



MINISTRY OF JUSTICE AND INTERNAL ADMINISTRATION
OFFICE OF THE MINISTER
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LEGISLATIVA PACKAGE ON MEDIATION
- JUSTIFICAION NOTES -

1. General considerations

A- Mediation Law Proposal

B- Mediation Decree-Law Proposal

C- Mediation Centers Decree-Law Proposal

D- Mediators Ethical and Deontological Regulation Proposal

The issue of access to Justice and to Law has been the object of great discussions worldwide. 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 VI Legislation 2001-2005, approved by Resolution n. ° 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:

In this framework and in consonance with the Government policy for the Justice sector, that we place this legislative package on Mediation that includes the Mediation Decree-Law proposal; a Mediators Ethical and Deontological Regulation proposal and a Mediation Centers Decree-Law proposal.

A – The Mediation Decree-Law Proposal

Mediation permits individuals, businesses and communities that resort to it, ample advantages. Among many, we can point-out the following:

- The possibility of an effective personal reparation that the judicial system can hardly provide and that, not rarely, is the true interest of the demander, not always assumed;

- Favors an improvement in the relationship between the parts, at the same time that it assures them control of the process;
- Resolves the conflict voluntarily and confidentially: only the parts, assisted by their own Attorneys, go, together with mediator, dedicate themselves to the resolution of the conflict (and not its amplification);
- Frees up important resources in the judicial system, allowing the courts to concentrate in the non-passive aspects of resolution through the alternative means;
- Minimizes the volume of costs inherent in conflict resolution;
- Significantly reduces the average conflict resolution time;
- It is a flexible and informal means, because it is not subject to processual rules;
- Provides speed and efficacy of results;
- It is based on the principle that all the intervening parts in the process gained with final agreement;
- Initiation of the Mediation process involves few risks. The parts always have control of the controversy and may decide to end the Mediation at any moment;
- Maintains the confidential character of the conflict and seeks to promote the maintenance of the relationship between the parts when the process is over;
- The conflict is treated in depth so as to be totally resolved at the end of the Mediation.

The Law consists of four chapters, containing 31 articles. Chapter I deals with general provisions. Article 1 fixes the object of the law, which uses Mediation in the resolution of conflicts by agreement between the parts. Article 2 defines Mediation as an alternative means of conflict resolution in which a neutral and impartial third party, trusted by the parties and freely chosen by them, intervenes assisting the parts in finding a solution by agreement.

It is a case, therefore, of a voluntary, peaceful and extra judicial process, that seeks, with the support of a qualified professional acting impartially and based on respect and confidentiality, to provide a space for dialogue and of investigation of the problems and of the participants' motivation, so as to attain a clear understanding of the conflict and of the real interests to be satisfied.

Mediation as an alternative method of conflict resolution has its own methods. Article 3 points out some general principles. On the basic and fundamental principles of Mediation is the principle of impartiality. The Mediator is, as has been stated, a third outside the issue that led to the conflict, impartial because he/she does not defend, represents or advises none of the parts, is neutral because he/she does not interfere taking positions of imposing solutions.

The confidentiality principle assures to the parts that whatever is discussed or worked in the ambit of a Mediation does not go out of this ambit. The Mediator cannot be witness in any cause that places the parts one against the other in court regarding the cause that dealt with in Mediation, nor what was dealt with, using a judicial process. This principle proposes to confer to the parts the necessary trust to deal with their interests in a franc and open way, without constraints.

The principle that makes Mediation a voluntary process guarantees to the parts that, by initiating Mediation, they are conscious of what is demanded of them and that which they can attain, but, above all, that they do so of their own free-will being jointly responsible for the success or lack of success of the process. Aside from those mentioned, we can highlight others such as the respect (accept the persons such as they are); the cooperation (openness, active listening and placing one's self on the other's place); the good faith (Mediation must strive for ethics, transparence and honesty); privacy (Mediation is a process closed to the public and confidential); self-composition (the parts must effectively be open to dialogue to responsibly reach a satisfactory agreement for both parts), among others.

N.º 1 of article 4 it regulates the nature of the causes that can be submitted to mediation: conflicts on civil, administrative, commercial, financial, labor, familiar or even criminal, as long as the same are based on existing law. N.º 2 indicates the cases that not be the object of Mediation: cause pertaining to food issues, bankruptcy issues, fiscal cases and cases pertaining to the capacity of individuals and those pertaining to the Public Treasury.

