

## Legal tools for amicable dispute resolution in Belgian (family) courts

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### Suggested citation

Sofie Raes, 'Legal tools for amicable dispute resolution in Belgian (family) courts', *Family & Law* February 2019, DOI: 10.5553/FenR/.000038

### I. Introduction

Alternative/amicable dispute resolution (ADR) is omnipresent these days. In line with global developments, the Belgian legislator has embraced the use of ADR mechanisms, starting with family law. In 2013, Belgium took a major step forward in promoting ADR in family matters.<sup>1</sup> A duty to inform regarding all types of ADR was introduced for both the judge's clerk and the Family Court itself. In addition, a specific 'Chamber of Amicable Settlement' was created within the Family Court, where a trained and actively involved family judge now helps the parties to negotiate an agreement. Hence, in-court ADR was installed by law. Prior to this legislative reform, other initiatives had been taken, but had proven to be insufficient. In 2018, a more comprehensive reform followed, which envisioned implementation of ADR not only in family cases, but in all civil cases.<sup>2</sup>

When it comes to ADR, too often all eyes are on mediation. This article primarily considers the understudied subject of the Belgian Chamber of Amicable Settlement, which could highlight areas of concern for foreign in-court ADR systems as well. The ultimate aim of this chamber is to restore people's faith in the justice system, improve the degree of satisfaction of the parties involved with both the process and the outcome, and have the parties reach a solution tailored to their needs in a fast and low-cost manner. Given the myriad of possible benefits and the lack of research on this topic, these settlements need to be investigated more thoroughly; all the more so because of the upcoming legislative evaluation<sup>3</sup>, the goal of which is to implement best practices in all Family Courts in Belgium.<sup>4</sup>

Firstly, this article aims to acquaint the reader with the specific, lesser-known concept of amicable settlement by briefly explaining its

(historical) context (section II). Secondly, in the sections III to VI the various options regarding ADR available to the Court are discussed within their legal framework, with a strong focus on amicable settlement. These options consist of information provisions (section III), mandatory appearance for the parties and a possible adjournment of the case (section IV), the referral towards out-of-court ADR (section V) and settlements (section VI). Each section discusses the tools for the Family Chamber (§ 1), the Chamber of Amicable Settlement (§ 2) and the civil courts (§ 3) and concludes with an assessment of the strengths and weaknesses. Finally, the conclusion briefly reflects on the future of judicial ADR (section VII).

## II. Amicable settlement 101

### § 1. *Historical development and context*

1. In regard to settlement, the Belgian judicial history reveals a considerable gap between the law in books and the law in action.<sup>5</sup> Traditionally, the legislator attached great importance to the so-called *conciliating role of the judge*, especially of the Justices of the Peace and in family matters. Despite this legislative interest, which was shown in numerous optional and mandatory settlement provisions in different areas of the law<sup>6</sup>, this conciliatory task was, for a long time, almost solely implemented with success by the Justice of the Peace Court. Often, other judges saw these attempts at settling as a mere fruitless formality delaying the proceedings, which discouraged them from putting any effort into it.<sup>7</sup>

In the last 2 decades, there has been a general evolution towards promoting ADR techniques in Belgium. A legal framework for mediation was first set up in 2005<sup>8</sup> and has recently been modified by the same act that set up a legal framework for collaborative law as well.<sup>9</sup> These new regulations assign an increasingly important role to judges, whose task it is to question the parties involved about previous amicable attempts at conflict resolution, encourage settlement and refer to ADR if possible.<sup>10</sup>

2. The 2013 law that introduced Family and Juvenile Court<sup>11</sup> takes the conciliatory role of family judges to the next level with the creation of a separate Chamber of Amicable Settlement within the Belgian court system. In other words, the instalment of this chamber is imposed by law.

The *Court of First Instance* consists of four sections, one of which is the Family and Juvenile Court. This section is composed of a Family Chamber and a Chamber of Amicable Settlement (together: the Family Court), as well as a Juvenile Chamber, which makes up the Juvenile Court.<sup>12</sup> The Family Chamber is competent to decide in almost all family cases, while the Chamber of Amicable Settlement guides the parties towards an agreement to resolve their family dispute, which shows the clear connection between these two chambers.

The *Court of Appeal* contains chambers for civil cases, correctional cases, juvenile cases and family cases (the Family Chamber). This Family Chamber then comprises a Chamber of Amicable Settlement<sup>13</sup>, which reveals a discrepancy between the organisation at the levels of first instance and appeal.

3. Due to the different organisation of the Court of First Instance and the Court of Appeal, the link between the Family Chamber and the Chamber of Amicable Settlement is manifested in a different way at each level. Therefore, it is important to be vigilant when creating new legislation, as the phrase 'Family Chamber' will include the Chamber of Amicable Settlement in the Court of Appeal, but not in the Court of First Instance.

## § 2. Terminology

4. Before the legal framework surrounding ADR can be examined, it is paramount to define what is to be understood as an 'amicable settlement' and how it differs from mediation. A clear understanding of the relevant concepts could also improve familiarity with these phenomena, which is the first step towards promoting ADR.

5. However, it seems that the Belgian legislator and legal scholars are not very fastidious when it comes to a correct use of the different terms regarding ADR. The legislator uses the terms 'mediation', 'conciliation' and 'amicable settlement' in an inconsistent manner, as near synonyms. Some scholars even wrongly claim that 'judicial mediation' was introduced with the creation of the Chamber of Amicable Settlement.<sup>14</sup>

The term 'amicable settlement' should be used instead of 'conciliation',<sup>15</sup> because the latter reflects a broader meaning which also covers merely patching up a quarrel, while the former is more specific as it refers to the mechanism of a judge leading the parties towards an agreement that solves their arisen dispute. 'Amicable settlement' can be defined as a method of conflict resolution during which a judge guides the parties, with or without their lawyers present, to negotiate among themselves about their current dispute in order to reach an agreement. The judge can take on an active role by making concrete proposals and suggestions, and will make a judgment if no agreement is reached.

Furthermore, the term 'mediation' should also not be used as a synonym for 'amicable settlement'. Even though 'mediation' and 'amicable settlement' refer to a similar objective, namely getting the parties to reach an agreement under the guidance of a neutral third party, the judge uses a much more directive approach during an amicable settlement than in mediation. The judge proposes own solutions, whereas in mediation proposals must come from the parties themselves. This influences the core of the method, especially when taking into account the limited time frame at the judges' disposal as well as their natural authority. Mediation is defined by law as a

confidential and structured process of voluntary consultation between conflicting parties with cooperation of an independent, neutral and impartial third party who facilitates their communication and aims at bringing parties to work out a solution on their own.<sup>16</sup>

### III. Information provision

#### *§ 1. Family Chamber<sup>17</sup>*

6. As in many EU jurisdictions, Belgium has encountered the mediation paradox: despite the high success rates, there is still a very limited use of mediation.<sup>18</sup> A legislative framework for mediation was installed in 2005,<sup>19</sup> but so far without great success. The unfamiliarity with the concept was believed to be one of the primordial reasons for its failure. Prior to the aforementioned reform in 2013, fragmented obligations existed for the judge and his clerk to inform the parties about mediation in divorce and custody cases.<sup>20</sup> This was not perceived as a successful way to promote mediation, but the legislator nevertheless continued along the same path in 2013.

7. Since the effective date of the law introducing the Family and Juvenile Court (September 1, 2014), the judge's clerk must inform the parties in all cases under the jurisdiction of the Family Court about the possibility of mediation, amicable settlement and other forms of amicable conflict resolution as soon as a case is filed with the court. In order to do so, the clerk must send them the relevant section of the law regarding mediation, an information leaflet about mediation, a list of all accredited mediators in family matters in the judicial district as well as details about information sessions, on-call services and other initiatives aimed at promoting amicable conflict resolution.<sup>21</sup>

8. Once the case is in court, the family judge was obliged to (verbally) inform the parties about the possibility to resolve their dispute by means of settlement, mediation or another form of amicable conflict resolution, which happens during the first hearing.<sup>22</sup> In order to make this provision effective, an obligation was created for the parties to appear in person at this first hearing for cases concerning the following matters: the demand of spouses for separate residencies, demands regarding parental responsibility, foster care, custody matters and all maintenance obligations. In addition, the parties must be present in person in all cases concerning minors at hearings during which the case is pled and questions regarding the minor are discussed.<sup>23</sup> However, with the reform of 2018<sup>24</sup>, the legal provision requiring family judges to provide information to the parties about all types of ADR was removed, and a new stipulation now states that, in family cases, the judge must ask the parties during the first hearing if they attempted to resolve their dispute amicably before filing the case (see below, section IV, § 1).

#### *§ 2. Chamber of Amicable Settlement*

9. Although the law does not include a job description for judges in the Chamber of Amicable Settlement, a proposed amendment suggested the following implementation: “*The Chamber of Amicable Settlement provides information regarding referral to mediation, attempts to settle any case amicably, and, when the occasion arises, refers to and follows up on the mediation.*”<sup>25</sup>

In line with the proposed amendment, scholars agree that the tasks of the Chamber of Amicable Settlement must not be seen as too narrow and that judges should inform the parties about the available alternatives to resolve conflicts and help them examine whether a different path might be more suitable.<sup>26</sup> However, as this amendment did not pass, this is no more than a mere *possibility*.

