

# THE PRINCIPLES GOVERNING MEDIATION IN LAND MATTERS IN FRENCH POLYNESIA

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*This article provides an introduction to two new institutions in French Polynesia: the Land Tribunal, and the profession of Land Mediator.*

*La question foncière reste encore aujourd'hui en Polynésie française, une source de difficultés. Après des décennies d'inertie et de tâtonnements, le législateur polynésien et français, ont mis en place en 2017 chacun dans leurs domaines de compétences respectifs, une première série de mesures qui tentent d'apporter quelques solutions concrètes.*

*Les auteurs soulignent que l'une des clefs du succès des réformes en matière de résolution des conflits fonciers en Polynésie française tient à la capacité et la volonté des concepteurs de ce nouveau cadre normatif à pouvoir opérer une synthèse entre une approche legaliste, fortement inspirée par le droit métropolitain et une approche plus culturelle et historique encore revendiquée par une large partie de la population polynésienne.*

*Ils font observer que le nouveau régime procédural spécifique mis en place par les autorités polynésiennes et française en 2017, systématisant le recours aux modes alternatifs de règlement des conflits dans les litiges fonciers et la création de la profession réglementée de médiateur-foncier, institution unique dans le droit français, respectent ces deux postulats.*

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## I INTRODUCTION\*\*\*

It is easy to agree that certain matters relating to land are a source of difficulties in French Polynesia and that they should be addressed.<sup>1</sup>

Although the causes and consequences of this fact have been known for a long time and have been extensively commented on, the issues are far from settled within Polynesian society.<sup>2</sup>

At a theoretical level, study of the matter involves almost all areas of social science and the humanities.<sup>3</sup> It is an inexhaustible source of study for many but the issues remain the source of much tension in the local community.

The Polynesian land issue appears moreover to be closely connected to a flurry of cultural claims, social identity<sup>4</sup> claims and even political claims given the division of roles between French Polynesia and the State.<sup>5</sup> In this context the rules of the Civil Code and the institutions that it organises often are seen as the explanation for the difficulties encountered.

There are two competing views as to how to improve the present system. On the one hand those who wish to reject the rules of the Civil Code state that that would accord with the historical and cultural links with the community of Pacific peoples and enable inspiration to be taken from the ways their land systems operate. On the other hand defenders of the civil law orthodoxy consider that any reform requires the maintenance of the present property and succession law system. Any reforms therefore could take only the form of transition of a more or less complete nature from the provisions and the French legal institutions.

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\*\*\* In this paper, "State" refers to France, "Land Tribunal" refers to the "Tribunal foncier" of French Polynesia.

1 See in particular Avis n° 2017-AO-03 du 4 juillet 2017 sur les projets de loi du pays portant réglementation de la profession de médiateur foncier et de l'activité d'agent de transcription en Polynésie française, p 4 and following. See also N° 2950 - Rapport d'information de M Jean-Jacques Urvoas déposé en application de l'article 145 du règlement, par la commission des lois constitutionnelles, de la législation et de l'administration générale de la République sur la Polynésie française pp 45-47 <[www.assemblee-nationale.fr/14/rap-info/i2950.asp](http://www.assemblee-nationale.fr/14/rap-info/i2950.asp)>.

2 Gérald Copenrath "La terre à Tahiti et dans les îles, histoire de la réglementation foncière, perspectives d'avenir" (Editions Haere Po, 2003).

3 See Taniatoa Bambridge et Philippe Neuffer *Pluralisme Culturel et Juridique en Polynésie Française: La Question Foncière* (Hermès 32-33, 2002) pp 307-315.

4 Paola Carmagnani "La Construction Identitaire En Polynésie Française: Chronotopes De L'insularité" p 210 and following <<http://dx.doi.org/10.13135/2384-8987/869>>.

5 See art 14 de la loi organique n° 2004-192 du 27 février 2004 portant statut d'autonomie de la Polynésie française.

At the theoretical level, this appears to be the corollary of what was commonly called 'legal pluralism'.<sup>6</sup> Jurists and anthropologists have approaches and definitions which differ in relation to the meaning of such pluralism. By way of example it is to be noted that legal pluralism evidences the cohabitation of several legal systems in the same jurisdictional entity<sup>7</sup> and that in relation to the small states of the Pacific<sup>8</sup> and to French Polynesia, legal pluralism has generated successive stratas of norms - customary law, imported law, post-colonial law - all of which often overlap. Thus after the Pomare Codes the Civil Code was introduced into the French Oceanic Establishments by Decree of 18 August 1868 (published by Order of 27 March 1874).<sup>9</sup>

The current special status of Polynesia was fixed by Law number 2004-192 of 27 February 2004. What is applied is therefore a specific law.<sup>10</sup>

Firstly, the principle of legislative and regulatory specialty requires that the metropolitan law (except the legislation relating to sovereignty) is applicable only when it is expressly mentioned (art 7 of 2004-192).

