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ADR CLIENT STRATEGIES IN EUROPE

LEADING LAWYERS ON INTERPRETING CHANGING LAWS AND REGULATIONS, DEVELOPING SUCCESSFUL CLIENT STRATEGIES, AND CHOOSING AN EFFECTIVE ADR METHOD

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ASPATORE

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Practice of Mediation and Conflict Resolution in France

For several months in France, we have seen a dramatic acceleration in the interest of governments, institutions, and various and diverse economic actors with respect to the use of mediation. The Guinchard report, followed by the Darrois report, both advocating the use of mediation in Europe, were published by the European Directive of May 21, 2008. Since then we have seen a great emergence of mediation centers in France, including the CMAP (Paris Mediation and Arbitration Center) as well as internationally, including the ICC. The largest French companies have signed the CMAP mediation charter. There has also been an initiative on the part of Mr. Magendie, First President of the Court of Appeal of Paris, who wants to develop mediation in that Court. It seems that attitudes have changed; perhaps we are on the verge of a new level of civilization that will enable us to better negotiate many issues, including peace. Maybe one day we can say, "We are all mediators!" Then mediation will be in its golden age.

The following are some key points regarding the use of mediation in France:

1. In France, mediation is regarded as a practice implemented in order to put an end to conflict. It may in the first instance be a judicial mediation, ordered by a judge after obtaining the agreement of the parties. As such, it is regulated by a Law of February 8, 1995 implemented by Decree No. 96-652 of July 22, 1996, codified in articles 131-1 to 131-15 of the French Civil Procedure Code.

Secondly, it may be "conventional" when the parties have agreed to include mediation clauses in their contracts whose absolute efficiency has been recognized by several judgments of the Supreme Court, including the notable decision of the mixed chamber of February 14, 2003.

In all cases, there must be strict conditions on both the mediation process, which needs to remain completely confidential, as well as the quality of the mediator who is to be appointed. The mediator must at all times remain a neutral, independent party, well versed in mediation, and able to facilitate,

frame, and direct the exchanges between the disputing parties so they are able to reach an amicable outcome.

2. Anyone can be a mediator, provided he or she is trained in what we might call the "art" of mediation. However, there is no particular qualification or compulsory training needed to practice as a casual or full-time mediator on French territory. This may seem contradictory with respect to the required training as stipulated by the European Directive of May 21, 2008, which will soon regulate the use of the title of mediator—which is a good thing, if one wants to reduce the risk of selecting unqualified mediators whose incompetence is harmful to those who resort to the process. As such, it is good to remind all candidates for mediation that a mediator is not an expert, an arbitrator, a magistrate, a former magistrate, a lawyer, or even a specialist in the subject matter in dispute. Rather, a mediator is a mediator—i.e., an expert in mediation and its original and complex techniques. Therefore, whatever his past, his qualifications, awards, and distinctions, what matters is his ability to be a mediator by making a total abstraction of any other of his past or current professional "lives." Those who must appoint a mediator—judges, or litigants assisted by their lawyers—should take this basic principle into account in order for the mediation to succeed. Beyond the mediator's training, his or her personality, talent, charisma, and above all, benevolence, must be the foremost considerations.

3. Mediation is seen as a quick and inexpensive process. For example, most large commercial disputes can be settled promptly, within a range of time lasting from several days to several months, for a total mediation period of between twenty and one hundred hours. The same business case heard in circuit court would take several years and require many more hours of work. Waging war is far more costly than negotiating peace. Quite rightly, the merits of mediation have been greatly praised: it is non-aggressive, prompt, simplistic, less costly, and confidential, and offers flexible, tailor-made solutions to address each situation.

We often hear that mediation is adopted in cases where there is a "collaboration" between the parties who, once the dispute is resolved, are somehow "condemned to live together." However, our experience shows that all cases can be resolved in mediation. First, in general, and particularly in the

economic world, there inevitably exists a place for discussion, negotiation, and finding an agreement through the use of rational speech, not writing. All worldwide economic disputes are therefore potentially subject to mediation.

