

ALTERNATIVE METHODS FOR SETTLEMENT OF COMMERCIAL DISPUTES UNDER THE LAW N^o: 22-13

Nadia KHERRAZ *

University of El oued
Algeria

nad.kherraz@gmail.com

Submission date: 31/03/2023 Acceptance date: 03/12/2024 Publication date: 01/01/2025



Abstract:

Indeed, the alternative methods for settlement of commercial disputes have nowadays become indispensable due to the role they play in settling the dispute between the two parties without resorting to the judiciary. Besides, they were stipulated, given their importance, by the legislator in the Code of Civil and Administrative Procedures, Law No.08-09, as per emphasized and strengthened in the last amendment to the Law No. 22-13, as this amended is related to both mediation and reconciliation.

key words: Commercial disputes; Mediation; Reconciliation; Commercial section; Specialized commercial courts.

* Corresponding Author.

Introduction

In fact, the judiciary has in recent times become incomprehensible to the volume of cases brought in front of it, which cases have shown to be constantly increasing, as it has become characterized by slow procedures and long-lasting litigation procedures, the fact of which has caused an accumulation in the volume of cases.

Further, due to this slowness, the legislator was compelled to resort to finding alternative methods for settlement purpose of disputes that help the judicial system in finding an appropriate solution to settle the raised dispute, together with the participation of the parties or bodies dedicated to settling disputes in amicable ways, as the aim of all these procedures is to help the judicial authorities to find an appropriate solution corresponding to the lawsuit at hand.

In this respect, the Algerian legislator stipulated alternative methods for settlement purpose of disputes in the Code of Civil and Administrative Procedures No.08-09, through the fifth book, whereat the provisions for reconciliation and mediation were specified in the first chapter of the fifth book, whilst arbitration was specified in the second chapter thereof.

Above and beyond, the legislator has proceeded, through his approval of alternative methods of settlement purpose of disputes in the Code of Civil and Administrative Procedures, to reducing the burden on the judicial authorities, all the way through allowing the litigants to conduct their disputes, or through a third party selected by them or appointed by the judiciary, as these steps are of assistance to attain a solution that satisfies the litigants and reassures them.

In virtue of which, this study is currently focused through this paper on reconciliation and mediation, since these two methods are the two issues that have been subject to amendment under the Law No.22-13, as amending and supplementing the Code of Civil and Administrative Procedures.

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Subsequent to which, the problem hereunder can in view of that be raised:

How could the recent amendment to the Code of Civil and Administrative Procedures address the alternative methods for settlement of commercial disputes (mediation and reconciliation)?

For answering purpose of this problem, the subject matter shall be divided into three chapters, as follows:-

- **The First Chapter:** Definition of mediation and reconciliation
- **The Second Chapter:** The amendments brought about by the Law No.13-22 on alternative methods for settlement of commercial disputes
- **The Third Chapter:** The extent to which such amendments are of effectiveness in the settlement of commercial disputes.

The First Chapter: Definition of mediation and reconciliation

Definition will be provided, through this chapter, for both of mediation and reconciliation as new means for settlement of disputes in amicable ways.

Firstly: Definition of Mediation

We will be dealing through this chapter with the meaning of “Mediation” together with pointing out its characteristics.

Meaning of Mediation:

Mediation is the basis on which the system of alternative methods is based, as it stands for the engine and the first way in terms of finding a consensual solution between the litigating parties, as it lies at the heart of the alternative methods¹.

Linguistic Definition of Mediation:

Mediate, Intermediate, Mediator of a place or people, Mediation of people and among them: Mediate in truth and justice, Mediation (source): The act of a Mediator².

Idiomatic Definition of Mediation:

In pursuance with the provisions of Articles enunciating the issue of Mediation (from 994 to 1005) of the Law No.08-09, pertaining to the Code of Civil and Administrative Procedures, it is noticed that the legislator failed to provide a clear definition thereto when enacting the mediation as an alternative procedure for settlement of disputes.

In fact, the Algerian legislator avoids more often than not putting definitions in the legal text and leaves jurisprudence dealing with the issue of providing definitions to such terms and setting controls thereto.

Nonetheless, in pursuance with the provisions of Article 994 of the Code of Civil and Administrative Procedures³, it is stated that: "The judge must proffer the mediation procedure to the litigants in all matters, except for the family affairs' cases, labour cases and everything that would prejudice public order.

In the case that litigants would accept this procedure, the judge appoints a mediator to receive the standpoint of each one of the parties and endeavour to reconcile them, in such a manner to enable them to find a resolution to the dispute".