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- 6 Vanderlinden J (2003) "Les pluralismes juridiques" Cahiers d'anthropologie du droit, p 31; Vanderlinden J (1993) «Vers une nouvelle conception du pluralisme juridique» Revue de la Recherche juridique – Droit prospectif n°2, p 582. "In Melanesia ... the traditional jurisdictions operated only according to the principles set down by the colonisers. The respect for these principles was in the final analysis controlled by the colonisers".
- 7 Étienne Le Roy, Autonomie du droit, Hétéronomie de la juridicité; Généralité du phénomène et spécificités des ajustements (présentation au Séminaire international «Le nuove ambizioni del sapere del giurista: l'antropologia giuridica e la traduttologia giuridica» (Roma, Accademia Nazionale dei Lincei, 12-13 03 08).
- 8 The PEIP.
- 9 After several attempts in 1866 and 1868 - see law of 28 March 1866; Loi du 28 mars 1866 sur l'organisation judiciaire tahitienne BO 1866 n° 4 p 40. Arrêté du 27/03/1874 (BO des EFO de 1874 n° 3 p 141). On that question see in particular Coppenrath (G) *La terre à Tahiti et dans les îles* (édit Haere Po, 2003) pp 212-215.
- 10 On the question of the sharing of authority between the State and French Polynesia, see in particular Peres, Jean "La Nouvelle Répartition des Compétences entre l'État et la Polynésie Française" [2004] VUWLR 18; (2004) 35 VUWLR 485, and A Moyrand *Introduction A l'Étude Des Institutions Politiques et Administratives de la Polynésie Française: Loi Organique Statutaire Du 27 Février 2004* Comparative Law Journal of the Pacific, Décembre 2013, pp 112 and following <[www.victoria.ac.nz/law/research/publications/about-nzacl/publications/special-issues/Moyrand-mono.pdf](http://www.victoria.ac.nz/law/research/publications/about-nzacl/publications/special-issues/Moyrand-mono.pdf)>.

Secondly, Polynesia is able, in relation to rules relating to the division of power between French Polynesia and the State, to intervene in respect of those powers that it exercises in respect of laws commonly called "laws of the country".<sup>11</sup>

Although the State retains competence in matters relating to succession and gifts, French Polynesia has competence in the following areas: the definition and types of property (including usufructs and easements), contracts relating to the exercise of undivided property rights, the sale exchange and renting of movables, agency, guarantee, pledge, privileges and mortgages, expropriation, prescription and possession.

At the practical level the difficulties encountered relate particularly to legal indivision (*indivision legale*); contractual indivision is controlled generally directly by the co-owners.

Although the causes of the difficulties are many they can nevertheless be grouped into two main categories: the structural and the sociological.<sup>12</sup>

Structurally the geographic spread of the country remains the cause of indivision that is the most difficult to deal with. The islands are distant, one from the other, but all the land-related services both administrative and judicial are found in Papeete on Tahiti. The main structural obstacle relates to the identification of owners of rights in land. As was emphasised by one authority "there, doubtless, is the most important principle of Polynesian land law, the need to go back right to the initial title (le Tomite)".<sup>13</sup>

Schematically<sup>14</sup> the allocation of the original titles was done in 1852, 1887, 1898, and 1902 but it was often done in a very imprecise manner, the lands registered were

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11 On the notion of "law of the country" see Antonino Troianiello "La Loi Du Pays Expression De L'autonomie Polynésienne" in RJP Hors Série IV p 175 et s <[www.victoria.ac.nz/law/research/publications/about-nzacl/publications/special-issues/hors-serie-volume-iv,-2004/Troianiello.pdf](http://www.victoria.ac.nz/law/research/publications/about-nzacl/publications/special-issues/hors-serie-volume-iv,-2004/Troianiello.pdf).

By the same author "Le nouveau statut d'autonomie de la Polynésie française (loi 2004-192 du 27 février 2004 portant statut d'autonomie de la Polynésie française)" in *Revue française de droit constitutionnel* 2004/4 (n° 60) pp 833-860.

12 On that matter see in particular Rapport d'information du Senat 23 juin 2016: Une sécurisation du lien à la terre respectueuse des identités foncières: 30 propositions au service du développement des territoires. See in particular "Des partages impossibles aux graves répercussions sociales provoquant l'engorgement des tribunaux" <[www.senat.fr/rap/r15-721/r15-7212.html](http://www.senat.fr/rap/r15-721/r15-7212.html)>.

13 R Calinaud "Les principes directeurs du droit foncier polynésien" (2001) 7 *Revue juridique polynésienne* pp 741-749.

14 For the fullest statements see H Paoletti et T Berthou "Les fondements juridiques de l'accession à la propriété foncière en Polynésie française" in *Droit Foncier en Polynésie Française: Bref Examen Critique et Propositions de Réformes* (Yves-Louis Sage) Comparative Law Journal of the Pacific. Collection 'Ex professo' Volume I (2013) pp 229 -248.

not identified with precision nor their boundaries indicated and measured; the owners were not always identified consistently with their civil status and moreover the first titles were neither transcribed nor recorded in a proper register.<sup>15</sup>

These deficiencies are today even more problematic because "the provisions which deal with the methods of the granting of the initial titles and the case law which has resulted, make clear that all the titles thus established are final and unchallengeable".<sup>16</sup> The result is, as Calinaud states, that transfers which have resulted either from natural or testamentary succession or by gift or sale "must necessarily attach to the original title by a continuous chain if they are to be regular and valid". In the absence of this complete historical linking the legal situation will never be beyond challenge.<sup>17</sup> Calinaud believes that "the system introduced by these laws could have achieved a clear and reliable land system analogous to that of the Land Book of Alsace or to the registration system in the Anglo-Saxon countries if it had been put into operation in a rigorous manner. Unfortunately that was not what happened".

