

THE IMPACT OF SPANISH ALTERNATIVE DISPUTE RESOLUTION (ADR) IN AGREEMENTS BETWEEN COMPANIES

Important considerations in the negotiation of agreements or at the pre-litigation stage

The recent procedural reform.¹ has made it mandatory in the civil and commercial sphere, with some exceptions, to take recourse to **appropriate Spanish alternative dispute resolution (ADR)** before bringing proceedings in the Spanish courts.

What is ADR and what forms are there?

ADR has been defined as any negotiating activity to which parties to a conflict turn in good faith to find an out-of-court solution.

They are a prerequisite for initiating legal proceedings in Spain in civil and commercial matters, but not when the parties have submitted to arbitration. Among the exceptions to this requirement, it is worth highlighting:

- Insolvency proceedings;
- Civil protection proceedings for fundamental rights;
- Proceedings in which a public sector entity is a party;
- Special collection proceedings;
- The filing of claim for enforcement;
- Applications for interim injunctions prior to the claim; and
- Applications for preliminary inquiries.

No single form of ADR has been established, but the legislator has provided for various mechanisms, such as mediation, conciliation, the neutral opinion of an independent expert, negotiation between the parties (with or without lawyers), the formulation of a binding offer and the use of a collaborative law process.

Key issues

Mandatory nature:

- As of 3 April 2025, it is mandatory to take recourse to a form of ADR in civil and commercial matters before going to the Spanish courts, with certain exceptions.
- It does not apply to agreements subject to an arbitration clause.

Impact on agreements

- The possible inclusion of an “ADR clause” in new agreements should be assessed on a case-by-case basis, avoiding pre-established practices.
- It should be considered that while its inclusion brings certainty to the legal relationship, in return it eliminates flexibility when a dispute arises. The decision established in the agreement is binding and may not be the best option when the actual dispute arises.
- In pre-existing agreements, if there was a pre-court dispute resolution clause, we recommend that it be applied in compliance with the requirements of the new ADR regulation, avoiding redundancies.
- It is important to remember that the position of the parties during ADR is confidential, but can be assessed later when setting costs.

¹ Organic Law 1/2025, of 2 January, on efficiency measures in the Public Justice Service.

Who chooses the applicable ADR and when?

The parties are free to decide what type of ADR they opt for. The choice can be made in the agreements or later when the dispute arises.

If the dispute arises and the parties do not agree on which ADR to use, it is important to know that the one proposed first will be used.

Should we include the type of ADR in our new agreements?

It is not mandatory to agree on the type of ADR in advance. If we do so, we will add legal certainty to the relationship, but on the other hand, we will lose flexibility and strategic options when the dispute arises.

If we want to prioritise certainty, it is advisable to assess the possibility of establishing different types of ADR (i.e. depending on the nature or amount of the dispute), and if it is advisable to explicitly agree that email will be a valid means to document compliance with the requirement to go to ADR.

What should we do if any pre-existing agreements contained a formula to resolve the dispute before resorting to the courts?

It will be advisable to take advantage of the terms stipulated in these agreements to avoid having to undergo two negotiation processes prior to the court proceedings.

To this end, we should adopt any necessary measures to comply with the prerequisites established by the new ADR regulation. For example, we should:

- specify the subject-matter of the dispute, which must be the same as the subject-matter of the ensuing proceedings.
- document in writing the attempt at resolution via ADR.

What do we need to know from now on in any disputes at a pre-litigation stage?

Should a dispute arise between the parties to an agreement, we must now ask ourselves if it is likely that the dispute will culminate in court proceedings. If the answer is yes, we would be wise to ask ourselves whether it is in our interest to proceed with this dispute via ADR immediately or whether to wait.

What effects does the opening of the ADR process have?

A party's request to initiate ADR interrupts the limitation periods or suspends the expiry periods for actions. To this end, it is essential that the application adequately defines the subject-matter of the dispute.

The confidential nature of the ADR process

The negotiation process and the documentation used are confidential, unless the parties, by mutual agreement, waive this obligation. Therefore, the documentation exchanged will not be admissible as a means of evidence in the court proceedings.

The obligation of confidentiality applies to the parties, to the lawyers involved (who, in any case, will be subject to the duties of confidentiality arising from professional secrecy) and, as the case may be, to any neutral third party involved in the proceedings.

Information on whether or not the parties resorted to negotiation and the subject-matter of the dispute defined during the ADR will not be confidential.

What would be the impact of any incidents between the parties during the ADR process?

The parties' position in the negotiation process may be taken into account for the purposes of assessing court costs, during which the confidentiality obligation is legally waived.

What happens if ADR is successful?

The agreement reached during ADR will be binding on the parties, which prevents the filing of a subsequent claim on the same subject-matter.

The agreement must be documented in writing. In order to give the agreement the status of an enforceable instrument, the parties may be obliged to execute it as a public deed. If the counterparty fails to comply with the request for execution as a public deed, the deed may be executed unilaterally by the requesting party. Judicial approval may be an alternative when ADR takes place by referral from existing court proceedings.

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