IPKey

AMÉRICA LATINA

Presence and use of mediation in Intellectual Property cases in Latin America

Analysis and overview of multiple country usage

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Bajo la dirección de la Comisión Europea, IP Key es un programa gestionado por la Oficina de Propiedad Intelectual de la Unión Europea.
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Table of Contents

Executive Summary

1. Context

This report is designed to support an initiative by IP Key Latin America to study the use of mediation in Intellectual Property disputes in 16 Latin American countries – Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Uruguay.

Whilst mediation has been a familiar concept and practice globally for many decades, its usage is still dependent on individual countries' legislation and practical applications and can vary by jurisdiction.

In this context, IP Key Latin America commissioned a study from the Centre for Effective Dispute Resolution (CEDR) to give a clear panorama of the state of play of mediation in IP in Latin America and provide background information on the operation of mediation in the countries within this study.

In particular, the objective of this study is to assess the presence and use of mediation proceedings in IP in Latin America during the registration process of IP rights and at enforcement levels, in the context of litigation on IP rights.

2. Definition and Purpose of Mediation in IP Disputes

The protection and enforcement of Intellectual Property rights are key elements in the Latin America region for those investing time, money and effort in their innovative processes leading to creations and inventions.

Indeed, the prospect of court litigation may deter IP right holders from enforcing and defending their own rights. The cost and length often associated with a trial, the lack of predictability, and, in some instances, the fear of publicity, are many reasons that would stop right holders from defending their IP rights to their full extent.

Within the context of IP disputes, mediation has the potential for parties to satisfy their commercial issues without the need for recourse to a lengthy court process; find solutions which have the potential to preserve or reduce damage to commercial relationships; and, save time and costs.

Mediation is defined in the EU Directive 2008/52(EU) as follows:

'Mediation' means 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. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

Therefore, mediation is a flexible and confidential process allowing parties to reach a mutually satisfactory settlement.

The awareness of mediation as a tool for resolving conflict of an IP nature has blossomed with the creation of mediation centres within international institutions, such as the WIPO in 1994 or more recently at the EUIPO, at appeal stage, for inter-party proceedings not related to the distinctiveness of a trade mark. As such mediation is used by parties who might otherwise litigate a dispute to reach a resolution with the assistance of a trained neutral facilitator (the mediator) who works with both parties to understand their needs and to help them to negotiate and settle a dispute with the other party.

3. Structure and Methodology of the Study

Following the introductory section covering context and methodology, the study is split into two main sections.

The first substantive section provides analysis at two levels. Firstly, there is an overall analysis of the 16 countries of the study. This is followed by a more in-depth focus on each country within three regions:

- Andean countries: Bolivia, Colombia, Ecuador and Peru
- MERCOSUR and Chile: Argentina, Brazil, Paraguay, Uruguay and Chile
- Central America and Mexico: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama, and Mexico

Finally, in the last section, the study concludes with insights into the evolution and trends of mediation in IP disputes in Latin America and makes some recommendations in respect of the further development of mediation for the resolution of IP disputes in the region.

The study was conducted over the course of 2020 and used a combination of desk research with in-country research and analysis conducted by a team of experts. Full details on the researchers can be found in Appendix A.

For each country, the researchers looked at understanding the following features.

- General recognition of mediation in the country - legal framework
- Use of ADR and resolution of Intellectual Property Disputes in the courts
- Existence and operation of Mediation Service Providers
- Use of mediation in National IP Offices

Due to the nature of the Covid-19 pandemic, access to National IP offices and data was sometimes restricted due to staff shortages in those countries whilst they were dealing with the impact of the pandemic.

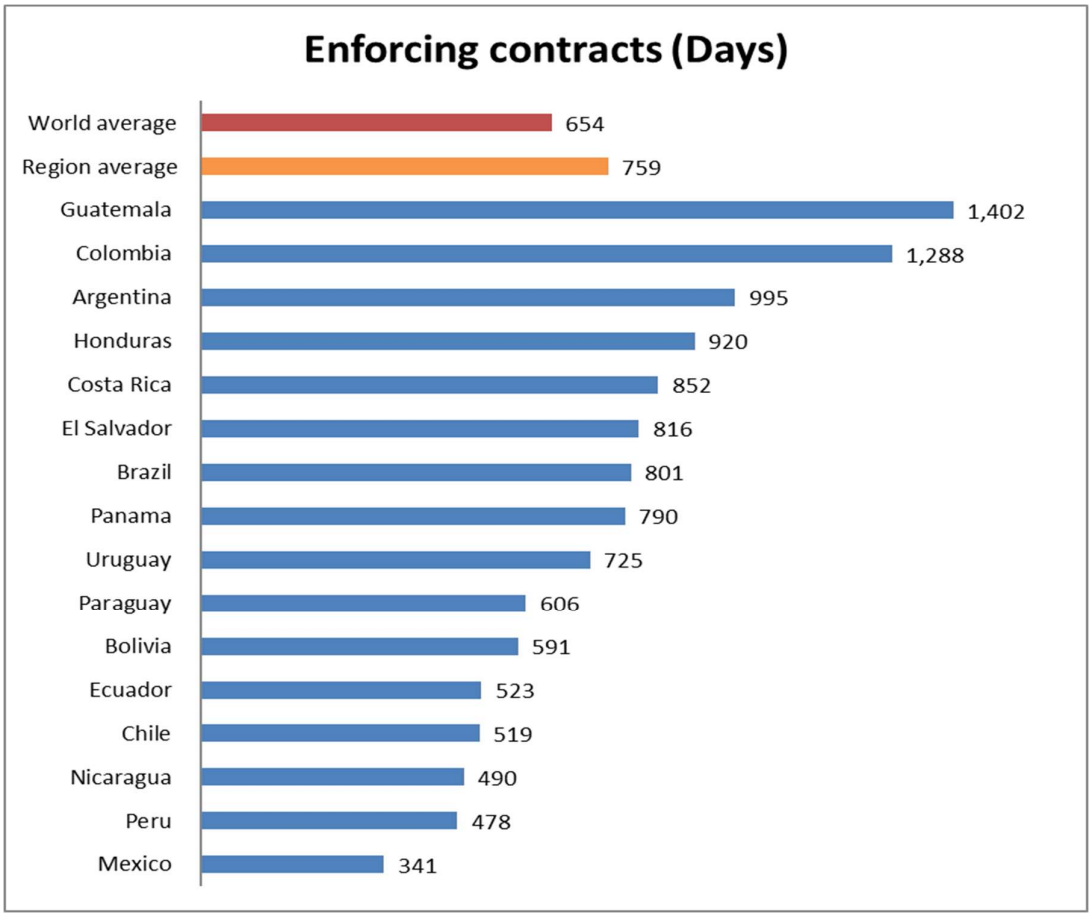
4. Analysis of Intellectual Property and Mediation in Latin America

1. Litigation Environment

The World Bank's 2020 Doing Business Survey [1] 'Enforcing contracts' measure, provides a useful baseline of the overall litigation environment in any jurisdiction. It uses time, cost and 'quality of judicial processes' indices to assess the efficiency of resolving a commercial dispute through the courts. These three indices combined are used to create an 'ease of doing business' score on a scale from 0 to 100, where 0 represents the lowest and 100 represents the best performance.

The regional average score for Latin America and Caribbean for contract enforcement is 53.5. Of the 16 countries in this study, 11 of them are above the regional average with four of the Central American countries being below the average. This indicates that the court systems in the region broadly operate to provide redress in respect of contract enforcement, however there is an opportunity for the use of mediation in order to provide quicker resolution and less costly redress.

[1] https://www.doingbusiness.org/



This is more clearly demonstrated in the graph above, which indicates the number of days required to enforce the contract in the 16 jurisdictions of the study. In this respect nine of the study countries take longer than the world average to enforce contracts, and eight take longer than the regional average. Clearly, mediation is one tool which can be used in these countries to reduce this enforcement timeframe.

2. Use of mediation

Mediation framework

The majority of the countries surveyed have an effective mediation framework. 11 countries have a mediation law or laws (Argentina, Bolivia, Brazil, Colombia, Ecuador, El Salvador, Mexico, Nicaragua, Panama, Paraguay and Peru), with five not having any national or state law, (Chile, Costa Rica, Guatemala, Honduras and Uruguay). However, it should be noted that in every one of these countries except Chile, despite the lack of enabling law, mediation or conciliation practice still exists.

Therefore 68% of the countries in this study have an enabling legal framework for mediation. By way of comparison, this compares favourably with the European Union where approximately 66% of countries[2] have an enabling legal framework for mediation.

All these legal frameworks are in line with accepted international best practice and cover at least the key aspects set out in the EU Directive, namely:

- the voluntary nature of the process;
- the provision of confidentiality;
- that there is enforceability of Settlement Agreements;
- that there are quality assurance frameworks for mediators and the process; and,
- the effect of participating in mediation on the relevant limitation period.

Finally, it is interesting to note that four countries within the study group (Columbia, Ecuador, Honduras and Uruguay) are early signatories of the Singapore Convention on Mediation, enabling easier cross-border enforcement of mediated settlement agreements. Additionally, the Brazilian Government approved the signing of the convention in November 2020, which should take place in early 2021.

Actual mediation activity

Broadly, the levels of actual mediation practice across the region can be described as nascent or emerging.

Mediation activity can be broken down into the following categories:

1. *Judicial settlement vs Judicial mediation*

There are a number of judicial settlement approaches, where the judge responsible for determining the substantive legal matter, convenes a settlement or conciliation hearing and assists the parties to reach a settlement. These types of judicial settlement provisions are common in judicial systems around the world and are used to various degrees of success. These are not strictly considered to be mediations as the judge acting as “mediator” here has the ultimate power to determine the case.

These judicial settlement hearings can be contrasted with Judicial mediation where the neutral may be a judge, but is also trained as a

[2] https://imimediation.org/resources/eu-eea-legislation-on-mediation/

facilitative mediator. Also, critically in a judicial mediation, the judge acting as the mediator *is not* the same judge hearing the substantive case.

Countries that offer either of these approaches include Bolivia (mandatory "pre-judicial mediation"), Costa Rica (voluntary judicial mediation) and Panama (voluntary judicial mediation).

2. *Extra Judicial Court-based mediation or conciliation*

This type of mediation or conciliation process is where the neutral is not a judge but an external qualified mediator providing their services within the overall court process. These cases may take place within the court (court-annexed) or be referred to outside organisations (court-referred).

There are a number of such programmes in the countries within this study. Frequently these are mandatory programmes which parties must go through before the litigation proceedings can proceed. From the data received in the study, the countries which appear to have court-based programmes are set out in the table below, with an indication as to whether the service is mandatory or voluntary:

Country	***Court Annexed or Referred***	***Mandatory/ Voluntary***	***Cases (2019)***
Argentina	Referred	Voluntary	Data not available
Brazil	Referred	Voluntary	Data not available
Colombia	Referred	Mandatory	172,000 requests
Costa Rica	Referred	Voluntary	3781
Ecuador	Referred	Both possible	54,554
Guatemala	Referred	Voluntary	9000
Mexico	Referred	Voluntary	6000 (Mexico City only)
Nicaragua	Referred	Mandatory	Data not available
Panama	Referred	Voluntary	3509
Paraguay	Referred	Voluntary	20,341
Peru	Referred	Mandatory	60,824
Uruguay	Referred	Voluntary	4499

3. *Private mediation services*

A third option is for mediation services to be offered neither by judges or the court system, but to be carried out within private mediation centres or by mediators acting independently. Mediators acting in this capacity are selected by the parties and are completely separate from the parties and the court process.

In relation to levels of activity of non- court-based mediations in some Latin American countries, the table below gives an indication of mediation case numbers in the main mediation centres of the study countries.

Country	***Centres***	***Cases per year (2019)***	***Settlement rate***
Argentina	Various	>500	Not available
Bolivia	Various	200 approx	60%
Brazil	Various	<100	Not available
Chile	Centro de Arbitraje y Mediación de la Cámara de Comercio de Santiago (CAM SANTIAGO)	38	26%
Colombia	Arbitration and Conciliation Centre of the Bogota Chamber of Commerce Conciliation and Arbitration centre Dario Velásquez Gaviria	6564 500	45% 60%
Costa Rica	Various	3781 (2018)	
Ecuador	The Arbitration and Mediation Centre of the Quito Chamber of Commerce Attorney General's Mediation Centre	2000 1500	Not available Not available
Guatemala	Various	9186	<20%
Nicaragua	DIRAC (Dirección de Resolución Alterna de Conflictos)	106 (2015)	Not available
Panama	The Alternate Conflict Resolution Centres of the Judicial Branch	4181 (2018)	67%
Paraguay	Paraguay Arbitration and Mediation Centre (CAMP), structured by the Paraguayan National Chamber of Commerce and Services (CNCSP)	8-12	60%
Peru	Peruvian Association of Conciliation and Arbitration	1300	35%

What can be seen from this table is that while overall case numbers appear modest, in some jurisdictions they are quite high relative to international comparators.

By way of comparison in England and Wales, which is a well-developed mediation jurisdiction, there were approximately 12,000 commercial and civil cases mediated in 2018 of which just under 7,000 were mediated by private centres or individual mediators[3]. Most of the other European countries have substantially lower levels of private mediation case numbers.

[3]CEDR 8th Mediation Audit 2018

Accordingly, what is evident from the study research is that there is a substantial private mediation market in operation in many Latin American countries.

In the other countries the levels of mediation activity using private centres is much lower, and in some countries such as El Salvador, there appears to be no activity at all.

3. Current state of mediation in Intellectual Property in Latin America

Size of IP market

The region varies in size of the IP markets with Argentina, Brazil and Mexico at the largest end (over 50,000 filings of IP rights each per year[4]). They are followed by Chile, Colombia and Peru (20-50,000 filings a year). Other countries have relatively small numbers of IP rights filings. Filings for patents per country follow similar ratios.

Mediation services in National IP Offices

The use of mediation services in National IP Offices can be broken down into three categories

I. Enabling legal framework and mediation service

Only Bolivia, Colombia, El Salvador and Mexico have some form of facilitated dispute resolution process. These are mainly described as conciliation services and are conducted by an official of the national office.

II. Enabling legislation but no mediation service

In Nicaragua, Panama and Peru there is an enabling legal framework for mediation in IP disputes before the national office but no service is provided by the National IP office.

III. No mediation services

In all other countries included in the study there is no mediation service. However, Chile and Ecuador have signed memoranda of understanding in developing a service.

Finally note no data was available from Brazil and Paraguay.

[4] This includes trademarks, design and Patents.

Mediators with Intellectual Property Experience

As part of undertaking this study, investigation was made into the presence of specialist IP mediators in the countries within the study. What was discovered was that there are no mediators whose sole focus was intellectual property. This is unsurprising given the relatively low overall mediation numbers and even lower levels of IP mediations. However, there are mediators who have experience in either mediating IP disputes and/or experience as lawyers in IP matters.

What the study research revealed is those mediators with IP experience have often mediated 1 – 10 IP disputes in their careers through private centres or direct referrals, mainly around trademarks issues. Therefore, it is possible to find mediators with sufficient knowledge and skill in IP to be able to handle a case involving these issues.

5. Insights: Evolution and Trends

The study resulted in the following insights into the evolution of mediation and trends in its development.

1. *Strong mediation foundations upon which to build*

There is a strong legal foundation to enable the operation of mediation in the region. This has in turn led to actual mediation practice developing in most of the jurisdictions within the study group. These mediations are a mixture of both court-based mediation and those taking place through referrals to mediation centres. While caseloads at this point are not large in most countries, they are increasing year on year. This follows the international trend of nascent mediation jurisdictions taking some time to develop with sustainable mediation markets beginning to emerge.

This is important in relation to the development of the use of mediation in IP disputes as the establishment of a 'mediation culture' in a jurisdiction then allows for more applied applications into particular dispute sectors, such as IP, to be considered.

Finally, currently 25% of National Offices already use some form of facilitative dispute resolution process (mediation, conciliation etc). This experience provides a good baseline from which to consider best practice and develop practice further.

2. *Use of conciliation in National IP Offices in Latin America*

In three of the four National IP Offices that offer ADR, the service offered is conciliation. Conciliation can be distinguished from mediation in that the role of the conciliator normally allows him/her to make suggestions and possible recommendations as to settlement. While this can have benefits in an area where the neutral is an expert, the downside is that it could become a quasi-judicial process, with conciliators effectively making decisions on behalf of the parties.

It should also be noted that the term 'conciliator' is a term that pre-dates modern mediation. However, as an example, the relatively newly reformed El Salvador IP Law of 2017 allows specifically for mediation. This is perhaps the first sign of a recognition that contemporary mediation practice is becoming the accepted approach. More research is needed to understand exactly how these different conciliation and mediation approaches operate within National IP offices.

3. *General legal and IP enabling frameworks for mediation, but lack of services*

The majority of jurisdictions have a general legal framework for mediation to take place and many have developed actual mediation services. Further many jurisdictions also have an IP legal framework that provides for mediation to resolve IP disputes. However, despite having the enabling legal framework, there is no indication that the National IP Offices do in fact provide such a service. Countries that fall in this category include Nicaragua, Panama and Peru.

The reasons for this are not clear from the data provided and more analysis would be required. However, what is clear is that the existence of enabling frameworks coupled with an interest to provide such a service does create an opportunity for future development.

4. *Awareness and interest in the use of mediation to resolve IP disputes*

While many National IP Offices do not actually provide mediation services, the majority of them have a good awareness about the option of mediation to resolve IP disputes. Many of the National Offices have indicated they collaborate with WIPO and its Arbitration and Mediation Centre, including

Chile, Cost Rica, Ecuador, El Salvador, Honduras, Nicaragua, Panama and Peru, with some signing memoranda of understanding with WIPO to develop local mediation centres.

This indicates an overall high level of interest in the use of ADR mechanisms, including mediation, to resolve IP disputes and is an opportunity in terms of future development, as it appears in these jurisdictions there is at least an openness to explore the provision of mediation as part of the National IP framework.

5. *Development in silos and lack of coordination of best practice*

As is common in the early stages of mediation development, the focus in each country has been on developing their own mediation framework and practice, rather than working cross region.

This is particularly the case in respect of mediation services within National IP Offices. Where services exist, they have been developed and run within the national office and there has been little sharing of experiences and best practice between the National Offices in respect of the use of mediation to resolve IP disputes. Where there has been input, it has come from the international experience of WIPO.

6. Recommendations

Given the analysis and emerging trends, the following recommendations are made for areas for development in the use of mediation for the resolution of IP disputes in Latin America:

1. *Bringing the mediation and IP communities together*

A workshop should be convened to bring together representatives from across Latin America to share experiences on the use of mediation to resolve IP disputes. In particular they should consider:

- Where there is a shared interest in the development of a specialist IP mediation service
- The obstacles to developing IP mediation and how to address these collaboratively
- Opportunities for future collaboration to develop best practice.

2. *Developing a best practice model for mediation in IP disputes*

Further actions can perhaps be undertaken considering current practices and approaches to providing mediation services in National Offices in this region, also comparing them to other key services around the world, such as the EUIPO and WIPO services, in order to develop a best practice model. Such additional work could include, amongst other things:

- Effective legislative framework to enable a mediation service
- Exact nature of the process
- At what point should mediation be offered
- Role of the neutral – conciliation vs mediation
- How to effectively operationalise a mediation service.

3. Continued development of mediation services in National Offices

Two barriers to developing mediation within National Offices are lack of resources and lack of expertise. These can be rectified partly by the development of a best practice model as set out above, as well as drawing in mediation design experts from around the world.

A collaboration between National Offices and supra-national organisations to develop, pilot and implement such services, either solely in National Offices or perhaps developing a regional approach, should be considered.

1. Introduction

Context

This report has been prepared in support of an initiative by IP Key Latin America to study the presence and use of Mediation in Intellectual Property disputes in 16 Latin American countries.

Mediation as a mean to resolve conflicts and disputes has grown significantly in the past 10 years throughout the world.

However, the purpose of mediation within a legal system and the minimum requirements for performing mediation, in terms of training, practice and ethics, is still dependent on local regulations and cross-border agreements.

