

Dr. Jorge Vladimir Pons Y García *

Universidad Juarez Autonoma de Tabasco (México)

GDI Global Law Universidad Internacional de la Rioja (Spain)

Notary (Mexico)

NEW OPPORTUNITIES FOR NOTARIES: THE USE OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

Do not advise the lawsuit and try to compromise with your neighbors.

Warn them that the winner is often the loser...

“For the expenses it assumes and the lost time”. –

Abraham Lincoln, 1851

Summary:

1. *Background.* 2. *Center of Attention of Alternative Justice from Aguascalientes to Yucatan.* 2.1 *State of Tabasco.* 2.2. *State of Puebla.* 3. *The main characteristics of the ADR.* 3.1 *Negotiation.* 3.2 *Mediation.* 3.3 *Conciliation.* 4. *The notarial function for dispute prevention by counselling.* 4.1. *Notary’s law for the state of Tabasco.* 4.2. *Notary’s Law for the state of Puebla.* 4.3 *ADR before notaries.* 4.3.1 *Proceedings ADR by notaries.* 4.3.2. *Notary Associations and their role as Administrator of ADR.* 5. *Conclusions.*

Keywords: Law, alternative means of dispute resolution, Civil Law Notary

Overview:

Today we have a relevant legal fact to face: globalization, that play an important role on internationalization, new technologies and some other global factors such as the desire to ensure fundamental rights. We can summarize in the novation of the Alternative means of Dispute resolution, (MARC) Some other authors call Alternative means of Dispute resolution (MARC) appropriate means, Alternative methods, regardless of how they were appointed or named, this it is nothing than A return to the ancestral and back to things that have been existed since ancient times, or at least as such for almost a hundred years ago.

Abstract:

En la actualidad nos encontramos ante un hecho jurídico relevante, en la globalización que enfrentamos, juegan un papel importante la internacionalización, las nuevas tecnologías y algunos otros factores mundiales tales como el deseo de velar por los Derechos Humanos, podemos resumir en la novación de los Mecanismos Alternativos de Solución de Controversias, Medios Alternativos de Solución de Conflictos que

hemos denominado (MASC) algunos otros autores los denominan Medios Alternativos de Resolución de Conflictos, (MARC) medios adecuados, métodos alternos, independientemente de cómo se le nombre o denomine, esto no es otra cosa que un volver a lo ancestral y retomar cosas que han existido desde épocas antiguas, o al menos como tales desde hace casi cien años.

1. Background

A long time ago, it was possible to ask for justice in the tribal councils, in the clans, in the meeting of neighbors¹, in the matriarchy or patriarchy and all those existent forms explained to us in the first years of study. We could also find it in the passing through the Greek governments, the Roman state (base of our right since these great warriors imposed their language and system of rights to be able to continue exercising the control when they conquered a territory) and the Middle Ages. As time went by, and as the rulers were the highest authority, they began administering justice and creating the corresponding institutions until the creation of the Court², which unfortunately due to the workload, caused that justice was not that “prompt and expeditious” in certain places.

Let us take into account that the role of the judge is the application of right; he is by no means empowered to create it, since it is not his responsibility. This belongs to the legislative function. Thus, his

¹ Ancient Greece, China, Japan, and all of these civilizations of Mesopotamia, coupled with the more remote legal antecedents placing them as the beginning of the laws.

² *Es gibt noch Richter in Berlin!* (*Still judges in Berlin!*) The famous phrase of the mill owner in ancient Prussia. anecdote attributed to Voltaire and quoted by Gustav Radbruch in 1930, in his book introduction to the science of the right–

Political Constitution of the Mexican United States¹

Title One

Chapter I

Of fundamental rights and their guarantees

Denomination of the amended chapter DOF 10-06-2011²

Article 1. In the Mexican United States, all persons shall **enjoy the fundamental rights** recognized by this Constitution and the international treaties in which the Mexican State takes part, **as well as the guarantees for their protection.** No right shall be restricted nor suspended except in the cases and under the conditions this Constitution establishes.

