

## Chapter 171

# Mediation and conciliation: what is the best option?

 10.56238/tfisdwv1-171

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### ABSTRACT

This work aimed to study the mediation and conciliation contained in the legislation in force as well as in the relevant doctrine, presenting the existing differences and similarities. It will address the functions of mediators and conciliators, when exercising their attributions. At the end, it signals which of the conflict resolution modalities - mediation or conciliation - are suitable for conflict resolution. The research method used was bibliographic consultation and legislation.

**Keywords:** Mediation, Conciliation, Difference, Conflict, Solution.

## 1 INTRODUCTION

Life in collectivity necessarily requires the individual to be aware of the possibility of occurrence of conflicts because, much of the daily decisions come from contracts. And once hired present will be the possibility of its non-compliance, whether by vice in the provision of the service, delay, defect of the product, or even unexpected events, "fortuitous case or force major". For the indoctrinator<sup>1</sup> Flávio Tartuce, the fortuitous case is (totally unpredictable event) or force major (predictable but inevitable event).

Thus, alongside the awareness of the possibility of the existence of conflict, there must also be awareness of the solution to the conflict, whether judicial or extrajudicial.

In this context, Brazilian legislation has long sought to regulate the way in which the conflict is resolved, whether by sparse legislation or by special legislation.

Thus, in order to better understand the institute of mediation and conciliation, as well as for a better understanding of the present work, there is a need to visit the legislation in force, even if in a reduced way, I will present it.

<sup>1</sup> TARTUCE, Flavius. **Civil Law: right of things**. – v. 4 - Ed. 11th - Rio de Janeiro: Forense, 2019. p.111.

## 2 LEGISLATION

As so vast is the legislation in Brazil that good didactics requires delimiting the visit to the legislation in force, thus, the Code of Civil Procedure, the Special Law as well as resolution 125 of the National Council of Justice - CNJ is elected.

Initially, it should be emphasized that in the code of civil procedure of 1973 (Law 5.869/73) already *repealed*, conciliation was present in Article 277<sup>2</sup> as a judicial and prior attempt to resolve disputes, where the parties were cited to attend the conciliation hearing and, if successful, was reduced to term and approved by the judge who resolved that demand.

It is important to emphasize that the civil process code of 1973 silenced the prediction of the mediation institute, however the current civil process code broke such silence, behold, brought express prediction of the mediation institute, including and even with broad emphasis.

So relevant that the institutes of mediation and conciliation are as a means of consensual conflict resolution, that even before the reform of the code of civil procedure and the issue of special legislation, the National Council of Justice issued Resolution 125 of November 29, 2010, aiming to improve access to justice, as well as a measure of uniformity of procedures, whose integration is in <https://atos.cnj.jus.br/atos/detalhar/156> , undeniable is the visit, to which I anticipate the invitation.

The legislator, noting the need to improve access to justice, which includes from the initial provocation to the satisfaction of the fair, effective and timely decision, did not waste the opportunity when the code of civil procedure was reformed, as it began to present predictions of mediation and conciliation in various provisions.

Such was the dedication, because the legislator made it appear in the code of civil procedure in force (Law 13105/2015), in the presentation chapter and as the fundamental norm of civil proceedings, in particular, in Article 3, § 3 assigning<sup>3</sup> a duty to the applicators of the right, to stimulate mediation and conciliation, in order to achieve the peaceful solution of the conflict. He brought in chapter three – chapter this entitled as auxiliaries of justice, and in section V, he emphasized the stimulation to the self-composition of conflicts, and now in chapter V, in which it is composed only of an article 334<sup>4</sup>, it was composed with

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<sup>2</sup> [http://www.planalto.gov.br/ccivil\\_03/leis/l5869impressao.htm](http://www.planalto.gov.br/ccivil_03/leis/l5869impressao.htm)

Art. 277. The judge shall designate the conciliation hearing to be held within thirty days, quoting the defendant at least ten days in advance and under warning provided for in § 2 of this article, determining the attendance of the parties. Being ad from the Public Treasury, the deadlines will count twice as long. (Wording given by Law No. 9,245, of 12.26.1995)

§ 1 - Conciliation shall be reduced to term and approved by judgment, and the judge may be assisted by a conciliator. (Included in Law No. 9,245, of 12.26.1995)

<sup>3</sup> [http://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2015/lei/l13105.htm](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm)

Article 3 will not be excluded from the judicial assessment threat or injury to the right.

