MEDIATION

France

LEXOLOGY
Getting The Deal Through

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Lux Mediation

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Jonathan Lux

Lux Mediation

Quick reference guide enabling side-by-side comparison of local insights, including law and policy (definitions, models, domestic mediation law, related incentives and sanctions); mediators (accreditation, liability, appointment, conflicts of interest, and fees); procedure; settlement agreements; courts' duty to stay proceedings in favour of mediation; other distinctive features; and recent trends.

Generated 12 September 2023

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Contributors

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Patrick Klugman
p.klugman@equanim-international.com
Equanim International

Matthias Fekl
m.fekl@equanim-international.com
Equanim International

Ivan Terel
i.terel@equanim-international.com
Equanim International

Denis Musson
d.musson@equanim-international.com
Equanim International

Soraya Amrani-Mekki
contact@equanim-international.com
Equanim International

Christiane Féral-Schuhl
contact@equanim-international.com
Equanim International

Pierre Servan-Schreiber
contact@equanim-international.com
Equanim International

Paul Rolland
p.rolland@equanim-international.com
Equanim International

LAW AND POLICY

Definitions

Is there any legal definition in your jurisdiction of the terms 'ADR', 'conciliation' and 'mediation'?

In France, alternative dispute resolution methods (ADR) cover all sorts of processes aiming to settle a dispute out of state court or arbitration. Within the field of ADR, a distinction shall be made between amicable ADR, which aim to settle a dispute through an agreement, and non-amicable ADR, such as expert determination or dispute boards' adjudication. French law provides for the use of amicable ADR in various areas and under various forms. The main legal framework relates to civil and commercial mediation but there are also other specific legal provisions applicable, among others, to:

- conciliation schemes, hereinafter mentioned;
- matters relating to public law (articles L213-1 seq of the French Code of Administrative Justice);
- consumer mediation schemes (articles L612-1 seq of the French Consumer Code), only applicable between consumers and companies; and
- the national education mediation scheme.

This document will concentrate on the commercial approach to mediation, mentioning where necessary the particularities of other branches if it is relevant.

Mediation v conciliation

Even if conciliation might be understood as a generic concept including all amicable ADR, mediation and conciliation have different meanings in law and in practice. Conciliation mainly refers to:

- the intervention of a neutral party aiding the settlement of a dispute through an agreement, who is either a judge (article 21 of the French Code of Civil Procedure (FCCP)) or a judicial conciliator (articles 129-2 seq of the FCCP) appointed by the court;
- the intervention of a judicial conciliator outside of any proceeding (articles 1536 seq of the FCCP);
- to a lesser extent, the action of the parties in dispute to settle their dispute through an agreement on their own initiative (article 128 of the FCCP);
- the mandatory preliminary amicable step in (1) labour law courts (article L1411-1 of the French Labour Code), (2) the agricultural land tribunal (article 887 of the FCCP), (3) for any proceedings related to the seizure of sums on incomes (article R3252-12 of the French Labour Code), (4) dispute relating to the formation, performance or termination of an employment contract with a seafarer (article L5542-48 of the French Transportation Code) and (5) for some disputes between public entities and civil servants or beneficiaries of state aids (Decree No. 2022-433 of the 25 March 2022); and
- in the commercial dispute resolution field, a specific judicial practice followed by some French commercial courts of first instance, especially the Paris commercial court, which established their own ad hoc conciliation scheme. Once a legal action is brought, the commercial court may refer the case to a specific and independent active or former judge of the same court (including a former judge registered as judicial conciliator). The conciliation usually takes place as a one-time meeting under the supervision and authority of the relevant commercial court.

Mediation mainly refers to the intervention of a neutral party assisting the settlement of a dispute without having

recourse to the abovementioned judicial conciliation or judicial conciliator. It is defined in article 21 of the Law No. 95-125 of 8 February 1995 , which states that:

Mediation governed by this chapter means any structured process, however named, by which two or more parties attempt to reach an agreement for the amicable resolution of their disputes, with the assistance of a third party, the mediator, chosen by them or appointed, with their agreement, by the judge hearing the dispute.

Specific provisions are included in the FCCP for judicial mediation (articles 131-1 seq of the FCCP) and contractual mediation (ie, organised through the will of the parties themselves or through a mediation centre (articles 1532 seq of the FCCP).

From a mediation model perspective, the neutral party acting as mediator helps parties to find solutions to settle their dispute and restore their relationship, while the conciliator goes one step further in making settlement proposals to the parties, therefore implicitly expressing a view on their respective positions.

Law stated - 19 June 2023

Mediation models

What is the history of commercial mediation in your jurisdiction? Which mediation models are practised?

Amicable ADR have been favoured since the French revolution of 1789, except after the mid-20th century where lawyers focused more on dispute resolution mainly through courts. Since the 80s, family mediation started to develop in France, thanks to the American and Quebec influence. More broadly, the development of mediation dates back to 1995 with the introduction of the above-mentioned Law No. 95-125 of 8 February 1995 and of the Decree of 22 July 1996 , which created the above-mentioned provisions for judicial mediation. Another booster has been the implementation into French law of the EU directive on mediation of 21 May 2008, through the French Order of 16 November 2011 , which adapted the law no. 95-125 of 8 February 1995 and through the Decree No. 2012-66 of 20 January 2012 , which introduced provisions on amicable ADR in the FCCP, including mediation.