Article 17. No one may take the law unto his own hands, nor resort to violence to enforce his rights. Every person has the right to petition justice before courts of law, which shall be ready to provide it under the terms and conditions set forth by the laws, and shall issue their judgments in a prompt, complete and impartial manner. Their services shall be free and consequently, judicial fees are prohibited.

The Congress of the Union shall issue laws to regulate collective actions. Such laws shall determine how those actions shall be applied, the correspondent judicial procedures and the means to make amends. Federal Judges shall be exclusively competent to solve these procedures and means.

The laws shall provide alternative mechanisms to resolve controversies. In criminal matters, they shall regulate its application, ensure reparations and establish the cases in which judicial supervision shall be required.

Article 18. Pretrial detention may only be applied for crimes punishable by imprisonment. The

¹ Reforming the Political Constitution granted on 5 February 1857.

² On June 10, 2011, it is published in the Official Journal of the Federation, the decree amending various articles, as stated in the: "(...)" Single item.-The name of the first chapter of the first title is amended; The first and fifth paragraphs of article 10; The second paragraph of article 3; The first paragraph of article 11; Article 15; The second subparagraph of article 18; The first paragraph of article 29; The first paragraph of article 33; The tenth fraction of article 89; The second subparagraph of article 97; The second and third paragraphs of article 102 (B); and subparagraph (g) of the second fraction of article 105; The addition of two new paragraphs, second and third, to article 1st. And the current ones are in their order; A new second subparagraph to article 11, the second, third, fourth and fifth paragraphs to article 29; A new paragraph (second) to article 33, through the current in its order and the new fifth, eighth and tenth paragraphs, the current ones in its order, to article 102 of subparagraph (B); All of the Political Constitution of the United Mexican States (...)

This reform, in addition to establishing the guiding principle in article 1st of the Constitution, changes are made to articles 11, 15, 18, 29, 33, 89, 97, 102, 105 in which the concept of individual guarantees for fundamental rights is amended, the bases of the A are broadened Constitutional shelter.

place of confinement shall be different and shall be separate from the one used for convicted persons. The prison system shall be organized on the grounds of respect to human rights labor and the training for it, education, health and sports as a means to re-install the inmate into society and to make sure he does not transgress again, noting the benefits that the law ensures him. Women and men shall be imprisoned in separate places.

The Federation, the States and the city of Mexico can make agreements to have the inmates accused of crimes within their field of cognizance serve their sentence in prisons under a different jurisdiction.

The Federation and the federal entities shall establish, within the field of their respective cognizance, an integral justice system for teenagers, which shall apply to those accused of a felony according to penal laws and are between twelve and eighteen years of age; in which the fundamental rights recognized for everyone by this Constitution are ensured, as well as those specific rights they are entitled to for their state of development. People under twelve years of age who have committed a crime shall only be subjected to rehabilitation and social assistance.

• Amended paragraph DOF 02-07-2015

The management of the system on every level of Government shall correspond to institutions, courts and authorities who are specialized on legal procedures regarding adolescents. In observance of the integral protection and interest of the adolescent, means of orientation, protection and treatment may be applied if the particular case merits it.

If appropriate, **alternative forms of justice** shall be observed when applying the system. Due process of law and independence among authorities in charge shall be observed whenever an adolescent is prosecuted. Every measure imposed by the authorities shall be proportional to the misconduct and shall seek social and familiar reintegration of the adolescent and the plain development of his person and capacities. Confinement shall only be used as an extreme measure and for a brief period of time, and it shall be applied only to adolescents above fourteen years of age who have committed grave and antisocial deeds.

As we know after the amendments of articles 17 and 18 of the Political Constitution (CPEUM) ³

³ ... laws will be provided for alternative dispute resolution mechanisms, in accordance with the reforms of the month of March 2008, relating to security and justice.

Exhibition of motives of the alternative media law in criminal matters for the state of Puebla. The constitutional reform of the eighteen of June of two thousand eight, by which ten articles of the Constitution were modified that establish

the extra-judicial conciliation before the process is compulsory.

* **As for formality:** mediation and negotiation do not have a formal structure while in arbitration and out of court conciliation they do have forms and stages to be fulfilled.

