

**Settle for less...? Or for more! Tips on timing,
confidentiality and strategy (multijurisdictional)
settlement arrangements**

Commissions Antitrust, Commercial Fraud, Litigation

Prague, 2014 – Working Session 5

National Report of France

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28 February 2014

1.1 General Issues

1.1.1 How do you define the term “settlement” in civil procedures?

Generally speaking, the term “settlement” refers to the French concept of *transaction* (also translated as “compromise”) (a). However, a new category of settlements has recently been instituted with the introduction in the French legal system of ADR (conciliation, mediation, participative procedure) (b). The distinction between in-court settlements and out-of-court settlements is not fully relevant under French law (c).

a. *Transaction*

A *transaction* is a contract whereby the parties settle on a dispute which has already arisen or to prevent a dispute from arising (Article 2044 of the French Civil Code).

Three conditions must be met for a contract to be a *transaction*:

- A dispute exists between the parties

French legal authors distinguish between “judicial transaction” (*transaction judiciaire*) and “extrajudicial transaction” (*transaction extrajudiciaire*).

An “extrajudicial transaction” is an agreement entered into to prevent a dispute from arising: one of the parties has a right of action against the other(s) but has not filed a lawsuit yet.

A “judicial transaction” is an agreement entered into to put an end to a dispute that has already arisen and been brought before a court. The “judicial transaction” is a contract, and thus an out-of-court settlement, unless the parties specifically request the judge to intervene or otherwise provided by the law (see 1.1.1.c).

- The parties grant reciprocal concessions to one another

Such concessions may consist, negatively, in a waiver of right or a (full or partial) abandonment of a claim, and, positively, in a new obligation undertaken by a party. It is incumbent upon the parties to determine the nature and the extent of their mutual compromises. When the validity of the *transaction* is challenged, the judges are not entitled to take into consideration the merits of the parties’ claims or to rule on their dispute. They are only entitled to verify, based on the parties’ initial claims, that (i) each party has made concessions in favor of the other(s), and (ii) the concessions which were made are not insignificant (*concessions dérisoires*).

- The parties wish to put an end to their dispute.

b. ADR Settlements

ADR settlements differ from a *transaction* in that the criterion of reciprocal concessions is not required: ADR settlements simply aim at resolving a dispute.

- Recent Introduction of ADR in the French Legal System

The French legal system only knows three ADR (in addition to arbitration which is not specifically addressed in this report since an arbitration tribunal amounts to a court with regards to settlement strategies): conciliation, mediation and participative procedure.

Historically, conciliation (which dates back to very ancient times) and mediation (which was first instituted by the Act No. 95-125 of 8 February 1995 and further defined in the Ordinance No. 2011-1540 of 16 November 2011, transposing European Regulation No. 2008/52/CE on civil and commercial mediation) were only judicial ADR, ordered by a judge and conducted under his aegis.

It is only very recently that a decree legally instituted conventional ADR, namely conventional conciliation, conventional mediation and participative procedure (Decree No. 2012-66 of 20 January 2012).

Thus, in civil, commercial, labor or rural disputes (unless otherwise provided by law), parties to a dispute can, on their own initiative, attempt to settle it amicably with the assistance of a mediator, a conciliator of justice or, as concerns the participative procedure, of their lawyers (Article 1528 of the French Code of Civil Procedure).

- Definition

Conciliation and mediation are defined as any structured process, whereby two (or more) parties attempt to reach an agreement in order to solve amicably their disagreements, with the help of a third party chosen by them and who conducts his/her mission with impartiality, competence and diligence. Mediation and conciliation can intervene outside any judicial proceedings or in parallel to judicial proceedings. Conciliation can even be conducted by the judge himself. Legal authors have attempted to determine what distinguishes mediation from conciliation, but this issue is still highly controversial. Though each procedure is governed by specific statutory provisions, substantive rules are very similar in both cases.

The French participative procedure (which was legally instituted by Act No. 2010-1609 of 22 December 2010 but only implemented as from the adoption of Decree No. 2012-66 of 20 January 2012) is inspired from the Anglo-Saxon Collaborative Law, but differs in many aspects (in particular, the statutory provisions do not include any obligation for the lawyers to retrieve from the case).

