

Ignacio Santabaya, Silvia de Paz, Celia Cañete, Rocio Acebal and Pablo Mayor

Procedural efficiency, alternative dispute resolution and costs in civil and commercial matters

New developments contained in the Draft Organic Law on the efficiency of the public service of justice and actions for the protection and defence of the rights and interests of consumers and users.

1. Introduction

On 22 March, the processing of the Draft Organic Law on the efficiency of the public service of justice and collective actions for the protection and defence of the rights and interests of consumers and users (the “**Draft**”) began in the Congress of Deputies. The Draft (i) proposes the incorporation of a series of measures that seek to guarantee procedural efficiency in civil and commercial matters; (ii) promotes the use of alternative dispute resolution measures; and (iii) amends the general regime on costs, introducing new criteria for their imposition by the courts.

This Legal Briefing will provide an overview of the new developments in civil and commercial matters, which will be implemented, if the Draft is approved, through the amendment of several provisions contained in the current text of Law 1/2000, of 7 January, on Civil Procedure (“**LEC**”).

2. Procedural efficiency in civil matters

A. Oral proceedings

The Draft adds a new procedure for proposing evidence that aims to streamline oral proceedings. One of the main new features is the granting to the parties of a new five-day period during which both parties may propose the evidence that they wish to submit. Within this period, the claimant may raise arguments regarding the objections raised by the defendant in their statement of defence (amendment of Article 438(8) of the LEC).

In addition, two new subsections have been added to this provision. Within a period of three days of the service of the written statement of evidence, the parties may submit the corresponding objections (amendment of Article 438(9) of the LEC). Once this period has elapsed, the court will issue a decision (subject to appeal for reconsideration with suspensive effects) on the challenge to the value of the claim, the objections raised, the admissibility of the proposed evidence and the appropriateness of holding a hearing. It may be agreed that the proceedings be closed for judgment if the holding of a hearing is considered unnecessary (amendment of Article 438(10) of the LEC).

Concerning the conduct of the hearing, the Court may allow the parties to appear by means of videoconference (amendment of Article 443(1) of the LEC). Similarly, judges may issue oral judgments which will subsequently be notified to the parties via audiovisual media, together with the testimony of the written text (amendment of Articles 210(3) and 210(4) of the LEC).

Finally, regarding claims in which, in addition to an eviction claim, claims for overdue and unpaid rent as well as claims brought against the guarantor or joint guarantor are brought, elements of the judgment relating to such joined claims will be considered *res judicata* (amendment of Article 447(2) of the LEC).

B. Judicial auction

Regarding the electronic judicial auction, the Draft introduces relevant amendments to speed up its processing. Concerning post-auction stages necessary for the approval of the sale, awarding and delivery of the goods, the Draft provides that the commencement of the calculation of the deadlines for the payment of the balance of the price and the transfer for the improvement of the bid will take place automatically as of the closing date of the auction (amendment of Article 650 of the LEC). Another noteworthy new feature introduced by the Draft is that the enforcing party may take part in the auction, even if there are no other bidders, without the need to deposit any amount (amendment of Article 647(2) of the LEC).

3. Alternative dispute resolution measures in civil matters

In accordance with the Explanatory Memorandum of the Draft, the introduction of suitable non-judicial dispute resolution measures into the Spanish legal system seeks to provide a sustainable public service of justice by promoting negotiation between the parties in order to reduce litigation. Article 2 of the Draft provides that these measures are “*any type of negotiating activity, as defined in this or other laws, to which the parties to a conflict resort in good faith with the aim of finding an out-of-court solution to the conflict, either by themselves or with the intervention of a neutral third party*”. In other words, Article 2 refers to alternative dispute resolution (“ADR”) measures.

Title II of the Draft is devoted to the regulation of ADR measures and will be applicable to civil and commercial matters when the parties expressly or tacitly submit to the provisions of the Title and/or when at least one of the parties is domiciled in Spain and the negotiation takes place on Spanish territory (Article 3 of the Draft). Matters relating to labour, criminal and insolvency law, and matters in which one of the parties is a public sector entity, are excluded.

