

# Kluwer Mediation Blog

## **The enactment of the French Decree No. 2012-66 of January 20, 2012 related to the amicable settlement of disputes: some progress in ADR in France?**

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This Decree establishes in the French Code of Civil Procedure a Chapter dedicated to the amicable resolution of disputes outside the Courts. Said Decree defines the rules applicable to each of the modes providing for amicable resolution of disputes.

The Decree No. 2012-66 (the Decree) mainly enacts rules dealing with certain aspects of mediation in civil and commercial matters pursuant to the European Directive 2008/52/CE of May 21, 2008 (for the full text of the Decree: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000025179010&dateTexte=&categorieLien=id#> in French).

The Decree begins by giving a definition of conventional - as opposed to judicial - mediation and conciliation: it is a structured process whereby one or more parties attempt to reach an out-of-court settlement aiming at resolving their disputes amicably, with the assistance of a third party chosen by them who accomplishes his/her task with impartiality, appropriate qualifications and care (Art. 1530). Conventional mediation and conciliation are subject to the principle of confidentiality as prescribed by the law (Art. 1531).

As regards conventional mediation, the Decree provides that the mediator can either be an individual or an institution, in which case the latter shall appoint a person capable of exercising the task referred to above (Art. 1532). The mediator shall possess the qualifications necessary for the dealing of the dispute and, as the case may be, experience and training adequate to the practice of mediation (Art. 1531).

The Decree also contains an important provision regarding ratification by the Court of the agreement reached in mediation that settles - in full or in part - the dispute: not only all parties must agree to ratification when filing the related request in Court, but also enforcement of a mediation agreement can take place in a Member State of the European Union when said agreement has already been declared enforceable in another Member State pursuant to the conditions laid down by the Directive referred to above (Art. 1534-1535).

Apart from conciliation - also dealt in the Decree but not examined here - the really

new mode providing for amicable out-of-court settlement is the “participative proceedings” (*procédure participative*) which shall be examined more in detail below.

Participative proceedings take place according to a conventional procedure whereby a settlement is sought and is followed, the case may be, by a judicial procedure (Art. 1542). Participative proceedings are defined as an attempt by parties, assisted by their lawyers (attorneys at the Bar), to reach a mutual agreement settling their dispute, according to the terms and conditions set out in a contract signed by both the parties and their lawyers (Art. 1544).

Parties exchange briefs and exhibits through their respective attorneys (Art. 1545).

Parties to participative proceedings can also call upon an expert, chosen by mutual agreement and who shall disclose any conflict of interest he may have regarding the parties (Art. 1548). The expert shall act with diligence and impartially and abide by the rules of due process (Art.1549). At the end of his/her task, the expert submits a report to the parties which can be filed in Court (Art. 1554).

If ratification of the agreement resulting from the participative proceedings is sought in Court, the participation contract shall be filed in Court on this occasion (Art. 1557).

Participative proceedings end either by the term fixed in the related contract, the early termination of said contract in writing by the parties assisted by their lawyers, or by the agreement settling the dispute in full or in part (Art. 1555).

In case of failure of the parties to participative proceedings to reach an amicable settlement of their dispute, any party, through its attorney, must file its case in Court within three months from the end of said proceedings and notify the other party’s attorney (Art. 1563).

More generally, the agreement reached by the parties to a mediation, conciliation or participative proceedings may be enforced in Court which can review its terms (Art. 1565).

French Law is now supplemented by conventional mediation, namely mediation that is not court-ordered. The definition provided in the Decree does not bring any new elements as to the posture and role of the mediator. It must be pointed out, however, that an institution (such as a Chamber of commerce for example) can be considered as a mediation body in so far as it designates an individual as mediator. Ratification and enforcement of mediation agreements bring more predictability and certainty in the mediation process from a legal and judicial perspective: this warrants the legality of the agreement and enable a party benefiting from said agreement to enforce it against a recalcitrant party.

As regards participative proceedings, these constitute a totally new mode providing for settlement of disputes. The mediation community may define said method as a mediation controlled by lawyers without the assistance of a neutral. It is inspired from Collaborative Law, widely practiced in the United States and Canada and to some extent in Ireland and United Kingdom (a to a lesser degree in Continental Europe). However participative proceedings differ from Collaborative Law since the lawyers

who participate to amicable discussions with their clients do not withdraw from their function if the negotiations fail. Such an approach raises the issue of the necessary skills that are required from the lawyers who are necessarily engaged in reasoned negotiations (i.e. negotiations based on interests and needs) as opposed to positional bargaining.

Progress in ADR in France shall therefore be noted. Mediation remains nevertheless rather limited, especially in certain jurisdictions and Courts. One may hope that conventional mediation, as legally embodied, and the new tool of participative proceedings will boost parties and practitioners to resort to these amicable and/or alternative means of resolving disputes.

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