

TRENDS IN ALTERNATIVE DISPUTE RESOLUTION CONCERNING INTELLECTUAL PROPERTY: A BRAZILIAN PERSPECTIVE

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INTRODUCTION

The Brazilian government recognized the increasingly important role intellectual property (IP) played in its economy when it enacted the Industrial Property Law in 1996,¹ the Plant Variety Rights Law in 1997,² and the Copyright³ and Software⁴ laws in 1998. The World Trade Organization (WTO) and the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS)⁵ played a decisive role in developing these laws. Brazil's interests in the opportunities international markets offered are certainly tied to the acceptance of improved levels of protection.⁶ The TRIPS transformed intellectual

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1. See Lei No. 9.279 arts. 1, 2, de 14 de Maio de 1996, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 15.5.1996 (Braz.).

2. See Lei No. 9.456 arts. 1, 2, de 25 de Abril de 1997, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 28.4.1997 2009 (Braz.).

3. See Lei No. 9.610 art. 1, 2, de 19 de Fevereiro de 1998, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 20.2.1998 (Braz.).

4. See Lei No. 9.609, de 19 de Fevereiro de 1998, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 20.2.1998 (Braz.).

5. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (1994) [hereinafter TRIPS Agreement].

6. See Hans Ullrich, *Expansionist Intellectual Property Protection and Reductionist Competition Rules: A TRIPS Perspective*, in INTELLECTUAL PUBLIC

property rights (IPR) by putting an emphasis on its commercial aspect in comparison to the international treaties in force prior to the TRIPS.⁷

IPR have a public and private component.⁸ The emphasis on one component of IPR inevitably creates conflict. One recent example of this conflict is the cross-retaliation between Brazil and the United States based on IPR and cotton plant producer subsidies.⁹ What is the relation between royalties paid to the U.S. film industry and subsidies paid to the U.S. agricultural sector? Both situations, namely protection of IPR and subsidies to an economic sector, fall within the scope of the WTO and the General Agreement on Tariffs and Trade (GATT).¹⁰ Consequently, these agreements may be involved in a cross-retaliation mechanism¹¹ contemplated by the signatory countries to the agreements, aimed at strengthening the commitments assumed thereunder. Due to the emphasis on the commercial component aspect of IPR by the TRIPS, the copyright owners end up having their rights suspended by cross-retaliation under the WTO mechanism.¹² Another

GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED REGIME 726, 734 (Keith E. Maskus & Jerome H. Reichman eds., 2005); see also PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM—WHO OWNS THE KNOWLEDGE ECONOMY? 192 (2002).

7. Compare Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at Stockholm, July 14, 1967, 21 U.S.T. 1583 [hereinafter Paris Convention], and Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971, 25 U.S.T. 1341, with TRIPS Agreement, *supra* note 5.

8. The public aspect is a state's recognition of the need to grant IPR to foster competition, innovation, and investments. On the other hand, the private aspect relates to the economic advantage granted to a private party.

9. Appellate Body Report, *United States—Subsidies on Upland Cotton*, ¶ 1, WT/DS267/AB/R (Mar. 3, 2005) [hereinafter *Cotton Subsidies*].

10. General Agreement on Tariffs and Trade arts. IV, VI, Oct. 30, 1947, 55 U.N.T.S. 189.

11. The WTO Agreements idealized cross-retaliation, which is a penalty and is the mechanism that allows that the non-fulfillment of an obligation under one of the agreements allows consequences to be drawn from matters inside another agreement. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 299 (1994).

12. See *Cotton Subsidies*, *supra* note 9. Brazil was authorized to sustain certain obligations assumed under TRIPS and the GATT. *Id.* ¶ 763; see also Karin Klemp Franco, *Dois Criadores e Duas Criaturas: Da relação entre a proteção à propriedade intelectual no Brasil e os subsídios governamentais americanos aos*

example of conflict between the private and public components of IPR is the subject of this essay: alternative dispute resolution (ADR) procedures for IP disputes. Even though private parties have agreed on a solution for a given dispute, the public component of a right may render such solution ineffective, which will be analyzed in more detail below.

Within the myriad of topics that may be addressed under such a comprehensive title, this essay shall focus on the following procedures, which are considered to be of relevance within the current Brazilian scenario: (I) arbitration, (II) conciliation, (III) mediation, (IV) the procedure of the National Council of Advertising and Self-Regulation, and (V) the procedure for resolution of Brazilian country code top level domain names (i.e., “.br”) conflicts.

I. ARBITRATION IN BRAZIL: A LONG PATH TRAVELED AND ACHIEVED

A. The Hurdles of the Brazilian Constitution

At first, business partners were reluctant to use arbitration; it was not until 2001 that arbitration was finally recognized as a method for dispute resolution that was consistent with the Brazilian Constitution.¹³ The Brazilian Supreme Court held that Brazilian Arbitration Law comports with the Brazilian Constitution and the fundamental right to access the judiciary.¹⁴ Consequently, an arbitral

produtores de algodão, 3 REV. ELECTRONICA DO IBPI - REVEL 115, 120 (2010) (Braz.), available at <http://www.ibpibrasil.org>; Claudio Lins De Vasconcelos, *Sobre Feitiços e Feiticeiros: a “Cruzada da Retaliação” no Comércio Internacional*, 3 REV. ELECTRONICA DO IBPI - REVEL 90, 101 (2010) (Braz.), available at <http://www.ibpibrasil.org>.

13. S.T.F., Agravo Reg. Sentença Estrangeira No. 5.206-7, Relator: Min. Sepúlveda Pertence, 12.12.2001, 60, DIÁRIO DA JUSTIÇA [D.J.], 1141, 30.4.2004 (Braz.). Brazil ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 2002. Decreto No. 4.311, de 20 de Maio de 1942, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 22.5.1942 (Braz.). The New York Convention provides common legislative standards to enforce arbitration agreements and foreign and non-domestic arbitral awards. The convention requires parties to ensure such awards are recognized and enforced in their jurisdiction the same way domestic awards are enforced. United Nations Convention on the Recognition of Foreign Arbitral Awards art. 1, June 10, 1958, 330 U.N.T.S. 3.