In this context, IP KEY Latin America has commissioned a report from the Centre for Effective Dispute Resolution (CEDR) to give a clear panorama of the state of play of mediation in IP in Latin America and provide background information on the operation of mediation in the countries within this study.

In particular the objective of this study is to assess the presence and use of mediation proceedings in IP in Latin America, during the registration process of IP rights and at enforcement levels, in the context of litigation on IP rights.

We are at a time where mediation and other means of non-judicial Alternative Dispute Resolution processes continue to grow as a means to improve the business and social environment worldwide.

On the international side, mediation agreements and regulations arising from both private and public organisations have grown significantly. A major recent development is the Singapore Convention on Mediation (2019), which seeks to harmonise the recognition and enforceability of cross-border mediation agreements worldwide. This continues mediation development work that has been integrated in free-trade agreements with initiatives such as Investor-State mediation, WIPO and EUIPO's Mediation Rules, and UNCITRAL.

Locally too, certain Latin America trade agreements, have integrated mediation as a means to resolve disputes arising within their free-trade market.

Commercially, mediation is also growing as a needed alternative to traditional court-based dispute resolution. 2020 has seen increasing

difficulties for businesses, especially SMEs, and individuals alike to survive amidst the COVID-19 crisis. The effect of this pandemic on private, public and governmental institutions has greatly slowed the traditional justice system, created communication difficulties and led many entities to enter a "survival mode" detrimental to collaboration.

Starting Point: The Purpose of Mediation in IP Disputes

The protection and enforcement of Intellectual Property rights are key elements in the Latin America region for those investing time, money and effort in their innovative processes, leading to creations and inventions.

When facing infringement of their IP rights, IP right holders may choose to resolve the issue in a negotiated settlement, such as mediation. Some IP right holders may be aware of the benefits of a mediation settlement, hence developing commercial opportunities, or at least favouring a negotiated settlement to a dispute and litigation in Court.

Indeed, the prospect of court litigation may deter IP right holders from enforcing and defending their own rights. The cost and length often associated with a trial, the lack of predictability, and, in some occasions, the fear of public exposure, are many reasons that stop right holders from defending their IP rights to their full extent.

Being aware of these difficulties, many legislative systems in Latin America introduced a compulsory pre-trial negotiation-based settlement phase, inviting parties to discuss the matter in a non-contentious way. This solution has the potential to encourage negotiations towards a peaceful resolution, for as long as it is not used as a delaying tactic between parties. At a minimum, it is a way to at least introduce awareness about alternative dispute resolution such as mediation.

Mediation is an Alternative Dispute Resolution mechanism which has been used for years in several countries in Latin America. It is a flexible and confidential process allowing parties to reach a mutually satisfactory settlement.

The awareness of mediation as a tool for resolving conflict of an IP nature has blossomed with the creation of mediation centres within international institutions, such as the WIPO in 1994 or more recently at the EUIPO, at appeal stage, for inter-party proceedings not related to the distinctiveness of a trade mark. A growing number of IP offices signed a memorandum of

understanding with the WIPO, aiming at encouraging parties to use alternative resolution in IP dispute.

SMEs should be encouraged to use mediation in IP disputes, for all of the potential it offers: saving time and cost, a neutral process and, if requested, the expertise of the mediator. Mediation is a proven tool in getting resolution of conflicts in various commercial and creative areas. Encouraging the use of mediation facilitates the resolution of disputes and helps to avoid the worry, time and cost associated with court-based litigation, thus enabling SMEs to secure their IP rights in an efficient way.

Supporting the awareness of SMEs on mediation can facilitate the resolution of conflicts in the region, in a constructive manner potentially covering a wider range of IP rights involved in a conflict and focusing on the opportunities rather than the deadlock of conflicts. In addition, approaching IP offices on the potential of mediation, as an alternative service for its stakeholders, can also result in better administration, offering other means of resolving conflict in an efficient manner.

Definitions

For the purpose of this research, we will use the full definition of mediation as provided in the EU Directive 2008/52(EU):

'Mediation' means 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. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

Additionally, the **EUIPO Rules on Mediation** define it as follows:

"Mediation" means a structured process 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.
These two definitions show the core features of mediation:

- It is a structured process aimed at settling a dispute.
- Mediations are normally conducted on a voluntary basis, with the possibility of being ordered by a court or a state to participate.
- Mediations involve the assistance of a third-party neutral (the mediator) who will work with the parties.

These definitions also set out essential characteristics of mediation that represent international best practice for the success of a mediation. We will define these below, and will use them to benchmark the development and establishment of mediation in a way that is adaptable to international practice, and suitable for international trade agreements. Indeed, if mediation is practised but unregulated in certain jurisdictions, this will bring issues for the recognition of mediation in cross-border disputes, and for the validity of mediation agreements in said countries.

Essential characteristics of mediation:

Voluntary process: This means that parties enter mediation voluntarily and in good faith. This aspect of mediation is essential to the efficiency and quality of the process. Although court-ordered mediation may question this aspect, only the requirement to attempt to mediate is mandatory, and parties must be able to withdraw from the process at any time.

Quality assurance: To protect the integrity of the practice, and safeguard businesses and citizens from inefficient or even dangerous freely practised mediation processes, member states are encouraged to develop and manage codes of conduct, initial trainings, specific accreditation processes and other safe-guarding mechanisms they deem necessary. These may include mandatory on-going training, peer-review sessions, professional liability insurance, and so on.

Recourse to mediation: Mediation should not be a practice available only in a private dispute resolution setting, but should be part of the court process and encouraged by judges. A common practice throughout the world is to give judges or other court officials the possibility to invite the parties to attempt mediation, or attend an information session on mediation.

Enforceability of mediation settlement agreements: Written mediation settlement agreements are at their essence, a novel contract between two parties agreeing a way forward. It is necessary therefore for there to be a clear establishment of the practice that mediation settlement agreements have the capability of being made enforceable by the law, a court or other competent authority.

Further to local enforcement, the status of foreign or cross-border mediation agreements needs also to be reflected upon to protect the integrity of parties and of the process. This is especially important in the light of the Singapore Convention.

Confidentiality: Mediation is intended to take place in a manner which respects confidentiality. This means that nothing said or done in a mediation

– so long as it respects the law and the integrity of both parties – can be disclosed outside of the mediation, unless otherwise agreed by the parties themselves. This also often protects the mediator from being called upon to give evidence or testify as a witness in a court of law.

Yet without clear regulations on mediation, this characteristic may be jeopardised, therefore endangering the value and efficiency of the process.

Effect of mediation on limitation and prescription periods: Mediation as an Alternative Dispute Resolution method should not prevent parties from initiating judicial proceedings in relation to that dispute. In order to facilitate its development, it is important to explore whether the law authorises the parties to attempt to settle a dispute without running the risk of reaching the limitation date, therefore losing their right to a trial.

Providing Information to the general public: Finally, it is important that there is clear public information on mediation and its uses and benefits. Providing publicly available guidance on what mediation is and what it is not, its limits, the power of the mediator, and the way to access mediation is necessary to ensure steady development of the field. This guidance can be provided by public authorities or private entities, often with judicial support.

Expected Results

Mediation specifically has been present in Latin American countries since the early 1990s but prior to that, conciliation practice is referenced in much older trade agreements already in force in the early years of the 20th Century.

Moreover, many of these countries are signatories to T*he Singapore Convention on Mediation*[5] adopted on 20 December 2018 and opened to signature on 7 August 2019, including Chile, Colombia, Ecuador, Paraguay, Uruguay and Honduras. Brazil has indicated that they will sign in 2021.

At the outset of this research, we anticipate that this support for mediation will be reflected in the practices of the National IP Offices. We also believe that international trade agreements and links to WIPO internal procedures will have been pre-established which have links to mediation processes, although these processes may not necessarily be called “mediation”. It is important to recognise that the practice called “mediation” as is today is still mainly defined by countries’ own legislations and may carry different names: Mediation, Conciliation, Facilitated negotiation, Out-of-court resolution process, etc.

[5] https://www.singaporeconvention.org/

Structure of the study

In the following chapters of this study, we will endeavour to present a state of play of mediation as it relates to Intellectual Property dispute resolution in the region.

We will begin by presenting the research methodology, tools and working team, as well as the approach we will use to assess the situation in the studied regions:

- Andean countries: Bolivia, Colombia, Ecuador and Peru
- MERCOSUR: Argentina, Brazil, Paraguay, Uruguay
- Chile
- Central America: Costa Rica, Guatemala, Honduras, Nicaragua, Panama and El Salvador
- Mexico

We will then provide an overview analysis of all 16 countries in the region looking at general mediation use as well as mediation specifically in relation to Intellectual Property disputes.

This will be followed by a more detailed look at each country through a regional analysis, which will combine individual countries assessment benchmarked against best practice as established in the introduction.

Finally, we will seek to analyse the overhaul situation of mediation in Intellectual Property disputes and offer insights into trends and make some recommendations to help its development in Latin America.

2. Methodology and study process

Methodology, approach and tools

The research comprised a combination of desk research, a proportion of which has drawn on existing international regulations, data from WIPO and the World Trade Organisation, and structured questionnaires completed by local experts in mediation of the regions studied.

The desk research has offered a technical insight into the size of the IP market, and is aimed at understanding the potentially pressing need for the development of mediation to improve the business environment for both local and international businesses, particularly SMEs.

The questionnaires were aimed at providing clarity on the state of mediation with regards to IP matters in each country, as per the benchmark defined in the introduction.

The Study had the following focus:

A. General recognition of mediation in the country

1. **Mediation law**: This will allow us to map out the differences and similarities between jurisdictions in Latin America in respect of enabling a framework for mediation, and have visibility on the shape of local mediation laws if those exist.
2. **Mediation Quality Assurance**: In order to ensure that mediation is conducted in an effective, impartial and competent way, it is important that states encourage the development of codes of conduct and quality control mechanisms. This assurance also facilitates cross-border mediation by offering the same guarantees to both parties wherever they decide to conduct the mediation.
3. **Confidentiality in Mediation**: Confidentiality of the mediation is at the core of the practice and of all laws and codes of conducts for third party neutrals. It is therefore fundamental that this aspect can be protected and guaranteed to ensure stable and efficient processes.
4. **Enforceability of agreements resulting from mediation**: To guarantee to the parties that mediation will end in an applicable agreement, there needs to be enforceability of the agreements before the courts. This is also a fundamental aspect of cross border mediation, and one of the key aspects of the Singapore Convention.
5. **Effect of mediation on limitation and prescription periods**: Mediation is developing throughout the world as a recognised Alternative Dispute Resolution Mechanism for civil and commercial

disputes. In order to guarantee its viability as an alternative to the courts, its access should not prevent parties from accessing the traditional legal route. It therefore begs the question of the enforceability of prescription periods, and if the use of mediation allows to postpone such period.

6. **Other Provisions of the legal Framework**

B. ADR and Intellectual Property in the courts: The aim of this section is to understand the degree to which the courts are active in encouraging the use of Mediation, and particularly in IP proceedings.

C. Mediation Service Providers: An important aspect of mediation development is the place of private/public service providers who shape the market, create the offer, and centralise mediators' services. Their presence can influence the development of mediation.

D. Mediation in National IP Offices: Finally, working with national IP offices, we aim to gather data, experience, needs and interests from the local registrar for Intellectual Property. Their links to WIPO, and to international trade agreements, place them in an excellent position to understand the impact and assess the need for mediation locally.

A full copy of the research questionnaire is available in Annex B.

In addition, aspects of this report are informed by CEDR's own knowledge and experience of international mediation development, some of the lessons of which are included in this report.

Analysis

The status of mediation in Intellectual Property matters, particularly its management processes, is still today dependent on each country's regulation. Despite certain multi-national regulations and directives, its fundamental aspects are still dependent on each country's law, and in the absence of it, on local private entities developing their own rules.

In order to have a common oversight of each country's situation regarding mediation, we have set out the fundamental characteristics that define the

process. These are based on an analysis of the EU Mediation Directive 2008/52(EU)[6], and the EUIPO/WIPO Rules on mediation[7].

Each of the regional overviews will provide comparative data on the country, the size of the IP market and the state of mediation within the country, based on the essential best practice of mediation as stated in the EUIPO Rules and EU Mediation Directive.

The study will also seek to make comparisons to international practice where applicable and where data is available. Finally, this will allow for the identification of trends and recommendation on possible actions to improve the use of mediation in IP claims in Latin America.

Network of researchers and experts

This research was carried out by a group of mediation experts.

The author of the study is James South, CEDR's Managing Director, who has over 25 years mediation experience, having worked in over 40 countries around the world advising on the development of mediation and training mediators, lawyers, government official and the Judiciary. He was supported by two CEDR colleagues within consultancy experience and three local mediation experts based throughout South America. Personnel from National IP Offices of the study countries have also collaborated with IP Key LA and CEDR to collect relevant data on their use of ADR.

Profiles of the experts are available in Annex 1.

Success and challenges in data collection

The gathering of information and data for each country, both on desk research and through the use of local experts proved effective and allowed the collection of substantial information which fitted into three categories:

- Statistical Data: particularly regarding the size of the IP market;

- Legal Information: with overview on local laws and regulation governing mediation, as well as both private and public bodies;

[6] https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/law_and_practice/mediation/Directive_2008-52-EC_en.pdf
[7] https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/law_and_practice/presidium_boards_appeal/rules_on_mediation_july_2013_en.pdf

- Technical Procedures: an overview of National IP Offices practices for Dispute Resolution.

However, given the pandemic crisis which occurred during the research data gathering period, certain country officials were unable to fully participate in the research, being unavailable or managing the crisis situation within their organizations.

These missing data were not detrimental to the overall outcome of the research, and if key information is absent, we have taken the approach of transparency, making this clear in the analysis.

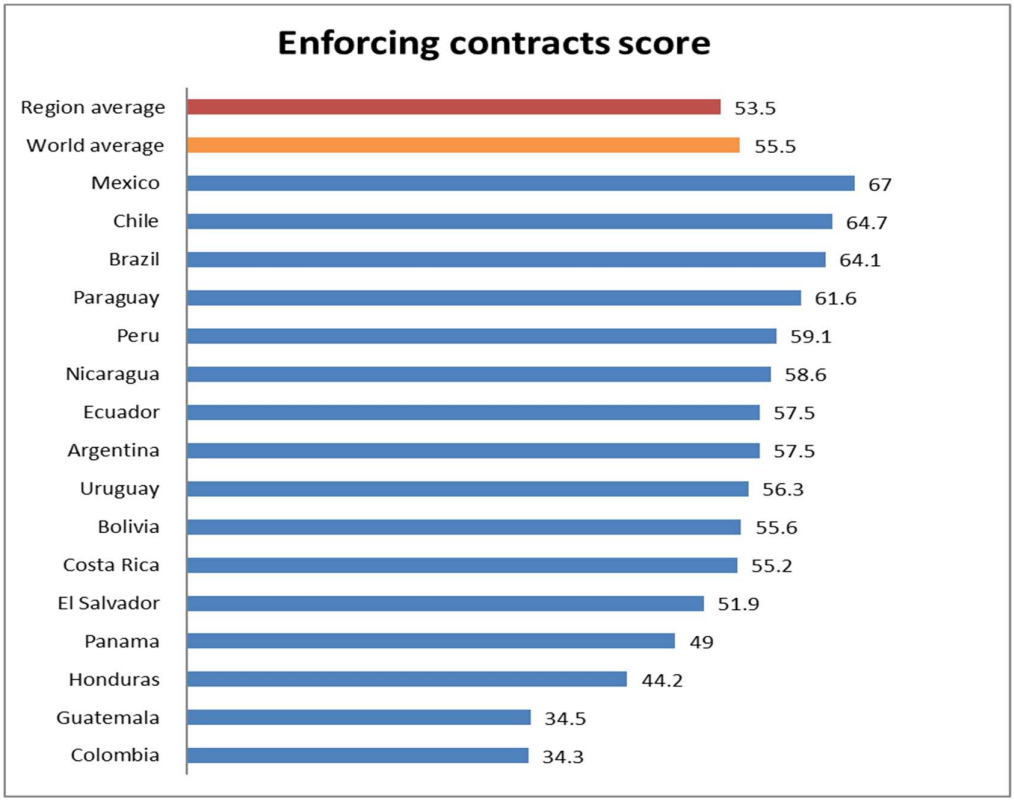
3. Analysis of Intellectual Property and mediation in Latin America- An Overview

Introduction

This chapter will provide an overall analysis of the use of mediation in all 16 countries of the study. It will draw together the themes and outcomes of the more detailed 3 regional analyses (Mercosur, Andean and Mexico and Central America), that are set out in the subsequent chapter.

Current state of Mediation law in Latin America

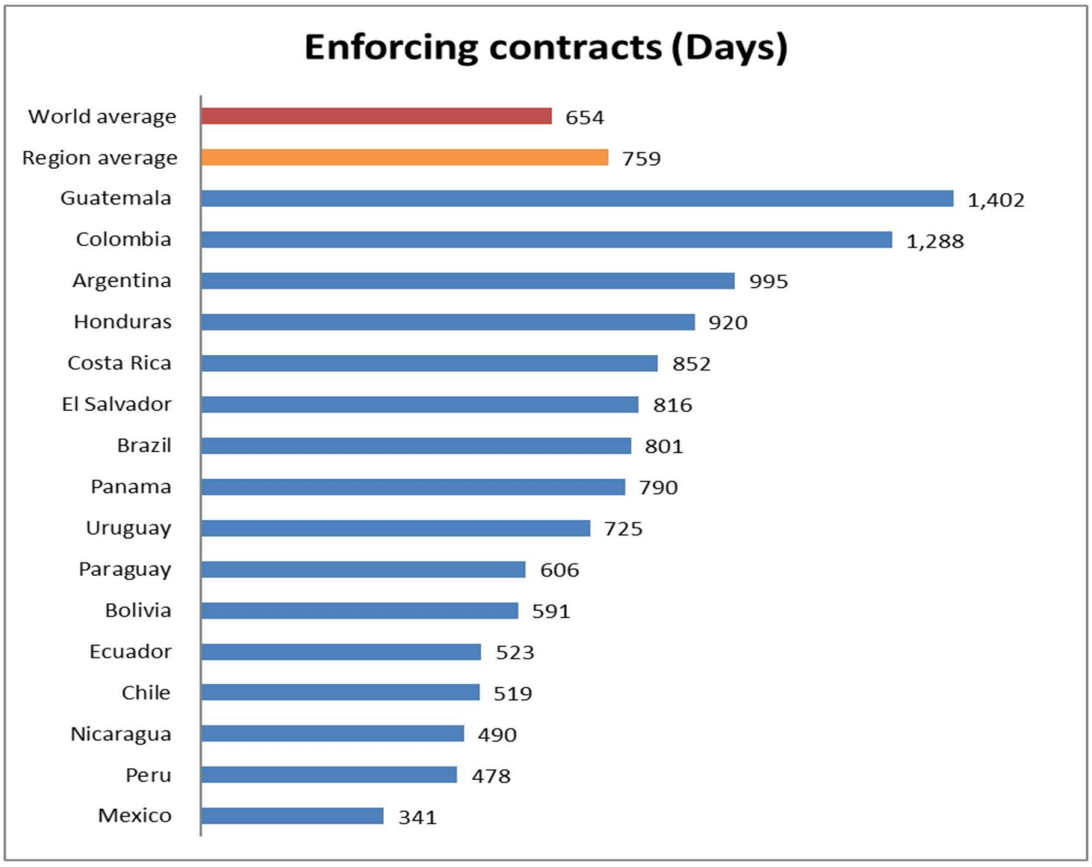
Litigation Environment



The World Bank's 2020 Doing Business Survey [8] 'Enforcing contracts' measure provides a useful baseline of the overall litigation environment in any jurisdiction. It uses time, cost and 'quality of judicial processes' indices to assess how efficient is the process of resolving a commercial dispute through the courts. These three indices combined are used to create an

[8] https://www.doingbusiness.org/

'ease of doing business' score on a scale from 0 to 100, where 0 represents the lowest and 100 represents the best performance. The regional average for Latin America and Caribbean for contract enforcement is 53.5. Of the 16 countries in this study, 11 of them are above the regional average with four of the Central American countries being below the average. This indicates that the court system broadly operates to provide redress in respect of contract enforcement, and that there is an opportunity for the use of mediation in order to access quicker and less costly redress.