A. The prior recourse to alternative dispute resolution measures as a prerequisite for civil and commercial actions.

The Draft provides that parties may freely resort to ADR to agree or settle their rights and interests, provided that (i) what has been agreed is not contrary to the law, good faith or public policy; and (ii) the dispute does not concern matters which the parties cannot resolve through, or have been excluded from, mediation (Article 4 of the Draft).

However, the Draft provides that, as a general rule, the parties must resort to ADR in order to be able to bring a claim. Accordingly, it will be deemed that the parties have complied with the ADR requirement when (i) the parties have submitted the dispute to mediation, conciliation (including private conciliation, under Article 15 of the Draft), or to the neutral opinion of an independent expert; (ii) a confidential binding offer has been made; (iii) “*any other type of negotiation activity*” as legally defined, which complies with the provisions of Chapters I and II of Title I of the Draft or a sectoral law, has been employed (e.g. conciliation before a notary public or registrar, under Article 14 of the Draft); or (iv) the parties have directly negotiated, with legal representation in the cases in which the Draft establishes it as mandatory. The dispute will be deemed to be the same as the dispute in the subsequent litigation if it is identical to the subject matter of the ADR, even if the claims asserted in the litigation vary (Article 5(1) of the Draft).

The decision to resort to ADR may be made by one of the parties, by both parties by mutual agreement, or by a decision of the court or the court clerk (*letrado/a de la Administración de Justicia*). In the event that both parties propose the use of ADR, but there is no agreement as to which type, the one proposed first will prevail (Article 5(4) of the Draft).

Voluntary jurisdiction proceedings and actions for the civil judicial protection of fundamental rights are excluded from this procedural requirement, as well as certain actions related to forced institutionalisation,

summary protection of tenancy or possession by someone who has been dispossessed of an object or right or whose enjoyment of it has been disturbed, demolition of objects in ruins, protection of minors and measures arising out of parent-child relationships (Articles 5(2) and 5(3) of the Draft).

B. Prescription and expiry of the limitation period

The Draft provides that the request by one of the parties to the other party to resort to ADR will interrupt the limitation period, or stay the expiry of the action as of the date on which the attempt at physical communication to the personal domicile or place of work of the requested party was recorded, or electronically through the electronic means used by the parties in their previous communications. If within thirty calendar days of the receipt of the proposal, a meeting aimed at reaching an agreement has not been held, or if no written reply has been received, the calculation of the time limits shall be resumed; and the procedural requirement for the filing of the claim will be fulfilled. For the request to be effective, it must adequately define the subject matter of the negotiation to be submitted to ADR (Article 7(1) of the Draft).

The Draft establishes that, in order to comply with the requirement of admissibility of an eventual claim, the parties will have a period of one year from the receipt of the proposal if no response is received or, as the case may be, from the termination of the proceedings without an agreement. This period shall be 20 days if interim measures have been adopted (Article 7(2) of the Draft).

C. Negotiation process

The Draft establishes that the parties may agree that all or some of the proceedings may be carried out electronically, provided that the identity of the parties and the applicable rules are guaranteed (Article 8(1) of the Draft).

Both the process and the documentation used in it will be confidential with regard to the parties and, where appropriate, the neutral third party that intervenes, with the exception of the information relating to the attendance of the parties and the subject matter of the dispute (Article 9 of the Draft). This confidentiality extends, where appropriate, to the making of a binding offer by one party to another (Article 17(3) of the Draft) and to the opinion of an independent expert on the dispute (Article 18(2) of the Draft). However, the parties to the dispute as well as the neutral third party may provide documentation arising out of or relating to the process, or be requested to do so, if (i) all parties have extended an express and written waiver; (ii) the challenge to the assessment of costs and the request for an exemption from or reduction of costs is being processed, and only for this purpose; (iii) the judges of the criminal jurisdictional order request it through a reasoned decision; or (iv) it is necessary for reasons of public policy (Article 9(2) of the Draft).

The Draft establishes that the negotiation must be documented through the intervention of a neutral third party, who will issue, at the request of either of the parties, a verifying document. In the absence of such intervention, it will be recorded through a document drafted to that effect signed by the intervening parties (Article 10 of the Draft).