14. S.T.F., Agravo Reg. Sentença Estrangeira No. 5.206-7, Relator: Min. Sepúlveda Pertence, 12.12.2001, 60, DIÁRIO DA JUSTIÇA [D.J.], 1141, 30.4.2004

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award became a legally binding decision that may be enforced inside the Brazilian territory.¹⁵

One of the most important changes introduced by the Brazilian Arbitration Law was that an arbitral award is equivalent to a judicial decree.¹⁶ Before the law was enacted, it was necessary to file a separate lawsuit to request a judicial decree stating that the arbitral award is enforceable.¹⁷ Regarding international arbitral awards, a foreign arbitral award had to be submitted to a double exequatur proceeding in order to be enforceable inside Brazil. The first of the exequatur proceedings used to be held in the arbitral award's country of origin, so as to obtain a judicial ruling declaring the arbitral award equivalent to a judicial decree. The second of the exequatur proceedings used to be held in Brazil, so as to homologate the previously adjudicated arbitral award. Only thereafter was the foreign arbitral award enforceable inside Brazil.¹⁸

(Braz.). "The Law shall not exclude any injury or threat to a right from the consideration of Judicial Power[.]" CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art.5, at XXXV (Braz.).

15. S.T.F., Agravo Reg. Sentença Estrangeira No. 5.206-7, Relator: Min. Sepúlveda Pertence, 12.12.2001, 60, DIÁRIO DA JUSTIÇA [D.J.], 1141 30.4.2004 (Braz.). Several parties were unable to enforce arbitral awards even though the parties went through proper and expensive arbitral proceedings; companies that lost in an arbitration proceeding would refuse to honor the arbitral award and would file a claim with Brazilian Courts or file a defense in a foreign award recognition and enforcement procedure with the Brazilian Supreme Court to argue the award is null and void for disrespecting the Brazilian Constitution. See JAN KLEINHEISTERKAMP, INTERNATIONAL COMMERCIAL ARBITRATION IN LATIN AMERICA (2005) (discussing historical analysis of arbitration in Latin America).

16. Lei No. 9.307 art. 31, de 23 de Setembro de 1996, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 24.9.1996 (Braz.). "The arbitral award shall have the same effect on the parties and their successors as a judgment rendered by a State Court, and if includes an obligation for payment, it shall constitute an enforceable instrument thereof." *Id.*

17. Before Lei 9.307, Brazilian Law would not recognize arbitral awards and viewed them as an invalid instrument that could not be enforced in Brazilian courts; only a judicial decree was enforceable.

18. A party has to file an additional lawsuit to execute a national or foreign arbitral award or judicial decree inside the Brazilian territory. See RACHEL BENEVENUTO, RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN BRAZIL—A COMPARATIVE STUDY WITH SWITZERLAND 129-37 (2010). A Superior Court of Justice homologation proceeding is required for a foreign arbitral award to be binding inside the Brazilian Territory. *Id.* The enforcement procedure is separate

With the enactment of the Brazilian Arbitration Law, foreign arbitral awards are subject—solely—to a homologation proceeding in the Brazilian Supreme Court. In contrast, a national arbitral award can be enforced directly in the Brazilian courts, since it is the equivalent of a judicial decree.¹⁹

Article 34 of the Brazilian Arbitration Law dictates that an award is foreign when it is rendered “outside the national territory.”²⁰ Frequently, parties will include a clause in their arbitration agreement indicating that the award will be rendered in Brazil, or they will request that the arbitral tribunal render its award in the Brazilian territory, thus, avoiding the required homologation by the Brazilian Supreme Court.²¹

B. Arbitration in Intellectual Property Disputes: Brazilian Public Policy as the Edge of the Parties’ Autonomy

Brazilian law neither permits nor prohibits the arbitrability of IP disputes. Arbitrability of contractual rights issues derived from transactional IP does not present any special challenges in comparison to other commercial arbitration cases. As a matter of fact, arbitration involving transactional IP, mainly license and franchise agreements, has become very common in Brazil.²² Difficulties arise when IP disputes migrate to address the scope and validity of the underlying IPR.²³

and is not initiated until the arbitral award is determined to be binding. *Id.*

19. Lei No. 9.307 art. 31. “The arbitral award shall have the same effects on the parties and their successors as a judgment rendered by a State Court and, if includes an obligation for payment, it shall constitute an enforceable instrument thereof.” *Id.*; see *supra* text accompanying note 18.

20. *Id.* art. 34 (“A foreign award is an award rendered outside the national territory.”).

21. After Constitutional Amendment 45, the judicial body responsible for homologating foreign arbitral awards changed from the Federal Supreme Court to the Superior Court of Justice. See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] amend. 45 (Braz.).

22. PAULOS RODRIGUES, BRAZIL: FRANCHISING 2-3 (2011), available at http://www.franchise.org/uploadedFiles/Franchise_Industry/International_Development/Country_Profiles/FranchisingReportBrazilCCGFeb2011.doc.

23. Under Brazilian Arbitration Law, “persons capable of contracting may settle through arbitration disputes related to patrimonial rights over which they may

As an introduction to the polemic, in Brazil, industrial property rights do not exist unless they are registered with the Brazilian National Institute of Industrial Property (INPI). In other words, the INPI does not declare a preexisting right with the registration—the registration itself creates the industrial property right. There are only a few exceptional cases²⁴ where the existence of an industrial property right is recognized, irrespective of registration with the INPI. The Brazilian industrial property system is not declaratory, but attributive.²⁵ The same applies for plant variety rights.²⁶ Copyrights and software rights,²⁷ in turn, are not registered IPR and, hence, it is easier to arbitrate the scope and validity of these rights, even though an arbitral award is ineffective against third parties.²⁸ Moral rights

dispose.” Lei No. 9.307 art. 1. Patrimonial rights in Brazil are property and economic exploitation rights. *Id.*

24. For example, a trademark is recognized when it is notorious within its particular field of activity. Paris Convention, *supra* note 7, art. 6*bis*.

