

## Mediation In France<sup>†</sup>

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The Act which officially provides for the possibility in France for the parties to any form of litigation to try to settle their case through mediation (articles 131-1 and following of the Civil Code of Procedure) is dated 8 February 1995.

Since that time, however, the development of mediation has been relatively limited and has not had any significant success. The few sectors or geographical areas where mediation has taken place are mainly because of the will of a specific judge within their jurisdiction.

However, over the past three years, there have been a number of signs that mediation is in the process of developing in France, surprisingly in business matters.

The first signs of this trend in favour of mediation appeared with a case before the Supreme Court dated 13 February 2004. This clearly showed the validity and efficiency of mediation or conciliation clauses provided in agreements, as a preliminary step in any legal proceedings. With such a clause, mediation is compulsory as a first step to find a settlement to the dispute. The Supreme Court held that legal proceedings initiated by a party before Court without implementing this first mediation step are no longer admissible. The penalty for not complying with such a mediation clause shows the confidence the judges have in the process. Even if the parties considered that mediation would fail once the dispute had arisen, and that mediation would therefore be a waste of time, the judges held that the parties must attempt to reach an agreement with the assistance of a neutral third party in a confidential environment, as this was their will and state of mind at the time the contract was signed.

If such a clause exists, but does not provide specific information on the organisation of the mediation, they would apply to a specialized organization such as the CMAP (Paris Mediation and Arbitration Centre, a branch of the Paris Chamber of Commerce) which is the French equivalent of the English CEDR, and a member of the "MEDAL" (the International Mediation Services Alliance). In such a case the CMAP regulations would apply. Otherwise, the parties would be required to sign a specific agreement to

draw up the rules of the mediation process and in particular the principle of confidentiality.

Nevertheless, not all contracts contain this type of clause, and not all disputes arise from a contract, particularly in matters of tortious liability, namely, when a question of liability for default of a product is at stake.

Parties are, however, entitled to apply for mediation prior to any legal dispute by sending a mediation offer to the opposing party before suing him. Statistics published by the CMAP show that in more than 60 percent of cases, such an offer is accepted (2005 statistics).

In the event that the claim is already filed before the Court, the judge can order mediation at any time if the

parties so agree (this agreement may be oral at the hearing or through written submissions). The judge then appoints a mediator (which may be done via the CMAP in commercial matters) and fixes the mediation period. In theory, the mediation process should not exceed three months, with a three-month renewal period if necessary, as well as the deposit the parties would have to pay for the fees of the mediator. This amount, as well as the general costs of the mediation are very reasonable according to CMAP statistics. These costs are from less than 1,000 euros (25 percent) to more than 4,000 euros (16 percent) for disputes in which the amounts at stake are, for 39 percent of them, higher than 1 million euros.

In the event that the mediation is ordered by the judge, the confidentiality of the discussions is required, pursuant to article 131.14 of the Civil Procedure Code.

Given the easy implementation and the real efficiency of mediation (the CMAP statistics show that for the year 2005, mediation led to an agreement in 71 percent of cases; the failure rate therefore being 29 percent. Moreover, among all the matters submitted to a mediation at the CMAP

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in 2005, 12 percent were IP related), along with the low costs and the short time frame for the process, mediation should automatically be envisaged as a viable alternative to legal proceedings, even in complicated or hostile cases.

French companies have clearly recognised this point, as they signed an Inter-company Charter for Mediation on 22 November 2005, under the aegis of the French Minister of Economy and Finance. At this date 55 amongst the biggest French companies of the Inter-professional Unions have signed the Charter.

As far as lawyers are concerned, they followed their clients' trend by signing a similar Lawyers' Charter for Mediation on 16 October 2006.

### **Recent mediation done with a mediator selected by the Mediation Center of the Paris Chamber of Commerce:**

All this started with an interlocutory injunction against a client. This client placed an order to another company to manufacture a very specific machine, which is necessary to produce the active ingredient of one of its major products. Their existing machine

was beginning to get old and, it was important to have a replacement available, just in case. The manufacturer did not deliver in due time a machine working according to the specifications indicated by the client and signed by both parties. So the client decided to stop payments. The other party sued our client in front of the Court (Tribunal de Commerce) and we asked the judge to order a mediation. We felt that this was the best solution, as the aim was not to win a litigation but to have a machine that is capable of production. The judge ordered it. We were happy with the selected mediator who, besides his technical expertise in mechanicals used in the manufacturing, notably in the pharmaceutical field, had a good approach on the psychological problems. He combined separate meetings with each party and meetings with both in the place where the machine was manufactured, as well as the place where it would be installed. It certainly took time and effort but the mediator was able to comply with the task given by the Court. In other words, to have a new version of the specifications and a corresponding schedule of payments. ■