More to the point, definition thereto can alike be provided as: "a mechanism based on the intervention made by a neutral third party in the negotiations to be engaged between two litigating parties, so that he/it endeavours to bring the standpoints between the two parties closer together, alongside facilitating the communication between them; subsequent to which, provide them with assistance to find an appropriate settlement to rule the dispute⁴".

Characteristics of Mediation:

Certainly, the Algerian legislator approved mediation as an alternative method for settlement purpose of the dispute because of its characteristics as a mechanism that is not linked to the principles of trials, together with long-lasting and multiple formalities, as it stands for a flexible means aimed at attaining results that satisfy everyone. Above and beyond, in the midst of the characteristics of this mechanism, we bring up for instance what follows:

1- **Confidentiality and Privacy:** The principle in the judiciary is the public character of sessions, which is considered one of the guarantees of litigation. As for mediation, it is characterized by confidentiality that serves the litigating parties, mainly in commercial disputes.

In addition, the legislator stipulated the confidential nature of mediation by obliging the mediator to keep the secret from other parties⁵.

2- **Reducing the burden on the judiciary:** Through his approval of mediation and the obligation to proffer it by the judiciary to the litigants, the legislator sought to reduce the burden of the volume of cases brought in front of it, all the way through using mediators to try to reconcile the parties with the aim to find a resolution that puts an end to the dispute.

Upon success of the process and approval of the mediation Minutes, together with the results satisfactory to the parties, a final and unappealable judgment is passed.

3- **Non-prejudice to the independence of the judiciary:** Mediation constitutes no derogation or prejudice to the independence of the judiciary, as the goal of the judiciary is to attain settlement of disputes and deliver the rights to their owners, which is the goal of mediation itself. Further, in pursuance with the provisions of Article 995 of the Code of Civil and Administrative Procedures, resorting to mediation does not mean

restricting the judge from dealing with the dispute, or that his mandate with regards to such case has come to an end, by the judge continues to a certain extent to follow-up the course thereof⁶, the fact of which can be found out, upon reaching an agreement by the mediation, and it is up to the judge to approve the Agreement Minutes according to an ordinance that can be subject to no appeal, whereat the Agreement Minutes shall be considered as an Executive Document⁷.

4- **Attainment of common gains for the two litigating parties:** In mediation, all parties, with the assistance provided by the Mediator, focus on the essential issues, in such a way that they endeavour together to find a practical resolution to their disputes that would attain the desired settlement by the two parties based on their common conviction and will, thus the resolution would be more acceptable to both parties⁸.

5- The freedom to withdraw from and return to litigation, together with the characteristic of simplicity, all the way through providing consensual resolutions⁹.

Secondly: Definition of Reconciliation

The objective study of reconciliation, as an alternative method to attain settlement of the dispute, requires clarification of its nature, through providing definition thereto and pointing out its pillars.

Meaning of Reconciliation:

Linguistic Definition of Reconciliation:

Linguistic-wise, Reconciliation stands for reconciling the people between themselves. Thus, it can idiomatically said: "they have reconciled, brought together, reconciled between themselves and reconciled between others" with the stress of the "R" as they put stress

on the R when pronouncing the term. Besides, they say reconciled people, means they attained conciliation among them¹⁰.

Idiomatic Definition of Reconciliation:

The Algerian society adopted the reconciliation system with the aim of attaining settlement for the disputes raised between the litigants, whereat the reconciliation groups had been prevailing throughout the entire national territory¹¹.

Likewise, the Algerian legislator has alike included reconciliation as an alternative method for settlement purpose of disputes in Chapter One of Book Five of the Law No.08/09 that includes the Code of Civil and Administrative Procedures, through Articles 990 to 993 thereof; nonetheless, such articles did not provide definition to reconciliation.

In addition, the Algerian legislator provided a definition in Article 459 of the Ordinance No.75-58, containing the Civil Code, as amended and supplemented¹², as: “a contract by which the two parties put an end to an existing dispute, or avert through which a potential dispute, by which each of the two parties waives, in exchange, his own right”.

Furthermore, the reconciliation was alike defined in the Ordinance No.75/59 pertaining to the amended and supplemented Commercial Law¹³, as per the fourth paragraph of Article 317 thereof, which stipulated that: “the reconciliation contract is proficiency between the debtor and the creditors who agree according to which the deadlines for payment of debts or reduction of part thereof”.

Moreover, Jurisprudence has alike provided definition to reconciliation as contract by which the two parties put an end to an existing or potential dispute, throughout potential exchange¹⁴, whilst it was defined by Ahmed Bouskia as: “reconciliation is a contract that put an end to the dispute in an amicable way”¹⁵.