25. See Lei No. 9.279, de 14 de Maio de 1996, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 15.5.1996 (Braz.). Lei No. 9.279 applies to trademarks, patents, industrial designs, and geographical indications. *Id.* art. 2(I)-(III). However, there are exceptions. See Paris Convention, *supra* note 7, art. 6*bis*. Some scholars classify the Brazilian industrial property system as a mixed system because registration is considered both declaratory and attributive. See MARISTELA BASSO, EDSON BEAS, & RODRIGUEZ JUNIOR, INTELLECTUAL PROPERTY LAW IN BRAZIL 28 (2010). This does not seem to be the correct interpretation according to Brazilian Industrial Property Law. See Lei No. 9.279 art. 2 (I)-(III).

26. Lei No 9.456 art. 2. “The protection of the intellectual property rights in plant varieties is effected through the grant of a Plant Variety Protection Certificate, which shall be considered a commodity for all legal purposes and the sole form of protection in the Country for plant varieties and the rights therein that may be invoked against the free use of sexually or vegetatively propagated plants or parts thereof.” *Id.* (establishing the Plant Variety Protection Law and enacting other measures).

27. Copyrights are protected under Lei 9.610, and software is protected under Lei 9.609. Lei 9.609 protects software through copyrights, but is complemented by Lei 9.610. Lei No. 9.609 art. 2 (“The protection system for intellectual property of software is the same granted to literary works by the copyright laws and connected provisions in Brazil, under the terms of this Law.”).

28. Copyrights and software are different, however, because registration for software and copyrights is elective and serves as evidence of authorship. See Lei 9.609 art. 2, § 3 (providing that software need not be registered). “Protection of the rights provided for in this Law shall be independent of registration.” Lei No. 9.610 art. 18. “Any author may register his work with the public body defined in the introduction and in paragraph (1) of Art. 17 of Lei No. 5.988 of December 14,

associated with copyrights are not subject to arbitration, but monetary consequences may be arbitrable.²⁹ Trade secrets, as such, do not present special difficulties for arbitration, but agreements relating to non-patented technology may.³⁰

Brazilian courts have not addressed whether registered IPR disputes are arbitrable at the domestic or international level. Once the awards reach the Brazilian courts, one may expect that the awards involving the registration, scope, and validity of IPR will be declared null and void or that homologation will be denied. As outlined below, the reason for such a result is not immediately apparent, but shall most likely emerge from an interpretation that the underlying registered IPR are not freely transferrable.

Brazilian Arbitration Law addresses the issue in cases where a dispute arises regarding rights that are not freely transferrable.³¹ The law states that the arbitral tribunal may stay arbitral proceedings and refer the parties to a state court when a final decision depends on the outcome at the state court level.³²

The solution for this dilemma, in many jurisdictions, has been to recognize the arbitral award is enforceable solely between the parties. Hence, registered IPR could be the object of arbitration and a decision that would be valid and binding to the involved parties. Although this resolves part of the problem, providing the parties autonomy to decide their commercial relationships remains a concern, at least in Brazil. Society, scholars, tribunals, and practitioners may

1973.” *Id.* art. 19.

29. See *Understanding Copyright and Related Rights*, WORLD INTELL. PROP. ORG., http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.html#moral_rights (last visited Oct. 8, 2012).

30. See Lei No. 9.279 art. 211. These agreements must be registered with the *Instituto Nacional da Propriedade Industrial* (INPI), which is the Brazilian Patent and Trademark Office, to be enforceable against third parties. *Id.* Further, registration with the Central Bank of Brazil is a condition precedent to have contractual payments remitted abroad. See *id.*

31. Lei No. 9.307 art. 25.

32. *Id.* (“If, during the course of the proceedings, a dispute arises regarding rights not freely transferrable, and once convinced that the final decision may depend hereon, the sole arbitrator or the arbitral tribunal may refer the parties to the State Court having jurisdiction, ordering a stay of the arbitral proceedings. The arbitration shall recommence after the preliminary question is resolved and evidence has been entered in the file of the final non-appealable judgment thereon.”).

object that this practice leads to uncertainty. For example, the disputed IPR could be unenforceable *vis-à-vis* the contracting party, but still affect third parties in general, as the IPR's registration was not cancelled or nullified by an *inter partes* decision.

Brazilian industrial property rights litigation practice dictates that whenever the validity or scope of an industrial property right is at stake, federal courts have jurisdiction; federal courts have jurisdiction because the INPI takes part in judicial proceedings and issues opinions.³³ In addition, lawsuits involving unfair competition, contractual breaches, and damages are filed in state courts.³⁴ In Brazil, it is common practice, however, to initiate parallel judicial proceedings in both state and federal courts.³⁵

Recent Brazilian case law discusses whether the invalidity of an industrial property right is a viable defense in state court. This is an interesting defense because the correct forum for invalidating an industrial property right would be the federal courts. Several judges have stated that allowing an industrial property right to be invalidated, without the participation of the INPI, would render the INPI registration merely a formal and administrative function, but that is not the case.³⁶

33. See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 109(I) (Braz.). Brazilian doctrine does not have a unanimous position on the INPI's role in these judicial proceedings. Some scholars defend that the INPI is a party to the claim, as a defendant. However, the INPI does not consider itself a party to the judicial proceeding. A party has to cope with the costs of the judicial proceedings in case the party loses its case; this is certainly one of the autarchy's motivations.

34. See *id.* art. 125.

35. The party's goal in a federal lawsuit is to invalidate an infringing trademark/patent/industrial design. Alternatively, the party's goal in a state lawsuit is to request damages and claim unfair competition. Therefore, in Brazil, practitioners frequently file parallel judicial proceedings in both state and federal court, so as to seek damages and invalidate an infringing trademark at the same time—albeit in different courts.

