LYDIAN

Mediation

Mediation is increasingly encouraged by the Belgian legislator and the courts. You will find hereinafter an overview of the types of mediations and characteristics of this alternative method of dispute resolution.

1. WHAT IS MEDIATION?

Mediation is an alternative method of dispute resolution. It is based on a confidential and structured process of voluntary dialogue between the parties with the help of a mediator. The mediator is an independent, neutral and impartial third party who facilitates communication and tries to guide the parties to find a solution to their dispute themselves. This solution usually consists in the signing of a settlement agreement.

2. EXTRA-JUDICIAL MEDIATION VS. JUDICIAL MEDIATION

A. Extra-judicial mediation: : the parties are free to organise mediation without any formality, independent of any judicial or arbitral proceedings, whether before, during or after court proceedings or arbitration.

In the event of an agreement, the parties generally comply voluntarily with the terms of the agreement. If this is not the case, the party wishing to perform the mediation agreement must apply to the court.

However, the mediation agreement can be enforced immediately without the intervention of the court, providing that the contract has been homologated. To this end, the parties have ensured that they:

- have used a mediator accredited by the Federal Mediation Commission;
- have concluded a mediation protocol with a series of mandatory provisions mentioned in article 1731 of the Judicial Code.

B. Judicial mediation: at any stage of the proceedings and even in summary proceedings, as long as the case has not been decided, the judge hearing the dispute may, at the joint request of the parties or on its own initiative but with their consent, order mediation. Recently, under certain circumstances, the judge may also order the parties to start mediation. This may concern all or a part of the dispute.

The judge is involved in the organisation of the mediation. The judge never takes on the role of mediator himself, but will appoint an accredited mediator. By agreement between the parties, the parties may jointly request the appointment of a non-accredited mediator in the context of disputes between companies.

If judicial mediation leads to a (partial) agreement, the parties may request the court to homologate the agreement in order to obtain an enforceable title. If no agreement is reached, the court proceedings shall continue without prejudice to the confidentiality of the documents used during mediation.

3. WHAT DISPUTES CAN BE MEDIATED?

Any dispute of a patrimonial nature, cross-border or not, including disputes involving a legal person governed by public law, may be submitted to mediation.

In the case of disputes of non-patrimonial nature, only disputes that can be settled by means of a settlement, disputes on which the special jurisdiction of the family court is based as well as disputes arising from a cohabitation, can be the subject of mediation.

4. MEDIATION CLAUSE

Parties that include a mediation clause in their contracts, undertake to use mediation before any other form of dispute resolution (binding third-party decision, arbitration or court proceedings).

The judge or arbitrator hearing a dispute which is the subject of a mediation clause shall, at the request of one of the parties, stay the proceedings, unless the clause is invalid or has expired.

5. WHAT GUARANTEES DOES MEDIATION OFFER?

A. Confidentiality: mediation is based on the principle of confidentiality, which is crucial to establish the credibility of this method of dispute resolution and to enable the parties to actually discuss and work out a solution.

All documents prepared and communications made during and for the purpose of mediation are in principle confidential. This applies to the parties and their lawyers as well as to the mediator.

In the event of a breach of confidentiality by the parties, the mediator and, as the case may be, third parties, may claim an award for damages. Confidential documents and communications that are nevertheless communicated or invoked by a party in breach of the obligation of confidentiality will automatically be excluded from debate. In addition, the violation of the professional secrecy of the mediator is punishable by criminal law.

This duty to confidentiality can only be deviated from with the consent of the parties. On the other hand, the mediation protocol and the mediation agreement(s) signed by the parties, as well as any document drawn up by the mediator in which the failure of the mediation is established, are, in principle, not covered by the obligation of confidentiality.

The parties may, by mutual agreement, extend or limit the confidentiality.

B. Suspension of the limitation period: in case of extra-judicial mediation, each mediation proposal suspends the limitation period of the claim linked to the right that the party is invoking, for one month. The signing of the mediation protocol suspends the limitation period during the mediation process.

In the case of judicial mediation, the limitation period for a claim is interrupted by writ of summons until a final decision has been taken.

C. Mediation is a voluntary procedure: each of the parties can terminate the mediation at any time without harmful effect.

6. WHAT ARE THE COSTS OF A MEDIATION?

The costs of a mediation depend on the services provided, the duration of the mediation process, the number of parties, the fees and the additional costs incurred by the mediator. The parties and the mediator must agree in advance on the method of calculation, the determination of the rates and the method of payment. This information is laid down in a mediation protocol. In Belgium, usually mediators work on the basis of hourly rate and expenses and not on the basis of a success fee. The costs and fees of the mediation are borne in equal parts by the parties, unless they decide otherwise. In addition, the parties will have to bear the costs of their lawyers when they assist them in the mediation process.

Mediation is in general more advantageous than litigation, in particular because it saves money for the preparation, filing and handling of the documents necessary to support the process, as well as several other costs inherent in the judicial resolution of a dispute.

7. CHAMBERS FOR AMICABLE SETTLEMENT

Since a few years, a practice has arisen within several courts whereby cases which qualify for conciliation or mediation based on criteria such as cost considerations, the need for a speedy resolution or possible evidentiary problems can be referred to specific chambers for amicable settlement at the request of a party or at the initiative of the judge. In such 'chamber for amicable settlement', the judge attempts to lead the parties to conciliation or refers the more complex cases to a mediator if necessary.

Meanwhile, the establishment of a chamber for amicable settlement has been enshrined in law for all (civil) courts of first instance, commercial courts and courts of appeal.

Although there are similar features to mediation (such as confidentiality), this is not a mediation as such, but rather a conciliation led by a judge. If the parties cannot come to an agreement, reference can still be made to a genuine mediation as described above, or the case shall be decided before a chamber on the merits by another judge.

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