### § 3. Civil courts

10. There is no legal provision that obliges judges in civil courts to provide parties with information regarding ADR. Instead, specific legal provisions were created for *lawyers and bailiffs* to inform the persons seeking justice (regardless of the nature of their conflict, so this provision also applies to family cases) about the possibility of mediation, conciliation and other forms of amicable conflict resolution, in order to assist people with conflict resolution before they initiate judicial proceedings.<sup>27</sup> The ultimate goal is to increase the awareness of the existence of alternatives to court, as well as the use of these out-of-court mechanisms.

### § 4. Assessment

11. Information is key to effecting a change in mentality and the promotion of ADR. Therefore, the legislator should be applauded for making different legal actors responsible for adequately informing their clients or justice seekers about the different options for conflict resolution. However, several remarks can be made regarding the legal stipulations for information provision about ADR.

12. Ideally, people should be informed about their options regarding conflict resolution *before the choice for a certain path* has been made. Once judicial proceedings have started, it is much more difficult to change the path. In this respect, the information provided by the judge’s clerk and the judge often comes too late.

13. Furthermore, it is believed that the *written information provided by the family judge’s clerk* has little impact. Not only is there too much information and does it mainly focus on mediation, the information is also not suited to the general public as it consists of a literal copy of the legal provisions, which is neither very attractive nor easy to understand. When it comes to written information, one succinct and attractive information leaflet about multiple ADR phenomena would be more desirable. In reality, the courts do not send the required information by mail since it would cost too much

time and money to print and send these documents to all litigants. Most courts send one information leaflet about mediation, a letter containing a link to a website with information about mediation or a letter stating that the parties can request a printed version of this information at the Court Registry.

14. The main problem with the previous obligation for *the family judge to provide this information verbally* was the lack of time during a first hearing to inform the parties about any (let alone all) form(s) of ADR. The first hearing has two goals: determine a calendar for the pleadings and determine whether an amicable solution is still possible. On average, a Belgian family judge must handle 20 to 40 cases per first hearing and has approximately 3 to 4 hours to do so. Providing information to everyone would be impossible, so judges would select the cases for which they assumed the information could be useful, or ask as a mere formality whether the parties were aware of the existence of mediation, or simply skipped this altogether. There were quite some variations between different Family Courts regarding the way the first hearing was held and the information that was given there, depending on the policy of the court. For example, it is common knowledge that some courts do not organise settlements in the Chamber of Amicable Settlement and therefore want to steer the parties towards out-of-court mediation as much as possible.<sup>28</sup>

However, this was not the aim of the legislator. Some courts (for example, Courtrai in the past, and Limburg) organise for a mediator to be present in court, before whom the parties must appear before being able to appear before the judge. The aim of these 15 minute conversations is to inform the parties about the concept of mediation and allow them to explore this possibility.<sup>29</sup> This sort of initiative has certainly advantages over information given by the judge (mediators are best placed to explain what that method entails), but it is unacceptable when only mediation is addressed as a form of conflict resolution. In Courtrai the project was eventually cancelled because the mediators felt their intervention had little effect as the information should be given at a prior time, before parties enter court proceedings. A study regarding trajectory mediation also indicated that the best time for trajectory mediation is before any choice regarding the conflict resolution method was made.<sup>30</sup>

Other courts (such as Antwerp) strongly believe in the advantages of the Chamber of Amicable Settlement and guide the parties towards those,<sup>31</sup> often without informing them about mediation beforehand. The Chamber of Amicable Settlement in Antwerp seems to function very well in terms of handled cases and concluded agreements.<sup>32</sup>

This development of diverging policies regarding the ADR-paths to be promoted is pernicious, because the information that can be obtained now varies depending on one's geographical location. Approaches that only focus on partial information provision by selecting one preferred method of dispute resolution, must be avoided.

The aim of the legislator was to create uniformity by establishing what

the judge should do during the first hearing:<sup>33</sup> the judge must hear the parties about the way in which they previously tried to resolve their conflict in an amicable way to determine whether an amicable solution could be considered. This provision leaves room for how much (or how little) information is to be provided. The vagueness of the stipulation makes one wonder whether it does indeed promote the desired uniformity. As this provision was only recently created by the legislator, research has not yet been conducted regarding the personal interpretation of this stipulation by judges.

15. For all information provisions from the family judge's clerk, judges, lawyers and bailiffs, the same remarks hold: there are little to no guarantees in place to assure that people can obtain more or less consistent and qualitative information regarding the diverse ways to resolve their conflict. In addition, it is very difficult to enforce these stipulations and ensure that the information is actually being provided.

## **IV. Prior attempts at conflict resolution and adjournment of the proceedings**

### **§ 1. Family Chamber**

16. The reform of 2018<sup>34</sup> replaced the legal provision requiring family judges to provide information about all types of ADR with a new stipulation that now states that, in family cases, the judge must ask the parties during the first hearing if they attempted to resolve their dispute amicably before filing the case. The judge then determines whether an amicable solution can be reached, and can adjourn the case for a month if this is deemed useful or if the parties make this request.<sup>35</sup> The goal of this delay is to allow the parties to gather information about ADR or attempt to come to an amicable solution. A closer look at the parliamentary proceedings related to the introduction of the reform reveals that its aims were to abolish the information obligation of the Family Court since the judge's clerk already provided this information, to standardise the way in which the first hearings of the various Family Courts are organised, and to encourage judges to make use of the parties appearing in person to assess if they might consider any form of amicable conflict resolution.<sup>36</sup>

17. For *certain family matters that are considered urgent*,<sup>37</sup> a specific legal provision exists, allowing the judge to compel the parties to appear in person during the entire judicial proceedings with a view to conciliation or to verifying the relevance of an agreement. The court can propose that the parties investigate the possibility of amicable settlement or mediation. Judges can do so *ex-officio*, or at the request of a party or the public prosecutor's office.<sup>38</sup>

### **§ 2. Chamber of Amicable Settlement**

18. There is no similar tool available for the Chamber of Amicable Settlement. The personal appearance of parties remains voluntary in this chamber and although a judge can ask parties during a settlement about prior attempts at resolving their dispute amicably, there is no need for a similar legal provision as the parties are already in an amicable conflict resolution method and must not be convinced anymore to attempt a form of ADR.

### § 3. Civil courts

19. Since July 12, 2018, any judge in a civil case has the authority to *order the parties to appear in person* at the first hearing or the very next one. In most cases, the judge has the discretionary power to compel the parties to appear in person, whereas it is mandatory for the parties to appear in person in certain family cases (more specifically: the demand of spouses for separate residencies, demands regarding parental responsibility, foster care, custody matters and all maintenance obligations). The reason for this provision is to question the parties about the way in which they attempted to resolve their dispute amicably prior to the judicial proceedings and to inform them about the possibilities to still do so.

20. At the request of one of the parties or *ex officio* if the judge deems it necessary and finds that conciliation is possible, the judge can *adjourn the case* to a set date within a month (unless the parties consent to a longer period). This decision can only be made at the first hearing or the following one. This should allow the parties to obtain the necessary information about ADR and to investigate whether they can resolve their dispute completely or partially in an amicable way. This measure cannot be imposed if it was previously ordered for the same dispute.<sup>39</sup> Thus, the judge can obligate the parties to inform themselves about the possibilities of ADR, and refuse to hear their case before the end of the adjournment period.

### § 4. Assessment

21. With these provisions, the legislator sent a clear signal that judges should hear the parties about their prior attempts at resolving their conflict amicably; in other words, judicial proceedings must be regarded as '*ultimum remedium*'. Before the parties turn to the court, they must have made a reasonable effort to resolve their conflict themselves. This in itself is significant in order to effect a more long-term mentality change.

22. In family cases and other civil cases, there are two distinct but very similar provisions according to which the judge can inquire which initiatives towards amicable conflict resolution were previously taken and if any ADR-alternatives could be considered. Regarding the *need for two different stipulations*, the Minister of Justice argued during the parliamentary proceedings on the matter that the main difference



between the two regulations is that, in certain family cases, the parties are obligated to appear at the first hearing, so that the judge *must* investigate whether an amicable resolution is possible.<sup>40</sup> As for the prior information provision, it is questionable to what extent family judges can effectively implement this new regulation in the very limited time frame at their disposal without making a selection of cases.

23. In the other civil cases, the judge has the *discretionary power* to decide whether or not the parties are ordered to appear in person. The usefulness of the parties appearing in person might be difficult to assess for a judge this early in the proceedings, when he or she can only rely on the first pleading of the plaintiff and, in some cases, that of the defendant. It remains to be seen how civil judges will implement this provision in practice, and if they will make use of it. Moreover, the short adjournment period set to allow the parties to appear in person and to gather information about ADR can place an additional burden on the workload of the different chambers. The judges then need to invest time and effort twice in the same case at this early stage, whereas this would only be once for regular judicial proceedings. If a considerable number of cases can be steered towards ADR, this investment might pay off. However, if these efforts fail to increase the use of ADR, it is expected that, after a while, judges will refrain from putting further effort into it.

It must also be noted that if the parties do not seem very willing to try ADR, the adjournment of 1 month may not be enough to change this attitude. The parties can simply claim that they gathered information about ADR but that it does not suit them. They cannot be forced to inform themselves about ADR. Therefore, this measure will probably only have an effect for those people who were already leaning towards ADR.

## V. Referral to out-of-court ADR

### § 1. Family Chamber

24. The legal framework that allows the Family Chamber to refer cases towards out-of-court ADR is the same as for the civil courts. More specifically, the legal stipulations apply to all courts except the Court of Cassation and the district court which decides jurisdiction disputes.<sup>41</sup>

### A. Mediation

25. Mediation is possible in all cases in which the parties can compromise. In Belgium, two types of mediation are regulated by law.<sup>42</sup> The range of this provision can be found in Article 1724 of the Judicial Code.

