

Brazilian Mediation - Ten Years In One

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When building the Brazilian capital, Brasilia, in the fifties, Juscelino Kubitschek's expression "50 years in 5" became famous. He was referring to the country's expected development. Maybe a sort of analogy - ten years in one - could be used to describe the recent developments in alternative dispute resolution in Brazil.

If compared to other relevant economies, Brazil had a significant delay in incorporating arbitration and mediation into legal practice. Last year the arbitration law completed its 20th anniversary but only in the past 10 years - after the constitutional recognition by the Supreme Court - has arbitration practice in Brazil really made headway. For mediation, it has been even more complicated: after four law bills, in 2015 an expert commission coordinated by Judge Luis Felipe Salomão succeeded and the first Mediation Law was enacted. Even if we understand that there was no need for a law to make mediation happen, the growth of mediation after the enactment of this law is undeniable. In the past year, Brazilian mediation grew ten years in one.

2016 was a challenging year for Brazil in general. Particularly in the economic field, the country has faced maybe the worst crisis in its history. The challenges for the State to overcome are countless and go beyond the economic problems. As an example, the judicial system is overcrowded with probably one of the biggest number of judicial proceedings in the world: at over 105 million.

On a more positive note, 2016 was an extraordinary year for ADR in Brazil. In the private sector, the number of arbitration proceedings instituted increased, while mediation took important steps towards its consolidation. Certainly 2016 was one of the busiest years for arbitration and mediation in the country's history, since both mechanisms and other tools were responsible for important achievements during this time. As a result, the new ADR set-up contributed to the accession of Brazil to the report *Doing Business* of the World Bank concerning the enforcement of contracts, which since its last report included as an analysis criterion the adoption of ADR methods and management of courts in the economies surveyed.

The positive scenario for ADR is not limited to mediation and arbitration. Relevant work and discussions are being conducted by academics and important institutions, for instance the Brazilian Development Bank recently held a seminar to discuss the employment of Dispute Resolution Boards and consensual means in infrastructure contracts. Additionally, models of Financial Ombudsman are being the object of studies and projects organized by the Getulio Vargas Foundation and the National Bank Federation. Finally, a complex Dispute System Design Program has been designed to address the indemnification disputes that are arising from the worst national environmental disaster, a mining dam collapse in the small town of Mariana/MG causing human deaths, damages and pollution.

This whole growth has been empowered by recent legislation and also by several courts' efforts. A

few days before the beginning of 2016, the Mediation law (Law 13.140/2015) came into force and since then has boosted the training for both judicial and extrajudicial mediators – although the legislation does not require specific training for extrajudicial mediators. In March 2016, the Resolution 125 of the National Council of Justice (CNJ), which established the National Judicial Policy concerning the appropriate way to approach conflicts of interests in the country, was amended. This amendment allows for the recognition of certain schools and training institutions for judicial mediators. Accordingly, Brazilian courts (in compliance with the legal provisions and resolutions of the National Judicial School) have regulated the recognition of these schools and institutions in each State.

In addition to the training and registration of mediators, another major challenge was – and still is – the structuring and adaptation of the courts for the reception of a new procedural system inserted by the new Code of Civil Procedure that came into force in March 2016, which encompasses strong tools to enhance settlements.

Even the Superior Court of Justice created a center for consensual dispute resolution. Furthermore, the movement extends beyond the judiciary: lately there have been Executive initiatives to encourage the usage of ADR in recent regulation regarding the guidelines for the continuation and reestablishment of public contracts. This regulation represents a very significant step for mediation and other ADR processes as it authorizes the employment of mediation, arbitration and other methods in issues involving public administration. By the way, the use of arbitration in this kind of dispute involving the public administration is not a new concept. The novelty lies in the authorization for the utilization of mediation and other extrajudicial methods of conflict resolution since these methods are still being developed within the country's legal culture. On the subject of public conflicts, a new regulation regarding the use of mediation by the public lawyers in the General Counsel for the Federal Government is expected soon.

Returning to the 2016 ADR timeline in Brazil, the second semester was crucial for mediation concerning a delicate subject: the adoption of mediation in disputes regarding labor issues. In September, the Superior Council of Labor Justice (CSJT) issued a resolution which regulates the application of conciliation and mediation methods in judicial disputes involving labor conflicts. This resolution is groundbreaking especially because in Brazil there is a lot of mistrust in the usage of mediation in disputes involving labor relations. Moreover, in 2017 there are some areas such as insolvency and consumer conflicts that might bring interesting developments.

In 2016, arbitration kept its growth meanwhile mediation and other ADRs left the “promised status” and became a reality. The construction of a culture that values non-judicial methods of dispute resolution is in progress and seems to be spreading fast.