Introduction to the Public Service of Justice Efficiency Measures Act 1/2025 of 2 January. "Suitable means" of resolving civil and commercial disputes as a prerequisite for claims to proceed in a court of law

Presentation of the "mini-trial" system, set to revolutionise civil procedural law.

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1. Presentation

In this preliminary explanation of Articles 2 et seq. of the Public Service of Justice Efficiency Measures Act 1/2025 of 2 January (the 'Act'), we are not going to exhaust, by far, the endless difficulties of interpretation and application that this (on this point) irresponsible law will generate from its entry into force. In particular, I will say nothing of the ostensible overlapping of the different "mini-trials" or of the disguised trade union battle that can be sensed at its base, and which the legislator has sought to tackle by means of the well-known technique of increasing the collective size of the billable business[1], but with exquisite care to ensure uniform treatment (*café para todos*)[2]. I will recall the rationale for the reform on this point, in the words of the explanatory notes: "the aim is to promote negotiation between the parties, directly or before a

[1] Remuneration for the provision of legal aid is thus extended to the negotiating activity. There is also a substantial modification in the area of costs: "to be able to include in the assessment of costs the intervention of professionals used by the consumer or user even when their intervention is not mandatory" (explanatory notes).

[2] "With alternative or suitable methods of dispute resolution, legal professions play a larger part, especially because of the negotiating role of lawyers, which is guaranteed in all cases, but also that of procurators, mediation professionals, employment legal executive, notaries and land registrars, as well as many other professionals.

neutral third party, on the basis that these means reduce social conflict, avoid overloading the courts and can be equally suitable for the solution of the vast majority of disputes in civil and commercial matters". One suspects what kind of (non-)jurist may be behind this verbosity when they write in the explanatory notes about the "importance (of) the reasons of the parties to build dialogued solutions in shared spaces". And yet they add that they "know the reality".

As a rule, neither civil nor commercial claims may be filed without prior conciliatory negotiation

2. Terms of art

For his future activity, every transactional or contentious civil or commercial lawyer will have to learn and become accustomed to the following terms: Suitable means of dispute resolution. Binding offer. Collaborative law proceedings. Independent third party expert involvement. Private conciliation. Collaborative law. Interest-based negotiation.

3. Suitable means for out-of-court resolutions

The structural concept of the new regulation is that of *suitable means of resolving civil and commercial disputes, even cross-border ones* (delimited by Art. 3(1) of the Act), with the exceptions listed, among which *insolvency matters* stand out (probably also the challenging of pre-insolvency agreements), possession trials (also anti-squatting trials?), applications for *enforcement proceedings* (also those based on non-judicial documents of title and foreclosures?; partly contradictory with the new Art. 19(3) of the Civil Enforcement Procedure Act3), applications for interim relief and negotiable instrument claim proceedings. In consumer matters, the (new) Articles 439(5) and 439 bis of the Civil Procedure Act (LEC) and the new Article 19 of the Consumer and User Protection Act (LGDCU), which will not be addressed in this paper.

Although in principle it could be *any type of negotiation activity*, its effectiveness for the purposes of this law depends on whether the means are recognised in this or other laws, national or regional. The characterisation as suitable means also requires that *the parties to a conflict come together in good faith with the aim of finding an out-of-court resolution to the conflict*, either by themselves or with the involvement of a neutral third party. Hence, the "means" do not require intermediation by a third party, nor is there a range of priorities. In fact, although it does not constitute an open-ended list, the *closing formula* that is the *simple party negotiation* residually absorbs any type of negotiation imaginable.

4. Types of suitable means

Suitable "means" will be mediation (Act 5/2012, 20th Final Provision), conciliation (by a court clerk, registrar [new Art. 103(2) of the Land Registry Act] or notary, and before the *new* justice of the peace, amended

[3] The new Article 19 LEC not to be confused with the original Article 19 of Act 1/2025.

