

THE SPECIFICITY OF CONCILIATION AS AN ALTERNATIVE TOOL FOR RESOLVING DISPUTES BEFORE SPECIALIZED COMMERCIAL COURTS

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Abstract:

Through the Law No. 08-09 containing the Code of Civil and Administrative Procedures, the Algerian legislator has introduced alternative methods for resolving the judicial disputes. With the amendment of this law by virtue of the Law No. 22-13, these methods were regarded as alternative tools for the peaceful settlement of disputes before the commercial judiciary after the commercial courts were introduced. Consequently, it imposed on the litigants to resort to the conciliation procedure before the initiation of the lawsuit. It also specified special procedures for it and stipulated its supervision by a judge. All of this is for the sake of alleviating the burden on the judiciary and resolving the commercial disputes more quickly and effectively.

Keywords: Conciliation, disputes, commercial, courts, alternative.

INTRODUCTION:

The significant developments in the commercial and economic fields have remarkably impacted the emergence of new types of cases and disputes whose resolution requires specialization. This prompted the Algerian legislator to establish specialized commercial courts in parallel with the existing commercial departments. This is in accordance with the Law No. 22-13, which amends and supplements the Civil and Administrative Procedure Law No. 08-09. These courts have been assigned exclusive commercial disputes whose resolution requires speed and credit. In this context, the Algerian legislator has obligated the conflicting parties to resort to alternative methods that are governed by a distinctive legal and procedural regulation in order to peacefully settle the disputes brought before the commercial courts.

Conciliation is considered one of these alternative methods, which the legislator seeks to apply by adapting the Civil and Administrative Procedures Law in its provisions related to these disputes. Following the amendment of this latter by the Law No. 22-13¹, the Algerian legislator has stipulated the necessity of implementing conciliation as a procedure prior to filing a lawsuit before the specialized commercial courts. This procedure is regarded as one of the legal mechanisms to settle commercial disputes and a tool for building relationships between opponents. It is also one of the alternative procedures for the traditional judicial system, aiming primarily to achieve rapidity and resolve disputes through agreement and satisfaction in order to reduce the burden on the judiciary and avoid delays in the procedures. Hence, what is the substantive and procedural framework of conciliation as an alternative procedure for resolving commercial disputes?

To address this issue, we will investigate the subject matter through two main chapters:

- The first chapter: The conceptual framework of conciliation as an alternative method for settling commercial disputes.
- The second chapter: The procedural application of conciliation before specialized commercial courts.

Chapter One: The Conceptual Framework of Conciliation as an Alternative Method for Settling Commercial Disputes

¹ Law No. 22-13, dated on July 12, 2022 amending and supplementing the Law No. 08-09 dated February 25, 2008, including the Code of Civil and Administrative Procedure, Official Journal, No. 48 issued on July 17, 2022.

The Algerian legislator has adopted the system of conciliation through various legal texts. Conciliation is regarded as an effective method for peacefully resolving disputes in various fields, including commercial matters. It involves the parties in resolving their disputes, saving time, and alleviating the burden on both them and the judiciary. It also ensures a swift solution for them, away from the complex judicial procedures, and guarantees the effectiveness of the confidentiality element. Therefore, we will (first) explore the concept of conciliation, then its elements (second).

First: The Concept of Conciliation:

Conciliation has significant importance in the Algerian legislation as its provisions have been addressed in both the Civil Code¹ and other specific laws. Regulations and procedures related to it are also established in the Commercial Code, particularly in Article 317². To understand the specificity of this procedure, we must examine its definition, conditions, and legal nature.

1. Definition of Conciliation:

We will look into its definition linguistically, doctrinally, and legally.

