

Kluwer Mediation Blog

Build it, and they will come !

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ADR in Brazil is a hot issue. The number of courses, events, discussions and debates over the present and future status of mediation is already significant and growing at high rates. For the people who are involved in the field, it looks like mediation booming.

There are reasons for this enthusiasm. On one hand, the Brazilian Court System may have become an economic bottleneck. Over the years, it has been swamped with an ever increasing number of disputes. According to the Justice in Numbers Report (www.cnj.jus.br), Brazil spends about 1.2% of its GDP in servicing these conflicts.

On the other hand, Brazilian current economic environment is propelling business ahead and, consequently, the number of disputes is increasing. Given the slowness of the Brazilian Court System, in theory, there is a demand for quicker, more agile and informal ways of resolving disputes.

The adversarial process built into the Brazilian court system can no longer be the sole or even the preferred way to address disputes. It is expensive, slow and unpredictable. This situation calls (or screams) for the application of ADR. Mediation would seem to be the natural solution to be adopted in most cases.

Additionally, Brazil has already produced a significant number of well-trained mediators, a Code of Ethics following international standards and judges and court staff adequately trained and prepared to identify cases which could be referred to mediation. The problem, therefore, is not on the supply and availability of good quality mediation services, but rather on the demand side of the equation.

In other words, despite the theoretically favorable environment, in practice, mediation is still not the preferred way to resolve disputes in Brazil. In fact, mediation in Brazil is adopted in a very small number of cases. Brazil has the need and the means to adopt mediation as a main stream form of dispute resolution, but somehow it has not happened so far. Such apparent contradiction begs two questions:

(i) Why, if both demand and supply for mediation are apparently abundantly present, mediation is still not a main stream form of dispute resolution in Brazil? and

(ii) What can the mediation practitioners do in order to bring mediation to main stream?

At first glance, the more obvious explanation as to why mediation is not a main stream form of dispute resolution in Brazil may be attributed to the fact that it is not a mandatory court procedure in the country. Slowly, there has been some progress in this area.

In the first years of the 20th Century, the Brazilian Government initiated extensive discussions on the Justice System Reform, aiming at reducing the time and resources consumed in the resolution of disputes in the court system. Mediation is one of the options that is being considered and since then has been receiving enthusiastic support from the Judiciary.

This support can be seen, for instance, in the state courts' initiatives in promoting the use of mediation by creating "mediation programmes". Another demonstration of the courts' support to the use of mediation was evidenced in 2010, when the use of mediation became public policy as the National Council of Justice (CNJ) published the Resolution 125.

Despite these and other institutional advances, mediation is still not a mandatory court procedure. This is unfortunate. Countries that implemented mandatory mediation programs achieved between 50% and 75% success rate in the settlement of cases without trial. In Brazil, certainly, a more intensive use of mediation would achieve significant results in reducing costs and time in resolving part of the disputes that currently find their way into the courts; while increasing client satisfaction, even assuming lower success rate levels.

Part of the solution could be to adopt other countries' successful experiences which encouraged and facilitated the use of mediation, achieving positive results. To this end Brazil could:

- 1) Introduce mediation as mandatory in some types of cases (family, civil and commercial disputes when concerns to disposable rights);
- 2) Motivate judges to recognize and refer cases to mediation, where appropriate;
- 3) Provide financial incentives, such as refunding part of the filing fees when the dispute settles in mediation;
- 4) Expand voluntary mediation by offering easy access to the necessary training in mediation; and, at the same time, informing lawyers, corporations and other stakeholders about the benefits of collaborative practice;
- 5) Increase data collection and benchmarks to demonstrate the effectiveness of mediation.

Bringing mediation to main stream in Brazil, however, goes beyond purely institutional actions such as the ones described above. Cultural and behavioral aspects must be also considered. In this day and age, not only the Brazilian general population does not have the culture of using mediation as a way to address conflict; but also has little or no awareness of mediation as an option.

