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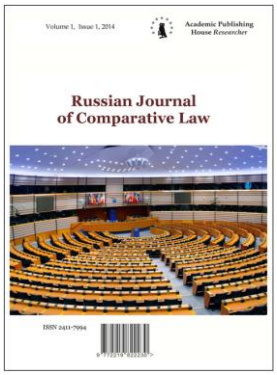

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Court-annexed and Contractual Mediation in France

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Abstract

The article deals with two forms of mediation in France: court-annexed mediation and contractual mediation. The European Union law and the French legislation, which regulate these two forms, are presented. In particular, it analyses the provisions of the Directive 2008/52/CE, the Code of Civil Procedure, and the modified Act of 8 February 1995. The main attention is paid to the description of court-annexed and contractual mediation, their differences, and their conditions of implementation. Moreover, we analyze the procedure established for judicial mediation and its performance in the Centre for Mediation and Arbitration of Paris. The question about distinctive criteria between mediation and conciliation also arises.

Keywords: France, mediation, court-annexed mediation, contractual mediation, regulation.

Introduction

Mediation has been practiced in France for many years. Some problems can be solved by using the mediation procedure. For instance, it helps to reduce costs, to avoid problems with enforcement or execution when court decisions were not fully accepted, to encourage dialog between parties and to save good relations, especially in business and family cases.

There are substantially two forms of mediation in France: court-annexed mediation *(mediation judiciaire*), applicable only to civil, family, commercial and labor cases, and contractual mediation *(mediation conventionnelle)*, available for parties at any time without any juridical involvement and based on their free will. Various special provisions regulate court-annexed mediation, in comparison with the few laws dealing with contractual mediation [1].

Method & Methodology

The main sources for writing this article were the official documents in the European Union legislative level and the French national legislative level, plus the practical information provided by mediation institutions. To create a clear understanding of the laws applying to the French mediation we used documentary analysis, systemic methods and legal techniques. The method of comparative analysis defines the differences between contractual and court-annexed mediation.

Legal regulation of mediation: European Union and France

First of all, we would like to highlight several important regulations of mediation (both court-annexed and contractual) inside the French and European legal framework, as it is not possible to analyze French mediation law without reference to the European Union law.

Since 1980, the Council of Europe is very interested in alternative forms of dispute resolutions, and several Recommendations were created about amiable resolutions of conflicts, their forms and their application in family, criminal, civil, commercial law matters (for example, Recommendations No. R (81)7, No. R (86) 12, No. R 98(1), No. R 99 (19), etc.). In the European Union level the initiative was adopted during the meeting of the European Council which took place in Tampere on the 15th and 16th of October 1999. This Summit was used to make the so-called "Area of freedom, security and justice" one of the primary objectives of the European Union. Among several measures presented, The Council invited the member states to stimulate, establish and organize "Alternative forms of Resolution on Conflicts" [2]. In order to prepare the evolution of justice in the European Union, the European Commission presented a Green Paper on Alternative Dispute Resolution in 2002. The purpose of the Green Paper was to initiate a broad-based consultation as regards alternative dispute resolution in civil and commercial law [3].

Years later, the legislation has been concretized by the Directive 2008/52/CE of the European Parliament and the European Council of Mai 21, 2008 "On certain aspects of mediation in civil and commercial matters" [4]. Directive looks to guarantee a more effective and appropriate justice; it improves access to forms of resolution of conflicts, specially favoring the offer of mediation services, during trials and outside trials; seeks to ensure a balanced relationship between mediation and judicial proceedings. From the legal point of view, it is very important that the Directive broadly defines "mediation" and "mediator":

"Mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State."

"Mediator means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation."

The Directive also contains several provisions about the scope of application, the recourse to mediation, the enforceability of agreements resulting from mediation, the effects of mediation on limitation and prescription periods, as well as about confidentiality.

Next basic regulation which was published in 2004 is the Code of good behavior for mediators (or European code of conduct for mediators), created by the European Commission in 2004 [5]. It provides that the mediator should be competent, independent and impartial, and have a good knowledge of the mediation procedure. The mediator must keep confidential all information concerning mediation procedure, unless compelled by law or grounds of public policy to disclose it. It is intended to apply to all kind of mediation in civil and commercial matters [6].

