

# ARTICLE

## ALTERNATIVE CONSUMER DISPUTE RESOLUTION VADE MECUM

IT and Data Protection Intellectual Property, Media, and Art Law Competition, Retail and Consumer Law  
Commercial and International Contracts | 15/04/16 | Mahasti Razavi

Given the latest rules entered into force on the subject, here is the Vade-mecum on the compliance regarding alternative consumer dispute resolution.

As a reminder, the French Ordinance no. 2015-1033 of 20 August 2015, implementing the Directive 2013/11/ EU of 21 May 2013 on alternative dispute resolution for consumer disputes, establishes the principle of a «*right to mediation*» for consumers and the resulting obligation for traders to ensure an effective access to such right (Article L. 152-1 of the French consumer code).

This mediation process is intended to all **domestic and cross-border** disputes between consumers and traders and, with some few exceptions, applies to **all sectors**.

The rules relating to the implementation of the mediation process have been specified by the Decree no. 2015- 1382 of 30 October 2015 relating to the mediation of consumer disputes and the Decree no. 2015-1607 of 7 December 2015 relating to the nomination conditions of business mediators.

Note that the European Regulation no. 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes also requires traders exercising online activities to inform consumers about the existence of the European online dispute resolution platform.

Since 1 January 2016, traders must fully comply with this new alternative dispute resolution mechanism.

In this regard, traders must first **(1) define** the mediation process they wish to offer to their customers and then **(2) inform** them of its existence.

### 1. Definition by the trader of his mediation strategy

**As a reminder**, the use of mediation by the consumer is possible only if:

- The consumer has **(i)** first addressed to the trader a **written complaint** to attempt to resolve the dispute and **(ii)** submitted his request to a mediator within **one year** as of his written complaint; and
- His grievance **(i)** is **not abusive or without grounds**, and **(ii)** has **not already been settled by a court or another mediator**.

Note that the mediation is **free of charge** for the consumer and is an **optional** procedure as it is neither a precondition nor a substitute for a legal action for the consumer, who may always bring proceedings before the courts. Finally, the outcome of the mediation must be made within 90 days from the notification by the mediator to the dispute parties (receipt by the mediator of the documents on which the consumer's grievance is based).

#### i. Who can be a mediator: which requirements?

- Any mediator must fulfill the requirements of **competence, independence and impartiality** ;
- Indeed, the mediator:
  - must have skills in the field of mediation and good legal knowledge including in the consumption field;
  - must be appointed for a minimum of 3 years period;
  - must be paid regardless of the outcome of the mediation;
  - must not be in a position of conflict of interests and, if need be, must report it.

In any event, any mediator must be approved by the **Commission d'évaluation et de contrôle de la médiation** (i.e. Commission of assessment and control of consumer mediation) established by the French Ordinance of 20 August 2015 (Articles 155-1 and following of the consumer Code) and registered by this commission on the **national list of mediators**, notified to the European Commission. As of today, this list, which is subject to modifications, is available on the website of the online dispute resolution platform of the European Commission:  
<https://webgate.ec.europa.eu/odr/main/?event=main.home.show&reload=false>

#### ii. How do you choose the appropriate mediator: which categories?



The French background of mediation is quite complex but the French law establishes the principle that a consumer dispute can be subject to one mediation only.

Specifically, depending on your field of activity, several mediators may have competence, but your choice should allow consumers to access to one of the following categories of mediators under the conditions specified below:

**- Mediator in charge of a specific area (external):**

**The public mediator:** he is the mediator appointed by a public authority under conditions set by **the French law**, which also determines his status, his field of competence and his intervention modalities (e.g. the national energy mediator, or mediator of the French financial markets authority (i.e. *Autorité des Marchés financiers*)).

Note that when there is an appropriate public mediator to proceed with the mediation of a consumer dispute, any other conventional mediation is, subject to exceptions, excluded (Article L.152-5 of the French consumer code).

**The sectoral mediator:** he is a mediator whose competence extends to all companies of an economic activity field, e.g. the mediator of Cooperative and Associative Trade, the mediator of the water and the mediator for electronic communications. This mediator «cohabits» with the public mediator.

Note that if the trader depends on an area of activity where there is a sectoral mediator, he must still enable the consumer to access it, even if he has chosen another conventional mediator - cf. below (Article L.152-1 of the French consumer code).

