

Conflict management is an important strategic issue for companies, which they cannot afford to leave to chance.

Until recently companies dealt with their commercial disputes almost exclusively before the national courts, with the risks and restrictions that this entailed and which often led to unsatisfactory outcomes for business managers.

Any dispute, no matter its nature, weakens an entity and its business relationships. It affects profitability, performance and future development if an outcome is not rapidly reached.

In this context and with the passing of a new law in France regarding mediation (February 8<sup>th</sup>, 1995), the CMAP was created in order to offer companies adequate solutions to solve their business conflicts.

In order to introduce the theme of Corporate ADR, through the 10-year experience of the CMAP, I will firstly present briefly the CMAP and draw up the profiles of companies that opt for the CMAP's methods, prior to developing the advantages of ADR Institutions and the solutions proposed by the CMAP.

## **Presentation of the CMAP and its clients**

### **The CMAP**

The Paris Chamber of Commerce and Industry, in association with other institutions (the Bar of Paris, the Commercial Court of Paris, the French Arbitration Association and the French National Committee of the International Chamber of Commerce) founded the CMAP in 1995 in order to provide companies with efficient solutions for their conflicts.

The CMAP is organized around three committees:

- the Accreditation and Appointments Committee,
- the Information and Prospecting Committee,
- the Training Committee.

Just as the development of ADR, the creation of the CMAP is the response to the needs expressed by companies. Today companies have an alternative to the courthouse by resorting to Alternative Dispute Resolution. Parties to a business relationship wish to find, even before a conflict develops, a neutral venue in which to examine and discuss their respective interests, in the presence of a third party. Appropriate solutions, which in many cases could not otherwise have been adopted, allow the parties to continue their business relationship.

The CMAP does not only represent an alternative but a first choice solution by meeting the expectations of companies through the following advantages:

- Confidentiality,
- Possibility to escape contradiction and purely legal arguments,
- Balance of treatment for the parties,
- Freedom to end the process at any time,
- Speed, flexibility and creativity of the process (at the CMAP, an average 15 hours of work per case),
- Control on the solution for the parties (voluntary process),
- Durable protection of the contractual relationship.

### **Companies' profiles**

In a large majority of cases mediation is preferred by companies when their conflicts arise from long term contractual relations. In these cases, mediation can allow a business relationship to continue or can avoid a brutal break-up between business partners and put in place what we could call “an amicable divorce procedure”: a rapid, confidential and non conflictual process.

A survey was conducted in 2006 over 300 mediations. This survey provides answers on the profiles of the CMAP's clients regarding their business sector, the financial amount at stake and their geographic origin.

#### **Business sectors:**

Conflicts between partners, corporate law, mergers and acquisitions: 16%

Distribution sector: 12%

Industry: 11%

Sales: 11%

Commercial property: 5%

Real-estate, construction: 9%

Banking, insurance: 9%

IT: 12%

IP: 12%

Other: 12%

#### **The financial aspect of the cases submitted to mediation:**

In 11% of the cases, 5 000 000 euros were at stake

In 30% of the cases, 1 000 000 euros were at stake

In 21% of the cases, 150 000 euros up to 1 000 000 euros were at stake

In 28% of the cases, 15 000 euros up to 150 000 euros were at stake

In 5% of the cases, 15 000 euros or less were at stake

Finally, in 5% of the cases, there was no financial aspect (or undetermined).

The geographic origin:

The geographic origin is for a large majority of companies Paris and its surroundings (67%). 14% of the companies come from other regions of France and 19% come from abroad.

As for the size of the companies, since the creation of the CMAP, a majority of medium to large companies have resorted to mediation. Despite the CCIP's forecast, the SME are less represented in ADR procedure.

This can be explained easily by the fact that large companies have a legal department which can anticipate conflicts and find an adequate solution. Whereas for SME without in-house legal department, they have trouble anticipating disputes and often have to deal with it as an emergency.

### **The advantages of an institution**

The main advantages companies benefit from an ADR Institution are the guarantees put in place by the institution to certify a high-quality mediation process.

### **The selection of the mediators**

The CMAP's rules of Mediation aim both at respecting the parties' freedom, without which the mediation cannot attain its desired object and at giving full latitude to the mediator to assist the parties throughout the process. However it is necessary to recall that the legitimacy of the mediator relies wholly on the confidence placed in him/her by the parties. The choice of the mediator is essential. The CMAP's mediators are businessmen, attorneys-at-law, former judges, experts...and most importantly all of them are trained and submitted to a quality control.

As soon as the parties agree to participate in mediation proceedings or when the contract between them contains a clause referring to the CMAP, the Accreditation and Appointments Committee appoints a mediator selected according to the nature of the dispute, or as the case may be, based on a suggestion from the parties.

The full success of mediation relies widely on the mediator:

- independence, neutrality and impartiality
- human skills (listening capabilities, pragmatism, diplomacy, creativity, availability)
- professional skills (knowledge of the techniques of mediation through a specific training, know-how often requested on the substance of the conflict, legal knowledge, practice of foreign languages, etc.)