For this reason the initial deficiencies remain the cause of numerous disputes about property because the original titles, being invalid from their origin, makes it often impossible to draw up a list of the heirs. Those who claim to be linked to a claimant whose identity is uncertain must go to the courts to have their rights recognised and must do that before any sharing.

To this can be added the slowness of the procedures for sharing<sup>18</sup>, the high cost, the lack of specialists, (it is only recently that the professions of genealogists and surveyors have been regulated<sup>19</sup>), the reluctance of notaries to proceed with divisions dating back more than 100 years because that involves a considerable research endeavour, the small number of specialist lawyers for land matters, and the recent establishment of a Land Tribunal.

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15 Ibid.

16 Ibid.

17 Ibid.

18 For an example of the length and complexity of the procedures relating to land see in particular Cour d'appel de Papeete, Chambre des terres, 16 mars 2017, n° 93/00396 (this case began in 1980 with about 100 parties).

19 The profession of land surveyors was established by the law of the country n° 2014-16 du 25 juin 2014 and that of genealogists by the law of the country which amended the law of the country n° 2016-12 du 12 avril 2016 portant réglementation de l'activité de généalogie en Polynésie française which received the approval of the Council of State on 5 December 2017.

It is often claimed by sociologists that the small number of cases of divisions of land in French Polynesia is because of the clear preference of the Polynesian peoples to stay in indivision which is the form of owning that corresponds to the management in customary systems.<sup>20</sup> In each generation there is an increase in the number of co-owners and this makes it more and more difficult to have agreement about division of the land.

It is necessary always to have in mind that the current land system in French Polynesia has become, as in most of the small states and territories of the South Pacific, the main factor in economic development. This provides a strong argument for the establishment of a modern law on land matters – a law which responds to and fits in with the political situation of global economic development. It requires to be clearly defined and be done in advance.

Indivision undeniably constitutes a brake on economic and social development in French Polynesia.<sup>21</sup> The State and French Polynesia have tried for more than 60 years to address this but the results have fallen short of expectations.

The first concrete solutions for the difficulties encountered were introduced by art 14 bis of title 7 of the law on "modernisation of the procedural law in the fields of justice and internal affairs", which modified the Code on Judicial Organisation and introduced into it new arts 1552-9-1 to 1552-9-11. This structure was announced in the Organic Law No 2004-193 of 27 February 2004 (art 17). Properly speaking it is not a special jurisdiction in the court system of French Polynesia. Rather, and more exactly, it is a land division in the first instance court of Papeete. It became operational at the beginning of December 2017 and sits with a bench presided over by the Magistrate of the first instance court and includes two assessors.

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20 Philippe T Neuffer "La Pleine Autonomie, Possible Réponse L'inadaptation Des Normes Métropolitaines aux Spécificités Polynésiennes?" p 147-149 in *Polynesie Francaise 30 Ans D'autonomie: Bilan Et Perspectives*, Actes du colloque organisé les 27 et 30 juin 2014 par l'Assemblée de la Polynésie française, Comparative Law Journal of the Pacific Journal De Droit Comparé Du Pacifique Collection 'Ex professo' Volume IV (2014).

21 See above n 1.

It has been estimated that there are more than 1,000 land cases pending in the courts of French Polynesia and that the average time before decision is 8 years.<sup>22</sup>

It can, furthermore, be predicted that this number will increase given that the law<sup>23</sup> states that the Tribunal's jurisdiction is "land matters". In practice this amounts to recognition of a jurisdiction over all actions that the legislation aims to protect because of their land law nature including:

- Petitory actions – that is to say those which relate to the existence of a land right including interests in land eg the droit de superficie, usufruct, rights of use and habitation, and easements. The Land Tribunal will be equally concerned to deal only with real actions which are less contested, actions which are initiated by co-owners for sharing, or those which relate to privileges, mortgages, and land pledges (formally called *antichrèses*), those with mining rights, emphyteosis, and those with rights to exploit electrical energy and access to mineral springs.
- Possessory actions – the possessor of property or a bare holder seeks protection of possession or mere detention where that has been disturbed.

It is calculated, therefore, that if all land actions in French Polynesia must henceforth be brought before the Land Tribunal its task will rapidly become overwhelming if not impossible. It is therefore necessary that the Polynesian lawmaker establishes relevant procedural rules (a matter within the exclusive competence of French Polynesia) which not only reduce but also regulate the flow of cases brought before the Land Tribunal.

Two complementary ways have been chosen to deal with these matters.

- (1) The establishment of a specific procedural system which systemises access to alternative modes of dispute resolution in land matters.
- (2) The creation of a regulated profession of land mediator.