* **As for the control of the parties on the process:** in mediation and negotiation, the parties exert a high control on the process. Out of court they exert a medium control and during the arbitration their control is minor.

* **As for the intervention of neutral third parties:** during the negotiation, there is no intervention of neutral third parties (as the negotiator represents one of the parties); however, this does not apply in the other alternative means. In mediation, the third neutral party is called mediator; in the extrajudicial conciliation such is called extrajudicial conciliation and in arbitration he is called arbitrator.

* **As for the duration of the process:** in the negotiation and mediation the duration of the process is generally short depending on the parties and the neutral third, while in the extrajudicial conciliation, the duration of the process is short and it subject to the legislator.

* **As to the obligation to comply with the agreement or award:** in mediation and extrajudicial conciliation, the agreement is voluntary. It becomes obligatory once it occurs. In arbitration, the arbitral award is exclusive decision of the third neutral and is obligatory for the parties.

* **As for confidentiality:** in mediation and negotiation, confidentiality is held by the parties. In out-of-court conciliation, both the parties and the conciliator must keep absolute reserve of what has been sustained or proposed. In arbitration the exception to confidentiality occurs in the event that the judgment is null and void.

* **As for the economy:** in the negotiation, unless the appointment of negotiators, there may not be any disbursement of money as long as a neutral third party is not involved. On the other hand in mediation, arbitration and extrajudicial conciliation neutral third parties are involved and their private services are remunerated.

* **In terms of flexibility:** the procedure adapts to the dispute of the parties and these may be applied freely or amended, provided that the parties agree.

3.1 Negotiation

Negotiation comes from the Latin *negotiatio* which means action and effect of negotiating.

It's a Bilateral method. Negotiation is the process by which stakeholders – or their representatives – resolve disputes, agree on lines of conduct, seek

individual and/or collective advantages and attempt to obtain results that serve their mutual interests. Some of its elements are the intervention of the parties to apply the professional secrecy committing to not to give publicity to what the parties treat and complying with continuous negotiations and a restricted work agenda.

3.2 Mediation

This is Trilateral Method. It turns out to be simple and without formalities. The parties involved seek a solution to a dispute through an impartial mediator who has no capacity to make decisions. It is an alternative mean to resolve a dispute by mediators with different specializations who will give a quick and effective response.

The law of mediation and conciliation in Aguascalientes (Mexico), indicates in its article six that: *it is the voluntary procedure by which the parties of the dispute seek to reach an agreement with the intervention of an impartial third party called mediator whose participation focuses in facilitating communication between those.*

In Puebla (Mexico) the legislation in this regard uses the concept of Re-mediation, by which due to the breach of the mediation agreement one of the parties requests, for the last time, the intervention of the Center in order to avoid a dispute of judicial nature.

Here, we have the intervention of a third party, designated by the parties or a court to measure the state of mind. The role of the mediator is that of a facilitator who collects concerns, translates moods and helps the parties to confront expectations with reality. In his role, the mediator reassures, lowers the exaggerated requests, explains positions and receives confidences.

The Mediator does not recommend to the parties any solution, except in exceptional cases and at the request of the parties; his work is focused on maintaining a positive and fluid negotiating process until the parties reach an agreement that both sides consider reasonable. Part of the mediator's work will be the suggestion of different possibilities so that the parties can consider various alternatives when it comes to reaching an agreement.

The mediator proposes a solution that may or may not be welcomed by the parties, through a process that can be divided into phases such as listening, orienting, settling and arranging to finally reach an agreement. We can talk about succession, civil, commercial, insurance, medical, new technologies, electoral, tax and family mediation or any other type.

They work through the models¹ practiced up to date. Each of such models have positive and negative issues, virtues and passions. We know them as:

- Traditional-linear model (Harvard)
- Circular-Narrative model (Sara Cobb)
- Transformative model (Busch and Folger)

3.3 Conciliation

Trilateral method.