In French participative procedure, the parties, assisted by their lawyers, jointly seek, under the conditions which are specified in a contract (*convention de procédure participative*), to reach an agreement which puts an end to their disagreement.

c. In-Court/Out-of-Court Settlements

The distinction between in-court settlements and out-of-court settlements is not fully relevant under French law.

Transactions and ADR settlements (conciliation, mediation and participative procedure) which were reached by the parties outside of any judicial forum may nonetheless be enforced by a judge under specific procedures (see 1.2). In certain cases, statutory provisions even bind the parties to do so; for example, where the *transaction* implies a minor or an adult under tutorship or curatorship or a legal person under receivership.

Judicial mediation is conducted by a third-party outside the court, though the whole process remains under the judge's control. The agreement reached by the party may, or may not, be enforced by the judge depending on the parties' choice (see 1.2).

Judicial conciliation may be conducted in court by the judge himself or outside court by a delegated third-party (*conciliateur de justice*), while remaining under the judge's control. The agreement reached by the parties is recorded in minutes of conciliation (*procès-verbal de conciliation*) (see 1.2).

Participative procedure may be merely a conventional process, but may also be followed by a judicial phase if the dispute has not been partially or fully resolved.

Transactions and ADR settlements may therefore be, in some respects, both in-court and out-of-court settlements.

1.1.2 Are there statutory provisions (e.g., in your civil procedural rules or substantive rules) dealing with settlements?

The main statutory provisions dealing with *transactions* and ADR settlements are included in the French Civil Code and the French Code of Civil Procedure. Other statutory provisions, which are based on the same substantive rules and will not be presented here for the sake of brevity, govern ADR procedures in certain specific matters (such as in labor and rural disputes, or with regards to physical or legal persons in debt).

a. Statutory Provisions on *Transaction*

Articles 2044 to 2058 of the French Civil Code define the substantive rules applicable to a *transaction*; in particular:

- The parties must have the capacity to dispose of the things included in the *transaction*.
- The scope of the *transaction* is strictly limited to the dispute between the parties and any waiver of all rights, actions and claims made therein extends only to what relates to the dispute.
- A *transaction* does not bind, and cannot be invoked by, any other party than those who signed the *transaction*.
- A penalty may be stipulated against the party who fails to perform the *transaction*.
- The *transaction* must be made in writing.
- A *transaction* has, between the parties, the authority of *res judicata* of a final judgment. It may not be challenged on the ground of an error of law or of a material error on the amount. Similarly an error of calculation must be corrected and does not resolve in the rescission of the *transaction*.
- A *transaction* may however be rescinded where there is an error as to the person or as to the subject-matter of the dispute.
- The *transaction* may be rescinded where the consent of one of the parties was vitiated due to (i) a misrepresentation of material facts, (ii) physical violence, or (iii) economic duress.
- The *transaction* may also be rescinded where it is based on an instrument or title which is void (unless the parties have expressly dealt about such nullity) or annulled if the documents on which the *transaction* was made were found to be false.

b. Statutory Provisions on ADR Settlements

Most of the statutory provisions on ADR settlements relate to enforcement and confidentiality issues and will be addressed hereinafter (see 1.2 and 1.3).

The procedural provisions applicable to ADR are briefly presented below.

1. Conciliation

- Conventional Conciliation

Articles 1536 to 1541 of the French Code of Civil Procedure govern the conciliation process and define the power of the conciliator (*conciliateur de justice*).

The conciliator may hear the parties and any third party (with his/her consent) and attend the scene of the dispute (with approval of the persons concerned).

- Judicial Conciliation

Under Articles 127 and 128 of the French Code of Civil Procedure, the parties may conciliate, on their own initiative or on the judge's initiative, at any time during the proceedings.

The judge defines the place, time and conditions of the conciliation that he/she deems appropriate.

The judge can give an injunction to the parties ordering that they meet with a delegate conciliator (*conciliateur de justice*) who will inform them on the conciliation process.

The judge may conduct the conciliation himself/herself, or appoint a conciliator for a two-month period, renewable once (Articles 129-1 to 129-5 of the French Code of Civil Procedure).

The conciliator has the same powers as in a conventional conciliation. However, he conducts the conciliation under the control of the judge and must refer to him if an issue arises.

