Innovations of the Brazilian Mediation System

New Mediation Horizons

Dulce Nascimento

Collaborative Lawyer - Brazil and Portugal; Certified IMI and ICFML Mediator
Master and Undergraduate in Law, Postgraduate in Human Resource Management
Specialist in the business, labor, health, civil, consumer,
family and school areas, with extrajudicial and judicial action
Institutional consultant and ADR specialist teacher, in the public and private sector
Judicial Instructor of the National Council of Justice
Coordinator of Mediation, Conciliation and Arbitration at ESA-OABMG
Supervisor of the Mediation and Conciliation Nucleus of OAB-MG-Brazil
Member of the National Commission for Mediation and Conciliation of the Federal Council
of OAB Judge Coordinator of the Peace Judge of Santa Maria da Feira (2008-2013)
Author of the book Mediation Club - Transforming dreams into reality, several articles and
published case law.
dulce@dulcenascimento.net

ABSTRACT

In this article we intend to make a summary approach on the innovations of the Brazilian mediation system in mediation, particularly in the period between the end of 2015 and the beginning of 2016 to present, reflecting on their relevance and potential results, in access to Justice and social peace.

KEY WORDS

Mediation; Brazil; Innovations; Parental Alienation; Family.

INTRODUCTION

Brazil's experience with the Mediation Institute as a process of conflict resolution has already taken a path and has sustained knowledge, deserving an in-depth study, since, in particular, within the legal framework, it is itself a great advance and innovation.

A number of reasons for its implementation and development began to be seen as an effective way of avoiding the costs of a legal dispute and of unburdening the judiciary and the State, and is now seen as a process of human pacification.
This self-compositional method of conflict resolution allows those involved in these situations, if they so wish, to voluntarily build agreements spontaneously through the intermediary's help, which translates into a third, professional conflict management expert who, in addition to being impartial, and often neutral, in relation to the parties and situation experienced by them, has no interest in the result that is to be achieved. In this work of management, the Mediator acts as an intermediary of the relationship of those involved in the situation, having as main functions, on the one hand to re-establish communication and, on the other hand, to provide the necessary conditions so that it is possible for them to reach the best solution to the controversy that they are experiencing.

We can already affirm that Mediation, as a process is translated into a modern and collaborative method, with a very complete procedure that aims to establish or reestablish the dialogue between the actors, so that they are able to build the best solution for The same, thus giving form and content to the desired result of the own.

Globally known as the problem of access to justice as access to justice, the solutions that the various countries have found to respond to the needs of populations have their problems solved effectively and efficiently.

In Brazil, from what was possible to be ascertained, inspired by the work of the Gaucho Conciliation and Arbitration Councils, which mostly dealt with neighborhood misunderstandings, and the Small Claims Courts of New York, after a study carried out in 1980, with the objective of To give an answer to the guarantee of the value of justice to the great masses of population, the legislator created Federal Law 7.244 of November 7. 1984, instituting the Small Causes Court, with jurisdiction attached to the civil sphere, and jurisdiction determined by the value of the conflict, as a way to enable the resolution of so-called small causes (given their economic value), and numerous Brazilian states have implemented Small Claims Courts.

In this sense, we can affirm that the Small Claims Law of November 1984, with the procedural characteristics of informality, celerity, gratuity and simplicity, for the treatment of causes of lesser economic value, initiated a historical framework of un-bureaucratization of Brazilian justice, as well as recognition of the importance of previously finding a conciliatory or arbitral solution, leaving only to the judicial solution if attempts to compromise are frustrated.

In practice, it began to be verified that empowering and facilitating communication, thus guaranteeing more and more freedom for the participants in the participation of the resolution of their own situations, effectively contributed to the construction of truly consensual solutions, also potentiating respect for the effective fulfillment of the found solutions, and consequently preventing further discord.
With experience in the matter, Brazil introduced Law 9.099/95 to create the Special Courts, formally introducing a new procedural rite, having as function the speed and procedural simplicity, with the reduction of formal procedures, deadlines, among others, with the objective To enhance access to justice for a specific segment of society, in order to combat the high costs and delay of common judicial provision, as well as to facilitate access to jurisdiction.