The last legal framework for mediation that we would like to notice, before the investigation in French national legal level, is a legislation adopted in 2013:

1. Directive 2013/11/EU on alternative dispute resolution which ensures that consumers have access to quality alternative dispute resolution entities (including mediation) for all kinds of contractual disputes with traders [7].

2. Regulation (EU) No 524/2013 on online dispute resolution (ODR), under which an EU-wide online platform will be set up for disputes that arise from online transactions [8].

For the European Union legislation to take effect at a national level, Member States must adopt a law to transpose it. Therefore, we would like to provide the basic knowledge about the implementation of above-mentioned legislation in France, and in particular the French law concerning mediation.

Judicial mediation was created in France in 1970, when some judges, mainly in labor disputes and family law, started to appoint outside mediators in the context of Article 21 of Civil Code Procedure ("To conciliate parties is part of the mandate of the judge") [9]. Then, on 8 February 1995, judicial (or court-annexed) mediation was established by law No.95-125 and implemented by decree No. 96-652 in the new Civil Code Procedure in 1996 [10]. These provisions

are still in force today and Article 131-1 contains the rule, that "A judge seized of litigation may, after having obtained the consent of the parties, appoint a third party who will hear them and confront their points of view to help them resolve the dispute dividing them. This power is also given to the summary procedure judge in the course of the proceeding". Moreover, Civil Code Procedure is one of the basic legal documents which regulates mediation in France.

Regulation (Ordonnance) No. 2011-1540 of 16 November 2011 transposed the Directive 2008/52/EC into the French law [11]. The Application Decree was adopted on 20 January 2012; it materially modified the legal framework in France.

Above-mentioned legislation is a basis for mediation procedure but there are some rules related to special areas in the Labor Code (Code de travail), the Criminal code (Code penal), the Code of Criminal procedure (Code de procedure penale), and the Monetary and Financial Code (Code monetaire et financier). Besides, there are several acts, orders and ministerial circulars which regulate particular types of mediation.

Defining mediation

According to the Act of 8 February 1995 modified in 2011 by the Regulation No. 2011-1540, mediation is "a structured process, however named, whereby two or more parties attempt to reach an agreement for the amiable resolution of their disputes, with the help of a third party, the mediator, chosen by them or designated, with their agreement, by the judge hearing the case" [12]. It is easy to compare and notice that this definition is very similar to the definition presented in the EU Directive 2008/52/CE.

Mediation and conciliation: does the distinctive criteria exist?

The identification of the differences between mediation and conciliation is not clear under the French law. One difficult question arises: why and when are these words used? The French legislature sometimes does not differentiate the terms, failing to establish a distinctive criteria [13]. For example, the Code of Civil Procedure in Art. 1530 (Book V) defines contractual mediation and conciliation in the same way ("La médiation et la conciliation conventionnelles régies par le present titre s'entendent [...]").Without regard to this provision, it is still possible to find differences between conciliation and mediation in French law. First of all, the judge has an opportunity to mediate ("concilier") between parties (Art. 21 Code of Civil Procedure). Secondly, certain conciliations in labor and family disputes must be mandatory for parties. Moreover, mediation and conciliation are divided in two different articles (Art. 1532 and Art. 1536 Code of Civil Procedure), where we can find rules that mediators and conciliators can be natural or legal persons.

Nowadays, such as many years ago, scholars continue to disagree about the exact relationship between these two procedures and the existence of distinguishing criteria [14]. To summarize, there are two different points of view: 1. Conciliation and mediation are the same processes. 2. Mediation is a particular form of conciliation.

Court-annexed and contractual mediation

As we mentioned above there are two main types of mediation in France: contractual (private) and court-annexed (judicial). Contractual mediation can intervene in many disputes, such as individual conflicts (concerning property, divorce, neighborhoods disputes), commercial disputes (between customers and suppliers, between agents), conflicts in labor relations, etc. According to the Center for mediation and Arbitration of Paris (CMAP), 45 % of cases, which are solved by mediation, refer to the breach of contractual obligations, 19 % of cases refer to company law, 16 % - labor law, 11 % - intellectual property, 9 % - other different (asset liquidation, termination of business relations, etc) [15].

Process of mediation may be proposed by one of the parties after the dispute arose or parties can include a mediation clause in their contract.

