

Mediation Q&A: Spain

by Natalia Andrés, Carla Carrasco and Luis J. Morón, Andersen Tax & Legal

This document is published by Practical Law and can be found at: uk.practicallaw.com/W-006-5857
To learn more about legal solutions from Thomson Reuters, go to legal-solutions.co.uk

Spain - specific information concerning the key legal issues that need to be considered when mediating a dispute.

This Q&A provides country-specific commentary on *Practice note, Cross-border mediations: an overview* and forms part of *Cross-border dispute resolution*.

RESOURCE INFORMATION

RESOURCE ID

W-006-5857

RESOURCE TYPE

Country Q&A

STATUS

Law stated as at 31-May-2018

JURISDICTION

Spain

Judicial attitude towards mediations

1. Is mediation a commonly used alternative dispute mechanism in your jurisdiction, especially in relation to cross-border disputes? What proportion of commercial disputes is settled through mediation? What is the judicial attitude towards mediation in relation to commercial disputes?

Although mediation is a recognised form of alternative dispute resolution, there isn't a strong mediation culture in Spain. Mediation is not a common method of cross-border dispute resolution. The process can be difficult and involves conflict of laws, and it does not guarantee legal security.

Mediation Directive 2008/52/EC, now incorporated into Spanish law, was set up to establish a range of minimum standards to encourage mediation in cross-border disputes. Member states have developed these rules in different ways. Applicable law in each state differs, depending on the subject matter and, given the problems with enforceability of foreign agreements, remains complex.

The Spanish judiciary actively supports and encourages the use of mediation as an alternative to judicial proceedings. In 2015, the available statistics show that of the 567 matters (commercial and non-commercial) referred to intra-judicial mediation 46.15% were settled through the mediation process.

Commercial attitude towards mediation

2. How do commercial parties commonly view mediation? Do parties typically opt for institutional mediations or do they prefer the flexibility of independent/ad-hoc mediations?

Although slow to accept change, from the 1970s Spanish companies have begun to recognise that

mediation can produce better results and costs can be significantly lower, compared to many lawsuits. Mediation offers companies a quick, economic and harmonious way to reach agreement while preserving confidentiality and trade relations. In addition, parties are able to retain control over the outcome. Circumstances that particularly favour mediation are where:

- Both parties have strong arguments.
- Both parties are of equal standing.
- Complex technical issues require discussion.
- The dispute involves miscommunication.

Parties tend to prefer ad hoc mediations rather than those conducted by mediation institutions. Ad-hoc mediations allow parties to have greater freedom to choose well-qualified mediators who are acceptable to both sides and ensure maximum confidentiality.

Laws on mediation

3. Are there any national laws or regulations that govern the conduct of mediations in your jurisdiction?

In Spain the laws on mediation are:

- Law No.5/2012 of 6 July, covering mediation in civil and commercial matters, which entered into force on 26 July 2012 (Mediation Act).
- Royal Decree No.980/2013 of 13 December, developing certain aspects of Law No.5/2012 of 6 July.

The main purpose of these laws is to incorporate into Spanish law, Directive 2008/52/EC of the European Parliament and the Council dated 21 May 2008.

At state level there are regulations which treat mediation as an extra-procedural resolution requirement (*Article 63, Law No.36/2011 of 10*

October) (see [Question 5](#)). According to Article 770.7 of the Civil Procedure Law the parties may request the suspension of the proceedings to undergo mediation.

The Mediation Act does not apply to employment disputes.

There are also several laws and regulations passed by certain Autonomous Communities, particularly in the field of Family Mediation.

International treaties on mediation

4. Is your jurisdiction a signatory to any international treaties on mediation? If so, please list the treaties.

At international level Spain is not a signatory to any treaty on mediation.

However, Directive 2008/52/CE of the European Parliament and of the European Council of 21 May 2008 dealing with certain aspects of mediation in civil and commercial matters has been incorporated into Spanish law. It represents the culmination of a process by member states to create a useful alternative to the traditional dispute resolution methods (ordinary courts and arbitration) in the region. It is also the common starting point for implementation of the mediation process by individual member states, whose different legal and cultural backgrounds will give rise to variations.

Mediation as a pre-condition to litigation

5. In the absence of a dispute resolution clause, which calls for mediation, are parties required to engage in mediation as a pre-condition to accessing local courts?

The Mediation Act provides for two ways to access the mediation process:

- At the request of one of the parties in fulfillment of a covenant to submit to mediation.
- By common agreement of the parties even in the absence of a dispute resolution clause.

