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Introduction.

For the average Argentinean private law practitioner, mediation is common ground to solve arising legal disputes. Largely, since federal legislation had enacted mediation as a preliminary procedure, mandatory to file any civil or commercial complaint before a federal Courts. Though, not all argentine provinces have adopted mediation as a mandatory preliminary procedure, all main districts had, making mediation a familiar alternative for dispute resolution procedure in the country.

Mediation procedure is not new to our legal system, on the contrary, for more than twenty years[1] all civil and commercial disputes must comply with said mediation process to enable any Court filing. This alternative dispute mechanism has been enforced as a legislative response to the high costs and lengthy procedure wage in any civil or commercial Court. Bear in mind, that Argentina maintains an historical writing legal procedure, meaning that almost every in-Court petition must be filed in writing. Hence, the average Court procedure in Argentina has an estimate extension of three to five years, turning mediation in a vital alternative to obtain an expedite resolution to any dispute.

Mediation legislation and procedure.

Argentine legislation has been very thorough when regulating the mediation procedure, due to the legal consequences that may trigger the correct execution of this procedure. As already anticipated, the failure to comply with the mandatory mediation procedure disables the plaintiff to file for Court procedure. Though there are certain exceptions to this mandatory mediation requirement, such as pressing matters (e.g. preliminary measures, stay orders, assets assignment, etc.) or legal disputes involving federal, state or local public agencies, practically all private law legal issues must comply with the regulated mediation procedure.

The mediation procedure is straight forward, conducted through undetermined hearings scheduled by the mediator, who at the end of every hearing must complete a proforma minute stating whether the procedure continues in a following hearing or concludes with or without agreement. The only requirement to initiate a mediation hearing is that legal council must represent both disputing parties.

Every mediator has his own particular approach to a particular situation, but in my experience, mediator are incline to use a more neutral and facilitative way within disputes related to civil or commercial matters, trying to be an effective intermediary between negotiating parties. But, when the nature of the dispute is family or labor law issues, the

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[1] Law 24,573 published in Argentina´s official gazette in 10/27/1995 set forth the preliminary mediation procedure.

mediator tends to adopt a more aggressive approach, expressing opinions to the merit and likely outcomes to force the parties to reach common ground and settle.

In case, parties don´t reach an agreement the mediator`s minute stating the conclusion of the procedure without agreement enables the plaintiff to file for in-Court procedure. On the contrary, if parties agree to settle the mediator drafts the terms of the agreement stipulated by both parties. Once the agreement is executed, it´s enforceable as any Court ruling. Labor law disputes mediation agreements must be approved first by the Ministry of Labor (as guarantor of labor rights) to be enforceable. Also, family law matters (involving minors) are subject to Court`s approval. The fact that executed mediation agreements are enforceable as Court rulings, makes this type of agreements -in most cases- fairly expedite to enforce, turning mediation in a secure and efficient alternative to dispute resolutions.

Nonetheless, the private nature of mediation foresees the possibility to complement any settlement with a confidentiality agreement to prevent any party to disclose information discovered during the proceedings or any aspect of the settlement executed.

Moreover, to secure the constitutional right to access the justice system, mediation –as a mandatory preliminary procedure- does not require any up front fee. All mediation fees are deferred to the mediation agreement or a later Court ruling, making mediation an almost free dispute resolution mechanism until the dispute is resolved.

Probably because mediation procedures are necessary conducted prior to any Court filing, gives us the impression of mediation as a complement procedure to any in-Court procedure, and not as an alternative dispute resolution method. Different case is arbitration, which is also contemplated in our legislation, but not as a complement but as a real alternative method. In fact, once the parties involved choose an arbitration forum to solve their dispute, they waive they right to present they case to any Court.

The fact that all private law disputes must first go through mediation, don´t makes the mediation process a less effective one. On the contrary, there are many issues that contribute to make a mediation to work or not to work. But, the fact that all disputes must pass first through mediation gives us a chance to prove whether mediation can work. The worst alternative is the one you did not pursue, so in this mandatory mediation scenario we must embrace every mediation agreement as an avoided trial. Especially, if you are faced with a high cost and long-lasting judicial procedure instead.

Mediator.

The extensive need for mediators -granted by the widespread scope of issues subjected to mediation-, forced the authorities (i.e. Ministry of Justice) to promote mandatory capacitation programs for all interested lawyers who apply to be mediators, and also set forth a Mediator´s public registry. Eligible mediators must be incorporated to the Mediator´s public registry, because only a registered mediator shall conduct a preliminary mandatory mediation procedure.

Mediation is a private procedure so there is no mandatory procedure to appoint a mediator, you can just contact one privately or request a mediator through the applicable chamber of appeals depending on the nature of the dispute. If the mediator was appointed privately by one of the parties, once notify of the mediation proceeding, the opponent party has a two-day statutory timeframe to request a different mediator. If the mediator was appointed through the chamber of appeals, the opponent party don`t have the possibility to request the change of mediator.

Mediators appointed by the chamber of appeal cannot refuse to mediate in a particular matter due to the mandatory nature of the mediation process. Mediators can only be excused, if there is a specific conflict of interest between a party and the mediator, or if the mediator has a particular impediment to conduct the mediation (e.g. medical problems). As you may notice, the exceptions are very limited so mediation can be as open and easy to access as possible.

To be listed in Mediator´s public registry, all candidates must be lawyers, member of the local bar association, and completed all capacitation programs set forth by the Ministry.

Judges or Court members are legally banned as mediators in said registry. Nevertheless, within the ordinary Court proceeding, a special hearing is appointed after initial arguments in which the Court or acting Judge shall invite the parties to settle the dispute. This hearing is not defined as a mediation session, but Judges tend to use this hearing as a perfect opportunity to mediate between parties and facilitate an agreement. The everyday increasing Court workload, makes Judges keener to act as mediators in this hearings as to cut work through a settlement and avoid ruling in the dispute in hand.

Conclusions.

High cost and long-lasting judicial procedure has made alternative dispute resolutions mechanisms very popular in Argentina, especially since mediation was enacted as a mandatory preliminary process to almost every private law dispute. The mandatory

nature of mediation, encourage lawyers to familiarize with ARD´s as effective tools for out-off-Court dispute resolution.

The private nature, informality and low cost-consuming nature of ARD´s contrast with the public, formal and extended nature of in-Court proceedings. But, mainly the fact that executed ARD´s agreements or arbitration awards are enforceable as Court rulings, makes this off-Court proceedings a highly recommended alternative, especially when dealing with complex and highly technical matters which are beyond the normal scope of regular Court.

The mandatory nature of mediation in private law mattes, forces us to embrace this particular ARD and try to get the best of it. So, it would be unwise to characterize mediation just as a preliminary step before filing for in-Court procedure, and knowingly submit to a more costly and time-consuming Court process, that due to the increasing workload handle by ordinary Courts could also have an ineffective outcome, particularly in complex and highly technical cases.

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