MEDIATION AND RECONCILIATION UNDER THE LAW: 22-13

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Abstract:
In a continuous effort by the Algerian legislator to provide opportunities for the settlement and resolution of disputes between disputing parties, while preserving goodwill and harmony between them, as well as securing finances, employment positions and protecting investments from the complexity and length of judicial procedures, the legislator, through Law 22-13, which amended the provisions of Law 08-09 on civil and administrative procedures, strengthened the alternative methods of dispute resolution, particularly in commercial cases. The law introduced provisions on mediation and conciliation, which are regulated in a different way from what was provided for in Law 08-09. Therefore, the purpose of this article is to examine the feasibility of amending Law 08-09 regarding mediation and reconciliation in commercial cases.
Keywords: *Mediation, reconciliation, specialised commercial courts.*

INTRODUCTION:

It is well known that the Algerian legislator has given the parties to a dispute the possibility of settling disputes that may arise in various aspects of life. Therefore, we find that the Algerian legislator has regulated these provisions within the framework of the so-called alternative dispute resolution methods in the first chapter of the fifth book of the law 08-09 on civil and administrative procedures. This is done through articles 990 to 1013, which deal with conciliation, mediation and arbitration. It is noteworthy that the Algerian legislator used these measures in the amendment of the Law 08-09 on commercial matters. This is undoubtedly due to the specific nature of commercial disputes and the possibility for commercial companies to resolve their problems before resorting to litigation. Has the Algerian legislator been able to include provisions for mediation and reconciliation in the amendment to Law 22-13, especially in light of the experience of reconciliation and mediation in other matters other than family and labour cases? We will approach this issue along two axes: the first axis will discuss the provisions of mediation within Law 22-13, and the second axis will discuss the provisions of reconciliation within Law 22-13. It is important to note that the purpose of this article is to first understand the requirements of mediation and conciliation within Law 22-13, and to understand the legislator's intent in making mediation mandatory and conciliation a procedural requirement prior to filing a lawsuit, similar to disputes related to numbering and labour issues. All this will be done through an analysis and evaluation of the new provisions on commercial cases.

Section One: Legal Provisions on Mediation: 22-13

The Algerian legislator has not only recognised mediation, but also made it compulsory in Law: 22-13, specifically in Article 534. It is now an obligation and not subject to the acceptance of the parties, as was previously the case under the provisions of Article 994 of the law: 08-09. The legislator has limited it by excluding the provisions and powers of article 536, which are repeated in the same law. The question therefore arises as to the purpose and motivation of making mediation compulsory. Before answering this question, let's define mediation and distinguish it from similar terms and concepts.

First question: Defining mediation and distinguishing it from similar terms and concepts

Mediation, conciliation and arbitration share the common goal of resolving disputes, but they differ in concept and process. What are the key elements that distinguish mediation from arbitration and conciliation?

1. Definition of mediation:

Judicial mediation is one of the alternative dispute resolution methods that provides a space for disputing parties to meet, engage in dialogue and reconcile their perspectives with the assistance of a neutral third party[1]. Although the legislator has not defined the concept of mediation, article 994 of the Civil and Administrative Procedure Law 08-09 suggests that it is a "means of bringing the parties to a dispute together for an optional dialogue before the judiciary"[2]. It is therefore an amicable method of resolving disputes before the competent judicial authority, with the intervention of a third party appointed by the judicial authority. This does not mean that the judge stops considering the dispute[3].

Mediation differs from arbitration and conciliation in several respects, which we will outline without going into detail, as this is beyond the scope of this article.

