MEDAM PROJECT. "THE NEW ROLE OF CITIZENSHIP IN RELATION TO ADMINISTRATIVE JUSTICE: THE REGULATION AND IMPLEMENTATION OF MEDIATION AS A CONFLICT PREVENTION AND RESOLUTION SYSTEM" (reference PID2020-112688GB-100)

REPORT 3. "CONTENTIOUS-ADMINISTRATIVE INTRAJUDICIAL MEDIATION: REALITY AND PERSPECTIVES"

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I. INTRODUCTION

The crisis of the administrative justice system and the problems, among others, of the effectiveness of the current system of remedies have shown that it is necessary and opportune to include, together with the traditional mechanisms (administrative and judicial remedies) in an alternative and/or complementary way, new methods for resolving disputes that are faster, more satisfactory and less expensive. From this perspective, the alternative means of conflict resolution called *Alternative Dispute Resolution* (ADR), which is so relevant and consolidated in other legal branches and which has gained so much momentum mainly due to its promotion in European Union law, is seen as an essential piece of the administrative justice model that is aspired to in order to respond to citizens' needs.

Traditionally, administrative law had resisted incorporating these mechanisms for out-of-court settlement of administrative disputes, and it is not until recently that implementing them has been encouraged. The delay and reluctance to apply these mechanisms are due to various reasons. These include the fact that implementing them comes up against the situation of inequality in which the parties to a legal-administrative relationship find themselves, given the advantageous position of the administration as it has important prerogatives and privileges compared to citizens; the unavailability of administrative powers; and because the administration is subject to the principle of legality and its duty to objectively serve the general interests. Another reason is the constitutional attribution of the review function of the administrative action to the judges and courts. However, the jurisdictional control of public administrations that is attributed exclusively to the judiciary (articles 106 and 117 of the Spanish Constitution) does not exclude implementing these ways of resolving conflicts that are compatible with the judicial system.

Nevertheless, these obstacles have been progressively overcome and these instruments currently show a clear strength in the legal-administrative field, as they have been incorporated into the regulations by the legislator. The transformations of public administrations, the mutations of administrative structures and the profound changes in legal-administrative relations have led to these techniques being promoted. Moreover, they are faster, less expensive and

provide more specialized solutions to disputes, they facilitate cooperation and communication between citizens and administrations, and comply with the principles of good administration, efficiency and administrative effectiveness. However, although it is an undeniable phenomenon that has already been translated into the regulations, in reality, in the field of administrative law, applying these mechanisms has been more difficult and they are still not as widely used as in other areas, such as civil law.

With the incorporation of these mechanisms, it is not only a question of providing solutions to judicial congestion, but also of implementing techniques that allow the general interest to be adequately satisfied as well as making citizens' guarantees fully effective as the response to disputes is developed through dialogue. The Explanatory Memorandum of the LJCA (Law of the Contentious Administrative Jurisdiction) states that "the control of the legality of administrative activities can and should also be exercised by other means complementary to the judicial one, which needs to be improved to avoid the proliferation of unnecessary resources and to offer inexpensive and fast formulas for resolving numerous conflicts" (section I).

In this context, it is advisable to incorporate new forms of preventing and resolving disputes that offer citizens a faster, more efficient, effective and satisfactory response that is less expensive in terms of time and money. Applying complementary dispute resolution formulas, and in particular mediation, can be useful for effectively preventing and resolving disputes in the field of administrative law, both administratively and in the contentious-administrative field. These formulas also speed up justice, especially if we consider the recurrent situation of collapse of the Contentious-Administrative Jurisdiction. However, applying these mechanisms implies a profound change in the way of thinking about managing conflicts between public administrations and citizens. It is also necessary to transform the structures themselves and the legal system insofar as citizens would become directly involved in the process of resolving the dispute and would have greater intervention. It is necessary to create a different legal-administrative relationship and a way of addressing conflicts through dialogue in the search for more satisfactory and less costly solutions for all parties involved. Therefore, the implementation of these dispute resolution mechanisms in the field

of administrative law implies not only incorporating new ways of preventing and resolving conflicts, in an alternative or complementary way to traditional mechanisms, but also transforming the administration-citizen relationship, with citizens being included in the search for solutions to the legal conflicts they have with the administration.

Although these mechanisms by themselves are not a solution to the collapse of the Contentious-Administrative Jurisdiction or to the problems currently posed by administrative justice, they can contribute to reducing litigation and increasing the effectiveness of the system in certain areas by offering citizens more (and often better) alternatives for resolving conflicts. In addition, these mechanisms represent a paradigm shift, by achieving greater citizen involvement.

In the contentious-administrative field, intrajudicial mediation, unlike mediation through administrative channels, does not prevent the conflict from reaching the courts, since it has already arrived and is being prosecuted. Nor does it represent a decrease in the number of cases or exempt the judicial body from certain tasks during the procedure, or the workload that these tasks entail. However, intrajudicial mediation can resolve conflicts more effectively than a judicial resolution because the parties participate in reaching an agreement. This guarantees the end of the conflict and facilitates the application of the solution.

Although the existing regulations are insufficient and there are difficulties that must be overcome, intrajudicial mediation in the contentious-administrative jurisdictional order is a reality (with different rates of implementation in the Spanish territory) and has attained remarkable achievements. Among them is the decisive support that the General Council of the Judiciary (CGPJ) has given to this mechanism, which is shown by the Protocol of Contentious-Administrative Mediation being adopted and included in the "Guide for the practice of intrajudicial mediation" (current version of 7 November 2016), as well as the various pilot experiences in some Contentious-Administrative Courts (Alicante, Barcelona, Burgos, Canary Islands, Madrid, Murcia, Valencia and Valladolid) and Contentious-Administrative Chambers of some High Courts of Justice (Valencian Community, Castilla and León Madrid and Murcia) in Spain.

II. CONCEPT, CHARACTERISTICS AND OBJECTIVES

1. Concept

Intrajudicial mediation in the contentious-administrative jurisdiction takes place once the case has been judicialized and the parties are immersed in a contentious-administrative process.

It is a means of conflict resolution that is complementary to judicial litigation, of self-composition of interests, in which, in the course of a contentious-administrative process, two or more legitimate parties voluntarily try to reach an agreement by themselves based on a proposal prepared by a mediator.

It is not an alternative to the contentious-administrative process, but rather it is inserted in this process and is carried out under judicial control with respect to the substantive rules and the system of procedural guarantees.

2. Characteristics

Intrajudicial mediation in the contentious-administrative jurisdiction has its own characteristics and connotations derived from the subjects of the process, that is, the administration and private subjects, and their different legal supremacy ("Protocol of contentious-administrative mediation", General Council of the Judiciary (CGPJ), 2016, p. 167) since there is a situation of real inequality between the parties.

The following characteristics are the most relevant:

- Intrajudicial mediation replaces the possible judicial resolution with the one agreed to by the parties based on a proposal made by a mediator.
- It avoids the detrimental effects of late justice.
- It reduces the proliferation of unnecessary resources and offers an inexpensive and fast formula for resolving numerous conflicts.
- It provides new participatory strategies to deal with certain judicial processes in which the response in the form of a judicial sentence does not correspond to the expectations of the procedural parties.