A- The Linguistic Definition of Conciliation:

Linguistically, "conciliation" refers to the process of making peace between people who were previously in conflict or dispute. The term "صلح" (conciliation) comes from "تصالح" (to reconcile). It implies resolving disputes and restoring peace. In Arabic, "صلح" signifies the end of a dispute, and it generally means peace.³

Jurisprudential Definition: conciliation has been defined sometimes as "an agreement that puts an end to the dispute with the consent of both parties, whereby each party relinquishes its rights in order to reach a resolution."⁴

Legal Definition: Although the definitions provided by legislators for conciliation vary, they all aim to highlight the importance of this concept. For the Algerian legislator, conciliation is defined in Article 459 of the Civil Code as a contract that ends the disputes between the parties through the mutual relinquishment of their rights. It is also addressed in the Civil and Administrative Procedure Code in Articles 990 and 993 without providing a specific definition.

- **Conditions for Conciliation:** As previously mentioned, the Civil Code considers conciliation as a contract. On this basis, it is subject to all the provisions that apply to contracts. The conditions for conciliation are as the following:

- **The Availability of an Existing or Potential Dispute:** There must be a serious dispute existing between the parties or likely to exist in the future.

- **The Intent to Resolve the Dispute:** This refers to the disputants' desire to end the existing dispute or prevent it through conciliation, in case it was expected. The conciliation may address some issues, while some others are left for the court to decide on them.

- **Each Litigant Waives Part of His/her Right:** Each party must give up part of his/her claim against the other to achieve mutual agreement or consent, typically in a reciprocal manner⁵. In commercial law, conciliation is broader than in civil law, as reciprocal relinquishment of rights is not required, i.e., it is sufficient for one party to relinquish their claim or part of it without providing any compensations to the other party.

2- The Legal Nature of Conciliation:

There has been a debate about defining the legal nature of conciliation, which resulted in two main perspectives:

¹ Order No. 75-58, dated on September 25, 1975 including the Civil Code, Official Journal, No. 78, issued on September 30, 1975 amended and supplemented.

² Order No. 75-59, dated on September 26, 1975 including the current law, Official Journal No. 101 issued on December 19, 1975 amended and supplemented.

³ Ibn Mandhour, Lisan al-Arab, Vol. 2, Adab al-Hawza Publishing House, Iran, 1985. P517.

⁴ Amar Zahi, le conciliation et processus arbitral mevue algérienne des sciences juridiques économiques et politique, N°4, 1993, p712.

⁵ Sadiki Abdelkader, Means of Amicable Settlement of Commercial Disputes According to Law No. 22-13 Amending and Supplementing the Code of Civil and Administrative Procedures, Academic Journal of Legal and Political Research, Volume Six, Issue Two, Year 2022. P73.

The First Perspective: This view considers conciliation to be a contract concluded between two parties. Following the court's approval, this contract becomes mandatory as the role of the judiciary is to protect interests and reconcile the views of the parties involved in the conciliation. This later requires a mutual agreement between the parties. Despite the necessity for ratifying it, a conciliation remains subject to annulment, which reinforces its contractual nature.¹

The Second Perspective: This view regards conciliation as a judicial ruling. Consequently, it is not a contract as it becomes mandatory following the approval of the court. Accordingly, this later is believed to be the creator of conciliation and its legal source that obliges its parties to conduct it. This is in view of the court's authority to ratify or reject it.²

Proponents of this view also argue that contracts, according to the general rules can be invalidated due to fraud, coercion, deception or error. While, a conciliation approved by the court can only be invalidated for deception because in this context the legislator has deviated from the general rules of contract invalidation. This deviation suggests that this conciliation should be considered a judicial ruling rather than a contract. Additionally, there is a difference between contracts governed by the principle of the relative effect of the contract, which is in contrast to the ruling ratifying the conciliation. Once ratified, this later becomes an executive act with a comprehensive effect.

Critics of this view argue that even though the court has the authority to refuse to ratify the conciliation, it cannot similarly refuse a ruling rejected by the parties or an amendment of the agreed-upon terms. Therefore, the prevailing opinion is that a conciliation is a contract between two parties, which is reflected in Article 317 of the Algerian Civil Code. It is considered a consensual contract that has been subject by law to the judicial supervision requiring its approval for the sake of public interest.