To be more specific, we can advocate the use of mediation in the following situations:

- Past or future cooperation. In this regard, the non-aggressiveness of the mediation process will be beneficial.
- Companies routinely competing in the same market. In this case, the non-aggressiveness, promptness, and reduction of costs implied by mediation will be beneficial between two or several companies that would have otherwise engaged in multiplied litigation.
- Risk of disparaging the reputation and image of the parties in a particular sector of activity. As such, individuals or companies who wish to preserve their reputation and image will appreciate the absolute confidentiality of mediation.
- Particularly complex disputes. The more complex the case, the more noticeable it is how simplistic the mediation process is in terms of orality, fluidity, confidentiality of information, and providing tailored-made processes.
- If either of the parties is foreign, and no arbitration clause is provided. Mediation avoids issues such as conflict of jurisdiction, conflict of law, and the reluctance to plead before a foreign judge suspected of partiality or bias.

4. In theory, mediation seems very simple. It is like a good recipe. In a comfortable and neutral room, the parties involved—i.e., those who are able to make a decision to settle—ask their lawyers to accompany them, since their presence is indispensable. Only lawyers can indeed usefully advise them to choose the best solutions, in comparison to what the courts may have decided, and negotiate their best interests.

However, we must remember that mediation is primarily about concerned parties who can speak or express themselves and not the lawyers who plead (in fact, lawyers do not plead anymore, they negotiate). It is indeed a rare opportunity that the judicial or arbitral conflict process never offers at any time. Simply put, the parties are allowed to express themselves by observing

an absolute rule: in mediation, no one interrupts the other party. Other mediation rules include:

- Do not be afraid of conflict: address it, discuss it, and make the parties agree on their disagreement.
- Let the parties talk about their vision of the case, their moods, their discomfort, their anger, and then let them discuss their plans and wishes.
- Place the parties and lawyers under the supervision and authority of the mediator, the guarantor of the integrity and dignity of the mediation process. After the force of the first exchanges of fire, let things cool down, and then allow the mediator to put the parties in a position to foresee their agreement. When emotions calm down and give way to rationality, it becomes possible to construct and accept an agreement.

5. The mediator is a guide. He has exceptional behavior, different from the everyday person. He is capable of saying things we never say in everyday life. He reacts as people never usually react. Therein lies the art of the mediator.

The essential techniques of mediation are active listening, and rephrasing open questions that put into perspective and mirror the topics. Beyond having exceptional listening skills and curiosity, the mediator should above all refrain from objecting, giving an opinion, or passing any judgment. In other words, the mediator must listen sympathetically, question, guide, understand, and show that he does so without ever accepting, defending, or objecting—all with the necessary dose of benevolent energy and steadfastness needed to move the parties toward their solution. The mediator is really the ideal man or woman. That is why the ideal mediator does not exist. An ideal mediator possesses the invisible hand of Adam Smith, the majesty of Socrates, and the curiosity of Inspector Colombo. To avoid losing one's head in the tempest of the process, the single motto of the mediator should be: "Will I be part of the problem or part of the solution?"

Arbitration Trends in France

Arbitration is generally associated with certain countries, and France generally tops the ranks. There are many reasons for this perception, including historical, factual or, more importantly, legal.

France has been seen by many as being at the forefront of arbitration because of the location of the headquarters of the International Chamber of Commerce (ICC) in Paris since 1923. The ICC's International Court of Arbitration has administered thousands of arbitration cases on the basis of the ICC Rules, one of the most popular set of rules in international arbitration. In 2010, the ICC's caseload reached more than 1,400 pending arbitrations (out of more than 16,000 cases), making the ICC Rules one of the most tested set of arbitration rules. France has consistently been selected as the most popular seat of arbitrations conducted under the ICC Rules, ahead of Switzerland, the United Kingdom, the United States, and Germany. In the past four years, the number of ICC arbitrations in France totaled 410 cases, as opposed to Switzerland with 407 cases, and the United Kingdom with 221 cases.

The ICC's presence in Paris certainly contributed to the development of efficient services required in parallel with arbitration proceedings, thus contributing to the attractiveness of France as a legal seat of arbitration, as will be further developed in this chapter. Paris, in particular, boasts excellent infrastructure for arbitration practitioners, whether in terms of accessibility from various parts of the world, or availability of excellent translation, transcription, stenographical, and other hearing facilities. The establishment in 2008 of the ICC Hearing Center in Paris is yet another testimony of the strength of arbitration in France. Organizing arbitration hearings in Paris is therefore a familiar task, carried out in hundreds of cases in the past few years alone.