This is more clearly demonstrated in the graph above, which indicates the number of days required to enforce the contract in the 16 jurisdictions of the study. In this respect 9 of the study countries take longer than the world average to enforce contracts, and 8 take longer than the regional average. Clearly mediation is one tool which can be used in these countries to reduce this enforcement timeframe.

Mediation Framework

Overall, the clear majority of the countries within the study have an effective mediation framework in place to enable the use of the process in their

jurisdiction. 11 countries - Argentina, Brazil, Bolivia, Colombia, Ecuador, El Salvador, Mexico, Nicaragua, Paraguay, Panama, Peru - have either a national mediation law or collections of laws, or similar state level mediation laws.

Conversely only 5 countries have no national or state Mediation law, (Costa Rica, Guatemala, Honduras, Chile and Uruguay). It should however be noted that in every one of these countries except Chile, despite the lack of enabling law, actual mediation or conciliation practice still exists.

Therefore 68% of the countries in this study have an enabling legal framework for mediation. By way of comparison, this compares favorably with the European Union where approximately 66 % of countries[9] have an enabling legal framework for Mediation.

All these legal frameworks are in line with accepted international best practice and cover at least the key aspect set out in the EU Directive, namely:

- Voluntary nature of the process
- Confidentiality
- Enforceability of Settlement Agreements
- Mediation Quality Assurance frameworks and
- Effect of mediation on limitation periods.

It is only in relation to voluntariness and limitation periods where we see any slight deviation of practice.

Surprisingly in a number of jurisdictions, such as Peru, Argentina and Nicaragua, extra-judicial mediation is compulsory step at the beginning of the litigation process, Bolivia has a compulsory judicial conciliation approach.

Of the 11 countries with a Mediation framework,, in four of them (Bolivia, Ecuador, Panama and Paraguay), opting for mediation does not suspend the time limits of the litigation process. The downside of this approach is that if not successful it can be argued to be perceived as a waste of time and prejudicial to the parties in pursuing their legal rights.

Finally, it is interesting to note that four countries within the study group (Columbia, Ecuador, Uruguay and Honduras) are early signatories of the 54 countries that have signed up to the Singapore Convention [10] on the enforcement of cross-border mediated settlement agreements, which entered into force in August 2020. The Convention allows for the recognition

[9] https://imimediation.org/resources/eu-eea-legislation-on-mediation/
[10] https://www.singaporeconvention.org/

and enforcement of settlement agreements as a result of mediation, in signatory countries. It therefore makes it easier for parties in two different jurisdictions which are signatories to the convention to trust that their settlement agreement reached by mediation can be enforced by the courts of the respective jurisdictions.

Brazil has also now indicated that it will sign it in 2021. This perhaps is an indication of the future direction of mediation in the region, and an area for consideration in terms of international cooperation.

Actual Mediation Activity

Broadly the levels of actual mediation practice across the region can be described as nascent or emerging.

Activity can be broken down into the following categories:

1. *Judicial settlement vs Judicial Mediation*

   There are a number of judicial settlement approaches, where the judge responsible for determining the substantive legal matter, convenes a settlement or conciliation hearing and attempts to assist the parties to reach a settlement. These type of judicial settlement provisions are common in judicial systems around the world and are used to varying degrees of success. These are not strictly considered mediation as the judge here has the ultimate power to determine the case.

   This can be contrasted with Judicial mediation where the neutral facilitator helping the parties to resolve the case may be a judge, but is also trained as mediator and is not the judge who is hearing the substantive case.

   Countries that offer either of these approaches include Bolivia (mandatory "pre-judicial mediation"), Costa Rica (voluntary judicial mediation) and Panama (voluntary judicial mediation).

2. *Extra Judicial Court-based mediation or conciliation*

   This type of mediation or conciliation process is where the neutral is not a judge but an external qualified mediator providing its services within the overall court process. These cases may take place within the court (court-annexed) or referred to outside organisations (court referred).

There are a number of such programmes in the countries within this study, a number of which are mandatory programmes which parties must go through before the litigation proceedings can proceed. The table below sets out the countries having court-based programmes; the nature of those programmes and case numbers where that data is available:

Country	***Court Annexed or Referred***	***Mandatory or Voluntary***	***Cases (2019)***
Argentina	Referred	Voluntary	Not available
Brazil	Referred	Voluntary	Not available
Colombia	Referred	Mandatory	172,000 requests for conciliation
Costa Rica	Referred	Voluntary	3781
Ecuador	Referred	Voluntary/Both possible	54,554
Guatemala	Referred	Voluntary	9000
Mexico	Referred	Voluntary	6000 (Mexico City only)
Nicaragua	Referred	Mandatory	Not available
Panama	Referred	Voluntary	3509
Paraguay	Referred	Voluntary	20,341
Peru	Referred	Mandatory	60,824
Uruguay	Referred	Voluntary	4499

3. Private mediation services

In relation to levels of activity of non-court-based mediations, in some Latin American countries the numbers of cases are quite high relative to international comparators.

By way of comparison in England and Wales which is a well-developed mediation jurisdiction, there were approximately 12,000 commercial and civil cases mediated in 2018 of which just under 7,000 are being mediated by private centres or individual mediators[11]. Most other European countries have substantially lower levels of private mediation case numbers.

From the figures available it appears that in the following Latin American countries, there is a substantial private mediation market, with the main centres being listed with case numbers and settlement rates where available.

[11] CEDR 8th Mediation Audit 2018

Country	*Centres*	*Case per year (2019)*	*Settlement rate*
Argentina	Various	>500	N/A
Brazil	Various	<100	N/A
Chile	Centro de Arbitraje y Mediación de la Cámara de Comercio de Santiago (CAM SANTIAGO)	38	26%
Colombia	Arbitration and Conciliation Centre of the Bogota Chamber of Commerce	6564	45%
	Conciliation and Arbitration centre Dario Velásquez Gaviria	500	60%
Costa Rica	Various	3781 (2018)	
Ecuador	The Arbitration and Mediation Centre of the Quito Chamber of Commerce	2000	N/A
	Attorney General's Mediation Centre	1500	N/A
Guatemala	Various	9186	<20%
Nicaragua	DIRAC (Dirección de Resolución Alterna de Conflictos)	106 (2015)	N/A
Panama	The Alternate Conflict Resolution Centers of the Judicial Branch	4181 (2018)	67%
Paraguay	Paraguay Arbitration and Mediation Center (CAMP), structured by the Paraguayan National Chamber of Commerce and Services (CNCSP)	8-12	60%
Peru	Peruvian Association of Conciliation and Arbitration	1300	35%

In the other countries the levels of Private Centre mediation are either lower or with no data available.

Mediation in Intellectual Property Disputes in Latin America

Size of IP Market

From the statistics provided in the regional analyses, unsurprisingly Brazil, Argentina and Mexico have the biggest Intellectual Property markets with

over 50,000 filings in relation to IP rights each year in their respective National IP Offices. This is followed by Colombia, Peru and Chile with between 20 and 50,000 trademark filings each year. Other countries have relatively small numbers of filings, although Panama does have higher levels of Domain name disputes.

These levels can be compared with trademark filing levels in some smaller countries of the European Union. Countries around the level of Argentina (63,000) are Estonia (57,000); Cyprus (58,000); Norway (78,000).
Countries around the level of Brazil (195,000) and Mexico (132,000) are Portugal (145,000); Finland (156,000) and Denmark (187,000).

But in contrast, the IP market of most EU countries is significantly higher than those of Latin America, For example per annum, there are the following trademark filings for European countries: Belgium (258,000); Sweden (300,000); Austria (317,000); Switzerland (499,000); Netherlands (519,000); Spain (750,000); Italy (1.1M); UK (1.2M); France (1.25M); Germany (2.355M).

Mediation services in National IP Offices

Overall the use of mediation services in National IP Offices can be broken down into three categories

I. *Enabling legal framework and Mediation service*

Of the 16 countries within the study only 25% have some form of alternative dispute resolution. Colombia, Bolivia, Mexico and El Salvador all have some form of facilitated dispute resolution process. These are mainly described as conciliation services and are conducted by an official of the national office. The extent to which the neutral can make suggestions or recommendation for settlement is not clear. However, the term conciliator normally implies that the neutral is able to make recommendations or suggestions for settlement. This would distinguish it from contemporary mediation, where the mediator does not normally make such suggestions.

The level of activity of these services varies and it has not been possible to obtain data in respect of cases that are resolved via conciliation. It is interesting to note that El Salvador has a mandatory mediation prior to the start of Judicial actions for IP Disputes.

II. *Enabling legislation but no mediation service*

In Peru, Nicaragua and Panama there is an enabling legal framework for mediation in IP disputes before the national office but no service is provided by the National IP office.

III. No Mediation Service

In Ecuador and Chile there is no mediation service within the national office however both offices have entered into collaboration with the WIPO in relation to the promotion of ADR.[12].

In the other jurisdictions no mediation service exists however many national offices such as Costa Rica are aware of mediation and have indicated an interest in developing it.

Finally note that no data was available from Brazil and Paraguay.

IP mediation in the general courts

In the countries where there are a reasonable number of general civil and commercial cases mediated through mediation centres, it can be assumed that some of these will be IP or part IP cases.

However, the lack of specific data from mediation centres across the region which breaks mediations by dispute type, means that it is not possible to provide any analysis of the numbers of IP cases mediated via the general court in each jurisdiction or in the region as a whole.

Mediators with Intellectual Property Experience

As part of undertaking this study, investigation was made into the presence of specialist IP mediators in the countries within the study. What was discovered was that there are no mediators whose sole focus was intellectual property. This is unsurprising given the relatively low overall mediation numbers and even lower levels of IP mediations. However, there are mediators who have experience in either mediating IP disputes and/or experience as lawyers in Intellectual property matters.

What our research uncovered is those mediators with IP experience have often mediated one to ten IP disputes in their careers through private centres or direct referrals, mainly around trademarks issues. Our research also led us to speak with one mediator with experience as IP Lawyers and a

[12] https://www.wipo.int/amc/en/center/specific-sectors/ipoffices/

specialisation in mediating this type of disputes with an outstanding track record. He revealed a track record of over 4000 IP Disputes mediated, through private centers or direct referrals, with cases of opposition, cease of use of trademarks and damages, trademark cancellation and patents/industrial models infringement actions. Yet he also noted that settlement rate is still quite low, with an average settlement rate of 23%.

4. Regional Analysis of Intellectual Property and mediation in Latin America: Outcomes of the field study

Andean Countries

1. Overview

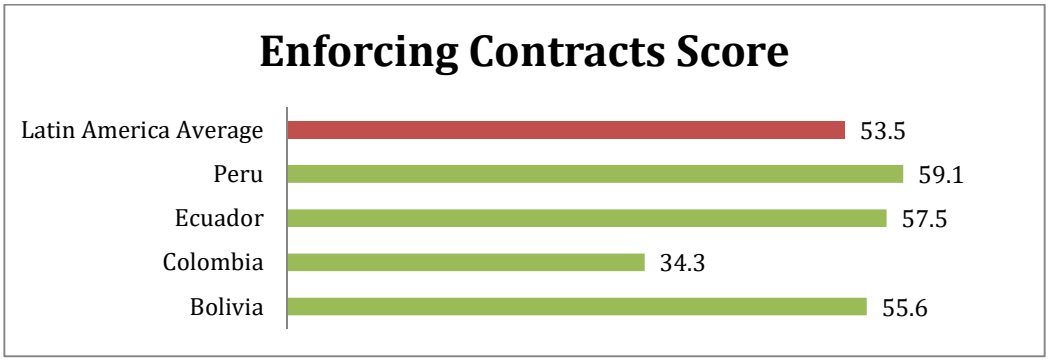
The presence of a mediation legal framework in each of the Andean countries, and a steady implementation of mediation within local rules and practices over the years has led the regulatory framework for mediation in the Andean region to be similar to the level of European regulation of mediation practice.

Through mandatory pre-litigation conciliation in Bolivia, Colombia and Peru, and court-referred mediation in Ecuador, the practice has also gone further than most European countries by becoming a habitual practice for the resolution of any dispute before the courts. It is important to note however that such mandatory pre-litigation mediation and habitual practice approaches, run the risk of having an impact on the mediation process. As has been observed in Europe with the EU Directive on Consumer ADR (*Directive 2013/11/EU*), standardised systemic mediation will be at risk of moving away from a truly facilitative process towards a conciliatory one where the neutral will make recommendations, rather than a traditional mediation where the neutral is silent on their views as to outcome.

In respect of the use of mediation for the resolution of IP disputes, the national IP offices of Bolivia and Colombia offer mediation by internal mediators for the resolution of IP disputes. In Ecuador, promotion of mediation is by the National IP office but mediations are conducted externally from the national office. Only in Peru, due to IP being very heavily regulated and the lack of a regulatory framework for mediation, is mediation not practised by the National IP Office.

2. Overall Litigation Environment and Mediation Legal Framework

a) Overall Litigation Environment



Bolivia, Ecuador and Peru have scores around the average for the region, with Bolivia a score of 55.6, Ecuador 57.5 and Peru 59.1.

This can be contrasted with much more complex litigation environment in Colombia which due to its long average length of judicial proceedings (1288 days) and relatively high legal cost as a percentage of the claim (45.8%) has a low overall score of just 34.3 and ranks 177th of the 190 countries measured in the survey.

b) Mediation Legal Framework

	Bolivia	Colombia	Ecuador	Peru
Has a mediation law	Yes	Yes [13]	Yes	Yes
Voluntary nature of mediation	No [14]	No [15]	Yes	No [16]
Quality assurance	Yes	Yes	No	Yes
Enforceability of agreements	Yes	Yes	Yes	Yes
Cross-border recognition of agreements	Yes	N/A	Yes	Yes
Confidentiality of mediation	Yes	Yes	Yes	Yes
Suspension of prescription periods	No	Yes	No	Yes
Official/Public information	Yes	Yes	Yes	Yes

[13] No specific mediation law, but that 2 laws that regulate conciliation as a practice
[14] Mandatory pre-litigation
[15] Judges do have the power to enforce an attempt to mediate
[16] This is regulated be certified mediation Centres

i. Mediation law

As can be seen by the above comparative table, the Andean region has a strong legal framework in respect of Mediation. Bolivia, Ecuador and Peru all have primary legislation that regulates the operation of mediation.

Ecuador's mediation legislation is contained in the 'Arbitration and Mediation Act' (*Ley de Arbitraje y Mediación*). This Act was enacted in 1997, based on the UNCITRAL model law, and was revised in 2006 and 2018, which set out essential rules for mediation. Although the law provides a framework for mediation and the accreditation of individuals and centres, it also offers some freedom to institutions. As an example, Art. 54 of *the Arbitration and Mediation Act* establishes that each Mediation Centre shall issue its own Rules and Code of Ethics, which will regulate the mediator's conduct. Only disputes related to rights that parties can freely waive can be subject to mediation. This opens the road for IP-specific mediations to be carried out.

Bolivia has divided Conciliation into two different categories. The first one is Extrajudicial Conciliation, which is regulated under the "*Ley de Conciliación y Arbitraje*" (Conciliation and Arbitration Law"), Law No. 708 of June 25, 2015. These are carried out by conciliators, and the settlement has the same effect as a judgment and is enforced as such. The second category is judicial conciliation, which is regulated by the Civil Procedural Code, (*Law No. 439 of November 19, 2005*). Judicial conciliation, which can take place before the first hearing is mandatory for civil and commercial cases and is carried out by a conciliator who is an officer of the court, with the settlement being approved by a judge. This form is referred to as Prejudicial Conciliation. Judicial conciliation can also happen as part of the preliminary hearing, and is carried out by the judge; this will not be taken into account for the rest of this research.

Peru has a Conciliation Law ("*Ley de Conciliación*"), Law No. 26872 published on November 13, 1997 in "*Diario Oficial El Peruano*", last amended by *Law No. 30514* on November 10, 2016. The law limits conciliation to rights that can be freely waived by the parties, but also opens it to family law (so long as the mediator takes into account the principle of respecting the best interest of the child), and labour claims, but states that it must respect the unwaivable rights of workers. It also specifically mentions an impossibility to go to conciliation for claims that involve the rights of people incapacitated by law to exercise their rights, and those that include domestic violence; as well as some procedures, including constitutional guarantee and precautionary measures, as examples of cases that cannot undergo conciliation. In the same way, the law establishes that conciliation cannot proceed when the requested party does not live in Peru. The law also states that conciliation is mandatory as a prerequisite to initiate most legal claims and that conciliations must be carried out in a Conciliation Centre authorized by the

Ministry of Justice of Peru, whether cases are public or private law. In addition, the conciliator must be authorised and registered in the Ministry of Justice's Registry of Trainers. Peru currently has 73 Conciliation training & Education centres and 91 free conciliation centres authorised to accredit conciliators, with over 60,000 recognised conciliators in the country.

Finally, in respect of **Colombia** it does not have a specific mediation law, rather there are several laws regulating conciliation. The two main laws that regulate conciliation are: *Law No. 446 of 1998* and *Law 640 of 2001*. It is important to mention that in Colombia there are two types of conciliation: in law and in equity. Conciliations in law are carried out in front of a conciliator that has a degree in law and take account of the legal positions of the parties. This therefore concerns legal disputes between individuals or organisations.[17] On the other hand, Conciliation in equity are done in front of conciliators in equity, endorsed by the Ministry of Justice, who help the parties to resolve their disputes taking into account the social norms that regulate the coexistence of the community. These conciliations focus on community and personal conflicts.[18] In both systems, conciliations can only be carried out for cases involving rights that the parties can freely waive, and agreements are considered as contracts (*contrato de transacción*). This therefore also includes IP disputes.

ii. Detailed operation of mediation laws and regulations

As can be seen from the table above the mediation regulations of the countries in the Andean region adequately cover all necessary key aspects required of the effective operation of mediation. In this respect they can be seen to be fully aligned with the requirements set out in the European Mediation Directive. Specifically:

- **Status of mediators** - In each jurisdiction the status of mediators is recognised, albeit in slightly different ways. In Peru, Bolivia and Colombia, the relevant mediation laws establish the process by which mediators are trained and registered. In Ecuadorean law, while mediators are required to be certified by mediation centres, through which all mediation takes place, there are no specific registration requirements set out in the law itself.

[17] http://info.minjusticia.gov.co:8083/MASC/-Qu%C3%A9-es-Conciliaci%C3%B3n-en-Derecho
[18] https://www.minjusticia.gov.co/MASC/-Qu%C3%A9-es-Conciliaci%C3%B3n-en-Equidad

- **Enforceability**- Across the region, mediation settlement agreements are enforceable by the courts. Colombia and Ecuador are both signatories of the Singapore Convention on Mediation with Ecuador ratifying the convention into its law on 9 September 2020.

- **Confidentiality**- all jurisdictions recognise the overall confidentiality of the mediation process. However, as is consistent with international practice, such laws also specify exceptions. In addition, the law in Colombia, Peru and Ecuador protects mediators from being called as witnesses. Unusually there is not such a prohibition against calling a mediator as a witness in Bolivian law.

- **Suspensions of Limitation Periods** – It is here we see the most divergence of practice across the region. With Colombia and Peru both pausing limitation periods to allow mediation to take place, with some exceptions. Conversely in Bolivia and Ecuador, somewhat unusually for countries with mediation laws, the instigation of mediation does not pause the limitation period.

iii. International Mediation legal frameworks

Both **Colombia** and **Ecuador** are signatories to the Singapore Convention on the enforceability of mediated settlement agreements, with Ecuador ratifying the Singapore Convention into law on 9 September 2020. The convention came into force on 12 September 2020.

In addition, all countries of this region are signatories to many international agreements that recognise the application of ADR for the solution of disputes. These include multilateral agreements such as Charter of the Organization of American States and the Inter-American Treaty of Peaceful Solutions of 1948. As well as bi-lateral trade agreements, for example in Peru's case these include: Peru-Mexico Trade Integration Agreement, Peru-Singapore Trade Liberation Treaty and the Peru-Canada Free Trade Agreement.