§ 1 - Arbitration is permitted in the form of law.

§ 2 - The State shall promote, whenever possible, the consensual settlement of conflicts.

§ 3 - Conciliation, mediation and other methods of consensual resolution of conflicts shall be encouraged by judges, lawyers, public defenders and members of the Public Prosecutor's Office, including in the course of the judicial proceedings.

<sup>4</sup> [http://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2015/lei/l13105.htm](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm)

Art. 334. If the application meets the essential requirements and is not the case for preliminary dismissal of the application, the judge shall appoint a conciliation or mediation hearing at least 30 (thirty) days in advance, and the defendant shall be cited at least twenty (20) days in advance.

twelve paragraphs, establishing the procedure for the conciliation and mediation hearing, and this chapter will be before conciliation and judicial mediation.

In the edition of the specific law regulating the matter (Law 14.140 of June 26, 2015), with some care and brilliance, the legislator regulated the mediation procedure as a means of resolving disputes between individuals and resolving conflicts when involving the public administration. However, from the reading it is clear that there is a shy approach to the theme of conciliation. Thus, the reading invitation is available at: [http://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2015/lei/113140.htm](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/113140.htm).

It is important to note the edition of the legislations in comment, here is that published in 2015, being: Law 13.105 of March 16, 2015, *with vacatio legis* of one year from the date of its publication, considered general law, and Law 13.140 of June 26, 2015, *with vacatio legis* of 180 days from the date of its publication, called special law, it is immediately inconstituted that these laws complement each other, thus, with nothing to talk about express or tacit revocation of articles related to mediation and conciliation, either by the edition of Law 13.140, or by the edition of the code of civil procedure - Law 13.105.

It is important to point out that the doctrine of Francisco Jose Cahali, alerts to the final outcome when the elaboration of Law 13,140 of June 26, 2015, whose greater attention was focused on mediation, thus available in his work:

And the greater attention is related to mediation, because the incidence of extrajudicial conflict is minimal, being, as mentioned above, more proven as an endoprocedural institute (judicial conciliation). In this respect it is curious to observe cultural indifference to extrajudicial conciliation, not only for the insignificant practice, but even because it was ignored by the Legal Framework of Mediation (Law 13.140/2015).

It does not seem to have seen its relevance in several issues, with a broad environment of consumer relations, various labor issues and even in some commercial relations.

In addition, the offer in some institutions respected under the name "conciliation and mediation" is noted, but both in the suggested clause and in the regulations, what appears is mediation. In this line, it seems, in the extrajudicial environment, right or wrong, how much there is is the entity, under the clothing of mediation, and as mediators, to use the case, conciliation to resolve a particular conflict if this technique is more appropriate to the issue.

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§ 1 - The conciliator or mediator, where any, shall necessarily act at the conciliation or mediation hearing, observing the provisions of this Code, as well as the provisions of the law of judicial organization.

§ 2 - There may be more than one session for conciliation and mediation, and may not exceed 2 (two) months from the date of the first session, provided that necessary for the composition of the parties.

§ 3 - The subpoena of the author for the hearing will be made in the person of his lawyer.

§ 4 - The hearing shall not be held:

I - if both parties expressly express disinterest in the consensual composition;

II - when self-composition is not admitted.

§ 5 - The plaintiff must indicate, in the application, his disinterest in the self-composition, and the defendant must do so, by petition, presented 10 (ten) days in advance, from the date of the hearing.

§ 6 - If there is a litisconsortium, the disinterest in holding the hearing must be manifested by all litisconsortes.

§ 7 - The conciliation or mediation hearing may take place electronically, in accordance with the law.

§ 8 - The unjustified non-attendance of the plaintiff or the defendant to the conciliation hearing is considered an act attentive to the dignity of justice and shall be sanctioned with a fine of up to two percent of the intended economic advantage or the value of the cause, reversed in favor of the Union or the State.

§ 9 The parties shall be accompanied by their lawyers or public defenders.

§ 10. The party may constitute a representative, by means of a specific power of attorney, with the power to negotiate and compromise.

§ 11. The self-composition obtained will be reduced at term and approved by judgment.

§ 12. The agenda of conciliation or mediation hearings shall be organized in such a way as to respect the minimum interval of 20 (twenty) minutes between the beginning of one and the beginning of the following.

