Public Service of Justice Efficiency Measures Act 1/2025. A close look at the amendments in respect of court costs

In the assessment and billing of costs, courts may consider the collaboration of the parties in the use of suitable means of dispute resolution and any abuse of the public service of Justice, and "to this end the party ordered to pay may request a waiver or containment of costs after these have been billed".

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1. Purpose of this paper

The second of the "titles" in which the Public Service of Justice Efficiency Measures Act 1/2025 of 2 January (the 'Justice Act') is structured, contains two parts ("chapters"), in which the so-called suitable out-of-court means of dispute resolution are introduced into our system (Chapter I) and various changes to the procedural rules regulating the proceedings in the different branches of the judiciary are made (Chapter II).

Both chapters include provisions on court costs, the regime whereof is altered (and completed) with the incorporation of changes of varying significance, the practical application of which is sure to pose many problems. Particularly significant are the introduction of the criterion according to which, in the words of the preamble to the Justice Act, "in the assessment and billing of costs, the courts may take into account the collaboration of the parties in the use of suitable means of dispute resolution

and the possible abuse of the public service of Justice", and the regulation "to this end (of) the possible request for waiver or containment of the costs after these have been billed".

In this paper I will circumscribe myself to giving an account of these changes, leaving a critical analysis of the same for another time.

2. Order to pay costs in a court of first instance (Art. 394 of the Civil Procedure Act)

2.1. *In general*

The changes introduced are as follows:

A) As is known, the Civil Procedure Act ('LEC') generalised in courts of first instance the loser-pays rule, with the sole exception that the court concludes, and explains, that the case presents serious doubts on points of fact or law (Art. 394(1)). Now with the Justice Act:

a) Within the general provisions of the first chapter ("Suitable out-of-court means of dispute resolution"), title II ("Measures in matters of procedural efficiency of the Public Service of Justice") lays down a rule (Art. 7(4)) according to which "[i]f court proceedings are initiated with the same subject matter as that of the previous negotiation activity attempted without agreement, the courts shall take into consideration the collaboration of the parties with respect to a consensual solution and a possible abuse of the public service of Justice when ruling on the costs or their assessment, and also in the imposition of fines or penalties provided for, all in the terms established in the Civil Procedure Act 1/2000 of 7 January".

This is, undoubtedly, one of the significant changes. As the preamble to the Justice Act states. "abuse of the public service of justice stands as an exception to the loser-pays principle, and informs the criteria for billing, by penalising those parties who have unjustifiably refused to participate in suitable means of dispute resolution, when such was mandatory. In the same way, the abuse of the public service of justice joins the infringement of the rules of procedural good faith as a concept deserving of the reasoned imposition of the penalties provided for in the aforementioned Act 1/2000 of 7 January". The legislator, aware of the difficulty of precisely delimiting the contours of the new concept (a task left in the hands of case law), provides as an example

The Justice Act introduces changes to the rules on costs in civil proceedings, some of them significant, such as those previously highlighted

of "irresponsible use of the fundamental right of access to the courts by unjustifiably resorting to the same when a consensual resolution to the dispute would have been feasible and evident [...] litigation on unconscionable clauses with identical factual requirements and points of law that has already been conclusively settled in court, or cases where the claims are clearly without merit, impacting on the sustainability of the system, of which the public is to be made a participant."

b) In Article 394(1)(iii) adds another exception to the general loser-pays rule: "there will be no order as to costs in favour of that party that has refused, expressly or by conclusive acts, and without just cause, to participate in suitable means of dispute resolution of which notice was effectively given", regardless of whether such activity commenced prior to court proceedings or was referred to by a judge; with the only exception that "an abuse of the public service of Justice is found" (Art. 394(4)). The rule is unnecessarily repeated in paragraph 4 ("If the party called on in order to initiate a prior negotiating activity aimed at avoiding court proceedings has refused to take part in the same, the calling party shall be exempt from the payment of costs, unless an abuse of the public service of Justice is found").

Likewise, a party that has refused to participate in negotiating activity prior to court proceedings may be ordered to pay costs in the event of a judgment in part for the same, as an exception to the general rule that excludes in these cases an order to pay costs except in cases of recklessness (Art. 39(2)(ii) LEC):

> ...if any of the parties has not participated, without just cause, in suitable means of dispute resolution, when mandatory or when the judge, the court or the court clerk so ordered during the proceedings, such party may be ordered to pay the

> costs, in a duly reasoned decision, even when the claim has been upheld partially.

B) The value of allowable claims is raised from 18,000 to 24,000 euros for the purposes of the limit set by Article 394(3) LEC for the collection of the costs corresponding to lawyers and other professionals not subject to public service fees or charges.

C) When the person ordered to pay costs is entitled to free legal aid, he/she will only be obliged to pay the costs incurred defending himself/herself against the opposing party in those cases expressly mentioned in the Free Legal Aid Act. Now the Justice Act adds: "When the party benefiting from the order as to costs is entitled to free legal aid, the amount thereof must go towards the professionals who have been appointed for said party's representation and counsel, who will be obliged to return any amounts received from public funds for their involvement in the proceedings. For such purposes, the Court Office will notify this situation to the relevant professional bodies (Art. 394(3)(iii)." Consequently, in the alteration of Article 36(1) of the Free Legal Aid Act, introduced by the tenth final provision of the Justice Act, these professionals are recognised as having standing to request an assessment of the cost of their involvement.