Conciliation implies the collaboration of a neutral third party who, in many cases, is a public official who is elected by a judicial authority to whom the parties give some control over the process but without leaving him the solution for it is the parties who will take the solution to the dispute. The role of the conciliator is to assist the parties so that they themselves agree on the solution. He leads them into the process of clarifying and delimiting the points of dispute.

The “conciliatory” faculty of the judges is also an interesting and effective tool recognized and developed in the legislation of several countries. Through it, the judges (in some countries the “family prosecutors”; the “Justices of the Peace”; the “conciliators in equity”; and also the “conciliation centers”), may call for conciliatory purposes the parties in dispute or trial at any state of the process. Conciliation (whether extra, pre or judicial) effectively ends with a conciliation, compromise or transaction agreement, which has legal force and produces the effects of a sentence. Do judges have time with all the workload and responsibilities to reconcile?

4. The Notarial function for dispute prevention by counselling

The well-known phrase of the Uruguayan jurist Joaquín Costa “open notary, closed court” has traveled the Latin world summarizing in those four words the notarial function. Notarial Public Certificate is that ability to recognize that whatever it certifies is credible and certain. It guarantees the existence of an official truth.

If the state is obliged to administer justice, that is, to resolve disputes among individuals, it is obliged to prevent them from appearing, it would be rather illogical to only resolve them and not to avoid them; because of this, the organs of the State must avoid disputes, through the courts, which are the bodies to which the Political Constitution entrusted the resolution of the disputes. For this reason, it is feasible that the notarial function should be

entrusted in order to avoid a considerable number of trials.

Let us remember that the Civil Law notary² is at the same time an attester and a lawyer whose activity consists in listening, interpreting, advising and educating the parties, and in preparing, writing, authorizing and certifying the document, its function has the limits that the legal system gives him. He has a non delegatable power to intervene, which as we know is undelegated, for he is invested in the public faith is the notary, not his collaborator. In addition to this the legal elements or principles of veracity, exclusivity or impartiality.

In most cases, these-the parties-are unaware of the corresponding laws and regulations as well as the appropriate legal means to terminate their will, for this reason it is necessary to provide them with advice, legal matters, legal means and legal consequences. A notary cannot draw up documents related to illegal things, invalid legal acts, or revocable legal business for disability. They use a Deontology Code, In the event that the consent of another party is required, it will be necessary to previously obtain the document that approves the existence of the authorization.

When the grantors go to the notary for the authorization of a contract, the public notary tries to know the will of the grantors by providing the necessary information about the effects or consequences of the granting of the instrument. The writing of the document-as complicated as it is- shall be a part of the free consultation. Free notarial advice is similar to the legal consultation paid to the lawyer – and often this has nothing to do with notary services, people use it as their marriage counselor, confessor, and psychologist-

4.1. Notary’s Law for the state of Tabasco (Mexico)

The notaries Law in Tabasco³, is at the forefront by retaking some elements mostly from the previous legislation, which highlights the following:

Article 2. The exercise of notaries in the state of Tabasco will be in charge of the executive power of the entity and by delegation, it is entrusted to professionals of the law, by virtue of the patent that for that purpose grants them.

Article 8. It is a professional of the law, invested in public faith in order to record the acts and legal facts to which the interested parties want or must give

¹ Vid. BARRERA ORDIERES, Patricia, La Mediación Transformativa, Diálogos por la Paz, año 3, n° 7, Centro de Mediación Notarial de la Asociación Nacional del Notariado Mexicano A.C. 2006, p.35.

² PONS y GARCIA, Jorge Vladimir: “La intervención de la función notarial en la material registral en Mexico”, Revista del Notariado del Colegio de escribanos de la ciudad de Buenos Aires. N° 904, 2011. p. 275.

³ Published in the Official Newspaper on December 20th, 2003.

authenticity according to the laws, and authorized to intervene in the formation of such acts or legal acts, redressing them with solemnity and legal forms. **It will also serve as an assistant to the administration of justice**, in accordance with the provisions of the Organic Law of the judiciary of the state.

Article 12. Notaries must always exercise their duties under the principles of **legality, impartiality and probity**; they have the same obligations of **council and advisory panel** to all concurrent persons to the acts or events, even if they have not requested or get paid directly their services.