The first type is *extrajudicial mediation*, which means that the

mediation takes place without the interference of a judge. The parties can turn to mediation whether or not there is a court case pending. The conditions for this type of mediation stipulate that the judge is not allowed to interfere, not even to order a referral to mediation. The second form of mediation is *judicial mediation*, which takes place out of court, but occurs during the judicial proceedings between the parties and is ordered by a judge in a judgment.

26. Specifically, throughout the entire judicial proceedings, the judge can appoint a mediator. The parties can freely choose this mediator, but he or she must be accredited by the Federal Mediation Commission.<sup>43</sup> Previously, the appointment of the mediator had to be either jointly requested by the parties or made on the initiative of the judge, on the condition that both parties consented. This last condition is no longer required for a referral. As of July 12, 2018, the judge can *ex officio* order a referral to mediation (as long as not *all* parties are opposed to it) when conciliation is deemed possible, but only at the beginning of the judicial proceedings and after hearing the parties. The judges can do so until the hearing held at the latest 1 month after the first plea of the defendant.<sup>44</sup> The approval of each party individually is no longer required for a referral towards mediation, thus affecting the voluntariness for starting up a mediation procedure.

27. The *time frame* needed for judicial mediation is determined by a judge and can initially be no longer than 6 months, but can be extended if necessary. Both the parties and the mediator can stop the mediation process at any time. If mediation ends prematurely or if the time frame has expired, the case is *brought back before the court*, and the parties can inform the judge of whether they reached an agreement. If no agreement was reached during the initial period, the mediation can be *prolonged* if requested by the parties; if not, the judicial proceedings resume.

28. The mediator can merely report whether an agreement was reached, but cannot elaborate any further. The law now specifically states that mediators cannot reveal why the mediation failed,<sup>45</sup> as they have professional secrecy, which is criminally sanctioned.<sup>46</sup> It is possible that a conflict escalates because of events that occurred during the mediation process. When the judge is left in the dark about this, it might interfere with further constructive settlement attempts between the parties. However, it is believed that this secrecy from the mediator will encourage parties to speak more freely and cooperate more extensively during the mediation sessions as well as increase their faith in the mediation process.<sup>47</sup> In my opinion, optimizing the chances of success and establishing a peaceful environment is more important than informing the judge.

29. During the mediation process, the judge remains competent and able to take *necessary measures* at any time. If a (partial) mediation agreement is made, both parties or one of them can request the judge's approval of this agreement, so that it is converted into a

judgment, which gives the agreement executory force. Judges can only decline this request if it goes against public policy or against the interests of any minors involved. For example, a judge will have to refuse (or suggest the modification of) an agreement that does not comply with tax regulations regarding joint custody of a child, in light of the public policy provision. The judge has the discretionary power to assess whether an agreement goes against the interests of minors, but he can also rely on the advice given by the public prosecutor's office. Judges almost always approve these agreements.

## B. Collaborative law

30. On January 1, 2019, a legislative framework for collaborative law came into force. Previously, this ADR technique was already sometimes being used in family cases by lawyers in Brussels and Wallonia. The aim of the legislator was to implement this method throughout the Family Court in Belgium, and create a framework to facilitate and stimulate its use.

31. Collaborative law is *defined* as a voluntary and confidential dispute resolution procedure by means of negotiation, in which both the conflicted parties and their respective lawyers are actively involved; the latter acting within an exclusive and limited mandate of assistance and offering advice in order to reach an amicable agreement.<sup>48</sup> This method can only be used by collaborative lawyers with the required accreditation (obtained after following specific training).<sup>49</sup> The method and its name originated in the United States. It is called collaborative law as a reference to its *most distinguishing characteristic*: the parties begin by signing a kind of 'protocol' in which they commit themselves not to commence or resume judicial proceedings during the negotiations. This protocol also states that the collaborative lawyers must withdraw if the negotiations fail, and therefore cannot represent their client(s) in an ensuing court case. Collaborative law is about identifying the needs and interests of all parties involved and using those to reach a long-lasting agreement that is acceptable to all.<sup>50</sup> If any expert is consulted, the advice given is confidential, as well as any documents and statements discussed in the context of the negotiations.<sup>51</sup>

32. Either the parties jointly request the referral to collaborative law or the judge takes the initiative, in which case both parties must give their *consent*, which is in contrast to the new regulation regarding mediation. This discrepancy between mediation and collaborative law is believed to be an error of the legislator<sup>52</sup> but has not (yet?) been remedied.

33. Also, as opposed to the legislative framework for mediation, the legislation does not elaborate on the link between the judicial proceedings and the collaborative law procedure. For example, it is not stated whether the judge has the authority to take necessary measures and whether a time frame for the negotiations must be set

once the judicial proceedings are already pending.

## **§ 2. Chamber of Amicable Settlement**

34. The legal provision which allows judges to appoint a mediator during judicial proceedings is formulated in general terms and can also be applied by a judge in the Chamber of Amicable Settlement.<sup>53</sup> A judge in the Chamber of Amicable Settlement can act as any other family judge and can render judgments, but only on the condition that all parties agree on the terms of the judgment.<sup>54</sup> This means that the judge can refer the parties to mediation and collaborative law according to the legal provisions that regulate these referrals, but not without their mutual consent. For mediation, this is different than for judges with the power to decide cases, because those judges can refer to mediation with the consent of just one party. Nonetheless, collaborative law can never be imposed by a judge without consent of all parties, regardless of the judicial body involved. Either the parties jointly request the referral to collaborative law or the judge takes the initiative, in which case both parties must give their consent.<sup>55</sup>

35. This type of referral is only possible after a referral of the case from the Family Chamber to the Chamber of Amicable Settlement. Only then does the judge in the Chamber of Amicable Settlement have the jurisdiction to pronounce a consent judgment which includes a referral to mediation or collaborative law. If the parties make an appeal to the Chamber of Amicable Settlement directly, there is no judicial proceeding pending, and thus the judge does not have the jurisdiction to make a referral to mediation or collaborative law.

36. The fact that there are only specific provisions regulating the referral to mediation and collaborative law does not mean that the parties cannot make an appeal to other types of ADR as well. It is up to the parties to decide if they wish to stop the settlement proceedings or request an adjournment for a certain period of time during which they attempt to resolve their dispute through the alternative ADR route.

## **§ 3. Civil courts**

37. The same legal framework applies to both the Family Chamber and civil courts.<sup>56</sup>

## **§ 4. Assessment**

38. It is commendable that there is a legal framework regarding the link between judicial proceedings and mediation (and, to a lesser extent, collaborative law). ADR is often thought to be most effective at the very beginning of a conflict before it escalates too much and before the parties turn to the court.<sup>57</sup> Although this might be true, it does not mean that good opportunities for ADR cannot arise during judicial

proceedings, even if this creates difficulties for the guiding third party (for example, the judge in case of a settlement or the mediator in case of a judicial mediation). This viewpoint is supported by many practitioners.<sup>58</sup> Such opportunities include the parties being disappointed that the judicial proceedings are not necessarily leading to the favourable result they had hoped for, or simply by the fact that a court case can be very time-consuming and expensive. Especially when one party cannot accept the decision of the court and therefore does not comply with it, the battle can seem endless. The parties may come to a point where, despite their anger and frustration, they are willing to talk and negotiate. As a result, the legal provisions that facilitate a referral to ADR during judicial proceedings have indeed proven to be useful.

39. It is now commonly believed that many judges no longer refer cases to mediation, but instead refer them to the Chamber of Amicable Settlement. Since the courts do not keep data regarding the number of referrals to mediation, this assumption cannot be verified. It is recommended to keep data about the use of judicial ADR in all its forms (for example, regarding referrals to out-of-court ADR, referrals to the Chamber of Amicable Settlement and the success rates of the latter). Keeping data is key to evaluate the impact of ADR on our judicial system and its efficiency.

40. Even though the Chamber of Amicable Settlement holds many benefits, it cannot replace mediation. Each system has its strengths which makes it better suited for certain cases than others. On the one hand, the Chamber of Amicable Settlement can lead to a quick result, with very few meetings (on average one or two meetings of one hour), and no additional costs. The professional leading the settlement is a judge, with a great natural authority and expertise, which can be appealing to some people. Mediation on the other hand allows a more in-depth approach and discussion of the conflict and its possible solution. The mediator will not suggest the right solution and will use a more facilitative approach than the settlement judge.

Therefore, it is paramount that judges recognise whether they are able to address the parties' needs, given the resources at their disposal. If they sense that parties need more time to address the underlying issues that prevent them from closing a sustainable agreement, they must suggest the option of mediation. Judges must be willing to admit that within the limited time frame at their disposal they cannot settle every case, which is also not expected of them.

## **VI. Settlement**

### **§ 1. Family Chamber**

#### **A. Settlement in the Family Chamber**

41. As in all civil cases<sup>59</sup>, the family judge has *the power to attempt to*

*procure a settlement* when deemed opportune, once a case is pending before the court. It is a part of his task to conciliate the parties<sup>60</sup> and promote an amicable solution of the dispute throughout the proceedings<sup>61</sup>.