The guiding criterion of this choice has to do with the availability or not of the issues of the object of the conflict. Those that may be available to the parts, that is to say, that allow transaction, may be the subjects of mediation.

Article 5 establishes autonomously the autonomy of the parts. Therefore, all the procedures pertaining to Mediation consists in bringing the parts to collaborate in the resolution of the problem instead of intransigently holding on to unsurpassable and antagonist positions. Once a problem is identified, the parts can work jointly for an agreement that resolves the problem with one mutually acceptable solution that is structured so as to maintain the continuity of the relation of one part with the other. It is the parts – not the Mediator – that decide, because no one better than they can determine the agreement that satisfies. All in all, during the entire process, the will of the parts must prevail. The parts negotiate the conflict directly with the objective of finding a solution that reasonable contemplates and satisfies the interests of all of them.

Article 6 talks about the mediation centers, admitting the creation of private centers and official structures and remitting their regulation to the Government, seeking on the one hand to

provide incentives to their development and on the other hand to reinforce the trust of the citizens and the professionals in these alternative mechanisms.

Attending to the relevant consequences it will certainly have, to the country and to the citizens, the creation of the figure of mediator and corresponding function, article 7 describes the requisites for exercising the function.

Chapter II talks about representation of the parts. As a general rule, the parts participate personally in the process. However, in the proven impossibility of not being able to so, they may make themselves represented by another person, with a power of attorney that delegates the powers of decision on the person. Likewise, attorneys or other persons of their trust may accompany them, as long as they agree to it mutually. (Article 8).

The attorneys have a fundamental and preponderant role, not only as direct stakeholders in the Mediation process, but also as collaborators, whether of the clients they represent, or of the Justice they must attain. In that sense, it is expected that the attorneys will promote an effective and cooperative negotiation between the parts. It is convenient to point out that the Mediator can never replace the Mediator. In truth, the attorney provides legal advice to its clients, suggests options, negotiates solutions, in short, and defends *lato sensu*, the client it represents.

The Mediator operates in a diverse sense. As a third neutral and impartial party, he/she seeks to facilitate communication between the parts, neither dictating nor suggesting any solution, but rather helping the Mediated, through appropriate techniques, to find an agreement for themselves. The representation is mandatory when the part is blind, deaf, mute, analphabet, not knowledgeable in the Portuguese or Creole languages or, if for any other reason, they are in a position of manifest inferiority (Article 9). It is an exception that plainly justifies itself given the disadvantage situation of the part in question.

Chapter III is reserved to the Mediation Procedures. It contains two sections, the first one pertaining to Pre-mediation and the second to Mediation.

Pre-Mediation is the stage that precedes the Mediation process as such. It is the first contact that the conflicting parts have with the Mediator, marking the parts positively or negatively. For that reason, it is the moment when trust is obtained in the procedure and in the Mediator, as well as to insert respect as a relationship model.

The initial work of the Mediator, maybe the most important, is to explain to the parts the need to collaborate, which implies a totally different form of intervention in a cause. It is an opportunity. It is an opportunity that the mediated have to present all the doubts they may have

about Mediation, but also an opportunity that the Mediator has to evaluate the posture of the two parts and if the problem is indicated or not to be worked-out in Mediation.

On the other hand, Mediation being a voluntary process, it would be in Pre-Mediation that the parts manifest their desire to continue, or not, with the process, now that they have been exposed to the Mediation rules and principles. The greatest difficulty encountered by the Mediator is precisely that of making the parts see that they need to collaborate in the course of the process, for the same to be capped with success with an agreement at the end, because, in reality, the parts arrive at Mediation with a competitive adversarial spirit that they associate to a conflict process.

For this reason, the initial work of the Mediator, under the heading of Pre-Mediation, consists in tearing down this way of thinking by the parts and in bringing to them the message of cooperation that must substitute for opposition, and of collaboration, that must substitute for competition.

The Mediation procedures are briefly described, next.

When the intervention of Mediation is solicited to resolve a conflict, the coordinator evaluates its admissibility and its precedence (article 9). The opposite part is notified of the filing of the request, within two days, so that within 10 (ten) days, it can manifest its acceptance or refusal to submit to the Mediation process. In case of omission of a negative response by the opposite part, within the deadline indicated in the notification, the institution informs the requestor of the non-acceptance through a specific communication (article 11).