More importantly, the strength of the arbitration practice in France derives from the importance of the legal community invested in international arbitration matters. Knowledgeable and experienced practitioners are found among lawyers, law professors, judges, and in-house counsels in Paris and elsewhere in France. Several internationally renowned bodies composed of prominent arbitration specialists are active in France such as the *Centre français de l'arbitrage* (CFA) and the *Institut de l'arbitrage international* (IAI). Arbitration writings and cases also feature highly in the main general French law reviews such as the *Dalloz*, the *Jurisclasseur Périodique*, the *Gazette du Palais* and others. Several high-quality legal publications dedicated to arbitration such as the *Revue de l'arbitrage* and the *Journal du droit international* are also available and cited in

international arbitration submissions and awards. Last but not least, many excellent universities in Paris and outside the capital city host excellent arbitration programs for students and first-class research centers with arbitration-savvy practitioners. In short, these features contribute highly to the importance of France as a source of scholarly thinking and writing in arbitration.

Perhaps the most important feature of France as it relates to arbitration remains in the attractiveness of French arbitration law and the strong pro-arbitration positions of French courts in arbitration matters.

France's current arbitration law, generally considered one of the most favorable to arbitration, dates back to a 1981 Decree, which today forms part of the French Code of Civil Procedure (Articles 1442 to 1507). Despite the fact that it was enacted almost thirty years ago, the French arbitration law remains one of the most liberal arbitration laws. Generally, the primacy of the parties' agreement and their autonomy in many respects is protected and given a driving role in the proceedings.

French courts, particularly the *1ère Chambre C* of the Paris Court of Appeals which rules on most arbitration related matters, have also played their part in favoring arbitration proceedings and limiting as much as possible any judicial intervention in the arbitral process. As long as an arbitration agreement exists and is *prima facie* valid, French courts have consistently applied the principle of *competence-competence*, providing excellent predictability for parties to arbitration agreements that their decision to have arbitrators decide their dispute will be respected. French courts thus strictly respect the arbitrators' precedence to determine the existence and extent of their jurisdiction and their ability to conduct the proceedings and ultimately rule on the dispute. As to potential annulment at the seat of the arbitration, French law only allows five limited grounds for annulment, which are applied very strictly.

It would be impossible to even attempt to summarize French law provisions on arbitration or the dozens of founding cases rendered by French courts. It is perhaps easier to isolate certain recent cases or principles that have an important bearing for current arbitration "users,"

whether parties or counsels. In this context, we chose to develop the French view on the following features of arbitration:

- That parties choosing to refer their disputes to arbitration should not be forced to appear before French Courts despite the arbitration clause.
- That parties choosing to refer their disputes to arbitration are not forced to litigate the matter once more before French Courts after the award is rendered.
- That parties choosing to refer their disputes to arbitration can nevertheless count on the control of French Courts to safeguard fundamental rules of due process.
- That parties choosing to refer their disputes to arbitration cannot avoid certain mandatory French rules on bankruptcy.

1. That parties choosing to refer their disputes to arbitration are not forced to litigate before French Courts despite the arbitration clause.

The parties' undertaking to respect their own choice to resort to arbitration for any dispute under their contract is a cornerstone of French arbitration law. French Courts consistently apply this principle, known as the "*negative effect of competence-competence*," without which there can be no predictable arbitration regime.