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22 Figure given by M Régis Vouaux-Massel, Premier Président de la Cour d'Appel de Papeete, on 28 November 2017, when he spoke at the colloquium on land in indivision in French Polynesia 27 to 28 November 2017 organisé par Le Ministère du Développement des Ressources Primaires, des Affaires Foncières et de la valorisation du Domaine et des Mines.

23 See art L552-9-1 of the Code de l'organisation judiciaire.

## **II A SPECIAL PROCEDURAL REGIME TO CONTROL RECOURSE TO ALTERNATIVE DISPUTE RESOLUTION MECHANISMS FOR LAND MATTERS**

It is evident from what has preceded that one of the keys for success of reform in relation to the resolution of land disputes that could gain acceptance by Polynesian litigants<sup>24</sup> lies in the capacity of the Polynesian lawmaker to achieve a synthesis between a legalist approach (which will be strongly informed by French law) and one that is more culturally and historically oriented.

The legalist approach would involve a simple transposing of the metropolitan legal provisions subject only to complying with the jurisdictional rules relating to the State and French Polynesia.

Taking the institutional and legal legitimization of the identity and cultural aspects of the land in French Polynesia into account can be justified by two arguments.

The first relates to historical precedent. That would satisfy the claims of those who call for a return to "Toohitu" – that is to say to the Grand Judges who from 1842–1892 were the key-stone of the Tahitian Legal Organisation<sup>25</sup> - or even to the application of Polynesian customary law (reduced to its simplest form). Indeed the history of the Kingdom of Tahiti and its dependencies shows that in respect of dispute settlement recourse to alternative methods of dispute resolution was not unknown, at least during the early years of the Protectorate.

The Joint Proclamation of 9 September 1842 between Queen Pomare and France envisaged the existence of a preliminary procedure of persuasion and arbitration by Consuls.<sup>26</sup> This possibility was also offered to foreigners.<sup>27</sup> The arbitral awards could then be dealt with on appeal in three different ways: before a bench composed entirely of judges of the nationality of the persons concerned (the number of jury members depending proportionally on the importance of their home country as represented in Tahiti), by appealing to the Council of Government with the Consul

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24 Mrad Fathi Ben, citing Jean-Loup Vivier "...: the conciliator develops a solution and gets the approval of the parties" in «Définir la médiation parmi les modes alternatifs de régulation des conflits», Informations sociales, 2012/2 n° 170, pp 11-19 especially at p 14.

25 On the Tahitian courts see Sage (Y-L), *Les institutions judiciaires à Tahiti et Dépendances de la période du Protectorat à 1945*, Revue Juridique Polynésienne, Vol III Juin 1997, pp 1 76.

26 Convention du 9 septembre 1842. Ils (les consuls) pourront procéder eux-mêmes pour les concilier soit par voie de persuasion, soit par voie d'arbitrage... Voir *Les institutions judiciaires à Tahiti et Dépendances de la période du Protectorat à 1945*, Revue Juridique Polynésienne, Vol III Juin 1997, pp 1-76 (Y-L Sage).

27 "Foreigner" meant anyone who was neither Tahitian nor French.



of the litigant's nationality being then necessarily an assessor, or finally by appealing directly to the Government of the King of France.

The second argument relates to the fact that the first Tahitian courts which, until their demise, exercised land powers<sup>28</sup> corresponded also to more modern models of similar institutions that are frequently found in the anglophone South Pacific. There the land problems are often the same as those that are experienced in French Polynesia. This is even more so with the small island states and territories of the South Pacific region which share not only a common colonial heritage<sup>29</sup> but also the same difficulties in relation to organising and ensuring the good management of land.<sup>30</sup>

In the small island states of the Pacific nearly all of the legal systems have instituted a dispute resolution mechanism in relation to land which enables problems to be resolved outside of the imported legal system. This relates to disputes which are generally geographically limited or which involve a close link to family matters.

The principal objective of this manner of conflict resolution is to give preference to an agreement accepted by both parties rather than to have to refer the dispute to a court which some litigants criticise (still and with no rational basis) alleging that the courts lack knowledge of local customs.

A study, albeit brief, of the ways of settling land disputes in the South Pacific and in New Zealand and Australia shows that the method used very often has the same characteristics as those that are traditionally attached to alternative methods of dispute resolution and more particularly to mediation and conciliation.

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28 Ibid p. 38.

29 See in particular De Deckker, P, et Faberon, J-Y 'Custom and the law' (editors) Asia Pacific Press, Canberra (2001), M Panoff "Un demi-siècle de contorsions juridiques. Le régime foncier en Polynésie Française de 1842 à 1892" 1966; *Journal of Pacific History* pp 115/128; Ravault, F, "Land Problems in French Polynesia" *Pacific Perspective*, 1982, Vol 2 (10) p 31.

30 Naren Prasad "Régimes fonciers et développement économique dans le Pacifique in *Studies and Reports of the Section of Cultural Research and Management - No 9 / Etudes et rapports de la Section de recherche culturelle et gestion - No 9*" <<http://unesdoc.unesco.org/images/0011/001162/116284fo.pdf>>.