42. The fact that settlements can be reached in both the Family Chamber and the Chamber of Amicable Settlement results in *two paths with disparate guarantees* (see no. 52-59). During the parliamentary proceedings, a lack of coherence on this matter was pointed out. As a result, an amendment was proposed to give the Chamber of Amicable Settlement exclusive authority to settle disputes and to oblige the Family Chamber to transfer such cases,<sup>62</sup> but this amendment did not pass.

## B. Referral to the Chamber of Amicable Settlement

43. Since there is no exclusive authority for the Chamber of Amicable Settlement to settle, judges ruling a case in the Family Chamber have the discretionary power to attempt a settlement in the Family Chamber or to command the referral of the case to the Chamber of Amicable Settlement of the same court.<sup>63</sup> This must simply be mentioned on the minutes of the hearing. The referral can be requested by *(one of) the parties, or the judge can ex-officio* decide to do so without consent of the parties, if deemed necessary. Within 3 days after this decision to refer, the judge's clerk sends the file to the clerk of the Chamber of Amicable Settlement, who will notify the parties by letter of this decision and give them a date to appear in court.

44. However, judges in the Family Chamber can only refer such a case on the condition that the Chamber of Amicable Settlement is *able to conduct a hearing on a date prior* to the one originally set by the Family Chamber; otherwise, they must keep the case. The underlying idea is not to delay the judicial proceedings too much.

45. A referral can be made upon request of the parties or if the judge considers it necessary. By analogy with the provisions for the preliminary request to settle (see no. 46), the request of one party is deemed to be sufficient. A distinction must be made between the decision to start with the settlement and voluntarily continuing the settlement proceedings. For the former, no consent of any party is necessary for a referral to the Chamber of Amicable Settlement. The law states that the judge can refer the case *ex officio* if he considers it *necessary*. There are no legal criteria to assess this necessity. A judge has the discretionary power to decide when and why a referral to the Chamber of Amicable Settlement is necessary.

A judge is allowed to make this referral without consent of the parties, except in certain *urgent family matters*. For those cases, the legal provision explicitly states that, "on the condition that all parties agree to this, the court can adjourn the case or transfer the case to the Chamber of Amicable Settlement".<sup>64</sup> No justification was given for

this decision, but an *ex-officio* referral was probably deemed undesirable because of the urgency of these cases. However, some of these matters are not so urgent and could indeed be settled in an amicable fashion. Therefore, a better option would perhaps be to establish a uniform system for all family cases which allows judges to interpret the urgency of the matter at hand.

## § 2. Chamber of Amicable Settlement

### A. Settlement in the Chamber of Amicable Settlement

#### 1. Initiation

46. As was briefly mentioned before, the parties can turn to the Chamber of Amicable Settlement *directly*, that is, before any demand is filed with the court.<sup>65</sup> This option was introduced to encourage the parties to reach an agreement, thus avoiding judicial proceedings, and is only available in the Court of First Instance, because once the parties are at the Court of Appeal, the case is already pending.

47. There are no formalities regarding this request, which can be made orally or written. The judge's clerk will write the parties to appear within 8 days.<sup>66</sup> It is possible for one party to make this request; the consent of the other(s) is not necessary to commence settlement proceedings.

In this situation, there will be no case pending before the court, no registration on the General Cause List of the Family Court and no court registry fees. This settlement attempt is therefore free of charge for the parties. If this attempt fails, there is no stepping stone to judicial proceedings. A petition will then have to be lodged with the Court Registry, and a court registry fee of 165 EUR must be paid.<sup>67</sup> After that, the case will be registered on the General Cause List of the Family Court with the status 'pending'.

48. Another way in which cases are brought before this chamber is after *referral by the Family Chamber* (see no. 43-45). This is possible both in first instance and before the Court of Appeal.

#### 2. Judge's tasks and competencies

49. During a settlement attempt, the judges must help the parties to negotiate in order to enable them to resolve their dispute themselves. They can do so by *leading the settlement* with the use of active listening and negotiation techniques, or by helping the parties *choose the way of conflict resolution* that best suits their needs.

50. *Once a case is pending before the court* and comes before the Chamber of Amicable Settlement after a referral by the Family Chamber, the judge in the Chamber of Amicable Settlement has the jurisdiction to pronounce *consent judgments*.<sup>68</sup> Parties always have a right to ask the judge to take note of agreements that were made

between them in order to resolve the dispute that is pending before court. The agreement will have the form of a (consent) judgment. This consent judgment has the same qualities as any other judgment: it is an authentic document and has executory force.<sup>69</sup> The difference with a regular judgment is that an appeal is not possible, unless the agreement was not legally established.<sup>70</sup>

A judge in the Chamber of Amicable Settlement can act as any other family judge and render judgments, but only on the condition that all parties agree on the terms of the judgment.

51. In the Chamber of Amicable Settlement, the judge can *hear minors* (irrespective of their age) and has the possibility (but, in contrast to the judge in the Family Chamber, not the obligation) to inform minors from the age of 12 about their right to be heard in custody cases initiated by their parents,<sup>71</sup> which can be conducive to reaching a settlement.

### 3. Guarantees

#### Specialisation

52. Family judges who wish to settle in the Chamber of Amicable Settlement are obliged to follow an *additional 3-day training*, organised by the Institute for Judicial Training,<sup>72</sup> during which emphasis is placed on communication and settlement techniques.<sup>73</sup> These *communication techniques* are derived from mediation practices and entail active listening skills, paraphrasing techniques, asking different types of questions and rephrasing negative comments into positive ones. The judges are also familiarized with a *settlement model* that completes four stages: fact gathering, positive problem phrasing, goal phrasing and transforming these goals into actions.<sup>74</sup>

#### Voluntariness

53. The parties can *never be forced to remain in settlement proceedings or to reach an agreement*. This would be explicit coercion, which is unacceptable in light of Article 6(1) of the European Convention on Human Rights, which grants everyone the right to a fair trial. This voluntariness is stipulated twice: first, it is mentioned that an attempt at amicable settlement can never be forced, and, second, the provision states that all parties as well as the judge in the Chamber of Amicable Settlement are free to stop the settlement proceedings at any time.<sup>75</sup>

54. Voluntarily continuing with the settlement proceedings must be distinguished from the decision to *start with the settlement*. Therefore, *no consent* of any party is necessary for a referral to the Chamber of Amicable Settlement (see no. 45).

#### Incompatibility Rule



55. In order to allow the parties to talk freely, reduce the pressure to settle and optimise the chances of success, the law stipulates that judges who have a hearing in the Chamber of Amicable Settlement *cannot conduct a hearing in the other chambers* of the Family and Juvenile Court for the cases they have taken cognizance of. If they decide on a dispute they had taken note of during a hearing in the Chamber of Amicable Settlement, this *judgment is null and void*. The parties cannot cover this nullity and decide the settlement is nonetheless valid because this nullity is absolute as it regards the judicial organisation.<sup>76</sup>

56. Discussion arises whether this means that judges have to recuse themselves from deciding in the dispute at hand or in all (future) disputes between the same parties. Ideally, with respect to confidentiality, to avoid any kind of pressure to settle and for transparency and legitimacy reasons, this should be interpreted as *all (future) disputes between the same parties*. The parties could feel betrayed after having revealed sensitive information to a judge whom they believe will never be the one to decide their case, when this judge turns out to be the one who hears their case in a later dispute. However, in practice, this incompatibility rule seems to create difficulties for smaller courts that do not have enough judges.

57. This rule does *not apply to the Family Chamber*, so when a settlement fails there, the judge who led the negotiations will also decide the case. According to some scholars, this raises concerns about the judge's impartiality.<sup>77</sup> An analysis of the European Court of Human Rights case law shows there is *no a priori violation* of the judge's impartiality, but a judge can violate the subjective impartiality assessment due to his specific behaviour or used language.<sup>78</sup> This is key in any settlement, both in the Family Chamber and the Chamber of Amicable Settlement: judges must not put pressure on parties to accept a settlement proposal they do not fully support, out of fear that the ruling will therefore be in the other party's favour.

## Confidentiality

58. To draw the parties to the Chamber of Amicable Settlement, a confidentiality guarantee was created. The law stipulates that *everything that is being said or written in amicable settlement hearings is confidential*.<sup>79</sup> This only applies to the Chamber of Amicable Settlement.<sup>80</sup>

59. However, *this confidentiality is not clearly defined*. There are no stipulations as to who is bound by this principle, which documents are exactly covered and which sanctions can be imposed in case of infringement. This creates uncertainties among practitioners. Some authors suggest to remedy this lack of detailed provision by applying the rules regarding mediation.<sup>81</sup> However, mediation requires a higher degree of confidentiality, including documents that were drafted and statements that were made *for the purpose of or during* mediation, so this is no good solution. A thorough analysis by means

of textual interpretation of the stipulation allows a clarification of the uncertainties.<sup>82</sup>

#### 4. Recording of the agreement

60. If the parties reach a (partial) consensus, this needs to be finalised in a written agreement, which can be recorded either in the minutes of the hearing<sup>83</sup> or in a special *consent judgment*, against which the parties cannot lodge an appeal, except when the judgment was not legally established.<sup>84</sup> Both options are possible for a consensus reached *in the Family Chamber or in the Chamber of Amicable Settlement after a referral*. However, if the case was negotiated in the latter after a *preliminary request* to settle, without a pending case, the agreement will only be recorded in the minutes of the hearing. This is because the Chamber of Amicable Settlement does not have the jurisdiction to pronounce consent judgments if no case is pending before the court, as is stated in Article 1043 of the Judicial Code.

