Conciliation procedures in land-related disputes

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Alternate procedures – Our role

Summary : Description of three alternate conflict settlement procedures on real estate matters and of the role that surveyors can play in this important trend of the legal world. It will particularly cover the latest procedure, which emerged recently, and was materialised by a European directive of April 2008, i.e. mediation.
The status of mediation in various countries will be discussed.

Our trade is highly diversified in its areas of intervention and is practised, at various levels, by « experts » with the most varied qualifications.

Land surveyors are called upon by Courts to settle disputes such as problems between tenants and landlords, joint ownership and easement issues, real estate issues, problems arising during building erection or transformation work, construction pathology, disputes in the area of the environment and city planning ; some of us dedicate themselves to that last activity.

One common point of disputes is, most often, the length and cost of the procedures. The usual process of legal proceedings involves the appointment of the surveyor during the proceedings, which extends the timeframe. The sequence of the proceedings initiating, the surveyor appointment petition, the adjustment and its possible conciliation, and, if it is unsuccessful, the hearings, require an overall settlement time that ranges statistically from two to ten years, with sometimes disastrous consequences for the parties (significant capital sometimes tied up, plus sometimes difficult dwelling situations , etc).

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As you know there are other ways to settle disputes in these areas, namely arbitration, conciliation and since a few years, mediation, reproduced in the Belgian Act dated 21 February 2005, anticipating the European directive on this matter, that has just been passed on 23 April 2008.

The European Community has always attempted to make easier the access to legal proceedings with a view to creating an area of freedom, safety and hence justice. Back in 1999, it invited its members to offer alternate out of court proceedings to citizens in the various countries.

With an Anglo-Saxon origin, and highly popular in the United States for about twenty years, the mediation process was introduced to Europe, including in a green paper by the European Communities on 19 April 2002, a discussion document about all alternate modes.

In the mediation area, a recommendation was passed by the European Council on 18 September 2002 and a draft directive was prepared on 22 October 2004 to lead to the very recent above-mentioned directive of 23 April 2008.

The major parts of that new directive, which give necessary tools to actively encourage the use of mediation, are as follows :

- Support to mediator training, to the elaboration of wilful codes of good conduct and procedures, ensuring process quality.
- Right for any judge to invite the parties to use mediation
- Allow to make binding the mediation agreement entered into by the parties, with a status similar to that of a ruling.
- Allow the process to be conducted in confidentiality.
- Allow the suspension of time barring periods.

General awareness seems to be emerging in Europe.

Belgium, Bulgaria, Spain, Finland, Greece, Hungary, Latvia, Malta, the Netherlands, Slovakia and Slovenia have gone through a positive change in the recent years. Great Britain and Portugal have long developed a true culture of mediation.

Regarding France, the First Presiding Judge of the Supreme Court said in 2002 « Then arises a modern view of Justice, a justice that observes, facilitates negotiation, takes it into account, and arranges for the future relationships between the parties, and protects the social fabric».

A 1995 Act set up legal mediation on civil and business matters, with the parties' agreement, to designate a third party to carry out a mediation. The result is limited, and the way opened by that law should be continued and extended, according to Mr Jacques Floch, who would like to set up a mediation research centre in France, allowing to put new bills forward.

It also seems that some major insurance companies required their clients to try mediation rather than letting the dispute go to court.

The French experiment seems still very limited though several movements are emerging, to try and spread the process to some areas of application.

The Netherlands have a highly extend mediation culture. All courts have a department to direct parties towards mediation. The overall number of judges in the country is low in relationship to others, and tends to decrease.

The United Kingdom has developed a stringent system to develop the use of the mediation procedure. A party winning or loosing a suit before conventional courts, has to pay all legal costs, if it unreasonably declined the mediation process when suggested by the judge.

In Germany, although there is a mediation process, it is making slow progress, as the discipline of absolute respect for court proceedings, seems to hold back the expansion of this new alternate form of dispute settlement. Some states however have adopted specific measures.

The mediation situation ion Norway, in the real estate area, will be described by our colleagues in a few minutes. It seems that that country has decided to push mediation in that area significantly forward.