36. See T.J.S.P., Agravo de Instrumento No. 0064419-15.2012.8.26.0000, Relator: Tasso Duarte de Melo, 25.6.2012, 1198, DIÁRIO DE JUSTIÇA DO ESTADO DE SÃO PAULO [D.J.S.P.], 20.7.2012, 216 (Braz.) (deciding that patent nullity is a viable defense during any stage of the lawsuit); S.T.J., Recurso Especial No. 1.132.449-PR, 2009/0062354-4, Relator: Minister Nancy Andrichi, 13.03.2012, 225 REVISTA DO SUPERIOR TRIBUNAL DE JUSTIÇA [R.S.T.J.], 20.03.2012, 15 (Braz.) (explaining that a trademark, patent, or industrial design must be nullified in a separate lawsuit in the federal court and is not a defense in a state lawsuit).

Recent Brazilian case law makes it unclear whether a national arbitral award, dealing with the scope of the federal courts and that imposing the participation of the INPI, should be considered when dealing with inarbitrability. The same reasoning applies to homologation of foreign arbitral awards, especially considering that the court responsible for homologating a foreign arbitral award is the same court where this recent case law emerged—the Superior Court of Justice (“STJ”).³⁷

Two commentators suggest that arbitrators should render separate awards that deal with separate aspects of the controversy in order to escape the ghost of arbitral award nullity: one award for the validity of IPR, another award for damages, and a third award for liability.³⁸ This should be viewed carefully in a Brazilian environment, as outlined below.

As for national arbitral awards, Article 32 combined with Article 26 of the Brazilian Arbitration Law provide that an arbitral award lacking grounds, and factual and legal analysis, is null and void.³⁹ If the arbitrators decide the scope of liability and indemnification based on the nullity declaration of the underlying IPR, then enforcement of a separate damages award would present a difficult task compared to a complete award.⁴⁰

Turning to foreign arbitral awards, case law is still developing. The STJ has not yet denied homologation based on lack of grounds for the arbitral award. In a precedential case, where the arbitral award’s reasoning was not explicit, the STJ denied homologation but on another ground: the lack of a valid arbitration agreement. The STJ did not need to address whether the arbitral award contained explicit

37. See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 105(I) (Braz.).

38. See TREVOR COOK & ALEJANDRO GARCIA, INTERNATIONAL INTELLECTUAL PROPERTY ARBITRATION 60-61 (2010).

39. Lei No. 9.307 art. 26(II). “The arbitral award [must] contain: . . . the grounds for the decision, with due analysis of factual and legal issues, including, if it is the case, a statement of the decision in equity.” *Id.* “An arbitral award is null and void if: . . . it does not comply with the requirements of Article 26 of this Law.” *Id.* art. 32(III).

40. The Brazilian Constitution requires a judicial decree be explicit, or the judicial decree is null; because an arbitral award is the equivalent of a judicial decree, it too must contain explicit reasoning, or it will be null and void. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 93, IX (Braz.).

reasoning because a valid arbitration agreement is a condition precedent to enforcing an arbitral award. Nonetheless, the STJ still addressed whether the award was valid.⁴¹ Brazilian Arbitration Law states that a request to homologate a foreign arbitral award shall be denied if the subject matter cannot be arbitrated, or if homologation of the award is contrary to Brazilian public policy.⁴² As a result, an award that (i) is grounded on the fact that the underlying industrial property right is invalid or (ii) does not contain grounds for the award has a high risk that Brazilian public policy will impede homologation.⁴³

To conclude, contractual issues, infringement claims, and damages resulting from any kind of IPR must be considered arbitrable, and the respective award must be enforceable inside Brazil. Disputes directly involving the existence of unregistered IPR (but not related moral rights) are also arbitrable and the respective award is enforceable inside Brazil. Nevertheless, when it comes to the validity and scope of registered IPR, arbitration will most likely face a barrier in Brazil.

II. CONCILIATION AND MEDIATION: SIMILAR RESULT, DIFFERENT APPROACH

As a civil law country, Brazil's legal culture has a background of preserving formality and rules of civil procedure when it comes to dispute resolution. Brazilian law, however, evolved to create a non-

41. This is known as the Kanematsu case. S.T.J., *Sentença Estrangeira Contestada* 885 US, 2005/0034989-7, Relator: Minister Francisco Falcão, 15.09.2010, 68, REVISTA DO SUPERIOR TRIBUNAL DE JUSTIÇA [R.S.T.J.], 14.10.2010, 70 (Braz.). This decision is accurate because a valid arbitration agreement is required before an arbitration proceeding may commence. *Id.* Further, the STJ will certainly have opportunities in the future to express its position on the necessity of explicit reasoning for arbitral awards.

42. Lei No. 9.307 art. 39 (I)-(II) (Braz.) (“The request of homologation for the recognition or enforcement of a foreign arbitral award shall also be denied if the Federal Supreme Court finds that: I - in accordance with Brazilian law, the subject matter of the dispute is not capable of settlement by arbitration; II - the decision is offensive to [Brazilian] public policy.”).

43. BENEVENUTO, *supra* note 18, at 219-20 (providing further analysis of denial of recognition of foreign arbitral awards based on unreasoning and also a discussion on the necessity to differentiate national public policy from international public policy).

adversarial method for dispute resolution, which is grounded in the Roman tradition of conciliation.

In a specific phase of the judicial proceeding, the judge makes non-binding settlement suggestions to the parties and is responsible for carrying out the judicial conciliation. Outside the judiciary, any third party can conduct conciliation; it is even possible to have more than one conciliator working together with the parties in a conflict. One characteristic of conciliation is that suggestions for a settlement come from a third party, not from the parties themselves. Scholars argue conciliation is useful for a dispute where the parties do not have a pre-existing relationship, as opposed to conflicts where the parties have history, which is better settled through mediation.⁴⁴

Many articles of the Brazilian Civil Procedure Code refer to “conciliation” or to a “conciliatory phase,” but none of them define the meaning of the term.⁴⁵ There is still no legal definition for conciliation in Brazil.