3. Objectives

The objectives of contentious-administrative intrajudicial mediation are as follows ("Protocol of contentious-administrative mediation", CGPJ, 2016, pp. 168-169):

- To complement and/or replace the possible judicial resolution by the agreement the parties have achieved based on a proposal from a mediator. The aim is to reach a consensual agreement while maintaining a balance between the guarantees of public and private rights at stake.
- To avoid the harmful effects of a late or merely precautionary justice that does not fully satisfy the constitutional right of effective judicial protection.
- To offer citizens an alternative to the difficulties of the Contentious-Administrative Jurisdiction, which include the complexity of accessing it, the necessary intervention of a lawyer, the delays in processing, the increase in litigation costs and the formalities of the process, among others.
- To transform the relationship between public administrations and citizens through the search for flexible formulas that allow the administrative power to be exercised while promoting the communication between the parties and the possibility of introducing subjective aspects that are usually left out of the formal procedure.
- To facilitate a broader composition of the interests in litigation, since mediation resolves past situations and allows bases of agreement to be created to resolve possible future conflicts. Mediation can suggest solutions that are different from those contained in the litigious object. Moreover, mediation makes it possible to act on the conflict to transform it because "while the conflict is fickle, versatile, unstable and capricious, the litigation is immutable and static" (p. 169).
- To strengthen the activity of the contentious-administrative courts and tribunals, facilitating their work of satisfactorily resolving disputes between citizens and public administrations by applying procedural formulas based on the autonomy of the parties and social harmony. Similarly, the aim is to be an instrument of modernizing the Administration of Justice, since

establishing these procedures, which involve a lower cost, could contribute to reducing response times in the Contentious-Administrative Jurisdiction.

III. BASIC PRINCIPLES

Intrajudicial mediation in the contentious-administrative field must be guided by a set of rules or principles that direct how it operates and provide the mediation carried out in this jurisdictional area with its own substantive and unique character that allow it to be identified compared to other self-composition mechanisms.

Among these basic principles, we highlight the following, included in the "Protocol of contentious-administrative mediation" of the CGPJ (pp. 169-171):

- Voluntariness: this mediation is a voluntary process, both in the decision to start and in its progression and completion, with the parties involved being able to withdraw at any time.
- Confidentiality: the confidentiality of the content of the mediation sessions and the documentation used is guaranteed. Both the mediator and the parties undertake to respect confidentiality when they sign the minutes of the constitutive mediation session.
- Impartiality and neutrality: the mediator must be neutral and seek a balance between the parties during the procedure. They must not have interests with respect to any of the parties, or with respect to the object of the conflict. Nor does the mediator make decisions on the controversy, since their role is to promote dialogue that allows different options to emerge to resolve the conflict as well as to lead the process.
- Bilateralism: both parties have the same opportunities to express themselves without any limitation other than that established by the mediator for the proper conduct of the sessions.
- Good faith: the parties must act in accordance with the principles of loyalty, good faith and mutual respect, during the process and negotiation to correctly focus on achieving the agreement, giving due collaboration and the necessary support to the mediator.

- Flexibility: the mediation process must be flexible so it can be adapted to the specific circumstances of the case and the subjects. The guidelines to be followed are agreed in each case by the mediator and the parties at the beginning of the process.
- Professionalism: mediation is a process of dialogue that is assisted and managed by a professional who has multidisciplinary training. The mediator provides the appropriate technical preparation to redirect the closed procedural positions of the parties towards the interests of each other and establish the appropriate framework for putting the negotiation on track towards a satisfactory agreement. As established in the CGPJ Protocol, "The professionalism of the mediator results from having achieved the legally required training, accumulating experience and maintaining constant learning" (pp. 170-171).
- Legal guarantees: in the mediation process, legal assistance is guaranteed without prejudice to the legal advice and direction function of the lawyers of each party. Moreover, the Recommendations of the Committee of Ministers of the Council of Europe recommend that lawyers accompany and advise their clients, since their assistance can favour achieving an agreement.

IV. REGULATORY FRAMEWORK

The regulatory framework of intrajudicial mediation in the contentious-administrative field is configured by the following rules:

- Law 29/1998, of 13 July regulating the Contentious-Administrative Jurisdiction:

The Explanatory Memorandum of this law provides that "the control of the legality of administrative activities can and should also be exercised by other means complementary to the judicial one, which need to be improved to avoid the proliferation of unnecessary resources and to offer inexpensive and rapid formulas for the resolution of numerous conflicts".

- Article 77 provides, firstly, that in proceedings in the first or only instance, "the Judge or Court, ex officio, or at the request of the party, once the claim and the response have been formulated, may submit for the consideration of the parties the recognition of facts or documents, as well as the possibility of reaching an agreement that ends the dispute, when the trial is promoted on matters susceptible to settlement and, in particular, when it is overestimating the amount". Secondly, it determines that the representatives of the defendant public administrations will need the appropriate authorization to carry out the transaction. Thirdly, it states that the attempt at conciliation "will not suspend the course of the proceedings unless all the parties request it and may occur at any time prior to the day on which the lawsuit has been declared concluded for sentencing". Finally, it provides that, if the parties reach an agreement that implies the disappearance of the dispute, "the Judge or Court will issue an order declaring the procedure terminated, provided that what was agreed was not manifestly contrary to the legal system or harmful to the public interest or third parties".

    - Article 113 provides that, after the execution period established in the agreement referred to in Article 77.3, either party may request its enforcement. If no deadline has been set for fulfilling the obligations derived from the agreement, the aggrieved party may request the other party to comply with it and after two months may proceed to urge its forced execution.

- Law 1/2000, of 7 January on Civil Procedure, which is of supplementary application in accordance with the first additional provision of Law 29/1998, of 13 July regulating the Contentious-Administrative Jurisdiction:

    - Article 19 allows litigants to "submit to mediation or arbitration and compromise on what is the subject of the same, except when the law prohibits it or establishes limitations for reasons of general interest or for the benefit of a third party". In addition, it provides that the agreement or pact reached by the parties "will be approved by the court that is hearing the litigation in order to put an end to it" and allows

all acts of disposition on the subject of the process to be carried out "according to their nature, at any time of the first instance or of the appeals or of the execution of the sentence". Likewise, the parties "may request the suspension of the process, which will be agreed by the Attorney of the Administration of Justice by decree provided that it does not harm the general interest or a third party and that the term of the suspension does not exceed sixty days".

- Article 415 provides for the possibility that, during the pre-trial hearing procedure, the parties state that they have reached an agreement or are willing to conclude it immediately, in which case "they may withdraw from the process or request the court to approve the agreement". Likewise, the parties, by mutual agreement, may also request the suspension of the process to submit to mediation. If the agreement is reached and is judicially approved, "it will have the effects attributed by law to the judicial transaction and may be carried out by the procedures provided for executing sentences and judicially approved agreements" and "may be challenged for the causes and in the manner provided for the judicial transaction".
- Article 517.2.2 attributes the status of executive title to mediation agreements that have been raised to public deed in accordance with the Law on Mediation in Civil and Commercial Matters.

Likewise, although these are simple recommendations and do not have binding legal value, it is worth mentioning the Recommendation of the Committee of Ministers R/86-12, of the Council of Europe, on measures to prevent and reduce excessive workload in the courts; and, in particular, Recommendation REC (2001) 9 of the Committee of Ministers of the Member States, on alternative ways of regulating disputes between administrative authorities and private persons.