Hence the question (just for reflection), if, definitely, it would not be better to definitively incorporate conciliation as one of the civil mediation, como do some countries, no longer having rules specific to one and the other (as is done in conciliation / judicial mediation).<sup>5</sup>

Despite the importance of the issue raised by Francisco José Cahali regarding the fact that the greater attention focused on mediation, it is undeniable that conciliation also has its space guaranteed as a means of solution of conflict and regulation provided for in the legal system.

On the other hand, if in practice mediation has a higher incidence and success in the procedures submitted to it, at a time, even if to a lesser extent, conciliation will also have to achieve results in one or another procedure. The greater nonconformism would be if the absence of regulation of the matter prevailed, and not by the little applicability or adhering of the actors involved in a given procedure - conciliation.

In this context, the importance and effort of the legislator in addressing and regulating the issue of mediation and conciliation is perceived, all in prestige for the maximum solution of conflicts with speed, effectively and fairly.

Thus, once the visit to the legislation in question is made, the analysis is carried out to mediation and conciliation, to present the relevant considerations at the end, as follows in a specific topic.

### 3 MEDIATION

Mediation, by legal provision, is one of the methods of consensual settlement of conflicts, as provided in Article 3, §3 of Law 13.105 of March 16, 2015, which may occur both in the judicial and extrajudicial terms.<sup>6</sup>

If judicial, will occur after filing and compliance with the legal requirements of the initial part (petition), and will have a special hearing designated by the judge, all in accordance with Article 334<sup>7</sup> of Law 13.105 of March 16, 2015, and, although not successfully achieved in the desired conciliation, such possibility will not be exhausted, because at any time at the initiative of those involved – Judge, Lawyer, Public Prosecutor, Public Defender, Lawyers – may lead to further attempts, the procedures of which will be governed by the foregoing law, with simultaneous and complementary application of Law 13.140 of June 26, 2015.

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<sup>5</sup> CAHALI, Francisco José, **Arbitration Course - Mediation. Conciliation. Multiport Court**. Ed. 8<sup>a</sup> – São Paulo: Revista dos Tribunais, 2020. p.49

<sup>6</sup> [http://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2015/lei/l13105.htm](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm)  
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§ 3 - Conciliation, mediation and other methods of consensual resolution of conflicts shall be encouraged by judges, lawyers, public defenders and members of the Public Prosecutor's Office, including in the course of the judicial proceedings.

<sup>7</sup> [http://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2015/lei/l13105.htm](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm)

Art. 334. If the application fulfils the essential requirements and is not the case for preliminary dismissal of the application, the judge shall appoint a conciliation or mediation hearing at least thirty (30) days in advance, and the defendant shall be cited at least 20 (twenty) days in advance.

§ 1 - The conciliator or mediator, where any, shall necessarily act at the conciliation or mediation hearing, observing the provisions of this Code, as well as the provisions of the law of judicial organization.

If extrajudicial, as the name well expressed, will occur outside the judiciary, and the procedure contained in Law 13,140 of June 26, 2015 must be observed, with application, as far as it is, of the provisions of the code of civil procedure, - Law 13.105 of March 16, 2015 - all as provided for in Article 175 and single paragraph<sup>8</sup>, since these laws are not excluded, on the contrary, complement each other.

In this context, for mediation (judicial or extrajudicial), these will have the participation of several leading actors being the main ones: those who are in conflict or litigation and the third parties intermediaries or facilitators, better named - mediators.

The mediator should have no interest in relation to the conflict or persons involved in it, as taught by Caio César Vieira Rocha and Luis Felipe Salomão, in his work – Arbitration and Mediation, as follows:

The mediator is a person who is a person in relation to the interests of the parties, chosen by common agreement by the parties, or belonging to the mediation chamber to which the parties freely have been linked, or in the case of judicial mediation, registered in the court or court in which the process in which the mediation may be distributed.<sup>9</sup>

In accordance with the above teaching, the mediator applies to him the same hypotheses of impediments and suspicions applicable to magistrates, and more, the duty of disclosure which, in brief words, consists of informing the actors (parties to the conflict or litigation), any fact or circumstance that may influence the work to be developed, thus honoring impartiality, as established in Article 5 of Law 13.140 of June 26, 2015<sup>10</sup>.