Art. 47 LEC and Title IX of the Non-Contentious (In Re) Proceedings Act [LJV]), "private conciliation" (which in Arts. 15 and 16 overlaps entirely with mediation), *the neutral opinion of an independent expert* (Art. 18, which will have to await regulatory implementation, 30th Final Provision), if *a confidential binding offer* is made (Art. 17) or if *any other type of negotiating activity* is engaged in, recognised in this or other laws, national or regional, but which complies with the provisions of Sections 1 and 2 of this Chapter or in a sectoral law. In particular, the requirement will be considered fulfilled *when the negotiation activity is carried out directly by the parties, or between their lawyers under their guidelines and with their agreement*, as well as in those cases in which the parties have resorted to a *collaborative law process* - Article 19, a substitute for irregular mediation monopolised by lawyers "accredited in collaborative law"[4] (!) -. As can be seen, the costs of both are not the same (for fees, Art. 11 and 2nd Additional Provision[5]), so it must be presumed that the parties not wishing to waste time or pay third parties *will tend towards the minimal solution of negotiation,* in essence, logically the "binding offer". Although it is not so cheap: making a "binding offer" is a means of resolution that necessarily requires the involvement of a lawyer (!). It is better to resort to the *direct negotiating activity between parties*, with or without the assistance of lawyers.

5. Confidentiality

All the information generated in the negotiation process is confidential as per Article 9. However, among other exceptions, confidentiality is suspended when a challenge to the assessment of costs and application for release from or containment of costs is being processed, as provided for in Article 245 LEC and for these sole purposes; this exception cannot be relied on for other different purposes or in subsequent proceedings, for the reason that will be stated later.

6. The fundamental procedural effect

The legislator's desired objective is that an agreement is finally reached (Art. 12). But the fundamental procedural effect of the new system is that recourse to the means of resolution (when the agreement fails) constitutes a procedural prerequisite for civil claims to proceed in a court of law. In the civil branch, in general, in order for the claim to be able to proceed in a court of law, it will be considered a procedural requirement to have previously resorted to some suitable means of dispute resolution of those provided for in the article, and for this purpose Articles 264, 399(3) and 403 LEC are redrafted. In order to understand this prerequisite to be fulfilled, *there must be an identity between the subject matter of the negotiation and the subject matter of the litigation, even if the claims brought on that subject to a court of law, as the case*

[4] "It facilitates the structured negotiation of the parties assisted by their respective lawyers and allows, in a natural and organic way, the integration into the team, if deemed appropriate, of neutral third party experts. The fundamental principles of the collaborative process are: good faith, interest-based negotiation, transparency, confidentiality, teamwork - between the parties, their lawyers and any neutral third party experts who may participate - and the waiver of recourse to the courts by the lawyers involved in the process, in the event of not achieving a total or partial resolution to the dispute" (new Art. 19 LEC).

[5] Regions may regulate "as much as they deem appropriate to cover the cost of the involvement of the neutral third party".

may be, vary. It goes without saying that there will be a chaos of case law on the interpretation of this crude formula.

7. Proof of attempted negotiation and termination of the process without agreement

The negotiation activity or the attempt to negotiate must be documented. If a neutral third party has not been involved, the requirement of proof shall be fulfilled with any document signed by both parties, stating the identity of the parties and, where appropriate, the professionals or experts involved in advising them, the date, the subject matter of the dispute, the date of the meeting or meetings held, where appropriate, and a statement of compliance that both parties have been involved in good faith in the process. Failing this, *the attempt to negotiate may be evidenced by any document proving that the other party received a request* or invitation to negotiate or, where appropriate, a proposal, on such and such a date, and that such party had access to its full content. Where a neutral third party has been involved in managing the negotiating activity, the same shall, at the request of either party, issue a certificate. Article 10(4) identifies other contingencies for the termination of the process without agreement. Among them, when one of the parties writes to the other party terminating the negotiations, "putting on record the attempt at communication if that is the will of the other party".

8. Time limit for filing a claim

The parties must file the *claim within one year* from the date of receipt of the request for negotiation by the party to whom the request was addressed or, where applicable, from the date of termination of the negotiation process without agreement, in order for the prerequisite to proceed in a court of law to be deemed satisfied. Although it is not stated, this time limit is a limitation period, and can certainly be determined *sua sponte*.

9. Limitation period for applications for interim relief

Very important in *practice* is that, if *interim relief has been granted during the conduct* of the negotiation process, the parties must make the application before the same court that heard them within *twenty days from the end of the negotiation process without agreement or from the date on which the negotiation process must be understood to have ended* without agreement in accordance with this law. If the interim relief was granted *prior to the commencement of the negotiation process*, the twenty-day period to make the application shall be suspended and resumed, respectively, in the terms mentioned above, and reference is made to the new paragraph 2 of Article 730 LEC.