One recent example of the strict application of the French Court's refusal to hear a claim from parties that had agreed to arbitration in the presence of a *prima facie* valid arbitration clause is given in the decision of June 7, 2006 by the French *Cour of Cassation* in *Copropriété Maritime Jules Verne v. American Bureau of Shipping*. (Civ. 1ère, 7 juin 2006, Copropriété maritime Jules Verne et autres v. société ABS *American bureau of shipping et autre*, Bull. Civ. I, n° 937.) In this important decision, the highest French jurisdiction confirmed in strong terms the rule of priority of arbitrators over national courts to determine their competence. This is true in all cases save for the "*manifest nullity*" or "*inapplicability*" of the arbitration agreement. As such, the threshold applied by French Courts is extremely high and, in practice, they do intervene extremely rarely if there is an arbitration agreement. This attitude is one of the most important guarantees for those that rely on arbitration that their willingness to stay away from national courts, for

reasons of their own, will be respected save for profound defects in the arbitration agreement (as would be the case if the dispute may not be subject to arbitration under French law). However, this should not and does not mean that French Courts are *never* involved in disputes based on arbitration agreements. They can become involved, albeit in a very limited manner, once the award is rendered, at the recognition, enforcement, or annulment stage.

2. That parties choosing to refer their disputes to arbitration obtain a final award that can hardly ever be reviewed before French Courts after the award is rendered.

French arbitration recognizes the fundamental principles that arbitration awards may be set aside at the seat of the arbitration on certain limited grounds, including on the ground of contradiction with the French conception of international public policy. This review also applies on limited grounds for foreign arbitral awards whose recognition or enforcement is sought in France. In this context, the main concern of parties to arbitration provisions is that the interpretation and application of the principles of "international public policy" can greatly differ from one country to another, ranging from a very narrow to an extremely wide conception. For example, it would be particularly alarming if national courts could essentially act as an appeal body after the arbitration process.

Fortunately, French Courts have never held such a view and carry out the "lightest" possible review of arbitral awards. In France, when it comes to assessing the compliance of arbitral awards with international public policy, this latter concept is construed very restrictively. This is seen as yet another guarantee as to the "finality" of arbitral awards and the predictability of the judicial system in which they would be recognized and enforced.

The attitude of French courts on this issue was recently confirmed in a decision by the French Cour de Cassation of June 4, 2008 in the matter of *Société SNF SAS v. Société Cytec Industries BV*. (Civ. 1ère, 4 juin 2008, Société SNF, SAS v. Société Cytec industries BV, Bull. Civ. I, n° 680.) This matter involved complex issues of compatibility of an arbitral award with the provisions of European Law, and notably of the EC Treaty and alleged violations of European antitrust laws by the arbitrators. The losing side in

the arbitration thus challenged the award as being incompatible with French international public policy. In confirming a decision by the Paris Court of Appeal, the *Cour de cassation* ruled that, "*when it comes to the violation of international public order, (...) the control [of the French courts as regards the compatibility of the solution of an award with such public order] is limited to a manifest, actual and specific violation.*" By deciding to restrict the control of an alleged violation of international public order by an international arbitration award to those violations that are *manifest*, *actual*, and *specific*, France's highest court adopted an extremely narrow mandate, thus confirming the extent of its respect for international arbitration. This is a further assurance given to parties in international arbitration proceedings that the resulting award will not be set aside in France and will be recognized and enforced, save for exceptional circumstances.

3. That parties choosing to refer their disputes to arbitration can nevertheless count on the control of French Courts to safeguard fundamental rules of due process.

The very flexible attitude of French Courts toward arbitration certainly does not mean that fundamental principles of due process are not safeguarded. Quite to the contrary, French Courts have recently adopted strict views on this matter.

On February 12, 2009, the Paris Court of Appeals rendered an important decision concerning the requirements of independence and impartiality of arbitrators in an arbitration seated in France. (Paris, 12 févr. 2009, n° 07/22164, SA J&P Avax c/ Sté Tecnimont, Rev. arb. 2009. 186, note T. Clay.) The Court emphasized the arbitrators' duty to disclose any fact or circumstance that may affect their independence, and impartiality continued throughout the arbitration proceedings.

The case stemmed out of a request for the annulment of a partial ICC arbitral award brought by the Greek company J&P Avax SA (Avax) against the Italian company Société Tecnimont SPA (Tecnimont). Tecnimont had concluded a subcontracting agreement with Avax for the construction of a factory located in Greece. A dispute arose between the parties, and Tecnimont instituted ICC arbitral proceedings in Paris pursuant to an arbitral clause in the subcontract agreement. Each party nominated an

arbitrator, and the chairman of the arbitral tribunal was nominated by the party-appointed arbitrators. A partial award was subsequently rendered by the arbitral tribunal on December 10, 2007.