3. Mediation Practice

a) Mediation Activity

	Bolivia	Colombia	Ecuador	Peru
Do court-based mediation programmes exist?	Yes [19]	Yes [14]	Yes	Yes [14]
Are they judicial mediations or extra-judicial	Judicial	Extra-judicial	Extra-judicial	Extra-judicial
Can judges invite parties to try mediation?	Yes [14]	Yes [14]	Yes	Yes [14]
If so, is it voluntary or mandatory?	Mandatory	Mandatory	Both	Mandatory
Is mediation mandatory pre-litigation?	Yes	Yes	No	Yes
Are judges trained in ADR?	Yes	No	Yes	No

In the Andean region all countries have court-based mediation or conciliation.

Ecuador has a court-based *mediation* (as opposed to conciliation) programme, and according to the statistics, it is a very successful programme. The Judiciary has its own Mediation Centre, which is the National Mediation Centre for the Judiciary. It does not operate annexed to any specific court but provides the services at a national level with the same requirements as any other Mediation Centre. In 2019, 54,554 cases were mediated via this National Mediation Centre, of which 17% were referred by Judges, and the remainder of cases were direct referrals. Mediations that happen following a direct referral fall under the Arbitration and Mediation Act and are therefore voluntary. However, when referred by a judge, the General Organic Code of Processes and the Organic Code of the Judicial Power established a mandatory referral.

In terms of the breakdown of cases by type, 17,633 (32%) were Civil cases, with the remainder being Family (47%), Labour (7%), Tenancy (6%) and Other. Unfortunately, there is no further breakdown available of Civil cases, and therefore it is not possible to provide statistics or information on the number of Intellectual Property cases mediated via this programme. The settlement rate for 2019 was 80-90%.

[19] These will often be called “conciliation” rather than “mediation”.

There are two other main providers of mediation services in **Ecuador**. The Arbitration and Mediation Centre of the Quito Chamber of Commerce handles Commercial and Civil case including Intellectual Property, when they fall outside the court-based programme. Their 30 mediators mediate approximately 2000 cases a year. There is no information available on the number of IP cases that are mediated via this centre each year. Finally, the Attorney General's Mediation Centre deals with mediations involving administrative Law and contracts with the state. This centre handled 1500 cases last year, with a panel of 29 mediators, all lawyers. There is no settlement rate data available for these two centres.

Finally, it should be noted that while these case numbers are comparatively low when compared to the National mediation centre, by international standards they are quite high for private or public mediation centres.

In the other three countries of the region, there is a mandatory mediation process as a pre-requisite to instigating a lawsuit before the courts. However, the operation of these mandatory pre-issue mandatory programmes differs from country-to country.

In **Bolivia**, *Law No. 439* establishes a mandatory prejudicial conciliation in civil and commercial matters (with certain exceptions). The Bolivian departmental courts have their own judicial conciliators, who are in charge of the mandatory prejudicial conciliation. These conciliators are court official, or conciliators working with a Conciliation Center whose functions are carried out in Court facilities. After successfully passing a test, the applicant conciliator becomes part of the staff of the Departmental Court of Justice and receives a salary. One of the requirements to be part of the team is to speak a native language, like any public servant, in this case Quechua.

By way of example in the Chuquisaca Departmental Court of Justice alone, there were 1,687 requests for prejudicial conciliation in 2019 for Chuquisaca Departmental Court with an 83% settlement rate. As there are not statistics available of the types of mediations handled by the departmental courts, it is not possible to say if Intellectual Property cases are mediated via this mandatory system. In relation to Extrajudicial Conciliation, which is regulated under the "*Ley de Conciliación y Arbitraje*", Given the presence of Conciliation in the courts, private ADR organisations carry out far fewer cases than judicial conciliators. An estimate of 250 cases is handled by private ADR organisations each year with an average settlement rate of 60%.[20] There is no data available on the breakdown of these cases but when it comes to Intellectual Property, interviews carried out by our local

[20] Data obtained from Guillermo Roca Roca of the Conciliation Center of the UNIR Bolivia Foundation

researchers show that private centres do not handle IP mediations, not for lack of will but because these cases are never brought to them.

In **Peru**, the Conciliation Law establishes that conciliation is mandatory as a prerequisite to initiate most legal claims. However unlike in Bolivia this conciliation is done by way of public or private mediation centres outside the courts, such as the Peruvian Association of Conciliation and Arbitration, or The Center of Arbitration of the Lima Chamber of Commerce. The law states that conciliations must be carried out in a Conciliation Centre authorised by the Ministry of Justice of Peru, whether it is public or private. Peru currently has 91 free conciliation centres around the country and our research shows that in in 2019, 60,824 cases were conciliated with a success rate of 50%. The low success rate could be interpreted in the light of mandatory pre-litigation conciliation that therefore does not guarantee fully voluntary attendance by the parties. While statistics are not available on the types of cases being mediated, our research indicates a likely low presence of IP mediation via the court system.

In **Colombia** a similar system to Peru operates in that Conciliation is mandatory as a prejudicial requirement for certain subject matters, including: for civil, family and administrative matters. Article 90 of *Law 1564* establishes that a lawsuit will not be admitted unless it demonstrates that parties complied with the mandatory conciliation. These mediations are conducted through registered conciliation centres. There are currently 6,167 authorities competent to conciliate, of which 5,927 are active. Over the past 10 years, these centres have seen a significant rise in the requests for mediation, with 90,000 applications in 2009 and 172,000 in 2019. The success rate of the cases mediated has also increased moving from 30% to 50% over the past 10 years.[21] These numbers reflect the consequence of mandatory pre-litigation conciliatory processes.

Private mediation centres also exist and carry out a high number of resolutions each year, particular in relation to commercial disputes. Examples include the Arbitration and Conciliation Centre of the Bogota Chamber of Commerce which handled 6564 mediations in 2019, with a settlement rate of 45%, and the Conciliation and Arbitration centre Dario Velásquez Gaviria, which handles 500 mediations per year and has a 60% settlement rate. It is in these centres that IP mediations are most likely to take place, however, statistics are not available as to mediation by dispute type.

Finally, it is important to note that this pre-trial mandatory mediation approach is not a common approach internationally. Most mediation

[21] https://www.sicaac.gov.co/Informacion/Estadistica

systems are voluntary. If they are mandatory, they are normally part of a specific court-based programme, and therefore post-filing of any claim.

b) Profile of mediator profession

	Bolivia	Colombia	Ecuador	Peru
Neutrality and Independence of mediators	Yes	Yes	Yes	Yes
Minimal training required	No	No	Yes	Yes
State certification	Yes[22]	Yes	No	Yes

In **Peru**, the Ministry of Justice and Human Rights is in charge of authorising, supervising and sanctioning conciliation centres, conciliation training and education centres, conciliators and conciliation trainers. Additionally, it is responsible for promoting conciliation in Peru. Accordingly, this is the only Andean jurisdiction which has both minimum standards set for training and a requirement for mediators to be certified. The 60,000+ Peruvian mediators are working with private & public conciliation centres, and as independents.

Conversely in **Ecuador** all mediators must, according to the law, complete at least 80 hours of mediation training and have completed the observation of 5 real mediations. Beyond this, specific mediation centres establish their own requirements for certification, and there is no state certification process. In Ecuador, the Council of the Judiciary has registered 100 mediation providers, which have also certified a total of 786 mediators.

Bolivia and **Colombia** both have state certification but no minimal training standard set out in their legislation.

In **Bolivia** extra-judicial conciliators are accredited by a Conciliation Centre or Conciliation and Arbitration Centre, in accordance with article 14 of *Ministerial Resolution No. 235/2015*. In turn, Prejudicial Conciliation, must be carried out in front of a judicial conciliator, who is an officer of the court. They are directly selected by the Magistrates Council. Although no data was available, our researcher estimated that there are over 150 accredited conciliators in the judicial system.

While in **Colombia**, *Law 640* establishes that any lawyer, who has gone through ADR training, passed an exam administered by the Ministry of Justice and registers with a Conciliation Centre, can act as a conciliator. The Conciliation Centre is also authorised by the Directorate of Alternative

[22] For Mediation Centres and judicial conciliators only

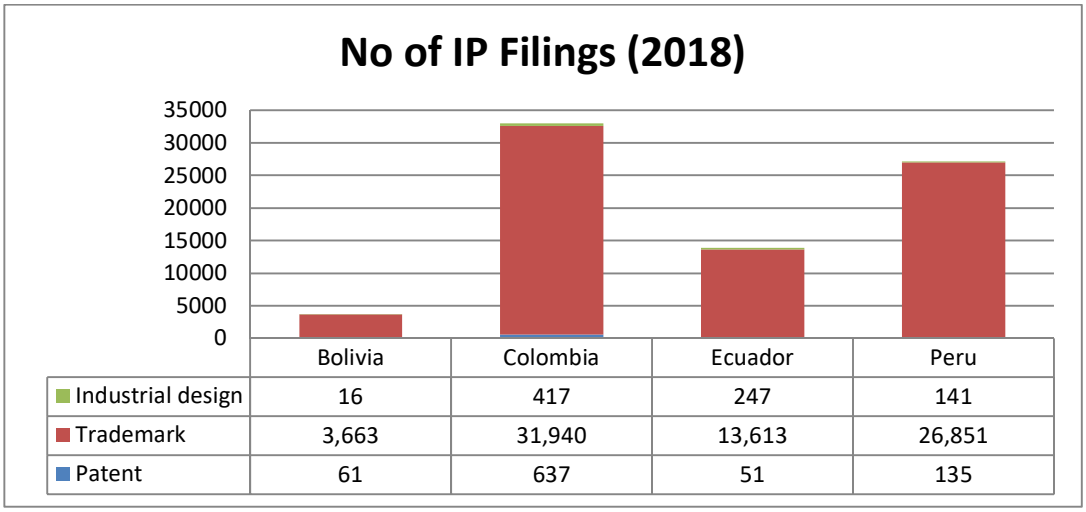
Conflict Resolution Methods. On the other hand, the conciliators in equity must have a number of personal characteristics. They must be of Colombian citizenship, be 18 years old or above, know how to read and write, have community presence, live in the municipality where s/he would act, be nominated by the community, go through a training process, pass a selection tests, be endorsed by the Ministry of Justice, and be nominated by the highest judicial authority of the municipality. Conciliators in equity act as community conciliators.

According to the SICAAC System registry, there are 57,354 conciliators in law registered, of whom 23,007 are active conciliators. In addition, there are 6,167 authorities competent to conciliate registered, of which 5,927 are active.

According to the Directorate of Alternative Methods of Conflict Resolution of the Ministry of Justice, in September 2019 there were 9,631 conciliators in equity.

4. IP Mediation within National IP Offices

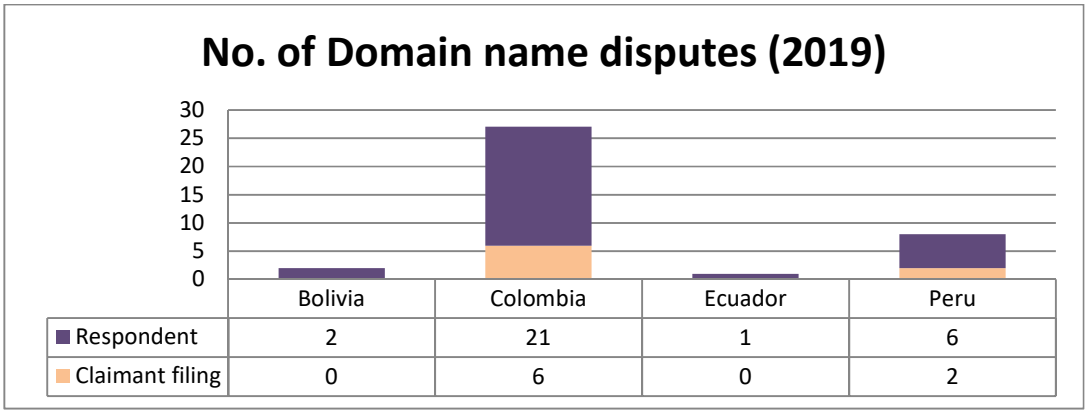
a) General size of IP market



	Bolivia	Colombia	Ecuador	Peru
Industrial design	16	417	247	141
Trademark	3,663	31,940	13,613	26,851
Patent	61	637	51	135

23

[23] WIPO statistics, accessed 14 September 2020 - - https://www3.wipo.int/ipstats/



24

The statistics above give an indication of the size of the IP market in each country in this region, this is important as it established the potential market for IP mediation. What it shows is that Colombia is the biggest IP market in the Andean Region, closely followed by Peru, then Ecuador and then Bolivia.

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b) Mediation Services in National IP Offices

	Bolivia	Colombia	Ecuador	Peru
Does the National IP Office offer mediation?	Yes	Yes	No	No
Does it communicate & advise about it?	Yes	Yes	Yes	No
Does it have its own internal mediator(s)?	Yes	Yes	No	No

It is interesting to note the differing approaches to offering mediation in this region. **Colombia** the biggest IP market in the region does have its own in-house mediation service, while **Peru**, the second biggest market, despite havening enabling provisions in its IP legislation, does not offer such a service. **Bolivia** also offers an in-house conciliation service, while **Ecuador** does not but does promote mediation to its users.

The IP Office SIC (Superintendencia de Industria y Comercio) is in charge of handling the Industrial Property registry in **Colombia**, including the registration of trademarks, commercial slogans, industrial designs, commercial names and patents.

[24] Ibid

The Office offers conciliation for IP disputes at various stages.

The Office offers Facilitation Hearing to overcome the obstacles of registering a distinctive sign when either another party's co-operation is required for registration or there is a registrability dispute under certain specific criteria.

This process is also regulated and clearly set out. The Directorate of Distinctive Signs, within five business days after receipt of the request, will set the date and time for the facilitation hearing. The hearing will last a maximum of one hour. The parties will have a single spokesperson and each participant will have up to fifteen minutes to make their proposals. At the end of the session, the terms and commitments proposed by the parties and accepted by the Directorate of Distinctive Signs will be recorded in a document. The facilitators of this highly regulated procedure are internal staff of the national IP office, specifically, the Director of Distinctive Signs.

In **Bolivia**, the National Intellectual Property Service (SENAPI) grants copyright and industrial property rights, including patents and trademarks. The Regulation of Internal Procedure of Industrial Property and Enforcement of SENAPI states that the interested party of a complaint of infringement of Industrial Property right may request, at any time of the process before a resolution is issued, that a conciliation hearing is held in the offices of the Legal Directorate of SENAPI. The Legal Director will order a date and time to carry out the conciliation hearing, which must be notified to the parties involved in the process.

The Director of Copyright and Related Rights of the National Intellectual Property Service is the competent authority to participate in the conciliation as a neutral and impartial third party. In 2018, the Director carried out 41 conciliations in the Office.

This administrative conciliation procedure is initiated at the request of one or both parties and takes place in SENAPI's Central office, unless both parties live in the same city outside of La Paz.

In **Ecuador**, The National IP Office, Servicio Nacional de Derechos Intelectuales (SENADI) grants patents, plant breeding, copyrights, intellectual rights, and distinctive signs.

The Diretor-General of World Intellectual Property Organization-WIPO, Francis Gurry, met with Santiago Cevallos, General Director of the National Service of Intellectual Rights-SENADI, to sign a Memorandum of Understanding for the implementation of a Mediation Centre in Ecuador for intellectual property issues. However, the SENADI Office has not yet implemented this service. However, according to the *Arbitration and*

Mediation Act, public entities such as SENADI can establish an ADR provider, that can offer mediation or other forms of disputes resolution.

The World IP Office (WIPO) undertook to provide training to the mediators who could be part of a mediation centre, which is expected to be of great use to those seeking to use an alternative form of conflict resolution.

SENADI currently contemplates the possibility of developing mediation, but is so far only offering information about the process on its website.

Finally, in **Peru** INDECOPI is the national authority competent responsible for the protection of intellectual property rights.

Art. 169 of the Copyright Law, Legislative Decree No. 822, determines the competencies of the Copyright Office of the National Institute for Defense of Competition and Protection of Intellectual Property (INDECOPI). One of its functions or competencies is "Act as a mediator, when the Parties request it, or call to conciliation, in the disputes that are presented regarding the exercise of the rights contained in the present Law."

However, the national office does not exercise any of these functions. This is in part due to the absence of a clear practical mediation framework to allow the establishment of such a service in the Country's Intellectual Property Office.

MERCOSUR and Chile

1. Overview

MERCOSUR has two of the biggest economies in Latin America however tis use of mediation is not uniform and there are marked differences between countries.

With the exception of Uruguay and Chile, the other countries have passed mediation law that provides a framework to the practice. However, the absence of law has not deterred the two aforementioned countries from establishing an ADR Practice linked with the justice system. Uruguay has, for example, established Judicial Branch Mediation Centres since 1995 to improve social relations within the country. Chile has so far approached and regulated mediation per sector (labour, health, family, etc.), but is also currently developing a general law to protect and embed mediation more widely in the country.

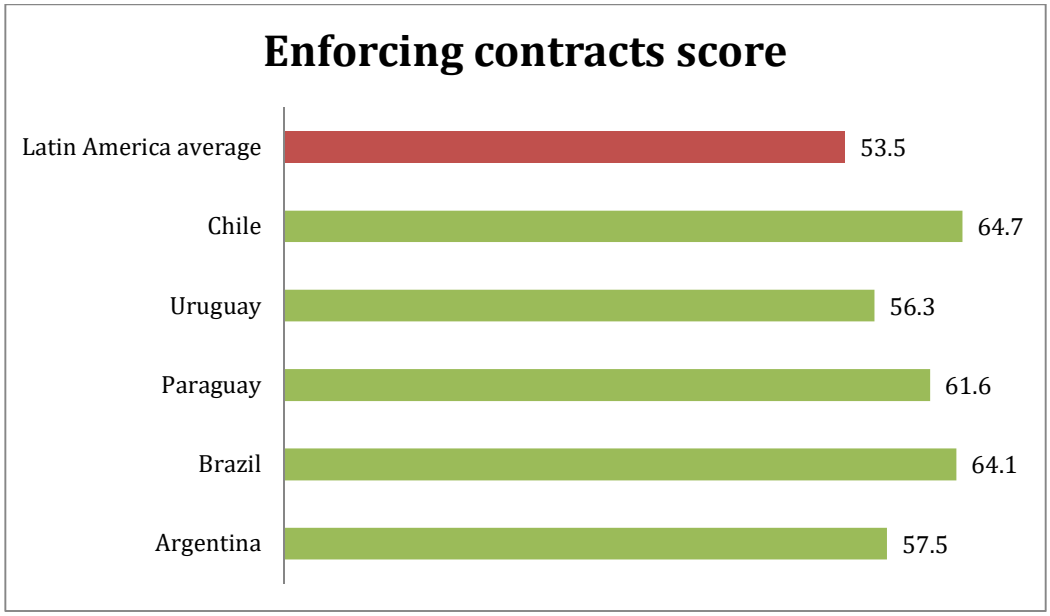
In those countries that have already regulated mediation, the practice has also been well established within the courts, allowing judges to refer the parties to ADR.

When looking in depth at the effects of laws and rules, and their application to international mediation agreements, most of the countries in the MERCOSUR region and Chile have developed an approach quite close to those suggested in EU Directive and the WIPO and EUIPO Mediation Rules. This shows clear potential for international collaboration and cross borders dispute resolution. Some aspects are however to be considered, particularly in Chile and Uruguay, where the absence of law has prevented clear state-regulated quality assurance of mediation. Confidentiality is also not fully protected in Uruguay, and the voluntary nature of mediation is relative in Argentina and Chile.

Looking at Intellectual property, MERCOSUR and Chile have one of the largest markets in Latin America. Yet it is surprising to see that none of these countries' National IP offices offers mediation in any way. Although some information is provided about it, the countries all refer the parties to WIPO's rules and do not offer mediation services within their offices.

2. Overall Litigation Environment and Mediation Legal Framework

a) Overall Litigation Environment



MERCOSUR and Chile is the strongest region in Latin America when looking at the ease of enforcing contracts, with the score of all countries ranking above the average.