The notary¹ shall provide advice and legal basis, this concept of advice indicates that the notary gives to the interested parties the appropriate legal knowledge to write a suitable public instrument, according to what the parties try to perform, explaining its value and legal strength to carry out the objective of the notary system.

Article 27.-The functions of the notary are incompatible with all employment, public office or commission of the Federation, of the State and of the municipalities for which payment or remuneration is performed; with the employments or commissions of private individuals; with the performance of the judicial mandate; **with the exercise of the profession of Attorney at law, when the act or the fact in question is related to the contentious business that sponsors or has sponsored as sponsoring or mandatory attorney**; with the activity of agent of Change, Commissioner, mercantile broker and the minister of any religious cult, with the following exceptions:

The notary shall:

- I. Accept private or public teaching and charitable positions,
- II. Be the representative of his/her spouse, ascendants, descendants or siblings, in cases permitted by the civil code of the State,
- III. Be tutor, guardian and executor,
- IV. To serve as a member of the board of Directors, commissioner or secretary of societies, as well as director of associations,
- V. **Provide advice and issue legal consultations,**
- VI. **Be an arbitrator or secretary in arbitral proceedings,** and
- VII. Sponsor those interested in the necessary administrative or judicial procedures....

4.2. Notary Law of Puebla

P.O. December 31 2012.

Similarly, the legislation of the state of Puebla, which proves to be more up-to-date, includes among its clause the same principles, detailing the following.

¹ Cf. Article 15 Notary's Law for the state of Tabasco (LNET)

Article 4.-Principles.-The exercise of the Notarial function will be developed under the principles of honesty, legality, fairness, praying, authentication, reliability, secrecy, publicity and transparency.

Article 6.- The notary is the professional of the law invested in public faith by the state, which by delegation exercises a function of public order, and is in charge to receive, interpret, write and give legal form to the will of the people under his/her advice, as well as authenticate and give legal certainty to the acts and facts under his faith, by means of the appropriation of the same public instruments of his authorship.

The public faith, investing the notary, refers exclusively to the exercise of its functions and any statement made outside of this scope, will be considered as a testimonial and valued as per the applicable law.

The notary also acts as an assistant to the management of justice, as **counselor, arbitrator or mediator** in terms of the respective laws.

Art. 49.-**Exceptions.**-Notwithstanding the provisions of this chapter, the notary May:

...

XI.-**Be an arbitrator or mediator;** and

XII.-Intervene in non-contentious procedures and proceedings in accordance with this law and those applicable to the case.

Article 173.-Obligations and powers of the Council.-they are the responsibility of the Council of Notaries:

I.-...

XXII.-act as **arbitrator, conciliator and mediator** for the settlement of disputes between individuals; for this purpose he/she **may designate, among his members,** those who perform such functions;

...

4.3 Acts of the notaries before the ADR

Mediation and notarial arbitration² can be defined as the intervention of the notary in the resolution of the disputes between the stakeholders, proposing or recommending the transaction or conciliation. The notary³, formed and/or accredited will then exert the preventive function of the litigation through advising intervention, arbitrator or mediator.

² In this regard see HUDABIUNIGG, Eva Krisper. Beratun und Mediation als Beitrag des Notariats zur Streitverhütung, Schriftenreihe des österreichischen Notariats, Manzsche, Wien, 2001, p. 2. As well as Japan National notaries Association, Report of the XXIII International Congress of Latin Notaries, 2001.

³ Picot Jean Paul. La función notarial preventiva de los litigious: el asesoramiento y la Mediación como uno de sus instrumentos, report of the French notary, Athens, 2001, p. 100.

of the parts, with the neutrality carried out daily in the activities.

5. Conclusions

Traditionally, the first instance of a judicial procedure, with all its various elements-ordinary and extraordinary resources, amparos¹, among others – the laws are not always contemplated by a prompt and expeditious justice, even though a solution will have as per the Law. Sometimes not in justice – because the judge would resolve in favor of the one who has proved his actions and his defense, but not necessarily is the one who is right. Litigants who prove to be more skillful will be more likely to succeed and there will always be a resentment in the losing party. There will be no litigant who accepts defeat because his client was not right, even less, that he did not have the knowledge or expertise to Defend. At other times, the affected person indicated that the lawyer and/or the judge was bribed or received a gift, and at best, that he/she resolved in the wrong way.