To conclude this introduction, we consider it relevant to conclude that Brazil has a long way of practice, coming from this Brazilian experience chosen by Portugal to influence the creation of solutions for judicial slowness, having implemented the Peace Courts as justice of proximity, servants By Law 78 of July 13, 2001, unanimously approved by the Assembly of the Republic, these courts endowed with characteristics of operation and own organization, proposing there that the resolution of conflicts is carried out through mediation, conciliation or judgment.

CONTEXTUALIZAÇÃO DO BRASIL AND NUMBERS OF JUSTICE -

MEDIATION AS A PUBLIC POLICY

Despite these investments to find solutions that effectively respond to the issue of access to justice, the data for 2015 continued to state that in Brazil we had about 100 million cases in the judiciary. This meant that for a population of approximately 200 million people, on average, we would have a process for each Brazilian, since each process has at least two opposing actors.

The growth of the mediation institute in Brazil went without regulatory and legal framework for several years, coming with the arbitration law n.º 9.307/96 to boost the growth of arbitration chambers, also specialized in mediation.

Differing from arbitration, mediation came to be seen as a possible differentiated and effective response to the population's need and yearning, and it was constituted in a public policy through Resolution 125/2010 of the CNJ - National Council of Justice. Its dissemination and implementation to be carried out within the judiciary for society, community and legal operators, in particular for lawyers, passing the Mediation to be seen as a public policy, beginning the institutionalization of mediation within the judiciary itself Brazilian.

As in all experiments, good and other less good results were found, without doubt the practical experience was very rich and rewarding, and its application evolved into several areas of different conflicts. Thus, in addition to civil disputes and the crime of special courts, we find mediation with judicial intervention in the areas of community, environmental, health, business and many other conflicts.

Although there are some specific legislative references to mediation, only in 2015 was it possible to conclude the regulatory and legal framework of this institute, with Law 13.140 coming into force on December 26, 2015, from then on Mediation of controversies between private
individuals and self-administration of conflicts within the scope of public administration, with various specificities, to be regulated in Brazil. Then, in March 2016, with the entry into force of the new Procedure Civil Code, mediation is a very significant priority within the Brazilian judicial process itself.

**MAIN INNOVATIONS OF THE BRAZILIAN MEDIATION LAW**

Article 3 of Law 13.140/2015 provides that mediation of disputes regarding available rights and unavailable rights, provided that in the case of the latter are transacted. The peculiarity that we find in legislation, in relation to unavailable transacted rights, in case of agreement is the fact that it must be judicial approved after hearing the public prosecutor, ensuring and respecting the function of the public prosecutor and the judge as guarantor of the Protection of essential and constitutionally recognized values.

The formalization and recognition of this possibility of mediating unavailable rights, as long as they admit transaction, besides being necessary and obvious, given the known practice, constitutes a significant and innovative step in the effective recognition of the importance and necessary incentive to the relevance of the principle of the autonomy of the will private partnership to guarantee the freedom and responsibility of citizens for their choices and decisions, corresponding to an important and fundamental advance of self-responsibility of the stakeholders in the construction of solutions in their life for their own differences.

Reinforcing the importance of the lawyer's intervention in the mediation process, the sole paragraph of article 10 of the Brazilian Mediation Law, states that if only one of the parties is represented by a lawyer or by a public defender (corresponding to the role of the Portuguese ombudsman) the mediation procedure must be interrupted until all parties are represented. In this sense, we find here, on the one hand, the recognition of the relevance of the intervention of the lawyer in the process of mediation, and on the other a reinforcement of the meaning and function that the lawyer occupies in the process of mediation with his client, thus verifying the necessity of the lawyer to know the novelty of this potential role that can and should occupy in this self-composed method of dispute resolution.