In New Zealand the Maori Land Court (Te Kooti Whenua Maori),<sup>31</sup> and in Australia (the National Native Title Tribunal) a land court, both promote resort to alternative methods of dispute resolution.

In the small island states of the Pacific the role of mediator will often be performed by a customary chief.<sup>32</sup>

At the procedural level meetings or organised discussion of an informal nature provide a secure environment for parties who, as in other classical mediation procedures, seek a consensual solution to their problems rather than having one imposed.

In Papua New Guinea customary land disputes cannot be raised before the local land court unless an attempt at mediation has been made by a mediator designated by the Provincial Land Disputes Committee.

In East Timor the same type of dispute must first have mediation attempted; that mediation will be led by officers of the Land and Property Directorate (which is part of the Ministry of Justice).

Certain legal systems of the small Pacific island states have combined recourse to alternative methods of dispute resolution with those organised by the state courts.

For example,<sup>33</sup> in Samoa, the Village Fono Act 1990 gives power to the village council (fono) to decide on matters relating to land interests of the village. In Tokelau disputes about customary land are within the power of the village council (Taupulega). In Vanuatu the Customary Land Tribunal Act 2001 provides that the state court system complements that established by custom. In Solomon Islands all disputes which relate to interests in all or part of customary land must, before being heard by the state courts, be submitted to the customary chiefs and to customary land arbitrators.

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31 This court was established in 1865 by the Native Lands Act under the name Native Land Court of New Zealand. It became the Maori Land Court in 1954 and the jurisdiction was originally for translating customary land claims so that they could be recognised by the common law as titles to land. The Court progressively was developed to deal with disputes concerning Maori land rights. From 1993 the Te Ture Whenua Maori Land Act gave the court a common law jurisdiction but at the same time allowed recourse to alternative methods of dispute resolution for all Maori land cases. On the mode of operation of the Maori Land Courts see in particular R Boast "Maori Land and Land Tenure in New Zealand: 150 Years of the Maori Land Court" CLJP vol 23, 2017 (accessible on the site of the New Zealand Association for Comparative Law).

32 Angelo (A) - Aimot (O) - Sage (Y-L) (eds) "Droit foncier et Gouvernance Judiciaire dans le Pacifique Sud" Comparative Law Journal of the Pacific- Revue Juridique Polynésienne, Laboratoire GDI-UPF, 2011.

33 For a complete overview of the land court systems in the PEIP see above n 32.

The provisions of Decree number 2015-282 of 11 March 2015<sup>34</sup> could also be a source of inspiration for the Polynesian lawmaker - notably, by picking up the principle according to which it is not possible to bring a matter to court whether by request, declaration, or assignation without noting in the document that there has been an attempt at consensual resolution of the dispute.

Although there is not in French Polynesia any specific status for the conciliators of justice as there is in arts 129-1 to 131 of the French Code of Civil Procedure (the result of the Decree of 1 October 2010), it is to be observed that rules relating to judicial mediation and contractual mediation were integrated, on 30 June 2017,<sup>35</sup> into the provisions of the Code of Civil Procedure of French Polynesia. They borrow heavily from arts 131-1 to 131-15 of the French Code of Civil Procedure. It is also to be noted that the Decree of 20 March 1978 had anticipated for France a status for law conciliators and their conciliation role is defined by the new arts 129-1 to 131. French Polynesia used the example in order to organise the new profession in French Polynesia.

The duty to attempt friendly resolution of land disputes as in the metropolitan provisions is one aspect of the giving of responsibility to litigants for the regulation of the role of court sittings<sup>36</sup> and this obligation fits perfectly with the cultural tradition of Polynesian litigants.<sup>37</sup> This twin source of inspiration appears to have underpinned the method used by French Polynesia and France in the development of some of the first reforms undertaken, the basis of which was the establishment of a Land Tribunal linked to a special procedural regime by Resolution no. 2017-100 APF of 12 October 2017. Henceforth litigants must provide proof of an attempt at mediation before the introduction of any claims; and a profession of land mediators was created by a law of the country.

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34 JO du 14 mars 2015 (in force 1 April 2015).

35 Délibération n° 2017-47 APF du 22 juin 2017 portant modification de la délibération n° 2001-200 A P F du 4 décembre 2001 modifiée portant code de procédure civile de la Polynésie française, Journal officiel de la Polynésie française le 30 juin 2017. The text is in its Annex.

36 Inspection Générale des Services Judiciaires, Rapport sur le développement des modes amiables de règlement des différends, AVRIL 2015 N° 22-15.

37 Titre VI– Dispositions Applicables Aux Actions Réelles Immobilières Portées Devant Le Tribunal Foncier» (Créé, Dél N° 2017-100 APF Du 12/10/2017, Article 1<sup>er</sup>), now articles 449-2 à 449-16 du Code de procédure civile de la Polynésie française (the CPCPF).

Though approved in October 2017, the provisions did not come into force until 1 January 2018. There has been therefore no possibility to reflect on the operation and practice either of the Land Tribunal or of the claimants or their representatives.