The judge can put an end to the conciliation at the request of a party or of the conciliator. He can also do so at his/her own initiative if he/she considers that the conciliation process is jeopardized.

2. Mediation

- Conventional Mediation

Conventional mediation is governed by Articles 1532 to 1535 of the French Code of Civil Procedure, which mainly concern the definition of the qualification and experience required from the mediator.

- Judicial Mediation

Under Article 131-1 to 131-15 of the French Code of Civil Procedure, the judge (whether of the merits or summary) can appoint a mediator to hear the parties and confront their point of views in order to enable them to find a solution to the conflict that opposes them.

The mediator is appointed for a 3-month period (renewable once) and his/her mission can concern part or all of the conflict. He/she can hear any third party (with his/her approval).

The judge remains in charge of the process and can take the measures that he considers necessary. At the end of the mediator's mission, a hearing is held before the judge to advise on the result of the mediation. In any event, the judge can put an end to the mediation on his/her own initiative or on the request of a(the) party(ies) or of the mediator, after having heard them.

3. Participative Procedure

- Contract of Participative Procedure (*convention de procédure participative*)

Article 2062 to 2068 of the French Civil Code govern the contract of participative procedure, whereby the parties to a dispute which has not yet been filed before a court commit to work jointly (with their lawyers) and in good faith to achieve an amicable resolution of their dispute.

The contract of participative procedure is a fixed term contract. It must be made in writing and specify the terms of the dispute, the documents necessary to the resolution of the dispute, the conditions in which they will be exchanged, and the date on which the contract expires.

As long as the contract of participative procedure is in force, the parties cannot file a lawsuit, unless one of the parties does not perform its obligations or, in case of urgency, if one of the parties requires provisional or conservatory measures.

- Procedure

Under Articles 1542 to 1564 of the French Code of Civil Procedure, the participative procedure begins with a conventional phase, where the parties may require the assistance of a technical expert.

The participative procedure can end (i) either at the date on which the participative contract expires (ii) upon termination by one of the parties, or (iii) by the conclusion of a partial or full agreement, which must be detailed in writing.

The parties may refer to the judge to enforce the agreement (see 1.2) or to rule on the remaining points of disagreement (in case of partial agreement) or on the whole dispute (in case of failure of the conventional phase of the participative procedure).

c. Common Rule on Time Limitation

Under Article 2238 of the French Civil Code, the limitation period does not run during an ADR process. The limitation period starts to run again as from the end of the ADR process, for at least six months.

1.1.3 Are there ethical rules and guidelines that affect your negotiation strategies in practice?

Some provisions of the French lawyers' Code of Conduct (*Règlement Intérieur National*) may affect lawyers' negotiation strategies.

First, under Article 3.1 of the French lawyers Code of Conduct (*Règlement Intérieur National*), all letters exchanged between lawyers are confidential. Such confidentiality cannot ever be raised. It derives from there that lawyers cannot disclose such letters (i) obviously in court, but also (ii) to their own client. As a result, an oral agreement between lawyers is unenforceable (as an oral agreement between the parties, absent any proof as to the terms of the agreement). It is only where a *transaction* or an ADR agreement is executed that a final settlement will be enforceable.

Second, under Article 1.3 of the French lawyers Code of Conduct (*Règlement Intérieur National*), lawyers are also bound by a duty of honor, loyalty, fraternity and courtesy, which should altogether guide them in their practice, and in particular in their negotiation strategies.

1.1.4 Is there a specific point in time in the history of a case that is particularly suitable for settlement discussions?

The right time to enter into settlement discussions is obviously whenever the parties agree that litigation is not the best way to address their dispute. This implies that the parties have already acknowledged their real risk exposure.

a. Self-Acknowledgment of the Risk Exposure

This may happen at a very early stage if each party is aware that his/her case has weaknesses. This may be the case even before the lawsuit is filed if the parties (or their lawyers) have already presented their lines of arguments and the legal basis for their claim and counterclaims.

If not, the time may come after the writ of summons and the defendant's first submissions have been filed.