I believe that the engagement with the general population is important if mediation is to become a main stream form of dispute resolution in Brazil. To this end, lawyers and mediators must tirelessly work to engage and explain to the general population the benefits of adopting mediation as a form of conflict resolution.

Mediators and lawyers must end their longstanding (and I must say outdated) rivalry. Rather, they should see themselves as natural and complementary parts of a larger dispute resolution system.

Sadly, many mediators and lawyers see themselves as competitors, although cooperation would yield positive results for both of sides.

Mediators and lawyers have both the need and the responsibility to promote the use of the mediation to the general population. After all, each and every individual in the general population is a potential mediation client. Without the engagement and support of the general population, mediation is will never be as important as it could, should and must be.

The benefits of mediation should be clearly communicated to the general public. The practitioners involved in mediation are the ones who should have the burden of communicating and engaging with the society as a whole. Mediation practitioners are the ones who should overcome the cultural bias against the practice of mediation.

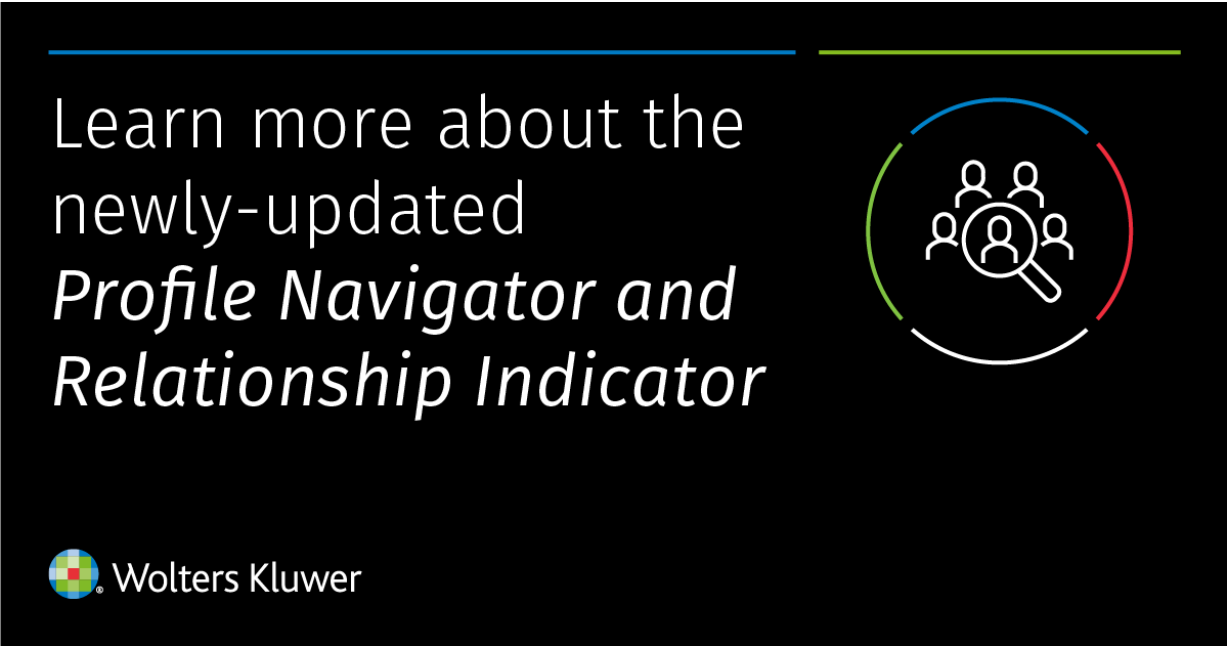
The supply of mediation professionals and the capacity to provide these services in large numbers are abundant in Brazil. The potential demand for mediation in Brazil is humongous. However, such demand for mediation, although large, is still latent. Mediators and lawyers must work hard to transform this potential demand in reality. It depends exclusively on us. Build it, and they will come!

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