This makes the region quite favourable for Alternative Dispute Resolution mechanisms such as mediation where settlement agreements often have the status of "contract".

b) Mediation Legal Framework

	Argentina	Brazil	Paraguay	Uruguay	Chile
Has a mediation law	Yes	Yes	Yes	No	No
Voluntary nature of mediation	No [25]	Yes	Yes	Yes	Yes/No[26]
Quality assurance	Yes	Yes	Yes	No	No
Enforceability of agreements	Yes	Yes	Yes	Yes [27]	Yes [28]
Cross-border recognition of agreements	N/A	Yes	Yes	Yes [22]	Yes
Confidentiality of mediation	Yes	Yes	Yes	No	Yes [29]
Suspension of prescription periods	Yes	Yes	No	Yes [30]	No
Official/Public information	No	Yes	Yes	N/A	Yes

i) Mediation law

Although not all MERCOSUR and Chile countries have a specific mediation law, mediation is present throughout the region.

In **Argentina**, the mediation procedure is regulated by *Law 26589* (hereafter "The Law"), which establishes mediation as a compulsory proceeding prior to most court actions. This procedure aims to promote direct communication between the parties in order to reach an out-of-court settlement of the dispute.

Although there are specific types of cases where the law does not apply, such as criminal actions, bankruptcy and lawsuits against government, most common commercial claims will have the option of participating in an ADR procedure.

[25] The law established mandatory mediation pre-trial.
[26] In certain circumstances, such as IP claims, mediation can be compulsory.
[27] Agreements must be confirmed by a judge to be enforceable
[28] Automatic in certain circumstances such as IP and Family, formalised transaction for Civil & Commercial
[29] Although not protected by the law, it falls under professional secrecy for most private mediation organisations
[30] This is only the case if both parties express a mutual agreement to do so

In **Brazil**, there is *Law No. 13,140/2015*, which is considered the Legal Framework for Mediation in Brazil. In addition, the *Code of Civil Procedure of 2015* regulates mediation and conciliation within the structure of the Judiciary (court connected mediation). The new code expressly provided for the use of alternative means for dispute resolution as a form of access to justice. There are currently two types of mediation in Brazil: Judicial Mediation and out-of-court Mediation.

Therefore, it is widely considered that this legal structure has meant that there is the implementation of the so-called multi-door Courthouse System in Brazil, whereby parties to a dispute when filing a claim have the option to start a mediation via the court prior to or in parallel to instigating litigation.

Paraguay has a specific law: *Arbitration and Mediation Law Nr. 1.879/02*[31] which regulates arbitration and mediation.

The law specifies that mediation can be applied to all matters arising from a contractual relationship or other types of legal relationships, provided that such matters are susceptible to settlement, conciliation, or arbitration. The Law also applies to Intellectual Property disputes.

In **Uruguay**, there is no specific mediation law. The country's legal system, however, recognises two separate and independent processes, conciliation and mediation, as being parts of the legal process. The first is an essential stage in the judicial process, which is enshrined in the Country's Constitution as a pre-trial stage and is also provided for in the preliminary hearing process, before establishing the subject matter of the proceeding. Conciliation is characterised by the reasoning that the neutral third party (judge) actively participates in trying to generate options and proposals for resolving the dispute. Mediation, on the other hand, is characterised in Uruguay as a process by which the mediator does not issue opinions, nor advise or propose forms of conflict resolution, but takes a facilitative role to guide the parties through a process using various techniques to ensure that the parties generate their own solution.

In addition, Uruguay has Judicial Branch Mediation Centres, which were created in 1995 from an agreement between the Judiciary and the Ministry of Public Health, in order to allow users the easiest and most direct access to mediation services, as well as to seek and promote the self-breakdown of conflicts, and to facilitate mediation in cases of different social issues. Since the implementation of this agreement, in 1996, the Supreme Court of Justice (maximum authority within the judiciary) through the *Agreed No. 7276* ordered the creation of five Mediation Centres in Montevideo (capital of the country), which was in principle a "pilot mediation project". The Centres are

[31] Please find access to the Law through the following link: http://www.bacn.gov.py/leyes-paraguayas/4545/ley-n-1879-de-arbitraje-y-mediacion

divided by subject matter. In the last census of 2017, they indicated carrying out 4499 mediations per year.

Despite the lack of a specific mediation law, Uruguay signed the United Nations Convention on International Settlement Agreements Resulting from Mediation, known as the Singapore Convention, on 7 August 2019.

In **Chile**, there is not a specific Mediation law and civil and commercial mediation is not regulated and is governed by the general rules established for contract law. However, it is provided for in different sectors by different regulation or laws for example in Family mediation (*Law No. 19.968*); Health mediation (*Law No. 19,966)*; School mediation (*Law No. 20.529),* Labour mediation (*DFL No. 2 and Service Order No.1) and* Mediation in financial consumption disputes (*Law No. 20, 555).*

Among these, those with the highest case volumes are in family mediation, health mediation and labour mediation.

Importantly for the purposes of this study, mediation is provided for in intellectual property, between associations with legal personality representing users of copyright or related rights and collective management entities. (*Law No. 17.336*)[32]

As part of the development of mediation in Chile there is currently a general mediation law, proposed, which is still a pre-legislative initiative. The Ministry of Justice and Human Rights has reported that it is intended to encourage the development of mediation separately from the draft Reform to the Code of Civil Procedure, given the crisis caused by COVID-19. It is expected that this public policy will be implemented continuously with a long-term vision and not exclusively attached to the emergency of the pandemic.

ii) Detailed operation of mediation laws and regulations

As can be seen from the table above the mediation regulations of the countries in MERCOSUR and Chile covers, to a certain extent, the necessary key aspects required of the effective operation of mediation. In this respect they can be seen to be aligned with the requirements set out in the European Mediation Directive, despite some differences especially in the suspension of prescription periods, the difficulty for confidentiality in Uruguay, or simply a total absence of regulation in Chile and Uruguay – that has however not prevented them from developing actual mediation practices.

[32] https://www.leychile.cl/Navegar?idNorma=28933
https://www.leychile.cl/Navegar?idNorma=1025662

Specifically:

- **Status of mediators** – In MERCOSUR and Chile the status of mediators is only recognised if there is a specific law. Although private mediation centres do exist, their status is not protected by the law, and therefore can leave the practice in a difficult situation, not protecting "mediators" from alternative unregulated practitioners taking on the same name.
- **Enforceability**- Across the region, mediation settlement agreements are enforceable by the courts. Differences lie in the local procedures to have the agreement enforced, sometimes requiring validation by a judge. As in many areas of the world, mediation agreements have at least the status of a contractual agreement. Uruguay has also formally adopted the Singapore Convention and therefore will also be able to implement cross border mediation settlements.
- **Confidentiality**- Most jurisdictions take confidentiality of mediations into account. However, due to the absence of regulation in Uruguay, it has appeared that confidentiality of mediation is not guaranteed, and can therefore have a detrimental effect on the practice.
- **Suspensions of Limitation Periods** – Interestingly for this region, this is not linked to the existence or not of a mediation law. Paraguay for instance, despite having a mediation law, does not allow for suspension of limitation periods to attempt mediation. In contrast, in Uruguay, despite the absence of legal framework governing mediation, the parties may initiate mediation even if a lawsuit is ongoing. However, to do so, they must request on their own initiative, expressly and by mutual agreement the suspension of the judicial deadlines before or during the procedure, for as long as they deem appropriate.

iii) International Mediation legal frameworks

Of these countries, **Argentina and Brazil** are the only countries in the region to-date who are **not** signatories of the Singapore Convention on mediation. However, the Brazilian government has approved the signing of the convention in November 2020, which should take place early 2021.

3. Mediation Practice

a) Mediation Activity

	Argentina	Brazil	Paraguay	Uruguay	Chile
Do court-based mediation programmes exist?	Yes	Yes	Yes	No	No
Are they judicial mediations or extra-judicial	Both	Extra-judicial	Extra-judicial	Extra-Judicial	N/A
Can judges invite parties to try mediation?	Yes	Yes	Yes	Yes	No
If so, is it voluntary or mandatory?	Mandatory	Voluntary	Voluntary	Voluntary	N/A
Is mediation mandatory pre-litigation?	Yes	No	No	No	No
Are judges trained in ADR?	No	No	Yes	Yes	Yes

In **Argentina**, The Code of Procedure provides a mechanism for judges to refer cases to mediation. This occurs during the preliminary hearing, which takes place after the defendant files the defence to the complaint, and before the evidentiary stage is opened. At this moment, the judge will summon the parties to a hearing, which he or she will preside over. The judge will invite the parties to conciliate or find another way of resolving the conflict. The judge may refer the parties to mediation if the nature and state of the conflict justify it. In this case, the proceedings will be suspended for thirty (30) days as from the notification of the mediator (this notification will be done by any of the parties). Once this period has expired, the procedure will be resumed at the request of any of the parties.

Although this mechanism exists, in practice judges rarely refer cases to mediation. Instead, they usually use the preliminary hearing to get the parties to negotiate and settle the dispute at this stage, before opening the evidentiary stage.

It is also interesting to note that ADR and Mediation is not part of the curriculum and training for judges. Although some awareness programmes are put in place, mainly in family courts, the absence of information made available to judges and businesses may slow the development of mediation to the profit of informal dispute resolution negotiations.

In **Brazil,** the 2015 Civil Procedure Code encourages the consensual resolution of conflicts and enshrines in its *Article 3* the settlement principle which establishes that finding a consensual solution must be encouraged at all times. In addition, the code modified the procedure for processing cases, moving the preliminary hearing to the beginning of the process, before the defendant has filed a defence. Thus, the article establishes that if the initial motion fulfils the essential requirements, the judge will designate a conciliation or mediation hearing at least 30 (thirty) days in advance, and the defendant must be cited at least 20 (twenty) days in advance.

The parties must indicate whether or not they want the mediation session to take place. If one of the parties says that it has an interest or does not make a representation, as a rule, the mediation will happen. If either party indicates they have no interest in settling then the case will not be referred to mediation. However, it will always be up to the Judge to determine whether or not to refer parties to NUPEMECs / CEJUSCs. Once forwarded, the parties are required to attend the scheduled conciliation hearing or mediation session.

There are no official statistics available; however, according to the NUPEMEC officials interviewed, approximately 90% of the judges do not refer cases to mediation yet.

In **Paraguay**, The *Supreme Court Mediation Rules* allows the option for Judges to refer cases to voluntary mediation.

Judges are increasingly inclined to refer cases to voluntary mediation. Statistic provided by the Paraguay Mediation Office for 2019 shows that there were 20,341 cases which had 8,973 settlements (a 44.2% settlement rate). The main types of mediation cases within the court are as follows:

Childhood and Adolescence Courts: 2.224 cases;

Civil and Commercial Courts: 88 cases;

Labour Courts: 722;

Criminal Courts: 587;

Criminal Courts for Adolescence: 28 cases;

and, Extrajudicial (private) cases: 16.208.

In **Uruguay**, There are the Judicial Branch's Mediation Centres, which were created in 1995 from an agreement between the Judiciary and the Ministry of Public Health, in order to allow users the easiest and most direct access to services, as well as to seek and promote the self-breakdown of conflicts, and to facilitate mediation in cases of different social issues. Since the implementation of this agreement in 1996, the Supreme Court of Justice

(maximum authority within the judiciary) through the **Agreed No. 7276** ordered the creation of five (5) Mediation Centres in Montevideo (capital of the country), which was in principle a "pilot mediation experience". The Centres are divided by type of matters. In the last census of 2017, they indicated carrying out 4499 mediations per year. Apart from the Judiciary's Mediation Centres, where parties may be sent by the judge or prosecutors, there is no court-based mediation structure.

It is interesting to note that in recent years, the Centre for Judicial Studies of Uruguay has begun training aspiring judges in mediation. Numerous private endeavours are also increasing the visibility and knowledge of mediators throughout the country. The University of the Republic of Uruguay, for example, currently teaches courses on mediation and has carried out several activities to promote the use of mediation.

In **Chile**, the Chilean Civil Code regulates "conciliation" as a mandatory instance in most civil trials. There is no procedure for referring cases to intellectual property mediation, neither for civil nor trade conflicts. Currently, there is a project to carry out a practical study of the design and implementation of a mediation unit in the Civil Courts, in order to obtain empirical evidence on the effectiveness of mediation within the court system as part of Civil Procedure Reform. This study called the "*Estudio Práctico Unidad Orientación y Mediación Civil*" and being run by the Centre for Justice Studies of the Faculty of Law of the University of Chile is being trialled in the Small Claims Civil Courts of Viña del Mar and in the 2nd Small Claims Court of San Bernardo.

It is interesting to note that ADR training has been progressively incorporated into the curriculum of the Judicial Academy, since alternative dispute resolution mechanisms are part of the 2015-2020 strategic plan of the Judiciary. Furthermore, the above-mentioned Practical Study includes induction talks to the officials of the aforementioned courts.

b) Profile of mediator profession

	Argentina	Brazil	Paraguay	Uruguay	Chile

Neutrality and Independence of mediators	Yes	Yes	Yes	Yes	Yes
Minimal training required	Yes	Yes	Yes	No	No (2)
State certification	No	Yes	Yes	No	No

In **Argentina**, mediator is a status regulated by the law. To be a mediator a professional must have the following requirements:

a) to be a lawyer admitted to the Bar of the jurisdiction where you will serve as a mediator at least three years before applying for admission as mediator
b) to show the certificate of basic training in mediation as established by the regulatory authority;
c) to pass the suitability test established for applicants to enter the Registry of Mediators;
d) to have offices in the Autonomous City of Buenos Aires, which allow proper development of the mediation process, the characteristics of which must be under the regulations;
e) to show proof of the continuous training

Certification, registration and continuous professional development is managed by the Directorate. They both deliver training and certify private trainings.

The Directorate also keeps a National Registry of mediators with a currently estimated number of 3500 mediators carrying out preliminary and judicial mediations.

Unlike many other jurisdictions, the Directorate does not have a specific code of conduct for mediators, but as lawyers they must all abide by the Code of Ethics of their bar association.

In **Brazil**, mediation will follow the principles of the mediator's impartiality between the parties, orality, informality, autonomy of the parties, and will search for consensus, in confidentiality, and in good faith, as provided for in Art. 2 of the Mediation Law, and two additional provisions of art. 166 of the code of civil procedure: independence and informed decision.

According to Article 9 of the Mediation Law, one may act as an out-of-court mediator who has the trust of the parties and is able to mediate, regardless of whether being part of any type of council, class entity or association, or enrol in it. In addition, the mediator must have experience, vocation, and trust of those involved as well as the aptitude to mediate. They must have

knowledge of the fundamentals of mediation, not only training in other areas of knowledge that are related to the merits of the conflict, so that the mediator does not need to be enrolled in the Brazilian Bar Association.

In **Paraguay**, the Mediation Office of the Judiciary, under the supervision of the Supreme Court has a role also in ensuring the quality assurance and mediation standards of mediations that are held within the courts. There are private self-regulated bodies that are also responsible for the quality of mediation processes that they handle. For example, Centre of Arbitration and Mediation of Paraguay, structured within the National Chamber of Commerce and Services, carries out and average of 8 to 12 mediations and 1 IP Mediation per year. Such Mediation Centres are organisations endowed with the administrative and technical elements necessary to support the mediation processes and for the training of mediators.

According to the law, the mediator must be a person of recognised standing, expertise, and impartiality and his/her work shall be to freely direct the process of mediation, guided by the principles of impartiality, equity and justice.

There are initial training requirements for mediators which are set out in the law. With regards to ongoing training requirements, there is no mandatory rule but in practice, the Mediation Office of the Judiciary and the private Mediation Centres offer continuous training seminars which are optional to attend.

There are currently 238 mediators registered before the Supreme Court; 116 mediators registered before the Mediation Office of the Judiciary; and, 40 mediators registered before the Mediation Centre of the National Chamber of Commerce.

In **Uruguay**, given the lack of legal framework, Uruguay has no official recognition or accreditation for mediators, except for the government Mediation Centre, where an Operational Commission appointed by the judiciary selects two mediators per centre based on their merits and knowledge in the field.

In **Chile**, there is no general framework of regulation responsible for ensuring the quality of mediation in the country. Rather there are specific requirements for each mediation body, according to the system covered by that specific regulation and who provides the service.

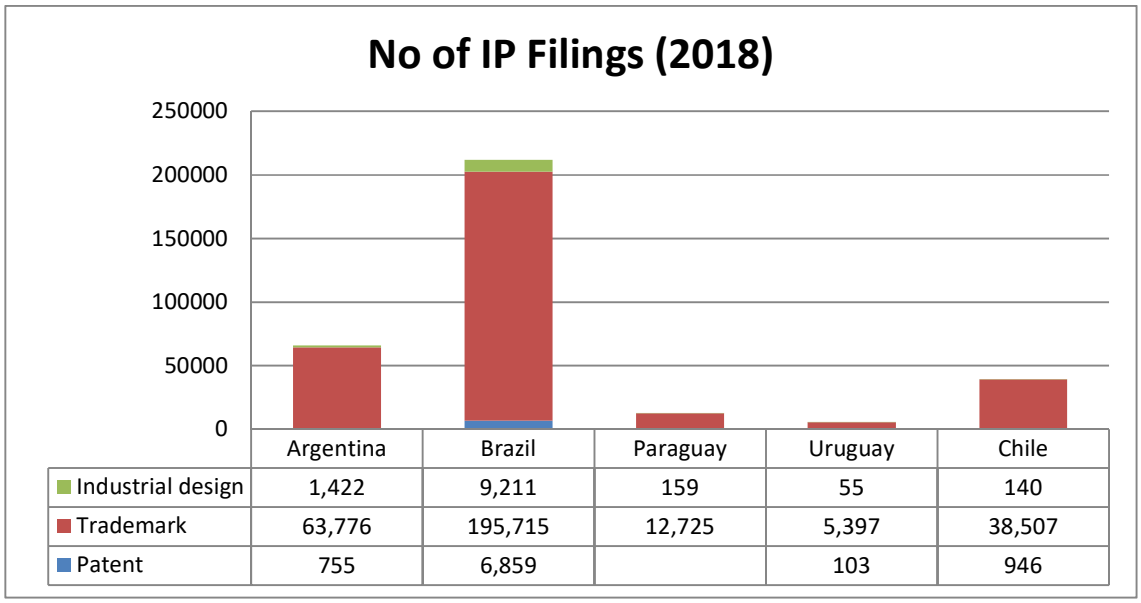
Regarding to mediation in intellectual property, please consult Decree No. 425 of the Ministry of Education, which regulates the registration procedure for the registration of intellectual property mediators and arbitrators, their form and characteristics, and the fees that mediators and arbitrators must receive. This decree establishes the following requirements: those who

request to join will be registered provided that they meet the following requirements: (i) Have a professional title; (ii) Have at least five years of professional practice; and (iii) Have qualified experience in the field of intellectual property or in the area of economic activity.[33]

[33] See Article 4 of the decree: https://www.bcn.cl/leychile/navegar?idNorma=1025662&idParte=0&idVersion=2011-05-24

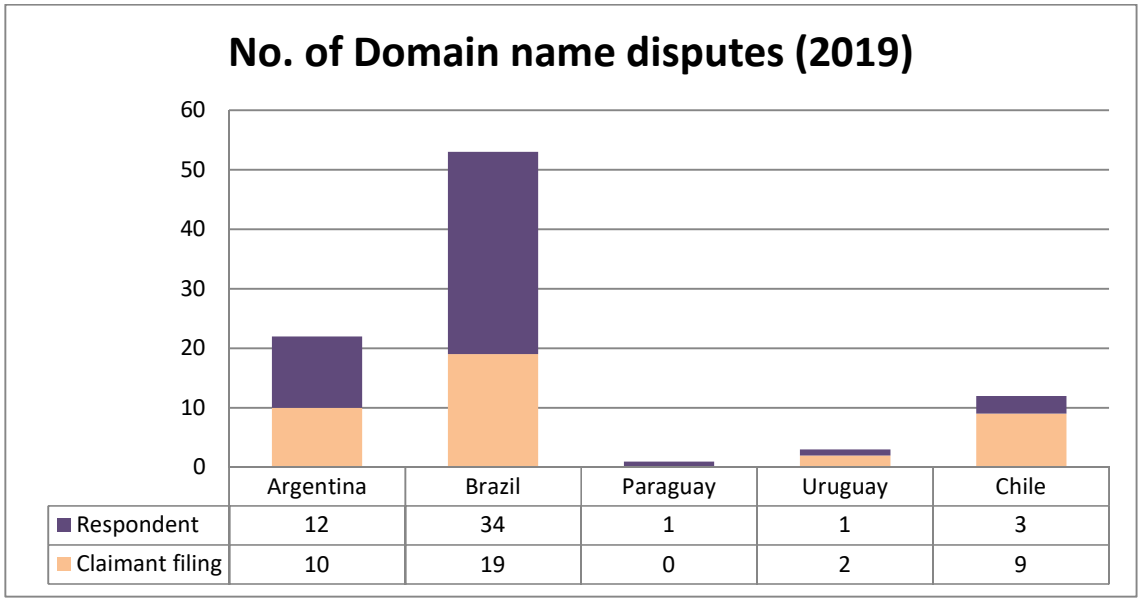
4. IP Mediation within National IP Offices

a) General size of IP market



	Argentina	Brazil	Paraguay	Uruguay	Chile
Industrial design	1,422	9,211	159	55	140
Trademark	63,776	195,715	12,725	5,397	38,507
Patent	755	6,859		103	946

34



	Argentina	Brazil	Paraguay	Uruguay	Chile
Respondent	12	34	1	1	3
Claimant filing	10	19	0	2	9

35

The statistics above give an indication of the size of the IP market in each country in this region, this is important as it established the potential market for IP mediation. It shows that Brazil is, unsurprisingly, the largest IP market in the region.