Other important developments in the legal framework for mediation include the implementation of the Directive (EU) No. 2013/11 on alternative dispute resolution for consumer disputes, which led to the creation of a consumer mediation scheme (Order N o. 2015-1033 of 20 August 2015 , creating articles L612-1 seq in the French Consumer Code), and the important update of the public law mediation provisions in 2016 (article 5 of Law No. 2016-1547 of 18 November 2016 , creating articles L213-1 seq of the French Code of Administrative Justice). While it did not result in a significant shift of the dispute resolution practice in France, it contributed to a slow change of perception on amicable ADR. As a consequence, several recent laws insisted on the need to continuously develop more forms of amicable ADR in France: Law no. 2016-1547 of 18 November 2016 included a sub-part named ‘Promoting alternative dispute resolution’ and Law N o. 2019-222 of 23 March 2019 also contains a sub-part named ‘Developing alternative dispute resolution culture’.

Mediation models

Regarding the variety of possible mediation models, the relevant applicable French laws do not mark a preference for

one over another. However, in practice, the dominant model is the facilitative one, as most mediators consider, due to their training, that they only have to facilitate exchanges between the parties. Although, some mediators consider that they should act more proactively and focus more on the outcome rather than the process itself. In practice, facilitative mediation in France may be called 'mediation' while evaluative mediation may be called 'conciliation'.

In public law mediation, the highest French court in the public law system (Conseil d'Etat) recommended that mediators appointed by public judges should be familiar with the specific features of administrative litigation, which may implicitly call for a more evaluative-style practice of mediation in this area.

Law stated - 19 June 2023

Domestic mediation law

Are there any domestic laws specifically governing mediation and its practice?

The European Union Directive on mediation has been implemented into French law by the order of 16 November 2011 amending Law No. 95-125 of 8 February 1995 and by Decree No. 2012-66 of 20 January 2012, introducing and amending provisions on both contractual and judicial mediation in the FCCP. Consequently, French law on private mediation is consistent with the EU Directive on mediation. As of today, private law mediation is governed by the following scattered laws and regulations:

- Law No. 95-125 of 8 February 1995;
- articles 131-1 seq of the FCCP for judicial mediation; and
- articles 1532 seq of the FCCP for contractual mediation.

Some provisions are applicable to both mediation and conciliation, such as articles 127 seq, 1528 seq and 1565 seq of the FCCP. As mediation is of a growing interest, it is specifically stated that it is possible to implement it during a proceeding before the highest French court in the private law system (Cour de cassation , see article 1012 of the FCCP) and public law system (Conseil d'Etat , see article 114-1 of the French Code of Administrative Justice).

Mediation can also be implemented in any field of private law as long as the claims and rights being disputed and negotiated do not concern public order or non-disposable rights. As a matter of fact, mediation may be used regardless of the type of dispute (contract, tort, asymmetrical litigation, collective redress, governance crisis, etc) and regardless of the field (bankruptcy, business and corporate, competition, finance and insurance, collective labour disputes, construction, industry and transport, IP/IT, media, etc). Mediation, especially when it is contractual, provides the flexibility needed to adapt to and take into account the specifics of all these situations.

Law stated - 19 June 2023

Singapore Convention

Has your state signed and ratified the UN Convention on International Settlement Agreements Resulting from Mediation or is it expected to do so?

Like other member states of the EU, France has not signed the Singapore Convention on Mediation. The main reason may stem from the current legal debate on whether the signature of the Singapore Convention falls within the EU's sphere of competence or not. Positively, it will then be necessary to determine whether the EU's competence is

exclusive (signature by the EU without the need for ratification by all EU member states) or shared (the Convention must be signed and ratified by all EU member states). If not, then every member state will be free to enter into the Convention individually.

Brexit permitted the UK to recently sign the Convention, which it considers as contributing to the international attractiveness of its domestic mediation and dispute resolution practice. There is now a growing pressure for the prompt signature of the Convention by France, without waiting for the outcome of the legal debate on EU competency.

Law stated - 19 June 2023

Incentives to mediate

To what extent, and how, is mediation encouraged in your jurisdiction?

In France, mediation is encouraged in many different ways. Despite the absence of a mandatory amicable settlement attempt prerequisite, many legal provisions and case law are prompting to resort to it:

- based on article 21 of the FCCP, judges may propose a mediation or conciliation and consequently designate a mediator or in some courts a judicial conciliator at any stage of the proceeding, since it is part of the judge's general duty to help parties to amicably settle their disputes;
- article 127-1 of the FCCP allows judges to order parties to meet with a mediator for information purposes only;
- article 750-1 of the FCCP provides a mandatory attempt – eventually through mediation – to amicably settle disputes of an amount of less than €5,000, or disputes relating to delineation and use of land property, or to abnormal neighborhood disturbances, if civil courts have jurisdiction (therefore not applicable to commercial courts);
- for civil cases (ie, excluding commercial matters) of a value of less than €10,000, parties can file a lawsuit requesting for a preliminary judicial conciliation (articles 820 seq of the FCCP);
- at the pre-trial stage before civil courts, parties may decide to conduct the inquiry of their case without any intervention of the judge through a process named pre-trial participatory procedure. This process specifically mentions that parties can resort to a mediation or a judicial conciliator (article 1546-3, 5° of the FCCP) or that they can amicably settle their dispute prior to termination of process (articles 1564-1 seq of the FCCP);
- settlement agreement can be made enforceable and be granted the effect of definitively settle the dispute;
- in the event of a dispute relating to the performance of a public procurement contract, purchasers and contractors may recourse to the 'Mediator for Business' (article 2197-23 of the French Procurement Code);
- French case law states that failure for a party to comply with contractual provisions setting out compulsory amicable dispute resolution prior to submitting a claim to a court results in a ground for dismissal of the lawsuit;
- legal aid is available to indigent parties under certain criteria when they resort to mediation, conciliation or participatory procedure to settle;
- lawyers' rules of professional conduct recommend they discuss with their clients the possibility of resolving their disputes by amicable or alternative dispute resolution before or during any legal proceedings, or when drafting a legal document by including a clause to this effect (article 6.1 of the French National Lawyers' rules of professional conduct);
- in 2021 France created the National Mediation Council to structure mediation practice and develop it. It held its first session, with its freshly appointed members, on 12 June 2023; and
- the main French Insurance companies agreed at the end of 2020 to extend the scope of the French Insurance Mediator, which was limited to disputes related to insured individuals, to disputes with insured professionals regarding coverage of business interruption losses.

Courts also decided to adopt policies regarding amicable dispute resolution. Commercial courts and some Courts of Appeal have developed internal policies to increase the use of mediation or conciliation. For example:

- some courts organise a specific procedure whereby the parties are summoned twice, once for a conciliation hearing with a judicial conciliator and, in the event the conciliation attempt fails, once again for a hearing before a judge. The Paris Commercial Court also proposes at several stages of the proceedings that the parties resort to conciliation with the assistance of an independent judge or judicial conciliator;
- some courts' sections organise the presence of mediators or judicial conciliators at hearings, allowing the judge to invite the parties on the bench to meet these mediators and judicial conciliators for an informational session on mediation;
- some judges sanction the refusal to go to the mediation information meetings or to mediation through an allocation of legal costs and expenses to the defaulting party; and
- courts organise many local symposiums on amicable dispute resolution with the legal community of their respective jurisdictions.

More broadly, the Minister of Justice has been developing since the beginning of 2023 a new amicable dispute resolution policy. Furthermore, some national mediation services have been institutionalised and are offering free of charge services for specific purposes:

- the national 'mediator for businesses' is a department of the Ministry of Economy that aims to resolve disputes between commercial companies or between these companies and French public entities. This service is primarily devoted to commercial disputes between companies with unbalanced negotiation powers (large v small, ie, contractors and sub-contractors), abrupt termination of long-established commercial relationships or issues regarding payment terms;
- the national 'mediator for loans' is a department of the French Central Bank that aims to resolve disputed issues between commercial borrowers and financial institutions regarding their existing loans, refusals or difficulties in granting financial credits; and
- the 'mediator for agricultural trade' is appointed by the Ministry for Agriculture, it may intervene upon parties' request in any dispute relating to the conclusion or performance of a contract for the sale or delivery of agricultural products, or the sale or delivery of food products intended for resale or processing (article 632-28 of the French Rural and Fishing Code).

These public national mediation services regulate and equalise the unbalanced powers that parties may have in their commercial dealings, as well as facilitate the resolution of disputes in this asymmetrical context.

Law stated - 19 June 2023

Sanctions for failure to mediate

Are there any sanctions if a party to a dispute proposes mediation and the other ignores the proposal, refuses to mediate or frustrates the mediation process?

Generally speaking, there is no sanction if a party to a dispute refuses another party's or the judge's proposal to attempt a mediation. However, in certain circumstances, some sanctions are applicable:

- if parties do not respect the mandatory preliminary attempt to settle provided by article 750-1 of the FCCP, it results in a ground for dismissal. In this case, parties also have to indicate the diligence undertaken to respect an obligation to attempt to settle, or they risk seeing their application being declared void (article 54 of the FCCP);
- the parties are subject to a ground for dismissal if they do not respect the contractual provisions setting out compulsory amicable dispute resolution prior to submitting a claim to a court; and
- some judges also sanction parties through the allocation of the costs and expenses of the trial when one refuses to go to a mediation information meeting or to go to mediation.

Law stated - 19 June 2023

Prevalence of mediation

How common is commercial mediation compared with litigation?

There is a growing trend for commercial mediation in France as corporations and business lawyers are more and more inclined to use it. Such trends are not necessarily reflected in statistics, which are rare in the field mainly for three reasons: first of all, there is no national reporting on judicial mediation, each court is free to report such information for itself. Second, mediation can be conducted on an ad hoc and personal basis by a mediator outside any referenced mediation centre. Third, mediation is guided by the principle of confidentiality, which makes statistical reporting far more difficult.

Only large centres publish statistics, such as the Paris Mediation and Arbitration Center. For instance, almost 7,000 legal actions for commercial litigation were processed in 2021 by the Commercial Court of Paris but only 330 commercial mediations, whether contractual or judicial, have been reported. If it is not yet mainstream, major disputes are already handled by mediation.