V. SCOPE OF APPLICATION

1. Formal scope

In accordance with the CGPJ Protocol on intrajudicial mediation in the contentious-administrative field (pp. 187-188), mediation shall be applicable:

- In cases where the legal system allows the transaction.
- In cases in which the legal system admits the conventional termination of the administrative procedure (art. 86 of the Law of Common Administrative Procedure of Public Administrations (LPACAP)).
- In cases for which the legal system provides for challenges and substitutes compositional procedures for the administrative appeal under Article 112.2 of the LPACAP.
- Regarding the exercise of discretionary powers of the administration.
- In the establishment of controversial facts in the powers regulated or that are a prerequisite for applying legal regulations.

2. Material scope

In accordance with the CGPJ Protocol on intrajudicial mediation in the contentious-administrative field (pp. 188-189), the parties may be submitted to mediation provided that the following formal conditions are met:

- The establishment of the amount of compensation, fair prices or bailouts.
- The determination of the rules on benefits in bilateral relations as well as contracts under public and private law, agreements and reimbursement of subsidies.
- Urban planning, environmental and territorial planning legislation, as well as the specification of magnitudes, parameters and standards in the application of said legislation.
- Annoying, unhealthy, harmful or dangerous activities.
- The inactivity of the administration, the de facto route and the administrative silence.
- The execution of measures in the disciplinary and sanctioning power of the administration.
- Enforcement of sentences.

- The others that are established in legal regulations or are agreed by the competent Judge.
- Public service, *mobbing* or harassment at work.

VI. ADVANTAGES AND DISADVANTAGES OF IMPLEMENTING MEDIATION

1. Advantages

Intrajudicial mediation in the contentious-administrative field has numerous advantages. Below we highlight some of them:

- There are benefits for the Administration of Justice (favouring quality justice), for the public administration (enabling an administration that is more modern, efficient and closer to the citizens), and for citizens (allowing a more satisfactory management and solution of their conflicts and generating greater trust in the Administration of Justice and in the public administration).
- Mediation favours the transformation of the relationship between the public administration and the citizens, leading to a closer and more sensitive administration and enhancing citizen participation and collaboration in the search for solutions.
- Speed and lower economic cost.
- Greater effectiveness and efficiency, since mediation allows considering the conflict in all its dimensions, understanding the underlying cause of the problem and ending different conflicts with the same origin.
- Flexibility, which allows adaptation to the particular circumstances of the conflict and the parties in the process.
- The parties can control the process and the result, and they play a leading role in determining the solution. In addition, mediation makes creative and specialized solutions possible.
- There is a high probability of compliance with the agreement reached.
- Future conflicts are prevented.

2. Disadvantages

Intrajudicial mediation in the contentious-administrative field still has many disadvantages and difficulties to be overcome. These include:

- The confusion and ignorance that still surround mediation for the parties involved as well as the professionals and even the judicial bodies themselves.
- The distrust of this mechanism, which could be mitigated with adequate information.
- The insufficiency of existing resources.
- The absence of regulation of intrajudicial mediation in the contentious-administrative jurisdictional order.
- The authorization regime necessary for the administration to compromise (see art. 77.1 of the LJCA).

VII. THE REALITY OF CONTENTIOUS-ADMINISTRATIVE INTRAJUDICIAL MEDIATION IN SPAIN

1. Protocols

1.1. IMPORTANCE OF THIS INSTRUMENT

Given the insufficient regulatory framework for intrajudicial mediation in the contentious-administrative field, it should be noted the important role played in this area by the different protocols that have been approved and that have made it possible to implement this mediation and adapt it to the existing organizational model and resources.

Currently, there are several protocols for contentious-administrative intrajudicial mediation. On one hand, there is the protocol adopted by the CGPJ; and on the other hand, there are the protocols adopted by different jurisdictional bodies (both Contentious-Administrative Courts and Contentious-Administrative Chambers of the Spanish High Courts of Justice).

1.2. THE CGPJ PROTOCOL FOR CONTENTIOUS-ADMINISTRATIVE INTRAJUDICIAL MEDIATION

These protocols have particular characteristics and some differences; however, they all have a similar structure and consist of an introduction and explanation of the scope of intrajudicial mediation in the contentious-administrative field, with an explanation of the reasons for using this mechanism; analysis of the regulatory framework; presentation of the basic principles and objectives of mediation; an organizational model; cost; material scope of its application, procedure and effects on the judicial route; as well as references to the evaluation model and service quality.

The CGPJ has given decisive support to contentious-administrative intrajudicial mediation, which takes the form of adopting the Contentious-Administrative Mediation Protocol, included in the "Guide to the Practice of Intrajudicial Mediation" (current version of 7 November 2016, which replaces a previous version of 2013).

This Protocol, after introducing contentious-administrative intrajudicial mediation and defining its objectives and principles, includes a guide for implementing mediation services and a protocol for referring cases to mediation. The latter includes the bases of action to carry out the mediation in the contentious-administrative process. It also includes provisions related to the following elements:

- Scope of application
- Suspension of the contentious-administrative process.
- Institutional mediation.
- Parties in the mediation.
- Mediation procedure.
- Carrying out mediation actions.
- Evaluation and control systems.

Finally, it includes the following five annexes:

- Advantages of mediation versus the judicial process.

- Legislative framework (European, national and regional standards).
- Types of cases.
- Information about the referral circuit.
- Forms.

1.3. OTHER PROTOCOLS

In addition to the CGPJ Protocol, the following protocols can be mentioned by way of example:

- The protocol for implementing a pilot mediation plan in the Contentious-Administrative Jurisdiction in the Autonomous Community of the Canary Islands.
- The protocol on the organizational infrastructure of mediation connected with the Courts and Tribunals of the Contentious-Administrative Jurisdiction within the scope of the High Court of Justice of Madrid (5 March 2018).
- The action protocol of the pilot mediation project in the contentious-administrative field in Valladolid and province (13 November 2019).
- The action protocol of the pilot project of contentious-administrative mediation in Valencia with the Court of Arbitration and Mediation of the Chamber of Valencia (2019).
- The Mediation Guide of the Contentious-Administrative Courts of Barcelona (2 November 2020).

2. Examples of practical experiences

Currently, there are several pilot experiences of intrajudicial mediation in some Contentious-Administrative Courts (Alicante, Barcelona, Burgos, Las Palmas de Gran Canaria, Madrid, Murcia, Valencia and Valladolid) and in Contentious-Administrative Chambers of certain High Courts of Justice (Valencian Community, Castilla and León, Madrid and Murcia) in Spain.

Below, we analyse some of these experiences of intrajudicial mediation in the contentious-administrative field.

2.1. HIGHT COURT OF JUSTICE OF MADRID

The High Court of Justice of Madrid began its activity in contentious-administrative intrajudicial mediation in 2018, through the Agreement of the Governing Chamber of the High Court of Justice of Madrid of 5 March 2018. From that year until today, the annual reports of the court have included a series of interesting data – due either to their presence or absence – regarding the outcomes of intrajudicial mediation in the Community of Madrid. The trial started with six mediators, which was then increased to eight from 2019 to the present.

The data on referrals to administrative mediation in the High Court of Justice of Madrid indicate that there has been a growing interest in mediation from the beginning, although there are signs of weakening interest in the last year (2023) [see Figure 1].