Avax brought annulment proceedings in France against this partial award claiming breach of Article 1502 2° of the French Code of Civil Procedure, which provides that annulment of an arbitral award may be requested if the arbitral tribunal had been improperly composed. In particular, Avax asserted that the chairman of the arbitral tribunal, a well-known arbitrator from a large international law firm, failed to fulfill his obligation to reveal circumstances that could affect his independence due to the nature of the links existing between his law firm and Tecnimont.

Avax indicated that in his declaration of independence on October 30, 2002, the chairman of the arbitral tribunal was required to reveal any associations existing between his law firm and Tecnimont, including Tecnimont's parent company and subsidiaries. Avax argued that the chairman had failed to disclose that his law firm advised Tecnimont's parent company, Edison, throughout 2002 and kept it as a client until 2005. Thus, when the arbitrator was appointed chairman of the arbitral tribunal, Tecnimont's parent company was still a client of his law firm. Several other direct or indirect relations between the chairman's firm and Tecnimont over the years were also revealed.

Avax argued that the chairman had failed to comply with his duty of independence because of the numerous associations over the course of the arbitration between his law firm and Tecnimont, Tecnimont's parent companies, and Tecnimont's wholly-owned subsidiary.

In rebuttal, Tecnimont argued that annulment proceedings were not admissible by the court because a request for the dismissal of the chairman filed with the ICC on September 14, 2007 had been declared barred. Tecnimont also argued that the annulment proceedings must be rejected because the chairman did not fail to fulfill his disclosure obligations and had fulfilled his obligation of independence.

The Paris Court of Appeals noted that an arbitrator must reveal to the parties all circumstances that could affect his judgment and could instill a reasonable doubt in a party's mind as to the arbitrator's impartiality and

independence. The court also noted that the chairman's declaration of independence merely disclosed that, during the previous year, certain offices of his law firm had assisted the parent company of Tecnimont with respect to a closed matter and that he had never himself worked for this client. The court took into account the fact that Avax had questioned the chairman's links to Tecnimont, and that it had requested additional information from him in the course of the proceedings. Based on the answers he provided, Avax challenged his appointment, a challenge that was subsequently rejected by the ICC. Avax nevertheless reserved its rights and wrote multiple letters requesting—and obtaining—additional information from the chairman. This information shed further light on the relationship between the chairman's law firm and Tecnimont. Given that Avax did not waive its right to challenge the independence of the chairman on the basis of these new facts, which were unknown before the rendering of the first partial award, the request for annulment of the partial arbitral award was found to be admissible by the Court of Appeals. The Court of Appeals noted that the chairman's disclosure concerning his law firm's links to Tecnimont was not exhaustive, as the firm did not stop working with Edison until 2005. It also noted the firm's work for other related companies in 2004 and 2005.

As stated by the Paris Court of Appeals: "Considering that the bond of confidence between an arbitrator and the parties must continually be preserved, the parties must be informed throughout the duration of the arbitration of relations that might in their eyes influence the judgment of the arbitrator and which is of a nature that could affect his independence, that Tecnimont could have known the affairs in which it, one of its subsidiaries, and its parent company had hired [the Chairman's law firm] and cannot excuse itself because of the global size of [the Chairman's law firm], with 2,200 lawyers, and observing that [it] has a department in charge of conflict checks and that the information furnished by [the chairman] to the parties involved in the arbitration were communicated to him by his law firm."

On this basis, the Court of Appeals found that the links with Tecnimont created a conflict of interest between the chairman of the arbitral tribunal and one of the parties to the arbitration. In summary, the Court of Appeals ruled that due to the lack of independence of the chairman of the arbitral

tribunal, the arbitral tribunal had been improperly composed, leading to the court's annulment of the partial arbitral award of December 10, 2007.

