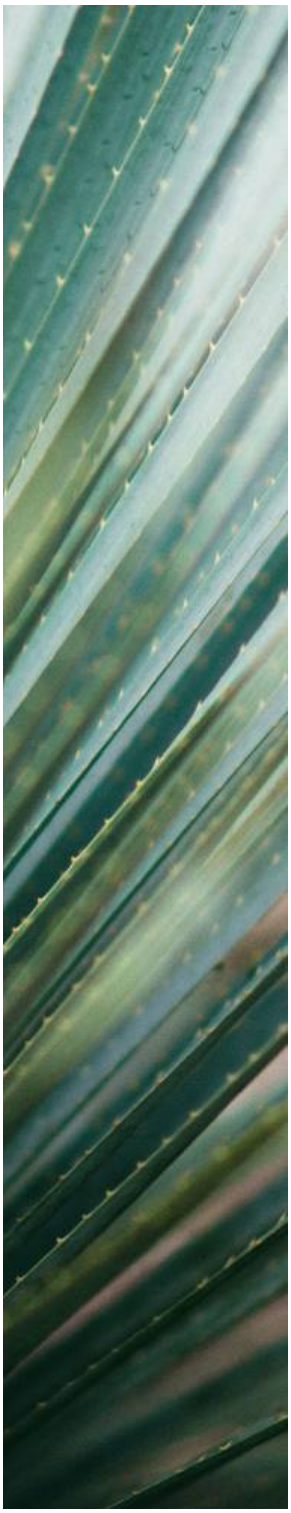


ARTICLE

LITIGATION NEWSFLASH

| 13/02/12 | Marie Danis

Conventional recourse to alternative methods of dispute resolution passes into French law

Pursuant to the Decree of 20 January 2012 (the "Decree"), a Book V dealing with "Amicable Dispute Resolution" is created in the French Code of civil procedure ("CCP"). Implementing Directive 2008/52/EC of 21 May 2008, the Decree lays down the rules for conventional recourse to mediation and conciliation and specifies how the new "collaborative process" will work (a mix between conventional and judicial dispute resolution methods). It thus introduces a new regime intended to further encourage use of amicable dispute resolution techniques and improve their efficiency in civil, commercial, social and rural matters. Although some scholars are critical of the lesser role played by judges, sometimes to the benefit of lawyers, the new provisions may well prove to be satisfactory for the parties. The Decree entered into force on 23 January 2012.

Conventional mediation and conciliation: the judge approves the parties' settlement

Objective: to draw the parties towards confidential techniques…

Mediation and conciliation imply the participation of a neutral who, unlike a judge or an arbitrator, will not decide the dispute but assist the parties resolving it. The Decree thus extends the definition of conventional mediation and conciliation to "any structured process whereby two or more parties try to reach a settlement outside of judicial proceedings in order to amicably resolve their dispute with the help of a neutral selected by them and who will conduct his/her mission in an impartial, capable and diligent manner" (article 1530 CCP). The parties' choice; impartiality; capability; diligence – all of the assurances have been provided to raise the parties' confidence in these techniques.

Therefore, as in the case of judicial mediation, parties wishing to resort to conventional mediation may designate either a natural person or a legal entity to conduct the mediation; in the latter case, the entity designates, with the parties' approval, the person who will effectively execute the mission (article 1532 CCP).

Who shall mediate? Besides the essential criterion of impartiality, new Article 1533 CCP imposes on the mediator an obligation of capability: the mediator must be sufficiently qualified thanks to his/her past or present activities, in view of the nature of the dispute, or must be able to prove that he/she has training or experience that is suited to conducting the mediation. The aim of this measure is undoubtedly to increase the mediator's legitimacy so that the parties have more confidence in the process.

The Decree also codifies an essential principle, key to the success of amicable dispute resolution: confidentiality. New Article 1531 CCP sets forth that findings made by the mediator or the conciliator during the course of his/her mission, as well as statements made by the parties during the course of the amicable dispute resolution, cannot be disclosed to third parties, nor produced or relied upon in the context of judicial or arbitral proceedings unless the parties agree to their disclosure.

Even though some (albeit limited) exceptions remain, formally imposing an obligation of confidentiality on the parties, the mediator and the conciliator should reassure the parties and raise their confidence in alternative dispute resolution methods.