The main characteristics that define a contractual mediation are:

1. It takes place before or parallel to litigation proceedings.

2. It implements outside the court, without judge interference (Art.1530 of the Code of Civil Procedure).

3. It is performed on the basis of the common intension "...for the amiable resolution of their dispute..." (Art. 1530). Parties establish the structure, principles and limits for this particular

mediation. Nevertheless, the contractual mediation is regulated by Act of 8 February 1995 (General provisions – Art. 21 to 21-5) and by several provisions established in the Code of Civil Procedure. Contractual mediation can be set in an institution and therefore based on the mediation rules that are proposed by a mediation center. For example, there is an organization – Institut d'Expertise, d'Arbitrage et de Médiation – which offers different services including the contractual and judicial mediation [15].

For the contractual mediation the parties should have an agreement to mediate in their contract, mediation clause or to be agreed after the dispute arose. This agreement may refer to either ad-hoc mediation or the rules of a mediation centre. It may be very general or detailed, for example, it can include the list of selected mediators. Contractual mediation can be initiated on the base of an effective and enforceable agreement to mediate.

Section 2 (Art. 21 to 22-3) of the Act of 8 February 1995 is dedicated to judicial (or court-annexed) mediation. According to it, with the consent of the parties, the judge in a pending case transmits the case to a mediator to conduct the mediation. We can find the same provision in the Art.131-1 of the Code of Civil Procedure. It is very important to pay attention that, in this case, the judge is the one who selects the mediator. The duration of the mediation process is also set by the judge. The positive outcome of mediation leads to the termination of litigation, the negative outcome means that the litigation should continue and that finally, the dispute will be decided by the judge.

The main characteristics that define a court-annexed mediation are:

1. Even a judicial mediation starts with the litigation; it takes place outside the court room and does not involve the mediator who is a court employee.

2. Like a contractual mediation, for a judicial mediation the consent of the parties is always required. Each party can reject the mediation or the mediator proposed by judge.

3. Judicial mediation does not eliminate judicial competence. The mediator can neither judge the dispute nor investigate the process. The judge does not transmit his judicial power and the mediator cannot replace the judge.

4. Judicial mediation can be accessed from all civil and commercial courts, at all instances, at any stage of litigation.

5. The mediation process is under the judge control, because he proposes the mediation, chooses and appoints the mediator, sets the duration of the mediation process and the date when case should come back to court. The judge determines and allocates the costs of the mediation. The judge can be informed by the mediator about any difficulties arising during the mediation process. Moreover, he can terminate the mediation at any time when the proper conduct of mediation appears compromised. Finally, if the mediation fails the judge decides the dispute.

Court-annexed mediation is the specific process, with particular procedures and rules, which determines how the parties, the judge and the mediator should act. Let us review them.

In case of court-annexed mediation, the judge is obliged to inform parties about the possibility to solve their dispute in the amiable way. For this purpose, the judge in France can send either a letter, addressed to parties and containing information about mediation, or a questionnaire, which parties should fill and return to the court [17]. In fact, court-annexed mediation may be suggested by the judge and applied if parties will give their consent. Moreover, the parties may propose mediation to the judge. If they both wish to mediate – the judge cannot refuse; he must order court-annexed mediation. According to the Art.131-15 of the Code of Civil Procedure the mediation order made by the judge is a procedural measure and it cannot be appealed. The judge's decision covers several aspects of the future mediation: the appointment of the mediator, the period of mediation and the date when the dispute should be referred back to court, the amount of money the parties should pay for the mediation and conditions of its deposit at the office of the court. There are three ways of selection of the mediator: 1.One party may propose him and another party may accept. 2. Parties can choose the mediator together. 3. The judge can recommend the mediator and parties may give their consent. In all these cases, the mediator is always appointed by order of the judge. According to Art.131-4of the Code of Civil Procedure the mediator should be a natural or legal person. If a legal person is appointed it means that it proposes its mediator to the judge. The mediator must not be convicted or legally incapacitated and must not be subject to any professional disqualification. The mediator must

possess the qualification which is required for the nature of the dispute or demonstrate an experience in mediation.

To understand how this system works in real life we can give an example. The judge can appoint the CMAP. Based in the recommendation of the Commission de Mediation et d'Arbitrage or, in the event of an urgent matter with the approval of the Commission's chairman, the Centre submits the names of three mediators to the judge. The judge selects the most appropriate candidate, according to the nature of the case. That mediator is then responsible for the mediation which he carried out under CMAP's protection and in its name as legal person. Mediators recommended to judge must satisfy the following requirements [18]:

1. Not have a criminal record.
2. Not have acted contrary to honour, probity and morals resulting in a disciplinary or administrative decision to dismiss, remove, revoke or withdraw approval or authorization.
3. Possess the necessary qualifications with regard to the subject of the dispute.
4. Prove that they have the training and experience necessary to conduct mediation (CMAP in also a center for the training and the certification).
5. Demonstrate the independence of the mediator, necessary to conduct mediation.

