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Lawyers as Mediators in Brazil – To Be or Not to Be !

Andrea Maia (Mediar360 – Dispute Resolution) · Friday, June 9th, 2017

As I have proudly published in several articles last year, Brazil has come a long way until it finally managed get its first Mediation Law into force. Find below a brief historic to remember this path:

• 2004 – Start of the Judiciary Reform
• 2010 – Ordinance No. 125 creates the National Judiciary Policy for handling conflicts of interests, seeking to ensure everyone with the right to resolve disputes by suitable means, making it quite clear that it falls to the Judiciary Branch – not only via a resolution awarded by judicial decision – to afford other mechanisms for the resolution of conflicts,

… Four law bills ….

• 2015 – Court Annexed Mediation -New Civil Procedure Code **(NCPC)**: Law 3105/2015- The text of the New Civil Procedure Code, approved by the Legislature in 2015, gives special emphasis on Conciliation and Mediation, regulating their overall application on court proceedings

• 2015 – Law 13.140/2015- Legislation related to judicial / non-judicial mediation and the activity of mediators. – to be enforced 12 months later so that the Judiciary, Law Firms, Companies could adapt and organize themselves.

As natural process of most of the new Legislations, these two new Laws brought not only improvements in the field (Mediation), but also intense debate and challenges to overcome. Among others, one of the most intense and controversial debates nowadays is related to the role of the lawyers as mediators in the Judicial Scenario, according to the NCPC.

The NCPC states, among other innovations, that it is the Judges duty to promote, at any time, the parties' own agreement, preferably with the aid of conciliators and court mediators.

According to the NCPC, it is expressly stated that conciliation, mediation and other consensual resolution methods of conflict should be encouraged by Judges, lawyers, public defenders and prosecutors, including in the course of legal proceedings.

In order to implement this procedure, local courts should create **judicial centers of consensual conflict resolution**, which would become responsible for conducting sessions, conciliation and mediation hearings, as well as the development of programs designed to assist, guide and stimulate agreement of the parties.

Despite the advancements of theses rules, however the implementation of the above has led one of the most debatable topics within the Mediation circles: The boundaries of the Mediators' function in relation to their other attributions. For instance,the NCPC clearly states that the Mediators registered to work in a Court Annexed Mediation Program, if also Lawyers, can no longer act in this capacity at that particular jurisdiction (State).

This indeed is a rather delicate matter and several practitioners, including myself, advocate that such a disposition should not be in place, as it will unquestionably drive away a lot of talented Lawyers from the Mediation profession, as most of them wouldn't really be willing to "throw away" their already established careers in order to venture into a new established field.

For instance, in practical terms, as mediators hail from different backgrounds and professions, they are all likely to have maintained some sort of professional relationship with instituttions, companies and individuals alike, regardless of their professional background. The distinction to lawyers in this case is rather unfair, as there will always be a considerable number of circumstances which the mediator (lawyers and non-lawyers) should disclose their background to the parties, ensuring that all relevant facts are adequately disclosed in a timely manner so that the parties can decide on whether or not to proceed with the appointment.

In addition, my strong view on this matter also derives from the basic nature of the Mediation profession itself: The Mediators' Impartiality.

Impartiality is a cornerstone of mediation. It is therefore clear that a mediator should remain independent at all times and maintain a position of strict neutrality with respect to the parties and their objectives, free from any taint of favoritism or bias.

The leading international mediation institutions and organizations, recognizing the essential nature of impartiality, make express provision to this effect in their rules. The Uniform Mediation Act states that the mediator "must be impartial."

The International Mediation Institute ("IMI") goes further, setting out at section 9 that "mediators will always act in an independent, neutral and impartial way. They shall act in an unbiased manner, treating all parties with fairness, quality and respect."

Finally, although divergent points of view are always important elements in a decision making process (as they help us to go deeper and deeper into the subject in order to arrive at the most favorable outcome), in an emerging country like Brazil, with notorious challenges in the Legal / Judicial system, I have no doubt that creating barriers (like the one above) that exclude "would be" Mediators from entering the profession, even if it is only restricted to the Court Annexed Mediation, can impact in the quality of the Mediation professionals.

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