Negotiated solutions for disputes and financial distress: a cultural shift in the judicial world

Focus on the business courts: An overview of the available tools

Summary

Courts, in particular in Belgium, are increasingly seen as venues for resolving conflicts through negotiation, mediation, and conciliation, rather than confrontation. The laws of 18 June 2018 and 19 December 2023 increasingly promote alternative dispute resolution tools in courts, especially within business courts, which deal with commercial, entrepreneurial, and insolvency matters. This contribution highlights and compares key tools available in these courts.

Text

A cultural shift is underway in the judicial world. The court is increasingly seen not just as a place of confrontation but as a venue for finding negotiated solutions to conflicts, tensions or financial distress. Significant milestones in promoting mediation, conciliation, and negotiation within the court system include the laws of 18 June 2018 and 19 December 2023. Various instruments and tools are now available, which can be used in all courts and at all stages of proceedings. This is particularly relevant in the business courts in Belgium, which handle both commercial and entrepreneurial disputes, as well as insolvency cases. Detecting and assisting companies in financial distress, as well as conducting insolvency proceedings, are major responsibilities of these courts. In this context two specific tools are exclusively available through the enterprise court.

Some instruments involving the enterprise courts, based on negotiation rather than confrontation or adjudication, are new and not widely known within the business community. The following provides an overview of these tools. To avoid confusion, the French and Dutch legal terms for the instruments or proceedings are included.

The goal of this overview is to outline the different tools available and highlight the distinctions between them.

1. The “Chambre de Règlement Amiable” / “Kamer voor Minnelijke Schikking”

In judicial proceedings, either party, or one of the parties, may request that the case be heard in the "Chambre de Règlement Amiable" (French) or "Kamer voor Minnelijke Schikking" (Dutch), in order to facilitate a conciliation between the parties. With the consent of at least one party, the court may also on its own initiative order that the case be treated in this chamber. During the hearing, which takes place with a different composition of judges, the case is heard confidentially, and the chamber may hear the parties individually and separately. A request thereto from a party acts as formal notice and suspends the limitation period. Recent legislation, the law of 19 December 2023, mandates that all courts establish such a chamber by 1 September 2025, with many courts already implementing these chambers. In this process, the court is permitted to express an opinion on the merits of the case. If conciliation is successful, the court can issue an enforceable judgment confirming the settlement or enforceable minutes of the hearing. If conciliation fails, formal proceedings continue in the chamber that originally handled the case. The legal basis for these proceedings is found in Article 734/1 of the Judicial Code.

2. The “Conciliation Judiciaire” / “Gerechtelijke Verzoening”

Parties, acting jointly or unilaterally, may request that the current chamber of the court attempt a conciliation at any stage of the proceedings. The court may also order the personal appearance of the parties, even when they are usually represented by lawyers. If the conciliation is successful, the court can issue an enforceable judgment confirming the settlement or enforceable minutes of the hearing. If conciliation is unsuccessful, formal proceedings continue before the same chamber of the court. The main difference with the case being heard in the Chambre de règlement amiable/ kamer voor minnelijke schikking resides in the shift of judges that hear the case and the possiblility for the judge to express an opinion (however without binding the court). The legal grounds for these proceedings are found in Article 734/1 of the Judicial Code.

3. The “Médiation” / “Bemiddeling”

At any stage of the proceedings, parties, acting jointly or unilaterally, may request that the court order mediation. Unless all parties oppose it jointly, the court has the authority to impose mediation, which can be a highly effective tool given that parties often hesitate to seek it on their own. The key distinction with the other processes mentioned is that the mediator is a neutral third party, chosen by the parties, and has no decision-making power. Mediation is a formal process, which can also involve experts, such as auditors or real estate professionals. The legal basis for these proceedings is found in Article 1734 of the Judicial Code.

4. The "Droit Collaboratif" / "Collaboratief Recht"

Parties may request that the current chamber of the court apply collaborative law at any stage of the proceedings. Unless all parties oppose it, the court can impose this process. Collaborative law involves specifically trained lawyers-"avocats collaboratifs" or "collaboratieve advocaten"-who assist the parties in negotiating a settlement, with the understanding that the lawyers must withdraw if no agreement is reached. If the parties prefer to keep their original lawyers, they can involve new, collaborative lawyers for the negotiations.

If no settlement is achieved, the original lawyers can resume their role in continuing the court proceedings. The legal grounds for these proceedings are found in Articles 1738 and following of the Judicial Code.

5. The "Médiation d'Entreprise" / "Ondernemingsbemiddeling"

Upon the request of a company in financial difficulty, the business court can appoint a reorganisation practitioner to assist the company in negotiations aimed at facilitating a turnaround. These negotiations may involve reaching amicable agreements with creditors way before the opening of formal proceedings. The mediation can also take place in the framwork of formal proceedings tending at reaching amicable agreements or at establishing a collective agreement as part of a reorganisation plan that requires approval by the court. The added value of business mediation lies in the neutrality, expertise, and authority of the practitioner, the confidentiality of the process, and the limited scope of the practitioner's duties, focused on a specific number of negotiation hours. The legal basis for these proceedings is found in Article XX.29/2 of the Code of Economic Law.

6. The "Examen à la Requête du Débiteur" / "Onderzoek op Verzoek van de Schuldenaar"

The business court's chambers for enterprise in difficulty can, upon the request of a company in financial distress, convene a creditor before the court to discuss the debt and negotiate a payment agreement. Creditors that are public authorities can also be summoned to participate in these negotiations. If successful, an agreement can be formalised and acted upon. The legal basis for this process is found in Article XX.29/1 of the Code of Economic Law.

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