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A New Path For Public Utility Expropriations Disputes In Brazil: Arbitration And Mediation

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On August 26, 2019, Brazil's President sanctioned Statute # 13.867/2019, which inserts provisions in the Brazilian expropriation for public utility statute (Federal Decree 3.365/41). One of the most innovative provision of Brazil's new law is the possibility of submitting disputes related to expropriations to mediation and arbitration, according to Brazil's mediation Statute and arbitration Statute.

This legislative innovation is welcome as it paves the way for the use of ADR in matters related to expropriation. This is important because it is common to have disagreements between the individuals and the public authority as to the amount to be paid as indemnification. These disagreements eventually lead to disputes that extend for years before the Judiciary.

Brazil's standard for indemnification for expropriation is quite similar to the internationally recognized threshold: compensation must be adequate, fair and immediately paid. However, it is often seen that the parties do not agree on what a fair market value is for a certain property that has been expropriated. When these disputes are submitted to Brazilian courts, they may take up to 10 years or more to be finally settled.

Undoubtedly the time spent for settling disputes in courts might simply taint any idea that such compensation be considered fair, or even lead to allegations of denial of justice from the individual that has not been properly compensated.

The use of mediation or arbitration can be an alternative to reduce the time spent in defining what a proper compensation entails. This is because of the flexibility and expertise of mediation and arbitration procedures, and lack of appeal procedures, that tend to allow conflicts to be resolved much faster.

The new statute is flexible in its language, as it allows the individual to choose mediation or arbitration in cases related to expropriation, but does not require such use. In other words, the cornerstone principle of ADR (adequate dispute resolution) in Brazil is still respected: the autonomy of the parties.

To understand how the new provision of the Brazilian expropriation act works, one must be mindful of the expropriation procedures under Brazilian Law. In Brazil, according to the Expropriation Act (Federal Decree # 3.365/1941), an expropriation must be preceded by: (i) a decree declaring the property of public interest; (ii) an evaluation of the property unilaterally made by the State; (iii) a compensation proposal made by the government; and (iv) a deposit of the amounts equivalent to the compensation.

The procedure envisioned by the new statute allows the Government to offer the expropriated individual the option of submitting any dispute to mediation or arbitration when the compensation proposal is made. This is important, as the statute itself cannot be interpreted as an unequivocal offer to arbitrate, as Bilateral Investment Treaties' dispute resolution provision are generally interpreted. The statute allows the expropriating authority to offer the mediation or arbitration alternative to the individual when the offer of compensation is made.

Thus, in its offer of compensation, the State must also indicate the institutions to which it agrees to refer the dispute to mediation or arbitration, which must be previously registered with public authorities (art. 10-B of the new Statute). This is another important point: any mediation or arbitration procedures must be institutional, and there is no express legislative permission for the Government to use the so-called *ad hoc* arbitrations.

Hence, if the individual does not accept the compensation proposal made by the government, and chooses to dispute the proposed amount, it will have three possible paths to dispute the proposed compensation: (i) the already traditional judicial process; (ii) mediation, following the rules of Statute # 13.140/15, or (iii) arbitration, following the rules of Statute # 9.307/96.

If the individual chooses to settle the dispute through mediation or arbitration, he/she must appoint one of the organs or institutions specialized in mediation or arbitration previously registered by the entity responsible for the expropriation.

Despite the numerous criticisms that may be made by the unspoken prohibition on the use of *ad hoc* mediation or arbitration, it should be noted that the new Statute uses the same legislative option as the state of Minas Gerais and the state of Rio de Janeiro in disciplining arbitration related to public entities. In these cases, the express legislative authorization for the public administration to use mediation and arbitration always refers to the so-called institutional procedures, with the mediation and arbitration institutions of recognized good reputation, competence and experience in the administration of mediation or arbitration proceedings.

There are, however, a few points of concern in relation to the new statute.

First, the new statute still awaits further regulation of the government in relation to the registry of mediation and arbitration institutions. It is expected that Brazil's Federal Government takes the same approach as the State of Minas Gerais and Rio de Janeiro, in order to maintain some uniformity between federal and state regulations.

Secondly, as we have alluded before, Brazilian authorities still have a great deal of

discretion not to arbitrate disputes related to expropriation, if they choose not to insert the mediation or arbitration option in the compensation offer sent to the expropriated individual.

Therefore, for the time being one can simply hope that the announced and desired efficiency of the Brazilian Federal Government extends to this new regulation, providing soon for the registry of the mediation and arbitration institution and incorporating the offer to mediate and arbitration in the compensation proposals.

If such practices are soon implemented, it would be expected that the use of ADR methods in expropriation procedures will allow disputes to be settled in more reasonable time lapses, thereby providing for a fairer compensation procedure.

Thus, it seems to us that Statute # 13.867/19 should be well received. We have to wait and hope that, on one hand, the public authorities will do their part and use this new exceptional conflict resolution alternative in cases involving the public administration, registering specialized institutions, their conditions and their costs, and, on the other hand, individuals will be able to properly use this great new alternative for expropriation cases.

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