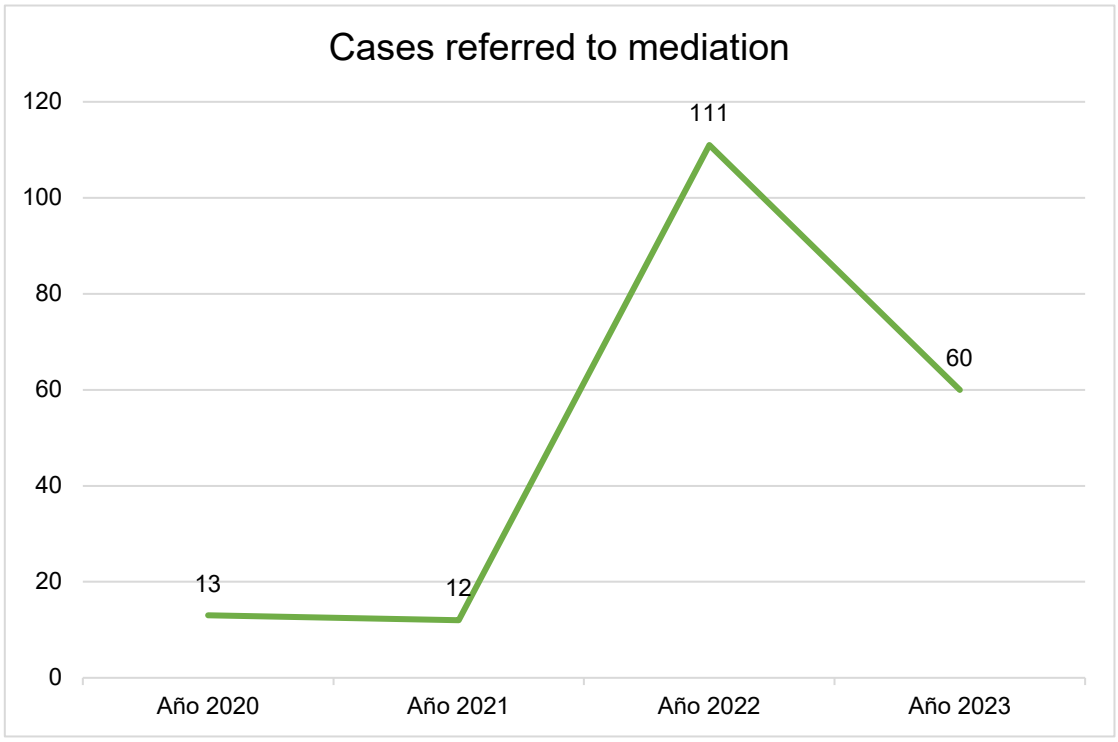
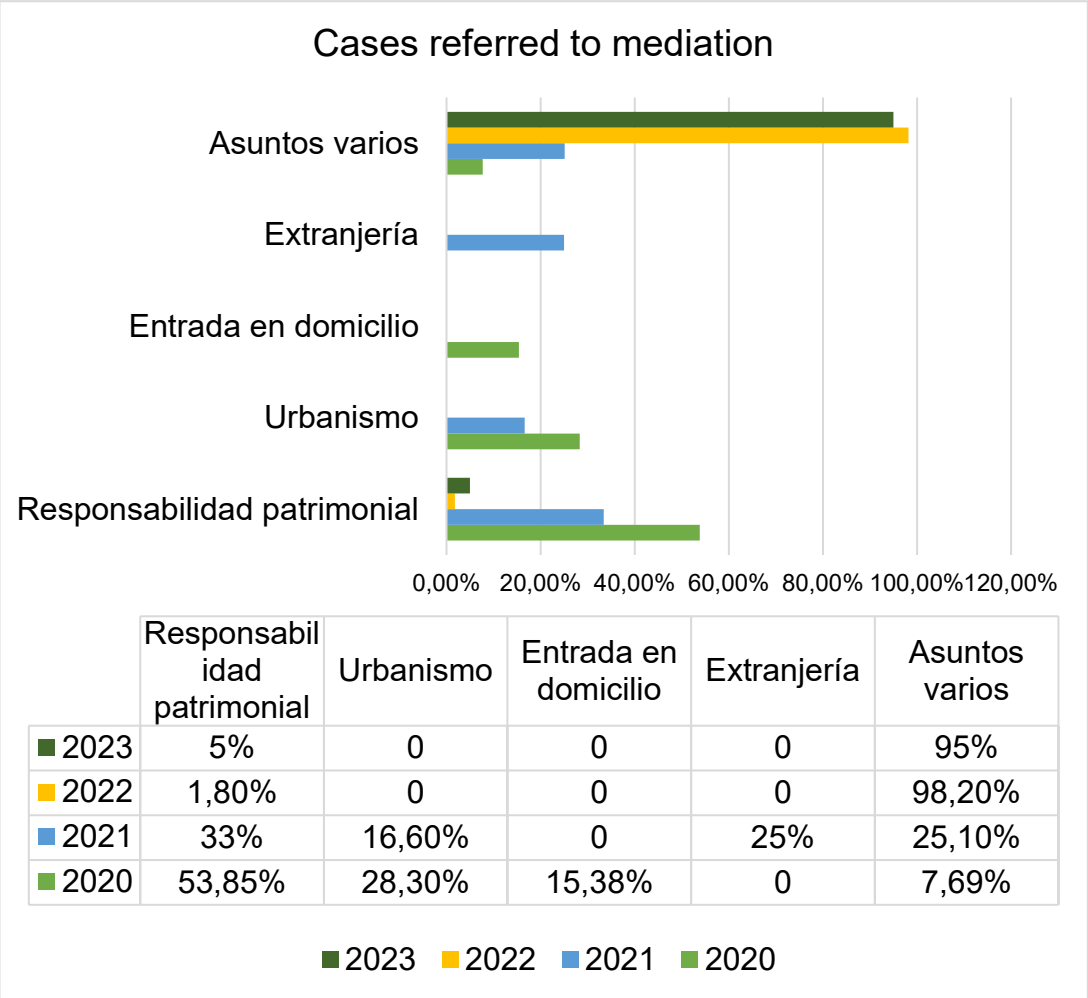


Figure 1 – Cases referred to administrative mediation according to the Annual Reports of the High Court of Justice of Madrid [change Año to Year]

These data show a strong upward trend in the promotion of mediation from 2022 (specifically, an increase of +925% compared to the previous year), which can be understood as an attempt by the jurisdiction to support and opt for mediation. Despite this, in 2023 there was a large decrease in this number of referrals (-54%). However, the number of referrals for 2023 is still positive compared to previous years, representing an increase of +500% compared to 2021.

Based on these referrals to mediation, the report determines a percentage differentiation on the types of conflicts referred to mediation. It can be seen that urban planning and patrimonial responsibility stand out [see Figure 2].