The process of initiating an ADR process will be terminated without agreement in the event that (i) thirty calendar days have elapsed since the receipt of the proposal without a first meeting or contact having been held, or without a written response having been obtained; (ii) three months have elapsed since the date of the first meeting without an agreement having been reached, unless the parties agree to continue the negotiation process by mutual agreement; or (iii) one of the parties notifies the other, in a reliable manner, that it is terminating the process (Articles 7(1) and 10(4) of the Draft). In addition, special provisions have been included regarding consumer matters (among others, the 6th and 7th Additional Provisions of the Draft).

In the event that the negotiation process is initiated through the presentation of a binding offer by one of the parties to the other, the offer will be deemed to have lapsed (and, therefore, the requesting party

will be considered to have complied with this procedural requirement) if it is rejected or not accepted by the other party within a period of one month or, where appropriate, such longer period as the requesting party may have granted (Article 17(4) of the Draft). In the event that the parties have mutually appointed an independent expert to give a non-binding opinion, the ADR procedure will conclude if either party does not accept such opinion (Article 18(5) of the Draft).

D. Agreement

In the event that the negotiation process ends in an agreement, said agreement will be binding on the parties. Consequently, they will not be able to file a claim with the same subject matter. The only legal remedy to which the parties would have access, under the provisions of the Draft, would be a possible action for nullity based on the grounds that invalidate contracts (Article 13 of the Draft). In the event that the agreement reached is partial, the parties may resort to litigation regarding the issues in respect of which the dispute remains (Article 4(1) of the Draft).

The parties may notarise the agreement and, when required by law or when the negotiation process has been initiated by a referral from the court, they may request judicial approval of the agreement. The notarisation, approval or, as the case may be, certification of conciliation in the registry, will convert the agreement into an enforceable title (Article 12 of the Draft).

E. Intervention by a neutral third party

Although the role of the neutral third party has not been defined in the Draft, the Government has been called upon to submit a draft law regulating the status of this role within a period of one year of the possible entry into force of the law (4th Additional Provision). The Draft provides for the possibility that the costs arising from the new regulation on ADR may be borne, in whole or in part, by public funds (2nd Additional Provision).

F. Ordinary proceedings

The Draft introduces the need to attach a description of the prior negotiation process carried out, as well as the supporting documents, in those cases in which this is required as a procedural requirement. The claim will not be admissible if these circumstances are not stated and the appropriate documents are not attached (amendment of Articles 399(3) and 403(2) of the LEC).

Once the evidence has been admitted, the Draft authorises the judge to consider the possibility of referring the dispute to ADR. In the event that the parties agree on the referral, it will be agreed through an order which may be issued orally. The negotiation activity must take place during the time between the end of the preliminary hearing and the date set for the hearing, which may be extended once at the request of the parties (amendment of Article 429(2) of the LEC).

Similarly, in the event that the parties reach an agreement, they must inform the court so that it can order the proceedings to be closed, without prejudice to the request for judicial approval beforehand. In the event that the procedure followed to reach the agreement was a conciliation before a notary or registrar, it will be verified through the deed or registry certificate, without the need for judicial approval (amendment of Article 429(2) of the LEC).

G. Oral proceedings

The Draft also provides that, before the taking of evidence in the oral proceedings, the court may raise the possibility of referring the dispute to ADR, provided that it reasonably considers that agreement between the parties is possible, and the court clerk has not attempted a prior referral. If all parties agree, the proceedings shall be stayed through an order, which may be issued orally. The negotiation must take

place within the maximum time limit set by the court, which may be extended by agreement between the parties (amendment of Article 443 of the LEC).

If an agreement is reached, the court shall order the proceedings to be closed, without prejudice to the parties having to apply for judicial approval beforehand. If the parties have not reached an agreement, the court shall allow the parties to make clarifications and establish the disputed facts (amendment of Article 443(3) of the LEC). If there is no agreement, the evidence previously admitted shall then be examined (amendment of Article 443(4) of the LEC).

H. Appeal

Concerning the processing of an appeal, Article 456(1) of the LEC has been amended to allow the court to refer the parties to any of the ADRs provided for by law if it reasonably considers that an agreement between them is still possible (amendment of Article 456(1) of the LEC).