After the judge selected the mediator, he should inform parties and this mediator about his decision. The mediator will receive the judge's order, he must accept his appointment and inform the judge about it. After the mediator is informed that the deposit (mediation fee) is received he calls the parties to a meeting, hears them and addresses their positions and points of view and work with them to develop a solution to their dispute. The mediator has no investigation power and may not simultaneously serve as an expert in the conflict. Nonetheless, with the agreement of the parties and if it is necessary for the aim of the mediation, the mediator can hear third party. The first session of mediation is very important: it helps to create the climate of trust. During this time the mediator makes introductions and explains the nature of the mediation to be carried out, the principles of mediation and the confidentiality obligations. He also sets the negotiation calendar. Moreover, in this session the parties present their positions and exchange their documents. In accordance with the Practical guide for the judicial mediation and conciliation in France established by The European Association of Judges for Mediation (Groupement européen des magistrats pour la mediation), the mediation is divided into three phases:

1. Determination and declaration of the respective positions of the parties.
2. Definition and communication of the interests, wishes, needs of each party.
3. Finding a common solution that satisfies all parties.

During mediation process sometimes it is necessary to meet with one party separately (for example, in conflict where there are trade secrets), but for this the mediator should receive the consent from both parties. Moreover, separate meetings with the mediator are useful to avoid excessive stress or harsh confrontations between the parties. In France this individual meeting is called "caucus" [19].

Results

Judicial mediation is confidential with the respect to the judge and third parties. The mediator cannot disclose any information to the judge without the parties' consent (such as the observations, proposals, statements produced during the mediation process). The mediator tries to resolve the conflict amicably within three months. This period can be renewed by the judge for the new three months. As we mentioned above, the mediator must notify the judge of any problems encountered during the mediation. When the mediation concludes, the mediator informs the judge in writing, if the parties have reached a solution. If mediation fails, the judicial proceeding resumes. If it has the positive result - the agreement between parties – the proceeding terminates and the parties may submit their agreement to the judge for ratification, which makes it enforceable. There are several technical solutions to write the parties' agreement: it may only contain facts or hold a simple compromise; it may be drawn as a settlement if the parties have made mutual concessions; the record may eventually constitute a mediation agreement. When the mission concludes, the judge issues an order setting the CMAP mediator's final compensation. The parties should decide how to distribute the costs and if they cannot agree, the costs are shared equally unless the judge will consider another.

Conclusion

Mediation is an alternative way of resolving disputes where a mediator helps the parties to reach an agreement. In France, the government and professionals are mindful of the advantages of mediation.

Despite the considerable quantity of laws which regulates mediation (in the European Union level, in the French legislative level, in different branches of law - family, civil, commercial, labor etc.) there is still the question of the distinctive criteria between mediation and conciliation. Scholars have two points of view: on the one hand, mediation and conciliation are the same processes. On the other hand, they are two different processes.

There are two forms of mediation in France: court-annexed and contractual mediation. Court-annexed is initiated by proposal of the judge (sometimes of the parties) with the consent of the parties. The judge chooses the mediator and all the process is placed under the judge's control. Contractual mediation is largely based on the free will of the parties and on the corresponding rules of a mediation center if parties call on this service.

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Судебная и договорная медиация во Франции

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Аннотация. Статья посвящена двум формам медиации, существующим во Франции: судебной медиации (медиации, осуществляемой при суде) и договорной медиации. Представлено право Европейского Союза и французское законодательство, регулирующее эти две формы. Проанализированы положения Директивы 2008/52/CE, ГПК, модифицированного закона от 8 февраля 1995 года. Особое внимание уделено описанию судебной и договорной медиации, их различиям, условиям их применения. Кроме того, нами анализируется процедура судебной медиации и порядок ее проведения в Центре медиации и арбитража в Париже. Также поднимается вопрос о характерном критерии различия между медиацией и согласительной процедурой.

Ключевые слова: Франция, медиация, судебная медиация, договорная медиация, регулирование.