#### B. Referral to the Family Chamber

61. If no agreement or only a partial agreement is reached, the Chamber of Amicable Settlement will *transfer the case back* to the Family Chamber where the case was originally filed. The *same conditions* apply as for the initial referral to the Chamber of Amicable Settlement (see no. 43).

#### § 3. Civil courts

62. Even though it is uncontested that *every judge has the power to attempt to procure a settlement* when deemed opportune once a case is pending before the court, Belgian law did not contain an explicit stipulation on this matter. According to many scholars, this conciliatory role is a vital part of their assignment, as much as deciding the case.<sup>85</sup> As of recently, the law explicitly states that it is part of the judge's task to conciliate the parties<sup>86</sup> and promote an amicable solution of the dispute throughout the proceedings<sup>87</sup>.

63. This type of settlement can be attempted at any stage of the judicial proceedings, at the *request of (one of) the parties or at the initiative of the judge* if this is deemed advisable. Judges do not need the consent of both parties, although it speaks for itself that any attempt at settlement will be more fruitful if both parties endorse it.

64. A few conditions must be met before a case can be settled in court,<sup>88</sup> which are the same for all civil and family chambers, as well as for the Chamber of Amicable Settlement. Firstly, the case at hand must involve an arisen or imminent *legal dispute*. The parties cannot ask the judge to authenticate an already existing agreement free of charge, when there is no longer or never was a dispute between them. The judge must deny such a request in order to prevent abuse of

discretion. In this case, a notary can be consulted to authenticate private agreements. Secondly, the court can only undertake settlements for those cases that fall under its *jurisdiction*.<sup>89</sup> A third requirement is that the case must *allow for compromise*, excluding those that affect one's legal status and therefore touch upon public policy (such as claims regarding affiliation, adoption and divorce.). This does not extend to all rights and obligations that result from a certain feature of one's legal status.<sup>90</sup> For example, the Chamber of Amicable Settlement cannot take note of the divorce itself, but can settle a case about its effects, such as alimony for the ex-spouse. Finally, the parties must have the *capacity* to enter into a compromise and thus be capable of parting with the personal property involved. The administrator of an adult lacking capacity, who is placed under supervision by the Justice of the Peace Court, can enter into a compromise after receiving a special authorisation by the Justice of the Peace Court.<sup>91</sup>

#### **§ 4. Assessment**

65. The assessment focuses on settlements in family cases brought before the Family Chamber or the Chamber of Amicable Settlement. Some of the remarks made below also hold for settlements that are executed by other civil courts. There are indeed many similarities between settling in the Family Chamber and other civil courts, including the fact that both allow the settlement judge to also decide the case after a failed settlement.

##### **A. The Family Chamber**

66. There are some *benefits* to the judge in the Family Chamber having the authority to settle cases. First of all, the family judge handles a case from beginning to end. Therefore, he or she *knows* the case and the parties best, and the parties are familiar with the judge, which could facilitate a settlement. Secondly, when the case can remain before the Family Chamber, *no time is being wasted* with referrals and extra waiting periods. Finally, settlements in the Family Chamber are well suited to *smaller, partial agreements* that the parties can easily agree on during the judicial proceedings. Sometimes they have already started negotiating outside of court, which allows them to finalise their negotiations and make commitments during the hearing. In such situations, it is very *efficient* if the judge present in the courtroom can take note of the (partial) agreement.

67. However, there are also a few *disadvantages* to family judges having the power to settle cases. Firstly, judges must realise that after a failed intervention, they still need to decide the case and must not only be *impartial* but also give the impression of impartiality. The fact that the same judge will decide

the case if the settlement fails can put considerable *pressure* on the parties to agree to something they do not really want because they think if they do not cooperate, the judge will rule against them later on. This sense of pressure seems to exist regardless of the outspokenness of the judge. In addition, it is possible that the parties are less eager to talk freely, since they know this judge can decide the case. There is also no confidentiality, which was seen as a disadvantage but makes total sense, since the settlement procedure and the judicial proceedings are tied together. In case of a failed settlement attempt, the judge must know the facts in order to be able to rule the case accordingly. Therefore both sides must be able to hear and respond to all arguments.

Secondly, these judges did *not receive any training* on how to lead a settlement because the law only requires this extra training for judges in the Chamber of Amicable Settlement. This may result into more variety in practices, each judge drawing from own experiences.

However, settling is not the same as their core business of judging, and one's experience cannot be put on a par with a training based on scientific research. It is recommended that all judges receive the same training as judges in the Chamber of Amicable Settlement, as they are allowed to settle cases as well and do so frequently.

Lastly, in the Family Chamber, there is often *very little time* (on average 10 to 30 minutes) to hear each case, due to the enormous case load. Having to settle a case within this limited time frame constrains the possibilities for finding an agreement, let alone a well-considered one. If the agreement is also drawn up during the hearing itself, the limited availability of time could have an impact on a proper drafting as well as on the content of the agreement.

68. However, stripping family judges of their power to settle or draw up partial agreements would display a very limited view and would not tally with the existing needs. The concept of a judge who can only decide cases and cannot take on a conciliatory role is a very rigid and old-fashioned one which does not apply anymore. Nevertheless, each judge must be *aware of the (high) potential risks* when taking on this settling role. Family judges should perhaps refer the case to the Chamber of Amicable Settlement if it seems necessary to double-check if all parties fully support and understand the agreement or if certain points must be talked through more in detail.

## **B. The Chamber of Amicable Settlement**

69. The creation of a separate Chamber of Amicable Settlement holds many *advantages*.

The most striking and obvious benefit is the *lack of costs*, in combination with the fact that it saves time when the parties can resolve their conflicts in this manner. If the parties make an appeal to the Chamber of Amicable Settlement, there is no court registry fee due and, even during judicial proceedings, there are no additional costs to

turn to the Chamber of Amicable Settlement. Therefore, if a lawyer is hired, fees should be charged only until an agreement is reached. The parties do not necessarily need a lawyer to assist them in the Chamber of Amicable Settlement, although it could be helpful for the drafting of the agreement and for support during the settlement.

Secondly, the waiting period for the Chamber of Amicable Settlement is shorter than for the Family Chamber, so a case can be *handled faster*. If the parties stand behind their agreement, compliance with the terms is more likely, which can save time fighting and trying to alter the decision.

Furthermore, the legislator has put some *guarantees* in place, to assure the quality of these settlements. Judges in the Chamber of Amicable Settlement are trained in how to lead a settlement. Since confidentiality and adherence to the incompatibility rule are guaranteed here (see no. 55-59), the pressure to settle is lower than in the Family Chamber.

The judge is a well-respected professional, who has a certain *natural authority* and substantial *expertise*. To some people, this is a great benefit, and it helps them to accept input more easily than from someone else.<sup>92</sup> In comparison to a mediator, a judge is freer to suggest potential solutions and indicate certain boundaries of the jurisprudence or the law.

Another advantage of the Chamber of Amicable Settlement is that there is more *time* available for these settlements (depending on the court, the time spent on these settlements differs from 30 to 90 minutes), which can allow the parties to share certain information and could help them to *feel heard*. The parties also have an *active role*, whereas they have to ‘undergo’ judicial proceedings. Finally, the setting is more *informal*: for instance, not all judges wear their robe. Legally, they are obliged to do so, but some judges choose not to do so to create a more informal setting. As with many other features of the Chambers of Amicable Settlement, uniformity is commended. Overall, this chamber could give our justice system a more humane character. 70. However, a number of *concerns* must also be taken into account. The main issue is that *varying interpretations* of the task at hand can lead to bad practices. There appear to be *geographical differences*<sup>93</sup>, resulting in unequal access to the Chamber of Amicable Settlement. Some courts do not organise them under the pretext that there is no demand for it. Other courts rarely refer to this chamber, and mainly keep on settling in the Family Chamber. However, this was not the intention of the legislator. The inclination and policy of individual courts make a difference. If the chamber works really well in certain regions such as Antwerp and Ghent, it can work perfectly in others such as Leuven and Limburg as well, as long as the court sends out positive signals and invests in this method. Right now, there are courts that believe the positive results of the Chamber of Amicable Settlement outweigh the investments that are being made and realise a reduction of the case load in the long term. There are also courts that

fear the Chamber of Amicable Settlement just creates an extra workload and does not pay off in terms of efficiency. Therefore, it is essential that all courts keep better track of their case load, the number of settlements in the Family Chamber, the specific investments that are being made in the Chamber of Amicable Settlement and its results, as well as whether these settlements succeed to prevent further litigation regarding the same dispute. With objective data it might be able to alter the mind-set of judges.

An equally important issue is that judges must remain careful to *not exert pressure* on the parties to settle. The fact that they do not have decision making power does not mean the parties do not feel obliged to agree upon something they do not want. The judge remains a figure who emanates authority, and the judge's colleague will still have to decide the case. The mere impression that non-cooperative behaviour could lead to an unfavourable decision could be enough to agree on a condition they do not support. This must be avoided, as it might lead to compliance issues.

Moreover, *the limited time frame available* for the settlement proceedings could make the parties feel like their case is not adequately considered, and might affect the *completeness and clarity of the agreement*.

Finally, if the settlement fails, the use of this chamber can slow down the case's progress. In addition, there is a waiting period for this chamber, varying per Family Court (depending on the number of cases that are being handled: in Family Courts where there is barely any referral to the Chamber of Amicable Settlement the waiting period is non-existent) and possibly mounting up to a maximum of 3 to 6 months, which diminishes their attraction.

