

REPUBLIC OF CAPE VERDE
DRAFT LEGISLATION ON
ON
MEDIATION

Proposal of Decree-Law

The issue of access to Justice and to Law has been the object of great discussions world-wide. The slowness in the realization of justice causes high costs to be incurred by persons and businesses. In as much as these social and individual needs require dynamic solutions and, given the essentially private character subjacent to many conflicts, students and practitioners in the field of law have recommended the adoption of quick and effective instruments better suited for the treatment of conflicts.

The Government's Program for the IV Legislation 2001-2005, approved by Resolution n.º 5-A/2001, of 13 March, identifies indications of an accentuated crisis and affirms that the same must be faced up to with determination and overcome through a vigorous and coherent movement of reforms leading to the affirmation and structuring of an effectively independent justice, accessible by all citizens, quick in its operation, that gives security to the citizen and is up to respond to the challenges of development. To alleviate the excess of conflicts and courts overload, it is proposed, among other alternatives, the incentive to a conciliatory resolution of conflicts, to the institutes suited to that end, namely, the arbitration centers and mediation instances.

Well, the recourse to mediation offers quickness and celerity in conflict resolution by consensus. In the last analysis, it is a mechanism that assures amplified access to justice and to the law by the citizens susceptible, for that reason, of reforming the operation of justice and the exercise of citizenship.

As an alternative form of conflict resolution, mediation presents itself as a possibility to undo the bottlenecks in the courts and, consequently, to strengthen their prestige before the citizens. In truth, the objective is a quick, secure and effective resolution of conflicts.

It is concluded, therefore, for the coexistence of a formal jurisprudence with an alternative conflict resolution, in as much as mediation does not seek to replace or weaken the Judicial Power, but rather, adds to it with the purpose of contributing to strengthening the amplification of the access to justice and to the law and, consequently, to making effective the fundamental rights and guarantees of the individual.

In one form or another, the access to law and the courts for the defense of the rights constitutes an indispensable fundamental guarantee of full citizenship.

In these terms,

In the use of the faculty conferred by subparagraph a) of number 2 Article 203 of the Constitution, the Government decrees the following:

CHAPTER I GENERAL PRINCIPLES

Article 1 Object

This decree-law regulates the use of Mediation in the resolution of conflicts by agreements of the parts.

Article 2 Definition

For the purpose of the preceding article, Mediation is an alternative way of conflict resolution by which the parts, assisted by a neutral, impartial and independent third party, seek to reach an agreement that resolves the issue that divides them.

Article 3 General principles of Mediation

Mediation is governed by the following general principles:

- a) impartiality;
- b) equality;
- c) informality;
- d) speed;
- e) confidentiality;
- f) autonomy and will;
- g) respect;
- h) cooperation;
- i) good faith,
- j) voluntarism;
- l) self-composition

Article 4 Nature of the case

1 – The conflicts on civil, administrative, commercial, financial, labor, family or even criminal matters may be object of mediation, as long as the same are based on available legislation.

2 – Without prejudice to the provisions in special legislation, the cases of an alimentary, **falimentar**, fiscal, and those pertaining to the state or capacity of individuals and pertain to the interests of the Public Treasury, among others, cannot be the object of Mediation.

Article 5

Predomination of the will of the parts

- 1 – The will of the parties always predominates in mediation.
- 2 – The parts negotiate the conflict discretely, with the objective of finding a solution that contemplates and satisfies their interests.

Article 6

Mediation centers

- 1 – Official or private mediation structures denominated mediation centers may be created, that avail to any interested party the access to mediation, as an alternative form of conflict resolution.
- 2 – The centers shall have as objective to stimulate the preliminary resolution of conflicts by agreement of the parts.
- 3 – The Government shall define, by decree-law, the operation and registration regime of the mediation centers.

Article 7

Mediators

- 1 – The Mediators are singular persons, national or non-national, fully able, of proven moral and professional credibility that enables them to mediate the conflicts ou cases submitted to the mediation centers included in the Official Mediators List.
- 2 - The mediator must meet the following requisites:
 - a) Be more than 25 years of age;
 - b) Have the 11th year of school;
 - c) Being trained with a mediation course recognized by the Ministry of Justice;
 - d) Be preferentially a resident in the district or island where he/she proposes to exercise the role of mediator.
- 3 – In the exercise of the functions for which they are indicated or appointed, the mediators obey the precepts contained in this Law, of the Mediators' Deontological Regulation, of the Mediation Center's Internal Regulation and any other pertinent norms.

CHAPTER II REPRESENTATION OF THE PARTS

Article 8 Representation

- 1 – The parts participate in the process, personally. In the proven impossibility to do so, they may be represented by someone else, with a power of attorney that delegates the powers of decision.
- 2 – The parties may be accompanied by attorneys, of other persons of their trust, as long as it is agreed between them and considered by the mediator as useful and pertinent to the Mediation process.

Article 9 Mandatory representation

Representation is mandatory, when the part is blind, deaf, mute, analphabet, not knowledgeable in the Portuguese or Creole language or, if for any reason, it is in a position of manifest inferiority.