Law stated - 19 June 2023

MEDIATORS

Accreditation

Is there a professional body for mediators, and is it necessary to be accredited to describe oneself as a ‘mediator’? What are the key requirements to gain accreditation? Is continuing professional development compulsory, and what requirements are laid down?

In France, there is no national professional body nor any official status for mediators, and there is no obligation for mediators to be accredited with a centre or to be registered on a public list. Theoretically, anyone can act as a mediator. However, acting as such it must respect some criteria, and the market practice and various codes of conduct call for minimum legal and professional standards.

Law No. 95-125 of 8 February 1995 states that: ‘The mediator carries out his duties impartially, competently, independently and diligently’.

For judicial mediation, article 131-5 of the French Code of Civil Procedure (FCCP) requires that the mediator shall (1) not have been convicted of any offence, or been disqualified or disqualified as a result of any offence mentioned in bulletin no. 2 of its criminal record, (2) not have been the perpetrator of acts contrary to honour, probity or good morals that have resulted in disciplinary or administrative sanctions such as removal from office, striking off the roll, revocation, withdrawal of approval or authorisation, (3) possess, through past or present practice, the qualification required by the nature of the dispute, (4) provide proof, as appropriate, of training or experience suitable for the practice of mediation and (5) present the guarantees of independence necessary for the practice of mediation.

For contractual mediation, the mediator shall only respect the provisions (1) and (3) mentioned above (article 1533 of the FCCP).

By way of exception, some mediation schemes outside the scope of commercial mediation require an accreditation to act as mediator, for example: the consumer mediation schemes, where an accreditation by a national commission of the French Ministry of Economy is mandatory, or the health collective redress mediation scheme, where a limited number of mediators, appointed by the Ministry of public health, are authorised to intervene.

Optional list of mediators

Each Court of Appeal draws up a list of mediators in civil, labour law and commercial matters (article 22-1-A of Law No. 95-125 of 8 February 1995 and Decree No. 2017-1457 of 9 October 2017). Family mediators have a special dedicated section as well as online dispute resolution providers. If a mediator wants to be enrolled, it must justify the required experience and minimum training in mediation, which are set by the relevant Court. These lists are made for information of judges only, to guide them when appointing a mediator. As a matter of fact, registration to these lists is not mandatory to be appointed as mediator.

Soft law

The code of conduct of many mediation centres also requires minimum training and/or experience in mediation. The national mediator's code of conduct sets for example that 'Mediators must have completed, and hold, specific mediation qualifications, in accordance with the standards or accreditation criteria in force in each mediation center' and that it must 'update and perfect their theoretical and practical knowledge through ongoing training'. Such centres generally require 56 to 200 hours of training.

Law stated - 19 June 2023

Liability

What immunities or potential liabilities does a mediator have? Is professional liability insurance available or required?

The mediator only has a reasonable best-efforts obligation: it must do everything reasonably possible so that the parties can resolve amicably their dispute. However, it may be held liable for damages in case of violation of the legal duties applicable to its intervention, for example, in case of lack of independence or impartiality or in case of breach of confidentiality.

Professional liability insurance is not mandatory for mediators. However, it is generally required under the individual codes of conduct applicable in mediation centres. The same subscription is also required for registration on the mediators' list of a French Court of appeal, even though it is not a legal requirement.

Law stated - 19 June 2023

Mediation agreements

Is it required, or customary, for a written mediation agreement to be entered into by the parties and the mediator? What would be the main terms?

It is not required by the applicable laws for parties to conclude a written mediation agreement, especially in judicial or contractual mediations, which are governed by the FCCP or the rules adopted by the relevant mediation centre. However, it is highly recommended to draft one to clarify or adjust the somewhat scattered and sometimes inadequate legal framework, or to adapt the flexible rules of a centre to the specific needs or common wishes of the parties. The main provisions dealt with in a mediation agreement may include: (1) duration of the process, (2) organisation of the process, (3) designation of the mediator, (4) fees for the mediation, (5) confidentiality and (6) applicable law.

Law stated - 19 June 2023

Appointment

How are mediators appointed?

This depends on the legal framework of the relevant mediation process as follows:

- for a contractual ad hoc mediation, parties appoint the mediator themselves;
- for an institutional contractual mediation (ie organised with the help of a centre): the centre either submits one or several names of proposed mediators for the parties to agree on, or appoints the mediator in the absence of agreement between the parties. It is also widely accepted that the parties can jointly request from the centre the appointment of a specific mediator; and
- for judicial mediation, judges appoint the mediator, which may be either a natural person or a mediation centre. Judges may also accept to appoint a mediator jointly proposed by the parties, even if judges are not obliged to follow such a request. When judges appoint a mediation centre as mediator, the centre will designate a natural person who will intervene as such.

In commercial mediation, the recommended option is the appointment of a mediator through a mediation centre, such as Equanim International, which would generally have a wider pool of affiliated mediators from which to select the most adequate profile to the specificities of the dispute.

Law stated - 19 June 2023

Conflicts of interest

Must mediators disclose possible conflicts of interest? What would be considered a conflict of interest? What are the consequences of failure to disclose a conflict?