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I would like to remind you of the basic differences between arbitration, conciliation and mediation. These three procedures can be described as amicable, since they require the agreement of the parties to be set up

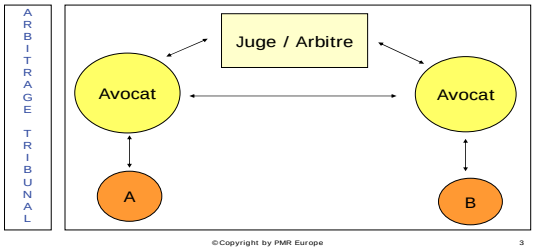
They are mentioned here in an increase order of party involvement in the dispute settlement.

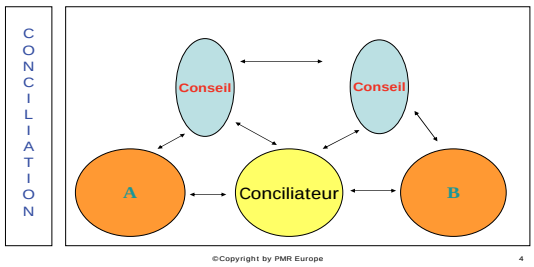
Indeed, arbitration, regulated in Belgium by the Judiciary Code, involves the appointment of one (or more) arbitrator, who, with a relatively low participation by the parties, will issue a binding opinion.

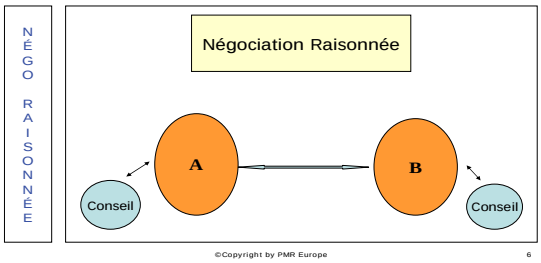
Conciliation involves the parties but the solution is directly induced by the conciliators and is reproduced in an agreement binding on the parties.

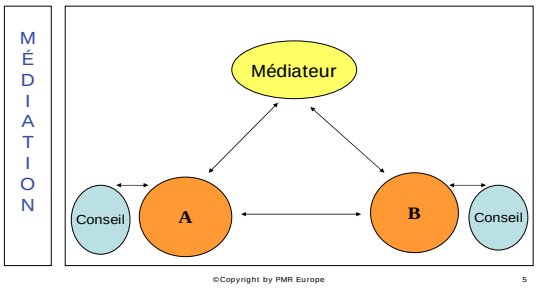
Mediation, lastly, is conducted by the parties themselves, possibly in the presence of their lawyers, but managed by one or more independent third parties. « Mediation is a wilful concertation process between disputing parties, handled by one or more third parties that facilitate communication and attempt to bring the parties to choose a solution themselves. »

These important differences between the various dispute settlement modes are described in the following diagrams (PMR Europe sprl source) :









Negotiation	Mediation	Conciliation	Arbitration	Courts and tribunals
Quick Original solutions developed by the parties Co-operation Flexibility The parties own the solution Customised Future-oriented	Link between parties that do no understand one another anymore Help the parties control their fate The mediator/conciliator is an interface Alternate (or Appropriate) dispute settlement method Preservation of the win/win relationship Confidential Controllable cost Quick The parties are « in control » of their solution (developed solution) Flexibility Emotions taken into account Suggests the solution		Winner/loser Costly Formal Long Decision by an imposed third party Ready to wear Remedies the past No communication between the parties Passive parties Difficult understanding of the process Emotions not taken into account *Sometimes : coercive and punitive aspect* Some choices of the parties on the arbitrator or Arbitration organisation No choice as to the judge	
	Third party involvement			

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I will develop below a few concepts regarding the mediation process applied to Belgium.

First of all, it is noteworthy that in our country, the lawmaker wished to leave parties entirely free to adhere to the process itself, and that each party may end the mediation at any time. One directly feels the significance of the persuasion force, of the psychology and management capacity of the mediator.

Mediation involves specific training delivered by private approved specialised organisations. Belgian law requires 90 hours training, leading to an official government approval. Vocational training is also required.

The parties designate the mediator by common agreement. He can also be appointed by the judge in the framework of a court mediation, but with the agreement of all the parties.

The confidentiality of the process and professional secrecy are main conditions of the mediation and all documents written in that framework will remain secret. They cannot be disclosed, unless otherwise agreed by the parties, in case of a common will to have them approved, or for later use as evidence in court.