***A The Obligation to have Conciliation or Mediation before Seizing the Land Court of the Matter***

This obligation, brought in through the Code of Civil Procedure of French Polynesia, places the burden on the plaintiff to show in the procedure that introduces the case that an attempt has been made at resolve the dispute by agreement. Henceforth, the Polynesian claimant must, within the framework of land litigation, justify or prove to the judges that consensual resolution has been attempted. To this end the plaintiff must indicate in the written complaint the steps taken to achieve a friendly resolution of the problem.<sup>38</sup> More particularly the plaintiff must indicate all the measures that have been taken by means of:

- (1) A land conciliation measure as provided in arts 449-20 to 449-32 of the French Polynesia Code of Civil Procedure;
- (2) Land mediation.

Failing that the plaintiff must give the reasons for not reaching agreement.<sup>39</sup> This raises the question of knowing what measures can be considered as acceptable or sufficient. Would simply an invitation to negotiate, or the giving of notice suffice?

The law does not indicate any particular form.

The question then becomes one of determining the manner in which the proof of the attempt can be provided. A written document must doubtless be favoured but in the absence of provisions in the Code of Civil Procedure it may be presumed that the proof of an attempt at conciliation could consist in negotiation, conciliation, or simply in the exchange of letters. The giving of notice of the claim that is obligatory for most cases before they go to court must henceforth contain an invitation to the opponent to settle the matter out of court.

Unlike the metropolitan Decree of 11 March 2015 there is no provision in the French Polynesia Civil Procedure Code for dispensing with the duty to attempt friendly resolution of the dispute. It may, nevertheless, be envisaged that the Land Tribunal will take guidance from the spirit of the metropolitan text where exceptions are possible if "there is a legitimate reason relating to urgency or to the material in question particularly when that concerns a matter of public order".

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38 Article 449-18. CPCPF.

39 Article 449-18. CPCPF.

### ***B Lack of Diligence Relating to the Friendly Resolution of the Litigation does not Mean that the Claim cannot be Heard***

If at the time of the introduction of the case there is no justification for the parties not to have undertaken steps to reach a friendly resolution of the litigation, the Land Tribunal may suggest that the parties attempt a peaceful settlement and to do that by way of conciliation or mediation.<sup>40</sup>

In support of the document that seizes the Land Tribunal of the case, the plaintiff will list all the steps that have been taken to achieve a friendly settlement of the case using one of the two possibilities listed in arts 449-20 to 449-32 of the French Polynesia Code of Civil Procedure:<sup>41</sup>

- (1) land conciliation,
- (2) land mediation.

The steps for land conciliation or land mediation are not mutually exclusive. They can occur successively or alternatively as desired by the parties or their representatives, or as a result of an order of the Land Tribunal.

### ***C The Procedure for Mediation and Conciliation by the Land Tribunal***

Even after the Tribunal has been seized of the matter the parties are free to reach agreement. They can also be required to do that on the initiative of the Land Tribunal at any time during the hearing of the case. In the latter instance it is for the Land Tribunal or for the Pre-trial Judge (*Juge de la mise en état*) who prepares the preliminary dossier to decide and to fix the conditions.<sup>42</sup>

The duty to conciliate or mediate is entrusted by the Land Tribunal by the Pre-trial Judge to any person that they think is qualified to perform the role.<sup>43</sup>

Persons appointed by the Pre-trial Judge or the Land Court to assist with conciliation or mediation can be challenged in accordance with arts 144 and 145 of the Code of Civil Procedure of French Polynesia.<sup>44</sup>

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40 Article 449-19. CPCPF.

41 Article 449-18. CPCPF.

42 Article 449-21. CPCPF.

43 Article 449-22. CPCPF.

44 Article 449-28. CPCPF.

The period for land conciliation or land mediation is set at three months and that can be extended one time.<sup>45</sup> The Pre-trial Judge can, on the request of one of the parties or of the person appointed to undertake the conciliation or mediation, end the conciliation or mediation task before the three months (or before six months if the period has been extended).<sup>46</sup>

An order which requires conciliation is a jurisdictional one<sup>47</sup> which -

- (1) Identifies the circumstances which render it necessary and the agreement of the parties to engage with the process;
- (2) Names the person who is qualified to fulfil the task and who is charged with the attempt at conciliation ;
- (3) Sets out the terms of reference in a precise manner;
- (4) Sets the period with which the task is to be completed;
- (5) Fixes the amount of the conciliator's remuneration;
- (6) Identifies the party who must pay that amount and sets a time limit for that to be done at the registry of the Land Tribunal; and
- (7) Fixes the date of the hearing on which the matter will be reopened after deposit of the conciliator's report.

### ***D The Specific Regime for Land Mediation***

Although the regime set up for land mediation is the same as that provided for conciliation it is, nevertheless, adapted because of the nature of the profession of land mediator.<sup>48</sup>

The Land Tribunal or the Pre-trial Judge establishes the amount of the fees and remuneration for the mediator and indicates that failing payment within a set period, and in accordance with the conditions, the appointment of the land mediator ends and the court proceedings will continue.<sup>49</sup>

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45 Article 449-29. CPCPF.