Second: The Elements of a Conciliation

A conciliation must contain the traditional elements similar to all the other civil contracts, which are the following:

1-The Element of Consent: A conciliation contract is formed when there is an agreement of offer and acceptance, i.e. when both parties express their will regarding all its terms. For the agreement to be valid, it must be made by a person with full legal capacity, as stipulated in Article 460 of the Civil Code. In other words, to conclude a conciliation, the parties must be aged at least 19 years old according to Article 40/2 of the same code. Additionally, their consent must be free from defects such as error, deception, coercion, or exploitation. However, errors in applying the law does not represent a reason for the invalidity of the conciliation³ as stated in Article 465 of the Civil Code because ignorance of the law is not an excuse.

2-The Subject Matter:

It refers to the contested right and the relinquishment of this right by one or both parties, which results in the final dismissal of the rights and claims that have been waived. According to Article 461 of the aforementioned law, the subject matter of the conciliation must meet the conditions required for the subject of commitment in general.

3- The Reason for the Conciliation:

It is the basic motive that prompts the litigants to conclude the conciliation contract, whether it is to avoid losing the lawsuit or to get rid of the prolonged litigation process and the expenses resulting from it. The reason must be legitimate and consistent with the public order and morals, otherwise, it will be invalid. Moreover, if part of the reason was invalid, the entire contract would be void, as conciliation cannot be divided. However, in accordance with Article 466 of the Civil Code, this rule does not apply if the contract explicitly states or indicates through evidence that the contractors agreed that the parts of the contract are independent of each other.

¹ Mostapha Kamal, Ali al-Baroudi, Commercial Law, First Edition, Al-Halabi Legal Publications, Lebanon, 2001. P446.

² Wahab Hamza, Judicial Conciliation System in the Algerian Commercial Law, First Edition, Dar al-Khalduniya for Publishing and Distribution, Algeria, 2017. P24.

³ Seema Mohamad Saeed, Khader al-Badrani, Rulings on the Conciliation Contract, International Scientific House for Publishing and Distribution, Amman, 2003. P446.

Chapter Two: The Procedural Application of Conciliation Before Specialized Commercial Courts

The Algerian legislator, through the Law No. 22-13 amending and supplementing the Code of Civil and Administrative Procedures, has for the first time made conciliation a mandatory procedure in all commercial disputes tackled by the specialized commercial court. This is addition to the commercial disputes presented to the commercial section, where conciliation is required as an alternative method to settle them. In this regard, the legislator has made conciliation a prerequisite settlement for filing a lawsuit before these courts. It has also allocated a set of procedures for it that must be adhered to by both the parties and the judicial authority (First). Additionally, the conciliation procedure often results in a set of effects (Second).

First: The Procedures that Must be Followed to Conduct a Conciliation:

To apply a conciliation before the specialized commercial court, the interested party must initiate it according to the conditions stipulated by the law. Additionally, a conciliation will only have its effects when it is conducted with the intervention of the judicial authority.

1. The Settlement Procedures Related to the Litigants:

The Algerian legislator, through the Law No. 22-13, has established a set of specific procedures for conciliation that the parties must adhere to, including the following:

a. Submitting a Conciliation Request Before Filing a Lawsuit:

According to Article 536 bis 4 of the Law No. 22-13, the disputing parties must submit a request for a conciliation to the head of the specialized commercial court before initiating their lawsuit through a petition to open the lawsuit. This is different from the provisions of Articles 990 and 991 of the Law No.08-09, in which the legislator allows for conciliation at any stage of the lawsuit.