Second: Distinguishing mediation from arbitration and conciliation

Arbitration, as stated in article 1011 of the law 08-09 on civil and administrative procedure, is the result of a prior agreement between the parties in which they agree to resort to arbitration in the event of a dispute. The agreement must specify the subject matter of the arbitration, the names of the arbitrators or the manner in which they are appointed. However, arbitration is not permitted in matters that are contrary to public order or to the status and entitlement of individuals[4]. Therefore, based on an analysis of articles 1006 and 1011 of the Law 08-09, we find that mediation differs from arbitration in that the latter takes place before the dispute is submitted to the judiciary. In this sense, mediation becomes a procedural requirement and, if overlooked, the claim may be rejected. This aspect is absent in the rules of mediation, as there is no obstacle to filing a lawsuit from the outset, and then the judge presents it to the disputing parties for acceptance or rejection. Of course, this is within the framework of the provisions of Law 08-09, where Article 534 of Law 22-13, which amends Law 08-09, has made mediation obligatory rather than optional, as stipulated in Article 994. The purpose of this amendment is to avoid any contradiction between Article 994 of Law 08-09 and Article 534 of Law 22-13.

It should also be noted that reconciliation is mentioned as a permissible option in three articles of Law No. 08-09. Article 990 states that reconciliation is permitted at the request of the parties or through the efforts of the judge at all stages of the dispute. Its purpose[5], as is clear from the provisions of Articles 990 to 993, is to give the parties the opportunity to settle the dispute under the supervision of the judiciary. The conciliation agreement is concluded by the signatures of the parties, the judge and the court clerk, and the conciliation record becomes an enforceable document when it is deposited in the court registry.

A settlement is a contract by which the parties either resolve an existing dispute or prevent a potential dispute by mutually waiving their rights[6]. The essential difference between mediation and reconciliation is therefore that the latter takes place[7] between the parties to the dispute under the supervision of the judiciary, whereas mediation is conducted by a third party who performs his function under the supervision of the judge. So what is new about mediation under Law 22-13?

The second request: Mediation in the commercial field

The first thing that catches the eye in Law No. 22-13 is the arrangement of alternative methods for resolving disputes in the commercial section, which turns the issue on its head. It starts with mediation before conciliation, whereas the first chapter of the Civil and Administrative Procedure Code is entitled "Conciliation and Mediation", and it would have been more appropriate to follow

[1]- Dridi Shnitni, Judicial Mediation in Light of Civil and Administrative Procedure Law No. 08-09," Jitli Publishing House, 2012, p. 71.

[2]- Refer to Article 994 of Law 08-09 on Civil and Administrative Procedures.

[3]- See Article 995 of Law No. 08-09 on Civil and Administrative Procedure.

[4]- See article 1006 of law 08-09 on civil and administrative procedure.

[5]- According to Article 536 repeated 04 of Law 22-13, reconciliation has become obligatory and the filing of a lawsuit is subject to it.

[6]- See Article 994 of Law 08-09.

[7]- See article 459 of the Civil Code.

the same approach and start with conciliation, at least in terms of following a consistent methodology. Be that as it may, what is the content of mediation within the commercial section and what are its procedures?

First: The content of mediation within the commercial section

If we examine Article 531 of Law No. 22-13, we find that it establishes the competence of the commercial section to consider all commercial disputes, except those mentioned in the provisions of Article 536, which are mainly:

- Intellectual property disputes
- Disputes involving commercial companies, in particular disputes between shareholders and the dissolution and liquidation of companies
- Court settlements and bankruptcy
- Disputes between banks and financial institutions and traders
- Maritime and air transport disputes and insurance disputes relating to commercial activities
- Disputes relating to international trade

The legislator has also stated in article 534, paragraph 2, that mediation is not subject to the acceptance of the parties, contrary to what is stated in article 994 of Law No. 08-09. This contradicts the freedom of the parties to manage the dispute and deviates from the principle that the dispute belongs to the parties. Instead, it imposes negotiations. The text of article 534/02 of the law directly indicates that the use of mediation and the appointment of a mediator are mandatory and not subject to the consent of the parties.

Does this procedure contribute to the resolution of disputes, reduce the burden on the judiciary and save time and effort?

The second: The conciliation procedure under Law No. 22-13

In Law No. 22-13, the Algerian legislator referred to the provisions of Article 994 and the following articles. The first procedure to be followed is that, as soon as the case is registered, the president of the commercial section appoints a mediator to hear the positions of the parties in order to try to find a solution and reconcile their perspectives. Article 595 states that the mediation may cover the whole or part of the dispute, all under the supervision of the judge, who is empowered to take appropriate measures during the mediation. The duration of the mediation should not exceed three months, which may be extended only once at the request of the mediator and with the consent of the parties. According to Article 996, mediation may be conducted by a natural or legal person, subject to certain conditions and rules set out in Article 998.