(Article 16, Mediation Act.)

Mediation is not a pre-condition to judicial proceedings, with the effect of preserving the fundamental constitutional right to effective judicial protection (Article 24, Spanish Constitution). Once judicial proceedings have started, the parties may still resort to "intra-judicial" mediation and the court should inform the parties of the possibility of redirecting the dispute to mediation (Articles 414.1 and 443, Civil Procedure Law).

One of the underlying principles of mediation in civil and commercial matters is the voluntary nature of the process from which the parties may withdraw at any time.

Without prejudice to Article 24 of the Spanish Constitution, the Spanish Labour Procedure Law (Law No.36/2011 of 10 October) makes conciliation or mediation a prerequisite to commencement of proceedings in the labour courts (Article 63). Article 64 provides exceptions for proceedings involving the following:

- Social Security disputes.
- Opposition to collective dismissal by workers representatives.
- Election of workers representatives.
- Geographic mobility.
- Substantial modification of working conditions.
- Challenge of collective agreements.
- Protection of fundamental rights.
- Annulment of arbitration.
- Challenge of reconciliation agreements.
- Labour protection measures against gender violence.
- Where the state or any public administration is the defendant.

The Consumer Code of Catalonia also makes mediation mandatory (Law No.22/2010 of 20 July). There is a duty to submit to mediation before court proceedings as consumer matters are outside the protection of the Mediation Act.

In cases of mortgage foreclosure of the main residence as a consequence of a debtor default, "the parties in dispute, before bringing any administrative complaint or lawsuit, must go to mediation or may agree to submit to arbitration" (paragraph 3, Article 132.4, Consumer Code of Catalonia). If a satisfactory agreement has not been reached at the end of three months from the date of the mediation request, either party can resort to an administrative complaint or a lawsuit.

The operation of Article 132.4 is now governed by Article 13 of the Decree of The Catalanian Generalitat (No.98/2014 of 8 July), which was introduced to provide a regulatory framework governing mediation procedure in the case of mortgage foreclosure applications. According to Article 13 it is the consumer or their representative who must commence the mediation process, not the company concerned.

Costs consequences of refusing to mediate

6. Can local courts force parties to mediate, especially in commercial or employment disputes? Do local courts impose costs for:

- Delay in consenting to mediation?
- Failure to mediate?
- Refusal to participate in mediation, particularly if that party is also a losing party in subsequent court proceedings?

In general, local courts cannot force parties to mediate. However, according to the Civil Procedure Law, local courts must impose costs against a party whose claim is rejected on the grounds of bad faith. Bad faith is deemed to exist where a party fails to attend mediation or abandons the process without the consent of the other party.

Under the Spanish Labour Procedure Law, litigants must attend the act of conciliation or mediation (*Article 66*). Whenever parties are duly summoned and the applicant doesn't attend without just cause, the application is deemed not to be made and all proceedings are dismissed. Costs will be awarded against the applicant.

Where the defendant doesn't appear, the certification of mediation issued by the court will expressly state this and mediation will be considered as attempted without effect. Costs will be awarded against the defendant. If the final judgment is, essentially, in favour of the applicant, the defendant will be fined and ordered to pay up to a maximum of EUR600 in attorney's fees.

In the common law system, courts may award costs if the solution given by the court could have been reached through mediation and one party refused to follow mediation procedures. Spanish jurisprudence has developed a tendency to adopt this common law approach.

Limitation period

7. What is the limitation period for filing a civil and commercial claim? Is the limitation period for initiating judicial or arbitral proceedings extended/suspended in cases where parties attempt to settle their disputes through mediation? What are the formalities required to trigger such extension/suspension?

Limitation periods differ depending on the type of action being brought. For example:

- Actions to recover a debt are subject to a five-year limitation period.

- Real estate property claims are subject to a 30-year limitation period.
- Claims for non-contractual damages are subject to a one-year limitation period.
- Claims for annulment of a contract have a four-year limitation period.

The mediation process suspends the calculation of deadlines both for prescription and expiry (*Article 4, Law No.5/2012*). It does not, however, interrupt the calculation of deadlines, so that the parties are prevented from using it as a delaying tactic or to extend the prescription time limits.

The day from which (*dies a quo*) the suspension runs is the date of receipt by the mediator of the mediation request or the day of its filing before the mediation institution. However, if the minutes of the constituent meeting are not signed within 15 calendar days from receipt of the request to initiate mediation the calculation of the deadlines will be resumed.