Specifications of Reconciliation:

In the light of the aforementioned definitions, it is clear that conciliation is a “contract” by which the two parties put an end to the dispute by performing something that is the waiver of a “right”. Starting from this point, it becomes clear to us that the reconciliation contract has specifications distinguishing the same from other alternative methods for settlement purpose of disputes, which are as follows:-

- Reconciliation is a consensual contract, with the evidence that the provisions of Article 459 of the Civil Code did not stipulate a special form for its conclusion, and the formality stipulated in Article 992 of the Code of Civil and Administrative Procedures has shown to be the stability and not a condition for conclusion, with the evidence that the provisions thereof enunciate that: “reconciliation is substantiated in a Minutes, to be signed by the litigants, the judge and the clerk, and shall be filled at the registry of the judicial authority”.

- Reconciliation is a binding contract for the two parties, whereat one of the conciliators is compelled to waive his right in exchange of the other party’s waiver of his right in return, and then the dispute ends within the limits of the waived right; as consequence, the claim that was waived falls on both sides of the party, whereat the part thereof that did not waive remains binding on the other party¹⁶.

- Reconciliation is one of the Compensatory Contracts, because each party’s waiver of his right receives a corresponding “right” waived by the other party.

**The Second Chapter: The amendments brought about by the
Law No.13-22 on alternative methods for settlement of
commercial disputes**

In fact, the Law No.13-22 dated 12th July 2022 published in the Official Gazette issued on the 17th of July 2022 introduced important amendments to the Code of Civil and Administrative Procedures.

Taking into account that such amendments mainly affected the organization and management of commercial judicial bodies and the administrative judicial bodies.

In light of which, light will be shed, through our current study, on alternative methods for settlement purpose of disputes (mediation and reconciliation) in front of the commercial judicial authorities.

Firstly: Mandatoriness of Mediation in front of commercial section

The new amendments introduced by the Law No.13-22, dated 12th July 2022, pertain to the decision made by the legislator of ordered the head of the commercial section to mandatorily proffer the commercial dispute in advance to mediation.

Mediation in front of the commercial section has become mandatory, as the dispute must be proffered pin advance to mediation¹⁷, which is not subject to the acceptance of the parties, as was the case beforehand under Article 994 of the Code of Civil and Administrative Procedures¹⁸ No. 08-09. Above and beyond, this new amendment was brought the new Article 534 of the Code of Civil and Administrative Procedures¹⁹, as the determination of people did not remain clear as before. Subsequent to which, the lawsuits brought starting from 17th July 2022, which corresponds to the publication date of this law in the Official Gazette, in front of the commercial section, are subject to a mediation procedure before final ruling thereon.

Secondly: Mandatoriness of Reconciliation in front of commercial section

The new created judicial body under the new Article 536bis²⁰ of the Code of Civil and Administrative Procedures, as amended, which is the Specialized Commercial Court.

The new amendment, in Article 536bis 04 thereof²¹, stipulates that the reconciliation procedure must be approved prior to any lawsuit filed in front of the Specialized Commercial Court.

Such reconciliation takes place at the request of one of the litigants, and shall be submitted to the Presiding Judge at the Specialized Commercial Court, who appoints within a timeline of 05 days as per an order on application, one of the judges to carry out the reconciliation procedure within a timeline not exceeding 03 months. Besides, it shall be up to the applicant for reconciliation to notify the date of the reconciliation session to the remaining litigating parties, by way of a bailiff.

As soon as the judge-mediator is appointed by the Presiding Judge of the Specialized Commercial Court, he can look for the assistance of any person he deems appropriate to assist him in conducting the desired reconciliation, which ends with the issuance of Minutes to be signed by the said judge together with the litigating parties and the clerk.

In the event that the mediation procedure would fail to attain settlement of the pending dispute, the case shall be filed in front of the Specialized Commercial Court with an Application Instituting Proceedings in accordance with the rules stipulated in this law, accompanied by the non-reconciliation Minutes, under penalty of the case to be declared inadmissible²².

Such non-acceptance is part of the public order that the Specialized Commercial Court decides on its own. However, the same shall apply in case the lawsuit would directly be filed at the Specialized Commercial Court without submitting a prior application to its Presiding Judge for conducting purpose of reconciliation.

The Third Chapter: The extent to which such amendments are of effectiveness in the settlement of commercial disputes

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The Algerian legislator every time makes amendments to his laws for the purpose of keeping abreast with the developments occurred in the trade movement, either internal or international.

Further, this amendment was conducted in terms of the alternative methods for settlement purpose of the dispute, through both of Mediation and Reconciliation.

Firstly: Assessment of the mediation amendment

In fact, mediation ensures the privacy of the dispute raised between them for the two litigating parties, mainly if they are capital owners, well-known merchants and employers. Hence, it is in their interest to avoid public judicial disputes that are offensive to their reputation, which may lead to jeopardize their interests.