[34] WIPO statistics, accessed 14 September 2020 - https://www3.wipo.int/ipstats
[35] *ibid*

b) Mediation Services in National IP Offices

	Argentina	Brazil	Paraguay	Uruguay	Chile
Does the National IP Office offer mediation?	No	N/A	N/A	No	No
Does it communicate & advise about it?	Yes	N/A	N/A	Yes	No
Does it have its own internal mediator(s)?	No	N/A	N/A	No	No

Please note that we have not received answers from the National IP offices of Brazil and Paraguay, and therefore cannot provide accurate information on these regions.

Argentina: As a result of the amendment of the Argentine Trademark Law (*Law no. 22,362 by Law no. 27,444*), the National IP Office now handles opposition proceedings, cancellation actions on the ground of non-use as well as cancellation actions against trademarks granted in violation of registration requirements.

According to Argentina Office 's **Resolution no. 183/18**, there is only one instance of Mediation which involves opposition proceedings.

Therefore, specific IP Mediation is currently not yet established within the office. Informal negotiations for dispute resolutions are carried out, and the National IP Office could be granted authorisation for mediating IP litigation cases, providing they have an agreement with the Ministry of Justice.

In **Uruguay**, the IP office decides disputes in the first instance and after a decision has been issued it may be challenged by any party that feels harmed. That revision has a first administrative stage – in the IP office and then in the Ministry of Industry – and after that stage, jurisdictional revision is also possible.

On average the office issues 400 first instance resolutions and 200 resolutions in administrative revisions, on an average timeframe of 9 months in the first instance and 5 months during administrative revision.

However, there is no established practice of mediation in the National IP offices. ADR mechanisms in general are regulated in the General Procedural Code and as such are applicable for cases involving damages substantiated before the judiciary. But for disputes involving registration of IP rights, since

there is a public interest in the integrity of the registry, in principle, agreements between parties may not be enforced upon the Administration.

In **Chile**, the *Intellectual Property Law No. 17.336*, provides that "associations with legal personality representing copyright holders or related rights, who have not reached an agreement with a collective management entity on the amount of the tax, shall submit the dispute to mediation, which will be compulsory for both parties." The same legal body establishes that, in the event that mediation fails in whole or in part, the contested matters(s) shall be submitted to arbitration at the request of either party. This is an instance of mandatory mediation established by law. However, there is nothing to prevent the parties from voluntarily submitting an intellectual property dispute to mediation. In such case, as it is not regulated, to enforce any agreement, it must be specified as a transaction agreement, usually through a term reduction by public deed.

The National IP office does not offer mediation; however, in 2018 the IP Office signed a memorandum of cooperation with WIPO´s Mediation Centre. Even though the Chilean IP Office is the body in charge of resolving these matters in the first instance - and, therefore, mediation would be in accordance with their powers - its implementation would require a change in the current legislation. One of the issues discussed internally is the type of IP-related matters that, under Chilean law, could be the subject of arbitration and/or mediation. In the proceedings before the Chilean IP Office (oppositions and invalidities) it would be possible to incorporate a mediation body which outcome is confirmed by the Institute, taking into account that the resolution of cases relating to the granting, and validity of industrial property rights corresponds to Chile Office's proprietary jurisdiction as a court of the first instance and, therefore, cannot be left at exclusive disposal of the interested parties.

Several activities have been carried out:

(a) The 2016 National IP Strategy addressed the use of alternative IP dispute resolution systems in Chile and included among its recommendations the study of an arbitration model or ante-project for IP dispute resolution;
(b) Signed cooperation agreement with WIPO Mediation and Arbitration Center;
(c) Collecting statistical information on the use of IP arbitration in Chile and at the comparative level;
(d) Dialogue with stakeholders on the use of arbitration and mediation methods in IP in Chile.

Mexico and Central America

1. Overview

Amongst Latin American countries, Mexico and the Central America region have the most inconsistency position in mediation development.

Attempt at embedding mediation within local regulations and practices seems to have come as an answer to a need to address a developing practice rather than endeavours to build and integrate a mediation within local business practice. This is particularly the case for **Costa Rica**, **Guatemala** and **Honduras**.

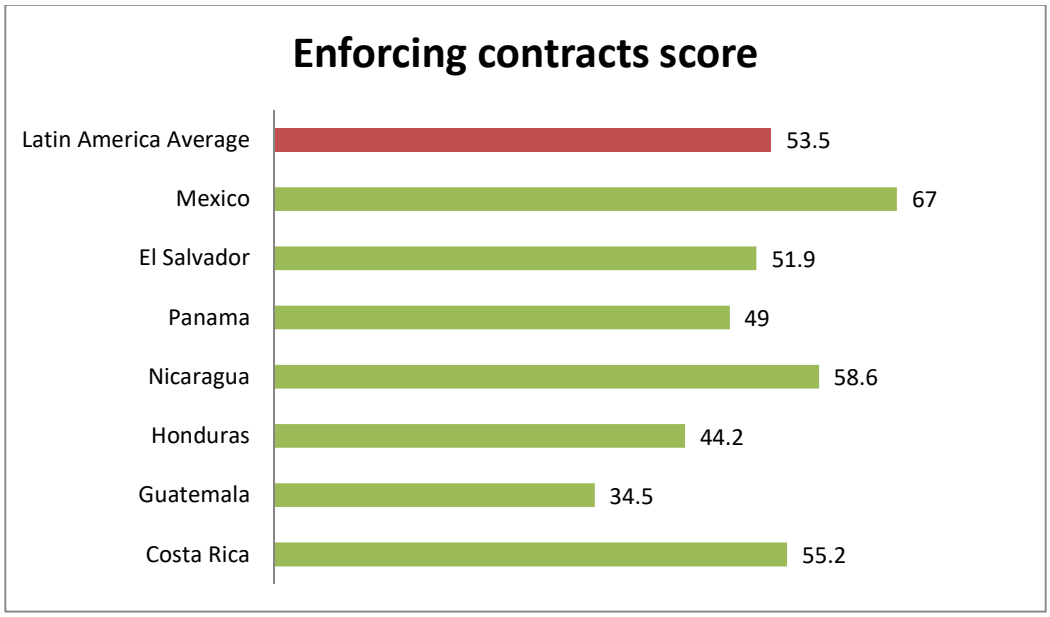
On the other hand, **Nicaragua** and **Mexico** seem to have established an approach to mediation both in their law and practices that is close to international best practice as established in the *EU Directive* and the *WIPO and EUIPO Mediation Rules*. In Nicaragua the law guarantees a certain level of training of mediators, with on-going quality assurance processes; allows local and foreign agreements to be enforced; protects confidentiality and neutrality of mediators; suspends prescription periods; and offers public information on the practice. Court-based mediation programmes also take place and are being used. It is important to note that pre-litigation mediation is mandatory in Nicaragua. In Mexico there is wide spread mediation practice with specific mediation laws in 30 of its 32 states, often linked with courts, and specific IP-related conciliatory processes.

In respect of the use of mediation for the resolution of IP disputes it is also important to note that mediation is nearly absent from IP offices as an internal service, except for **El Salvador** and **Mexico**. Knowledge and information about mediation is of course available, mainly through the links with WIPO's international mediation & arbitration centre.

El Salvador's National IP Office does offer mediation services and has integrated mediation both in its general law and IP procedures. Yet mediation has limited links with the courts.

2. Overall Litigation Environment and Mediation Legal Framework

a) Overall Litigation Environment



Mexico, **Nicaragua** and **Costa Rica** have scores above the average for the region, with **El Salvador** just below average.

This can be contrasted with much more complex litigation environment in **Guatemala**, **Honduras** and **Panama** which may be due to their long average length of judicial proceedings, with up to 1402 days in **Guatemala** ranking 176 (out of 190).

It is interesting to note that the courts in **Nicaragua** and **Mexico** take respectively an average of 490 and 341 days to enforce a contract, making it the most favourable in terms of length of time for resolution of disputes.

b) Mediation Legal Framework

	Costa Rica	Guatemala	Honduras	Nicaragua	Panama	El Salvador	Mexico
Has a mediation law	No [36]	No [37]	No	Yes	Yes	Yes	Yes
Voluntary nature of mediation	Yes	Yes	Yes	No [38]	Yes	Yes	Yes
Quality assurance	Yes	No	N/A	Yes	Yes [39]	No	Yes
Enforceability of agreements	Yes	Yes	N/A	Yes	N/A	Yes	Yes
Cross-border recognition of agreements	No	No	N/A	Yes [40]	N/A	Yes [35]	Yes
Confidentiality of mediation	Yes	Yes	N/A	Yes	Yes	Yes	Yes
Suspension of prescription periods	No	No	N/A	Yes	No	Yes	Yes
Official/Public information	Yes	Yes	N/A	Yes	Yes [41]	Yes [42]	Yes

i) Mediation law

As can be seen by the above comparative table, Mexico and the Central America region have mixed legal frameworks in respect of Mediation. Nicaragua, El Salvador and Mexico have mediation laws, whereas the other jurisdictions not having such a framework for the operation mediation.

Costa Rica has an Alternative Dispute Resolution Law but only contemplates the existence of Mediation (*Ley No 7727*). It only establishes that mediation may be freely practised by the parties within the law limitations but provided no more in terms of framework within which mediation can operate.

[36] Instead has a general law on ADR that contemplates the existence of mediation without providing a framework.
[37] Currently only governed by state guidelines referring to Art. 25 of the Code of Criminal Procedure
[38] This is due to mandatory pre-litigation mediation in several courts
[39] Government authorises mediation centres
[40] Only under certain trade agreements
[41] Through mediation centres
[42] Minimal information

The National Directorate of Alternative Dispute Resolutions, dependency of the Ministry of Justice, DINARAC (Dirección Nacional de Resolución Alterna de Conflictos) is designed to promote ADR, authorize, supervise and control the centres that are authorized for the institutional administration of Alternative Dispute Resolution methods ("Center").

Although **Guatemala** does not have a specific Mediation Law, it uses as a legal framework the *Article 25 of the Code of Criminal Procedure*, among others. The government also provides several guidelines as administrative tools for Mediation and other ADR.

Honduras does not have a mediation law; however, it has a *Conciliation and Arbitration Law* that contemplates Alternative Disputes Resolution in general. This law does not contemplate mediation *per se*.

Mediation is not provided by the courts, although it is allowed as a mechanism to avoid trial in civil matters according to A*rticle 415* of the Civil Procedure Code. In the courts, when a case has been resolved by mediation, the proceedings are stopped.

Private entities can apply mediation and in this area the conciliation and mediation centers created by the Chambers of Commerce, the Bar Association and the National Autonomous University of Honduras stand out.

Nevertheless, in Honduras very little mediation is being used and conciliation is applied instead.

Nicaragua's *Arbitration and Mediation Law (Ley No. 540*) only establishes that mediation may be freely practised by the parties to resolve financial and civic conflicts within the law limitations.

The DIRAC (Directorate of Alternative Dispute Resolutions, dependency of the State Judiciary) is designed to promote ADR, authorize, supervise and control the centres that are authorized for the institutional administration of Alternative Dispute Resolution methods ("Center") and regulate mediators.

The law also requires that each mediation centre has its own Code of Ethics.

Panama has an Arbitration, Conciliation and Mediation Law: *DECRETO LEY N°5 De 8 de Julio de 1999*. It only establishes the minimum definition and needs for mediation, and that mediation may apply in matters subject to transaction, withdrawal and negotiation.

The Ministry of Government and Justice, through the Alternate Conflict Resolution Directorate, authorises and supervises the centres that are authorised for the administration of Alternative Dispute Resolution methods ("Centre"). These centres are also required to establish a Code of Ethics.

El Salvador has a mediation law, *DECRETO No. 914.-*, that defines mediation practice, its processes and limits.

The Government Ministry promotes, authorises, supervises and controls the centres that are authorised for the institutional administration of Mediation ("Centre"), and also to supervise the quality of mediation.

The law also requires that each mediation centre has its own Code of Ethics.

Mexico does not have a National mediation law, however 30 out of the 32 Mexican states have a specific mediation or ADR Law.

State laws generally refer to civil, family and commercial cases. Some of them include community cases as well. Criminal cases are excluded. There is no specific reference to IP in Mexican mediation law, but it is also not excluded.

ii) Detailed operation of mediation laws and regulations

As can be seen from the table above the mediation regulations of the countries in Mexico and Central America covers to a certain extent the necessary key aspect required of the affective operation of mediation. In this respect they can be seen to broadly align with the requirements set out in the European Mediation Directive.

Specifically:

- **Status of mediators** – In **Central America** & **Mexico** the status of mediators is recognised and regulated, with the exception of **Honduras** (which has no regulation), and **Nicaragua** and **El Salvador** (which has limited regulation). The minimal requirements for mediators are often in a self-regulatory approach that is asked of state-recognised Mediation Centres. **Nicaragua**, **Mexico** and **El-Salvador** alternatively only require a minimal number of training hours, with some Mexican states also requiring legal experience.

- **Enforceability** - Across the region, mediation settlement agreements are enforceable by the courts. Differences lie in the local procedures to have the agreement enforced, sometimes requiring validation by a judge.

- **Confidentiality** - all jurisdictions recognises the overall confidentiality of the mediation process. However as is consistent with international practice, such laws also specify exceptions

- **Suspensions of Limitation Periods** – This is where the region diverges most from European and international practices. Few of the

countries suspend prescription period to start mediation; with the exception of **Nicaragua** and **El Salvador** who only allow it in special circumstances. This is mostly due to the absence of clear rule, and therefore often deters the parties from being aware of this option, even if their circumstances could allow it. In **Mexico**, the law does provide for up to 2 month suspension of proceedings for mediation to be attempted.

iii) International Mediation legal frameworks

Honduras signed the Singapore Convention on International Cross Border Mediation Enforcement on 7 August 2019, the only country in this region to so far do so.

3. Mediation Practice

a) Mediation Activity

	Costa Rica	Guatemala	Honduras	Nicaragua	Panama	El Salvador	Mexico
Do court-based mediation programmes exist?	Yes	Yes	"Facilitation"	Yes	Yes	No	Yes (1)
Are they judicial mediations or extra-judicial	Both – Judicial conciliations and extra-judicial mediations	Extra-judicial	Judicial	Extra-judicial	Both – Judicial conciliations and extra-judicial mediations	N/A	Extra-judicial
Can judges invite parties to try mediation?	Yes	Yes	N/A	Yes	Yes	No	No
If so, is it voluntary or mandatory?	Voluntary	Voluntary	Voluntary	Mandatory	Voluntary	N/A	Voluntary
Is mediation mandatory pre-litigation?	No	No	N/A	Yes	No	No	No
Are judges trained in ADR?	No	N/A	N/A	No	No	No	No

In **Costa Rica**, there exists both the opportunity for a judge led conciliation process and extra-judicial mediation processes.

At any stage of a judicial process, the Court can propose a conciliation hearing conducted by a judge. This process is voluntary and can therefore be accepted or refused by the parties.

ADR is not part of the curriculum for judges; however, the Ministry of Justice and the Justice Commission promotes ADR and offers certifications, programme trainings and courses. It is unclear how frequently judges in Costa Rica actually act in this way.

The parties are also able to use a mediation process outside the courts. The parties can suggest this themselves and it is encouraged by the courts. The mediators in **Costa-Rica** are spread between Public and Private institutions, as well as some working independently.

Public centres mainly focus on social peace and harmony, with focus on neighbourhood conflicts, family disputes, consumer issues and loans/debts.

Centros RAC (Entities created for the institutional administration of alternative disputes resolution) offer a wider range of mediation services. There are 27 public and private centres and 4 governmental centres.

The Main Providers are:

a) Mediation and Arbitration Centre (CAM-CR)
b) Conciliation, Mediation and Arbitration Centre (TRAC)
c) Labour Ministry (governmental)
d) Centro RAC-Culture Ministry (governmental)

The most recent statistics in 2018 showed that 3781 mediations were carried out by Centros RACs.

In **Guatemala**, the absence of a clear mediation law does not prevent claimants from being referred to mediation by a judge.

There are Voluntary, Referred and Derived cases. Referred cases are those that are referred to institutions such as the Public Ministry, non-governmental organisations or other mediation centres. Derivatives cases are forwarded by the courts. Voluntary cases are those where mediation is sought directly by the parties. In each instance, mediation must be accepted by both parties.

Guatemala has 89[43] public mediation centres that handle over 9000 cases each year. In 2019, over 8000 of these cases resulted in an agreement.[44] There also are private organisations, but due to the lack of legislation, these are often linked with commercial or international entities, such as the Chamber of Commerce and Industry.

The Judiciary of **Honduras** has a Justice Facilitators programme for vulnerable groups called "National Service of Judicial Facilitators " (*Servicio Nacional de Facilitadores Judiciales*"). In the Civil Procedure Code of Honduras it is established that the parties may go to conciliation or mediation before starting a civil process, however, there is no further regulation in this regard.

In any event, mediation is always voluntary and parties cannot be forced to attend the process.

In **Nicaragua**, mediation occurs in all civil, commercial, family, agrarian, criminal and labour cases filed in the respective courts, prior to any action, the Judge will call for a mediation process between the parties. These mediations are mandatory.

According to the *Organic Law of Judicial Power of Nicaragua*, the Mediation and Arbitration Law, there are court-linked mediations in Civil and Criminal courts. The parties may make use of the different methods of

43 http://www.oj.gob.gt/Archivos/DMASC/DocumentosEImagenesMenu/Directorio%20de%20Centros%20de%20Mediaci%C3%B3n.pdf
44 http://dmasc.oj.gob.gt/#/dashboard

conflict resolution at the headquarters of the Directorate of Alternative Conflict Resolution, or in an authorized alternative conflict resolution methods administrator. The legislation contemplates mediation before and during the process.

There is no exact total number of registered mediators in the country, however the DIRAC has a list of 77 mediators. There are also 52 authorised Mediation Centres, both private and public, throughout Nicaragua.

ADR is not part of the curriculum for judges however, the DIRAC and the Judicial Council promotes ADR and offers training programs.

In **Panama**, The Court can propose mediation hearings and the mediation must be carried out by a certificated mediator by the Ministry of Government, through one of the 13 Alternate Conflict Resolution Centres of the Judicial Branch (CARC Spanish Acronym). These mediations are voluntary.

They concern cases of: Family, Civil, Financial, Commercial, Labour, Agrarian, Crime, Consumer Issues, Neighbourhood and since 2012 in Copyright law as well[45] . In 2019 there were 3509 extrajudicial mediations, and 3262 judicial mediations. Extrajudicial mediations have had a settlement rate was 72%, against 59.7% for judicial mediations. [46]

The Ministry also provides information on ADR processes available for the wider public.