Based on the above information, conciliation has become an essential procedure for formally accepting the lawsuit in such disputes. The plaintiff is often the applicant, either personally or through his/her lawyer, as he/she is the one whose rights have been infringed. In this context, it is worth noting that the legislator did not refer in the Law No. 22-13 to a particular provision that requires the representation of litigants with a lawyer before the specialized commercial court. It rather left this to the freedom of the parties despite the complex nature of commercial disputes. Nonetheless, the legislator should have made the legal representation by a lawyer mandatory.¹

B - Conditions for Accepting the Request:

The person requesting conciliation must meet the conditions stipulated in Article 13 of the amended and supplemented Code of Civil and Administrative Procedure 08-09. As for the request for conciliation that is submitted by the opponents, it must be in the form of a two-copy petition that is reasoned. It must also include references to the presented documents and papers and all evidence proving the existence of the right and its relation to the other party. Additionally, the appointment of a judge to conduct the conciliation will be by an order on a petition according to the provisions of Article 311 of the previously mentioned Law No. 08-09. Therefore, in addition to submitting their documents, the parties must provide a brief presentation of the facts, requests, and means on which the request is based as previously mentioned. This is in order to define the subject of the dispute, adapt the actions in a legally correct manner and ensure by the head of the commercial court that the jurisdiction condition is met in order to accept or reject the request for conciliation.

C - Notification of the Conciliation Request:

According to Article 536 bis 4, first paragraph, the applicant is responsible for notifying his/her opponents of the date of the conciliation session set by the judge that was appointed to conduct it. Here, the applicant bears the costs of the notifications prepared by the judicial officer through legal summons with a delivery report, in accordance with Articles 18 and 19 of Law No. 08-09.

2- Court Procedures:

They are represented in the following:

¹ Maamari Kouadri Mohamad, "The Representation of Opponents by a Lawyer before Specialized Commercial Courts between Choice and Obligation", an intervention presented at the study day on the prospects and challenges in resolving commercial disputes in light of the establishment of specialized commercial courts, organized by the Ain Defla Judicial Council on December 18, 2022. P04.

A - The Order to Appoint a Judge to Conduct the Conciliation:

After the request is submitted by the parties to the Registry of the Head of the specialized commercial court and is marked as received, the Head of the Court assigns the task of conciliation to one of the judges to supervise it. This assignment must be completed within 5 days from the date of submission of the request. This is done through an order on a petition so that the appointed judge directly mediates between the parties in disputes that fall within the jurisdiction of this judicial body. It should be noted that the Algerian legislator did not specify whether the Head of the Court issues the order to appoint a conciliation judge as soon as the opponent submits his/her request or he/she has the authority to review whether the dispute falls within his/her jurisdiction or not. The date of conducting the conciliation is specified by virtue of the order appointing the conciliation judge. However, the legislator did not clearly identify who determines this date. Is it the Head of the Court as part of the appointment order or the appointed judge? On this basis, it might be either specified in the order issued by the Head of the Court or by the appointed judge supervising the conciliation. With reference to Article 536 bis 4, the legislator did not specify whether there is a possibility to appeal the order appointing the conciliation judge, nor did he outline the procedures taken in case of rejecting the request. It is also unclear whether the procedures of Article 312 of the Law No. 08-09 apply in this case, which provides the right to appeal such decisions before the Head of the Judicial Council within whose jurisdiction the specialized commercial court is included, or it is an administrative order not subject to any appeal.

The judge assigned with conciliation is granted a period that does not exceed three (3) months to conduct the procedures. Moreover, in order to facilitate reaching a mutual agreement between the parties, the judge may seek assistance from any individual that seems appropriate to help him/her, i.e., he/she has the right to choose a qualified and neutral person to contribute to finding an amicable solution to the dispute¹. However, the Algerian legislator did not clarify in Article 536 bis 4 whether the litigants can object to the person chosen by the judge for assistance. He also did not outline the procedures to follow in case that the opponent objects to participate in the conciliation, nor even the procedures that the judge would take to seek the assistance of this person and whether he/she would be paid for that or not. Nonetheless, the parties retain the freedom to accept or reject the conciliation results despite its mandatory nature.²

Second: Effects of Conducting Conciliation before the Specialized Commercial Courts:

After concluding his/her attempt to settle the dispute amicably between the litigants, the judge prepares a report in which he/she proves either what the parties have agreed upon or that they have not reached an agreement. Each of these outcomes has specific legal effects.