By this Law, it is confirmed in the sole paragraph of article 20 that an agreement resulting from the final mediation term constitutes an extrajudicial enforceable instrument and if it is legally approved becomes a judicial enforcement order, thus reinforcing the necessary security of the final outcome of a mediation through the agreement. Legal certainty, effectively reinforced by the importance of the presence of lawyers in mediation, which will ensure that the agreement reached has a legal and legally relevant.
In this sense, there is no doubt about the distinction between the role of mediators and lawyers, given that the mediator does not give either technical or legal advice, as well as advises or makes decisions, since he is not a psychologist, a lawyer or judge. The mediator is a mediator. He is a professional specialized in administering conflicts, in an impartial and independent way, also acting as a communication facilitator. A conflict manager specialized in the mediation process.

We consider it very important to reinforce the effective intention of the Brazilian law to reinforce the distinction between the intervention of the lawyer and the mediator in the Mediation, as well as the importance of the lawyer in this process for which, as a rule, he does not yet have sufficient training.

But the greatest novelty that the Brazilian mediation law stipulates is that provided for in its Article 46, which mediation may be carried out over the internet or through communication that allows the transaction at a distance, provided the parties are in agreement, that is, respecting the principle of voluntariness and other principles of mediation. Complementarily in the case of mediation carried out by these means, if one of the media is domiciled outside Brazil, it may be subject to the rules of the Brazilian mediation law, as provided for in the sole paragraph of that article.

A final touch on the Mediation Law, although the diploma refers to mediation as a means of settling disputes between individuals and in the self-composition of conflicts within the public administration, it provides for a subsection on judicial mediators (Article 11 To 13º) where, among other aspects, it states that the remuneration due to judicial mediators will be fixed by the courts and borne by the parties, and free mediation is ensured to those in need.

**MAIN INNOVATIONS OF THE NEW BRAZILIAN CIVIL PROCEDURAL LAW**

The Brazilian Civil Procedure Code (CPC) turns out to be a very innovative and daring diploma, starting with distinguishing between the function of the Mediator and the Conciliator, but establishing that in both procedures they are characterized by the principles of independence, Impartiality, autonomy of the will, confidentiality, orality, informality and informed decision (article 165 and 166 CPC).

The distinction that the new CPC itself makes between mediation and conciliation is extremely important, using two criteria. On the one hand, the distinction is made since the mediator can’t give any type of suggestion or opinion, unlike the conciliator to whom it is possible to suggest, provided that he does not use any type or form of embarrassment or intimidation. On the other hand, the Brazilian legislature comes to bring another criterion to make that distinction, which refers to the existence or not of previous bond between the parties. In this sense, if there is such a link, the most appropriate method will be mediation. If not then the appropriate method
will be the reconciliation. In this sense we find here the deepening, on the one hand, the question of the third mediator as a facilitator (being unable to evaluate or suggest), and on the other of the linking characteristics in the relationship between the subjects involved in the conflict, that is, the presence of subjective elements in the conflict, where there is an intention to maintain, improve, not deteriorate or initiate a relationship (regardless of the degree of intensity or intimacy of the same), a thesis that we have been advocating for several years\textsuperscript{176}, and bring it into practice.

We can affirm that the great innovation of this Brazilian diploma lies in the legal provision, established in article 334, under which we find regulated the principle of compulsory attendance in the mediation process, in the initial stage of pre-mediation session. In this sense, the judicial process only admits the non-conciliation or mediation hearing, carried out by the conciliator or the mediator, if both parties expressly express disinterest in the consensual composition and when self-compensation is not allowed.

The procedural importance given to this requirement of compulsory attendance in the first stage of the mediation process is intended to reinforce the importance of informing and clarifying the actors, rules, principles and expectations. In this sense, the civil procedure code, in paragraph 8 of the aforementioned article 334, establishes that it is considered to be an offense against the dignity of justice, non-attendance without justification, conciliation or mediation, being sanctioned with a fine of up to 2% of the economic advantage sought or the value of the case, reversed in favor of the State or the Union. More establishes the aforementioned decree, in paragraph 9 of said article 334, that the parties must be accompanied by their lawyers or public defenders (Portugal), thus reinforcing the importance that they always have the possibility to decide in an informed and informed manner on their rights and the legal consequences of their actions and omissions.