The exercise of the mediator's duties, is expected in the 4th article, § 1 of Law 13.140 of June 26, 2015<sup>11</sup>, from which it is extracted that the essence is to direct the procedure and facilitate communication between the parties, having to achieve greater, achieve the resolution of the conflict through the reestablishment of communication between the parties.

Better clarifying, teaches Francisco José Cahali, where he taught:

One of the main functions of the mediator (according to the *school* to be followed) is to lead the parties to *their empowerment*, that is, to the awareness of their acts, actions, conduits and solutions, also inducing them to recognize the position of the other, so that he is respected in his positions and propositions. Of course here too, the creation of a propitious environment to overcome animosity is a relevant task. Moreover, due to the origin of the conflicts, the challenge of minimizing the effects of resentment, hurt, perverse resentment to the intended dialogue (speech and listening) is much

<sup>8</sup> [http://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2015/lei/113105.htm](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/113105.htm)

Art. 175. The provisions of this Section do not exclude other forms of conciliation and out-of-court mediation linked to institutional bodies or carried out through independent professionals, which may be regulated by specific law.

Single paragraph. The provisions of this Section apply, as it may be, to the private conciliation and mediation chambers.

<sup>9</sup> ROCHA, Caio Cesar vieira; SOLOMON, Luis Felipe, **Arbitration and Mediation - The reform of Brazilian Legislation**. Ed. 2nd - São Paulo: Atlas, 2019. p.219.

<sup>10</sup> [http://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2015/lei/113140.htm](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/113140.htm)

Article 5 - The same legal hypotheses of impediment and suspicion of the judge apply to the mediator.

Single paragraph. The person designated to act as mediator has the duty to disclose to the parties, prior to acceptance of the function, any fact or circumstance that may give rise to justified doubt regarding their impartiality to mediate the conflict, an opportunity in which it may be refused by any of them.

<sup>11</sup> [http://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2015/lei/113140.htm](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/113140.htm)

Article 4 The mediator shall be appointed by the court or chosen by the parties.

§ 1 - The mediator shall conduct the communication procedure between the parties, seeking understanding and consensus and facilitating the resolution of the conflict.

greater, because those feelings can generate ill will in communication and in the search for consensual solution.<sup>12</sup>

Thus, for the foregoing, the main objective in mediation is the conflict existing by the absence of dialogue between the parties, so what is sought is only the re-establishment of communication so that, from there the parties themselves can resolve the conflict so far existing by the absence of communication.

Moreover, it is easy to conclude that the mediator does not necessarily need to have extensive knowledge of the objective elements of the matter at issue, as it will not face it.

Thus, I share with the teachings of Francisco José Cahali, where he clarifies that the mediator does not judge, does not intervene in decisions, nor interferes with the proposals, offering opposed<sup>13</sup>, therefore, the role of the mediator in its essence is to restore communication.

#### 4 CONCILIATION

Like mediation, conciliation, by legal provision is also a method of consensual settlement of conflicts, has its provision provided for in Article 3, §3 of Law 13.105 of March 16, 2015<sup>14</sup>, and may occur in the judicial way, as in the extrajudicial.

If provided on the judicial route, it will have a prior hearing designated by the judge, pursuant to Article 334<sup>15</sup> of Law 13.105 of March 16, 2015, and, even if the greater objective – conciliation – has not been achieved by non-composition between the parties at first, it will still be encouraged at all times by the Judges, representatives of the Public Prosecutor's Office, Public Defenders, and Lawyers.

It is important to point out, that there may be some discomfort or even distrust of the client and lawyer, the techniques, clarifications of the advantages of the agreement as well as information of possible complications and even the duration of the process, allied to the good speech and knowledge of the professional lawyer, most often will prevail.

In the same sense, are the teachings of Fernanda Tartuce, presented in the work - Negotiation, Mediation, Conciliation and Arbitration - Course of Appropriate Methods of Dispute Resolution, coordination of Carlos Alberto Salles, Marco Antônio Garcia Lopes Lorencini, Paulo Eduardo Alves;

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<sup>12</sup> CAHALI, Francisco José, **Arbitration Course - Mediation. Conciliation. Multiport Court**. Ed. 8ª – São Paulo: Revista dos Tribunais, 2020. p.47.