71. If conceived and executed properly, keeping these weaknesses in mind, the Chamber of Amicable Settlement does indeed have considerable potential.

## Specialisation

52. Family judges who wish to settle in the Chamber of Amicable Settlement are obliged to follow an *additional 3-day training*, organised by the Institute for Judicial Training,<sup>94</sup> during which emphasis is placed on communication and settlement techniques.<sup>95</sup> These *communication techniques* are derived from mediation practices and entail active listening skills, paraphrasing techniques, asking different types of questions and rephrasing negative comments into positive ones. The judges are also familiarized with a *settlement model* that completes four stages: fact gathering, positive problem phrasing, goal phrasing and transforming these goals into actions.<sup>96</sup>

## Voluntariness

53. The parties can *never be forced to remain in settlement proceedings or to reach an agreement*. This would be explicit

coercion, which is unacceptable in light of Article 6(1) of the European Convention on Human Rights, which grants everyone the right to a fair trial. This voluntariness is stipulated twice: first, it is mentioned that an attempt at amicable settlement can never be forced, and, second, the provision states that all parties as well as the judge in the Chamber of Amicable Settlement are free to stop the settlement proceedings at any time.<sup>97</sup>

54. Voluntarily continuing with the settlement proceedings must be distinguished from the decision to *start with the settlement*. Therefore, *no consent* of any party is necessary for a referral to the Chamber of Amicable Settlement (see no. 45).

### Incompatibility Rule

55. In order to allow the parties to talk freely, reduce the pressure to settle and optimise the chances of success, the law stipulates that judges who have a hearing in the Chamber of Amicable Settlement *cannot conduct a hearing in the other chambers* of the Family and Juvenile Court for the cases they have taken cognizance of. If they decide on a dispute they had taken note of during a hearing in the Chamber of Amicable Settlement, this *judgment is null and void*. The parties cannot cover this nullity and decide the settlement is nonetheless valid because this nullity is absolute as it regards the judicial organisation.<sup>98</sup>

56. Discussion arises whether this means that judges have to recuse themselves from deciding in the dispute at hand or in all (future) disputes between the same parties. Ideally, with respect to confidentiality, to avoid any kind of pressure to settle and for transparency and legitimacy reasons, this should be interpreted as *all (future) disputes between the same parties*. The parties could feel betrayed after having revealed sensitive information to a judge whom they believe will never be the one to decide their case, when this judge turns out to be the one who hears their case in a later dispute. However, in practice, this incompatibility rule seems to create difficulties for smaller courts that do not have enough judges.

57. This rule does *not apply to the Family Chamber*, so when a settlement fails there, the judge who led the negotiations will also decide the case. According to some scholars, this raises concerns about the judge's impartiality.<sup>99</sup> An analysis of the European Court of Human Rights case law shows there is *no a priori violation* of the judge's impartiality, but a judge can violate the subjective impartiality assessment due to his specific behaviour or used language.<sup>100</sup> This is key in any settlement, both in the Family Chamber and the Chamber of Amicable Settlement: judges must not put pressure on parties to accept a settlement proposal they do not fully support, out of fear that the ruling will therefore be in the other party's favour.

### Confidentiality

58. To draw the parties to the Chamber of Amicable Settlement, a confidentiality guarantee was created. The law stipulates that *everything that is being said or written in amicable settlement hearings is confidential*.<sup>101</sup> This only applies to the Chamber of Amicable Settlement.<sup>102</sup>

59. However, *this confidentiality is not clearly defined*. There are no stipulations as to who is bound by this principle, which documents are exactly covered and which sanctions can be imposed in case of infringement. This creates uncertainties among practitioners. Some authors suggest to remedy this lack of detailed provision by applying the rules regarding mediation.<sup>103</sup> However, mediation requires a higher degree of confidentiality, including documents that were drafted and statements that were made *for the purpose of or during* mediation, so this is no good solution. A thorough analysis by means of textual interpretation of the stipulation allows a clarification of the uncertainties.<sup>104</sup>

## VII. Conclusion

72. The aim of the two legislative reforms of 2013 and 2018 was clear: *to change how our society deals with conflict resolution* so that parties would not turn so easily to the courts. The 2018 reform on mediation and collaborative law is more comprehensive than what was discussed here. For instance, the law now lists and expands on the tasks of the Federal Mediation Commission, including briefing the public on the opportunities that mediation offers, taking all necessary measures to promote a proper execution of mediation, and researching and supporting new methods and practices of mediation and other forms of conflict resolution.<sup>105</sup> The Minister of Justice set out to promote out-of-court conflict resolution, specifically in the early stages of a conflict, through national campaigns.<sup>106</sup> We can only hope that the *renewed Federal Mediation Commission* takes on a more active role than it has in the past, especially in the promotion of mediation to the general public. It seems like a missed opportunity that the Commission was not given the broader task of informing the public about all forms of ADR, not only mediation.

In an evaluation of the Family Court, the Flemish Bar Association stated that the attention for amicable conflict resolution was one of the most significant accomplishments of the law of 2013, as it created change for everyone involved in family disputes.<sup>107</sup> Hopefully, the same will hold for the 2018 reform, and a similar evolution can be observed for civil cases. The last few decades the conviction grew that ADR can be especially beneficial in family cases, because our judicial system meets its limits regarding execution and continued demands for alternation of the arrangement. That conviction seems to be less strong regarding the needs for ADR in other civil cases, so it is possible that this reform will be less successful than the one in family cases. However, it seems as though we are at a crossroad and the



realisation that we must give ADR an actual chance is slowly sinking in. It will depend on all the (legal) practitioners whether the 2018 reform will hit the bull's-eye.

73. Concerning *settlements*, the competent bodies will hopefully fulfil their obligation to evaluate the Chamber of Amicable Settlement and seize this opportunity to thoroughly reflect on its desirable direction. If attention is paid to its weak spots (in particular the limited time frame that is available, the possible exertion of pressure and the lack of uniformity between different Family Courts) and investments are made to improve the settlement proceedings, the Chamber of Amicable Settlement could become quite a success story and perhaps restore some of the much-needed trust in our justice system. These improvements could consist of a more comprehensive training for judges, with a view to creating more uniformity and having more time and judges available.

74. All these developments show that ADR is an intensely debated topic in Belgium. In the past, too often easy promotion measures with a presumably minor budgetary impact were chosen, which did not result in any real change. Let us hope that if these latest reforms do not prove to have an actual impact, the legislator will attend to this issue by creating a more comprehensive and coherent policy on information provision about conflict resolution, as well as on the promotion of ADR and its relation to the Belgian justice system, so that ADR can finally make a real difference.

## Noten

**1** Act of July 30, 2013 on the introduction of a Family and Juvenile Court, Belgian Official Gazette, September 27, 2013, 68429.

**2** Act of June 18, 2018 containing various provisions on civil law with a view to promoting alternative forms of dispute resolution, Belgian Official Gazette, July 2, 2018, 53455.

**3** The law states that the implementation of the Act of July 30, 2013 shall be evaluated in 2020 by the Minister of Justice and the Minister responsible for family policy. More specifically, the functioning of the Chamber of Amicable Settlement will be investigated, see Article 273 of the Act of July 30, 2013 on the introduction of a Family and Juvenile Court, Belgian Official Gazette, September 27, 2013, 68429.

**4** K. Geens, 'Het justitieplan. Een efficiëntere justitie voor meer rechtvaardigheid', 2014, 35 p., [www.koengeens.be/news/2015/03/18/het-justitieplan-voor-een-snellere-efficiënte-en-rechtvaardige-justitie](http://www.koengeens.be/news/2015/03/18/het-justitieplan-voor-een-snellere-efficiënte-en-rechtvaardige-justitie).

**5** B. Petit, 'Passerelle entre conciliation et procédure judiciaire', *Ius&Actores* 2008, no 1, p. 87 and 106.

**6** P. Rouard, *Traité élémentaire de droit judiciaire privé. La procédure civile*, I, *L'introduction de la demande*, Bruxelles: Bruylant 1973, p. 95-111, no. 24-44.

**7** B. Beeldens, 'L'impartialité et la problématique du cumul de fonctions judiciaires', *Ann.dr.Louv.* 2001, vol. 61, no. 2-3, p. 291; Petit 2008, p. 87 and 106.

**8** Act of February 21, 2005, amending the Judicial Code concerning mediation, Belgian Official Gazette, March 22, 2005, 12772.

**9** Act of June 18, 2018 containing various provisions on civil law with a view to promoting alternative forms of dispute resolution, Belgian Official Gazette, July 2, 2018, 53455.

**10** See for example new Article 730/1 of the Judicial Code.

**11** Act of July 30, 2013 on the introduction of a Family and Juvenile Court, Belgian Official Gazette, September 27, 2013, 68429.

**12** Article 76 (1) of the Judicial Code.

**13** Article 101 (1) of the Judicial Code.

**14** K. Devolder, *De bevoegdheidsverdeling in familiezaken: voor en na de familierechtbank*, Antwerpen: Intersentia 2014, p. 227, no. 247.

**15** The term 'conciliation' is still being used in this article, due to the exact wording of the legal provisions.

**16** Article 1723/1 of the Judicial Code.

**17** In the Court of Appeal, the Chamber of Amicable Settlement is also called the 'Family Chamber'. However, in this article 'Family Chamber' is being used in the meaning of 'Family Chamber in first instance', *i.e.* the chamber over which a judge presides who has jurisdiction to decide the case.