Conciliation is first mentioned in Article 125 of the Brazilian Civil Procedure Code: “the judge may attempt, at any time during the legal procedure, to conciliate the parties.”⁴⁶ Conciliation is mentioned again when the Code discusses the judicial phase of the preliminary hearing in Article 331, which states, if the lawsuit involves freely transferable rights, then the judge shall designate a preliminary hearing where a composition shall be attempted.⁴⁷ If the parties reach an agreement, conciliation shall be executed and homologated by the judge as a judicial decree.⁴⁸ If no conciliation is achieved, the lawsuit proceeding shall continue.⁴⁹

44. See Riberti Eliana Nazareth, *Mediação: algumas considerações*, 87 *Revista do Advogado* 129, 129-33 (2006); JOEL DIAS FIGUEIRA JÚNIOR, *ARBITRAGEM: JURISDIÇÃO E EXECUÇÃO: ANÁLISE CRÍTICA DA LEI 9.307 DE 23.09.1996* 121-29 (1999).

45. See CÓDIGO DE PROCESSO CIVIL [C.P.C.], de 11 de Janeiro de 1973, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.1.1973 (Braz.).

46. *Id.* art. 125(IV).

47. *Id.* art. 331.

48. When the parties have a conciliation agreement that a judge has homologated, then the agreement is enforceable. See *id.* arts. 449, 584. However, Article 584 of the Código de Processo Civil was subsequently repealed. See *id.* art. 584.

49. Articles 447 and 448 of the Civil Procedure Code provide the conciliation procedures before a judicial hearing. *Id.* arts. 447, 448.

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The following laws also mention conciliation: Law 9.099, which disposes jurisdiction on Special Civil and Criminal Courts;⁵⁰ Law 10.259, which disposes jurisdiction on Special Federal Courts;⁵¹ Law 9.957, which disposes jurisdiction on a Summary Labor Court Proceeding;⁵² and Law 9.958, which disposes jurisdiction on Commissions of Previous Labor Conciliation.⁵³

Mediation—at least in Brazil—is when a third party mediator encourages the parties to reach an agreement, but refrains from making suggestions. Whenever the parties in the dispute have a history of conflict, mediation is more likely to reach the origins of the conflict, as opposed to conciliation. Having this characteristic in mind, mediation is the dispute resolution method most likely to provide an enduring settlement because it aims to address the controversy at its roots, not just its effects.

Brazil is still reluctant to adopt mediation; this attitude derives mostly from the civil law's tradition to have courts resolve conflicts. Nonetheless, mediation is an ADR method that will grow in the future. Traditional Brazilian arbitral institutions have expanded their services to offer a structure for hosting mediation proceedings.⁵⁴ Low costs, short duration, and secrecy are certainly positive aspects of mediation. Also, management of the proceeding through an institution—like a chamber of commerce or an industry association—with clear conditions, rules, ethics, and code of conduct for the mediation procedure and mediators, instills confidence and formality to meet Brazil's cultural needs.

50. Lei No. 9.099 arts. 1, 2, de 26 de Setembro de 1995, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 27.9.1995 (Braz.).

51. Lei No. 10.259 arts. 1, 2 & 3, de 12 de Julho de 2001, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.7.2001 (Braz.).

52. Lei No. 9.957 art. 1, de 12 de Janeiro de 2000, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.1.2000 (Braz.).

53. Lei No. 9.958 art. 1, de 12 de Janeiro de 2000, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.1.2000 (Braz.).

54. Examples of prestigious chambers in Brazil are the Brazil-Canada Chamber of Commerce Mediation and Arbitration Chamber, and the Mediation and Arbitration Chamber of the Federation of Industries and Centre of Industries of the State of São Paulo. See CÂMARA DE COMÉRCIO BRASIL-CANADÁ, www.ccbc.org.br/arbitragem.asp (last visited Oct. 8, 2012); FEDERAÇÃO DAS INDÚSTRIAS DO ESTADO DE SÃO PAULO, www.fiesp.com.br/sobre-a-fiesp/camara-de-arbitragem (last visited Oct. 8, 2012).

Currently, the Brazilian Congress is scrutinizing a mediation bill.⁵⁵ At its inception, the bill only contained seven articles, but in the course of congressional discussions, the bill reached forty-seven articles.⁵⁶ What was initially intended to be a simple and smart law aimed at giving legal support to mediation, became a detailed sketch of types of mediation: (i) prior to court proceedings, (ii) incidental to court proceedings, (iii) extrajudicial and prior to court proceedings, and (iv) extrajudicial and incidental to court proceedings.⁵⁷ As a result, legislative debates have perverted the bill's aim, and an approval of the bill is still far from being reached.

Another bill also provides for mediation: the bill for a new civil procedure code.⁵⁸ In conjunction with mediation, the new civil procedure bill also expands conciliation.⁵⁹ The new civil procedure bill sets forth that each court may create a sector for mediation and conciliation, which are to be governed by the principles of independence, neutrality, autonomy, confidentiality, and informality.⁶⁰ One provision also prohibits the mediator/conciliator from representing or giving consultation to any of the parties for a period of one year.⁶¹ Remuneration should be made according to the fee charts set forth by the relevant court and according to parameters fixed by National Justice Council ("CNJ").⁶² The new civil procedure bill also

55. Projeto de Lei No. 4.827, de 11 de Outubro de 1998, *available at* <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=21158>.

56. On July 13, 2006, the Senate approved the bill from the House of Representatives. *See id.* (substituting Projeto de Lei 4.827 for Projeto de Lei da Câmara No. 94 de 2002).

57. *Id.* Further controversial definitions were included in the bill; for example, an attorney wants to become a judicial mediator, they must have at least three years of legal experience and the local bar will monitor their activities. *Id.* For non-judicial mediation, the mediator does not need to be an attorney, but the court monitors the mediator's activities. *Id.*

58. Projeto de Lei No. 8.046, de 25 de Outubro de 2010, *available at* <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=490267> (click "Inteiro teor" for the bill's text).

59. *See id.*

60. *Id.* art. 134.

61. *Id.* art. 141 (setting forth that the one-year term shall be counted as of the end of the proceeding).