<sup>13</sup> CAHALI, Francisco José, **Arbitration Course - Mediation. Conciliation. Multiport Court**. Ed. 8ª – São Paulo: Revista dos Tribunais, 2020. p.47.

<sup>14</sup>[http://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2015/lei/113105.htm](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/113105.htm) .  
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<sup>15</sup> [http://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2015/lei/113105.htm](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/113105.htm)

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§ 1 - The conciliator or mediator, where any, shall necessarily act at the conciliation or mediation hearing, observing the provisions of this Code, as well as the provisions of the law of judicial organization.

Although so may be, often the client distrusts the lawyer who proposes a consensual solution, assuming he is allied to the opposing party. The situation, therefore, may prove delicate for the professional – who, with clarity and serenity, must show that his duty as technical advisor is to collaborate for the broader and efficient view possible of the means of composition of controversies, for the benefit of the interests at stake. Such advice, moreover, should be valued, since the lawyer, using differentiated techniques, is able to collaborate to achieve the purposes desired by the client.<sup>16</sup>

Thus, as difficult or even embarrassing as it may be, the lawyer must, in search of maximum efficiency and procedural speed, honoring the culture of peace, contribute to achieving success, always offering and providing the parties with favorable moments, effective proposals and even viable to the effective scope of the conciliation proposed by him or those he participates in with his client.

When sought in the out-of-court route the institute of conciliation, will have mandatory observance of the procedures contained in the code of civil procedure - Law 13.105 of March 16, 2015 - all as provided for in Article 175 and single <sup>17</sup>paragraph, and also in the regulations of the Private Conciliation and Mediation Chambers.

Differently from the mediator, the conciliator in the exercise of his duties has greater freedom to act, since he seeks the solution to the object of the conflict, thus disregarding the situations of subjective ballasts.

Francisco José Cahali, quoting Ademir Buitoni, teaches:

The conciliator, whether Judge or no, is on the surface of the conflict, without entering into the intersubjective relations, on the factors that triggered the dispute, focusing more on the advantage of an agreement where each one gives in a little, to get out of the problem. There is no concern to go deeper into subjective and emotional issues, the factors that had triggered the conflict, as this would require leaving the sphere of legal dogmatics, the objective limits of the controversy.<sup>18</sup>

In this context, it is easy to identify that the conciliator should intervene and suggest proposals as well as encouraging the parties to resolve the conflict consensually.

In this context, the teachings of Francisco José Cahali follow:

The conciliator intervenes with the purpose of showing the parties the advantages of a composition, clarifying the risks of the demand being judicialized. Deve porem, create animosity-friendly environment. As an impartial third party, your task is to encourage the parties to propose their favors. But the conciliator must go further to reach the agreement: he must make balanced and viable proposals, exerting, to the limit of the reasonable, influence on the conviction of the interested parties.<sup>19</sup>

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<sup>16</sup> TARTUCE, Fernanda, **Negotiation, Mediation, Conciliation and Arbitration - Course of Appropriate Methods of Dispute Settlement**. Ed. 3rd - Rio de Janeiro: Forensics, 2020. p.289 - Coordination of Carlos Alberto Salles, Marco Antônio Garcia Lopes Lorencini, Paulo Eduardo Alves(

<sup>17</sup> [http://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2015/lei/113105.htm](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/113105.htm)

Art. 175. The provisions of this Section do not exclude other forms of conciliation and out-of-court mediation linked to institutional bodies or carried out through independent professionals, which may be regulated by specific law.

Single paragraph. The provisions of this Section apply, as it may be, to the private conciliation and mediation chambers.

<sup>18</sup> CAHALI, Francisco José, **Arbitration Course - Mediation. Conciliation. Multiport Court**. Ed. 8ª – São Paulo: Revista dos Tribunais, 2020. p.45.

<sup>19</sup> CAHALI, Francisco José, **Arbitration Course - Mediation. Conciliation. Multiport Court**. Ed. 8ª – São Paulo: Revista dos Tribunais, 2020. p.45.46.

