Smaill Claims Court in Brazil and other practices fomenting Access to Justice

The Hon. André Gomma de Azevedo
State Judge, State Court of Bahia, Brazil.

Since mid 1970s Brazilian judges have been constantly developing public policies directed toward approximating the general population to the dispute resolution services provided by the states and by the Union. Several states in Brazil enacted small claims court acts in early 1980s and these values were reflected in the 1988 Brazilian Constitution which pursued the enforcement of civil, political and social rights. This current constitution developed an extensive list of material and procedural rights and was innovative with regard to diffuse and collective rights. Procedural and Social Justice equality received unprecedented treatment, including provisions establishing class actions, small claims court, and rights pertaining to a segment of the population that did not pursue the state to solve some of its disputes due to procedural inefficiencies.

Still in the 1980s (and to a much lesser extent to the current date), many critics perceived the system of justice as one which had not been working as a mechanism to guarantee the rule of law. Common criticisms included concerns with delays, an antiquated formalism, and complex written procedures. The public perception of the justice was not always favorable. Research indicated that many users of the judiciary perceived the public dispute resolution system as one in which rules were not to be respected, to some extent a significant segment of the Brazilian population still believed that it was not worthwhile to act according to the law; that the law was not universally applicable: that the civil system was closed for the poorer segments of the population and that the criminal system was open only to this same group of citizens.

The creation of small claims courts in Brazil in some states in the 1980s and as a federal public policy for state courts in 1995 was a significant change not only in the Judicial System but also as a means to improve access to justice. Those Courts were considered a ‘procedural revolution’ – due to the fact that there were based on the Common law tradition in contrast with the civil code system that orients the Brazilian Judicial power. The main inspiration to the

---

1 Judge of the Court of the Bahia State. Master of Laws from Columbia University in New York - USA. Research Associate Professor, Faculty of Law, University of Brasília (FD / UnB). Instructor in self-compositional of the Movement for the conciliation of the National Justice Council (CNJ). He was a mediator at the Institute for Mediation and Conflict Resolution (IMCR) and the Small Claims Courts in Harlem, both in New York - USA.
Brazilian Small Claims Court (‘BSCC’) Act were the small claims court model implemented in other countries, such as England, New Zealand and the United States, in the 1970s and 1980s. Following the global trend, the BSCC Act established a strong incentive to conciliation and mediation and the achievement of a shared solution to the dispute resolution process. The costs in the BSCC are low or null and depending on the amount of money being debated it is not necessary to make use of attorneys or legal advisors. In 2001 the Federal Small Claims Court Act was enacted to include the Federal Union and the Federal Justice in this global procedural tendency.

This paper summarizes the Brazilian Small Claims Courts and their main characteristics.

Principles

The BSCC are oriented by the principles of orality, simplicity, informality, economy of proceedings and celerity. These principles guide the interpretation and conduct of judges on their proceeding. In perfunctory terms these are the main characteristics of these principles:

- The principle of **orality** establishes that procedures should be conducted orally and one should document evidence only when strictly necessary.

- The principle of **simplicity** establishes that procedures in a BSCC should be developed in a low complexity basis with practices simple and plain enough to a non-lawyer to understand and be able to participate of a fair process of dispute resolution.

- The principle of **informality** establishes that formalisms are necessary only to attaining goals unattainable by other means. In this sense, if one pursues in BSCC his/her rights without any knowledge of legal terminology the clerk or the judge him/herself should make the necessary amendments to assure the fair development of the dispute resolution process.

- The principle of **economy of proceedings** establishes that proceeding should be directed to a significant procedural efficiency – unnecessary evidentiary proceedings are excluded from the BSCC.

- The principle of **celerity** established that Small Claims Court procedure should be as fast as possible and procedures should be designed for time-efficiency purposes.
Competency

State Small Claims court cases are subject to a financial limitation of approximately US$ 11,000.00 and Federal Small Claims Court to a US$ 17,000.00 limit.

The Brazilian State Small Claims Court act also barred cases pertaining to alimony, bankruptcy, fiscal, labor and other whose procedures demand specific stages or evidentiary practices which would recommend longer procedures.