CHAPTER III OF MEDIATION SECTION I PRE-MEDIATION

Article 10 Introducing the case to mediation

- 1 – A case may be introduced to Mediation verbally or in writing.
- 2 – When done in writing, the part presents a mediation request with the most complete identification possible of the parts and a summary description of the conflict, adding the documents considered useful for the resolution of the conflict.
- 3 – Whenever mediation is solicited for the resolution of a conflict, the mediation center coordinator verifies from the outset if the issue presented is applicable to mediation as well as its origin.
- 4 – If there is any reason that excludes the conflict from the scope of mediation, the fact and the reasons are immediately communicated to mediation requestor.

Article 11

Notification of the request to the other part

1 – The other part is notified, in two days from the filing of the request. Within ten days of receipt of the notification, the other part must manifest its acceptance or refusal to be submitted to the mediation process.

2 – Not responding within the deadline established shall be considered as non-acceptance of the mediation, which shall be communicated immediately to the requestor.

Article 12

Pre-mediation session

When the invitation to mediate is accepted by the opposite part, the parts are convoked to participate in preliminary interview, denominated Pre-Mediation Session.

Article 13

Course of the pre-mediation

The Pre-Mediation interview will follow the following course:

- a) The mediator listens to the parts for the purpose of comprehending the nature and extent of the conflict;
- b) Seeks clarification from the parts regarding the object of the conflict and the motives that led them to opt for Mediation, verifying if some reason came up to exclude the conflict from mediation;
- c) Gets a feel for the predisposition of the parts for a possible mediation agreement;
- d) Illucidates tha parts on the objectives, Mediation techniques, as well as its processes and costs;
- e) If the parts manifest agreement they choose, by common agreement, the professional to be appointed to the function of Mediator, under the terms of Article 17.

Article 14

Signature of the Terms of Commitment to Mediation

1 – The parts meet with the mediator after one has been chosen and under the mediator's guidance, sign the Terms of Commitment to Mediation, by which they contract the mediator and establish:

- a) The identification of the parts and their representatives in the Mediation sessions. It is a demandable requisite that such representatives have the necessary powers to agree on a consensus solution to the conflict, without the need for additional consultations, and the identification of the attorneys, if the parts agree to have them present.
- b) The identification of the mediator and, if there is one, of the co-mediator;
- c) The objectives of the Mediation;
- d) The process rules, even if subject to negotiated redefinition at any moment, during the process;
- e) The maximum number of mediation sessions;

- f) The honoraries as well as the expenses incurred during the Mediation and forms of payment, which shall be supported by the parts in equal proportions, in the absence of express stipulations to the contrary;
- g) A clause indicating that any of the parts may, at any time, get off the Mediation, by committing itself to present to the mediator or conciliator a prior notice of this fact at least 48 hours in advance. In such case the Mediation shall be ended.

2 – It is mandatory that the Terms of Commitment to Mediation contain an absolute confidentiality clause regarding the entire process and contents of Mediation, under the terms of which the parts and the mediator commit themselves to maintain total confidentiality on the Mediation process and not utilize any oral, written or computerized information produced during or as a result of the Mediation, for the purpose of subsequent utilization in arbitral or judicial judgment;

3 – A clause specifying that the Mediator may, by his/her own initiative, end the Mediation when it considers that:

- a) The same is useless, given the strong improbability of an agreement;
- b) The same should not continue, because one or both parts violated the ethical norms and conduct they obligated themselves to respect in the course of the Mediation.

4 – A clause by which the parts commit themselves to commit to writing the eventual agreement they may have reached during the Mediation, signing it or making it be signed by their legal representatives, with the understanding that the existence of an agreement cannot be invoked until the referred document has been signed by both parts.

SECTION II MEDIATION

Article 15

Courses of action

1 – Upon signature of the Terms of Commitment to Mediation, the Mediation shall follow the course agreed to by the parts or, in the absence of the latter, those that are fixed by the Mediator taking into account the circumstances of each case.

2 - Ordinarily, and without impediment to the alterations in the preceding number, the process shall break down in the following phases:

- a) Summary of the interests and sequencing of the problems presented by the Mediator.
- b) Joint and separate sessions.
- c) Final session and signature of the Agreement, if obtained.

Article 16

Agreement

1 – Having obtained the agreement, the mediator elaborates the corresponding term, signed by the parts and by two witnesses, overseeing as an extra-judicial executive.

2 – If there should be no agreement regarding the pretended objective of the Mediation no fact or circumstance revealed or occurred during this phase shall result in harm to the rights of any of the parts, in an eventual arbitration or judicial process that may follow.

CHAPTER IV MEDIATOR

Article 17 Choice of a Mediator

1 – The parts will freely choose the mediator, and the choice may fall on the mediator who performed the Pre-mediation.

2 – The parts may choose more than one mediator.