62. *Id.* art. 142. Since this is a bill, the CNJ has not issued a fees' chart. CNJ was created back in 2004. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] amend.

sets forth that the settlement, homologated by the judge, shall be enforceable and have the effect of a judicial decree.⁶³

Lastly, it is important to mention that a CNJ Resolution instituted the National Judicial Policy for the Adequate Treatment of Conflicts.⁶⁴ The policy's objective is to offer a permanent incentive for non-adversarial dispute resolution.⁶⁵ According to the CNJ Resolution, the policy shall be implemented with the support of the judiciary and partnering entities, such as universities.⁶⁶

The basis of the treatment of conflicts policy is to centralize all structures to the judiciary, provide for adequate formation, train the civil servants of the judiciary, and monitor results by the use of statistics.⁶⁷ The CNJ Resolution creates: (i) permanent centers of non-adversarial methods for conflict resolution, which are responsible for the planning and implementation of the policy and targets set forth in the CNJ Resolution; (ii) judicial centers for the resolution of conflicts and active citizenship, where the proceedings and orientation of citizens shall take place; (iii) rules setting conditions and requirements to become a conciliator or mediator at the centers; and (iv) a database with statistical information.⁶⁸ The CNJ Resolution further provides for mandatory training courses for mediators and conciliators.⁶⁹

The CNJ Resolution also defines six principles, and five rules that shall guide the National Judicial Policy for the Adequate

45, art. 91, § 1 (Braz.). The CNJ performs a variety of tasks: perform strategic planning and propose policies for the judiciary; foster the technological modernization of the judiciary; broaden access to justice, pacification, and promote social responsibility; and guarantee that the civil liberties are respected and criminal executions performed. *Id.* Judges, state attorneys, private attorneys, and citizens compose the CNJ. *See Sobre o CNJ*, COUNSELHO NACIONAL DE JUSTIÇA, www.cnj.jus.br/sobre-o-cnj (last visited Oct. 8, 2012).

63. Projeto de Lei No. 8.046 art. 143.

64. Conselho Nacional de Justiça Res. No. 125, de 29 de Novembro de 2010 [hereinafter CNJ Res. No. 125], *available at* <http://www.cnj.jus.br/atos-administrativos/atos-da-presidencia/323-resolucoes/12243-resolucao-no-125-de-29-de-novembro-de-2010>.

65. *Id.*

66. *Id.* arts. 5, 6(IV).

67. *Id.* art. 3.

68. *Id.* arts. 13, 14.

69. *Id.* art. 12.

Settlement of Conflicts.⁷⁰ The principles are: confidentiality, competence (of the professionals involved), impartiality, neutrality, independence/autonomy, and respect for public policy and applicable laws.⁷¹ The rules include: the rule that the parties must be informed on what method should be applied; the rule that parties' retain autonomy; the rule that there is no obligation to achieve a result; the rule that a third party is to be free of professional ties (if expertise is necessary, a professional may be convened); and the rule associated with the reality test (duty to promote a compromise between the parties with the fulfillment of the settlement).⁷²

In conclusion, although conciliation and mediation are simple, informal methods for non-adversarial dispute resolution, the Brazilian legislature and judiciary are currently attempting to "conform" such methods to the Brazilian civil law system. These attempts create formalities that may pervert the benefits of mediation and conciliation. Such practices strip one of the most important advantages mediation and conciliation have—simplicity and celerity. Hopefully, these official efforts honor their good intentions and help promote the non-adversarial dispute resolution procedures inside the Brazilian territory.

Arising from the parties' autonomy and a non-binding character, conciliation and mediation can be used to settle IP disputes in Brazil, so long as the parties are available to negotiate and willing to submit to the proceeding.

III. THE NATIONAL COUNCIL OF ADVERTISING SELF-REGULATION

The Brazilian National Council of Advertising Self-Regulation ("CONAR") was created in 1980, and was tasked with safeguarding the freedom of expression of those engaged in marketing communication and defending the interests of the parties involved in the advertising market, including consumers.⁷³ CONAR oversees the ethics of commercial advertisement broadcasted in Brazil, and is guided by the provisions contained in the Brazilian Code of

70. *Id.* art 1.

71. *Id.*

72. *Id.* art. 2.

73. *Missão*, CONSELHO NACIONAL DE AUTORREGULAMENTAÇÃO PUBLICITÁRIA, www.conar.org.br (click tab "sobre o CONAR"; then click "Saiba mais" under "Missão") (last visited Oct. 8, 2012).

Advertising Self-Regulation.⁷⁴ The Brazilian Code of Advertising Self-Regulation contains advertising guidelines, which reflect recommendations of the International Chambers of Commerce (ICC) and the International Code of Advertising Practice.⁷⁵ This code is the ethical instrument applied by CONAR.⁷⁶

CONAR is composed of advertising agencies, advertisers, advertising industry providers, and private entities whose goal is to protect consumers. CONAR's Board of Ethics is a sovereign body that surveils the market and decides code compliance.⁷⁷ The Board of Ethics has internal bylaws called *Regimento Interno do Conselho de Ética* (RICE) and is composed of the following divisions: (i) the Plenary, (ii) the Special Chamber for Appeals, and (iii) the Chambers.⁷⁸ The Plenary adjudicates extraordinary appeals, harmonizes case law, and approves or rejects precedents.⁷⁹ The Special Chamber for Appeals decides ordinary appeals, while the Chambers decides code violations and grants injunctive relief.⁸⁰

These proceedings are guided by the principles of due process, simplicity, economy, and celerity.⁸¹ Any individual may represent a party in the Board of Ethics' proceedings. The proceedings may be an investigation or litigation. An investigation aims to verify who the responsible advertising party is and whether the party violated the Code.⁸² A directive from CONAR's President initiates the investigative proceeding.⁸³ The litigation proceeding aims to challenge an advertisement⁸⁴ and is initiated by a written directive

74. See Código Brasileiro de Autorregulamentação Publicitária (1973) (Braz.), available at www.conar.org.br (click tab "Código"; then click "Saiba mais" under "Código").

75. *Id.*

76. *Id.*

77. *Id.* art. 21.

78. Regimento Interno do Conselho de Ética [RICE] art. 2(I)-(III) (1978) (Braz.), available at www.conar.org.br (click tab "Código"; then click "Saiba mais" under "Regimento").