It should be noted that Article 999 of Law No. 08-09 needs to be amended. A review of the article shows that once the mediator has been appointed, the order must include the consent of the parties to the dispute. However, article 534/02 abolishes this requirement, but article 999 still maintains the provision of obtaining the consent of the parties, which should be amended.

The mediation procedure includes the setting of a deadline for the mediation and a date for the case to return to court.

According to Article 1000 of Law No. 08-09, the clerk of the section notifies the mediator and the parties of the appointment, and the mediator announces their acceptance of the mediation and invites the parties to the first mediation session. The mediator carries out his duties by summoning the parties and hearing them.

Article 1002 allows the judge to terminate the mediation at any time at the request of the mediator or the parties.The judge may also terminate the mediation automatically if it becomes clear that it cannot proceed smoothly.In any case, the case will be reassigned to the session and the mediator and the parties will be summoned through the registry.

According to Article 1003, when the mediator has completed his task, he informs the judge of the agreement reached. If an agreement is reached, a report is drawn up, including the agreement, which is signed by the parties.The case is then returned to the judge on the date set.

According to Article 1004, the judge approves the agreement record by means of an irrevocable order and the agreement record becomes an enforceable document.It is worth noting that throughout these stages, the judge's role is important and he supervises the agreement. This makes

the objective of reducing the burden on the judiciary to achieve the parties' agreement very simple, as the preliminary and weak statistics show.

The second section: The Reconciliation Provisions of Law No. 22-13

The Declaration emphasises that reconciliation is a legacy among Muslims and a custom that aims to achieve harmony within society. Whether it be social relations and behaviour or financial transactions aimed at making a profit and preserving jobs and institutions. These objectives seem to be precisely what the legislator intended by establishing reconciliation as a preliminary procedure before initiating legal proceedings. What are the new provisions on conciliation in Law 22-13? And what is their significance?

First: Establishment and jurisdiction of the specialised commercial court

The Algerian legislator introduced several amendments to improve the commercial and investment environment with regard to commercial disputes. These amendments concerned the composition of the commercial judiciary, either within the regular courts, specifically within the commercial sections, or within the newly created specialised judicial body, namely the Specialised Commercial Court. What are the newly introduced changes regarding the composition and jurisdiction of the commercial judiciary?

First: The composition of the specialised commercial court

The Specialised Commercial Court shall be constituted, in accordance with Article 536 bis 02 of the Sections, as determined by the President of the Specialised Commercial Court, and the number of judges shall be determined according to the nature and extent of the commercial activity prevailing in the jurisdiction. This is done after consulting the public prosecutor. The court is presided over by a judge and assisted by four assistants. In the absence of one of the assistants, the court may meet in ordinary session. If two or more assistants are absent, they are replaced by one or two judges and the decision is taken in rotation.

It is worth noting that, since the specialised commercial court is composed mainly of assistants, the Algerian legislator, in Executive Decree No. 23-52 of 14 January 2002, which lays down the conditions and procedures for the selection of assistants to the specialised commercial court, set up a committee chaired by the President of the Judicial Council within the jurisdiction of the specialised commercial court. Article 03 of the decree provides for the establishment of this committee, while Article 05 requires that the assistant member have broad expertise in specialised commercial matters, be an Algerian citizen, enjoy civil and political rights and have a good reputation. The assistant member should not have been convicted of a crime or offence, except for unintentional offences, and is subject to administrative investigation at the initiative of the public prosecutor of the Judicial Council in his jurisdiction[8]. In addition, article 06 of the same decree stipulates that assistants must undergo specialised training before taking up their duties, the duration and programme of which are determined by the Minister of Justice.

