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ALTERNATIVE DISPUTE RESOLUTION UNDER FRENCH LAW

The rise of ADR under French law: numerous solutions and procedures are now open to parties and judges to find an amicable solution to disputes

Alternative Dispute Resolution (ADR) has been known in French law since the Middle Ages, when arbitration was a common resolution method for commercial disputes.

After a first period of decline, correlative to the reinforcement of royal power, the French revolution, inspired by Jean-Jacques Rousseau's Social Contract, favored the use of arbitration, conciliation and settlement, largely out of their distrust of the formal justice system.

Therefore, the authors of the Code of Civil Procedure of 1806 continued to provide conciliatory procedures an important place. It was thus that conciliatory procedures were imposed as preconditions for the judicial resolution of disputes, notably in commercial matters.

Although the majority of cases were reconciled before it became necessary to bring the dispute before a judge, these preliminary reconciliation procedures became less and less effective during the 19th century and were finally removed in 1949.

It is only in 1975, during the drawing up of the new Code of Civil Procedure, that conciliation was reintroduced among the fundamental principles of court proceedings. Since then, the movement in favor of ADR has grown and has recently received two confirmations: Law No. 2010-1609 of 22 December 2010 establishing notably the agreement to a collaborative law process and the Ordinance No. 2011-1540 of 16 November 2011 which transposed into French law Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters and Decree No. 2012-66 of 20 January 2012 on amicable dispute resolution, which implemented it.

Under French law ADR can be conventional (I) or judicial (II)..

I-CONVENTIONAL ADR

The parties may decide to have recourse to these alternative methods of dispute resolution, prior to bringing any action before a judge or arbitrator:

- Either when the dispute between them arises;
- Or by inserting in their contract a provision governing their professional relationships or, between professionals and consumers, a clause requiring mediation as a precondition to any action in court.

The French Supreme Court (Cour de cassation), in its judgment of 14 February 2003 (Mixed Chamber, 14 February 2003, Bulletin of the Mixed Chamber No. 1) found that when the parties have undertaken to submit a dispute to ADR prior to arbitration or litigation, failure to do so renders a claim inadmissible under Articles 122 et seq. of the Code of Civil Procedure.

ADR may be either:
- a collaborative law process;
- a conventional mediation or conciliation.

I.1-The participation agreement:

Now codified by Articles 2062 through 2067 of the Civil Code, *"The participation agreement is an agreement by which the parties to a dispute that has not yet been referred to a judge or an arbitrator undertake to work together and in good faith for the amicable resolution of their dispute.*

To be declared valid, the agreement shall be concluded for a fixed time, set out the object of the dispute and clarifies the exhibits and information necessary for the dispute's resolution and the formalities for their exchange. The use of lawyers is compulsory in application of Articles 2064 of the Civil Code and 1544 of the Code of Civil Procedure. The process suspends the limitation periods. When the parties come to an agreement resolving all or part of their dispute, they may submit it for the Judge's ratification ("homologation")."

The law does not provide for the confidentiality of the exchanges between the parties, assisted by their lawyers.

Moreover, Article 1554 of the Code of Civil Procedure provides that the report established by the Expert who the parties judge useful to consult, and who they have jointly chosen, in order to be better informed, could subsequently be produced in court in the event that the collaborative law process fails.

I.2-Conventional mediation and conciliation

Pursuant to Article 1530 of the Code of Civil Procedure Code created by Decree No. 2012-66 of 20 January 2012, *"the conventional mediation and conciliation governed by this Title consist in (…) any structured procedure, by which two or more parties try to reach an agreement, outside of any judicial process, for the amicable resolution of their dispute, with the help of an independent third-party chosen by them who will carry out his/her mission with impartiality, competence and diligence".*

Conventional mediation and conciliation are in principle confidential pursuant to Article 1531 of the Civil Procedure Code.

- Conventional conciliation is entrusted to an independent third person who is a *"judicial conciliator" (conciliateur de justice)*, as established by Decree No. 78-381 of 20 March 1978, and whose mission is to seek the amicable resolution of a dispute.
- The judicial conciliator is appointed by the judge for a period of one year. He can be reappointed for a renewable period of two years.

Judicial conciliators act on a voluntary basis.

This process is suitable for civil disputes such as consumer claims. Approximately 60% of disputes submitted to this process are reconciled.

- In conventional mediation, the parties freely choose a mediator or recourse to a mediation centre, such as that of the International Chamber of Commerce (ICC) in application of its ADR Rules; the Paris Mediation and Arbitration Center (CMAP) created in 1995 by the Paris Chamber of Commerce and Industry; or the Institute of Expertise, Arbitration and Mediation (I.E.A.M), whose origins date back to the Edict of 1563.

The fees of the mediator are freely fixed in agreement with the parties.

If the mediation is successful, a settlement agreement is concluded by the parties pursuant to the provisions of Articles 2044 *et seq.* of the Civil Code. This agreement has the same effect as a definitive Court decision. Lastly, the parties can request the President of the district court *(Tribunal de Grande Instance)* to render the agreement enforceable pursuant to Article 1441-4 of the Civil Procedure Code.

Parallel to these purely conventional ADRs, the law introduced mediations for the resolution of certain categories of disputes in very specific areas.

II-JUDICIAL CONCILIATION AND MEDIATION

The judge must encourage the parties' conciliation. Article 21 of the Code of Civil Procedure reminds that *"It is within the judge's mission to conciliate the parties".*

The conciliation may be conducted directly by the judge if he deems it favorable, at any moment of the procedure. The conciliation is conducted in accordance with the modalities set by the judge, in application of Articles 127 to 129 of the Code of Civil Procedure.

- The judge may delegate the conciliation to a judicial conciliator. The conciliator's mission cannot exceed two months, but can be renewed.

The mission is conducted in application of Articles 129-1 to 129-5 of the Code of Civil Procedure. The judge may end it at any moment, at the request of a party or at the conciliator's initiative.

- The judge may also instruct a mediation procedure, with the parties' agreement, by designating an independent third person to find a solution to the dispute.

The mediation is then conducted in application of Articles 131-1 to 131-15 of the Code Civil Procedure. Its initial duration is of three months, renewable once, for the same duration, at the mediator's request.

Judicial conciliation and mediation are, in principle, conducted confidentially. Should they fail the findings and statements collected by the conciliator or the mediator cannot be introduced subsequently in the procedure before the judge without the parties' consent, or in any other proceeding.

In technical disputes, it is very frequent for French judge to designate an independent expert independent from the parties. In accordance with Article 240 of the Code of Civil Procedure, however, this expert cannot be assigned a conciliation mission.

In contrast, the administrative judge, who essentially hears disputes between economic players and the administration, has the power to assign the conciliation mission to a judicial expert in application of Article R 621-1 of the Code of Administrative Justice.

CONCLUSION

Mediation constitutes one of the priorities of the reform *« justice of the 21st Century »*, which aim is to modernize justice and adapt it to the transformation of society.

The courts are aware that mediation is not the solution to all cases and thus carefully select them. This selection contributes to a success rate amounting to up to 70% of cases entrusted to a mediator.

According to data from the Paris Commercial Court, in charge of the most important business disputes, one case on ten is identified by the Court as a candidate for mediation and more than 500 mediations were concluded in 2013.

Regarding judicial conciliation, statistics from the Paris Bar show that the chances of reaching an agreement are higher when the parties are accompanied by their attorneys.

Attorneys thus invest the areas of freedom available to them in dispute resolution and favor pragmatism, preferring a negotiated judicial order over an imposed judicial order.