	Responsabilidad patrimonial	Urbanismo	Entrada en domicilio	Extranjería	Asuntos varios
2023	5%	0	0	0	95%
2022	1,80%	0	0	0	98,20%
2021	33%	16,60%	0	25%	25,10%
2020	53,85%	28,30%	15,38%	0	7,69%

Figure 2 - Conflict cases subject to administrative mediation in accordance with the Annual Reports of the High Court of Justice of Madrid. [Miscellaneous matters; Immigration; Home entry; Urban Planning; Patrimonial responsibility]

Notwithstanding the data, and despite the substantial increase in mediations in 2023 compared to 2021 and 2020, the results show that the interest in mediation of the High Court of Justice of Madrid has clearly decreased. There were three (3) agreements reached in 2020, and also three (3) in 2021. However, from that date the results ceased to be published, and were replaced with the following text (which was identical in the subsequent reports): "Experience has shown that the proper implementation and effective development of intrajudicial mediation in this contentious-administrative order requires the approval of a regulation that expressly regulates this mediation, taking into account the peculiarities of this jurisdictional order and removing some of the procedural obstacles that are hindering the achievement of agreements between the parties to the judicial process in order to provide security to all the operators involved".

This message shows a clear discouragement towards mediation due to the regulatory vacuum surrounding it, which can scare away legal operators such as lawyers or officials, who are more confident of the traditional sentences than of the flexible mediation agreement. This discouragement is also evidenced by the data having very little detail in the last two reports. While in the first reports the subject matter of mediation was indicated in a more varied way, so that "miscellaneous matters" represented just 7.69% in 2020 and 25.10% in 2021, in the two subsequent reports this item absorbed all the previous ones without mitigation and was 98.20% in 2022, and 95% in 2023.

2.2. High Court of Justice of Murcia

The Intrajudicial Mediation Unit of Murcia (UMIM) was made a formal unit of the Judicial Office of Murcia in 2014 by Order JUS/1721/2014, of 18 September (BOE 25 September 2014).

In the field of contentious-administrative mediation, its participation began in 2016 with a referral protocol for the Contentious Chamber of the High Court of Justice of Murcia. However, in 2020 a new protocol was approved to incorporate the seven Contentious-Administrative Courts of Murcia and the Contentious-Administrative Court of Cartagena.

The statistical data concerning contentious-administrative mediation in the High Court of Justice of Murcia show the interest in this mediation during the last seven years, although there is a downward trend in the number of referrals [see Figure 3].

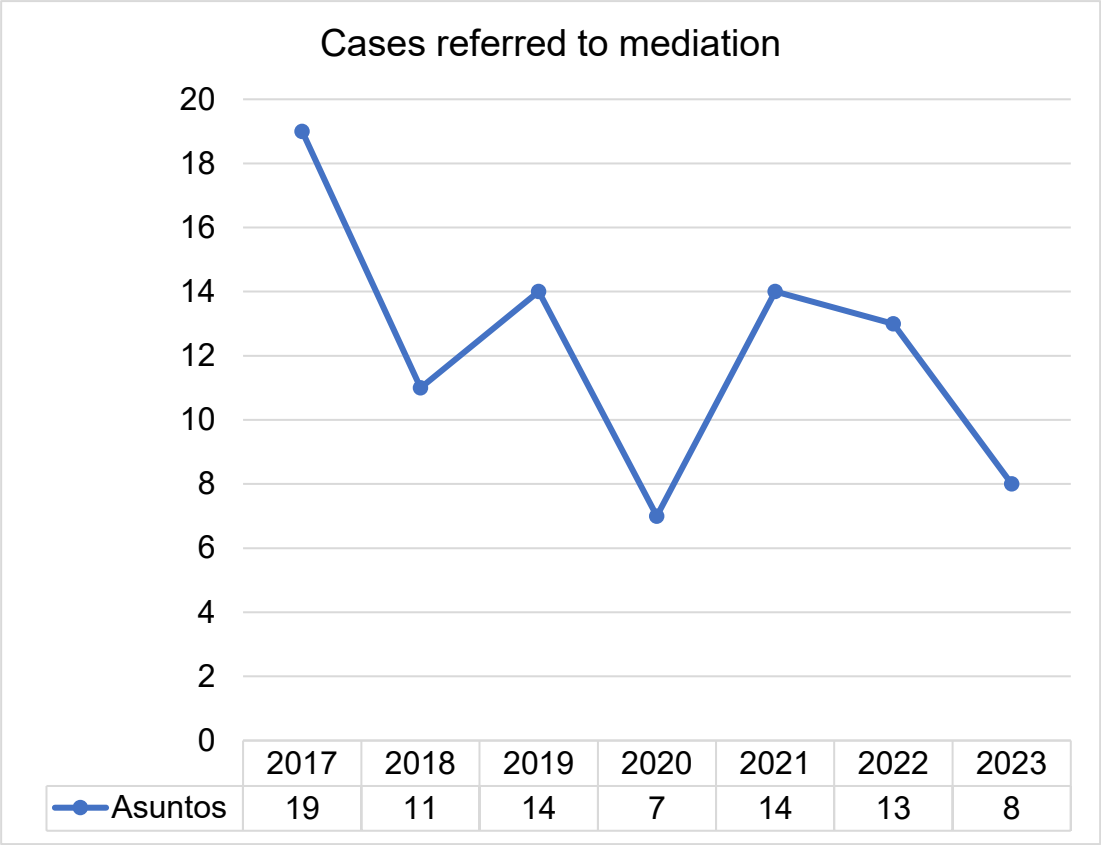


Figure 3 – Cases referred to administrative mediation according to the annual reports of the Intrajudicial Mediation Unit of Murcia. [Asuntos = Cases]

This graph shows an upward trend in 2021, when the number of referrals doubled (7 in 2020 and 14 in 2021). However, in 2023 there was a decrease of 42% compared to the year with the highest number of referrals (19 cases referred to mediation in 2017), although the positive figure remains similar to that of 2020.

Despite this situation, the High Court of Justice of Murcia and the courts remain committed to this area. Proof of this is the number of mediations that end in an agreement, since, for example, of the four mediations carried out in 2021, three arrived at an agreement, which corresponds to 75%, and although the figures in

2023 decrease, agreements continue to be reached (2) [see Figure 4 and Figure 5].