Therefore the parties can express themselves in confidence and in the utmost discretion. It is the illustration of one of the advantages of alternate dispute-settlement procedures, i.e. strict confidentiality, as opposed to court settlement, which is mainly public.

The Court approval will automatically remove any possibility of appeal. It implies having called on an approved mediator, an indispensable condition, but also is a guarantee for the judge that the mediation agreement he will need to approve is compliant with specific law and public order.

There is in Belgium, a significant increase in the number of court mediations, i.e. mediations offered to the parties by the judge at an adequate time of the proceedings, and conducted, inter alia, by specialised organisations such as the « Chamber of conciliation, arbitration and mediation on real estate matters (CCAI) ».

Let also note here that time barring periods are suspended during the mediation period.

Since the end of the year 2000, the Union Belge des Géometres (UBG), through one of its components, Union des Géometres Experts de Bruxelles (UGEB), and in itself, is part of the CCAI.

That chamber is made of bar associations, solicitors associations, architect associations, legal adjusters and surveyors.

One specific feature that led to the setting up of the chamber is the simultaneous presence of lawyers and technicians. Very often indeed, both worlds ignore one another, and that distance impacts the duration and quality of the proceedings, in addition to the delays inherent to the legal system.

Apart from the results achieved by the CCAI in various cases, I would like to strongly emphasise the bringing together of technicians and lawyers, which I personally give a great deal of importance to. There is a lot to be gained from knowing one another better, which will inevitably facilitate our relationship in the framework of standard procedures.

The reception given to the CCAI was highly positive but nonetheless suffered, in the early stages of its existence, from the lack of circulation of the very concept of other procedures than conventional court proceedings.

The concept however, is progressing, more slowly than what one could wish, like any change in the habits and laws engraved in the marble of our modern societies, though in a consistent manner.

The CCAI settles disputes by appointing a lawyer and a technician as co-mediators, for all cases.

This poses the problem of chamber approval, apart from the official approval of mediators , both of experts and of lawyers. The board of directors of the chamber always studies applications, which should come from one of the participating associations, based on well established criteria of competence, morality and experience. The CCAI's bureau handles, on a case by case basis, the appointment of the experts and lawyers that have been approved, in a specific manner, in the three procedures (Arbitration, conciliation and mediation) and in six different categories regarding experts, i.e. :

- Building pathology
- Ownership, boundary, joint ownership, rental disputes
- Assessments
- Agreements
- City planning and environment
- Joint ownership and easements

Such appointments occur, of course, subject to the parties' right to choose themselves, by common agreement, the people that will help them reach a satisfactory solution.

Regarding mediation, depending on its particularly sensitive and sometimes psychologically complex nature the synergy between the lawyer and technician is so important that the choice is left to a first appointed mediator, of a co-mediator.

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In order to better understand the mediation process, it is not necessary to distinguish between a position negotiation and a reasoned negotiation.

The position negotiation includes the following features :

- Unclear position of each party
- High initial demand, which will be decrease like on the second hand car market
- Important limitation of information communication
- Belief that there is only one solution and that there is therefore necessarily a winner and a loser
- Use of subjective criteria that are often understood or admitted only by one of the parties

That negotiation model is often very egotistical, does not meet everyone's stakes, and generates few original solutions.

The main consequence of this type of negotiation is the frustration of other party, leading, even when an agreement is reached, to often permanent damage to the interpersonal relationship.

Reasoned negotiation :

- Tires to separate people from issues, as often as possible
- Determines everyone's' interests behind positions taken (all interests)
- Considers the possible options of mutual gain (all options)
- Is conducted based on objective criteria understandable by all parties

Those four pillars are found at the base of the mediation process, which derives directly from the definition of reasoned negotiation :

Phase 1 : Installation : « Builds trust »

A prior interview is organised, sometimes only with the lawyers, if required by the parties, in order to elaborate an agreement protocol and state the main features of mediation.

Based on the mediation protocol, signed at the first plenary meeting, the mediator creates the indispensable trusting atmosphere by defining his role, states that it is a free and wilful process, also states that the parties themselves are the architects of the final solution.

He stresses the confidentiality aspects and their consequences, establish communication rules (for instance, balance speaking time, listening and reformulation, no assumptions) and have them approved by the parties and counsels.

He communicates the process (including the option of a caucus i.e. separate conversations) and advises of the creation of a table reproducing the various elements of negotiation.

