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ADR clauses in France and China: A flexible tool to settle commercial disputes

Pursuant to a Decree dated March 11, 2015 relating to the simplification of civil procedure, electronic communications and amicable dispute resolution, any and all summons must, since April 1, 2015, specify the steps taken by the parties to attempt to amicably settle their dispute.

Yet, in France like in China, the effectiveness of alternative dispute resolution clauses included by the parties in their contracts remains often uncertain.

Since April 1, 2015, plaintiffs must specify in their summons, petitions or statements to the court "*the steps taken in view to reaching an amicable settlement of the dispute*", "*unless they can provide a legitimate reason related to the urgency of the matter, or to the subject under consideration, in particular when such subject is a matter of public order*"[1].

It is true that non-compliance with this new obligation is sanctioned neither by the nullity nor by the inadmissibility of the summons or petition since, in case of non-compliance, the judge has merely the possibility to propose to the parties to initiate a conciliation or mediation process. The implementation of this new obligation will not be without difficulties, not least because these "*steps*" are quite often taken by legal counsels and, as such, are covered by professional secrecy.

Yet, and despites these reserves and uncertainties, this recent development is clearly part of the trend towards a "contractualization" of French disputes, or one could even say towards their diversion from courts. In this respect, while a similar diversion movement is also spreading in China, it should rather be considered as a revival of the tradition of conciliation that is deeply rooted in the Chinese civilization.

Alternative dispute resolution methods (also called ADR) offer significant benefits, including, but not limited to, a quick process, small costs, confidentiality, better chances to have the decision enforced, or the strategic continuation of the business relationship on the long-term.

Contrary to lawsuits, which are more cumbersome as they inevitably result in a situation where a party loses the case while the other wins it, ADR enables to achieve a win-win outcome. Consensual in nature, ADR techniques help economic operators put an end to their business disputes in a completely different way. Both internally and internationally, business partners no longer hesitate to anticipate things and to insert in their contracts clauses providing for a conciliation process prior to standard court litigation.

At a time where China has become the European Union's 2nd most important trading partner, and the European Union China's biggest trading partner[2], an increasing number of French companies are looking at the Chinese market, and vice-versa. For Chinese companies wishing to invest in France, just like for French companies wishing to expand their operations on the Chinese market, the effectiveness of ADR clauses in both countries is an issue that naturally arises.

I. Effectiveness of ADR clauses under French law

French contract law is governed by the principle of consensualism: *"Agreements lawfully entered into take the place of the law for those who have made them"*[3]. The parties may thus freely set forth in their contract that they will attempt to settle their dispute amicably before going to court.

The question concerning the effectiveness of such clauses – by which the parties define the terms and conditions under which they will bring a dispute to court – has long been a controversial issue. In a series of recent decisions rendered by the *Cour de Cassation* (French Supreme Court), it seems that the binding force of the contract should now prevail.

A first controversy arose over the question of how non-compliance with ADR clauses should be sanctioned: when one of the parties refuses to engage in a prior conciliation process and goes directly to court, can it be sanctioned? While the Second Civil Chamber of the *Cour de Cassation* first clearly rejected the idea that non-compliance with the conciliation process provided for in the contract could constitute a "*fin de non-recevoir*", i.e. a ground for dismissal that can cause the opponent's request to be dismissed and that can be raised at any stage of the proceedings[4], before later hanging its opinion[5], the First Civil Chamber had ruled that "*there is no sanction associated with*" such a clause[6]. Finally, the Joint Chamber of the *Cour de Cassation* harmonized the diverging court decisions and held as follows: "*lawful, the clause of a contract that provides for a mandatory conciliation procedure prior to the initiation of legal proceedings, the enforcement of which suspends the statute of limitations until its outcome, constitutes a "fin de non-recevoir" which must be granted by the judge if the parties raise it*"[7]. French legal writers, who extensively commented this decision, almost unanimously approved all of the Joint Chamber's findings.

A second controversy then arose over the question as to whether the situation could be cured, and consequentially, whether it was possible to avoid the sanction of inadmissibility of the claim brought to court

by attempting conciliation before the judge renders a decision. The Second Civil Chamber and the Commercial Chamber of the *Cour de Cassation* had successively ruled in 2010[8] and in 2011[9] that the parties who had directly go to court could cure the situation by engaging the conciliation process during the course of the legal proceedings. In December 2014, the *Cour de Cassation*, sitting again in Joint Chamber, finally held that the situation could not be cured after the contentious matter has been referred to the judge[10].

Assuredly, for the conciliation process contemplated by parties to be fully effective, it must take place before the matter is brought to court.