The Law in **El Salvador** does not allow for court-referred mediation. There are also no court-based programmes as such. However, there is a Mediation and Conciliation Unit that depends on the Attorney's Office and provides mediation in Family, Neighbourhood, Civil, Labour, Discrimination, Childhood, and academic conflicts.

In **Mexico**, arbitration is significantly more popular with commercial parties than mediation, but mediation is used and the courts can stay proceedings for alternative dispute resolution to occur. As previously mentioned, mediation is regulated and controlled by individual states. The state courts do have court-connected mediation programmes but there are different levels of uptake per state.

Mediation is entirely voluntary in Mexico, with the closest point to a requirement being in labour disputes where parties are required to comply with a pre-hearing conciliation discussion. However, there is no compulsory element of negotiation here and parties rarely attempt to settle.

[45] however, there is no mention about it on the DNMARC website).
[46] https://www.organojudicial.gob.pa/uploads/blogs.dir/1/2020/07/456/informe-estadistico-centros-de-mediacion-2019.pdf

In Mexico City, around 6% of the total number of legal claims are dealt with through mediation, both public and private. Mexico City reports anecdotally a high settlement rate although no percentage is available. These mediations are free. In terms of numbers, the Mexico City Court has declared 6000 mediated cases annually.

ADR methods (such as mediation) are available to resolve patent disputes. However, in practice they are used to resolve disputes relating to licence agreements, rather than invalidity or infringement disputes.

The FLPIP (Federal Law for the Protection of Industrial Property) introduced a conciliation proceeding before the MIIP (Mexican Institute of Industrial Property). Any party can initiate the conciliation proceeding at any stage of the administrative infringement or invalidity proceeding of a patent, utility model, industrial design, layout, complementary certificate, trade mark and unfair competition matters. However, it is not possible to initiate a conciliation proceeding if the MIIP has already issued a resolution regarding the same matter.

Once the MIIP admits the written petition for conciliation filed by any of the parties, it will notify the other party which then has five working days to respond (either accepting or rejecting the proposal to settle submitted by the applicant). If no response is filed within that period, the conciliation proposal is deemed rejected. If the party responds on time, it will get involved in a negotiation process and will receive the initial proposal of the applicant, and can accept or prepare and submit a written counterproposal.

As part of the conciliation proceeding, the MIIP invites the parties to meet at its facilities. The parties only have two meetings in which they can reach an agreement. If an agreement is reached, the parties must submit a settlement agreement. If a party (after being duly notified) in any stage of the conciliation proceeding remains uncooperative, the MIIP can sanction it. The conciliation and negotiation process cannot suspend an ongoing administrative infringement proceeding. If a settlement agreement is executed, that concludes the conciliation proceeding and has the legal effect of res judicata and mandatory execution.

In the field of copyright, there is a conciliation proceeding before the Copyright Office that the parties can use to solve their dispute. If no settlement is achieved, the parties can request a private arbitration, although this does not often occur in practice.

b) Profile of mediator profession

	Costa Rica	Guatemala	Honduras	Nicaragua	Panama	El Salvador	Mexico
Neutrality and Independence of mediators	Yes	Yes	N/A	Yes	Yes	Yes	Yes
Minimal training required	Yes	No	N/A	Yes	Yes	No	Yes
State certification	No	No	N/A	No	Yes	No	Yes

In **Costa-Rica** the Law requires that the mediators of each Centre must have experience in Alternative Dispute Resolution methods, with a minimal training received from a recognised Centre. Likewise, each institution has its own regulations and requirements such as certain hours of practical training or previous experience as a mediator.

Mediators must also abide by the Code of Ethics of the mediation centre in which they have received their initial training.

In **Guatemala** the Judicial Branch and the Directorate of Alternative Methods of Conflict Resolution (DMASC, Spanish acronym) is designed to promote the ADR, authorize, supervise and control the centres that are authorised for the institutional administration of mediation ("Center").

However, with regard to mediators, the only requirement in the official guidance is that they are trained. No more details on the nature, length or certification of trainings exist.

There is also no specific code of conduct, however, the ethical regulations that govern the Judicial Branch are established in **Agreement 22-2013** of the Supreme Court of Justice, which are mandatory and apply to mediation.

Honduras: In Honduras, there is no specific information available regarding the mediation profession and its regulation.

In **Nicaragua**, there is no exact total number of registered mediators in the country, however the DIRAC has a list of 77 own mediators. There are also 42 authorised Mediation Centres, both private and public, throughout Nicaragua.

The Law requires that the mediators have appropriate experience in Alternative Dispute Resolution methods, and at least 40 hours of training. There are no national certifications as such, however, the DIRAC grants authorisation to the Centres so they can provide Alternative Dispute Resolution methods and requires that they have to certify their mediators. The DIRAC also has their own list of mediators.

Panama: To practise mediation, the Law requires that all mediators must be trained and certificated by any authorised institution. The Law establishes that all mediators must have initial training or certification in order to practice mediation. There is no official requirement regarding ongoing training, however, each Centre requires, offers and promotes additional training and practice.

In national or municipal public entities, mediation must be carried out by mediators certified by the Ministry of Government and Justice. Likewise, in general, the Ministry of Government and Justice, through the Alternate Conflict Resolution Directorate, grants authorization to centres so they can provide Mediation, therefore, the centres have to certify their mediators.

El Salvador: The law requires that each Centre must have specific requirements for their mediators. For example, The Mediation and Arbitration Centre of the Chamber of Commerce requires that the mediators have to take its mediation training course.

However, there are no national certifications as such.

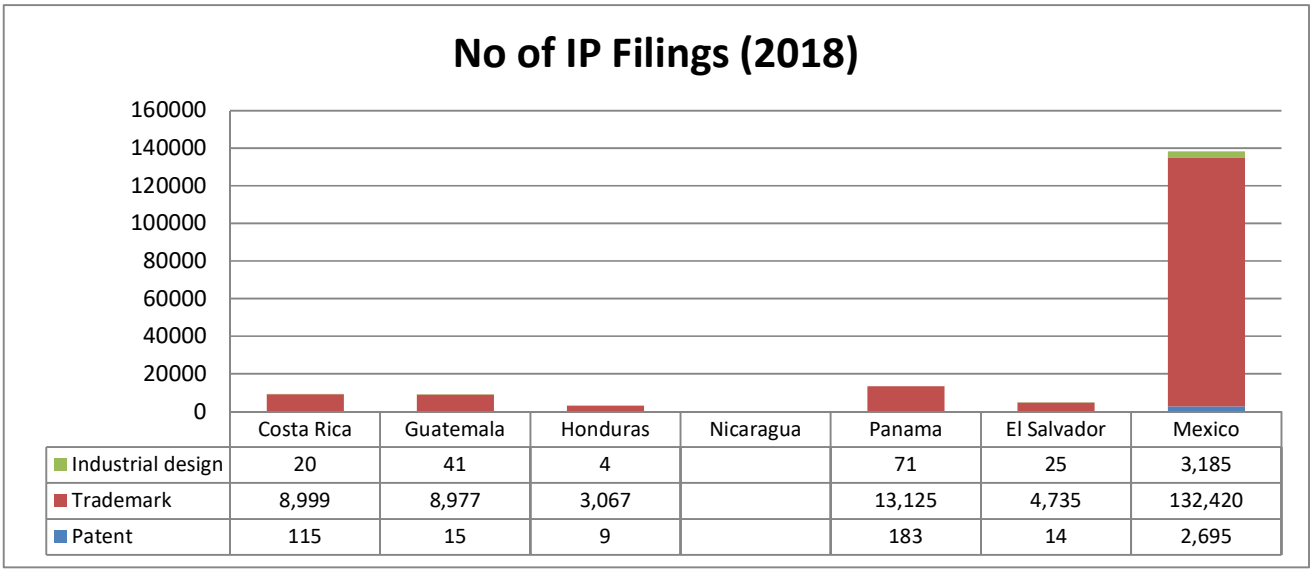
Mexico: Generally, the judicial branch in every state is in charge of the standards and certification of mediators.

In general, mediators will be required to have been lawyers for a minimum of two years – with certain exceptions for other professions – and will sometimes be required to do 160-hours of training. There are approximately 600 Mediators in Mexico City, and 300 in Nuevo León. Often, regional mediation laws will also put forward a particular standard of conduct to be performed by the mediators.

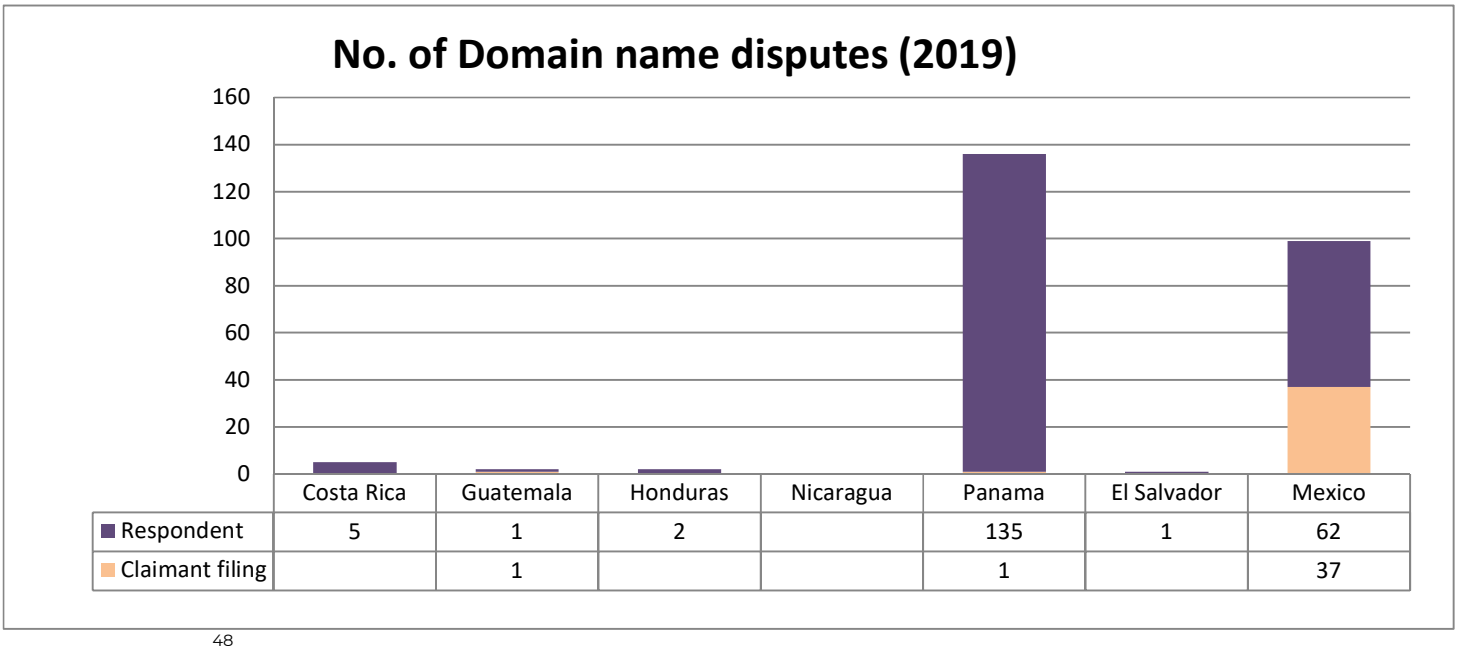
4. IP Mediation within National IP Offices

a) General size of IP market

[47]



	Costa Rica	Guatemala	Honduras	Nicaragua	Panama	El Salvador	Mexico
Industrial design	20	41	4		71	25	3,185
Trademark	8,999	8,977	3,067		13,125	4,735	132,420
Patent	115	15	9		183	14	2,695



	Costa Rica	Guatemala	Honduras	Nicaragua	Panama	El Salvador	Mexico
Respondent	5	1	2		135	1	62
Claimant filing		1			1		37

[48]

The statistics above give an indication of the size of the IP market in each country in this region. This is important as it established the potential

[47] WIPO statistics, accessed 14 September 2020 - https://www3.wipo.int/ipstats/
[48] *ibid*

market for IP mediation. **Mexico** is by far the largest market in this region. After this, **Panama** is the biggest IP market in the Central America Region, followed by **Costa Rica** and **Guatemala**.

The size of the IP market in Mexico cannot be compared with Central American countries, due to its size and historical relationship with Northern America.

b) Mediation Services in National IP Offices

	Costa Rica	Guatemala	Honduras	Nicaragua	Panama	El Salvador	Mexico
Does the National IP Office offer mediation?	No	No	No	No	No	Yes	Yes[49]
Does it communicate & advise about it?	Yes	No	No	Yes	No	Yes	Yes
Does it have its own internal mediator(s)?	No	No	No	No	No	Yes	Yes

The National IP Office of **Costa Rica** is well aware of mediation, interested in developing it, and collaborates with WIPO on this subject. Yet the lack of legislation has thus far prevented them from establishing this practice. This does not prevent them from calling upon private external mediators, and advising clients, when a resolution is needed.

Costa Rica: Despite a collaboration with WIPO for international best practice, the absence of mediation law has thus far prevented the National IP office, as well as many private organisations, from developing a structured IP Mediation service.

Honduras: As there is no status for mediation in Honduras, there is currently no mediation offered at the National IP Office. However, Honduras is an active member of WIPO and a signatory of the Singapore Convention, although it has not yet ratified the convention.

Nicaragua: Through reform to *Law No. 380, Law on Trademarks and Other Distinctive Signs*, Nicaragua contemplates the possibility that the Registrar may carry out mediations at the request of a party. Nicaragua is also an active member of WIPO, and collaborates with them through its National Office of Copyright and Related Rights; Intellectual Property Registry (RPI);

[49] Conciliation

and the Ministry of Development, Industry and Trade (MIFIC). However, there is no information that the National IP office has started to carry out IP mediations.

Panama: According to the IP Law (reformed on 2012), the parties may resolve any IP dispute using any ADR. Likewise, Panama, as an active member of WIPO, collaborates with the WIPO Arbitration and Mediation Center, through its IP Offices and the Depositary Libraries.

However, there is no evidence that the IP Office administrates mediations.

El Salvador: According to the **IP Law (Reformed on 2017)** for all disputes about Copyright and Related Rights the parties shall be submitted to a Mediation Procedure, which will be processed before the Registry of Intellectual Property prior to the start of the corresponding judicial actions. Likewise, El Salvador, as an active member of WIPO, collaborates with the WIPO Arbitration and Mediation Centre, through its IP Offices. – National Centre of Registries.

In **Mexico**, no general Intellectual Property data was available. However, for copyright disputes, there is a special dispute resolution process, including a conciliation stage before the administrative institution, with a public official acting as conciliator/mediator. However, the only information and guidance provided through the National IP offices are linked to the WIPO procedure.

Mexico has also recently passed a Federal Law for the protection of Industrial Property which came into force on 5 November 2020. The law contemplates conciliation so it is expected that the National IP Office (IMPI) will make efforts to conciliate the interests of the parties. Likewise, IMPI will have the power to carry out a conciliation procedure regarding administrative offenses and determine the payment of damages.

5. Insights: Trends and Recommendations

Insights into evolution and trends

From the preceding analysis it is possible to provide the following insights into the evolution of mediation in IP disputes and the emerging trends in respect of its likely development:

1. ***Strong Mediation Foundations upon which to build***

It is clear from the countries researched for this study, that there is a strong legal foundation to enable the operation of mediation in the region. This has in turn led to actual mediation practice developing in most of the jurisdictions within the study group. These mediations are a mixture of both court-based mediation and those taking place through referrals to mediations centres. While caseloads at this point are not large in most countries, they are increasing year on year. This follows the international trend of nascent mediations jurisdictions taking some time to develop with sustainable mediation market beginning to emerge.

This is important in relation to the development of the use of mediation in IP disputes for two reasons. The first is that it is important for a jurisdiction to develop a 'mediation culture', which proponents can point to, to indicate that it can operate as an effective dispute resolution process within the particular country. The second reason is that the establishment of the mediation culture then allows for more applied applications into particular dispute sectors, such as IP, to be considered.

Finally currently 25% of National Offices already use some form of facilitative dispute resolution process (mediation, conciliation etc). This experience provides a good baseline from which to consider best practice and develop practice further.

2. ***Use of Conciliation in National IP Offices in Latin America***

In Bolivia, Colombia and Mexico, the dispute resolution service offered is conciliation. As previously set out this can be distinguished from mediation in that the role of the conciliator normally allows them to make suggestion and possible recommendations as to settlement. While this can have benefits in an area where the neutral may have a particular sector expertise (as in National IP offices) the downsides are that it can risk becoming a quasi-adjudicative process, with the parties not completely having full control over negotiating their own settlement of a dispute, rather they are influenced by the recommendations of the conciliator.

It should also be noted that the term conciliator was used more widely before the emergence of modern mediation proactive globally in the last 20 years. In the case of El Salvador, the relatively newly reformed IP Law of 2017, allows specifically for Mediation. This is perhaps the first sign of a recognition that contemporary mediation practice is the more appropriate approach and a move away from the term conciliation.

3. ***General legal and IP enabling framework for Mediation but lack of services***

The majority of jurisdictions have a general legal framework for mediation to take place and many have developed actual mediation services. Further many of jurisdictions also have an IP legal framework that provides for mediation to resolve IP disputes. However, despite having the enabling legal framework, there is no indication that the National IP Offices do in fact provide such a service. Countries that fall in this category include Peru, Nicaragua and Panama.

The reasons for this are not clear from the data provided and more analysis would be required. However, what is clear is that the existence of enabling frameworks coupled with an interest to provide such a service (see point 4 below) does create an opportunity for future development.

4. ***Awareness and Interest in the use of mediation to resolve IP disputes***

While many National IP Offices do not actually provide mediation services, the majority of them have a good awareness about the option of mediation to resolve IP disputes. Many of the national offices have indicated they collaborate with WIPO and its Arbitration and Mediation Centre, including Peru, Chile, Ecuador, Cost Rica, Honduras, Nicaragua, Panama and El Salvador, with some signing memorandums of understanding with WIPO to develop local mediation centres.

This indicates an overall high level of interest in the use of ADR mechanisms including mediation to resolve IP disputes and is an opportunity in terms of future development, as it appears in these jurisdictions there is at least an openness to explore the provision of mediation as part of the National IP framework.

5. ***Development in silos and lack of coordination on best practice***

As is common in the early stages of mediation development, the focus in each country has been on developing their own mediation framework and practice. This does not mean that international best practice has not been used in these countries, but more often than not this is from more advanced mediation jurisdictions such as the United States etc, rather than drawing on the experiences within the region.

This is particularly the case in respect of Mediation services within national IP offices. Where as far as can be ascertained where services exist, they have been developed and run within the national office and there has been little sharing of experiences and best practice between the national offices in respect of the use of mediation to resolve IP disputes. Where there has been input, it has come from the international experience of WIPO.

In addition there does not appear to be much sharing of practice and experiences between the general mediation practitioners in any jurisdiction and their colleagues in the IP national offices .

Recommendations

Given the above the following recommendations are made:

1. ***Bringing the Mediation and IP communities together***

Tremendous progress has been made by the mediation community in developing the use of mediation in Latin America. Most jurisdiction have not only legal frameworks but also burgeoning mediation activity. In the IP sector while some National Offices offer a mediation service it appears there is little or no contact let alone collaboration between these two communities.

Accordingly, it is recommended that some form of regional workshop or conference be convened in order to bring both these communities together to:

- Understand the work of each community
- Where there is a shared interest development of a specialist IP mediation service
- The obstacles to developing IP Mediation and collaborative problem solving on ways to address these obstacles
- Opportunities for future collaboration

2. ***Developing Best Practice Model for Mediation in IP Disputes***

This study has identified that the majority of countries do either provide some form of facilitated settlement process, or at least have the legal framework that would enable such a process to be used to resolve IP disputes. However, it has not been possible in this study to get more detailed information on the how these services actually work. Indeed, there seems to be a number of models used from conciliation to facilitated settlement to mediation itself.

This is in line with International practice where there seems to be a number of different approaches used by National IP Offices. Some use external mediators, some use their own officials to mediate. Some adopt a conciliation approach where the neutral makes suggestion and recommendations, while other as is the case with the EUIPO's mediation service, take a more traditional mediation approach where the mediator only facilitates the parties' decision-making process, and does not directly make suggestion as to possible solutions.