There is no direct obligation under French law for the mediator to disclose any interest it may have with the parties. However, French law requires the mediator to act 'independently' and 'impartially', which implies to disclose any conflict of interest it may have with the parties. Consequently, it shall disclose any facts or circumstances which might call into question its independence (eg, financial interests with one of the parties or contractual relationships). Most of the private code of conduct require mediators to do so. Mediators acting in breach of this duty may be held liable, even if the conditions required to implement a lawsuit on this basis are difficult to fulfil.

Law stated - 19 June 2023

Fees

Are mediators' fees regulated, or are they negotiable? What is the usual range of fees?

Mediators' fees are not regulated in commercial mediation. Their determination varies depending on the legal framework in which the mediation takes place:

- in ad hoc contractual mediation, parties negotiate the fees with the mediator, which can be an hourly rate, a lump sum or any other specific fee arrangement;
- in institutional contractual mediation, mediation centres determine the mediator's fees applicable to the parties, mainly on an hourly rate basis and sometimes on a lump sum basis. Some mediation centres make their tariffs public, which are often only indicative and subject to specific proposals depending on the size and complexity of the cases; and
- in judicial mediation, the judge who orders the mediation also determines a provisional fixed fee, which the parties will then adapt and agree on with the mediator (article 131-13 of the FCCP). The judge only intervenes if the parties and the mediator are unable to agree on the fee arrangement. Again, fees are mainly fixed on an hourly rate basis and sometimes on a lump sum basis.

The question on whether the mediators' remuneration could include contingency fees is still debated in France within the mediation community. Nowadays, nothing prohibits this practice in commercial mediation, provided it is transparent and agreed between the parties in mediation. Some practitioners are, however, claiming that such a fee would impact the mediator's neutrality because of his or her financial interest in the result of the process, namely for the parties to find an agreement. Many lawyers and companies consider on the contrary that this financial incentive ensures that the mediator will use its best efforts, push and favour ideation, for the parties to find solutions to their dispute and reach a settlement agreement.

By way of contrast, mediators' fees are regulated for mediators acting in family matters under certain conditions and when one or more parties are entitled, because of their complicated financial situation, to legal aid.

Law stated - 19 June 2023

PROCEDURE

Counsel and witnesses

Are the parties typically represented by lawyers in commercial mediation? Are fact and expert witnesses commonly used?

Representation by external counsels is not mandatory for any mediation scheme (ad hoc, institutional, or judicial). However, in commercial mediation, it is common for the parties to be assisted by their respective in-house or external lawyers.

Contractual mediation is a very flexible process wherein parties can decide, with the help of the mediator, to appoint an expert or to hear witnesses in support of their mediation process. Mediation rules of certain mediation centers may also explicitly provide for this option. In judicial mediation, article 131-8 of the French Code of Civil Procedure (FCCP) grants powers to the mediator to hear any third party who accepts subject to the prior approval of the parties in mediation.

Moreover, the FCCP provides the parties in mediation and their mediator with the opportunity to arrange for a jointly agreed private expertise (articles 1547 seq of the FCCP), with the expert's report and opinion having the same evidentiary value as a court-ordered expertise.

Law stated - 19 June 2023

Procedural rules

Are there rules governing the mediation procedure? If not, what is the typical procedure before and during the hearing?

There is no pre-defined methodology for conducting the mediation process. The mediator remains free to act according to its sole will, except if the parties have agreed on a certain behavior or method. As a matter of fact, the mediator may meet at the beginning of the process with the parties together or separately and require, or not, submissions of their respective dispute statements. It may be recommended for parties to enquire which method the mediator intends to apply before the start of a mediation to avoid any deceptive effect for the parties. It is likely that the mediator will adopt the facilitative method, without the use of caucus, as it is what is mainly taught in French mediation training.

A new approach, introduced by Equanim International and called the 'global mediation method', aims to accompany parties with the potential solicitation of mediation by one party, their introduction into the mediation process and agreement on its details, their potential joint appointment of an expert in support of the mediation if required and, assistance in the monitoring and implementation of the executed settlement agreement if needed by the parties. This 'global mediation method' has been proven very effective in complex disputes and settlements and is highly appreciated by the parties involved.

Law stated - 19 June 2023

Tolling effect on limitation periods

Does commencement of mediation interrupt the limitation period for a court or arbitration claim?

For contractual mediation, whether ad hoc or institutional, article 2238 of the French Civil Code states that the statute of limitation period is suspended from the date, after a dispute arises, at which the parties resort to mediation (ie, the date of the written mediation agreement or, in its absence, the date of the first mediation meeting). The running of the limitation period resumes for a mandatory minimum period of six months, following the date on which any or all parties to the mediation, or the mediator itself, declare the end of the mediation. For judicial mediation, the question is irrelevant since the filing of a case with a court interrupts the limitation period. Same applies in public law mediation (article L213-6 of the French Code of Administrative Justice)

However, specific delays provided for certain disputes, existing in parallel to the limitation period, may continue to run despite the statute of limitation period ('prescription') being suspended where parties are implementing a contractual mediation (ie, the delay to file an appeal in front of the civil courts of appeal is of one month), except for mediation in public matter (article L213-6 of the French Code of Administrative Justice)

Law stated - 19 June 2023

Enforceability of mediation clauses

Is a dispute resolution clause providing for mediation enforceable? What is the legal basis for enforceability?