However, if the parties are positional and/or consider that their risk exposure is limited, settlement discussions have little chances of success. Nonetheless, French proceedings can prove to be very lengthy (one to two years in average for each level of jurisdiction) and there are three levels of jurisdiction (first instance court, appellate court and Supreme Court), with possibly one or two returns before an appellate court if the Supreme Court reverses the appellate decision. At some point in time, the parties may review their position and prefer to adopt a shorter track.

b. Hints on Real Risk Exposure

Where the case raises technical questions which require the appointment of an expert to investigate on the causes of a loss or to assess the quantum of the loss, it may also be appropriate to initiate settlement discussions after the filing of his/her report.

Though the judges are not legally bound by the terms of the expert's report (whether he/she is appointed by the parties or by the court), the judges tend to follow opinion of the expert (especially when he/she has been appointed by the court).

The parties therefore have a better view of their risk exposure after the filing of the expert's report and his/her technical findings may then serve as a basis for settlement discussions (provided, of course, that they are not challenged by the parties).

Similarly, the parties may reassess their risk exposure after a first decision has been rendered on the case (*e.g.* in summary proceedings or on a jurisdiction issue, *etc.*).

1.1.5 We assume that all jurisdictions know the out-of-court settlement. Is it, however, frequent in your jurisdiction that the court or the judge facilitates settlement discussions between the parties? What enables (if yes) or prevents (if no) the court from doing so?

In the French legal system, not only do courts play a major role in facilitating discussions between the parties, but they also give full force to contractual clauses binding the parties to seek to settle the dispute through conciliation or mediation.

- Statutory Provisions

Article 21 of the French Code of Civil Procedure states, as a general rule, that it enters into the scope of the judge's mandate to conciliate the parties.

A full set of statutory provisions defines the judicial conciliation (see 1.1.2.b.1). Other specific statutory provisions tend to facilitate judicial conciliation.

First, in minor civil cases which fall within the jurisdiction of the *Tribunal d'instance* (disputes less than €10,000), Article 829 of the French Code of Civil Procedure enables the claimant to file a writ of summons for the purpose of a preliminary conciliation.

Second, a preliminary conciliation process is mandatory in labor disputes or divorce cases.

Third, in family matters, a number of statutory provisions enable the judge to suggest conciliation and/or mediation to the parties. Thus, Article 1071 of the French Code of Civil Procedure states that the judge for family matters must try to conciliate the parties. The judge can propose mediation or give an injunction to the parties to meet with a mediator for the purpose of explaining the mediation process (Article 255 of the French Civil Code). Similarly, Article 373-2-10 of the French Civil Code expressly states that the judge must do his/her best endeavors to facilitate the conciliation of the parties in case of disagreement over the exercise of the parents' authority on the children (*autorité parentale*) (e.g. as regards to their place of residence).

- Case Law on Conciliation/Mediation Clauses

French Courts fully enforce contractual clauses which stipulate that the parties must enter into a conciliation or mediation process before filing a lawsuit. Any lawsuit filed in breach of such clause is deemed inadmissible (Cass. Ch. Mixte, 14 February 2003, No. 00-19423 and 00-19424 ; Civ.1, 8 April 2009, No. 08-10866).

The only limit to such principle relates to (i) labor disputes (Soc. 5 December 2012, No. 11-20004) because a preliminary conciliation is mandatory, or (ii) urgent provisional measures which are requested in summary proceedings (CA Paris, 4 July 2011, BICC 2002, No. 125).

- Settlements in Practice

There is currently a trend in favor of ADR procedures, in particular conciliation and mediation, notably because of the considerable work load that French courts have to cope with.

In particular, Commercial Courts do tend to facilitate settlement discussions between the parties by suggesting ADR procedures at an early stage of the proceedings. However, let alone the case of international firms (which have some experience in ADR) or of physical persons (who are not comfortable with justice and may prefer an amicable and cost effective procedure), clients are not always ready to enter into a negotiation/ADR process.

As a result, the settlement rate in litigation cases is probably lower than 50% in France.

1.2 Enforcement of Settlement

1.2.1 Are there differences between the in-court and the out-of-court settlement, for example with respect to their effect in enforcement proceedings? Are there other practically relevant differences?

As previously explained, the distinction between in-court and out-of-court settlements is not relevant, even when it comes to the enforcement of ADR settlements: in-court ADR settlements are not necessarily enforceable and likewise out-of-court ADR settlements can be enforceable under some circumstances.