Phase 2 : Determination of the facts and interests of the parties : « Separate people from issues and determine each party's interests »

The mediator listens to the points of view and reformulates them, and tries to handle emotions. He handles communication, identifies interests, needs, stakes, fears, priorities, and has them approved by the parties. He identifies points in common.

Phase 3 : Option definition : « Define the mutual gain »

The parties, helped by the mediator, identify the various options and their possible alternatives and select options generating a mutual gain. A division of interests is suggested and the parties' creativity is raised.

Phase 4 : Negotiation : « Distributive strategy »

Based on the objective criteria defined in the previous phases, a negotiation can take place based on crossed offers, their assessment defining a distributive strategy.

Phase 5 : Decisions : « Summary and clarification »

The main part of uncertainty is removed, by setting up, as needed, a reality test, before signing the agreement, elaborated and drawn up by the lawyers, the parties themselves and / or possibly, the mediator.

The latter phase can therefore lead, if wanted, to approval by the competent court.

A lot of conflicts can be settled within a timeframe of one to three months and four to sixteen hours of mediation work. The cost of a satisfactory agreement is therefore low, in relationship to a conventional procedure.

One immediately understands the main goal of the procedure, i.e. the creation of a drive capable of ensuring a long term relationship.

One can always assume, during a conflict, that there is no point in thinking about the future and that the only important thing is victory now. Obviously, it is rarely the case and once could quote many examples where need, apart from the moral issue, for a long term approach, is essential (buyers of property and company giving a long term guarantee, landlords and tenants, neighbours who will sometimes be so for the rest of their lives, etc).

Mediation is specifically designed for conflicts requiring confidentiality, urgency and therefore, a controllable cost, hazard control, the parties' right to express and try and remove the feeling of injustice. Let us try to avoid severing a thirty year relationship in a permanent manner and from there, build a customised solution.

Mediation is therefore mainly based on the creation of a new type of relationship rather than being restricted to a dispute settlement method.

Mediation is less suited to a dispute whose settlement should be based on case law, of where there is need for broad publicity, as well as when there is obvious bad faith.

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Surveyors have a dual role in those alternate dispute settlement forms.

Firstly, we can act as prescriber. When we are asked about a property dispute, we can sometimes direct the parties towards either of those alternate procedures.

The choice of procedure will broadly depend on the parties in presence, and their individual dialogue capacity.

We can secondly, with adequate training, act as counsel, arbitrator, conciliator or mediator, beyond our usual work.

In those occasions we can grow listening and integrity, non judgmental, empathy, inquisitiveness, perseverance, creativity and verbal and non verbal communication skills.
Those qualities, which will develop more through adequate vocational training, will also be useful in our standard court and other work.

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Justice in all countries in the world, is a costly, slow and complex process. It is possible to suggest alternatives.

The various bar associations that studied those procedures are convinced that they are useful and of their future. One can fear, at first glance, that some lawyers will oppose such alternate procedures, and indeed, some are reluctant out of fear of the unknown, fear of the impact on their privileges and possibly their sales figure.

However, in Belgium, most specialised real estate firms have approved mediators.

I really do believe that this situation will gradually change in the near future and based on the United States experience, where we are often twenty year behind in some society changes (sometimes fortunately), the increase in the number of such alternate procedures is unavoidable.

I am convinced that slowly, the reform of justice in all European countries will need to promote these new dispute settlement methods, and that we have a significant rile to play in these matters.

Like social sciences are taking on increasing importance in citizen management, dispute settlement approaches based on reason negotiation will take an increasing place in everyday life and its inevitable disagreements. It is a new method of social regulation.

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Bibliographical references :

Courts de formation en mediation civile et commerciale dispensés par la société :
PMR Europe sprl, avenue Brugman 12A à B1060 Bruxelles. Phone +3223462737
Mrs Coralie Smets-Gary
Mrs Martine Becker

Various articles written by Me Renaud de Briey, place de l'Hôtel de Ville 15-16 in B1300 Wavre. Phone +3210244545

Information report filed by the French National Parliament delegation to the European Union on mediation in Europe presented by Mr Jacques Floch, representative, on Feb. 13, 2007

A few interesting web sites :

www.mediationetArbitration.com
www.cedr.co.uk
www.adrcenter.it
www.nmi-mediation.nl
www.mediate.com (USA)
www.cpradr.org (USA)

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