When the invitation to mediation is accepted by the opposite part, upon agreement on the chosen or appointed mediator, the parts are invited to participate in a preliminary interview denominated Pre-Mediation Session, with a well-defined course of action (article 12).

Upon choosing a Mediator, the parts meeting with him/her, and under his/her guidance sign **Term of Commitment to Mediation**, by which they establish among others (article 14):

- *The identification of the parts;*
- *The Mediator and, if there is one, the Co-Mediator;*
- *The objectives of the Mediation;*
- *The rules of the process;*
- *The costs and forms of payment of the Mediation;*
- *An absolute confidentiality clause relative to the entire Mediation process and contents.*

The preliminary phase of Mediation ends with the signature of the Term of Commitment to Mediation and the following phase of Mediation as such, whose course of action is indicated in article 15.

Once the agreement is obtained, the mediator elaborates the corresponding **Term**, signed by the parts and by two witnesses, with the weight of an extra-judicial executive title. In the event that **there is no agreement** regarding the pretended objective of the Mediation, no fact or circumstance revealed or occurred during this phase shall harm any of the parts, in eventual arbitral or judicial cause that may follow. (article 16).

Chapter IV talks about the Mediators. It regulates the choice, the possibility of having more than one mediator (co-mediation) when the nature and complexity of the controversy so justifies (article 18) the principles of impartiality and independence that must guide the conduction of the mediation aside from the rules and principles of the Mediators' Ethical and Deontological Regulations), the regime of impediment regarding processes subsequent to the Mediation, the duty to confidentiality and the responsibility for acts or omissions related to the Mediation (articles 22, 23 and 24).

It should be said that Co-Mediation is more than a Mediation done by two Mediators. Co-Mediation is a modality of conducting the Mediation sessions that brings advantages to the Mediator and the mediated.

In truth, this cooperation and collaboration between the Mediators only brings added advantages to the entire Mediation process, especially when one is trying to implant and/or the Mediator has limited experience. The presence of two Mediators in a Mediation session helps to balance the positions of the mediated.

Chapter V regulates the cases containing a Mediation process. (article 25).

The VI, and final chapter, regulates the final provisions of the law. It begins by foreseeing the general regime and operation of the mediation centers and the creation of the Official List of Mediators. It foresees a rule by which each mediation service or institution must have its own Regulation on Costs, indicating, among others, the honoraries and administrative charges rules (article 27).

The parts may be interested in publishing or seeing published, the results obtained in the Mediation. In these cases, there must be an express authorization and the identity of the parts must be preserved (article 28).

As an incentive to the use of mediation this law recommends the insertion of a Mediation Clause in the contracts in general before resorting to other judicial or extra-judicial means for resolution of conflicts (article 29).

It is a norm that, if observed, shall bring enormous gains to the parts and the judicial power itself will come out gaining.

It attempts to create the figure of mediation and the inexistence of qualified professionals in the transitory provisions it proposes to institute a training Course for Mediators, destined to prepare qualified professionals to exercise that function (article 30) and remits to the Ministry of Justice the regulation of bidding process.

B- Mediators Ethical and Diontological Regulation Proposal

As a professional activity, Conflict Mediation does not exist currently in Cape Verde. However, foreseeing the development of this activity, the need to institutionalize a set of deontological and ethical norms should appear in short order to serve as a pattern for the actions of these professional and guarantee the legitimate interests of the citizens that resort to Mediation as an alternative form of conflict resolution.

The creation of a Deontological and Ethical Regulation shall meet the requirement of the need to protect the Mediator as a professional, guaranteeing an exempt, independent and impartial performance and imposing norms of conduct that has impact in its relation with other professionals, under the penalty of application of disciplinary sanctions.

This Regulation consists of four Chapters and 11 articles in all. The first regulates the general provisions. It fixes the object of the Regulation (article 1) and incorporates a set of fundamental principles that must guide the Mediator's action in the exercise of its functions (article 2). The second chapter regulates the general obligations that the mediators must obey in the performance of their function (article 4); and on the third chapter it regulates the actions of the mediators.

The concretization of these norms translates into security for the mediator and for the parts because it shall guarantee that the Mediator's posture be, unconditionally, correct in defining a set of ethical and deontological duties in the performance of his/her functions.

These are norms that impose how the Mediator must behave in relation to his/her appointment (article 5); the mediator's attitude in the preliminary phase of the mediation, that is to say, in Pre-Mediation (article 6); the regulation mediator's behavior and obligations toward the

parts during the process (article 7); the mediator's action during the mediation proceedings (article 8); and the mediator's action toward the mediation institution (article 9).