I. Enforcement proceedings

The Draft provides that, at any stage of the enforcement proceedings, the parties may submit to ADR, in which case the course of enforcement will be stayed (amendment of Article 565(1) of the LEC). In addition, the Draft provides that the agreements reached by the parties via ADR which have been notarised will be enforceable (amendment of Article 517(2)(2) of the LEC).

J. Interim measures in support of arbitration

The Draft also provides for the possibility of applying for interim measures before the court, prior to initiating arbitral proceedings, provided that the requesting party proves that an attempt at an out-of-court settlement has been initiated via ADR (amendment of Article 722 of the LEC).

4. Costs in civil and commercial matters

A. Introduction of the concept of “abuse of the public service of justice”

The Draft adapts the new regulation on ADR to the current general regime on costs. The introduction of the concept of “abuse of the public service of justice” as a new assessment criterion for the imposition and assessment of costs is noteworthy in this regard.

Some examples of the concept of “abuse of the public service of justice” introduced by the Draft have been provided. These include (i) the irresponsible use of the fundamental right of access to the courts, unjustifiably resorting to the courts when a consensual solution to the dispute would have been feasible and evident; or (ii) cases in which the claims manifestly lack any justification, thus affecting the sustainability of the system. However, the Draft itself provides that further clarification by the courts will be necessary, especially concerning the concepts of recklessness and procedural bad faith (Recital V of the Draft).

The “abuse of the public service of justice” has been proposed as an exception to the general principle that costs follow the event, and allows the sanctioning of those parties who have unjustifiably refused to resort to ADR when this was mandatory (Article 7(3) of the Draft and amendment of Articles 247, 394 and 395 of the LEC). Similarly, the Draft permits the justification of an eventual request for the waiver or reduction of costs, taking into account the previous criterion; as is provided for in situations in which one party has made a proposal through an ADR process, the other party has not accepted, and the order made in court is substantially identical to the content of said proposal (amendment of Article 245(5) and introduction of Article 245 bis of the LEC).

Finally, no costs will be imposed when challenging the assessment of costs as excessive, except in cases of “abuse of the public service of justice” (amendment of Article 246(3) of the LEC). The Draft justifies this

decision on the basis that the criteria of the professional associations are often not followed by the courts and courts of appeal, together with the lack of regulation of the criteria governing fees and the complexity of the cases in matters of costs (Recital VI of the Draft).

5. Entry into force

The Draft provides that the entry into force of some of its provisions - among others, those relating to the regulation of ADR, the amendment of procedural laws, or the cost of the intervention of the neutral third party - is subject to the publication of the Statute of the Neutral Third Party. The remaining provisions contained in the law that may be approved would enter into force three months after publication in the Official State Gazette in some cases, or twenty days after such publication in others (the 23rd Final Provision of the Draft). The Draft also provides that, in those legal proceedings in progress at the entry into force of the law, the parties may decide by mutual agreement to submit to ADR (the 9th Transitional Provision, subsection 2, of the Draft).

In any case, the entry into force of the provisions introduced by the Draft is subject to the corresponding parliamentary procedure and the eventual approval of the law, meaning that the current text may be subject to amendments and corrections.

CONTACTS



Sonsoles Centeno
Partner

scenteno@perezllorca.com
T. +32 2792 6751



Ignacio Santabaya
Partner

isantabaya@perezllorca.com
T. +34 91 432 51 26



Beatriz García
Partner

bgarcia@perezllorca.com
T. +34 91 423 20 78



Natalia Olmos
Partner

nolmos@perezllorca.com
T. +34 91 423 67 15



Javier García Marrero
Partner

jmarrero@perezllorca.com
T. +34 91 423 66 38



Ana María Rodríguez
Partner

amrodriguez@perezllorca.com
T. +34 91 423 66 15



Fernando de la Mata
Partner

fdelamata@perezllorca.com
T. +34 93 404 70 58



Jordi Gras
Partner

jgras@perezllorca.com
T. +34 93 269 79 15



Jorge Masía
Partner

jmasia@perezllorca.com
T. +34 91 423 47 31



Silvia de Paz
Senior Associate

sdepaz@perezllorca.com
T. +34 91 423 66 59

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