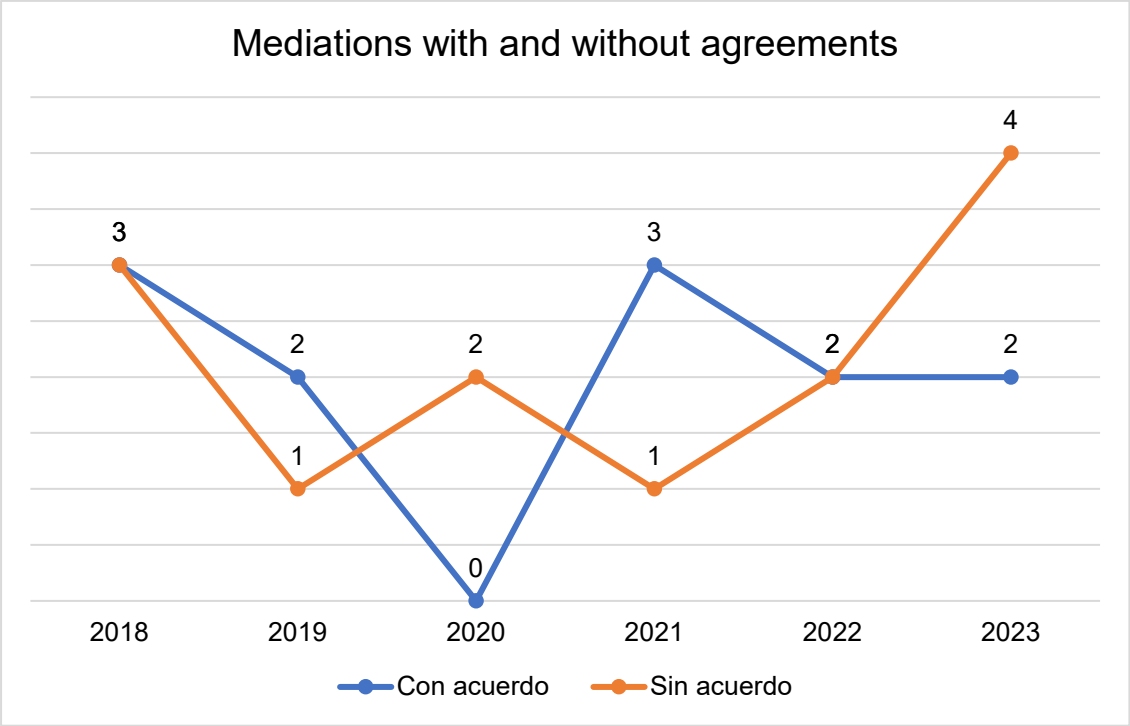


Figure 4 – Cases referred to administrative mediation that end with an agreement or without an agreement according to the Annual Reports of the Intrajudicial Mediation Unit of Murcia. [Con acuerdo = with an agreement; Sin acuerdo = without an agreement]

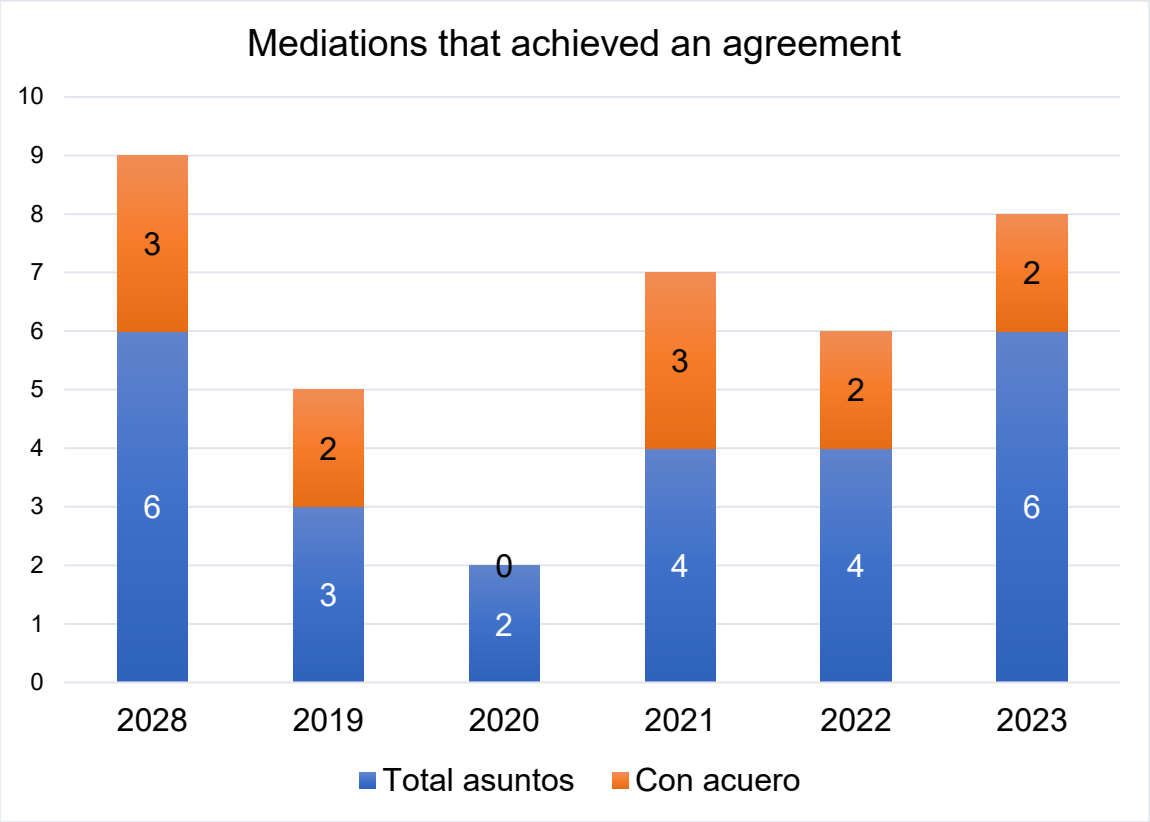


Figure 5 – Cases referred to administrative mediation that end with an agreement according to the Annual Reports of the Intrajudicial Mediation Unit of Murcia. [All cases ; With an agreement]

Consequently, the percentage of cases closed by mediation (33% in 2022 and 37% in 2023) should be assessed positively compared to those cases that were closed but did not follow the referral to mediation (67% in 2022 and 63% in 2023) [see Figure 6]. Despite being small figures, it is worth noting the slight increase in the last year, which shows the boost given to mediation by the High Court of Justice of Murcia and the courts in this area.