**18** G. De Palo, A. Feasley & F. Orecchini, *Quantifying the cost of not using mediation – a data analysis*, Brussels: European Union, Directorate-general for internal policies – Policy department C. 2010, [www.europarl.europa.eu/studies](http://www.europarl.europa.eu/studies), p. 9-10.

**19** Act of February 21, 2005, amending the Judicial Code concerning mediation, Belgian Official Gazette, March 22, 2005, 12772.

**20** These were created by the following acts: Act of July 18, 2006 with a view to favouring equally divided living arrangements for children

whose parents are divorced and regulating the enforced implementation regarding the children's living arrangements, Belgian Official Gazette, September 4, 2006, 43971; Act of April 27, 2007 on the reform of divorce, Belgian Official Gazette, June 4, 2007, 30881; Act of April 5, 2011 amending the Judicial Code with regard to appearing in person and attempts to reconcile the divorce and to introduce information provision on the existence and usefulness of mediation in divorce cases, Belgian Official Gazette, June 16, 2011, 35811.

**21** Article 1253<sup>ter</sup>/1, § 1 of the Judicial Code.

**22** Old Article 731 (5) of the Judicial Code.

**23** Article 1253<sup>ter</sup>/2 of the Judicial Code.

**24** The judge's obligation to inform was initially part of the proposed draft law containing various provisions on civil law and amending the Judicial Code with a view to promoting alternative forms of dispute resolution, Parliamentary Documents, House of Representatives, 2017-2018, no. 54-2919/1, p. 244. This draft finally led to the Act of June 18, 2018 which contains all provisions regarding ADR. In a later stage of the parliamentary proceedings, the stipulation regarding the judge's duty to inform was – for reasons that are unclear – transferred to the legislative proposal that aimed to amend the regulation regarding the contact between grandparents and grandchildren and which resulted in the Act of June 15, 2018.

**25** Amendment no. 92 (S. Lahaye-Battheu) on the legislative proposal to introduce a Family and Juvenile Court, Parliamentary Documents, House of Representatives, 2010-2011, no. 53-682/10, p. 2.

**26** W. Hensen, 'Alternatieve geschillenoplossing in de nieuwe familierechtbank: een stap voorwaarts of een gemiste kans?', *P&B* 2014, p. 49.

**27** New Article 444 (2) and 519, § 4 of the Judicial Code.

**28** R. Boone, 'Twee jaar familie- en jeugdrechtbanken: tijd voor een evaluatie (interview met H. De Paepe, K. Gerets, K. Grisez, K. Vander Steene, J. De Ridder, W. Verhaegen, A. Bruneel, S. Brusselmans, L. De Meirsman, E. Raskin & S. Brouwers)', *Juristenkrant* 2016, no. 336, p. 9.

**29** S. Brusselmans, S. Bonte & A. Pyck, 'Het project trajectbemiddeling in de familierechtbank te Kortrijk', in: E. Lanckswaert (ed.), *Gerechtelijke bemiddeling: bemiddeling tijdens civiele gerechtelijke procedures*, Brugge: die Keure 2016, p. 154-155.

**30** T. Demeyere & A. Buysse, ‘Trajectbemiddeling’, in: I. Pasteels, D. Mortelmans, A. Buysse, K. Matthijs, J. Van Bavel & G. Verschelden (eds.), *Families in transitie, transitie in families*, Antwerpen: Garant 2018, p. 68. More in-depth information about what a session in trajectory mediation should entail can be found in: S. Raes & T. Demeyere, ‘Trajectbemiddeling volgens het FittiF-onderzoek: een pad richting meer doordachte oplossingswegen’, in: E. Lanckswert (ed.), *Gerechtelijke bemiddeling: bemiddeling tijdens civiele gerechtelijke procedures*, Brugge: die Keure 2016, p. 117-134.

**31** R. Boone, ‘Twee jaar familie- en jeugdrechtbanken: tijd voor een evaluatie (interview met H. De Paepe, K. Gerets, K. Grisez, K. Vander Steene, J. De Ridder, W. Verhaegen, A. Bruneel, S. Brusselmans, L. De Meirman, E. Raskin & S. Brouwers)’, *Juristenkrant* 2016, no. 336, p. 9.

**32** This became clear after personal observations of different court sessions in the Family Chamber and Chamber of Amicable Settlement.

**33** Justification for amendment no. 3 (G. Uyttersprot, S. Becq, C. Van Cauter & P. Goffin) on the legislative proposal to amend Article 375bis of the Civil Code, Parliamentary Documents, House of Representatives, 2017-2018, no. 54-1895/3, p. 3-4.

**34** The judge’s obligation to inform was initially part of the proposed draft law containing various provisions on civil law and amending the Judicial Code with a view to promoting alternative forms of dispute resolution, Parliamentary Documents, House of Representatives, 2017-2018, no. 54-2919/1, p. 244. This draft finally led to the Act of June 18, 2018 which contains all provisions regarding ADR. In a later stage of the parliamentary proceedings, the stipulation regarding the judge’s duty to inform was – for reasons that are unclear – transferred to the legislative proposal that aimed to amend the regulation regarding the contact between grandparents and grandchildren and which resulted in the Act of June 15, 2018.

**35** Article 1253ter/1, § 2 of the Judicial Code, as amended by Article 4 of the Act of June 15, 2018, amending Article 375bis of the Civil Code and Articles 1253ter/1, 1253ter/3 and 1253quater of the Judicial Code, Belgian Official Gazette, July 2, 2018, 53454. This Article’s effective date is July 12, 2018.

**36** Justification for amendment no. 3 (G. Uyttersprot, S. Becq, C. Van Cauter & P. Goffin) on the legislative proposal to amend Article 375bis of the Civil Code, Parliamentary Documents, House of Representatives, 2017-2018, no. 54-1895/3, p. 3-4.

**37** The specifics of these matters are mentioned in Article 1253ter/4, §

2 of the Judicial Code, and are the same for which parties must appear in person at the first hearing: the demand of spouses for separate residencies, demands regarding parental responsibility, foster care, custody matters and all maintenance obligations.

**38** Article 1253ter/3, § 1 of the Judicial Code.

**39** New Article 730/1, § 2 of the Judicial Code.

**40** Report on the second reading on behalf of the Committee on Justice (C. Brotcorne) regarding the draft law containing various provisions on civil law and amending the Judicial Code with a view to promoting alternative forms of dispute resolution, Parliamentary Documents, House of Representatives, 2017-2018, no. 54-2919/9, p. 45.

**41** Article 1734, § 1, (1) of the Judicial Code.

**42** The legislative framework can be found in Articles 1724-1737 of the Judicial Code.

**43** An exception to this rule is possible if the parties can prove that no accredited mediator with the required competencies is available, which will in reality never occur as there are 987 accredited family mediators in Belgium (as on February 1, 2018).

**44** Article 1734, § 1, (2) of the Judicial Code.

**45** New Article 1728, § 2, (1) of the Judicial Code.

**46** Article 458 of the Criminal Code.

**47** A. Vanderhaeghen, 'Bemiddeling en vertrouwelijkheid', *NJW* 2009, p. 204, no. 50.

**48** Article 1738 of the Judicial Code.

**49** Article 1739 of the Judicial Code.

**50** A.-S. D'HERDE, 'Collaboratief recht in België: een veelbelovende ADR-methode voor de Vlaamse advocaat', *TMD* 2016, p. 40.

**51** Article 1741, § 1, 2<sup>o</sup>, 3<sup>o</sup> and 5<sup>o</sup> of the Judicial Code; A.-S. D'Herde, 'Collaboratief recht in België: een veelbelovende ADR-methode voor de Vlaamse advocaat', *TMD* 2016, p. 40-41.

**52** This was stated by Miek Warson during the workshop 'Mediation and collaborative law: two of a kind' on the Congress Central Day for

Mediators, organized by the Federal Mediation Commission ([www.fbc-cfm.be](http://www.fbc-cfm.be)). Warson is one of the experts who collaborated on the draft that led to the Act of June 18, 2018.

**53** S. De Bauw & G. Verschelden, 'De kamer voor minnelijke schikking en de bevordering van een minnelijke oplossing van familiale geschillen', in: P. Senaevé (ed.), *Handboek familiaal procesrecht*, Mechelen: Wolters Kluwer 2017, p. 167-168, no. 332.

**54** See no. 50.

**55** Article 1740 of the Judicial Code, effective date of January 1, 2019.

**56** See no. 25-33.

**57** F. Glasl, *Handboek conflictmanagement* (vertaling door B. Bakker), Amsterdam: SWP Uitgeverij 2015, p. 387-398.

**58** I. Moriau & R. Boone, 'Bemiddeling is niet soft (interview met S. De Bauw en B. Gayse)', *Juristenkrant* 2009, no. 196, p. 11.

**59** This aspect will be further discussed in § 3 of this section.

**60** Article 731 (1) of the Judicial Code, as introduced by Article 212 of the Act of June 18, 2018 containing various provisions on civil law with a view to promoting alternative forms of dispute resolution, *Belgian Official Gazette*, July 2, 2018, 53455, effective date of July 12, 2018.

**61** Article 730/1, § 1 of the Judicial Code.

**62** Amendment no. 62 (F. Delpérée) concerning a draft law to introduce a Family and Juvenile Court, *Parliamentary Documents*, Senate, 2012-13, no. 5-1189/4, p. 16.

