

## MEDIATION AND ADRS (ALTERNATIVE DISPUTE RESOLUTION MODES)

### 1. ADR AS A SUITABLE ANSWER TO THE NEEDS OF THE PARTIES

In France, many voices are rising to denounce the judicial system criticized for its complexity, the duration of proceedings, the expensive costs related to it as well as the hazard implications of trial.

In addition, the litigants' concerns have evolved, reflecting new expectations for the resolution of their dispute and the means invested to find a suitable solution to their needs - beyond the only financial compensation, in most of cases.

It is within this context that alternative modes of dispute resolution (ADR) are flourishing. Prioritizing a broader perspective of disputes, both on the issues raised and the specific expectations expressed by the parties, ADR aims to bring a more satisfying answer than the classical judicial one. Indeed, the parties are able to conceive together the solution which suits them in order to end definitely their dispute and, as the case may be, rebuild their relations on new basis.

These alternative dispute resolution modes are expected to grow significantly in the future as they were considered as a priority by the successive governments to relieve congestion in the courts. They can take various forms.

### 2. MAIN METHODS IN ADR

#### MEDIATION

Confidential process taking place out of a trial (or at its margin) and which tends to the resolution of a dispute between the parties with the help of a neutral third party, independent and impartial, called mediator. The role of the mediator is to facilitate the establishment and continuation of discussions between the parties while supporting them throughout the amicable process. Mediation helps to precisely determinate the subject matter of the dispute and its profound origin for the emergence of a sustainable solution between the parties. However, the mediator will not replace the parties who remain the only decision makers for the elaboration and the implementation of their agreement.

#### COLLABORATIVE LAW/PROCESS

Process in which the parties and their lawyers, properly trained, intend to find a negotiated solution before referring the matter to the judge. The actors of the collaborative process undertake, through a collaborative charter, to respect the core principles (confidentiality, politeness, respect and transparency in the communication of information relevant for the comprehension of the dispute and its resolution). The process relies on the willingness of the parties to work jointly for the resolution of their dispute. Furthermore, the whole process is framed by the parties' lawyers who act as guarantors for the smooth running of the process and are deemed to be removed from the case in the event no solution is reached.

#### CONCILIATION

Process involving the designation of a conciliator, the mission of which is help to the parties to reach an agreement. The conciliator is free to use any means for this purpose: participate to the debate between the parties or conduct it, declare itself in favor of a solution or even apply some mediation techniques if he masters them.

#### INTEREST-BASED NEGOTIATION

Method allowing the parties to reach a balanced solution through negotiations which prioritize the listening of others and a loyal behavior. Interest-based negotiation focuses on the parties' interests (common and opposed) more than their respective positions in order to overcome a deadlock situation and promote further relations between parties. Individual related questions are set aside from the dispute allowing the adoption of a wider perspective of the solution.

#### PARTICIPATORY PROCEDURE

Procedure implemented by a fixed term agreement signed by the parties who commit to "*work jointly and in good faith to the amicable resolution of their dispute*" (article 2062 of the French Civil Code) with the mandatory assistance of their lawyers. This agreement suspends the applicable prescription, prohibits the parties from referring the matter to the court and establishes a confidential framework in which the parties will be able to raise their arguments on a legal and factual basis. In the event no agreement is reached, the participatory phase shall be considered as a preparation of the case which will be discussed before the court in a classical judicial framework.

## ARBITRATION

Procedure conventionally implemented by the parties, apart from any judicial state system which tends to the constitution of an independent and impartial tribunal. This tribunal, composed of one or more arbitrators appointed by the parties, will review their case according to the law chosen by them or in equity (amicable composition) and will deliver a decision, in principle not subject to any appeal and binding for the parties. This procedure is widely inspired from the judicial logic in its articulation but takes place according to a scheme designed and agreed beforehand by the parties. The question of its affiliation with other ADR modes is therefore subject to debate.

### 3. LUTRAN & ASSOCIÉS' EXPERTISE IN ADR

Lutran & Associés assists its clients in their disputes in view of an amicable resolution, if such a perspective can be contemplated and is in their interests.

Trained by the EIMA<sup>1</sup> to the practice of alternative dispute resolution and as a lawyer assisting its clients, graduate in collaborative law, David Lutran also acts as a Mediator. He is accredited as Mediator by the CMAP<sup>2</sup> and registered by the CNMA<sup>3</sup>. He is also referenced among the mediators of the International Chamber of Commerce ("ICC").

Co-founder and President of the AVOMARC Association (Association for practicing lawyers in Alternative Methods for Dispute Resolution), David participates in workshops and lectures related to alternative dispute resolutions, and in particular to mediation applied to various fields of activities (private and international commercial relations, labor law...).

David Lutran took part in business law-oriented mediations (disputes between partners - which may also involve patrimonial and family matters, termination of commercial relationships between clients and suppliers, loan agreements...).

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<sup>1</sup> Paris Bar International School for alternative dispute resolution

<sup>2</sup> Center for Mediation and Arbitration of Paris

<sup>3</sup> Center for Mediation of French Lawyers