

An invitation to negotiate meets Spain's pre-action ADR requirement when it is rejected, left unanswered or not received for reasons attributable to the addressee

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According to the Spanish organic act 1/2025, civil and commercial claims can be filed only if the claimant has first attempted to resolve the dispute through an ADR mechanism, such as mediation, conciliation, an independent expert opinion, a "confidential binding offer" or "any other form of negotiation activity".

So far, this has proved a significant practical challenge for claimants, as the law lacks clarity and some courts across Spain are applying interpretative criteria that either do not clearly follow from the wording of the law or are unduly strict and formalistic.

Unsurprisingly, defendants are taking advantage of this uncertainty to argue that the claimant did not properly make the mandatory pre-action ADR attempt and should therefore be refused leave to bring the claim. One recurring issue is whether the pre-action step undertaken by the claimant indeed demonstrates a willingness to negotiate a settlement.

The Barcelona Court of Appeal (BCA) has recently issued an interesting and, in our view, sensible decision on this point¹.

A creditor sent a letter through the *buropax* national postal service to the debtor company and its director demanding payment, warning of the director's potential liability and expressly inviting them to negotiate on the following terms: "This notice of debt shall serve as a binding offer to initiate negotiations between the parties".

The postal service attempted delivery twice and left a delivery notice, but the letter remained uncollected at the post office for one month², after which the creditor commenced court proceedings.

A commercial court found that the claimant had failed to comply with the pre-action ADR requirement and, therefore, refused leave to bring the claim, but the BCA overturned that ruling on two grounds:

- (i) Receipt of the letter (debtor's passivity).

The BCA found that the letter should be treated as having been received, since it had been established that the claimant sent it to the address designated by its recipients and that they had the opportunity to access it. It relied on settled Supreme Court case law, pursuant to which communications are effective where

¹ Order 289/2025 of 21 November.

² According to the organic act 1/2025, the claimant may bring court proceedings if, within thirty calendar days of the defendant's receipt of the initial request to negotiate, no meeting or contact aimed at reaching an agreement is held or no written response is received.

failure to receive them is attributable to the addressee's passivity, negligence, lack of skill or express or implied will.

- (ii) Sufficient content (invitation to negotiate in good faith).

The BCA held that a letter satisfies the pre-action ADR requirement where it shows a genuine willingness to resolve the dispute without litigation. It ruled that, while a mere payment demand is not enough, an invitation to negotiate in good faith that precisely identifies the subject matter of the negotiations should suffice, even if it does not put forward a specific settlement proposal.

The BCA deemed the procedural prerequisite fully met in the case at hand, as the claimant made an "express offer of its willingness to initiate negotiations". It warned that requiring anything further of the creditor would infringe its fundamental right to effective judicial protection under article 24 of the Spanish Constitution.

In this regard, the Alicante Court of Appeal noted -rightly, in our opinion- that "a creditor cannot be required to waive, whether in whole or in part, the claim" for its offer to qualify as a valid pre-action ADR attempt, since that would amount to "imposing an unjustified sacrifice as a condition for access to the courts, undermining the right to effective judicial protection and, in practice, expropriating the creditor's legal position without any compensation"³.

³ Order 48/2025 of 18 July.