**63** New Article 1253ter/1, § 3, (1) and (2) of the Judicial Code. This regulation was previously part of Article 731 of the Judicial Code and was moved to Article 1253ter/1, § 3 of the Judicial Code in Act of June 15, 2018 amending Article 375bis of the Civil Code and Articles 1253ter/1, 1253ter/3 and 1253quater of the Judicial Code, *Belgian Official Gazette*, July 2, 2018, 53454.

**64** Own translation of Article 1253ter/3, § 2 of the Judicial Code; A.-M. Boudart et C. Vander Stock, 'La loi portant création du tribunal de la famille et de la jeunesse et les modes alternatifs. Réflexions sur quelques questions choisies', *Act.dr.fam.* 2014, p. 174; N. UYTENDAELE, 'Le règlement amiable des conflits familiaux', in: A.-C. VAN GYSEL (ed.), *Le tribunal de la famille et de la jeunesse*, Limal:

Anthemis 2014, p. 76, nr. 6.

**65** Article 1253ter/1, § 3, (1) of the Judicial Code.

**66** Article 732 and 707 (1) of the Judicial Code.

**67** Article 2691 (1) 2° Code on Registration, Mortgage and Registry Fees, recently modified by Act of October 14, 2018 amending the Code on Registration, Mortgage and Registry Fees in order to reform the Registry Fees, Belgian Official Gazette, December 20, 2018, 101202, effective date of February 1, 2019.

**68** Article 1253ter/1, § 3, (5) of the Judicial Code, with a reference to Article 1043 of the Judicial Code.

**69** B. Lambrecht, 'Commentaar bij artikel 1043 Ger.W.', *Comm.Ger.* Mechelen: Kluwer 2008, p. 4, no. 4.

**70** Article 1043, (1) and (2) of the Judicial Code.

**71** Article 1004/1 of the Judicial Code.

**72** [www.igo-ifj.be](http://www.igo-ifj.be).

**73** Article 78 (7) and Article 101, § 2, (4) of the Judicial Code.

**74** M. Smilde & C. Van Leuven, 'Verslag van twee experimenten met een nieuw zittingsmodel. De zitting: naar de kern van de kwestie', *Trema* 2013, November, p. 314-320.

**75** Article 731 (3) and Article 1253ter/1, § 3, (7) of the Judicial Code.

**76** D. Pire, 'La loi du 30 juillet 2013 portant création d'un tribunal de la famille et de la jeunesse', *Act.dr.fam.* 2013, no. 9, p. 172, no. 7.

**77** S. Degrave, 'En route vers le tribunal de la famille...?', *Act.dr.fam.* 2011, p. 59; C. De Vel, 'Bemiddeling en verzoening, De rechterlijke bemiddeling als alternatieve geschiloplossing', in: F. Ringelheim (ed.), *Gerechtelijke achterstand: geen noodzakelijk kwaad*, Brussel: Bruylant 2004, p. 159; J. Laenens, D. Scheers, P. Thiriar, S. Rutten & B. Vanlerberghe, *Handboek gerechtelijk recht*, Antwerpen: Intersentia, 2016, p. 114-115, no. 197.

**78** No violation: ECHR June 6, 2000, no. 34130/96, *Morel v. France*, [hudoc.echr.coe.int](http://hudoc.echr.coe.int); ECHR January 7, 1991, no. 14063/88, *Jensen v. Denmark*, [hudoc.echr.coe.int](http://hudoc.echr.coe.int). Violation: ECHR October 27, 2016, no. 8001/07, *Vardanyan and Nanushyan v. Armenia*, [hudoc.echr.coe.int](http://hudoc.echr.coe.int); ECHR September 28, 1995, no. 14570/89, *Procola v. Luxemburg*,

hudoc.echr.coe.int.

**79** Article 1253<sup>ter</sup>/1, § 3, (6) of the Judicial Code.

**80** UYTTENDAELE 2014, p. 71, no. 3.

**81** S. Brouwers, 'Langs nieuwe wegen, van familierechtbank naar bemiddeling' in: Permanente vorming van de Orde van Advocaten van de balie van Kortrijk (ed.), *Alternatieve geschillenbeslechting*, Brussel: Larcier 2015, p. 10, no. 17; J.-P. Masson, 'La loi du 30 juillet 2013 portant création d'un tribunal de la famille et de la jeunesse', *JT* 2014, p. 191; D. Pire, 'La loi du 30 juillet 2013 portant création d'un tribunal de la famille et de la jeunesse', *Act.dr.fam.* 2013, p. 185, no. 62.

**82** This analysis can be found in S. Raes, 'Hete hangijzers inzake de werking van de kamers voor minnelijke schikking', *T.Fam.* 2018, no. 8, p. 205-208.

**83** Article 731 (8) of the Judicial Code.

**84** Article 1043 of the Judicial Code.

**85** Rec. R(86)12 of the Committee of Ministers of the Council of Europe to member states concerning measures to prevent and reduce the excessive workload in the courts, September 16, 1986, [www.coe.int](http://www.coe.int), p. 1; B. Allemeersch, 'Bemiddeling en verzoening in het burgerlijk proces', *TPR* 2003, p. 417-418, no. 9; I. Brandon, 'L'office du juge dans la conciliation', *JT* 1995, p. 506.

**86** Article 731 (1) of the Judicial Code, as introduced by Article 212 of the Act of June 18, 2018 containing various provisions on civil law with a view to promoting alternative forms of dispute resolution, Belgian Official Gazette, July 2, 2018, 53455, effective date of July 12, 2018.

**87** Article 730/1, § 1 of the Judicial Code.

**88** Article 731 (2) of the Judicial Code; R. Haex, 'Commentaar bij artikel 731 Ger.W.' in *Comm.Ger.* Mechelen: Kluwer 1998, p. 5-6, no. 2-3.

**89** For the Family Chamber and the Chamber of Amicable Settlement, the material competence is stipulated in Article 572<sup>bis</sup> of the Judicial Code.

**90** Devolder 2014, p. 219, no. 236.



**91** Article 2045 (3) of the Civil Code.

**92** The same goes for a judge who attempts to settle a case in the Family Chamber.

**93** R. Boone, ‘Twee jaar familie- en jeugdrechtbanken: tijd voor een evaluatie (interview met H. De Paepe, K. Gerets, K. Grisez, K. Vander Steene, J. De Ridder, W. Verhaegen, A. Bruneel, S. Brusselmans, L. De Meirsman, E. Raskin & S. Brouwers)’, *Juristenkrant* 2016, no. 336, p. 9.

**94** www.igo-ifj.be.

**95** Article 78 (7) and Article 101, § 2, (4) of the Judicial Code.

**96** M. Smilde & C. Van Leuven, ‘Verslag van twee experimenten met een nieuw zittingsmodel. De zitting: naar de kern van de kwestie’, *Trema* 2013, November, p. 314-320.

**97** Article 731 (3) and Article 1253ter/1, § 3, (7) of the Judicial Code.

**98** D. Pire, ‘La loi du 30 juillet 2013 portant création d’un tribunal de la famille et de la jeunesse’, *Act.dr.fam.* 2013, no. 9, p. 172, no. 7.

**99** S. Degrave, ‘En route vers le tribunal de la famille...?’, *Act.dr.fam.* 2011, p. 59; C. De Vel, ‘Bemiddeling en verzoening, De rechterlijke bemiddeling als alternatieve geschiloplossing’, in: F. Ringelheim (ed.), *Gerechtelijke achterstand: geen noodzakelijk kwaad*, Brussel: Bruylant 2004, p. 159; J. Laenens, D. Scheers, P. Thiriar, S. Rutten & B. Vanlerberghe, *Handboek gerechtelijk recht*, Antwerpen: Intersentia, 2016, p. 114-115, no. 197.

**100** No violation: ECHR June 6, 2000, no. 34130/96, *Morel v. France*, hudoc.echr.coe.int; ECHR January 7, 1991, no. 14063/88, *Jensen v. Denmark*, hudoc.echr.coe.int. Violation: ECHR October 27, 2016, no. 8001/07, *Vardanyan and Nanushyan v. Armenia*, hudoc.echr.coe.int; ECHR September 28, 1995, no. 14570/89, *Procola v. Luxemburg*, hudoc.echr.coe.int.

**101** Article 1253ter/1, § 3, (6) of the Judicial Code.

**102** UYTTENDAELE 2014, p. 71, no. 3.

**103** S. Brouwers, ‘Langs nieuwe wegen, van familierechtbank naar bemiddeling’ in: Permanente vorming van de Orde van Advocaten van de balie van Kortrijk (ed.), *Alternatieve geschillenbeslechting*, Brussel: Larcier 2015, p. 10, no. 17; J.-P. Masson, ‘La loi du 30 juillet 2013 portant création d’un tribunal de la famille et de la jeunesse’, *JT*

2014, p. 191; D. Pire, 'La loi du 30 juillet 2013 portant création d'un tribunal de la famille et de la jeunesse', *Act.dr.fam.* 2013, p. 185, no. 62.

**104** This analysis can be found in S. Raes, 'Hete hangijzers inzake de werking van de kamers voor minnelijke schikking', *T.Fam.* 2018, no. 8, p. 205-208.

**105** New Article 1727, § 2, 11° and 12° of the Judicial Code, effective date of January 1, 2019.

**106** [www.koengeens.be/news/2017/12/22/meer-bemiddeling-moet-rechtszaken-voorkomen](http://www.koengeens.be/news/2017/12/22/meer-bemiddeling-moet-rechtszaken-voorkomen).

**107** Flemish Bar Association, 'Open brief: evaluatie van de familierechtbanken', December 12, 2017, p. 2, unpublished.

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