A dispute resolution clause providing for mediation is mainly enforceable through a procedural sanction resulting in the inadmissibility of the legal action filed in courts in violation of such clause, as French courts have ruled since 2003 (Ch mixte, 14 Feb 2003, Nos 00.19-423 et 00 19-424). The same sanction applies in arbitration (C iv 1ère, 1 Feb 2023, No. 21-25 024). However, this type of clause must fulfill some requirements in order to be enforced: it needs to provide a (1) mandatory and (2) preliminary (3) recourse to mediation before any court or arbitration proceeding and (4) stipulate a minimum set of implementation requirements (eg how the mediator will be appointed, etc). Referring to mediation rules (eg the Equanim International Mediation Rules) easily fulfill such requirements. Such clauses also benefit from a favorable legal framework regarding the termination of civil contracts they are included in, as article 1230 of the French Civil code provides that such termination does not affect the dispute resolution clause. By way of exception, the aforementioned sanction does not apply when parties are filing a lawsuit to request an interim or precautionary measure in a context of emergency. Aside from such context, the clause should be enforceable. Same reasoning applies for lawsuits aiming to request investigatory measures.

Multiple-step dispute resolution clause example

A classic example of a multistep contract clause is the following:

In the event of a dispute arising out of or in connection with the Contract (insert the term referring to the contract which the clause will be implemented)', the parties shall attempt, in a mandatory manner and before any other proceeding, to settle their dispute in accordance with the mediation rules of Equanim International.

If the dispute has not been settled pursuant to the said mediation rules within [XX days/months] following the filing of a request for mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled through [...]

Law stated - 19 June 2023

Confidentiality and without prejudice privilege of proceedings

Are mediation proceedings strictly private and confidential and subject to without prejudice privilege? To what extent does confidentiality apply within the mediation itself?

Confidentiality is a key feature of mediation and is legally protected in France. Article 21-3 of Law No. 95-125 of 8 February 1995 states that: 'Unless the parties agree otherwise, mediation is subject to the principle of confidentiality. The mediator's findings and any statements made during the mediation process may not be disclosed to third parties or invoked or produced in any judicial or arbitration proceedings without the agreement of the parties'.

These provisions remain too vague and one may wonder if any element disclosed in mediation is covered. Judges recently ruled that the confidentiality principle was applicable to all elements brought in the mediation process (Civ 2e, 9 June 2022, No. 19-21.798). The only exceptions provided to this principle are limited disclosures required:

- for compelling reasons of public order;
- for reasons relating to the protection of the best interests of the child or relating to the physical and psychological integrity of a person; and
- and when the disclosure of the existence or the content of the mediation agreement is necessary for its implementation or execution.

In terms of sanction, judges also ruled that the elements brought in a lawsuit in breach of the confidentiality principle should be declared inadmissible, ex officio (ie, the judge has a duty to act so) if necessary (Civ 2e, 9 June 2022, No. 19-21.798). The same applies to parties' settlement offers communicated to the mediator (Versailles Court of appeal, 26 January 2021, No. 19/05110).

Law stated - 19 June 2023

Success rate

What is the likelihood of a commercial mediation being successful?

There is no national data publicly available on the number or success rate of commercial mediation, including judicial mediation. Only mediation centers or government-related mediation bodies are able to provide data related to their mediation activity such as number of mediation cases and their rate of success. Based on the published data, it is estimated that the average success rate of commercial mediation is above 70 per cent.

Law stated - 19 June 2023

SETTLEMENT AGREEMENTS

Formalities

Must a settlement agreement be in writing to be enforceable? Are there other formalities?

A mediation settlement agreement is not subject to any requirement regarding its form, even if in most of the cases, parties will draft and execute it in written. The writing form is also required for a settlement to be submitted to the court (eg, for mediation settlement in consumer collective redress action where the court certification is required) or to be legally qualified as a ' transaction' (a special type of settlement agreement) between the parties under French laws.

A 'transaction' is a specific contract under article 2044 of the French Civil Code pursuant to which the parties, through mutual concessions, amicably settle a dispute that has arisen or prevent a dispute from arising between them. The benefit of entering into a transaction is to definitively settle the dispute, as it prevents the parties from continuing or initiating new judicial proceedings against each other for the same matters as those settled.

Law stated - 19 June 2023

Challenging settlements

In what circumstances can the mediation settlement agreement be challenged in court? Can the mediator be called to give evidence regarding the mediation or the alleged settlement?

A mediation agreement is a civil contract and it requires the standard conditions of validity: (1) the parties must consent to the agreement; (2) the parties must have the legal capacity to enter the agreement and (3) the agreement

must have a lawful and certain object and content. Defects of consent (error, fraud and violence) may constitute a ground for challenging the mediation agreement.

Law stated - 19 June 2023

Enforceability of settlements

Are there rules regarding enforcement of mediation settlement agreements? On what basis is the mediation settlement agreement enforceable?

Mediation settlement agreements can be made enforceable through two main mechanisms:

- the courts' certification or approval (homologation), for which judges will verify (1) whether the agreement meets the legal criteria of a settlement; (2) that the agreement is not contrary to public policy and morality and (3) that it is not manifestly null, void or nonexistent. The judge's control is consequently very limited (articles 1565 seq of the French Code of Civil Procedure (FCCP)). This mechanism is also possible in public law mediation, where the judge can exercise greater control; and
- an enforcement order granted by the court clerk for agreements that are countersigned by outside lawyers (articles 1568 seq of the FCCP).