46 Article 449-30. CPCPF.

47 Article 449-23. CPCPF.

48 Délibération n° 2017-30 LP/APF du 12 octobre 2017 de la loi du pays portant réglementation de la profession de médiateur foncier. See développements below.

49 Article 449-26. CPCPF.

### *E Approval of the Agreement*

The Land Tribunal or the Pre-trial Judge can, if requested by the parties, approve in whole or in part an agreement which is provided to the judge by one of the parties.<sup>50</sup>

The contractual procedure is ended by the conclusion of an agreement even if it does not settle all the issues<sup>51</sup> following conciliation or mediation.

This agreement is formalised by a settlement which puts an end to the disagreement or by a writing which establishes the continuance of the dispute in whole or in part.<sup>52</sup>

At the request of one or both parties,<sup>53</sup> the agreement for conciliation or mediation accompanied by the documents which establish that the parties to the agreement own the rights and have them at their free disposition is then approved. This puts an end to the dispute and renders the agreement executory.<sup>54</sup>

The Land Tribunal to which an agreement has been submitted cannot change its terms. The approval of a partial agreement is possible but it is then for the Land Tribunal to determine the matters that remain to be settled.<sup>55</sup> More particularly the request for approval must contain:<sup>56</sup>

- (1) The points on which there was agreement between the parties and for which they seek approval;
- (2) The respective claims of the parties relative to the points on which they remain in dispute accompanied by the facts, the points of law on which each of the claims is founded and an indication of the documents relating to each claim.

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50 Article 449-27. CPCPF.

51 Article 449-32. CPCPF.

52 Article 449-31. CPCPF.

53 Article 449-34.

54 Article 449-33.

55 Article 449-36.

56 Article 449-37.

A refusal to approve an agreement can be appealed. The appeal is in the form of a declaration to the registry of the Court of Appeal in Papeete. The case is then decided in accordance with the discretionary procedure.<sup>57</sup>

### **III THE PROFESSION OF LAND MEDIATORS**

#### ***A A Profession of a Unique Nature***

The Minister in charge of land matters and the Department of Land Affairs in French Polynesia have undertaken the process of regulating all activities related to land matters and that with a view to the professionalisation of these activities and consumer protection.

The declared goal of the creation of the regulated profession of mediator by law of French Polynesia no 2017-37 of 30 November 2017<sup>58</sup> was to give legal status to those who exercise the profession and to indicate that the matter was regarded as serious and to give confidence to Polynesian plaintiffs.

The procedural system which goes along with the establishment of the Land Tribunal in French Polynesia gives an important role to the land mediator who has to try to obtain a friendly settlement of land disputes. The land mediator can be engaged either directly by the parties or by the Land Tribunal or by the Pre-trial Judge.<sup>59</sup>

Although this profession has no equivalent in France the core ideas reflect the good characteristics that commentators on the metropolitan laws have attached traditionally to mediation.<sup>60</sup>

Furthermore, this mode of reconstructing the links for re-establishing communication based on the choice of the parties without sanction in case of default appears to be a perfect complement to the cultural and traditional approach to settling land disputes in French Polynesia.<sup>61</sup>

57 Article 449-39.

58 Portant réglementation de la profession de médiateur foncier. JOPF 30/11/2017 pp 7787 and following.

59 Article 449-21. CPCPF.

60 Stephen Bensimon, Martine Bourry d'Antin, Gérard Pluyette *Art et techniques de la médiation* (LexisNexis Collection: Pratique professionnelle) 549 pages.

61 As indeed it is in the rest of the island countries of the South Pacific. A Angelo, Y-L Sage, "Des Principaux Modes De Resolution Des Litiges Fonciers Dans Les Petits Etats Insulaires Du Pacifique Anglophone" in *Droit Foncier et Gouvernance Judiciaire dans le Pacifique Sud: Essais Comparatistes/Land Law and Judicial Governance in the South Pacific: Comparative Studies*, CLJP Hors Serie Volume XII, 2011 pp 5-27.



### ***B The Title of Land Mediator is Protected***<sup>62</sup>

Article 433-17 of the Criminal Code applies to anyone who for payment performs any activity mentioned in art 1 without being authorised to do so under art 2, or by using an administrative authorisation which is not in accordance with the law.<sup>63</sup>

### ***C A Regulated Profession whose Duty is Linked to that of the Land Tribunal***

The profession of land mediator is described in art LP1 of the legislation:

Land mediation extends to any structured process by which two or more parties seek to reach agreement outside or within a judicial proceeding, with a view to amicably settling all or some of their differences in a case which is within the jurisdiction of a first instance court sitting in land matters, with the aid of a third person, the mediator, chosen by them or by the court of first instance which has power in land matters.

Thus the limits of the activity of the land mediator are disputes which are within the jurisdiction of the Land Tribunal of French Polynesia. Given that the same causes produce the same effects as those set out in relation to the consequences of the material jurisdiction of the Land Tribunal,<sup>64</sup> it can be predicted that the land mediators will quickly be overwhelmed by the number of cases submitted to them either by the Land Tribunal or by the parties.