Second: Qualitative jurisdiction

In Law No. 22-13, the legislator has defined, in Articles 536 bis and 536 bis 04, the provisions of the Qualitative Jurisdiction of the Specialised Commercial Court and the procedures of conciliation. In article 536 bis, the legislator has defined a number of cases that fall under the jurisdiction of the specialised commercial court, including

- Intellectual property disputes
- commercial company disputes, in particular disputes between shareholders and the dissolution and liquidation of companies
- Insolvency and bankruptcy
- Disputes between banks and financial institutions and traders
- Maritime, air and insurance disputes relating to commercial activities
- Disputes concerning international trade

[8]- Refer to the conditions for assistants set out in Decree No: 23-52 of 14/01/2023, which sets out the conditions and procedures for the selection of assistants for the Specialised Commercial Court. You can find this information in the Official Journal, issue 02, published on 15/01/2023, page 18.

All other cases fall under the jurisdiction of the commercial sections of the ordinary courts. With regard to the concept of infringement, disputes relating to contracts and commercial paper fall within the jurisdiction of the commercial sections, given that commercial companies constantly use these commercial papers, together with contracts, in their various transactions. This complexity can lead to challenges in determining the correct jurisdiction for dispute resolution.

The third point concerns territorial jurisdiction: In Article 536 bis 01 of Law 22-13, the legislator referred to the provisions on territorial jurisdiction laid down in Law 08-09 and applied them to the specialised commercial court. On examining these provisions, and in particular Articles 37 to 46 of Law 08-09, it can be seen that Article 536 bis follows a similar pattern to the disputes referred to in the third paragraph of Article 40 of the Code of Civil and Administrative Procedure (Law 08-09).

Despite the fact that territorial jurisdiction is a regional obligation binding the parties, as indicated by the phrase "without any other", the legislator should review the provisions on regional jurisdiction in Article 536 bis 01, emphasising that the rules on territorial jurisdiction remain the same as in Law 08-09. It's crucial not to simply state that the rules of territorial jurisdiction remain the same as in Law 08-09, since Article 40 of Law 08-09 remains unchanged.

A review of Article 40 reveals that it establishes the mandatory venue for filing lawsuits, particularly in intellectual property cases, at the seat of the court where the defendant is domiciled. Thus, it's quite conceivable that an individual suing a defendant residing in the wilaya of M'sila in a case related to intellectual property would not turn to the specialised commercial court in the wilaya of Setif. This is in line with the provisions of Decree 23-53, which defines the territorial jurisdiction of specialised commercial courts[9]. Article 40 imposes the obligation to file the claim specifically with the M'sila court.

Irrespective of the circumstances, no commercial dispute as defined in Article 536 bis can be brought without a conciliation procedure.

Therefore, the Algerian legislator, through Article 536 bis 04, has made conciliation a prerequisite for the filing of a lawsuit, which is to some extent similar to the procedures for real estate disputes and social disputes relating to employees, as described in Article 504 of Law 08-09.What are the procedures for conciliation under the provisions of article 536 bis 04?

Second requirement: Conciliation procedure under Article 536 bis 4

According to Article 536 bis 4, any dispute relating to, for example, a court settlement, bankruptcy or intellectual property must be submitted to the specialised commercial court. The president of the court should, within 5 days, appoint one of the judges to conduct the conciliation proceedings within a maximum period of 3 months. The applicant for conciliation should inform the other parties of the date of the conciliation meeting. In addition, the second paragraph of Article 536bis(4) allows the judge to seek the assistance of any person deemed helpful in resolving the dispute, which results in a report being drawn up and signed by the judge, the parties involved and the court clerk. If attempts at conciliation fail, a report is drawn up stating that conciliation has failed, which serves as permission to initiate legal proceedings. However, it is noteworthy that Article 536(4) does not set a time limit for filing a lawsuit after the issuance of the report on the failure of reconciliation. This is a procedural shortcoming that should be remedied by setting a maximum time limit of three months for filing the action with the specialised commercial court.

The legislator has mentioned in article 536, paragraph 5, that an appeal may be lodged with the Court of Appeal after the specialised commercial court has delivered its judgement, within the same time limits and provisions for appeals, namely within one month from the date of notification of the judgement delivered by the specialised commercial court.