Furthermore, in some areas of law where *transactions* or ADR settlements may contravene French public order or public policy rules, the parties would, in any event, have to submit their settlement agreement to the judge's review and approval. Such situations relate mainly to family law (consensual divorce), insolvency proceedings (settlement reached between a liquidator and a director with respect to the shortfall of assets, ...) and the protection of minors or adults under tutorship or curatorship.

When the judge's review is not mandatory and the parties wish to obtain an enforceable instrument, the *transaction* or ADR settlement would then have to be executed in the form of one of the enforceable instruments listed under Article L.111-3 of the French Code of Civil Enforcement Proceedings.

Pursuant to this article, *transactions* or ADR settlements would be enforceable instruments where (i) they have been reviewed and approved by a judge (*homologation*), (ii) they have been recorded in conciliation minutes (*procès-verbal de conciliation*), or (iii) they have been signed in the form of a notarial deed (*acte authentique*).

As a result, when parties wish to have an enforceable *transaction* or ADR settlement, they will either execute their settlement in the form of one of the instruments listed above, the main difference between these three options being the judge's control.

a. The ADR settlement was signed in the form of a notarial deed (*acte authentique*)

In France, notarial deeds have a high degree of authority and are considered to be probative.

Pursuant to Article L.111-3 of the French Code of Civil Enforcement Proceedings, notarial deeds are enforceable instruments. They do not require the judge's review.

b. The ADR settlement was acknowledged in conciliation minutes (*procès verbal de conciliation*)

Pursuant to Article 130 of the French Code of Civil Procedure, any settlement reached through a judicial conciliation is acknowledged by the judge in conciliation minutes (*procès-verbal de conciliation*). This principle applies even in situations where the discussions were led by a delegate conciliator, outside the judge's presence.

Before signing the conciliation minutes acknowledging the dispute settlement, the judge will ensure that (i) the ADR settlement does not contravene French public order or public policy rules, and (ii) the parties gave free and full consent to the settlement.

The judge is not entitled to amend the terms and conditions of the *transaction* or ADR settlement.

c. The *transaction* or ADR settlement was reviewed and approved by a judge (*homologation*)

The third legal means available to the parties to obtain an enforceable instrument is to require the judge to enforce their ADR settlement.

Various provisions of the French Code of Civil Procedure allow the parties to request the judge to enforce their settlement depending on whether the settlement was reached as part of a pending litigation or not.

- The *transaction* or ADR settlement was reached as part of a pending litigation

In this case, the parties' request can be submitted to the judge's review on the ground of Articles 131 (judicial conciliation), 131-12 (judicial mediation) or 768 (general powers of the judge instructing the case) of the French Code of Civil Procedure.

According to some legal authors, enforcement of ADR settlements reached as part of a pending litigation fall within the non-contentious powers of the judge (Articles 25 et seq. of the French Code of Civil Procedure). In non-contentious matters, the judge can ground his/her ruling on all facts related to the case submitted to his/her review, carry useful investigations, conduct interviews, and consult third parties if necessary.

As a result, the judge's control in non-contentious matters can be broader than the one exercised when the settlement is acknowledged in conciliation minutes.

Nevertheless, as for ADR settlements acknowledged in conciliation minutes, the judge cannot amend the terms and conditions of the settlement or the *transaction*.

- The *transaction* or ADR settlement was reached outside of court

The parties can submit their settlement to the judge's review and approval on the ground of Articles 1565 et seq. of the French Code of Civil Procedure. These articles relate to conventional conciliation and mediation, participative procedure and *transaction*. They state the conditions under which the parties can require the judge to enforce their *transaction* or ADR settlement.

Even though the judge is not entitled to amend the ADR settlement's terms and conditions, the judge can nonetheless refuse to enforce the ADR settlement, especially when the settlement contravenes to French public order and public policy rules or involves a party who needs further protection (minors and adults under tutorship or curatorship, legal entity subject to insolvency proceedings, see 1.2).

If the judge refuses to enforce the *transaction* or ADR settlement, the parties have no other choice than pursuing the discussions and amending their ADR settlement as eventually suggested by the judge, before going to litigation.