The conclusion (*dies ad quem*) of the suspension period will be extended:

- In the case of a mediation agreement, until the date it is signed. In absence of agreement, on signature of the initial record.
- If termination of mediation occurs for any of the reasons provided by law.

In the case of intra-judicial mediation, suspension of the prescription of actions starts from the filing of the mediation request by the parties in accordance with Article 19.4 of the Civil Procedure Law.

Disputes suitable for mediation

8. Are there any class or type of disputes that are not considered suitable, either by law or otherwise, for mediation in your jurisdiction?

The only type of case where mediation is not allowed is a crime of domestic violence (*Organic Law No.1/2004, about Measures of Comprehensive Protection against Domestic Violence*).

Mediation agreement

9. Is it customary in your jurisdiction to execute a written mediation agreement before the start of the mediation proceedings to record the rights and obligations of the parties and the mediator?

A written mediation agreement is very common and the law requires a record to be made of a number of important points of which the parties must be informed at the constitutive session (*Article 19, Law No.5/2012 of 6 July*) (see *Question 10*).

Standard clauses for mediation agreement

10. Are there any clauses that would be usual to see in a mediation agreement and/or that are standard practice in your jurisdiction?

After the first informative session, the mediation starts with a constitutive session, the minutes of which must be recorded and signed by the mediator and the parties. The parties must be informed of their mediation rights and that they are able to withdraw from the process at any time. The following aspects must be agreed and recorded:

- Identification of the parties and the mediator.
- Place and language of the proceedings.
- Object of the dispute.
- The mediator's role.
- Principles of mediation.
- Confidentiality.
- Mediation costs including professional fees and any other possible expenses.
- Subsequent appointments and approximate duration of proceedings.

In the event of agreement not being reached on any of these matters, the minutes must state that mediation was not successful.

Timing of mediation

11. When do parties usually mediate?

Parties usually seek mediation before commencing court proceedings. Although the courts may redirect the parties to mediation at any time during court proceedings, the largest number of successful mediations takes place before the commencement of court proceedings.

Figures published in the General Council of the Judicial Power's publication about intra-judicial mediation show that in 2015 only 104, of a total of 567 civil cases referred, were settled through the mediation process. Under Article 19.4 of the Civil Procedure Law parties may, by mutual agreement, request a stay of the proceedings to avail themselves of mediation. If a final agreement is reached, the court will terminate the legal proceedings. This does not prejudice any request for the court to give express approval to the agreement. In the absence of agreement either party may request that the suspension is removed and the court will announce the continuation of the legal proceedings.

Choosing a mediator

12. How do parties usually choose a mediator? What happens if the parties cannot reach an agreement?

Either party may propose a mediator but the final choice must be by mutual agreement.

If the parties proceed through an institution of mediation, it will suggest a list of potential candidates, depending on circumstances, suitability and availability. The parties must agree on the most appropriate choice. If the parties are unable to reach agreement a choice of mediator cannot be forced on them.

Conduct of mediation

13. How are mediation proceedings conducted in your jurisdiction?

The procedure is governed by Articles 16 to 24 of the Mediation Act.

Failure to participate by one of the parties is taken to be a withdrawal from mediation by that party.

In summary:

- The mediation process starts with an application to the chosen mediator or mediation institution (*Article 16*).
- An information session is convened. The following information is provided to the parties:
 - any possible circumstances that might affect the mediator's impartiality or create a conflict of interest;
 - the mediator's profession, training and experience;
 - the cost of mediation;
 - the procedural calendar;
 - the legal consequences of any agreement reached; and
 - the deadline to sign the minutes of the constituent meeting (*Article 17*).
- Next an inaugural meeting is held. Minutes of the meeting must be recorded and signed (*Article 18*).
- Further sessions will be arranged in advance by the mediator, as deemed necessary, but these should be as few as possible. The aim is to maintain transparency and facilitate further co-operation between the parties. However, the mediator may meet privately with either party and is only obliged to disclose the existence of the meeting, not its content (or any related documentation) to the other party.

At the conclusion of the process final minutes must be drafted by the mediator. Proceedings may be concluded with or without agreement (*Article 23*).

Facilitative or evaluative mediation

14. What approach does the mediator usually take to the mediation, is this facilitative or evaluative?

The mediator's role is a facilitative one to encourage parties to reach agreement. The mediator's task is to facilitate dialogue and promote understanding between the parties, while maintaining impartiality, neutrality and confidentiality.