In the same sense, Humberto Dalla Bernardina de Pinho and Marcelo Mazzola objectively clarify:

Conciliation occurs, therefore, when the intermediary adopts a more active stance: he will not facilitate the interaction between the countries, but, mainly, interact with them, present solutions, seek paths not thought of before by them, make proposals to admonish them that a particular proposal is too high or that another proposal is very low; finally, he will have a truly influential stance in the outcome of that litigation in order to obtain its composition.<sup>20</sup>

Valuable are the teachings of Fernanda Tartuce present in the work - *Negotiation, Mediation, Conciliation and Arbitration - Course of Appropriate Methods of Dispute Resolution*, coordination of Carlos Alberto Salles, Marco Antônio Garcia Lopes Lorencini, Paulo Eduardo Alves:

If properly, conciliation can achieve the goal of peacefully: otherwise, illegitimate transactions will lead to more conflicts between the content and generate other disputes.

For this reason, it is essential that the conciliator act with care in his important function, promoting meaningful and productive reflections able to promote the awareness of those involved about reciprocal rights and duties.

Conciliator implies actively participating in communication (bringing individuals together), collaborating to identify interests and helping to think about creative solutions and encouraging the parties to be flexible, and may present (if necessary) suggestions for ending the conflict.<sup>21</sup>

However, care must have the conciliator in the performance of his mister, because the duty of obedience to the principles that guide the exercise of his duties, as well as all the legislation in force and even the code of ethics contained in the annex to resolution 125 of November 29, 2010, of the National Council of Justice, not to extrapolate and compromise the final result of conciliation, behold, as provided for in the code of civil procedure, Article 165 § 2 of Law 13.105 of March 16, 2015, denied<sup>22</sup> the use of any kind of embarrassment or intimidation for the parties to reconcile.

## 5 FINAL CONSIDERATIONS

Doubt is not, the ideal would be the non-existence of the conflict, however, to deny its existence is to give opportunities that will provide enrichment without cause or even injustices on the part of some, or even the practice of doing justices with their own hands.

In the course of studies to diplomas - Law 13.105, of March 16, 2015; Law 13,140 of June 26, 2015 and Resolution 125 of November 29, 2010 – it was identified that they are contained, in a crystal clear and valuable way, a strong attempt to pacification through the institutionalization of the various means of conflict resolution – including mediation and conciliation – objects of this study.

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<sup>20</sup> PINE, Humberto Dalla Bernadinha; MAZZOLA, Marcelo, **Mediation and Arbitration Manual**. Ed. 1ª – São Paulo: Saraiva, 2019. p.45.

<sup>21</sup> TARTUCE, Fernanda, **Negotiation, Mediation, Conciliation and Arbitration - Course of Appropriate Methods of Dispute Settlement**. Ed. 3rd - Rio de Janeiro: Forensics, 2020. p.292 – Coordination of Carlos Alberto Salles, Marco Antônio Garcia Lopes Lorencini, Paulo Eduardo Alves(

<sup>22</sup> [http://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2015/lei/113105.htm](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/113105.htm)

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§ 2 - The conciliator, who will act preferably in cases where there is no previous link between the parties, may suggest solutions to the dispute, being denied the use of any kind of embarrassment or intimidation for the parties to reconcile.

Therefore, once the existence of the conflict has been verified and brought to the attention of any of the other actors – Judges, Lawyers, Public Defenders, members of the Public Prosecutor's Office, before starting the management of the appropriate route – mediation or conciliation – these actors will carefully gather the initial information for the end, through their keen knowledge, to conclude whether they are conflicts arising from subjective or objective situations.

For the applicability of the conflict resolution instrument - MEDIATION - conflicts arising from subjective situations, in which there is a family ballast, or even a continuation of the relationship between the subjects, such as family conflicts, should be directed.

For the applicability of the conflict resolution instrument – CONCILIATION – conflicts arising from objective situations, in which there are no relations of affection or continued relations between the parties, as in consumer relations, should be directed.

Moreover, a highlight must be made regarding the mediation institute, because, identified that in conflicts with subjective and objective ballasts, it is recommended to direct the resolution of conflicts through mediation, and once the success has been achieved and the dialogue is restored, the conflicting actors/parties themselves can achieve conciliation by resolving the conflict without the need for the intervention of a third party.

Undeniable and easy to conclude is that, when the choice to resolve the conflict is appropriate to the conflict (mediation or conciliation), and there is success in the procedure, several will be the benefits for the parties, such as: speed of procedure, lower financial cost, maximum debureaucratization, fair and effective decision.

Therefore, there will be no better or worse choice between mediation or conciliation, but rather an appropriate direction of the conflict to the means of extrajudicial solution capable of inscing positive results and contributing to the much desired social pacification.

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