Both State and Federal Small Claims Court also deal with misdemeanors or crimes established in the Brazilian Criminal Law as tantamount to misdemeanors. This inclusion of misdemeanors in Small Claims Court was on the first initiatives in the Brazilian Legal System to implement Restorative Justice practices. It is also the first time our Legal System established a model similar to the plea bargaining procedures.

Conciliation and Mediation

The BSCC also established a strong incentive towards conciliation and mediation. In Brazil, though there are still debates on semantics, conciliation is defined as the negotiation assisted by a third party which may suggest a solution while in mediation the neutral third party may on facilitate the perception of the case and the parties’ interests – in mediation in Brazil mediators may not suggest solutions.

The effectiveness of mediation as dispute resolution process is slowly initiating a significant change in the perception of justice by the public. Some effusively positive responses by the users of mediation have created a stimulus towards establishing, in the modern Brazilian court systems, a variety of mechanisms in which the users’ active participation is required as a form of establishing not only legitimacy of the process and its result but also as a means of empowerment or of providing a form of education towards dispute resolution.

One of the several factors that caused the positive responses of mediation was the adequate address of the social relationships between the parties in conflict and the effective restructuring of these relationships which are constantly altered by conflict – an event inherent to any human involvement. This change was only possible due to the improvement of the theory of conflict. Arguably the most important concept in the modern theory of conflict was the dichotomy of Constructive and Destructive processes of dispute resolution.
According to Conflict Theorist Morton Deutsch, a destructive process can be characterized by the weakening of the social relationship of the parties in conflict as a result of the procedure. In addition, destructive processes have a tendency to expand and escalate the conflict. This tendency results from the conjunction of three interrelated characteristics: 1) competitive behavior involved in the attempt to win a conflict; 2) processes of misperception and biased perception; and 3) parties’ commitment arising out of pressures for cognitive and social acceptance or consistency (Deutsch, 1973).

On the other hand, a constructive process can be defined as one in which the social relationship of the parties in conflict is strengthened as a result of the procedure. In these processes there are key psychological elements such as: 1) the arousal of an appropriate level of motivation to solve the issues; 2) the development of the conditions that permit the reformulation of the problem once an impasse has been reached; and 3) the concurrent availability of diverse ideas that can be flexibly combined into novel and varied patterns (Deutsch, 1973).

It is clear that mediation and other constructive forms of dispute resolution have presented a virtuous alteration in the legal system. These processes, by applying techniques that restrain excessively aggressive attitudes which are generally inefficient, as a rule stimulate proper repair of the social links between parties in dispute and, therefore, provide genuine and legitimate peacemaking.

**Conclusion**

The experience of Brazilian Small Claims Courts has been overall positive. The small claims court innovation both on State and Federal levels is arguably the most successful public policy directed towards the improvement of Access to Justice in Brazilian history. Many judges consider the principles of orality, simplicity, informality, economy of proceedings and celerity as the cornerstone of the BSCC system and its effectiveness – with simpler procedures, faster responses and accessible solutions may be attained.

The latest tendency in BSCC has been the incentive towards conciliation and mediation. Perhaps the most significant factor in the acceptance of mediation by the general public is the orientation towards goals other than exclusively reaching an agreement. In this sense, transformative mediation (Bush, 1994) does not only pursue the resolution of the issues in dispute, it seeks the empowerment of the parties and the mutual recognition of their perspectives.
By empowering the parties to define their own issues and to develop skills which will allow parties to reach solutions on their own, the process of mediation can be used in a more efficient manner. In addition, by enabling the parties to understand each other's perspective, mediation can be used as a means of improving social relations (or even humanizing) the dispute resolution process. Under the transformative approach, the mutually agreeable settlement is a secondary effect – the main objective of transformative mediation is to promote empowerment and recognition, enabling them to develop new and more efficient skills for dispute resolution.

Bibliography

ABA, Young Lawyers Division(1995), Carrer Satisfaction, Chicago, IL: ABA.
Brams, Steven & Taylor, Alan (1996); Fair Division: From Cake-cutting to Dispute Resolution, New York, NY: Cambridge University Press.


Kolm, Serge-Christophe (1996), Modern Theories of Justice, Cambridge, MA: Massachusetts Institute of Technology.


Mnookin, Robert et al. (2000), Beyond Winning: Negotiating to Create Value in Deals and Disputes, Harvard University Press.