For certain specific disputes, settlement agreements must be submitted for the court's certification (ie, in collective redress mediation). It also possible to resort to a notary whose authentic instruments are also considered as writ of execution.

Law stated - 19 June 2023

STAYS IN FAVOUR OF MEDIATION

Duty to stay proceedings

Must courts and tribunals stay their proceedings in favour of mediation? Are arbitrators under a similar duty?

For a judicial mediation, judges may stay the proceeding for six months maximum (three months renewable once), while parties implement the mediation it ordered. This measure does not relieve the judge who may at any time take any other measures it deems necessary. If it orders a mediation or prompt the parties to meet a mediator for information purpose, such measure interrupt the time limits to file submissions and request a cross-appeal during the course of an appeal (article 910-2 of the French Code of Civil Procedure (FCCP)). The interruption is effective until the expiry of the mediator's term of office.

If parties decide to implement a contractual mediation in parallel with a court proceeding, they may ask judges to stay the judicial proceedings but judges are under no obligation to accept.

In arbitration, parties may ask arbitrators to stay the proceedings if they are implementing a mediation, except if arbitration rules provide otherwise. Considering the contractual nature of arbitration, arbitrators will be inclined to accept even if they are under no obligation to do so.

Law stated - 19 June 2023

MISCELLANEOUS

Other distinctive features

Are there any distinctive features of commercial mediation in your jurisdiction not covered above?

Early evaluation

Early evaluation as a means to enable the parties involved in the dispute to make informed decisions regarding the pursuit or settlement of a dispute is not well developed in France. Some courts (eg, the Paris commercial court) are implementing this early stage to promote the recourse to amicable ADR. In front of civil courts of first instance, parties have to inform the judge whether or not they intend to enter in a pre-trial participatory procedure (article 776 of the French Code of Civil Procedure (FCCP)). Some mediation centres, like Equanim International, are also starting to provide such early evaluation services.

Hybrid ADR

Generally speaking, hybrid ADR methods are not often used in France. The main one is ‘Med-arb’, which refers to the practice of combining mediation and arbitration. Depending on which procedure is initiated first, it can be referred to as 'Med-arb', 'Arb-med', 'Med-Arb-Med' or 'Arb-Med-Arb'. It finds its legal basis under French law in article 21 FCCP, which allows the arbitrator to conciliate, that is to encourage a settlement between the parties during the proceedings, or help organise a conciliation with a neutral third-party neutral. The expression is mainly used to encompass two different situations:

- The arbitrator himself attempts to conciliate the parties during the course of an arbitration (aka simultaneous 'Arb-Med'). Naturally, the principle of due process limits the scope of such practice (in this respect, see article 1520 of the FCCP listing violations of due process as a basis to request the setting aside of an award).
- Mediation and arbitration proceedings are combined, with the same person acting alternatively as arbitrator or mediator (ie, med-arb-med, arb-med-arb) or with different persons acting as a mediator and arbitrator simultaneously. For reasons mentioned above, there is a risk that the award be set aside if the mediator subsequently acts as arbitrator. Note, however, that parties can always choose to have the mediator successively act as the arbitrator, and even resort to caucuses. It is nevertheless recommended that these procedures, mediation and arbitration, be conducted by different neutral entities.

Online dispute resolution

Online dispute resolution (ODR) might be understood in two manners under French jurisdiction: on one hand, the recourse to IT tools to conduct the mediation (telephone, videoconference, etc), on the other hand, the recourse to partially automatised mediation processes through artificial intelligence.

Regarding the former, the covid-19 pandemic has boosted this practice, even if there was skepticism at the beginning. Many understood that it should not be an obstacle and that a mix of face-to-face and remote mediation could be as efficient, if not more from a cost and environmental standpoint especially with distant or international parties, as a fully in-person proceedings. Some even consider that on balance fully remote mediation may also be a viable alternative for many disputes, in particular for the smaller.

For the latter, French law provides a legal framework for automatised mediation since 2019 (see articles 4-1 seq of Law No. 2016-1547 of 18 November 2016 modified by article 4 of Law No. 2019-222 of 23 March 2019). The choice was made to let private entities in the online ADR market develop while limiting the control over the operation of the

services they offer. Online ADR service providers must:

- abide by the obligations arising from personal data protection regulations and, unless otherwise agreed by the parties, to confidentiality obligations;
- limit the use of algorithms or automated systems; and
- carry out their mission with impartiality, independence, competence and diligence.

The text also specifies that online ADR service providers may ask to be certified by an accredited body (the COFRAC), without being mandatory. As an example, the Ministry of Justice implemented a brand named 'Certilis' to provide online ADR with certification.