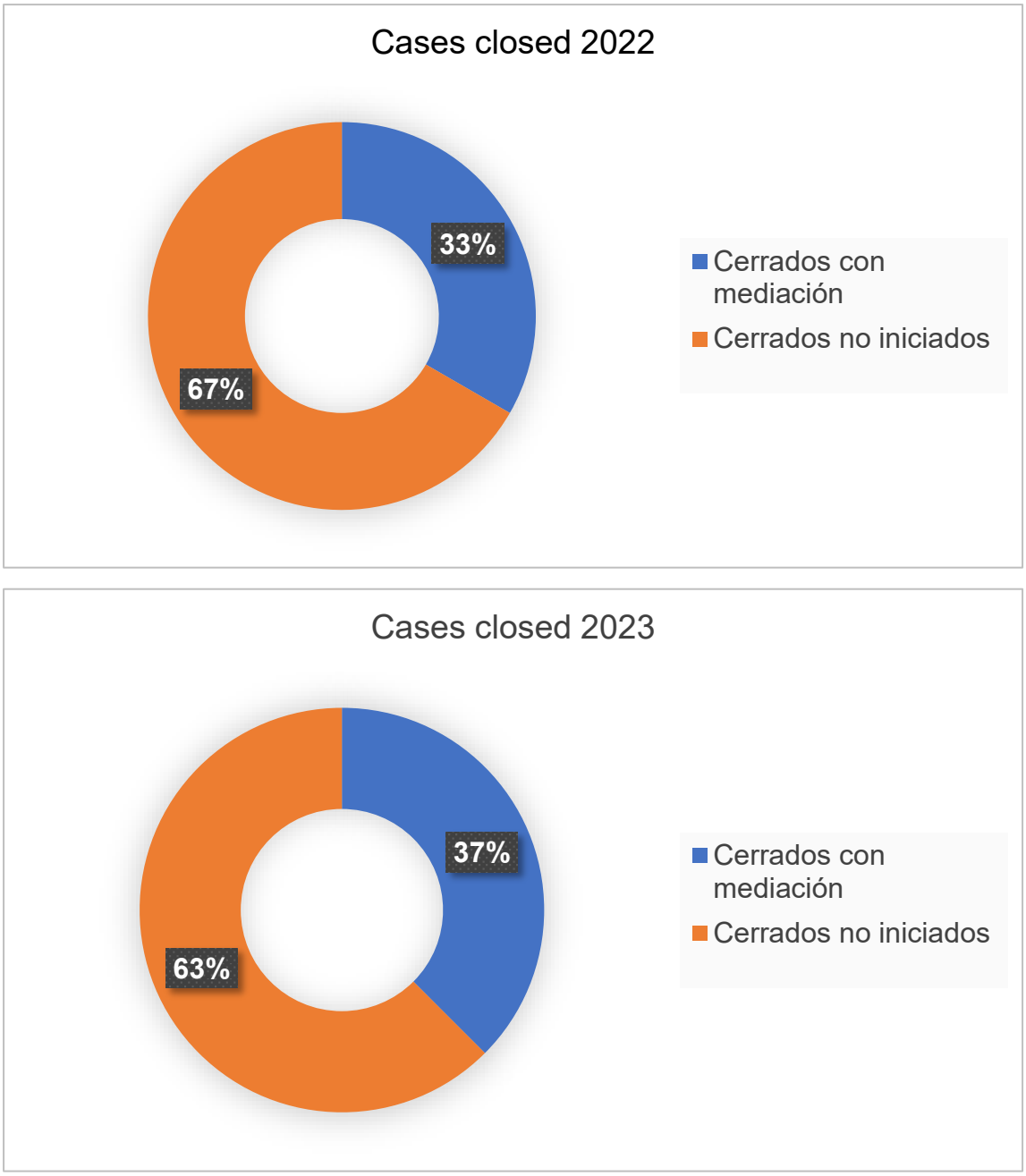
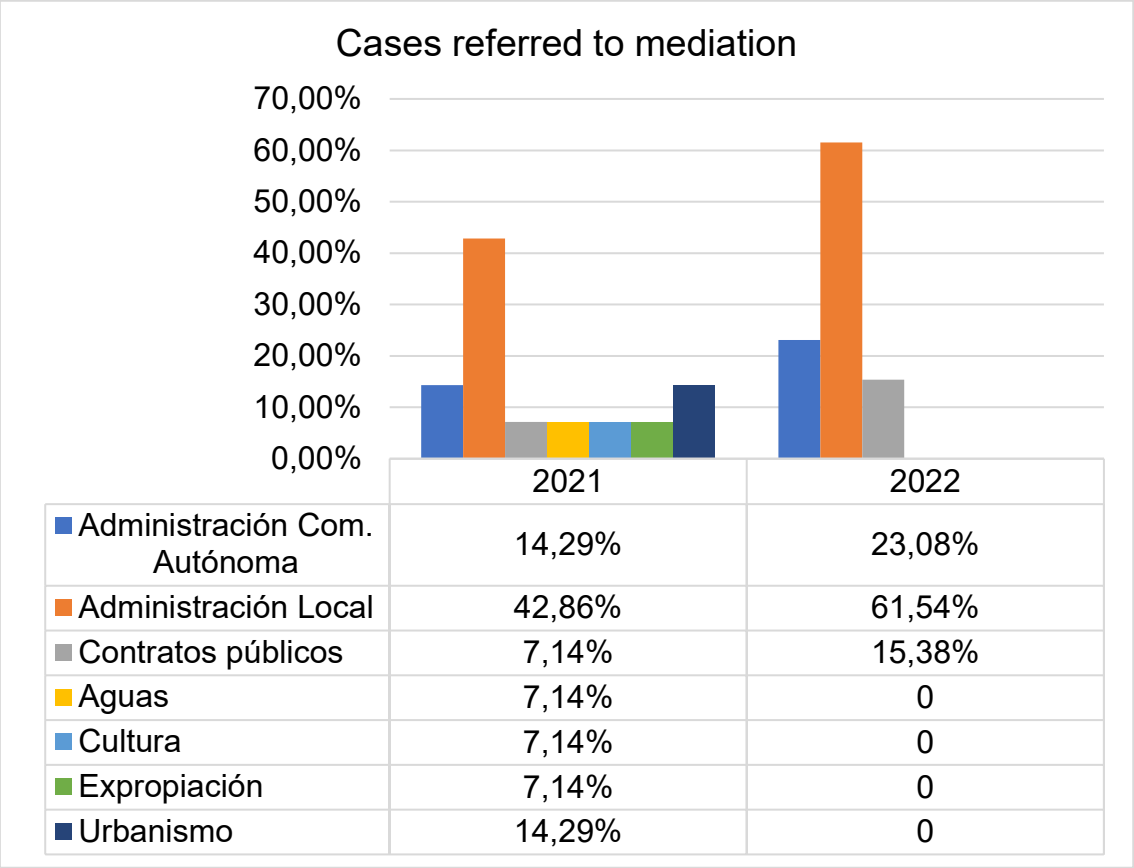


Figure 6 – Cases closed in 2022 and 2023 according to the Annual Reports of the Intrajudicial Mediation Unit of Murcia. [Closed with mediation ; closed without mediation]

These data show a downward trend; however, they are interpreted optimistically and enthusiastically by the High Court of Justice of Murcia and the courts, as they highlight how difficult it is to reach, document and sign an agreement in this area.

The annual reports of the Intrajudicial Mediation Unit of Murcia indicate the sectoral areas that are most frequently referred to mediation, among which the

cases of the local administration stand out with 61.54% and the administration of the autonomous community with 23.08% in 2022. However, if we compare these data with those of the previous year, we can see an increase of 18.68 and 8.79% respectively. Nevertheless, other areas such as urban planning, forced expropriation, culture, water and public contracts have not had the same fate and in the last year there were no cases referred to mediation in these areas [see Figure 7].



	2021	2022
Administración Com. Autónoma	14,29%	23,08%
Administración Local	42,86%	61,54%
Contratos públicos	7,14%	15,38%
Aguas	7,14%	0
Cultura	7,14%	0
Expropiación	7,14%	0
Urbanismo	14,29%	0

*Figure 7 – Cases referred to mediation according to the Annual Reports of the intrajudicial Mediation Unit of Murcia. [*Administration of the autonomous community; Local administration; Public contracts ; Water; Culture ; Expropriation; Urban planning]

The last reports of the Intrajudicial Mediation Unit of Murcia (years 2022 and 2021) make a percentage differentiation on some aspects of the referral to mediation, being of special interest the phase of the referred case, the type of participants and the times between the referral and the conclusion of the mediation, and between the beginning and the conclusion of the mediation. This

accuracy of data is more proof of the encouragement and commitment of the High Court of Justice of Murcia and the courts to referrals to mediation.

Concerning the phase of the referred case, the data show the relevance of the declarative phase, which reaches up to 76.92% in 2022 (19.78% more than in 2021).

The type of participants most represented are clearly individuals, as they reach 42.22% in 2022 with an increase of 18%. However, the local administration also has a high participation with 20%, although in this case there is a decreasing trend of 13.33% compared to the previous year.

The percentage differentiation on the time between the referral and conclusion and between the start and conclusion of the mediation is clearly in the period of 3 to 6 months, accounting for 50% of cases during the last two years (2022 and 2021). However, the other 50% is located in the 6-month period during the years 2021 and 2022.

3. An example of using mediation successfully

As an example of the successful use of intrajudicial mediation in the contentious-administrative field, we can cite the well-known case of the old building of the company Fenosa, in A Coruña, in which the City Council of A Coruña reached an agreement in the execution phase of the sentence, putting an end to a controversy that had lasted more than twenty years.