The mediator's main functions are to:

- Act as a peacemaker and try to eliminate any aggressive behavior.
- Find a balance between the parties.
- Identify the parties' respective positions, interests and needs.
- Help establish options and to seek solutions.
- Clarify the best interests of the parties.

The mediator does not:

- Act as a lawyer for either party.
- Provide legal advice.
- Evaluate or judge the issues raised in the process.
- Decide who wins or loses.

Any solution the mediator proposes is non-binding on the parties.

Time frame for mediations

15. What is the general time frame for mediations in your jurisdiction? Is there any statutory period within which mediations must be completed?

According to the Mediation Act the process should be short with the fewest possible number of sessions (*Article 20*). However, the exact duration depends on the complexity of the dispute and the attitude of the parties.

Professional advisors in mediations

16. Are parties required to be represented by professional advisors, such as lawyers in mediation proceedings? If there is no requirement, are professional advisers usually present?

It is not necessary for the parties to be represented by a professional advisor such as a lawyer. However, in practice, it is more usual, particularly in intra-judicial mediation, for the parties to be legally represented.

A lawyer's responsibilities are important and include:

- Protecting the client's interests.
- Checking the capacity of the mediator.
- Advising on the most appropriate way to resolve the dispute.
- Giving advice during the proceedings, for example, about proposals and options and checking shared strategic information.
- Being knowledgeable about the code of conduct.
- Evaluating the legal viability of the mediation agreement before signature.
- Drafting mediation agreements that are efficient and easy to execute.

Judges as mediators

17. Do judges ever act as mediators? If so, do they commonly give a view as to the merits of a dispute? Are they then removed from involvement in the case if the mediation is not successful?

It is possible for a judge to act as a mediator provided the legal requirements are met, but it is uncommon (*Article 11, Mediation Act*).

Mediator's role post an unsuccessful mediation attempt

18. Are there any provisions under national law or institutional rules that prohibit a mediator to subsequently act as a judge, arbitrator or conciliator in relation to the same dispute?

Article 13 of the Mediation Law includes a provision in this respect. Mediators cannot be involved in the proceeding or must leave it when their impartiality has been affected.

Therefore, if the mediator has acted in favor of one of parties previously, they will never act as a judge, arbitrator or conciliator in the same dispute because they would not be neutral or impartial.

Court-annexed, judicial and online mediations

19. Are court-integrated or judicial mediations (conducted under the "shadow" of the court) and online mediations popular in your jurisdiction? If so, what types of disputes are

considered suitable for such mediations?

Give details of any pilot schemes that currently exist in your jurisdiction. Are any of these schemes compulsory?

Mediation is a relatively new and still unknown concept to most of the Spanish population. Despite the many advantages of mediation, such as efficiency and economy, Spain still has a very rooted culture of recourse to the courts. Court-integrated or judicial mediations are not popular and even when courts propose mediation to the parties the proposal is often rejected because the parties only trust in judicial decisions.

Online mediation in Spain is used in all those matters or claims not exceeding EUR600, provided that the parties have access to electronic media. It is defined as the simplified procedure for mediation of claims using electronic media.

Institutions must offer mediation services electronically, particularly for disputes concerning monetary claims.

The biggest problem with online mediation is maintaining confidentiality.

Costs

20. Who bears the cost in mediations involving civil and commercial disputes?

The parties pay the cost of proceedings. As a general rule, the cost of mediation will be divided between the parties equally, unless the parties agree otherwise (*Article 15, Mediation Act*). Both the mediator and the institution can demand payment of deposits by the parties to meet mediation costs.

The Mediation Act considers the possibility of free access to mediation, but this is yet to be regulated.

Confidentiality in relation to mediation proceedings

21. Are mediation proceedings considered confidential? In the absence of an express clause in the mediation agreement, can confidentiality be implied in negotiations conducted through mediation?

Proceedings and documentation must be kept confidential (*Article 9, Mediation Act*). The mediator must inform the parties of the need for confidentiality at the first informative session and in the constitutive session. An agreement reached in the constitutive

session usually contains a confidentiality clause. Even if the mediation agreement doesn't contain an express clause, confidentiality will be implicit, being one of the most important principles of mediation.

Confidentiality obligations of the mediator

22. Does the confidentiality obligation extend to the mediator as well?

The mediator is bound by confidentiality. The mediator is not obliged to disclose information or documents for the purpose of judicial proceedings unless the parties agree in writing or a request is made by a judge (see *Question 21*).