The Paris Court of Appeals' decision demonstrates the importance of continuous and strict conflict checks by arbitrators throughout the arbitration proceedings. Arbitrators involved in arbitration proceedings with a seat in France must ensure that their independence and impartiality is preserved in the eyes of the parties not only at the inception of the arbitration but until the final award is rendered, by updating, whenever necessary, the disclosure they initially made. The strict approach of the Paris Court of Appeals requires arbitrators to make sure that conflict of interest databases are regularly updated and consulted. Undoubtedly, this adds to the arbitrators' responsibilities and may be challenging to enforce, especially when arbitrators are part of an international law firm. However, far from making arbitration more complex, this important decision has the very positive effect of ensuring that arbitrators sitting in international arbitration tribunals in France are, and also remain, truly independent and impartial throughout the proceedings. The decision must also be taken into account by parties to arbitration agreements when it comes to appointing arbitrators. It is also their duty, in order to safeguard the arbitration process and ultimately the award, to appoint arbitrators that are aware of their obligations, including their continuing obligation to disclose any potential conflict of interest, as stated in the Paris Court of Appeal Decision of February 12, 2009.

4. That parties choosing to refer their disputes to arbitration cannot avoid certain mandatory French rules on bankruptcy.

In France, when bankruptcy proceedings are instituted against a party involved in a pending arbitration, the situation can result in conflicts between the applicable arbitration and insolvency rules. In that context, an arbitral tribunal sitting in France may be confronted with determining the extent to which they must defer to mandatory insolvency rules. This issue is particularly topical in difficult economic times such as the ones currently experienced by most countries in the past years.

A recent decision by the French *Cour* de cassation provides clear guidance on this matter. In the case of *Liquidateurs of Sté Jean Lion v. Sté International Company for Commercial Exchange Income*, rendered on May 6, 2009 (Civ. 1ère,

6 mai 2009, Société Mandataires judiciaires associés, agissant en la personne de Mme X, en sa qualité de liquidateur judiciaire de la société anonyme Jean Lion et compagnie v. société International Company For Commercial Exchanges Income, Bull. Civ. I, n° 509), the highest French judicial authority confirmed the general principle that arbitrators must apply when confronted with the bankruptcy of a party to an arbitration in France. The Court ruled that an arbitral tribunal may only render a decision deciding the amounts owed by the insolvent party, and that, under French bankruptcy law, the tribunal cannot order the bankrupt party to pay any amount. Failure to respect these principles will lead French courts to set aside the resulting award if the seat was in France, or to refuse to recognize and enforce the award in the French legal system.

The facts of the case brought before the *Cour de cassation* were as follows: Jean Lion, a French company, concluded three contracts containing an arbitration clause with Income, an Egyptian company. In 2001, Income initiated arbitration proceedings in London against Jean Lion, under the Rules of the Refined Sugar Association. While the arbitration proceedings were pending, Jean Lion was declared bankrupt in France and subjected to judicial liquidation.

In 2004, the arbitral tribunal ruling upon the dispute rendered an award in favor of Income, ordering Jean Lion to pay certain sums. The arbitral award was declared enforceable in France by a judgment of the Paris First Instance Court in 2006. In 2008, the Paris Court of Appeal confirmed that the arbitral award was recognized and enforceable in France. At the request of Jean Lion's liquidators, the *Cour de cassation* eventually reversed the decision of the Paris Court of Appeal and declared that the award violated French principles of international public policy under Article 1502.5 of the Code of Civil Procedure.

Jean Lion's liquidators argued two main legal grounds before the *Cour de cassation*. The first ground was an alleged procedural defect; namely, the liquidators claimed they were not validly summoned in the arbitration and therefore the proceedings should not have resumed. In the second ground, Jean Lion's liquidators contended that an arbitral tribunal may decide the value of the debt owed by the insolvent party but may not, in any case, require the debtor to pay the amounts.

The *Cour de cassation* rejected the first argument based on *estoppel*. However, the second argument successfully persuaded the Court.

The Court found that, by recognizing an arbitral award in which Jean Lion was ordered to pay certain amounts to Income, despite being bankrupt, the Court of Appeal breached article L. 621-41 of the French Commercial Code (now article L. 622-22) and violated the fundamental principle of equality between the creditors in insolvency proceedings.

Interestingly, Income had argued before the Court of Appeals that this principle would not be applicable as it had only requested recognition of the arbitral award, not enforcement, in France. In effect, Income had clearly stated that it would not seek its enforcement.