This binding force has a very serious effect as it deprives defaulting plaintiffs from the possibility to cure their breach by attempting conciliation during the course of the proceedings in order to avoid that their claim be declared inadmissible by the court. As such, they have no other choice but to initiate the conciliation process, and to hope that the statute of limitations will not have run at the time they will initiate legal proceedings if conciliation eventually fails.

II. Effectiveness of ADR clauses under Chinese law

In China, the concept of conciliation is deeply rooted in the country's history. Confucianism, as the prevailing philosophy in the Chinese culture, advocates harmony and mutual understanding in social relationships. For the Chinese, conflict is viewed as an impediment to the smooth circulation of breaths and as a loss of energy[11]. In other words, the ideal society is a society without conflicts.

In such a social and cultural background, "conciliation", "negotiation" or "mediation" are terms that occur very frequently in Chinese legal texts. Let us take for example the Civil Procedure Law of the People's Republic of China. Article 9 of this Law stipulates that courts must conduct conciliation in accordance with the principles of voluntariness and lawfulness, and this is only when mediation fails that the judgment must be rendered without delay. Pursuant to Article 49 of this Law, asking the judge to conduct mediation is a right of the parties. The same applies when the parties decide to try to reach an amicable settlement on their own[12].

It is worth noting that, at the time the Civil Procedure Law was amended in 2012, the Chinese legislator had even tried to impose on civil parties the obligation to use mediation before initiating legal proceedings. Such an attempt appeared, however, to go "too far". A "compromise" provision was finally included in the Civil Procedure Law, according to which "*Wherever appropriate, mediation shall be adopted for civil disputes before they are brought to the people's court, unless the parties thereto refuse mediation*"[13].

While conciliation and meditation standards have mushroomed under the impulse of the Chinese authorities, the legal texts governing civil and commercial procedures remain silent on the effectiveness of contractual ADR clauses. Article 57 of the Contract Law of the People's Republic of China certainly guarantees the validity of such clauses, even if the contracts where such clauses are inserted become invalid, or are rescinded or terminated. Yet, uncertainty remains high as regards the effectiveness or the binding force of these clauses.

Contrary to France, decisions rendered by judicial and administrative courts in China are not published online.

Such decisions are not, in principle, available to the public. In 2013, the Supreme People's Court ordered to strengthen the publication of court decisions… but the reform remains far from complete. For example, in February and March 2014, only 18 decisions, deemed "exemplary", were published. It is, therefore, quite difficult to study Chinese judges' behavior with respect to the effectiveness of ADR clauses included in commercial contracts.

In practice, in the presence of a contractor that failed to meet the obligation to engage in prior conciliation and brought its claims directly to court, the judge will first encourage the parties to make efforts to reach an agreement through conciliation. If conciliation fails, the judge shall declare the claim admissible and rule on the merits without delay.

Despite the uncertainty that remains as to the effectiveness of ADR clauses included in commercial contracts, the use of such clauses in the framework of domestic and transnational business transactions is steadily increasing. This can be explained by the fact that the spirit of conciliation and the inclination to minimize disputes are deeply rooted in the Chinese social and legal contexts. Civil and commercial judges encourage, at every stage of the proceedings, the parties to reach an amicable settlement and arbitrators too can also prompt the parties to settle their dispute amicably before the arbitral award is rendered.

It appears that, in China, the omnipresence of a conciliation spirit makes the uncertainty as to the effectiveness of ADR clauses a lesser concern, at least to the extent that parties to commercial disputes are always invited by the courts to try to find an amicable settlement, regardless of whether or not the parties have previously agreed on an ADR clause.

[1] Decree dated March 11, 2015 relating to the simplification of civil procedure, electronic communications and amicable dispute resolution

[2]European Commission's website: http://ec.europa.eu/trade/policy/countries-and-regions/countries/china

[3] Article 1134 of the French Civil Code

[4] Second Civil Chamber of the *Cour de Cassation*, January 15, 1992, n°90-19.097

[5]Second Civil Chamber of the *Cour de Cassation*, July 6, 2000, n°98-17.827

[6] First Civil Chamber of the *Cour de Cassation*, January 23, 2001, n°98-18.679

[7]Joint Chamber of the *Cour de Cassation*, February 14, 2003, n°00-19.423

[8] Second Civil Chamber of the *Cour de Cassation*, December 16, 2010, n°09-71.575

[9] Commercial Chamber of the *Cour de Cassation*, May 3, 2011, n°10-12.187

[10]Joint Chamber of the *Cour de Cassation*, December 12, 2014, n°13-19.684

[11]I. P. Karmenarovic, *Le conflit. Perception chinoise et occidentale*, Les Editions du Cerf, 2001, p. 128

[12] Article 50 of the Civil Procedure Law of the People's Republic of China

[13] Article 122 of the Civil Procedure Law of the People's Republic of China