

Kluwer Mediation Blog

New Winds from Brazil

Andrea Maia (Mediar360 – Dispute Resolution) · Monday, May 4th, 2015

In the late 90's in Brazil, a sudden interest in Mediation started to develop under the influence of the newly enacted Argentinean legislation (1995). Unfortunately, just until a few years ago, mediation had grown at a very slow pace, with a few advocates effortlessly lobbying for its widespread implementation and for a local legislation. Finally, after some years of debates on the pros and cons of a local legislation, the hard effort of this group has finally paid off, as the New Civil Procedural Code (CPC) inserted mediation in the Brazilian legal system in 2015.

However, the first signs of the “new era” started in 2010, when the National Council of Justice, the agency that controls and manages the quality of civil services rendered by the Brazilian Judiciary Power, issued [Resolution N. 125](#), based on the premise of the right of access to Justice, laid down in the Federal Constitution:

“Art. 1 of the Resolution institutes that the National Judiciary Policy for handling conflicts of interests, seeking to ensure that everyone has the right to resolve disputes by suitable means”

As one of the first steps in order to achieve their overall objectives, the Courts were to set up Permanent Centers for Consensual Methods of Resolution of Disputes and to install Judiciary Centers for Resolution of Disputes and Citizenship. In addition, the Resolution also addressed the required level of qualification for the conciliators and mediators, the registry and statistical monitoring of their activities and management of the Centers.

Since then, mediation has in fact started to grow in Brazil, as several proceedings in the civil, family and small claims, among others, have become ever more frequent. The parties involved in the different cases started to realize that resorting to this ADR method could produce better results in a faster and more cost-effective manner, without being subjected to the very crowded judicial system.

Developed by a committee of respected professionals appointed by the President of the Brazilian Senate, the new Brazilian Civil Procedure Code (CPC) was first presented in June 2010, approved by the Brazilian Lower Chamber (Câmara dos Deputados) four years later (March 2014) and was finally enacted by the President in March 2015 (but will only be valid from 2016 onwards).

The new [Brazilian CPC](#) is, no doubt, a very important step towards the further dissemination of mediation practices in the country, especially in the Courts of Justice, as there are about 22 references to mediation in the new legal text (whilst there was none in the previous text). A new legal culture is highly anticipated in several circles within the legal system.

Overall, the new CPC generally addresses Mediation within the judicial boundaries (context), but it does not rule out other forms of ADR methods. Some of its main goals are to regulate court-connected mediation and the accreditation of mediators in order to safeguard the process. Differently from the past, as long as it is in the interest of the parties, it will now be possible to use other consensual methods for case resolutions, even when they started in a judicial manner. Confidentiality is also be assured when Mediation is applied (this was one of the main local concerns).

After all being said, there are some controversy in the academic community regarding some specific points of the law, especially those associated to the restriction to work as legal practioner and as a judicial mediator in the same jurisdiction. In other words, the legislators feared a possible conflict of interest between the activities of a judicial mediator and other legal related activities.

As far as I know, I am not aware of such rule being applied anywhere else in the world, and I agree that it can in fact discourage some outstanding attorneys from engaging in Mediation and/or other ADR related activities (as they would have to make a choice). Such rule does not follow the same logic of the Brazilian Bar Code of Ethics; as a result, it has been deemed highly concerning by the market as a whole.

There is no doubt the new CPC will help to disseminate Mediation (and other ADR methods) in a faster and more organized way in Brazil. However, the quality of the implementation and the initial results are key elements to its acceptance and long term sustainability within the legal community. In addition to have well-qualified Mediators working with court annexed mediation, all of those within the legal profession are to be fully informed of its benefits so that they cannot only trust it as a reliable way of solving disputes, but also to understand the benefits to their clients and to themselves.

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