The same rules and guidelines apply to the other ADR processes proposed by the CMAP (arbitrator, neutral third party...)

## **The creation of the companies' charter**

In order to promote the process, the CMAP has developed "*the companies' Charter for mediation – for amicable resolution of business disputes*". The Charter was signed on the 22<sup>nd</sup> of November, 2005 by about 40 of the largest companies in France in the presence of Mr. Thierry Breton (Economy and Finance Minister).

The Charter was established by the "Académie de la Mediation" directed by Thierry Garby and composed of businessmen, legal department's directors, lawyers, judges, CMAP mediators...

The aim of this Charter is to promote mediation in the business world, because the first purpose of each and every company is to gain clients and not to waste their time, money and energy to win trials.

### The Companies' Charter for mediation:

*It is in the interest of all businesses to forestall disputes and solve their conflicts amicably rather than through litigation; there are ways to find amicable settlements, even after a negotiation has failed and litigation procedures have been started.*

*For these reasons, the parties declare their intent as follows:*

- 1. To examine whether it is possible and desirable to have recourse to amicable dispute resolution procedures when they find themselves in a situation that could lead to a conflict or when they are drawn into a process of litigation;*
- 2. When the outcome of such examination is affirmative, to suggest an amicable approach to the other parties giving them, where necessary, all information that may be of use to this end;*
- 3. To renew this examination, as appropriate, during the course of the litigation procedures in such cases where it has not been possible to prevent the start of litigation;*
- 4. Whenever it is possible and desirable to do so, to introduce clauses for amicable dispute settlement in their contracts;*
- 5. To implement in-house training so that amicable dispute settlement methods are known and understood by all persons liable to come across situations of conflict;*
- 6. To publicize the fact that they are signatories to this Charter;*

7. *To bring this Charter to the attention of the lawyers who usually assist and counsel them;*
8. *To participate in meetings with other signatories of this Charter to share their experience and to improve their practice of amicable dispute settlement.*

**The success of the process**

We can finally notice that in 2006, 71% of the mediations within the CMAP resulted in an agreement.

## **The solutions proposed by the CMAP**

Mediation and arbitration are the two main procedures used by the CMAP to settle disputes. They obey to specific rules and guidelines set forth by the CMAP.

### **Mediation**

Mediation is an amicable dispute resolution process. It provides a shield of confidentiality and trust, which allows entities to negotiate and explore by themselves a mutually acceptable solution to their dispute. The mediator orchestrates these exchanges, without becoming involved in the substance of the dispute, leaving the parties entirely free to decide of the outcome of their dispute.

Mediation proceedings are initiated either upon request of both parties, where they have so agreed at the outset of the dispute, or upon request of one of the parties.

In the latter case, as soon as the request is registered, the CMAP informs the other party and invites it to accept to take part in the mediation. When the CMAP receives the agreement of the other party the case is submitted to the Accreditation and Appointments Committee which will designate a mediator. When the other party refuses or fails to respond, the CMAP tries to understand its motivation, through a telephone conversation, and advises the party having requested a mediation.

### **MedArb**

Mediation and arbitration can be complementary and used in succession (mediation followed by arbitration if the parties did not reach an amicable settlement; or arbitration which once started may be suspended to try mediation) or at the same time (simultaneous Med-Arb).

The CMAP also proposes other ADRs. These procedures are referred to as “new Solutions”; their aim is to provide companies with tools to prevent litigation from occurring through the early intervention of skilled and neutral third parties. Every procedure has its own set of rules and guiding principles drafted by the CMAP.

### **Technical expertise**

An expert gives a non-binding advice:

- on a technical or financial question (*including within a mediation or an arbitration proceeding*)
- on the determination of a price or a value

The process is launched by both parties and puts in place a contradictory, confidential and non-binding procedure

The technical expertise enables to sort out the technical or financial issues in order to make further negotiations easier.

### **Early neutral evaluation**

A neutral-lawyer asserts objectively:

- how a Court would presumably rule the case or evaluate the damage
- how one could interpret and/or re-draft a litigious contractual clause

The process is launched by both parties (including during mediation) and leads them to a contradictory, confidential and non-binding evaluation that cannot be produced in Court. It is the starting point to an optimal negotiated solution because it enables each party to consider the strengths and weaknesses of its position.

### **Adjudication**

An adjudicator assists the parties in the good performance of their agreement by taking conservative decisions, in urgency, when a conflict arises. His decisions are binding and put an end to difficulties (mainly technical) arising during the life span of the contract. They have a contractual value; they are quick, enforceable and confidential.

The parties agree to apply the decisions without delay. The parties can reserve an option upon which, after the end of the contract, they can contest the decisions before a judge or an arbitrator in order to obtain a definitive decision regarding the scope of their obligations.

Finally, an online recommendation service allows access to a neutral third party via a secure computer network system.

The wide range of ADRs provided by the CMAP allows companies, at any time, whether at the first symptoms of a possible conflict or after several years of litigation, to engage in an efficient and customized dispute resolution process, with managed deadlines and costs.

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