹³ The solution reached still falls short of the current provisions on breach of an arbitration commitment clause, which amounts to breach of a private jurisdiction agreement and thus determines the absolute lack of jurisdiction of the judicial court in which the proceedings were initiated (See Article 94 of the Civil Procedure Code), even though it is not decided of the court’s own motion and the action cannot be simply referred to the court of jurisdiction (See Articles 97(1) and 99(2) and (3)).

the same in contravention of an optional mediation clause, whether in judicial or arbitration proceedings, would be interesting.⁹⁴

4.4. COMMITTING TO INSTITUTIONAL MEDIATION

Lastly, one final word regarding mediators and their growing credibility as a key element for the smooth functioning of mediation.

As we have been highlighting in this article, mediation is a self-composition dispute process conducted by the parties and for the parties. However, as also mentioned above, while mediators do not dominate the process – or even any agreement that is entered into – they have a key role to play throughout the mediation in ensuring effective and productive communication between the parties, without any aggression, qualifying statements or position-taking, but instead strive for true satisfaction of the parties in a compromise perspective wherein both are winners. For this reason, it is very often said that the success of mediation largely depends on the quality of the mediator.

Within this context, recourse to a mediation centre or private mediation institution will certainly be an asset since it affords the parties access to a list of carefully selected mediators, many of whom are accredited and some of whom may be included in the Ministry of Justice’s dispute mediator list (and, consequently, provide the possibility of attributing enforceable power to any agreement), as well as to a set of rules that guarantee a structured process.

For all of these reasons, the performance and quality of the services provided by mediation centres, such as those currently in operation at the CCI, CAC-CCIP and Concórdia, especially at this initial stage, will, in our view, be extremely important, including for boosting the credibility of the mediators nominated in each case. To this end, the insertion of ethical rules applicable to the activity of mediator either in the centre’s regulation⁹⁵ or by referral, for instance, to the European code of conduct,⁹⁶ will be extremely useful.

In light of the above, particularly in these early days of mediation in Portugal, an additional (and preferred) recourse to institutional mediation – for which provision is made, where possible, *ab initio* in the contract mediation clause – as opposed to *ad hoc* mediation seems advisable.

5. CONCLUSIONS

From the comparative law analysis conducted throughout this article, it is clear that mediation has played a marked role in recent years in the resolution of disputes in various legal orders across the world – even superseding arbitration in some cases.

The effectiveness of private, civil and commercial mediation in obtaining swifter solutions that are better adjusted to the intentions of the disputants stems from the outset from the control these have over the mediation process and its final outcome (i.e. the “empowerment” of the parties).

In effect, mediation is a process of the parties, selected and controlled by them at all times, and conducted in accordance with their true interests and needs, even when these find no express provision in the letter of the law. Unlike in a judicial or arbitration setting, mediation advocates a clear division between the legal dimension and the affective and psychological dimensions of the dispute – essential in most cases for clarifying the interests and needs of each party - and the mediator’s intervention is fundamental in this context. In fact, it is the only dispute resolution mechanism capable of bringing the current dispute to an end and, at the same time, preventing the

⁹⁴ In this vein, see Article 4 of the Fees and Costs Appendix of the CCI Mediation Regulation, which includes an incentive for mediation by reducing prior arbitration costs. In the same vein, see Article 2(3) to (5) of the Concórdia Mediation and Conciliation Regulation.

⁹⁵ See CAC-CCIP Mediation Regulation, Schedule II of which includes a code of conduct.

⁹⁶ See Article 5(3) of the Concórdia Mediation and Conciliation Regulation, in which a referral is made to the European Mediators Code of Conduct.

occurrence of future disputes between the parties, through more creative and satisfactory solutions for both parties.

Obviously, for the reasons given above, not all disputes should be submitted to mediation – even if they can in theory be mediated – and in this respect thorough filtration work is required on the part of the lawyers and mediators involved. However, once this case-by-case assessment has been carried out, as long as the parties are in good faith and there is a possibility of approximating their interests, the success rate of mediation in dispute resolution is truly very positive. Likewise, the voluntary compliance rate with agreements reached in mediation is high because these agreements stem from the intentions and autonomy of the parties rather than from an imposition by third parties endowed with greater or lesser powers of authority. Nevertheless, under the recent Portuguese Mediation Act approved in 2013, it is sufficient that any mediation process includes the participation of a mediator from the Ministry of Justice’s list of dispute mediators in order for the final agreement reached by the parties, after being signed by that mediator, to be an enforceable instrument.

However, despite all these advantages, the recent legislative efforts and the impressive and exciting comparative law experience, mediation is still in its early stages in the Portuguese legal order and our businesspeople and – worse still – those involved in the law barely even know about it.

This perplexity inspired the present article: ultimately what is lacking for mediation to become a reality in Portugal?

Having analysed what appear to be the main barriers or difficulties which mediation has been facing in the Portuguese legal order, what is especially lacking, in our opinion, is additional intensive work on disseminating mediation (particularly, among our lawyers, judges and arbitrators) and raising their awareness to the advantages of mediation, whether for them or for the parties. This promotional impetus, together with the implementation of a growing practice of including mediation clauses in contracts entered into by the parties and investment in institutional mediation as a way of lending credibility to a still innovative method of dispute resolution in this country, will be essential for the success of mediation in Portugal in the short term.

One thing is certain: mediation will necessarily be the *order of the day* in the coming years. Its practical implementation cannot be delayed, especially in a judicial panorama such as our own where sluggishness and cumbersomeness are watchwords and where judicial decisions do not always mirror the interests of the parties.

It is this certainty that makes us wish to advocate mediation more and more and to contribute towards its implementation and actual use in Portugal in cases where it proves to be an appropriate means for the resolution of the issue or dispute in question, trusting that in this way we will be contributing to the advancement of justice, social concord and business relationships in Portugal.

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