In virtue of which, the legislator was right when acknowledging the necessity of mediation in commercial disputes, as the nature of commercial work requires confidentiality instead of openness imposed by ordinary courts.

Should the compulsory mediation procedure reduce the volume of cases brought in front of the courts, however, the legislator has shown to be blemished that imposing or obligating mediation on the litigating parties entails unquestionably significant costs for the litigants, as they are the ones who will bear the fees of mediators, since we fully know that the simple citizen cannot afford all these expenses and burdens pertaining to mediators and lawyers's costs.

More to the point, it is widely known that mediation is not one of our judicial traditions, and that those assigned to ensure mediation are time and again lacking experience and appropriate training.

Secondly: Assessment of the reconciliation amendment

In light of this new amendment imposed by the Algerian legislator, which contains the mandatoriness of reconciliation in front of the Specialized Commercial Courts, as they deal with several type of

disputes, contrarily to the commercial section; besides, all the disputes that had been addressed by such courts shall mandatorily be subject to reconciliation as an advance procedure prior to exposing the same in front of them.

Most importantly, the disputes whose qualitative jurisdiction is attributed to Specialized Commercial Courts by the Algerian legislator, in pursuance with Article No.536bis, are as follows²³:-

- The intellectual property-related disputes;
- The commercial companies-related Disputes, mainly the disputes of associates and the dissolution and liquidation of associates;
- The banks and financial institutions-related disputes with merchants;
- The maritime disputes, air transport and insurance disputes pertaining to the commercial activities;
- The international trade-related disputes.

In virtue of our extrapolation of the nature of disputes that fall within the jurisdiction of the commercial courts, in which reconciliation has shown to be required, we figure out that they are major issues that need more accurate examination for adjudication therein. More and more, the reconciliation procedure is compulsory for avoiding purpose of the public character of the judiciary, together with its settlement by amicable ways so as to preserve the secrets of their work.

In the light of such facts set out above, we note that the legislator has rightly decided in the issue of compulsory reconciliation in such disputes, for the purpose of attracting foreign capitals that avoid the courts of the host country.

Nevertheless, the legislator is criticized for the fact that he failed to state where or not the three-month period assigned to the judge-

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mediator, in order to decide on the dispute brought before him, is a renewable period or just a single period. Likewise, he must issue a Minutes either for reconciliation or non-reconciliation.

Similarly, the legislator failed to point out the period required to file the lawsuit after issuing the non-conciliation Minutes in front of the Specialized Commercial Courts, as he left it as an open period, as is basis for the provisions of Article 536bis 04, Paragraph 03.

More to the point, the new law did not provide for special provisions regulating the effects of the reconciliation Minutes drawn up by the judge-mediator, in which he examined the agreement that took place between the litigating parties. As consequence, the general provisions governing mediation are the ones that apply for the reason that the judge-mediator was appointed by virtue of an Ordinance issued by the Presiding Judge of the Specialized Commercial Court, and that the reconciliation Minutes that include the terms of the agreement shall be approved by this latter and filed with the Registry of the Court. In virtue of which, it shall possess the nature of an executive document in pursuance with the provisions of Article 600-8 of the Code Civil and Administrative Procedures²⁴.

Conclusion

In the light of the foregoing, it becomes clear to us that the Algerian legislator put emphasis on the adoption of alternative methods for settlement purpose of commercial disputes prior to resorting to the judiciary, all the way through stipulating the mandatoriness of both Mediation in front of the Commercial Section, and Reconciliation in front of the Specialized Commercial Courts. Thus, all these procedures have shown to be keeping abreast with the development that takes place in the field of business.

More to the point, it also became clear to us that the mediator represents a third person who is not the judge in the disputes of the commercial section; whilst Reconciliation has shown to be conducted by the judge appointed by the Presiding Judge of the Specialized Commercial Court, upon request made by one of the parties.

Above and beyond, it has shown clear to us, through imposing by legislator of Mediation and Reconciliation on the litigants before resorting to the courts, whether ordinary or specialized, that he gives them in that case an opportunity to maintain commercial relations, together with attaining settlement of their disputes in amicable ways.

Hence, for enhancement purpose of the role of such amicable means, we suggest in closing the recommendations listed below, as follows:-

- Specialized mediators are supposed to exist so as to consider such disputes, throughout the creation of training centres for mediators;
- Reconsidering and fixing the reconciliation period, by avoid the extension of the three-months period for the judge-mediator after expiry thereof;
- Reconsidering the third paragraph of Article 536bis 04 of the Law No.22-13, with regards to the legal period required for filling the lawsuit in front of the Specialized Commercial Courts after issuance of the non-conciliation Minutes, and avoid leaving the same open-period as he did.

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