10. The initiative

The initiative of resorting to suitable means of dispute resolution may come from one of the parties, from both by common agreement or from a court decision or clerk referring the parties to this type of means (amended Art. 19(5) LEC: but it is voluntary for the parties). In the event that all the parties propose to resort to suitable means of dispute resolution and there is no agreement on which to use, the one that has been first proposed before will be used. Everything in this Article 5(4) is nonsensical. Why would a judge send one of the parties to mediation if said judge can just strike out a claim that does not satisfy the prerequisite to proceed in a court of law?

11. Good faith and the prerequisite to proceed in a court of law

It should be noted that recourse to the "means" must be in good faith to resolve a civil dispute. If not in good faith, or this good faith is not upheld in the negotiations, the effectiveness of the "means" is eliminated; that is to say, failed negotiation *do not yet allow resorting to a court of law,* because the means used have not been used correctly. There is no need to point out the chaotic procedural situation in terms of defences and motions to dismiss that such subtle considerations can produce. There are so many that here their existence need only be pointed out.

12. The substantive and procedural value of an agreement

An "agreement", which could be termed a settlement, has *prima facie* a quasi res judicata effect. But only apparently, because the interested party can claim in the subsequent trial that the agreement is contrary to the law, public policy or good faith, which returns to the court full *cognitio* (Art. 4(1)). And still, although the parties cannot file suit with the same subject matter, *an action for declaration of invalidity can be brought on the grounds that invalidate contracts, without prejudice to the objections that can be raised, as the case may be, in enforcement proceedings* (Art. 13). In validity "review" proceedings or in the same proceedings in which the original disputed claim is to be pursued?

13. Effects of the commencement of the process and of its termination without agreement

The request of one of the parties addressed to the other party to initiate a negotiation process through suitable means of dispute resolution, *in which the subject matter of the negotiation is adequately defined* (!), *will interrupt or suspend the limitation period* from the date on which the attempt to communicate this request to the other party at the address of the other party is documented. Note that not even an "out-of-court demand" within the meaning of Article 1973 of the Civil Code is required. The interruption or suspension will continue until the date of the signing of the agreement or the termination of the negotiation process without agreement. If the first meeting aimed at reaching an agreement is not held or if no written reply is received within thirty calendar days from the date of receipt of the request for negotiation by the party to whom it is addressed, or from the date of the attempted communication, if no such receipt occurs, the limitation period shall run once again. There are special rules if the means attempted are mediation (Act 5/2012 applies) or conciliation by a court clerk, notary or registrar (the LJV applies). Also for cases of *involvement of an independent expert*.

14. The abuse of process exception

Word of warning to all types of lawyers. If legal proceedings are initiated with the same subject matter as the previous negotiation activity attempted without agreement, *the courts must take into consideration the collaboration of the parties with regard to the agreed solution and the possible abuse of the public service of justice when deciding on court fees or charges*, and also for the imposition of fines or penalties, all in the terms established in the LEC, as "the abuse of the public service of justice is an exception to the general principle of the loser-pays principle". This abuse can be exemplified, therefore, in the *irresponsible use of the*

fundamental right of access to the courts by unjustifiably resorting to the same when *a consensual solution to the dispute* would have *been feasible and evident*, such as *litigation on unconscionable clauses* already conclusively resolved in the courts and with identical factual requirements and points of law, or in cases in which *the claims evidently lack any support, impacting on the sustainability of the system,* of which the citizenship is to be made a part. "Thus, although this new concept may present concomitant elements with other existing ones such as recklessness, abuse of rights or procedural bad faith, it complements them, offering a dimension of Justice as a public service by requiring an assessment by the Courts of the conduct of the parties prior to the proceedings, in the achievement of a negotiated solution" (explanatory notes). One would presume that the same will apply when an agreement has been reached, but thanks to the bad faith of one of the parties; in the subsequent challenge, the pre-proceedings conduct will have to be included in the charges.

Those who do not proactively cooperate in prior conciliation may be ordered to pay costs even if they win the lawsuit