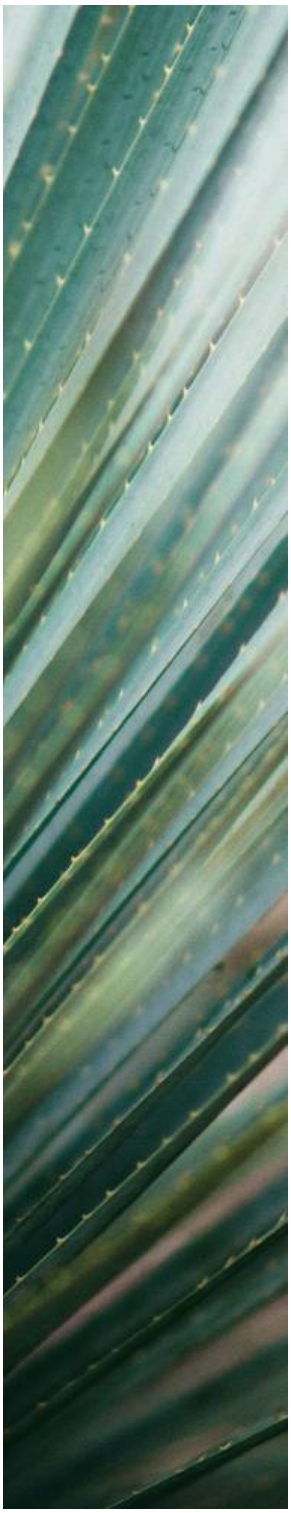
…. that are more efficient

Lastly, the parties' recourse to conventional mediation is facilitated, regardless of whether they provide for recourse to mediation in their contract or decide to use this technique after the dispute has arisen. They may also easily refer their dispute, without any particular formalities, to a judicial conciliator (new Article 1536 CCP) who has the possibility, for the purpose of his/her mission, of convening the parties, visiting the premises and hearing, with their consent, all such persons whom it may be useful to hear; he may also be assisted by another judicial conciliator, with the parties' approval (new Articles 1537 through 1539 CCP).

At the end of the amicable resolution process, if the parties managed to settle their dispute, they must together seek the competent judge's approval of the settlement or memorandum of understanding they reached, without discussion, and the judge cannot modify the terms thereof (new Articles 1565 and 1566 CCP). The judge's refusal to approve the parties' settlement may be appealed.

In the judge's approval lies the efficiency of mediation and conciliation techniques, as it makes the settlement enforceable.

Since these provisions result from the implementation of a Directive, all EU Member States have adopted the same principle of the enforceability of settlement agreements arising out of alternative dispute resolution measures; this ensures the efficiency of such settlements within the EU, as the French judge will recognise settlements arising out of mediations that have been made enforceable in other EU Member States (article 1535 CCP), and, vice versa, settlement agreements resulting from mediation and approved in France are now enforceable in other Member States



(subject to the provisions of the domestic law implementing the same Directive).

The collaborative process: an original negotiation technique organised by lawyers without a judge

Passed into law by Act no. 2010-1609 of 22 December 2010 (a.k.a. the "Béteille Act"), the collaborative process agreement defined in Article 2062 of the French Civil Code is "an agreement whereby the parties to a dispute which has not yet been referred to a judge or arbitrator undertake to work together in good faith to resolve their dispute amicably." This tool allows the parties, who must be assisted by their lawyers, to agree on the terms and conditions for negotiating a resolution of their dispute.

To better understand this "US-style" process, below is a brief summary of its features:

The assistance of a lawyer is required, even though such assistance is not mandatory before a French Commercial Court;
No prior referral to a judge or arbitrator;
To be valid, the agreement must specify its term, the subject matter of the dispute and the documents and information necessary for its resolution. This process therefore applies to disputes which have already arisen, and recourse to this process cannot be provided for in advance in the contract between the parties.

Ordinarily, the rights in question must be available and this type of dispute resolution technique is excluded for employment disputes.

The Decree now sets forth the conditions to implement a collaborative process, enabling the parties to put it into practice. The process is split into two phases: (i) a consensual phase to try to find a settlement and, as the case may be, (ii) a procedural phase for judgment. Therefore, the judge only steps in once a settlement has been reached or if no settlement has been reached by the time the agreement expires, unless he is required to intervene in relation to the enforcement of the collaborative process agreement itself (like the juge d'appui in arbitration procedure).

During the first phase, the parties, assisted by their lawyers, come together to try and reach a settlement to resolve their dispute, according to the terms of the collaborative process agreement they entered into. The lawyers exchange briefs and evidence to this end (new Article 1545 CCP). This stage of the process bears strong similarities to a usual case management phase, but without a judge or an arbitrator. The parties' agreement determines all of the terms and conditions for these exchanges. The lawyer is therefore at the centre of this process and it is the lawyer's ideas and practice that will shape it. Although experience will be quickly gained, the process is likely to take on multiple different styles and so, at present, its success remains uncertain in many respects.