It is clear that all the CNJ's investment in the last decade, as well as recently by the legislature, in reinforcing the importance of this public policy of consensual methods, where we find the obligatory nature of the pre-mediation session, is aimed at achieving the necessary And indispensable, information and dissemination on the mediation procedure, the benefits and advantages that it allows the actors to achieve with its use, as well as, restore dignity in the effectiveness of the judicial process and enhance the effective access to justice.

For more than 10 years, and in particular during the period of exercise of the function of Coordinating Peace Judge of the Santa Maria da Feira Court (2008-2013), which, given the lack of information and economic difficulty, we have defended the need of the Judge of Peace in Portugal have time available to carry out information campaigns and efficient dissemination on self-

\textsuperscript{176} Available in http://repositorio.ulusiada.pt/bitstream/11067/716/1/md_dulce_nascimento_dissertacao.pdf.
compositional methods in general and on mediation in particular, as well as the need to introduce this theme in curricula of education (of 5; 15 and 20 years of age), with the basic rationale that, on the one hand, there is a lack of information, and on the other, misinformation about what the Mediation is and what it serves, especially with lawyers and solicitors.

Given that those who do not know or have not experienced enough knowledge to pronounce or decide, in an informed and informed manner, whether or not the mediation process is the most adequate to solve the difference that is living, we believe that only After this understanding you may decide whether or not to participate in the process.

Effectively, if the name "imperative Pre-mediation " bothers, it can be changed, but we can’t be indifferent to the fact that we continue to have an uninformed population is the main factor so that this mediation procedure is no longer used, even when it is The most appropriate method taking into account the characteristics of the situation and the parties to the conflict. In this sense, responding to those who defend that mediation is voluntary, and it is an incongruity to speak of any phase of the process as mandatory, we will always say that we can change the name, as it was done in Portugal in the Labor Mediation System, in which I exercised the Coordination of Labor Mediators of Lisbon, where the initial phase of the process was renamed "Information session", in which the mediator clarifies the rules of mediation, rights and duties, as well as other obligatory information, and only after checking the will of the parties in accepting the procedure follows with the mediation sessions.

From the experience of being a Coordinating Judge of the Peace Court of Santa Maria da Feira, it was possible to verify that, in view of the absolute voluntariness of mediation in Portugal, in the vast majority of cases, non-attendance or refusal of subjects to join Mediation, was verified by lack of information or lack of knowledge. This situation unfortunately remains. People in Portugal who still do not adhere to this procedure, for the most part, continue to have a distorted view that mediation does not make sense, because they imagine the mediator as a subject who will help them talk, and talk to They are something that is seen as impossible because they have tried to do it and they have not succeeded.

Now, the process of mediation is much more than that. It has to do with communication, dialogue and cooperation, effectively being a simplified procedure, but with formality and rules, managed by highly qualified, specialized and experienced technicians, some of whom are certified.

Thus, this self-compositional method of dispute resolution must be valued, as well as respecting professionals who perform this function in a highly specialized manner, giving them due importance in what constitutes a real opportunity for effective access to justice and the exercise of the principle of autonomy of the private will.
Internally in Brazil several currents have already been formed on this audience being necessary or obligatory, with those who understand that compulsory mediation is unconstitutional, violating the principle of autonomy of the will; Who consider that there is no incompatibility between the Mediation Law and CPC; And those who defend that there is incompatibility between the two mentioned diplomas, with the repeal of this part in the CPC by the Law of Mediation because it is a special law and later in its approval (although previous in the publication), concluding for the need to work together the legal field on mediation in Brazil.

Another great novelty is the formal recognition by the CPC, in paragraph 3 of article 166, which admits and encourages the application of negotiation techniques, with the aim of providing a favorable environment for self-composition. This reinforcement of the need to update the lawyer to perform new functions in a professional manner, with the conscious and trained use of effective knowledge in collaborative negotiation techniques, win-win techniques, for which until now there was no effective recognition of his existence, importance and consequences in the self-settled resolution of disputes.