In participative procedure, where the dispute was settled in part, the parties can request the judge to (i) enforce the settled part of the claim (Article 1557 of the French Code of Civil Procedure), and (ii) rule on the unsettled part (Article 1560 of the French Code of Civil Procedure).

1.3 Confidentiality and Privilege

1.3.1 Does your jurisdiction consider a civil settlement agreement and the discussions/correspondence leading to such a settlement confidential by law or other rules (e.g., ethical rules) or do the parties have to agree on confidentiality in the context of their settlement of the settlement discussions?

Most of the time, the parties will agree that discussions leading to a settlement as well as their *transaction* or ADR settlement agreement will remain strictly confidential. There is no general principle of confidentiality under French law. To the contrary when French public order is at stake, confidentiality can be raised (Article 21-3 of Act No. 95-125 of 8 February 1995).

Various rules nonetheless apply with respect to confidentiality. While judicial conciliation and mediation are not subject to confidentiality unless the parties have decided otherwise (a), confidentiality applies to conventional conciliation and mediation (Article 11-1 of Act No. 72-626 of 5 July and provisions of the French Code of Civil Procedure relating to conventional conciliation and mediation) (b). Although participative procedure is a conventional way of settling a dispute, it is not subject to confidentiality (c). Finally, enforcement of ADR settlements and *transactions* raises questions as to whether full confidentiality can be ensured (d).

a. *Transactions* or ADR settlements reached through judicial conciliation and/or mediation : No general principle of confidentiality

Confidentiality of discussions and confidentiality of the *transaction* or ADR settlement agreement are not provided by law.

As a result, if confidentiality is determining of the negotiations and the parties' consent, they then have to contractually agree on confidentiality from the onset (see 1.3.2 on the means available under French law to protect confidentiality for further developments).

If the parties chose to go through a judicial conciliation process, they have the possibility to request that the discussions are held in chambers and not publicly in order to ensure that third parties do not have access to the contents of the discussions with the judge or the conciliator.

Nonetheless, if the conciliation process ends up with the execution of a *transaction* or ADR settlement agreement acknowledged by the judge in conciliation minutes (*procès-verbal de conciliation*), third parties, though they are not entitled to request a copy of the settlement agreement itself, nonetheless have access to the conciliation minutes.

b. Conventional conciliation and mediation are subject to confidentiality

According to Article 1531 of the French Code of Civil Procedure, conventional mediation and conciliation are subject to a general principle of confidentiality. The conditions of implementation of this principle are stated by Article 21-3 of Act of 8 February 1995.

Pursuant to this article, the conciliator or mediator's conclusions as well as the parties' statements made during the mediation or the conciliation process cannot be revealed to third parties nor disclosed as part of later litigation or arbitration proceedings.

c. Participative procedure is not subject to confidentiality by law

Unlike the conventional conciliation or mediation, none of the provisions of the French Civil Code or of the French Code of Civil Procedure relates to confidentiality. In this respect, the French participative procedure, as compared to the Anglo-Saxon collaborative procedure, also lacks provisions.

To ensure the confidentiality of the discussions, the parties have to agree in their participative contract that the negotiations and the documents exchanged to that purpose are strictly confidential.

Although the parties can agree on the principle of confidentiality from the onset of the discussions, the participative procedure still raises questions as to whether the confidentiality can be fully ensured:

- Unlike the Anglo-Saxon collaborative procedure, the lawyers assisting the parties do not have to depart from the case if the negotiations fail.
- In addition, should the negotiations fail or the parties come to a settlement relating to a part of the dispute only, all documents exchanged during the negotiations may be disclosed during the judicial phase before the judge.

d. Enforcement of *Transactions* and ADR Settlements and Confidentiality

Enforcement of transactions and ADR settlements raises questions with respect to confidentiality.

Submitting the ADR settlement to the judge's enforcement, whatever the legal ground of the parties request, supposes that the judge will render a decision acknowledging that the parties came to an agreement. As such, third parties, if not aware of the terms and the conditions of the settlement, are able to request a copy of the court's decision acknowledging the parties' settlement of their dispute.

The parties may, however, wish that even the existence of the settlement itself remains confidential. Such confidentiality will not be ensured if the settlement is acknowledged in conciliation minutes (*procès-verbal de conciliation*) or submitted to the judge's enforcement (*homologation*).

