

An empty formality: It is necessary to attempt an ADR procedure (MASC) before seeking the judicial appointment of an arbitrator, even when the breaching party has consistently failed to receive communications

Madrid, April 2026

The High Court of Madrid (HCM) has recently dismissed a petition for the appointment of an arbitrator on the grounds that the petitioner had not first attempted to reach an agreement with the counterparty on the arbitrator's appointment¹.

Pursuant to Spanish organic law 1/2025, it is mandatory to attempt an ADR mechanism (MASC²) before bringing a judicial claim, and the HCM held that a request for the court appointment of an arbitrator is not exempt from this requirement.

The case concerned a loan agreement that had been breached by one of the parties and included a non-institutional arbitration clause.

The HCM acknowledged that the breaching party "has for some time maintained [...] a complete disengagement from the matter [...] a clear refusal to receive or collect any communication relating to the loan whose repayment is being sought from her, [...] she did not collect the *buropax* through which the claimant -prior to bringing legal action- requested performance of her contractual obligations. [...] once the judicial proceedings had commenced, all attempts to serve notice on and summon her [...] were unsuccessful".

However, the HCM noted that "what has not been demonstrated to us in any way is any attempt by [...] the claimant to contact the defendant in order to reach a consensual appointment of the arbitrator who is to resolve the dispute".

In our view, the HCM's decision is highly questionable, as it fails to take into account that the purpose of the legal requirement to attempt a MASC before bringing a court claim is by no means to comply with an empty formality but rather, as the law itself states, to promote the resolution of disputes through more efficient and less confrontational means than court proceedings³.

Accordingly, where the breaching party has completely disappeared, requiring a MASC that was bound to fail becomes, in our opinion, an unnecessary formality that is inconsistent with the purpose of the law.

¹ Judgment 3/2026 of 10 February.

² "Appropriate Means of Dispute Resolution" (*Medios Adecuados de Solución de Controversias*).

³ "The aim is to promote negotiation between the parties, either directly or with the assistance of a neutral third party, on the basis that these mechanisms reduce social conflict, avoid overburdening the courts and may be equally suitable for resolving the vast majority of civil and commercial disputes".