CIVIL PROCEDURE CODE INNOVATIONS IN FAMILY LAW

To finalize this article on the new horizons of mediation, and in general on the innovations of the Brazilian mediation system, it’s important to mention that the new Brazilian CPC brings a new chapter for family actions (Chapter X - Articles 693 to 699th), where 90% of the articles deal with the subject of self-composition, with very relevant and innovative peculiarities, being applicable to contentious actions of divorce, separation, recognition and extinction of stable union, custody, visitation and filiation, referring to procedure established in legislation specifies the action of food and to deal with the interest of children and adolescents.

This chapter begins by stating that in family actions all efforts will be undertaken for the consensual solution of the controversy, gaining more value here the institute of the family, and a greater reference to what are the values and fundamental principles of the stability of a society, In particular the family institution, regardless of its characteristics or particularities.

One of the specificities found in article 694 of the CPC refers to the possibility of the judge having auxiliaries from other areas, in the light of what also happens in the Portuguese legislation. However, the difference is that in Brazilian law it is established that these professionals from other areas have knowledge of mediation and conciliation, that is, they are mediators with specialized training. In this sense, we find the reinforcement of the need for multidisciplinary knowledge in mediation and conciliation professionals, and their teamwork.

In addition to the single paragraph of article 694 of the CPC, which provides for the possibility of the court to suspend the process for extrajudicial mediation or multidisciplinary
assistance. For multidisciplinary care in Brazil, we can report the existence of effective collaborative practices, which means the joint work of several professionals, with different areas and knowledge, acting in a multidisciplinary team, solving one case, working with the duty of confidentiality, and in the particular case of lawyers the duty of non-litigation.

Finally, we conclude with one of the most interesting peculiarities from the chapter, which is found in the provision of article 695, according to which, in the special case of family actions, the citation of the defendant contains only the data necessary for the initial mediation and conciliation hearing. However, in a court case, which always has a litigating charge, where it receives a judicial summons, it involves the usual request for a conviction, motivated by allegations and documents of something that is running against him, inevitably produces a series of feelings and consequences. Thus, it is extremely interesting to verify the concern and sensitivity of the Brazilian legislator when proceeding to regulate the citation in this way, with the concrete objective of effectively stimulating self-composition, assuring the defendant's right to examine the action at any time, but giving it space for the possibility of performing a self-composition without contamination.

With this peculiar quotation, the Brazilian legislature sought to guarantee the existence of the necessary and indispensable environment for the work of self-composition, reducing to a minimum the procedural litigation burden, taking into account the particularity of the subject matter.

**CONCLUSIONS:**

The innovations of the Brazilian system in mediation seem to be of extraordinary relevance for this institute to effectively reach new horizons in the world, concluding that Brazil, with the path of professionalization of the mediator's action and of the public policy of the procedure, has here the opportunity to become a world reference, believing that, in particular, it may come back to inspire changes in the Portuguese mediation system.

In particular, on the innovation of the obligation of mediation established in Brazilian legislation, regardless of the scorn of the doctrine, and given some experiences in other countries (such as Colombia where conciliation has been mandatory since 1991, or Argentina, where since 1996 Mediation is mandatory in the Federal Court of the province of Buenos Aires, currently 22 out of 24 provinces to have legislation on mediation), we believe that it is extremely relevant that in the next five years we are effectively paying close attention to the results achieved in Brazil, since we understand that this period shall correspond to the time necessary for the full integration of this institute into society, as well as the verification of its effective results in access to justice and social pacification.
LEGISLATION:

Mediation Law No. 13,140 of June 29, 2012, effective as of December 26,

Brazilian Civil Procedure Code - Law 13.105 dated 16.03.2015, with entry into force on

March 18,

Resolution 125 of November 29, 2010 of CNJ - Conselho Nacional de Justiça, with the
changes resulting from Amendment 1 of March 31, 2013 and Amendment 2 of 08.08.2016.