The Decree also states that the parties may resort to a technician (new Article 1547 CCP) whose report may then be produced before the courts. The idea is therefore to allow the parties to use sophisticated modes of proof right from the amicable phase.

The Béteille Act cruelly lacks provisions to ensure the confidentiality of the negotiations, and the Decree does not make up for this. Some scholars consider that the confidentiality of exchanges between lawyers suffices to ensure confidentiality.

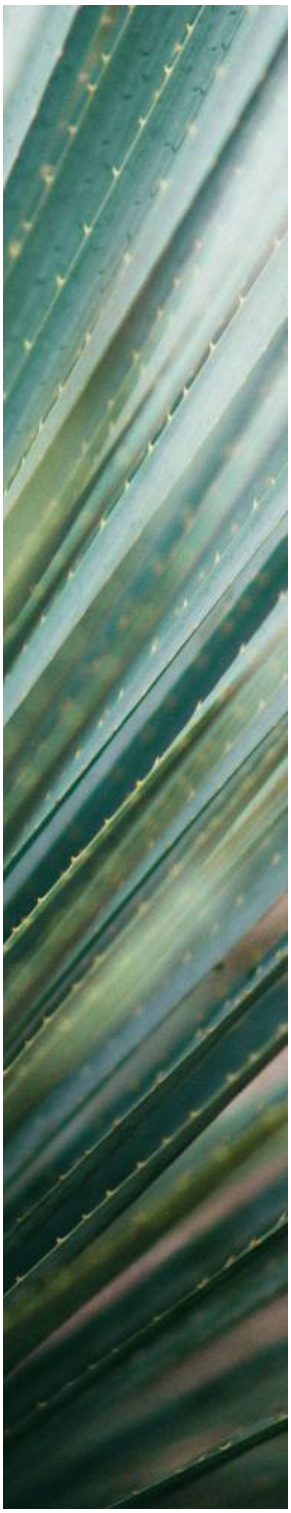
However, as mentioned below, all of the documents exchanged during the consensual phase may be produced before the judge should the negotiations fail. This lack of confidentiality has therefore already been highly criticised. Admittedly, in reality, it is possible to keep the negotiations confidential, but there is nothing to guarantee this unless the parties make specific provisions from the outset as to confidentiality.

When the collaborative process reaches a successful end before the agreement expires, the parties set down their settlement in writing, still with the assistance of their lawyers. If the parties have resolved only part of their dispute, they will indicate this accordingly in their settlement agreement.

The second phase of the process then begins and the judge reappears: the matter is referred to the judge so that he can either (i) approve the parties' full or partial settlement of their dispute, or (ii) rule on the remaining unsettled aspects of the dispute or the entire dispute, as the case may be.

For the sake of time-efficiency, the Decree even provides that the case may be brought directly to a hearing before the first-instance civil court without going through a case management phase which, a priori, has already taken place. However, the entire dispute may also follow the ordinary judicial procedure. The parties therefore have two options for resolving their dispute: either through an ordinary procedure or by resorting to a fast-track procedure without the case management phase mentioned above. If the parties choose the fast-track procedure, they need to file a joint petition with the judge indicating their respective claims and submit the evidence produced during the collaborative process. The dispute will not go through the case management phase unless it is necessary to update the amount of any successively-enforceable claims, oppose a payment or subsequent setoff, or obtain a ruling on issues arising out of the intervention of a third party or the disclosure of a fact after the settlement has been reached, or if further explanations are requested by the judge. Therefore the parties will not have wasted any time by looking for an amicable solution. When the entire dispute is referred to the judge, it is also possible for a party to file an ex parte petition, it being specified that mechanisms to preserve adversarial principles have been provided (new Article 1563 CCP).

This process already seems to be particularly suited to sensitive matters or cases where the parties want to preserve their business relations or minimize the uncertainty or aggressive nature of litigation. There are nevertheless doubts as to



whether the parties will be able to agree on an efficient preparation of the case.

A suspension of the period of limitations to reassure the parties

Finally, among Parliament's efforts to encourage amicable dispute resolution techniques, it is worth remembering that the rules governing prescription periods were modified in 2008 so that the period of limitations is suspended when amicable dispute resolution is attempted (Article 2238 of the Civil Code). The period of limitations begins to run again when the mediation or conciliation ends.

Therefore, the period of limitations cannot be less than six months.
This ensures that the parties will, literally, not be wasting their time by attempting an amicable resolution.

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