1. **In the Case of a Successful Conciliation:** The judge appointed for this purpose may succeed in bridging the gap between the disputing parties and reconciling them. In this case a report would be prepared, in which the terms agreed upon are mentioned in addition to the place and time of the reconciliation. This report should be signed by all the parties involved, i.e., the judge, the litigants, and the court clerk. After it is deposited to the Registry of the commercial court, the report becomes an enforceable document in accordance with Article 993 of the Law No. 08-09. Consequently, it can only be appealed in the case of forgery as stipulated in Article 600/08 of the same law.

2. **In the Case of an Unsuccessful Conciliation:** All attempts made by the conciliation judge may fail due to reasons that are beyond his/her control, such as the litigants' refusal of the conciliation or their failure to attend the conciliation sessions. In this case the judge prepares a report on this failure. The parties then are left with only the right to file a lawsuit before the commercial court in accordance with the legally stipulated conditions. This must be accompanied by

¹ Saad Laqlib, Noui Ahmed, Reasons and Justifications for the Establishment of Specialized Commercial Courts in the Algerian Legislation, *Tabna Journal of Academic Scientific Studies*, University Center of Barika, Algeria, Volume 06, Issue 02, December 2023. P551.

² Zahia Ziri, Alternative Methods for Resolving Disputes According to the Algerian Code of Civil and Administrative Procedures, Master's Thesis in Law, Faculty of Law and Political Science, Mouloud Mammeri University of Tizi Ouezou, 2015. P34.

a report of the failed conciliation; otherwise, the lawsuit may be formally rejected. Thus, the non-conciliation report is a procedural prerequisite for filing the lawsuit and the plea of the absence of conciliation is a matter of public order that the judge raises on their own initiative. Nevertheless, the legislator has left the deadline for filing a lawsuit before the commercial courts open after obtaining the non-conciliation report. This is contrary to the social cases where the deadline for filing a lawsuit is set at 6 months from the date of receiving the non-conciliation report, after which the right to file the lawsuit is forfeited in accordance with Article 504 of Law No. 08-09.

CONCLUSION

We conclude from this study that, given the developments taking place in society especially in the field of commercial activities, the Algerian legislator has sought to adapt its legislative system to align with these changes. This includes the provisions of the Civil and Administrative Procedures Law No. 08-09, amended by Law No. 22-13, through which the role of amicable means for resolving commercial disputes was determined. In this regard, the principle of mandatory conciliation was introduced. Thus, the legislator has forced the litigants to use this procedure before the specialized commercial courts as it made it a restriction on filing a lawsuit before them and entrusted the judge to supervise the process. Accordingly, we have reached several findings including the following:

- 1- The role of alternative means of resolving commercial disputes and settling them amicably to preserve commercial relations has been strengthened by establishing the obligation of conciliation before filing the lawsuit.
- 2- Conciliation is assigned to the judge appointed by the President of the Commercial Court who has the right to seek the assistance of persons that he/she deems appropriate.
- 3- The deadline for filing a lawsuit before the specialized commercial courts is not restricted with the date of issuing the non-conciliation report.
- 4- Conciliation aims to resolve the dispute without issuing a judicial ruling, as well as reducing the burden of litigation procedures on litigants.

In conclusion, we recommend the following:

- Given the ambiguities in the current texts related to conciliation, it is important to provide more detailed procedures.
- The duration of the conciliation process should be reconsidered to allow the supervising judge to request an extension if necessary.
- It is mandatory to be represented by a lawyer at the level of the specialized commercial court, due to the nature of the disputes brought before it.

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