**Company mediator (internal):** he is a mediator appointed by the trader who sets up his own mediation service (e.g. a mediator within the company). In this case, the mediator employed or remunerated by the company must meet, in addition to the above criteria, additional criteria to ensure the independence and impartiality requirements:

- he is appointed by a **collegial body** – which can be set up by the company or by an advisory national body in the consumption field (e.g. *Conseil national de la consommation*) or in charge of specific area (e.g. *Comité consultatif du secteur financier*) – composed of at least two representatives of French authorized consumer associations and two representatives of traders;
- he cannot be hired by the trader or by a federation to which the trader is affiliated for a period of **3 years following the end of his mandate**;
- **no hierarchical or functional link** between the trader and the mediator may exist for the exercise of the mediation mission. In this regard, the mediator shall be clearly separated from the operational trader bodies; and
- he must have a **separate and adequate budget** to carry out its mission.

**Another mediator (external):** any other natural person who meets the legal requirements for ensuring consumer disputes mediation and selected by the trader as the referent mediator, with whom **a mediation agreement shall be concluded**. For example, it may be a mediator of a trader association to which the trader is affiliated, such as the *Fédération e-commerce et de la vente à distance* (French Federation of e-commerce and distance-selling - FEVAD).

However, as mentioned above, the mediator, regardless of his «status» must be approved by the **Commission d'évaluation et de contrôle de la médiation**.

Note: If you have to allow consumers to use the mediation process, you do not have to accept the solution provided by the mediator.

## **2. Consumer information arrangements of the mediation process**

### **i. Where to provide the information to the consumer: which medium?**

You can provide information on the mediation process using the following media:

- your website;
- your terms and conditions ;
- your purchase orders; or
- any other suitable medium.

In practice, we suggest:

- if you have an brick and mortar business (e.g physical stores), to deliver information on a medium in your store and / or on the back of the invoices or sales receipts given to the consumer;
- if you have an online business, to deliver the information on your website and / or on your terms and conditions of sale.

### **ii. What information to provide to the consumer: the content?**

You must register, in a visible and legible manner, **(i) the contact details** and **(ii) the website address** of the mediator (s) to whom you are accountable to on the above-mentioned media.

Furthermore, traders who perform their activities online must inform consumers of the existence of the European online dispute resolution by including a link to this platform on their website.

We suggest the insertion on the above media of the following standard wording:

▪ If you have a brick and mortar business:

*« In the context of a dispute between the parties and following a failure of a customer's written complaint to our customer service or in the absence of response of this service within a reasonable period of one (1) month, the customer, that is a consumer, may use any alternative dispute resolution, including a mediation procedure by contacting the mediator (s) as follows: [contact details of the mediator(s) and its / their websites] who will try / attempt to, independently and impartially, reach an amicable resolution of the dispute. The customer is free to accept or reject the use of mediation and, in case of mediation, each party is free to accept or reject the solution proposed by the mediator. »*

▪ If you have an online business :

*« In the context of a dispute between the parties and following a failure of a customer's written complaint to our customer service or in the absence of response of this service within a reasonable period of one (1) month, the customer, that is a consumer, may use any alternative dispute resolution, including a mediation procedure by contacting the mediator (s) as follows: [contact details of the mediator(s) and its / their websites] and/or by accessing to the European online dispute resolution at the following address: <http://ec.europa.eu/odr> who will try / attempt to, independently and impartially, reach an amicable resolution of the dispute. The customer is free to accept or reject the use of mediation and, in case of mediation, each party is free to accept or reject the solution proposed by the mediator. »*

▪ If you have both a brick and mortar and online business:

*« In the context of a dispute between the parties and following a failure of a customer's written complaint to our customer service or in the absence of response of this service within a reasonable period of one (1) month, the customer, that is a consumer, may use any alternative dispute resolution, including a mediation procedure by contacting the mediator (s) as follows:*

*- For any in-store purchase the following mediator (s) : [contact details of the mediator(s) and its / their websites] ;*

*- For any online purchase the following mediators : [contact details of the mediator(s) and its / their websites] and/or by accessing to the online dispute resolution at the following address: <http://ec.europa.eu/odr> who will try / attempt to, independently and impartially, reach an amicable resolution of the dispute. The customer is free to accept or reject the use of mediation and, in case of mediation, each party is free to accept or reject the solution proposed by the mediator. »*

As a reminder, any failure to comply with such above-mentioned obligations is subject to an administrative fine up to EUR 3,000 for natural persons and up to EUR 15,000 for legal persons (Article L.156-3 of the French consumer code).

Mahasti Razavi, associé  
Barbara Naouri, avocat

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