Litigation in Spain: Critical Developments

Mandatory negotiation as a pre-requisite for admission of civil complaints

1. Introduction

Organic Law 1/2025 of January 2 "On Measures related to Efficiency of the Public Service of Justice" (hereinafter, the "Law") implements extensive changes to the Spanish judicial system extending to both court structure and procedures. The law came into effect on April 3, 2025 and is only applicable to those claims brought in court after that date. This article will focus exclusively on those changes contained in the Law's Article 2, of Title II, Chapter 1 termed "Adequate measures for extra-judicial dispute resolution" ("MASCs" as per the term in Spanish). While the term MASC would, at first glance, seem to overlap with certain procedures often referred to as alternative dispute resolution (ADRs) in English, it is actually much broader and covers "any type of negotiating activity recognized in this or other laws, national or regional, to which the parties resort to in good faith with the purpose of finding an extra-judicial solution to the same, whether by themselves or with the intervention of a neutral third party". Summarily stated, Article 2 indicates that a MASC is any "negotiating activity" carried out in good faith and recognized by law. From a procedural point of view, what is most striking about the Law is that it establishes that a MASC must be demonstrated as having been attempted by a claimant before most civil (and for purposes of this article, commercial) claims will be admitted by the relevant court.

Before entering into a more detailed analysis, we should point out that the Law is in keeping with the European Mediation Directive (Directive 2008/52/EC of the European Parliament and Council) mandating member countries to encourage mediation as a cost-effective and efficient measure both for the judicial system and potential litigants. This Directive did not lay out any specific model or measures to be undertaken and left each member country to its own devices. Most countries, while promoting mediation and similar measures, fell short of making these mandatory and, some 17 years later, the Directive has been largely judged as ineffective (see Giuseppe De Palo, "From Promise to Practice, Resolving the Mediation Paradox in Europe", June 16, 2025 www.lexology.com/firms/jams/giuseppe_de_palo). Only three countries (Italy, Greece and now Spain) went so far as to impose some level of mandatory resort to mediation or negotiation. This limited progress across the European Union has been largely attributed to the difficulty of finding the right balance between constitutionally protected access to the courts and the need to alleviate an overburdened judiciary. The "Law on Measures related to Efficiency of the Public Service of Justice" includes mediation as one of the required MASCs, but also admits a number of others.

The Law is generally applicable to all manner of international disputes brought before the Spanish courts, and while covering most commercial matters, it does specifically exclude, amongst certain others, the MASC requirement for protective measures and enforcement of judicial sentences.

2. Good faith attempt to negotiate as a pre-requisite for admission.

Article 5 of Title II of the Law establishes the fundamental provision that in order for most civil claims (and virtually all commercial claims, except for those referred to

above) to be admitted for judicial consideration, a claimant must demonstrate that it has previously resorted to "… any type of negotiation activity… to which the parties to a dispute resort to in good faith with the aim of finding an out-of-court solution to the dispute, either on their own or with the intervention of a neutral third party." This very broad language finds greater specificity in Article 5.1 in what appears to be a non-exclusive list of admissible "negotiation activities" and which includes: i) mediation, ii) conciliation, iii) the opinion of an independent third-party expert, iv) the presentation of a binding confidential settlement offer or v) "any other negotiating activity recognized by law". The first three listed MASCS, mediation, conciliation and the use of third-party experts are described in further detail in Articles 14 through 16 and Article 18 and a specific law on mediation has been in effect in Spain since 2012. Given their detailed treatment in the Law, these first 3 listed MASCS are unlikely to raise issues of interpretation for the courts when determining whether the parties' resort to them satisfies the requirements for admission. However, the fourth enumerated MASC, the binding confidential settlement offer, receives a much more succinct treatment in Article 17 and is more likely to raise issues of interpretation as we will see below, particularly when combined with the fifth catch-all MASC "any other negotiating activity recognized by law".

All MASCs are supported by Articles 6 through 13 which describe requirements for notification, attorney representation, tolling of the statute of limitations, confidentiality, evidence demonstrating negotiating activities, formalization of eventual agreements and the binding nature of the same.

In practice, prior to the enactment of the Law, litigants in Spain have shown little enthusiasm for dedicating time, cost and effort to mediation, conciliation or resort to independent third-party expert opinions. As to the fourth listed MASC, the "binding confidential settlement offer", while pre-trial correspondence and often ill-defined offers have long been common practice, it is questionable to what extent these practices may fall into the category of "binding confidential settlement offers" or even the catch-all MASC of "any other negotiating activity recognized by law" and these areas are likely to raise issues of legislative interpretation for the courts. Moreover, given their low cost and simplicity, we believe most future claimants will attempt to comply with the Law precisely by relying on the "binding confidential settlement offer" or simply alleging the more open-ended "negotiating activity recognized by law". Consequently, we will focus on these below.

3. <u>The binding confidential settlement offer</u>

The binding confidential settlement offer receives a relatively abbreviated description under Article 17. Article 17 states that the offer must be binding and therefore its acceptance by the other party is both irreversible and establishes what is essentially a contractual obligation, provided that such acceptance is communicated to the offeror within one month or such longer period as the offer may specify. Further, the offer and acceptance must meet certain formal requirements for admission by the court, including verifiable sending and receipt, the corresponding dates of each and the content of the offer itself. Article 17 suggests, and legal commentators confirm, as we will see below,

that the offer must constitute something more than the usual "shot-across-the bow" pre-trial communications typically used in Spain and elsewhere.