1.3.2 What means do you have to protect the confidentiality of your settlement and related discussions / correspondence for civil or other procedures?

Various means are available to the parties to protect the confidentiality of their exchanges, discussions and settlement.

a. Conducting the Discussions Through the Lawyers' Parties

Article 3.1 of the French lawyers' Code of Conduct provides that any letter (including emails, facsimile,...) exchanged between lawyers is confidential. It derives from this ethical principle that should the discussions fails, the parties would not be able to use the letters exchanged between their lawyers to support their respective claims before the judge.

As a result, this means appears to be the most efficient and powerful tool to protect the confidentiality of the parties' discussions.

b. Signing an Onset Agreement Ensuring Confidentiality of the Discussions

Another means to protect the confidentiality of the settlement and related discussions is to sign an onset agreement providing for the confidentiality of all exchanges and documents in relation to the settlement discussions.

It would also be recommended to include, in the *transaction* or ADR settlement, provisions dealing with confidentiality and listing the conditions under which one party may be entitled to disclose the settlement agreement (to a third party in specific cases, to the judge in order to execute the agreement or request its enforcement, to the administration ...).

c. Negotiating Through Collaborative Procedure

Collaborative procedure is not legally instituted in the French Code of Civil Procedure. Nonetheless, some French lawyers are trained to the collaborative process (the list of French lawyers trained to collaborative law is available under the following links: <http://www.droit-collaboratif.org/accueil-1-1-1>, <https://www.collaborativepractice.com/>).

Unlike the participative procedure, confidentiality is determining of the success of the collaborative procedure since all parties and their lawyers agree prior to any discussions to the confidentiality of the documents and the exchanges in the collaborative contract.

Under a collaborative procedure, none of the parties is in possession of the documents exchanged during the discussions. In addition, all documents are stamped “collaborative procedure”.

Though collaborative procedure is not legally instituted, French courts are aware of this amicable way of settling a dispute and should reject all documents exchanged during the collaborative process and stamped “collaborative procedure”.

d. When not required by law, avoiding submitting the *transaction* or ADR settlement to the judge’s review or approval.

The parties may wish to keep confidential the existence of their *transaction* or ADR settlement. In such a case, the parties may consider not submitting their *transaction* or ADR settlement to the review of the court for enforcement purposes (see 1.2). They may, however, need to obtain an enforceable instrument. In this case, they may consider executing their *transaction* or ADR settlement in the form of a notarial deed.

1.3.3 What are the possible consequences of a breach of confidentiality?

If the discussions are conducted through the parties’ lawyers bound by Article 3.1 of the French Lawyers Code of Conduct and a breach of confidentiality is identified (like the disclosure of a confidential letter exchanged between lawyers), the other party can request the judge to reject the confidential documents from the debates.

The lawyer who disclosed a confidential letter in breach of Article 3.1 of the French Lawyers Code of Conduct may be held liable. A disciplinary action may even be brought before the Bar’s chairman.

If the parties signed an onset agreement on confidentiality, the parties themselves may be held liable for a breach of confidentiality. In this case, the other party may be entitled to file a claim based on contract law in order to seek damages against the party who breached the confidentiality agreement.

Both aspects are presents in the collaborative procedure: a claim based on contract law would be available against the other parties to the collaborative contract (as the lawyers are also parties to the collaborative contract, they also may be held liable on the ground of a breach of the collaborative contract in addition to the breach to their ethical rules).

All documents reviewed as part of the collaborative procedure (including letters, minutes of meetings, expert's reports, statements, ...) are stamped "collaborative procedure". As a consequence, the judge should reject any document stamped "collaborative procedure" from the debates.

Nonetheless, we shall add that the risk of a breach of confidentiality is remote in collaborative procedure since the parties do not have a copy of the collaborative documents that remained at the lawyers' office.

1.3.4 Are you allowed to disclose the settlement agreement in other proceedings?

Usually, the parties include in their ADR settlement a clause providing that the settlement agreement is confidential and cannot be disclosed.

Likewise *transactions* and ADR settlements generally provide the conditions under which confidentiality can exceptionally be lifted.

If a party discloses the settlement agreement in other proceedings in breach of such clause, the other party may be entitled to file a claim grounded on contract law and seek damages.

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