### ***D The Profession of Land Mediator***

The permit to exercise the profession is granted after the advice of a Commission<sup>65</sup> made up of the Director of the Department of Land Affairs of French Polynesia who presides, the Secretary General of the Government, the Director General of Economic Affairs, and one person with knowledge of culture and/or Polynesian languages.

The Commission can be assisted in an advisory capacity by any person from whom they wish to seek advice about a person's particular skills.

62 Article LP 20—I.

63 The same rules apply when a land mediator has been suspended or had autorisation withdrawn for a period of ten years.

64 See above Part II.

65 Article LP 2.

The promulgating of special rules for the profession are justified, as the Polynesian Competition Authority emphasised by the "strong asymmetry in the information between consumers and professionals, particularly in relation to those professionals who have special skills of a legal nature or of a technical nature but also of a social nature, whose skills consumers are not necessarily in a position to possess".

It was understood that the law would require access to this profession by holders of very precise and mandatory criteria concerning nationality<sup>66</sup>, good character and professional skill.<sup>67</sup>

They must hold a diploma indicating a skill level equal to or superior to a Masters degree as well as a diploma indicating university study relevant to the procedures and techniques of mediation.<sup>68</sup>

The same strictness is found in the conditions of good character because the land mediators must undergo an administrative enquiry which includes the advice of the Attorney-General to satisfy certain conditions of good character and, for instance, of not having been insolvent or bankrupt.<sup>69</sup>

Article 2 provides that land mediators (they can be natural or legal persons) can act only when they hold a professional law mediator permit issued by the President of French Polynesia (or his or her delegate).

The role of land mediator is incompatible with any salaried employment with any public or ministerial duty and with any activity of a kind which would put in doubt the mediator's independence.<sup>70</sup>

Moreover, art 14 provides that in the context of the mediator's tasks the land mediator cannot act as an arbitrator, give law advice, draw-up documents for others, or undertake any activities relating to the sale of land.

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66 Be a French national or national of another state in the EU.

67 Article LP 2.

68 Article LP 2-B. 'Être titulaire d'un diplôme délivré par l'État ou au nom de l'État et sanctionnant un niveau égal ou supérieur au master 1 sans validation d'acquis professionnel dans le domaine juridique et d'autre part, être titulaire d'un diplôme sanctionnant une formation universitaire d'une durée minimum de 150 heures, adaptée au processus de médiation et à l'intégration des techniques de médiation, portant sur le droit, notamment le droit des successions, la psychologie et la sociologie".

69 Article LP2 B 2-4.

70 Taking the text literally, it would seem that to protect independence a land mediator can have no other employment.

### ***E Misuse of Title***

The title of land mediator can be used only by those who fulfil the conditions imposed by the legislation. Consequently whoever exercises the role without having the relevant permit commits an offence.<sup>71</sup>

### ***F The Exercise of the Profession of Land Mediator***

The legislation indicates that the remuneration that the land mediator will receive must be a clear and certain<sup>72</sup> sum and be within the tariff limits fixed by order of the Council of Ministers.<sup>73</sup>

In order to obtain free and informed consent from those who will use the services of the land mediator, the land mediator must before commencing the task advise those persons by way of free advice as the nature of the service and also the basis of their remuneration.<sup>74</sup> A mandate is required which considers the nature and extent of the task undertaken and its duration.<sup>75</sup>

After signing the mandate the client has the opportunity to reject it by registered letter with notice of receipt within seven days on Tahiti and within 30 days for the outer islands of French Polynesia, holidays included.

## ***IV CONCLUSION***

The action of the French Polynesian legislature in relation to regulating land disputes had three objectives:

- (1) To propose a way for Polynesian litigants to settle disputes amicably in addition to access to the Land Tribunal and to the mediation process which is part of it. That appears to be better suited to the particularities of land disputes in French Polynesia;
- (2) To establish good judicial practice to control the number of land disputes likely to divert the energy of the courts;

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71 The provisions of art 433-17 of the Penal Code are applicable.

72 Article LP 9.

73 Article LP 10.

74 In respect of a maximum tariff fixed by the decision of the Council of Ministers.

75 This mandate must, to be valid, be written and in French and if the client so wishes also in one of the Polynesian languages.

- (3) To give greater responsibility to the parties to play a central role in the procedure, particularly, by attempting amicable resolution of the dispute.

By way of conclusion it is proposed to complete the system of methods of friendly resolution of land disputes by creating a land arbitration court in French Polynesia. That is to say a court whose existence and principal rules of operation are integrated into the provisions of the Code of Civil Procedure of French Polynesia.

One of the objectives sought is to offer to the Polynesian litigant an alternative complementary to resorting to the Land Tribunal but one that is itself institutionalised. This arbitral tribunal finds inspiration both in the early Tahitian courts (which until 1945 dealt with land matters) but also in more modern institutions as are found in the Anglophone South Pacific.

At a formal level its establishment would involve only a relatively simple rearranging of the provisions of Book 7 (arts 967 and following) of the Code of Civil Procedure of French Polynesia.<sup>76</sup>

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<sup>76</sup> It is possible in this way to harmonise these provisions with those of decree no 2011 – 48 of 13 January 2011 which related to the reform of arbitration in France and which modernised arbitration both domestically and internationally.

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