Further to the best of the authors knowledge there has been no detailed research into what is the most effective model for the use of mediation in the specialist area of IP disputes. There are some early signs that the field is moving beyond the old paradigm of Conciliation vs Mediation, and development of some thought leadership and suggested best practice in this area would not only be useful to National Offices in the region but more broadly.

Accordingly, it is recommended that a further comparative study be undertaken into the current practices and approaches to providing mediation services in National Offices in this region, also comparing them to other key services around the world, such as the EUIPO and WIPO services, in order to develop a best practice model for Mediation services within a national or Supra-national IP office. Such a study could include amongst other things:

- Effective legislative framework to enable a Mediation Service
- Exact nature of the process including consideration of a more nuanced approach to the making of suggestion for settlement given the specialist nature of these services
- At what point in the disputes resolution process of National Offices should mediation be offered
- Role of the neutral
- How to effectively operationalise a mediation service

3. Continued Development of Mediation Services in National Offices

From the previous analysis it is clear that mediation has begun to become embedded in the broader dispute resolution system across Latin America and this will continue to develop. Further, many IP legal frameworks allow for mediation to be used, and many of the National Offices have expressed an interest in implementing such a service but have not yet done so.

Why this is the case, could not be established from the data received for this study. However, two barriers to developing mediation, normally present in these situations are lack of resources and lack of expertise. The former can be rectified partly by the development of a best practice model as set out above, as well as drawing in mediation design experts from around the world.

A collaboration between national office and supra-national organisations to develop, pilot and implement such services, either solely in national offices or perhaps developing a regional approach, should be considered.

6. Conclusion

As the practice of mediation has begun to spread and develop around the world, it has often been difficult to ascertain the degree to which countries and regions are adopting the use of the mediation to resolve disputes within their society. Further it is often even more difficult to understand the extent to which it is being used in a particular type of dispute.

This study of 16 countries in Latin America from Mexico to Argentina has sought to provide answers to both those question. How much mediation is being undertaken in general within these countries and if and to what extent it is being used for the resolution of Intellectual Property Disputes.

While inevitably in an emerging field there has been some difficulties in data collection, the results of the preceding analysis show clearly that mediation practice, while nascent, is beginning to emerge and develop. This is partly due to the enabling legal frameworks that exist in most of the jurisdictions of the study, which provide parties the confidence that this process is regulated and supported by the law.

In respect of the use of mediation for the resolution of Intellectual property disputes, unsurprisingly the picture is more fragmented and less developed. This is to be expected, as in most jurisdictions the use of mediation in specialist areas normally follows the development of mediation in general practice.

Only a handful of National IP offices offer some form of facilitated resolution service, which is normally framed as conciliation. However, there are green shoots pointing toward the potential for development mediation in this area.

Firstly, many of the countries have enabling legislation or regulations for mediation, but have not put them into practice. This therefore means that there is no legal obstacle for the use of mediation to resolve IP disputes.

Secondly most IP National Offices are aware of the potential to use mediation to resolve IP disputes and many have engaged in collaboration on mediation, with organisations such as WIPO.

Finally, many of those offices have expressed an interest in considering how to develop a mediation or other facilitated resolution service.

Given this, the recommendations of this report are for a further study into best practice for a facilitated dispute resolution service; a coming together

of the Mediation and IP communities to share experiences and areas of potential collaboration which may in turn lead to the development of more specific mediation services across the region.

The foundation has been laid for the collaboration to begin to further develop the use of mediation for the resolution of Intellectual Property disputes.

Annexes

Annex A: Profiles of CEDR & Local experts

About CEDR

CEDR is a leading non-profit ADR institution, based in London and operating internationally. CEDR has an annual income of around $8 million. In addition to working with a panel of some 140 practising mediators and around 40 trainers and consultants, we employ over 75 full-time staff. This makes us by far the largest commercial mediation body within Europe.

For over 30 years we have been promoting, growing and shaping the use of Alternative Dispute Resolution (ADR) in commercial disputes in Europe and around the world. We operate in five main areas:

- CEDR is called upon by international organisations and governments to enhance the business environment and civil justice through developing the use of ADR within their jurisdictions.
- CEDR's training & consultancy arm is held in the highest regard around the globe as providing outstanding quality training in mediation, negotiation and conflict management skills. CEDR has trained approximately 9,000 people in over 50 countries to become commercial mediators, and our assessment leading to CEDR accreditation is internationally recognised as the gold standard of quality assurance for newly trained mediators.
- CEDR's dispute resolution team has been referred over 17,000 disputes and has worked with over 300,000 parties in deadlocked conflicts, working with its panel of highly skilled mediators, arbitrators, adjudicators and other neutrals to resolve disputes across a huge variety of commercial areas.
- CEDR's consumer services arm, IDRS, has resolved tens of thousands of consumer and small business disputes, mainly through the use of tailor-made adjudication and arbitration services.
- CEDR, through our Foundation, works consistently to be thought leaders in the field of mediation and conflict resolution and promote their use in all areas of business life and civil justice whilst developing the field of ADR for the benefit of all.

Research team

James South

The report will be led and authored by James South, the Managing Director of CEDR, a Spanish speaker and a world-leading professional in Dispute Resolution with 20+ years' experience in Alternative Dispute Resolution.

James South is CEDR's Managing Director and mediator with 25 years' experience. He is one of the world's most respected mediation skills trainers and consultants having worked in over 40 countries. A Board member of the International Mediation Institute he has led numerous ADR development projects around the world, and is regularly consulted by the World Bank Group and other Supranational organisations in relation to their projects. James is a Barrister and Solicitor of the High Court of New Zealand and holds a Masters in Law in Dispute Prevention and Resolution (Hons). James has mediated a number of cases involving IP rights.

James was supported in the management and drafting of the report by Joachim Muller, a mediation expert with 6 years' experience in ADR and CEDR consultant, and Frederick Way, a CEDR Dispute Resolution professional with 8 years' experience in ADR.

Joachim Muller

Joachim Muller is an experienced trainer and mediator with who has been working with CEDR for over 5 years. He has managed International Development Consultancy and Training programmes worldwide, most recently with the UNDP in Georgia, the World Bank Group in Jordan and Ethiopia, and the European Bank for Reconstruction and Development in Moldova. Trained in France in Mediation and conflict management system design, Joachim is also a CEDR Accredited Civil and Commercial Mediator and trainer.

Frederick Way

Frederick Way is Head of the CEDR Foundation, the thought leadership, research and charitable arm of CEDR. In his role, Frederick has written multiple reports including a *Guide For Chairs of Public Inquiries*, *Improving Diversity in Commercial Mediation*, *The Use of Technology in Commercial Mediation*, *Utilising Alternative Dispute Resolution in Grievance Investigations*. Frederick is also a commercial mediator since 2013, and has worked with CEDR on projects involving the World Bank Group. Frederick was called to the Bar of England and Wales in 2012 as a barrister, and has a qualification in law. As well as working for CEDR, Frederick sits on the boards of two charities.

CEDR was locally supported by three expert mediators with practice in the field of IP mediation. Each carried out research in several countries, liaising with local authorities, mediation centers, mediators and National IP offices.

Mariana Souza

Mariana Freitas de Souza is a mediator based in Rio de Janeiro, Brazil, where she also acts as a lawyer and arbitrator. She serves as mediator with the main arbitration and mediation centers in the country, such as Câmara de Comércio Brasil Canadá (CCBC), Centro Brasileiro de Mediação e Arbitragem (CBMA) of which she is also a board director, and abroad, such as the UN Global Mediation Panel.

In the past years, she has written several articles on ADR and has been a guest speaker in ADR events in Brazil and abroad.

Mariana holds an LL.B. from the Rio de Janeiro Estate University and an LL.M. from Tulane University School of Law. She is fluent in English and Spanish and is a native Portuguese speaker.

Fernando Navarro

Fernando Navarro-Sánchez is a commercial mediator with the JAMS panel, based in Mexico where he has led JAMS efforts with its outreach in Mexico and other Latin American countries.

He is certified by the Mexico City Courts System as private mediator No. 445, a mediator with the Global Mediation Panel at the Office of the United Nations Funds and Programmes, and a fellow to both the Weinstein International Foundation and the International Academy of Mediators.

Further, Fernando is co-founder of the “Academia de Negociación” an initiative to foster negotiation skills in Spanish for legal and other professionals. Fernando is an attorney by the Universidad Autónoma de San Luis Potosi, in Mexico. He also holds an LL.M. in dispute resolution by the Straus Institute for Dispute Resolution at Pepperdine University in California. He speaks English, French and conversational Portuguese, and is a native Spanish speaker.

Ximena Bustamante

Ximena Bustamante is founding partner of PACTUM Dispute Resolution Consulting and a mediator in several mediation centers across Ecuador, being one of the most acknowledged mediators in the country. She is a Professor at San Francisco de Quito University and has taught several courses and seminars on mediation both in Ecuador and internationally. She is a senior fellow for the Weinstein International Foundation and part of the Expert Group on Mediation at the UNCITRAL.

Ximena has served as National Director of Mediation at the Attorney General Office, Deputy Director at the Arbitration and Mediation Center of the Quito´s Chamber of Commerce, and Director of the Project for the Development of Mediation in Ecuador for MBB and the JAMS Foundation. In the U.S. she worked as an assistant mediator at the Weinstein Group, mediator in the courts of Los Angeles, and legal assistant at Girardi | Keese. She completed an Internship at the ICC International Centre for ADR.

Ximena graduated as a lawyer, first of her class, at San Francisco de Quito University and holds an LL.M. for Dispute Resolution from Pepperdine University.

Annex B: Research questionnaire

IPKey

AMÉRICA LATINA

IP Mediation in Latin America

www.ipkey.eu

Financiado por la Unión Europea
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EUIPO
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INTELLECTUAL PROPERTY OFFICE

Bajo la dirección de la Comisión Europea, IP Key es un programa gestionado por la Oficina de Propiedad Intelectual de la Unión Europea.

Sob a direção da Comisão Europeia, IP Key é un programa gerido pelo Instituto da Propiedade Intelectual da União Europeia

IP Mediation in Latin America – Questionnaire

Mediation as a means to resolve conflicts and disputes has grown significantly these past 10 years throughout the world. Yet the definition of mediation and the minimal requirements in terms of training, practice and ethics is still dependent on local regulations and cross-border agreements.

In this context, IP KEY Latin America has decided to implement an activity designed to "present a state of play of IP mediation in Latin America, focusing on the benefit of a negotiated settlement of IP disputes and offering a practical approach through case examples and mediation techniques related to IP".

The objective of this activity is to sensitise and increase awareness of SMEs in the use of mediation as an alternative dispute resolution and explain how negotiated settlements are beneficial to all parties of a dispute. Supporting the awareness of SMEs on mediation could facilitate the resolution of conflicts in the region, in a constructive manner potentially covering a wider range of IP rights involved in a conflict and focusing on the opportunities rather than the deadlock of conflicts.

CEDR understands that some information may not be available in some countries, particularly with regards to statistical data. We have marked with a **(*)** *all questions that specifically require an answer. For all information not available, please make a note of absent information in this document and inform us of it so we may explore other means of obtaining this data.*

A. The general recognition of mediation in the Country

1. Mediation law (*)

Aim: As part of the research, this will allow us to map out the differences and similarities between jurisdictions in Latin America in respect of enabling framework for Mediation.

- Does the country have a specific Mediation law? If so, please provide reference and (if available) an English version
- Does the law specify what type of cases the mediation law does and does not apply to?
- If the answer to the above question is yes, please specify and indicate if the law applies to intellectual Property disputes
- Is the country part of an international mediation agreement? (eg. The Singapore Convention, cross-border trade agreement that may include mediation, etc.)

2. Ensuring the quality of mediation (*)

Aim: In order to ensure that mediation is conducted in an effective, impartial and competent way, it is important that states encourage the development of codes of conduct and quality control mechanism. This also facilitates cross-border mediation by offering the same guarantees to both parties wherever they decide to conduct the mediation.

- Are there minimal requirements in the country for a process to be considered "Mediation"?
- Is there a statutory or self-regulatory body responsible for the quality assurance and standards of mediation within the country?
  If so, please provide links and specify below its function (General promotion of mediation, certification of mediators, registration/requirements of training programmes, disciplinary process, or other.)

- Does the law specify requirements in order to be a mediator? Eg. professional background, education etc.
- Are there initial and ongoing training requirements of mediators set out under the law or other regulations? Please detail.
- Are their national certification or registration requirements to become a mediator set out in the law or other regulations?
- If the answer is yes to the above question how many registered/certified mediators are there in the country? Please estimate if exact figures are not available
- Does the law or other regulation specify a national Code of Conduct for Mediators? If not are there Voluntary codes of conduct being used?
  Please insert link to relevant codes

3. Confidentiality of mediation (*)

Aim: Confidentiality of the mediation is at the core of the practice and of all laws and codes of conducts for third party neutrals. It is therefore fundamental that this aspect can be protected and guaranteed to ensure stable and efficient processes.

- Is the confidentiality of mediation protected by law?
- Are there instances/exceptions in the law or in case-law that restrict the operation of confidentiality?
- Is the mediator protected from being called as a witness before the courts in respect of the dispute they have mediated?

4. Enforceability of agreements resulting from mediation (*)

Aim: To guarantee to the parties that mediation will end in an applicable agreement, enforceability of the agreements before the course is necessary. This is also a fundamental aspect of cross border mediation, and one of the key aspects of the Singapore convention.

- Can mediation agreements be enforceable/made enforceable?
- What is the process for a mediation agreement to be enforceable before the courts?
- Can agreements resulting of mediations carried out in another country be made enforceable? (eg: for cross-border agreements where a mediation took place in another jurisdiction)
- If yes, what is the procedure?
- If mediation agreements require a specific process to be enforceable, how often is it sought by the parties?

5. Effect of mediation on limitation and prescription periods (*)

Aim: Mediation is developing throughout the world as a recognised Alternative Dispute Resolution Mechanism for civil and commercial disputes. In order to guarantee its viability as an alternative to the courts, its access should not prevent parties from accessing the traditional legal route. It therefore begs the question of prescription periods, and if the use of mediation allows to postpone such period.

- Does the beginning of a mediation process pause the limitation or prescription period?
- If no, do mediators find this is an obstacle for parties to accept mediation?

6. Other Provisions of the legal Framework (*)

- Are there other provisions of the law that might impact on the use of Mediation in IP disputes?
- Are there official/state issued guidelines and information on mediation and the mediation law?

B. ADR and IP in the courts

Aim: To understand the degree to which the courts are active in encouraging the use of Mediation.

Questions

1. Does the law or Court procedure provide a mechanism for Judges to refer cases to Mediation? Please specify? **(*)**
2. If the answer to 1 is yes, please indicate if such referral is mandatory or voluntary on the parties **(*)**
3. If the answer to question 1 is yes, please indicate how prone judges are to refer case to mediation. If stats available, please detail (for example: in what courts it is used and the percentage of cases where referrals to mediation are made etc).
4. Is ADR/Mediation part of the curriculum and training for judges? If not are there awareness programmes for Judges about mediation?
5. Are their Court-based mediation programmes in any courts in this country? Please provide details, in particular: **(*)**
    - Which courts
    - Eligible types of cases
    - Jurisdictional limits
    - How many cases are mediated via these programmes?
        - Can a breakdown of cases be provided - value and type?
    - What is the settlement rate in each specific court?
    - Is there any specific information available on the mediation of IP disputes via these court based programmes

      Note: The points above are only here as guidance.

6. Are there specific awareness activities or information about Mediation available in the courts or in court documentation? Please specify

Statistical data

Please provide any available relevant statistics about court cases in this jurisdiction:

Courts in general or by specific levels of courts if possible

Note: If stats for each court are not possible, please insert general stats in first column. Should you need more columns, please copy table in separate document.

	First Instance	2nd Instance	Final Appellate
Insert names of the courts			
How many pending cases in each court?			
Type of cases			
Value of Cases			

What percentage of cases are appealed?			
Specifically, how many IP cases are dealt with by the courts?			
Does this court deal with IP disputes?			

Court-based mediation (if exists)

Note: If multiple court-based mediation programmes exist please use one table per programme. For more than 3, please duplicate table on a different document.

Programme 1

Name of programme:

	General mediation	IP Mediation
What is the cost of mediation?		
How many cases per year?		
Average duration of mediation?		
Average value of the claims mediated?		
Settlement rate (in %)?		

Programme 2

Name of programme:

	General mediation	IP Mediation
What is the cost of mediation?		
How many cases per year?		
Average duration of mediation?		
Average value of the claims mediated?		
Settlement rate (in %)?		

Programme 3

Name of programme:

	General mediation	IP Mediation
What is the cost of mediation?		
How many cases per year?		
Average duration of mediation?		
Average value of the claims mediated?		

Settlement rate (in %)?		

C. Mediation Service Providers

Aim: An important aspect of mediation development is the place of private/public service providers who shape the market, create the offer, and centralise mediators' services. Their presence can influence the development of mediation.

Questions

1. Who are the main Mediation service providers in respect of civil and commercial mediation? **(*)**
   For each service provider, please indicate the information outlined below if available:
   (Please duplicate questions i – vii below for each new service provider)

i)Name:

ii) What is their governance structure (public /private, not for profit, for profit etc.):

iii)Type of cases they handle:

iv) Number of mediators and broad breakdown of professional experience:

v) Number of mediations handled each year:

vi) Does the organisation handle IP cases? If yes, how many each year?

vii) Settlement rate of disputes mediated:

2. How are private mediators/ADR Organisations communicating about mediation?

3. Is there any specific information available on the mediation of IP disputes via these centres? **(*)**

Statistical data:

Based on your research into private Mediation Service Providers, can you provide data on mediation (averages based on Mediation Service Providers surveyed) :

	General mediation	IP Mediation
What is the cost of mediation?		
How many cases per year?		
Average duration of mediation?		
Average value of the claims mediated?		
Settlement rate (in %)?		

D. Mediation in National IP Offices

Questions

1. What type of IP rights are your office granting? (eg. Patents, trademarks, designs, domain names, copyright etc) **(*)**
2. Dispute Resolution within your Office **(*)**

How many *inter partes* IP disputes does the IP Office deal with each year	
What type of dispute are they (eg. opposition, cancellation, invalidity)	
At which stage (eg. first instance, 2nd instance)	
Length of time taken to resolve	
Average IP office fees	
Average value of these disputes	
Background of parties (eg. SMEs, National/International, etc.)	
In which language do you offer proceedings?	

3. Can proceedings be suspended for negotiation between parties? **(*)**
4. Does your office have a legal basis to offer mediation or other forms of ADR for the resolution of IP Disputes? **(*)**
5. Does the National IP office offer mediation to resolve IP disputes? **(*)**

5.1 If yes **(*)**

- How?
  - Internal Service with own staff mediators ☐
  - Internal service with external mediators ☐
  - Cooperation to other external mediation provider ☐

  Other: ☐

- For which type of Office proceedings mentioned above?
- At what stage – Opposition, Cancellation, Invalidity proceedings – first instance, appeal etc.?
- Who are the parties? (e.g. SME's/Multinational/Individual)
- What languages is mediation offered in?
- Venue of Mediation? (e.g. At the Office, external venue, On-line)
- Who are the mediators and how have they been trained?
- Describe the exact mediation process used at your IP Office.
- Who is proposing mediation?
- Do you undertake satisfaction surveys? If so please share the form used and the results.
- Does your office have institutional cooperation on mediation with other IP offices or Mediation organisations?

Statistical data

Percentage of proposed mediations that actual mediate	
What is the cost of mediation?	
How many cases per year?	
Average duration of mediation?	
Average value of the claims mediated?	
Settlement rate (in %)?	

Comments:

5.2 If no **(*)**

- Does the IP Office advise/provide information on mediation?
- Have there been any mediation related initiatives? Eg. Awareness, training, etc.
- Does the IP Office offer a list of mediators?
- Is the IP Office aware of mediation?
- Has the possibility of using mediation been discussed previously?
- Would they be interested in developing mediation as a service within their office?
- Would they require a specific type of support to do so?
- Are there obstacles to mediation being used for IP cases in this country?