



# Construction contract and the Spanish Act on Mediation in civil and commercial matters

-----  
**Chantal Moll de Alba**

*Professor of Private Law  
University of Barcelona  
[cmoldealba@ub.edu](mailto:cmoldealba@ub.edu)*



### I.- The Spanish act 5/2012 on mediation in civil and commercial matters

1. Implementation of Directive 2008/52/EC
2. Definition of mediation
3. Definition of mediator
4. Mediation principles
5. Mediation process
6. Mediation and judicial proceedings
7. Enforceability of the mediation agreement

### II.- Construction contracts and mediation in Spain

1. Scope of mediation
  2. Advantages of mediation for construction disputes
  3. Use of mediation in construction disputes in Spain
-



**The Spanish act 5/2012**  
**on mediation in civil**  
**and commercial matters**



- The Spanish Act 5/2012 incorporates into Spanish Law **Directive 2008/52/EC** of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.
  - The Spanish act is not only applicable to **cross-border cases**, but also to **internal cases**.
  - A **cross-border dispute** is a dispute in which at least one of the parties is domiciled or habitually resident in a State other than that of any other party.
-



- Mediation was already regulated in Spain in some Autonomous Communities for **family matters**.
  - **Catalonia** was the first Autonomous Community to regulate **Family Mediation in 2001** and in **2009** they decided to implement by themselves the European Directive and the **Catalan Mediation Act on Private Law** was approved three years before the Spanish Act.
  - **Mediation is a very common way to solve disputes in family law in Spain** (divorces, child custody, etc.) but it has not been regulated and used for other private matters till 2009 in Catalonia and 2012 in the rest of Spain.
-



As an **alternative dispute resolution** “Mediation” means **a non judicial structured process** whereby two or more parties attempt by themselves, on a voluntary basis, to reach **an agreement on the settlement of their dispute** with the assistance of a mediator.

---

## DEFINITION OF MEDIATOR

---



- Any third person who is asked to conduct a mediation **in an effective, impartial and competent way.**
  - In Spain to act as mediator it is compulsory to have a **degree** and a **special training** given by institutions specially accredited.
  - Mediators must have a **professional indemnity insurance.**
-

# MEDIATION PRINCIPLES

---



- **Voluntary process:** parties shall agree the intervention of a mediator
  - **Neutrality:** mediator shall be neutral
  - **Impartiality:** mediator shall be impartial
  - **Equality between parties:** mediation can not be applied for public disputes (e.g. construction contract with Administration)
  - **Confidentiality:** neither mediators nor those involved in the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process.
-





## 1.- Information session

## 2.- Constitutive session (initial minutes are written)

## 3.- Individual or joint sessions (mediator/party/ parties)

## 4.- Mediation agreement (final minutes are written)

-----  
*The whole process can also take place by electronic means, specially  
for disputes of less than 600€.*

-----  
*During the mediation process mediator can resign or be removed*

---



- Parties who choose mediation in an attempt to settle a dispute **are not subsequently prevented from initiating judicial proceedings** or arbitration in relation to that dispute.
  - In this sense in Spain **the request to initiate mediation suspends the period of prescription or limitation of the judicial claim** till the final agreement is signed or the mediation is terminated.
-

## ENFORCEABILITY OF THE MEDIATION AGREEMENT

---



UNIVERSITAT DE BARCELONA



- The content of the agreement may be made enforceable by a **judgment decision or in a public deed.**
  - To enforce the title in Spain **the competent judge is the court of the city where the agreement was signed.**
  - If the **mediation agreement was signed in another State** and was not enforceable at this State, this mediation agreement can only be enforceable in Spain by a public deed with a Spanish notary.
-



# Construction contract and Mediation in Spain



Mediation can only be used for **PRIVATE CONTRACTS**, it can not be used for disputes between constructors and Public Administration.

In Spain Mediation can solve **disputes between any of the agents described at the Spanish Construction Act of 1999**

- The developer
  - The designer (arquitect or engineer)
  - The constructor
  - The constructor manager (arquitect or engineer)
  - The suppliers
  - The buyer
-



- **Faster and cheaper** than ordinary court proceedings
  - **Avoids confrontation** between parties
  - **Allows the parties to maintain their professional relationship beyond the dispute** (that is an important point as in construction parties usually have long-term relationships).
  - Enables parties **to find creative and technical solutions** which they can not obtain in court. In Spain it is particularly interesting as there isn't a construction jurisdiction and judges have not technical knowledge.
-



- It is **a new professional career** for a lot of architects and engineers, professions very affected by the economic and housing crisis in Spain.
  - Schools and professional associations of engineers and architects offer **training in mediation**, as this training is compulsory by the Spanish act on Mediation.
  - A **mediator with expertise** (architect, engineer) is much more appropriate to solve technical conflicts that arise in the field of construction.
  - For the moment, the use of **mediation in construction contract is not widespread** because many professionals are unaware of this possibility. We need some time to integrate a new culture on mediation.
-



**Thank you very much**



**Chantal Moll de Alba**  
[cmoldealba@ub.edu](mailto:cmoldealba@ub.edu)

---