However, those who may or intend to use the alternative mechanisms of dispute resolution should seek to go with the people who are suitably equipped with the necessary morality and prudence, as well as being recognized as honest and expert in the subject. All these qualities and others have to be found in whom the problem will be entrusted. So, a single mediator or a group of arbitrators can be designated who should be in odd number to facilitate the result, considering further that the support of an Association of Professionals that provide legal certainty by providing their endorsement.

BIBLIOGRAPHY

1. BARRERA ORDIERES, Patricia, La Mediación Transformativa, Diálogos por la Paz, Year 3, n° 7, Centro de Mediación Notarial de la Asociación Nacional del Notariado Mexicano A.C. 2006.
2. DIAZ, Luis Miguel, Negociaciones y Democracia, Diálogos por la Paz, year 3, No. 7, Centro de Mediación Notarial de la Asociación Nacional del Notariado Mexicano A.C. 2006.
3. HUDABIUNIGG, Eva Krisper. Beratun und Mediation als Beitrag des Notariats zur Streitverhütung, Schriftenreihe des österreichischen Notariats, Manzsche, Wien, 2001, p. 2.
4. LOPEZ SOBERANO, José Rubicel, Medios Alternativos de solución de conflictos en fuerza jurídica, No. 3, July 2004.
5. Japan National Notaries Association, Report of the XXIII International Congress of Latin Notaries, 2001.
6. MARSOLAIS, La Mediación notarial en Quebec. Boletín de la Asociación Nacional del Notariado Mexicano, No. 5, March, 1998.
7. MUNUERA GOMEZ, Pilar. Sara Cobb's Circular Narrative model and its techniques, Portularia Vol VII, N° 1-2, 2007.
8. PÉREZ CASTAÑEDA, Jorge I. *Justicia Alternativa*. http://www.justiciabc.gob.mx/sala_prensa/notas_fechas/17A-GO10%20ZETA%20abog%20NSJP%20inauguracion.pdf
9. PICOT Jean Paul. La función notarial preventiva de litigios: el asesoramiento y la mediación como uno de sus instrumentos, report of the French notary, Athens, 2001.
10. PONS y GARCIA, Jorge Vladimir: "La intervención de la función notarial en material registral en México", Revista del notariado of the Colegio de Escribanos de la Ciudad de Buenos Aires. N° 904, 2011.
11. PONS y GARCIA, Jorge Vladimir. "Importancia de los MARC en el Siglo XXI", Notarial Magazine, Association of Notaries of Tabasco, year 1, No. 1, July 2015.
12. PONS y GARCIA, Jorge Vladimir. "La aplicación desde el ámbito notarial de los Mecanismos Alternativos de solución de controversias", Perfiles de las Ciencias Sociales, Year 4, No. 7, December, 2016.
13. RAZAFINDRABE, Tsiory. «La Gobernanza en Madagascar», Perfiles de las Ciencias Sociales, Year 1, vol. 1, No. 2, Jan-Jun. 2014.
14. SOBERON MEJIA, Jose Ives. "Revolucionará la mediación al sistema judicial mexicano", Nexo jurídico, year VI, No. XXV, June 2015.
15. <http://elpopular.mx/local/puebla-promueve-justicia-alternativa/>
16. <http://www.monografias.com/trabajos33/medios-de-solucion/medios-de-solucion.shtml#ixzz3PPLbis4r>

¹ The amparo trial is a means of controlling the constitutionality of acts issued in connection with the exercise of power provided for by the Mexican legal system, which aims to protect human rights and fundamental rights established in the Constitution, as well as in the International Treaties of which Mexico is a party, when these are violated by general norms, acts or omissions of authority or of individuals indicated in the law. The Mexican amparo proceeding is regulated by articles 103 and 107 of the Political Constitution of the United Mexican States and its regulatory law, called the Amparo Law.