Exceptions to confidentiality

23. Can the local courts override confidentiality provisions and permit confidential information arising out of, or relating to, a mediation to be disclosed under any circumstances?

A judge in criminal proceedings can request information or documents used in mediation only in certain limited circumstances.

Documenting a settlement

24. How do parties usually formalise any settlement? Is the mediator involved in drafting the settlement agreement?

Mediation proceedings can be concluded with or without a settlement (*Article 22, Mediation Act*). Any settlement can deal with part or all of the issues raised.

The mediator drafts the agreement, and if there are lawyers in the proceedings, they review it. Finally, the parties or legal representatives sign the settlement.

Disposal of court proceedings

25. How are court proceedings disposed of if settlement is reached at mediation?

If mediation has been instituted after the start of court proceedings, once the agreement has been signed by the parties and properly recorded, the parties will notify the court asking for a final stay of legal proceedings. The judge will order the termination of the legal proceedings instituted at court.

Enforcing settlements

26. Are there any special procedures for enforcing a settlement agreement reached at mediation? Does this differ from a settlement agreement reached outside mediation? Is it easier to enforce a settlement agreement reached at mediation?

The agreement binds the parties and if granted in a Public Deed before a notary it will have the quality of executive title directly enforceable at court. The Spanish notary public will verify whether the requirements established by the Mediation Act are met and that the content of the agreement is not contrary to law.

If the agreement is executed in another country it must comply with the requirements of international conventions to which Spain is a party and with EU standards.

Implementation of cross-border agreements must be in accordance with the Law on International Legal Cooperation in Civil and Commercial Matters.

The mediation agreement is a contract and is enforceable by the parties as such (*Article 1091, Spanish Civil Code*).

It is the mediator's duty to inform the parties of "the binding nature of the agreement" (*Article 23, Mediation Act*).

In the event of default, the parties will have recourse to the courts to request compliance with the agreement (*Article 1124, Spanish Civil Code*).

In addition, the parties' transaction has the authority of "*res judicata*" (*Article 1816, Spanish Civil Code*).

Mediation institutions and centres

27. What are the main institutions or centres that provide mediations services, including appointment of mediator in your jurisdiction?

In Spain there is a Register of Mediators and Mediation Institutions under the supervision of the *Ministry of Justice*.

This Register is public, informative and consists of three sections:

- First Section - Registration of mediators. Natural persons only.
- Second Section - Registration of insolvency mediators: individuals or legal entities.
- Third Section - Registration of mediation institutions: legal entities only.

There is also an *Association of Mediation* located in Madrid. In addition, there are many territorial delegations that are present in all judicial districts of Spain.

There are several mediation centres that offer services to the mediators who are registered and to those seeking mediation. Facilities include boardrooms for parties to meet with mediators who do not have their own office.

Accreditation schemes for mediators

28. Is there an accreditation scheme or regulatory body for mediators in your jurisdiction? Describe the qualifications, continued professional education schemes and training courses that such institutions have in place for mediators.

The mediator must have an official university degree or advanced vocational training and be specifically trained to practice mediation. Specific training must include one or more courses provided by accredited institutions.

The mediator must take out insurance or equivalent guarantee to cover civil liabilities.

Mediation institutions can be public or private, and may be Spanish or foreign, including multinational corporations dealing with public law. The mediation institutions promote mediation by facilitating access to it and administering proceedings. An important function is the appointment of mediators. The institutions must guarantee transparency in those appointments.

A person or institution who wants to be considered as an insolvency mediator must comply with the requirements under Article 27.1, Law No.22/2003 of 9 July. Individuals heading mediation institutions must also comply with these requirements.

Contributor details

Luis J. Morón, Counsel

Andersen Tax & Legal

T +34 963 527 546

E luis.moron@andersentaxlegal.es

W www.andersentaxlegal.es

Natalia Andrés, Associate

Andersen Tax & Legal

E natalia.andres@andersentaxlegal.es

W www.andersentaxlegal.es

Carla Carrasco, Associate

Andersen Tax Legal

E carla.carrasco@andersentaxlegal.es

W www.andersentaxlegal.es

Areas of practice: Litigation, arbitration and civil law.

Legal solutions from Thomson Reuters

Thomson Reuters is the world's leading source of news and information for professional markets. Our customers rely on us to deliver the intelligence, technology and expertise they need to find trusted answers. The business has operated in more than 100 countries for more than 100 years. For more information, visit www.thomsonreuters.com