

Entry into force of the decree of January 20, 2012 on the amicable resolution of disputes

Decree n°2012-66 of January 20, 2012, that became effective on January 23, 2012, was enacted further to Ordinance of November 16, 2006 that transposed Directive 2008/52/EC of May 21, 2008 on certain aspects of mediation in civil and commercial matters, and further to Law n°2010-1609 of December 22, 2010 that created the participative process agreement.

1. Legal framework regulating the conventional mediation and conciliation

These two dispute resolution techniques, so far governed by ordinary general laws, will henceforth be subject to a specific legal regime.

As such, newly created Articles 1530 and 1531 of the French Code of Civil Procedure (“FCCP”) stipulate that conventional mediation and conciliation are structured processes:

- designed to find an amicable settlement outside legal proceedings;
- subject to confidentiality;
- Involving a third party *“who shall perform his/her/its assignment impartially, skillfully and diligently”*.

The Decree of January 20, 2012 (“Decree”) specifies that the mediator, who can be a natural person or a legal entity, must be able to prove that he/she/it *“possesses, through his/her/its past or present activities, the skills required by the nature of the dispute or that, as the case may be, he/she/it has the training experience or expertise suited to conducting the mediation”* (Article 1533 2 of the FCCP).

Therefore, the qualifications of the mediator will primarily depend on the nature of the dispute.

The conciliator is a sworn court official who performs his/her obligation on a voluntary basis and who must have a legal experience of at least 3 years. He/she is appointed pursuant to an order of the First President of the Court of Appeals, after consultation with the Public Prosecutor, upon proposal of the trial judge (Articles 1, 2 and 3 of Decree n°78-381 of March 20, 1978 on judicial conciliators).

2. Clarification on the participative process agreement

Reminder of the purpose of the participative process agreement:

The participative process was introduced by Article 37 of the Law n°2010-1609 of December 22, 2010 on the enforcement of court decisions, the conditions of exercise of certain regulated professions and court experts.

The participative process agreement is an agreement whereby the parties to a dispute which has not yet been referred to a judge or arbitrator undertake to work together in good faith to resolve their dispute amicably (Article 2062 of the FCC).

This agreement is entered into by the parties, who must be assisted by their respective lawyer, for a fixed-term period.

So long as the participative process is underway, any recourse brought by either party before the judge in relation to the dispute will be held inadmissible. Yet, if a party fails to enforce the provisions of the agreement, the other party is entitled to submit the dispute to the judge (Article 2065 of the FCC).

Further details provided by the Decree of January 20, 2012:

Pursuant to the Decree, the production and communication of submissions and exhibits by and between the parties must take place through the parties' lawyers, in accordance with the provisions set forth in the participative process agreement.

When an exhibit is produced, a list of exhibits must be drawn up (Article 1545 of the FCCP).

If the parties do not reach an amicable settlement, the exhibits produced and communicated in the framework of the participative process can be subsequently used and relied upon before the judge.

Indeed, when the parties have only settled part of their dispute, they may refer the matter to the judge and ask the latter to rule on the unsettled aspects of the dispute, either in compliance with the procedural rules applicable before the judge, or pursuant to a joint petition of the lawyers who assisted the parties during the participative process.

Similarly, when the parties are unable to find a settlement, the matter can be referred to the judge in the same conditions as explained above.

If the parties so wish, the case can be directly adjudicated at a pleading hearing, thereby allowing to avoid a new conciliation stage imposed in certain types of legal proceedings or a long case-management stage should the case be referred to the Court of First Instance.

As such, even if the parties who entered into a participative process agreement are unable to find an amicable settlement or only agree on a part of the dispute, the fact that they conducted negotiations can subsequently

give them access to fast-track legal proceedings if they so wish.

3. The settlement agreement becomes enforceable once it has been approved by the judge

The Decree created Article 1565 of the FCCP according to which *“To become enforceable, the agreement reached by the parties to a mediation, conciliation or participative process may be submitted to the approval of the judge who is competent to hear the dispute.”* »

The request for approval must be filed with the judge through a petition.

The Decree therefore allows a settlement agreement to become enforceable, thereby considerably strengthening the efficiency of amicable dispute resolution techniques.

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