Relying on that representation, the Court of Appeal decided that "*in order to be unlawful, the recognition or enforcement of an award should constitute an effective and concrete violation of international public policy rules. This is not the case when there is a purely formal violation of the prohibition of condemnation of a legal entity that was declared bankrupt.*" The Court of Appeal reiterated a well-known concept of French arbitration law that requires a "*blatant, concrete and effective violation of international public order*" to set aside international arbitration awards with a seat in France or to oppose their recognition and enforcement in France.

However, the Court of Appeal's decision was also quashed by the *Cour de cassation* for breach of article L. 621-41 of the Commercial Code (now article L. 622-22). The *Cour de cassation* stated in broad terms that "*with respect to bankruptcy matters, the stay of proceedings is a rule of both national and international public policy.*" Even in the context of an international arbitration, as long as bankruptcy proceedings are filed in France against a party, an arbitral tribunal must apply French international public policy rules. Therefore, because the award did not respect such rules, the Court of Appeal should have denied recognition and enforcement of the award. The *Cour de cassation* held that its finding was not affected by the creditor's representation that he would not seek the enforcement of the award. As a matter of international public policy, it does not matter whether the creditor decides to abandon the enforcement of the award or if enforcement is not possible if the debtor has no assets.

The *Cour de cassation*'s decision is therefore a strong confirmation of the limits set by French law to an arbitral tribunal's jurisdiction and powers, even with a

seat outside France, if one party is subject to insolvency proceedings in France while the arbitral proceedings are pending. Although somehow strict, the approach of France's highest court allows for the harmonious coexistence of bankruptcy and arbitration laws in France as well as in arbitrations involving parties subject to French bankruptcy proceedings.

Key Takeaways

- Those who must appoint a mediator—judges, or litigants assisted by their lawyers—should take this basic principle into account in order for the mediation to succeed. Beyond the mediator's training, his or her personality, talent, charisma, and above all, benevolence, must be the foremost considerations.
- Only lawyers can usefully advise the mediation parties to choose the best solutions, in comparison to what the courts may have decided, and negotiate their best interests. However, mediation is primarily about concerned parties who can speak or express themselves and not the lawyers who plead (in fact, lawyers do not plead anymore, they negotiate).

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Mr. Ayela joined Mayer Brown in 2009 and in addition to his native French, he speaks English. He received his LLM in international business law from Ottawa University and his Masters from Aix en Provence University.

Dany Khayat *is an attorney in Mayer Brown LLP's International Arbitration–Litigation group in Paris. He was involved in arbitrations under the ICC, ICSID, and UNCITRAL rules as well as ad hoc arbitration proceedings. Mr. Khayat has substantive knowledge in investment treaty arbitration and the protection of foreign investments, having written extensively on ICSID awards and decisions for several years.*

Mr. Khayat was also involved in arbitration-related proceedings before French courts as well as disputes involving state immunities and seizure of state-owned assets and other contractual and commercial matters heard before French courts.

Mr. Khayat appeared in several conferences as a speaker on the topic of investment treaties and investment disputes and lectured in 2006 on arbitration in the Arab countries at the University of Paris I (Panthéon–Sorbonne).

Mr. Khayat has been with the firm since 2008. Previously, he was an attorney in the International Arbitration group of a large, international firm in Paris where he worked since 2000. He speaks French, English, and Arabic and has reading knowledge of Spanish.

Recent or pending arbitration or court proceedings in which Mr. Khayat was involved include a Middle-Eastern company in the distribution business as claimant in an ICC arbitration with a seat in Paris against another Middle-Eastern company; a leading European electronics company as respondent in an ICC arbitration in Paris against an Asian State as well as related annulment proceedings before French Courts; a well-known European clothing brand as respondent in an ICC arbitration against its franchisee and distributor in a Latin American country; and the subsidiary of a leading European company in the aeronautics and aerospace industry in an ICC arbitration against its North American supplier.

Mr. Khayat graduated from University of Paris II Panthéon–Assas, DEA droit international, with honors, in 1999; University of Paris I Panthéon–Sorbonne, Maîtrise en droit des affaires in 1998; University of Paris II Panthéon–Assas, Institut des hautes études internationales; and Institut d'Etudes Politiques de Paris, Diploma, section internationale, in 1995.