D) Article 22(2) provides as follows:

> If any of the parties claims the subsistence of a legitimate interest, denying with reasons that their claims have been satisfied out of court or with other arguments, the court clerk shall summon the parties, within ten days, to an appearance before the Court which shall deal with that sole subject matter. At the end of the appearance, the court shall decide by order, within the following ten days, whether to continue the trial, and the costs of these proceedings shall be levied against the party whose claim is not upheld.

Now the Justice Act adds:

> In the event that the legitimate interest claimed is limited to the satisfaction of the costs incurred, the court clerk will inform the court, which will order, after hearing the other party, the termination of the proceedings, and may order the payment of the costs in accordance with the criteria established in Article 395 of this Act.

E) The preamble also states that "a new regulation of costs is also introduced in the consolidation of proceedings, eliminating the loser-pays principle criterion for billing, giving way to a criterion weighing good or bad procedural faith, thus favouring any motions to consolidate in the interest of

procedural economy." Although this announced amendment is not reflected in the corresponding amendment of the LEC because, in fact, it had already been produced by Royal Decree-law 6/2023 of 19 December, which gave the following wording to Article 85(2) LEC: "The order denying the consolidation will order the party made the motion to pay the costs thereof if such party acted with recklessness or bad faith."

2.2. *In the event of admission of the claim*

A) If the defendant admits the claim before responding to it, there will be no billing of costs unless the court makes a finding, with reasons, of bad faith in the admitting party's conduct or, the Justice Act now adds, abuse of the public service of Justice (Art. 395(1)). The Justice Act completes the assumptions in which it is understood, for these purposes, that there is bad faith and changes its requirements: "when the offered agreement or the participation in suitable means of dispute resolution has been rejected [by the admitting party]". It is not sufficient, therefore, that the request "has been made" or that suitable means for the resolution of disputes "have been initiated", which was what was provided for in the previous wording.

B) The admission will not exclude an order to pay costs if the defendant "has not participated, without just cause, in suitable means of dispute resolution, when mandatory or when the judge, the court or the court clerk so ordered during the proceedings"; "unless the court, in a duly reasoned decision, finds exceptional circumstances not to bill them" (Art. 395(3)).

3. Assessment of costs

A) The most important change introduced is the possibility granted (Art. 245(5) LEC) to the party ordered to pay costs to request a waiver or containment thereof when said party "made a proposal to the opposing party in any of the suitable means of dispute resolution in which they participated, the same was not accepted by the called-on party and the court decision that ends the proceedings is substantially the same as the content of said proposal". "An unjustified rejection of the proposal made by a neutral third party, when the judgment rendered in the proceedings is substantially the same as the said proposal", will have the same consequences. For such purposes, the waiver or containment request must be accompanied by "the complete documentation referring to the proposal made, which at this procedural moment and for these purposes, shall be exempt from confidentiality. In the absence of such documentation, the court clerk shall reject, by decree, the request. An appeal for review may be lodged against this decree".

Once the request for waiver or reduction of the costs has been presented, the

new Article 245 bis provides for incidental proceedings of an adversarial nature, which will be determined either by the court clerk if the same is accepted by the party favoured by the order as to costs, it being understood that the latter gives his or her conformity if he or she lets the time limit lapse without responding to the request made, or by the court in the opposite case (of non-acceptance). In the first case, the court clerk will issue a decree (against which an appeal for review is provided for) "fixing, as the case may be, the amount due in the terms of the request"; in the second case, the court will decide "whether or not (the costs are) appropriate in the amount assessed, by means of a decision without an order to pay costs" against which an appeal for reconsideration may be lodged. And the provision concludes: "Once the decision rejecting the waiver or reduction, as well as the decision reducing the amount of the costs, has become final and conclusive, any contesting of the assessment of costs based on the same being excessive or undue shall be processed, if applicable, in accordance with the provisions of the following article".

B) Other amendments made are as follows:

a) Article 32(5) LEC incorporates the provision that, as an exception to the general rule, in proceedings instigated by consumers after having made a prior out-of-court claim, the lawyer's and procurator's fees shall be included within the items comprising the costs, even if their involvement is not mandatory and without the fees of the former (lawyer) being subject to the limit set out in Article 394(3)."

b) Against the decree that rejects the contesting of the assessment for not mentioning in it the lawyer, expert witness or procurator fees and the specific items to which the discrepancy refers and the reasons thereof, an appeal for review may be filed (and no longer the appeal for reconsideration previously provided for in Art. 245(4)), the determination whereof shall not be subject to any appeal whatsoever.

c) In the processing of the contest, a report of the Bar Association will not be necessary "within the scope of Article 438 bis when a report has already been issued previously, unless it is justified by the concurrence of circumstances different from those taken into account by the Bar Association for the preparation of the previous report" (Art. 246(1)).

d) The billing of costs (to the claimant) if the contest is rejected in full, and to the lawyer (or the expert) if the contest is totally or partially allowed, which in the previous wording was provided for in general, is eliminated. However, the rule now states that, if the contesting of the assessment of costs (as excessive or undue) is rejected in full, "the costs of the incidental proceedings will be billed to the

contesting party if it had acted abusing the public service of Justice, or to the professional who contested the assessment to include expenses that he or she considered duly proven or claimed". And if allowed in full or in part, "they shall be billed, also in the case of having acted abusing the public service of Justice, to the expert or the party defended by the lawyer whose fees have been considered excessive or undue."

The justification contained in the preamble is as follows: "On many occasions, the criteria of the relevant professional body are not followed by the Provincial Courts. Therefore, given the set of cases that can apply when interpreting the criteria of fees and the complexity of some matters, it seems logical that, being a non-regulated matter, costs should not be billed unless the aforementioned abuse is found. This will avoid the practice of a multitude of assessment of costs for the incidental contesting of the main costs."