The IV, and last chapter, regulates the sanctions and processual norms. It stipulates the rule by which the Mediators are made responsible for the disloyal and fraudulent exercise of his/her functions, for damages caused and for violations of the law during the Mediation. On the other hand, non-compliance of the rules in this Regulation more than once by the same Mediator may, as a function of the gravity of the violation, may determine for the cancellation of his/her registration, as well as publicity of the conduct under question through the communication media.

C- Mediation Centers Decree-Law Proposal

The reinforcement of the quality of democracy and deepening of the citizenship suggest the construction of a system in which the administration of justice has to be characterized by greater accessibility, proximity, speed, economy, multiplicity, diversity, proportionality, informality, equality, participation, legitimacy, responsibility and effective reparation.

Therefore, it is in this context that the new means of prevention and the different modality of conflict resolution gain their own space, at the same time that the organizing expressions of the civil society are convoked to add to their greater civic demand the responsibility for a new and true protagonism in the daily and concrete execution of justice.

Little known among us, but sufficiently experimented with in other places, the modalities of alternative resolution of conflicts may offer the scope and the circumstance for another, well different action by the State.

It is so because, in contrast with the exclusive and absolute reserve of power invariably attributed to it in this domain, the State can here and now bet on a true partition of competences with other social agents, impelling a movement that promotes a distinct division of attributions, that better serve the citizens and the collectivity.

Bringing other people and other institutions to bid actively in the execution of justice, the State can, advantageously, reserve for itself its primordial function of regulation and impartial frameworking.

This law proposes to promote the resolution of conflicts by alternative means, providing incentives for the rise of the Mediation Centers, disciplining their operation and equipping them with mechanisms that permit adherence to it by the citizens. Article 1 defines the mediation centers and their function, making possible the rise of centers specialized, for example, in

insurance. Article 2 creates a registration system for these entities, an important instrument for their credibility before the citizen.

These centers' operational principles and rules (articles 3 and 4) are also consecrated, by requiring the existence of an internal Regulation that clearly defines the procedures adopted and instituting the need for these centers to be coordinated by a coordinator who should be a Mediator who, among other functions should strive for the compliance of the deontological rules of the Mediators who collaborate with the center.

This law defines, further, the administrative charges of the mediation and regulates the Mediators' honoraries, stipulating the maximum percent value, over the amount of the conflict, to be paid by the parts (articles 6 and 7).

Nevertheless, the maximum limit of the costs must never exceed 1/5 of the case's amount (article 7). We think this criterion is more just because the amount of the charges and costs with mediation varies proportionately with the value of the case.

The registration fee is set at 3%, received together with the mediation request (article 8); the administrative charges set at 5%, fixed in the pre-mediation session during which the form and deadline for payment are also established, permitting ample flexibility between the centers and the parts (article 9) and the honoraries of the mediators set at 8%, paid in two parcels, with one half paid together with the registration fee and the other half between the end of the last mediation center and the signature of the Term of Mediation Agreement (article 10), permitting however that other forms be agreed to between the parts and the Mediator, with acceptance by the Center.

In any case, the amount of the administrative charges and of the honoraries depend on the number of sessions eventually had.

Regula-se as despesas dos mediadores pois trata-se de um componentes dos encargos a serem pagos pelas partes. As despesas dos mediadores correspondem ao total dos custos de deslocação e de estadia e fixadas em função do seu custo efectivo (artigo 12.º).

It regulates the consequences for non-payment of the charges or honoraries and permits the Centers to suspend the mediation in these cases placing the responsibility on the parts who are the principal beneficiaries of the mediation process.

Nevertheless, the diploma safeguards the possibility of any of the parts being able to subrogate to the defaulting party in the payment of the costs, and the payment having been made, the process shall continue to the normal conclusion.

It is imperative that the internal regulation of the centers defines its service organization as a guarantee of the principles of transparency and impartiality that should be the primary objective of these centers.

It is possible for these centers to be created by private initiative in partnership with the municipalities (article 16) or to function on the basis of protocols with the latter, aside from the possibility that the Municipalities having the initiative of installing mediation centers in their installations.

Article 17 regulates the registration of these entities whereas article 18 remits the oversight of these entities' operation to the Ministry of Justice.