New policy on amicable dispute resolution

On 5 January 2023, the Minister of Justice released a new action plan for justice in France, including an ambitious amicable dispute resolution policy. Four main measures have been released:

- introduction of an amicable settlement hearing in front of civil courts, whereby judges may refer a case to another judge in order to try to amicably resolve the dispute submitted to their jurisdiction;
- introduction of a possible caesura (bifurcation) of the trial in certain cases, by which the judge makes a ruling on the merits of the case and then lets the parties negotiate and settle on the quantum of damages;
- new drafting of the provisions on amicable ADR in the FCCP by the beginning of 2024; and
- a change in the training provided in professional legal schools (for judges and lawyers) in order to make it more oriented towards the amicable resolution of disputes rather than judicial adjudication of the cases.

New areas for mediation

Mediation is gaining traction in certain fields of disputes where it was not yet used by the parties, for example in civil liability or collective redress disputes. Regarding these new areas, two are currently under the spotlight.

Corporate duty of vigilance

Articles L 225-102-4 seq of the French commercial code provide that companies exceeding certain thresholds have a duty of vigilance with regard to the companies they control and all their contractors and suppliers. This corporate duty of vigilance is structured around two mechanisms: (1) duty to establish a mapping of the risk induced by companies' activities (violation of fundamental rights, health, personal safety, and the environment in connection, etc) and to take measures to manage them, and (2) a redress and liability mechanism to sue companies in breach of this duty. The first decision based on the aforementioned law was rendered by the Paris Judicial Court on 28 February 2023, where judges ruled the law provided a 'vague' duty inviting companies and stakeholders to co-construct the response to the identified risks. Mediation, therefore, appears to be the perfect tool to establish the appropriate framework for this co-construction.

The European Commission adopted a proposal for a Directive on Corporate Sustainability Due Diligence that extends the scope of the required duty and which promotes a spirit of dialogue that mediation will easily satisfy.

Project mediation

Considered by an increasing number of companies as an effective dispute prevention method, project mediation is embedded in the contractual scheme of the project to support its smoother implementation and avoid any interruption in its execution. From the start of the project, a mediator is appointed by the contracting parties to enable his or her intervention as soon as a potential dispute situation arises. Project mediation can be used in all sectors (real estate and infrastructure, mining and heavy manufacturing industry, IT, pharmaceuticals, defence and aerospace, etc) in which strategic, complex multi-party, medium or long-term projects are being carried out (M&A, JVs, consortium, licences, PPP, long term supply agreements, etc) or in projects that may face strong opposition from stakeholders (eg, NGOs or local residents).

Dispute relating to digital activities

Developments in European regulations have an impact on French mediation and ADR law, as these methods are increasingly favoured by the European Union to resolve litigation, particularly in the context of regulating digital activities. For example:

- Regulation (EU) 2019/1150 imposed on online platforms a mandatory mediation mechanism for the resolution of disputes between platforms and their business and corporate website users (see articles 12 and 13);
- Regulation(EU) 2022/1925 (the Digital Market Act) makes mandatory for gatekeepers to publish general conditions of access including an alternative dispute settlement mechanism (see especially article 6.12); and
- Regulation (EU) 2022/2065 (the Digital Services Act) provides for a mandatory out-of-court settlement mechanism regarding disputes between online platforms and the recipients of their services (see especially article 21).

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UPDATE AND TRENDS

Opportunities and challenges

What are the key opportunities, challenges and developments that you anticipate relating to mediation in your jurisdiction?

More than 10 years after the implementation of the European Directive, mediation is at a turning point in France. Since January 2023, the French government has decided to push for the amicable settlement of disputes and may soon adopt new legislation experimenting with financial incentives for parties to use these methods, which could constitute a major change in French litigation practice. Companies are also facing new legal challenges (eg, corporate sustainability due diligence or class action lawsuits) calling for mediation as the primary dispute resolution mechanism.

As a result, new mediation centres are created marking an upgrade and expansion in the offer of mediation or dispute resolution services on the market. For example, Equanim International, created in March 2021, is the first international mediation platform, allowing parties to tailor their mediation proceedings in compliance with its rules, and with the possibility of using high-level mediators such as former CEOs or heads of government. It also offers mediation services addressing a wide range of commercial disputes, including new types of disputes that companies are facing.

Such a positive conclusion does not call into question the remaining challenges for the development of mediation. There is a lack of awareness about mediation among companies and the practices of mediators sometimes do not meet their expectations in terms of dispute resolution (eg, proactivity to steer the process or the evaluation of the case,

or both). Moreover, certain external lawyers are still reluctant to refer the cases they handle to ADR, as this could reduce the amount of fees they could apply in the event of a long-lasting dispute. Nevertheless, a growing number of external lawyers see amicable ADR, and especially mediation, as an opportunity to develop intimate and long-term relationships with their clients as a result of expeditious and cost-efficient resolution of their contentious business and legal issues.

*Sorayah Amrani-Mekki, professor at SciencesPo Law School, Christiane Féral Schul, mediator, attorney at law, former President of the National Bar Council and of the Paris Bar, and Pierre Servan-Schreiber, mediator, attorney at law, member of the Paris and New York Bars, are all members of Equanim International's scientific committee.

Law stated - 19 June 2023

Jurisdictions

Bermuda	Trott & Duncan
France	Equanim International
Ghana	Sam Okudzeto & Associates
Greece	Bahas Gramatidis & Partners
India	Mediator Vikram
Nigeria	Chief Rotimi Williams Chambers
Switzerland	von Segesser Law Offices
United Kingdom - England & Wales	Lux Mediation