Like the other MASCS the Article 17 binding settlement offer is covered by the more general provisions described above (Articles 6 through 13) and particularly those provisions meant to ensure confidentiality. Article 9 prohibits the parties or their counsel from submitting the content of the binding settlement offer in evidence and, in the event of submission, precludes its consideration by the court, except in very specific cases, in particular i) when the litigants agree to its admission, ii) when required by considerations of public policy and iii) when required for the determination of costs after a sentence has been rendered (in particular Article 245 of the Civil Procedure Code).

The last of the above-mentioned exceptions reflects the legislators desire to make sure that the Article 17 offer is not used in bad faith, in particular the making of exaggerated and clearly unacceptable offers knowing that they will be rejected by the other party but which will allow the claimant to get over the Article 5 admission hurdle. The exception to confidentiality requirements which references Article 245 of the Civil Procedure Code, essentially permits the judge to access, post-sentencing, and consider the actual substance of the offer in determining the post-sentence award of costs. Where the offer is clearly unreasonable in light of the damages finally awarded, then the judge may determine that the offer was made in bad faith simply to overcome the Article 5 hurdle and moderate his award of costs accordingly. Similarly, the court may consider the fact that a party rejected an offer largely in line with the court's sentence.

4. Negotiating Activity in general as complying with the MASC requirement

While the Law does establish four relatively clear forms of MASCs acceptable for getting over the hurdle of admission, it by no means makes clear that these are exclusive. In fact, Article 5.1 specifically admits any other type of "negotiating activity" permitted by law. This broad catch-all language does not seem to exclude communications that are less defined than those described in Article 17 for the binding confidential settlement offer and leave very extensive interpretational space for the courts when determining the admission of claims. For example, are extensive exchanges of correspondence seeking to find a mutually acceptable settlement sufficient "negotiating activities" even though they do not include a clear offer and acceptance? For the moment, litigants will have to wait for the courts to interpret this open-ended provision.

5. Initial interpretation by professional organizations

Given the recent nature of the Law and the fact that no significant case law on the matter has been generated yet, a number of professional and judicial organizations, including bar associations, provincial courts and others, have issued their preliminary interpretations to serve as guidance for claimants. Of these organizations, the guidance offered by the National Association of Court Secretaries ("Letrados de la Administración de Justicia" in Spanish) is perhaps the most detailed and relevant. Court secretaries serve as the gatekeepers to judicial review, revising claims submitted and deciding their conformance to formal and certain procedural requirements prior to

passing them on to the judge for consideration. The court secretaries will be responsible at first instance for determining a claimant's compliance with the Law's requirement of attempted "negotiating activity".

In particular, it is interesting to note that the National Association of Court Secretaries, (the "Association") recognizes the past reticence of litigants to resort to mediation, conciliation or third-party opinions and even goes so far as to recommend the binding confidential offer as a "practical and flexible tool for initiating a negotiation, permitting the parties to explore solutions without committing themselves definitively prior to reaching an agreement." Surprisingly this language "without committing themselves definitively prior to reaching an agreement" would seem to contradict the very definition of the binding confidential settlement offer. In any case, it does suggest that in the future court secretaries will be lenient in their interpretation of the Article 17 binding settlement offer, perhaps even going beyond what the legislative language indicates, and converting the offer into more of an "initial proposal" (the Association's term) to negotiate, provided that that it identifies the parties and the overall nature of the dispute or, as per the Association's language, a "generic descriptions".

From a practical point of view, this apparent leniency on the part of the Association is understandable. When reviewing evidence of an attempted MASC and, particularly given their confidential nature, court secretaries will not be in a position to view the actual content, and can only rely on very "prima facie" evidence as to their existence. This may well explain why the court secretaries are, in contrast, quite strict on the documentary evidence to support some level of verifiable communication suggesting the existence of a MASC and, more particularly, a binding confidential settlement offer or attempts at other good faith negotiating activity. In particular, the Association indicates that court secretaries will look to clearly indisputable communications such as notarial delivery, the Spanish "Burofax", certified letters with acknowledgment of receipt and insist on multiple attempts to engage the opposing party. The Association also specifies that court secretaries are likely to admit e-mail where this has been used by the parties previously in the ordinary course and even SMS communications, presumably according to the same criteria. On this last point, it should be pointed out that certain provincial courts have rejected the use of text messages and e-mail in their preliminary guidance (Courts of Zamora and Logroño).

6. <u>Our impressions:</u>

While the Law clearly require parties to engage in some level of verifiable pre-trial negotiation, past practices in Spain suggest that the Law will do little to further the use of mediation, conciliation or third-party expert opinions. These methods will likely continue to be viewed as time-consuming, costly and offering little security for success. Our belief is that potential claimants will simply seek to comply with the requirements of the Law's Article 5 by giving greater formality to their pre-litigation communications in an attempt to fit them within the definition of binding settlement offers or, more generally, "negotiating activities". Further, litigants are likely to be more careful in documenting these communications to ensure they pass muster with court secretaries. As legal commentators have suggested, and we agree, these methods are relatively low cost and simple and are largely in keeping with past practices.

Although the jury is still out in Spain as to whether the Law has found the right balance between constitutionally protected access to the judiciary and encouraging extra-judicial settlements, what is clear is that both potential claimants and the courts will have to take additional steps prior to advancing any litigation. Claimants will have to engage in greater documentation and formalities to demonstrate pre-claim "negotiation activities" and the courts, and more particularly court secretaries, will have to spend more time in reviewing the related documentation to determine whether the Law's Article 5 requirement have been met.

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