79. *Id.* art. 43.

80. *Id.* art. 48.

81. *Id.* art. 13.

82. *Id.* arts. 15, 16.

83. *Id.* art. 17.

84. Advertisement is construed broadly to include any means of

from CONAR's President whenever there is evidence of code violation.⁸⁵ Additionally, members of CONAR's administrative body, associates from CONAR, or any consumer may require the president to initiate an investigative or a litigious proceeding.⁸⁶

While RICE litigation begins with representation, injunctive relief may immediately follow it. First, the party has five days to offer its defense.⁸⁷ The party then has ten days to appeal the first decision, and the opposing party will have five days to oppose the appeal.⁸⁸ After appealing the first decision, a party can also file an extraordinary appeal, and the subsequent opinion is the final decision.⁸⁹ All RICE investigative proceedings are subject to confidentiality.⁹⁰ In exceptional cases, however, CONAR litigation proceedings can be confidential; cases are exceptional when (i) there is a need to protect a trade secret or a market strategy; (ii) the disclosure of the proceeding's content does not necessarily benefit consumers; and (iii) the parties responsible for the advertisement agree to voluntarily suspend it until a final decision is rendered.⁹¹

From an IP perspective, CONAR commonly resolves disputes relating to copyright violations, trademark violations, and unfair competition claims, including comparative advertising.⁹²

advertisement, such as packages, flyers, and any material with an identifiable point-of-sale. *Id.* art. 18.

85. *Id.* art. 17, § 1(a).

86. *Id.* art. 17, § 1.

87. *Id.* art. 20.

88. *Id.* arts. 41, 42 & 46.

89. An extraordinary appeal can be filed by (i) the President of the Special Appeals Chamber, (ii) CONAR's officer, (iii) the defeated party, (iv) any third party that is prejudiced by the decision, or (v) by the Special Appeals' Chamber's President, ex-officio. *Id.* art. 42. However, the decision must recommend a public announcement of CONAR's position. *Id.* art. 50. The defeated party or the prejudiced third party may file the extraordinary appeal when the decision rendered by the Special Appeals Chamber is not unanimous; the decision violates a provision of CONAR's statutes; or the decision is grounded on a factual error resulting from acts or documents of the case. *Id.* art. 42. The extraordinary appeal may be filed ten days after the decision has been docketed. *Id.*

90. *Id.* art. 21.

91. *Id.* art. 22.

92. See *Estatísticas 2011*, CONSELHO NACIONAL DE AUTORREGULAMENTAÇÃO PUBLICITÁRIA, www.conar.org.br (click "Decisões"; then click "Estatísticas") (last

When deciding a dispute, CONAR's code sets forth four different penalties: (i) a warning, (ii) recommendation for amendment of advertisement, (iii) recommendation for suspension of advertisement, and (iv) an injunction.⁹³ An injunction is granted whenever there is (i) a fair suspicion that the judgment disapproving the advertisement will be ineffective (due to the time elapsed); (ii) an ethical violation that constitutes an abuse of commercial expression, compromises the advertisement sector's ethics, or implies a serious risk to consumers; (iii) a violation that falls within the scope of a binding precedent; or (iv) an advertisement that the Body of Ethics already reprovved and is advertised again with small variations.⁹⁴

The decisions from CONAR's Body of Ethics are merely recommendations; failure to comply with CONAR's decisions can be discussed in judicial courts and administrative government agencies.⁹⁵ Since most of the influential players in the advertising industry are members of CONAR, broadcasting entities (members of CONAR themselves) broadcast the decision to suspend the advertisement. As a result, this penalty proves to be very effective, even though non-binding. If the party requiring suspension of the advertisement succeeds in getting an injunction, then the advertisement is suspended only a few days after the procedure is filed.⁹⁶

CONAR is a striking example of self-regulation. It is the most consolidated dispute resolution body in Brazil, whose decisions economic agents respect. Further, CONAR enjoys a reputation of professionalism and impartiality with the judiciary and the entrepreneurial community.⁹⁷

visited Nov. 17, 2012).

93. Código Brasileiro de Autorregulamentação Publicitária art. 50 (Braz.), available at www.conar.org.br (click tab "Código"; then click "Saiba mais" under "Código").

94. Regimento Interno do Conselho de Ética [RICE] art. 30 (1978) (Braz.), available at www.conar.org.br (click tab "Código"; then click "Saiba mais" under "Regimento").

95. For example PROCON, which is a foundation that protects consumers. PROCON, <http://www.procon.rj.gov.br/objectivo.html> (last visited Oct. 8, 2012).

96. Regimento Interno do Conselho de Ética [RICE] arts. 29-34 (1978) (Braz.), available at www.conar.org.br (click tab "Código"; then click "Saiba mais" under "Regimento").

97. According to CONAR, since 1978, it has rendered around 8,000 decisions. See *Decisões*, CONSELHO NACIONAL DE AUTORREGULAMENTAÇÃO PUBLICITÁRIA,

IV. ADMINISTRATIVE SYSTEM FOR THE RESOLUTION OF BRAZILIAN
COUNTRY CODE TOP LEVEL DOMAIN NAMES “.BR”
CONFLICTS – SACI-ADM

Brazil’s Internet Steering Committee, *Comitê Gestor da Internet* (“CGI”), manages Brazilian country code top-level domain names, which are “.br” domains. CGI created *Núcleo de Informação e Coordenação do Ponto BR* (“NIC.br”),⁹⁸ a private non-profit institution, to implement CGI decisions and projects, perform the registration of domain names, allocate Internet Protocol addresses, and administer “.br.”⁹⁹

Sistema Administrativo de Conflitos de Internet Relativos a Nomes de Domínios sob “.br” (“SACI-Adm”)¹⁰⁰ was developed under the Brazilian country code top-level domain name “.br” to resolve registration disputes between the owner of a domain name and any third party. NIC.br defined basic rules for managing dispute resolution proceedings that are employed by entities enrolled in and approved by NIC.br.¹⁰¹ Such NIC.br approved entities can personally define additional conflict resolution rules. Instead of making use of already existing resolution procedures for other top level domain names, NIC.br opted for a completely new and autonomous resolution proceeding for the “.br.” This enabled users to choose between different institutions, allow Portuguese language to be mandatory for the proceeding,¹⁰² and apply Brazilian law.¹⁰³

Three institutions are currently authorized by NIC.br to use domain name dispute resolution procedures: the Brazil-Canada

www.conar.org.br (click “Decisões”) (last visited Nov. 17, 2012).

