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Commercial - Newsletter

LETTRE D'INFORMATION

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COMMERCIAL MEDIATION:
AN EFFECTIVE POST-COVI-19 TOOL

Commercial Litigation:
An effective post-Covid-19 tool

The Covid-19 crisis has aggravated an already very slow judicial situation, due to a lack of means and despite the efforts of the parties involved.
During the crisis, the courts rightly favoured cases affecting individuals.
The situation of companies, faced with their judicial needs, is now very much impacted even though they may face major difficulties,
despite protective measures taken by ordinance.

A FACT: COURTS WILL FIND IT DIFFICULT TO LOWER THE DELAYS

The Covid-19 crisis put most of the judicial activity on hold, already heavily impacted by the strikes that followed one another prior to this exceptional situation. Despite the efforts of judges and court officers, mainly in the area of personal rights, delays have accumulated.
Poorly equipped due to a lack of enough resources, the judiciary will take time to recover from this crisis, even if it tries to abolish oral argument hearings. In Paris, the Judicial Tribunal and the Court of Appeal gave lawyers 15 days from 23 and 27 April 2020 to decide whether they refused or accepted that their files should simply be filed, without pleadings.
Without even discussing this process, which any lawyer can only question even for written proceedings, this will not be enough to absorb the pre-Covid-19 delays, the delays created by this crisis and the post-Covid-19 unsatisfied demands of litigants.

A FLEXIBLE TOOL: MEDIATION

Mediation allows the parties to attempt to resolve their divergences with the help of a **neutral, independent, impartial, trained, non-coercive** third party, based on solutions they find between themselves or with the help of third parties in order to sign an agreement, if possible, immediately enforceable.
It combines confidentiality, **flexibility**, deadlines, costs, **pragmatism** ("business" solution), creativity of solutions, limitation of uncertainty, efficiency in execution, etc.

Mediation already provided for by the parties:

Mediation can be contractually provided for before the dispute arises. This is often the case in contracts with successive execution, shareholders' agreements, etc. In this case, it is a mandatory prerequisite for any legal action, the sanction being its inadmissibility.
In the **case of cross-border** contracts or contracts between legal persons of different nationalities, it has the advantage of avoiding, at least initially, questions relating to the applicable law, the choice of courts, etc.
In this case, reference must be made to the contractual clause which must mention the modalities of the mediation and not only the necessity of its existence. It is advisable to provide for the duration of the mediation (generally 2 to 3 months), the place of mediation, the language or languages of the proceedings, the modalities of appointment of the mediator, his remuneration, etc...

Mediation not provided for by the parties:

In the presence of any dispute, this tool can be considered by the parties. **Neither proof of strength nor proof of weakness**, mediation is a "business" option for economic actors wishing to try to avoid the delays, costs, energy and hazards of legal proceedings, which exist in all latitudes.
In France, conventional mediation is provided for in Articles 1530 to 1535 of the Civil Code and is defined as a "***structured process*** *by which two or more parties attempt to reach an agreement, outside of any legal proceedings for the amicable resolution of their disputes, with the assistance of a third party chosen by them who carries out his mission with impartiality, competence and diligence*".
It may be accepted by the parties at any time, even if proceedings have already been initiated. The parties may wish to appoint by mutual agreement an *ad hoc* mediator, or to go through a mediation centre whose mediators are **regularly trained**, which is a determining factor in the success or otherwise of the discussion to take place. The mediator is not a guarantor of the outcome. But he is a guarantor of the process and participates in it in a neutral manner, through the structured process in which he is trained. In particular, the mediator preserves the **confidentiality** of the mediation. This confidentiality is also protected by the Courts.

A structured but fast, confidential and pragmatic process

Mediation is being prepared:

To be effective, mediation requires that each party, for its part, establish a **statement** of the state of its situation as objectively as possible. Each party must revisit the facts, its evidence, the coherence of its legal, economic, financial position, as the case may be. Each party must question the persons connected with the facts in question, verify who will be the most appropriate person to attend the mediation and validate that the person or persons present have **the power to compromise**. The lawyer will have the mission to help them in the establishment of these findings with an external view, with a critical mind intended to prepare the discussion in an efficient way.
Mediation remains "**the thing of the parties**". It is the parties who speak first, not their lawyer. It is therefore necessary to prepare and check the limits within which, in a first approach, they will be able to envisage a possible agreement.

Mediation is practiced:

Under the aegis of the mediator, who may or may not have contacted each of the parties before the meeting, the principles of confidentiality, neutrality and verification of independence are validated.
Mediation is not necessarily contradictory. "**Apartés**", i.e. aside meetings, are organised by the mediator with each of the parties, for greater freedom of speech with instructions that may be given to the mediator in terms of confidentiality concerning certain remarks. The lawyers present serve as "safeguards" to ensure that all the points are dealt with and that the solutions envisaged are legally possible to implement. Several meetings may be held, but either party may terminate the mediation **at any time**.

Mediation secures the agreement if it exists:

Without an agreement, the parties regain their freedom. In the event of an agreement, most often a transactional one, a protocol is signed between the parties.

The mediator does not draft an agreement. He does not sign it either. The mediator remains a third party.
This is most often the role of the lawyers, a drafting process facilitated by the quality of the discussions aimed at validating each of the points raised during the mediation.
In most cases, the agreement is immediately executed, so that no guarantee of execution is necessary.
In the case of an agreement that is to be executed over a certain period of time or under certain conditions, the parties may jointly apply to the competent court to have the agreement resulting from mediation **homologated**, thereby making it enforceable.
When the agreement resulting from the mediation has been made enforceable by a court or an authority of another Member State of the European Union under the conditions provided for in Article 6 of Directive 2008/52/EC of 21 May 2008 of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, it is recognised and declared enforceable in France, and vice versa.

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Having tried confidential mediation, even if it fails, will save time before the Courts, which now systematically tend to propose this alternative means of dispute resolution, but not always under conditions that will suit the parties.

So, keep your hand in!

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