However, it is not clear that this appeal, after having been heard by a specialised commercial court, will be heard by a collective judicial panel at the level of the Judicial Council, which is completely different from the composition of the specialised commercial court provided for by the legislator in article 536, paragraph 2, which is composed of one judge and four assistants with

[9]- Refer to Decree No. 23-53 of 14/01/2023, published on 15/01/2023 in the Official Journal No. 02.

extensive knowledge of commercial matters on the basis of their advisory opinion[10]. It would therefore have been preferable for the appeal to be lodged with a specialised court of appeal with this name and with a composition similar to that of the specialised commercial court.

It should be noted that, pursuant to Article 536 bis 6 of Law No. 22-13, the president of the commercial court exercises all the powers granted to the president of the ordinary court in commercial disputes.

In addition, the president of a section of the specialised commercial court may take provisional or precautionary measures to safeguard the rights in dispute, by means of an accelerated procedure.For example, they have the power to appoint a judicial expert for urgent inspections.The most important observation is that the legislator's intention in setting up the provisions of Article 536, paragraph 4, on pre-litigation conciliation procedures was to provide mechanisms for the survival of the company, whether through a settlement or by avoiding the declaration of bankruptcy, and thus to provide an opportunity.However, the implementation of this intention and the reality of its application leave room for statistical analysis to ascertain the effectiveness of the procedures and management.

Conclusion:

I believe that the mandatory mediation procedures introduced under the first paragraph of Article 534 of Law No. 22-13 are not effective, considering the preliminary statistics recorded in this research paper. Moreover, the idea that mandatory procedures are in conflict with the principle of freedom of access to justice is contradicted. In addition, the constant role of the judge in these procedures suggests that they hinder rather than speed up the resolution of disputes.

The text of Article 999 of Law No. 08-09 should be amended to exclude the requirement of the parties' acceptance of the mediator's appointment, as provided for in Article 534 of Law No. 22-13.

Article 536 bis should be revised to extend its jurisdiction to disputes relating to commercial documents and disputes relating to electronic commerce.

It is necessary to regulate the specific criteria for cases falling within the jurisdiction of the specialised commercial court and its specialised divisions.

The text of Article 40 of Law No. 08-09 should be amended in order to avoid ambiguity in the determination of the jurisdiction for intellectual property cases, court settlements, bankruptcy and disputes between partners, in accordance with the provisions of Article 536 bis.

The selection criteria for assistants to the specialised commercial court, as set out in Decree No. 23-52, should be made more precise and specific. A broad knowledge of commercial matters alone is not sufficient and needs to be clarified.

There is a need to establish specialised commercial appellate courts with a mixed composition, composed mainly of professional judges with specialised expertise.

These recommendations aim to improve the effectiveness and efficiency of commercial dispute resolution procedures and to ensure a more streamlined and specialised approach to the handling of commercial cases.

List of sources and references:

First: Legal texts

[1] Law No. 22-13 of 12 July 2022 amending and supplementing Law No. 08-09 of 25 February 2008, published in the Algerian Official Gazette, issue No. 48, dated 17 July 2022, which includes the Code of Civil and Administrative Procedure.

[2] Law No. 08-09 of 25 February 2008 enacting the Code of Civil and Administrative Procedure, published in the Official Journal of Algeria, No. 21 of 2008.

[3] Decree No. 23-52 of 14 January 2023 laying down the conditions and procedures for the selection of assistants to the specialised commercial court, published in the Official Journal, issue No. 02 of 15 January 2023.

[10]- Refer to the text of article 536, repeated 02, of law 22-13.

[4] Decree No. 23-53 of 14 January 2023 laying down the conditions and procedures for the selection of assistants to the specialised commercial court, published in the Official Journal, issue No. 02, dated 15 January 2023.

Second: Books

1- Dr. Dridi Cheniti, Judicial Mediation in the Light of Civil and Administrative Procedural Law No. 08-09, Jitli Publishing House, 2012.