98. NÚCLEO DE INFORMAÇÃO E COORDENAÇÃO DO PONTO BR [Brazilian Network Information Center], <http://www.nic.br/sobre-nic/index.htm> (last visited Oct. 8, 2012).

99. Núcleo de Informação e Coordenação do Ponto BR Estatuto arts. 1, 4 (Braz.), <http://www.nic.br/estatuto/index.htm>.

100. *See Relativos a Nomes de Domínios Sob “.br”—Denominado SACI-Adm*, SACI-Adm Art. 1 (2010) (Braz.), <http://registro.br/dominio/saci-adm.html> [hereinafter SACI-Adm].

101. *Id.* art. 1, § 3.

102. *Id.* art. 33.

103. *Id.* art. 16.

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Chamber of Commerce,¹⁰⁴ the World Intellectual Property Association,¹⁰⁵ and more recently the Brazilian Association for Intellectual Property.¹⁰⁶

Under the SACI-Adm, a conflict may be resolved by maintaining the domain name, transferring the domain name, or cancelling the domain name.¹⁰⁷ The proceeding is not confidential, however.¹⁰⁸ The domain name owners are required to adhere to SACI-Adm and agree to adhere to SACI-Adm when they register the domain name, and is a condition precedent to obtain the domain name.¹⁰⁹

SACI-Adm only applies when the domain name was registered in, or is being used in, bad faith causing damages to the complainant.¹¹⁰ Additionally, one of the following situations must exist for SACI-Adm to apply: (i) the domain name is identical or similar enough to cause confusion with a trademark from the complainant, which was deposited before the domain name was registered or already registered by INPI;¹¹¹ (ii) the domain name is identical or similar enough to cause confusion with a trademark owned by the complainant, and the trademark is famous in its area of activity under Article 126 of Industrial Property Law,¹¹² even though not registered or applied for in Brazil; or (iii) the domain name is identical or similar enough to cause confusion with a commercial name, personal name, patronymic, pseudonym, famous nickname, artistic name, or another domain name

104. See *Comitê de Controvérsias sobre Registro de Domínio do CAM-CCBC*, CÂMARA DE COMÉRCIO BRASIL-CANADÁ, <http://www.ccbc.org.br/ccrd.asp> (last visited Oct. 8, 2012), for further information and decisions.

105. See *Mecanismo de resolução de conflitos relativos a nomes de domínios .BR*, WIPO ADR, <http://www.wipo.int/amc/pt/domains/cctllds/br> (last visited Oct. 8, 2012), for further information and decisions.

106. See ASSOCIAÇÃO BRASILEIRA DA PROPRIEDADE INTELECTUAL [ABPI], <http://www.abpi.org.br> (last visited Oct. 8, 2012), for further information and decisions; specifically, links “*Institucional*” and “*Centro de Solução de Disputas*.”

107. SACI-Adm, *supra* note 100, art. 1, § 3 (2010) (explaining that there shall be no damages or additional claims to be resolved).

108. *Id.* art. 24. Also, procedures relating to .com and other country’s domains are not confidential.

109. *Id.* art. 1, § 2.

110. *Id.* art. 3.

111. *Id.* art. 3(a).

112. *Id.*

of the complainant that was established prior to the infringing domain name.¹¹³

The complainant chooses where to bring the dispute and also chooses if one or three specialists shall constitute the decision panel.¹¹⁴ Upon filing of the petition, the institution shall notify SACI-Adm, the complainant, and the owner. SACI-Adm, however, will not allow the domain name to be transferred until the end of the proceeding.¹¹⁵ In case the domain name is cancelled by the owner, or the owner fails to pay maintenance fees, SACI-Adm will reserve the domain name until the end of the proceeding.¹¹⁶

Next, the complainant presents his defense, then the panelist(s) notify the institution of the decision, and the institution notifies the parties. Any party may initiate a judicial or an arbitral proceeding, and once a decision is reached, the decision will be communicated to NIC.br. NIC.br then waits fifteen days after the decision before it transfers or cancels the domain name (if the decision so instructs).¹¹⁷ If a judicial or arbitral proceeding is initiated, NIC.br will not implement the decision and must wait for a court or arbitral tribunal order before it can move forward with the disputed domain name, as the judicial or arbitration order may dictate further proceedings.¹¹⁸ A decision, nonetheless, shall be rendered in ninety days, and the accredited institution may extend this term for a justifiable reason. If extended, however, a decision must be rendered within twelve months.¹¹⁹

V. CONCLUSION

Although judges are becoming familiar with IP issues, traditional judicial resolution of IP disputes is slow and unpredictable in Brazil. The slow judicial resolution allows parties to use a broad spectrum of

113. *Id.* art. 3(c).

114. *Id.* art. 2(e).

115. *Id.* art. 7 (explaining an exception is made when a judicial order requests the transfer).

116. *Id.*

117. *Id.* art. 22.

118. *Id.*

119. *Id.* art. 28.

possibilities for ADR proceedings—both adversarial and non-adversarial.

Traditional Brazilian arbitration chambers, which started booming in 2001, with the recognition that arbitration is constitutional, are expanding their services to offer conciliation, mediation, and domain name dispute resolution proceedings.

Yet, Brazilian civil law tradition still offers some resistance to ADR methods, but even the Brazilian Judiciary has recognized the necessity to expand conflict resolution and foster the use of ADR proceedings, as evidenced by the enactment of CNJ Resolution No. 125 in December 2010.

Brazil has come far, but still has far to go. ADR is becoming increasingly popular and is expected to continue to be more common in the coming years in Brazil, and ADR is expected to be even more popular in IP related disputes.