3 – By common agreement the parts may, exceptionally, choose a mediator that does not belong in the list of the mediators that collaborate with the mediation center and in duly justified cases, that are not included in the Official List of Mediators.

4 – The parts may delegate the of the mediator to the mediation center of their choice.

Artigo18 Co-Mediation

The chosen mediator may recommend a Co-Mediator, depending on the nature and complexity of the controversy.

Article 19 Meeting of the mediator with the parts

1 – In the Mediation sessions the mediator meets, preferably, jointly with the parts.

2 – If there is need and agreement by the parts, he/she can meet separately with each of them, abiding by the provisions of the Mediators Ethical and Deontological Regulation regarding the equality of opportunities and the secrecy in that circumstance.

Article 20 Liberty of the proceeding

The mediator conducts the process in a manner it considers adequate, taking into account the circumstances, the provisions of the negotiation with the parts and the urgency of the process.

Article 21 Impartiality and independence

The person designated to act as mediator must be impartial and independent must be impartial and independent, and remain so through the entire mediation process. This duty is extensive to the co-mediator, in the event of Co-Mediation.

Article 22
Impediment

The mediator is impeded from acting or being directly or indirectly involved in processes subsequent to the Mediation, such as the arbitration or the judicial process, independently of the success of the Mediation, unless the parts determine differently.

Article 23
Confidentiality

1 – The Mediation information are confidential and privileged.

2 – The mediator, any of the parts or any person that acts in the Mediation, cannot reveal to third parties or be called or compelled, including in subsequent arbitration or judicial process, to reveal facts, proposals or any other information obtained during the Mediation.

3 – The documents presented during the Mediation must be returned to the parts, after they have been analyzed. The remaining documents must be destroyed or archived as agreed upon.

Article 24
Responsibility

The mediator cannot be made responsible by any of the parts, by act of omission related to the Mediation conducted according to this decree-law, the Mediators Ethical and Deontological Regulation and rules agreed to by the parts, except when there is proven **dolo**, fraud or violation of confidentiality.

CHAPTER V
CLOSING OF THE MEDIATION PROCESS

Article 25
Closing of the Mediation Process

Aside from the means already foreseen in this law, the Mediation Process may be ended by decision of the coordinator of the mediation center when there are fundamented motives to believe that the mediation rules or principles established in this Decree-Law, in the Mediators Deontological Code or in remaining applicable legislation, were violated.

CHAPTER VI FINAL PROVISIONS

Article 26

List of Mediators

- 1 – The names and professional domiciles of the persons qualified to exercise the functions of mediator, under the regime of liberal profession, and or in collaboration with the mediation centers, shall be included in the Official Mediation List, in alphabetical order.
- 2 – The lists are updated annually by dispatch of the Ministry of Justice and published in the Official Bulletin.
- 3 – Inscription in the lists is made by interested parties that meet the requisites foreseen in Article 7 of this Decree-Law.
- 4 – The referred inscription does not give those inscribed the quality of agents, nor does it guarantee the payment of any remuneration fixed by the State.
- 5 – The Government oversees and regulates the mediators' activity.

Article 27

Honoraries and charges

- 1 – Each mediation center shall adopt its own Regulation, adjusting, among others, the rules on honoraries and administrative charges according to the rates in effect, published by the Ministry of Justice.
- 2 – The mediation charges include the mediation fee, the administrative charges, the mediators' honoraries, the mediators' expenses and the extraordinary expenses.
- 3 – The charges for mediation are supported by the parts in equal fractions, save for convention to the contrary.
- 4 – The Government shall establish the maximum amounts of the honoraries and charges to be observed by the mediation centers.

Article 28

Publication of agreements

- 1 – When there is interest from the parts, and by express authorization of the same, the results divulged in the Mediation may be divulged.
- 2 – The publication of the agreements obtained must always preserve the identity of the parts.

Article 29
Mediation Clause

It is recommended that the parts start inserting a Mediation Clause in the contracts in general that they may sign, such as the proposed model:

«Se surgir um litígio em razão deste contrato ou posteriores adendas, nomeadamente, o seu incumprimento, término, validade ou invalidade, as partes convencionam desde já que primeiramente procurarão uma solução por meio de Mediação, fundadas no princípio da boa-fé, antes de recorrer a outros meios judiciais ou extrajudiciais para resolução de litígios».

Article 30
Transitory provisions

1 – The Government shall promote, during the year 2005, the selection and the specific training of mediators for the Official List.

2 – The selection to qualify to provide the mediation services is done by curricular bid, open to that effect.

3 – Regulation of the bid process is approved by Ordinance from the Ministry of Justice..

Article 31
Integration of loopholes

The eventual loopholes in this decree-law shall be overcome by the parts and under the terms of the general law.

Article 32º
Effective date

This law goes into effect 90 days after its publication.

Viewed and approved in the Council of Ministers.

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Promulgated on ____/____/2004.
Publish it.

The President of the Republic,

Pedro Verona Rodrigues Pires

Referended on ____/____/2004.

The Prime Minister,

José Maria Pereira Neves.