In this case, the judgment of the High Court of Justice of Galicia no. 1850/2001, of 20 December 2001 (Contentious-Administrative Chamber, Section 2 appeal no. 6937/1997, presented by: José Antonio Méndez Barrera) had declared the nullity of the license granted by the City Council of A Coruña for the rehabilitation of the property corresponding to the old building of Fenosa, as being contrary to the law, and ordered the demolition of said building.

The execution of this ruling would have required the restoration of the old Fenosa building to the time before the annulled license was granted, recovering the building intended for offices in accordance with the licenses of 1962 and 1964 and demolishing the rehabilitation works carried out and whose annulment was

agreed in the ruling. This would have meant the loss of the homes of eighty-seven families (more than four hundred people), as well as seven commercial premises and twelve offices, where more than a hundred people worked. In addition, it would have led the City Council of A Coruña to an unsustainable economic-financial situation with a high social cost, which would have had a direct impact on citizens through a modification of local taxes. However, through mediation, a more satisfactory solution was achieved, reflected in two agreements, one between the City Council and the appellant, and one between the City Council and the Community of Owners of the old building of Fenosa. The two agreements were subject to judicial approval by Order no. 76/2019 of the High Court of Galicia (Contentious-Administrative Chamber, Section 2 appeal no. 6937/1997, presented by: María Azucena Recio González).

The agreement reached between the City Council and the appellant took the form of the City Council of A Coruña publicly recognizing its responsibility regarding the cancellation of the license for the rehabilitation of the old building of Fenosa; the city council adopting a Protocol of Good Urban Planning Practices in order to prevent a case like the old building of Fenosa occurring again; the city council constructing official protection housing; the city council paying compensation for personal damages of a moral nature caused to the appellant; and the appellant making a waiver of actions.

The agreement reached between the City Council of A Coruña and the Community of Owners of the old Fenosa building involved replacing the execution of the court sentence, and thus avoiding the demolition of the building; the city council’s public recognition of their responsibility regarding the cancellation of the license for the rehabilitation of the old Fenosa building; the modification of the urban planning of A Coruña to include the old Fenosa building as a "singular building"; the city council’s adoption of a Protocol of Good Urban Planning Practices; and the bases for compensation to the owners.

VIII. DIFFICULTIES OF INTRAJUDICIAL MEDIATION IN THE CONTENTIOUS-ADMINISTRATIVE FIELD

There are many difficulties involved in implementing intrajudicial mediation that still need to be overcome. Among them, we highlight the insufficient regulation in the contentious-administrative order. In addition, at the present time, the main obstacle is the authorization regime necessary for the Administration to compromise, since the representatives of the Public Administrations need an express authorization, sometimes even with a prior hearing of the Council of State or equivalent advisory body. This rigidity does not facilitate the agility, flexibility, and simplicity required in mediation.

There is an uneven implementation of intrajudicial mediation in the different autonomous communities due, in part, to the different involvement of the public authorities. This impacts effective judicial guardianship in terms of equity. Therefore, it is absolutely essential that the different competent public administrations offer all citizens, regardless of the territory in which they are located, the possibility of accessing mediation.

Another of the main difficulties involved in intrajudicial mediation is the additional cost that it can represent for the parties and, especially, the public, because it is necessary to pay the professional fees of the lawyer and the expenses of the mediation. This economic element may be dissuasive for the parties to initiate the procedure, since it may end in failure because the agreement must necessarily be accepted by both parties.

In addition, there are other less obstructive difficulties such as the lack of adequate training of judicial bodies to promote mediation where appropriate; or the ignorance of existing services by both the parties and the judicial bodies, as well as the insufficiency of resources.

IX. SOME PROPOSALS FOR IMPROVEMENT

It is essential to regulate intrajudicial mediation in the contentious-administrative field. To achieve greater implementation, it is necessary that it has its own substantivity through a specific regulation. In this regard, it should be noted that the Council of State, in Ruling 222/2010, of 17 February 2011, in the Preliminary

Draft Law on Mediation in Civil and Commercial Matters, has considered that intrajudicial mediation in the contentious-administrative field must have its own regulation given the particularities that exist in the administrative field, which make it inappropriate to simply transfer the application of the regulations and principles that govern mediation in civil and commercial matters. Thus, it states that

> "At the time of undertaking such regulation, the notorious particularities that the administrative field presents in relation to the civil and commercial sphere should be considered. Thus, it should be remembered that the latter is governed, as a general rule, by the principle of autonomy of will, which allows, not only to create, modify or extinguish legal-private relations of a material nature, but also to affect the substantive scope insofar as the parties can also freely decide how to resolve – by judicial means or by alternative means to the judicial system such as mediation or arbitration – the conflicts they may have over their own private interests. It is clear that this principle of free disposal – both of the material law at stake and of jurisdictional law – is much smaller in the public sphere, as reflected in the modifications that the Preliminary Draft proposes to introduce in the Law of Contentious-Administrative Jurisdiction.
>
> Along the same lines, it should be borne in mind that, in cases where the possibility of reaching conventional solutions has been introduced into our legal system, they have been surrounded by ad hoc regulation, which also seems the way forward regarding the establishment of mediation.
>
> For this reason, before entering into a procedural regulation of mediation in administrative matters, it is necessary to clarify and define the material space of availability in which mediation in this area is possible.
>
> All this advises that the eventual regulation of mediation in the administrative sphere be the subject of a regulatory initiative different from the rule that regulates mediation in civil and commercial matters, so it is suggested to delete the second final provision of the Preliminary Draft" [section III.p), epigraph ii)].

Therefore, it considers that:

"If mediation is admitted in certain administrative matters, it should be provided with the specific regulation applicable to the case, which would render unnecessary the power that the Preliminary Draft attributes to the Judge or Court to impose on the parties the submission to the rules of the legislation now being drafted" [section III.p), epigraph ii)].

From this perspective, it is interesting the proposal to modify the LJCA for promoting and defending democratic values formulated by the Valsaín Foundation, the Ilustre Colegio de Abogados de Las Palmas (Association of Lawyers of Las Palmas) and the European Institute of Mediation and Public Ethics, in exercise of the right of petition, in accordance with Organic Law 4/2001, before the Justice Commission of the Congress of Deputies. Specifically, it is proposed, firstly, to rewrite article 77 of the LJCA, which would be worded as follows:

"Article 77.1 In proceedings in the first, only and second instance, the Judge or Court, ex officio or at the request of a party, in any procedural phase of the first instance, in the phase of appeals or in the execution of the sentence, will submit for the consideration of the parties the recognition of facts or documents, as well as the possibility of reaching an agreement that ends the dispute, when the trial is promoted on matters susceptible to mediation, conciliation, conventional termination or settlement and, in particular, when it is overestimating the amount .

77.2 Authorization of Mediation Agreement. – The intrajudicial mediation agreement must be authorized by the competent authority when it directly affects assets and rights of the Public Treasury.

77.3 Such authorization will not be necessary, and the intervention of the State Attorney, Lawyer or Legal Representative of the Administration will suffice, when the intrajudicial mediation agreement refers to:

a) Indirect patrimonial effects and, in any case, disputes of a determined amount that do not exceed the amount of 2,000 euros.

b) Claims of an amount, sanctioning power, forced expropriation, immigration, public function, sports, urban planning and the environment, public contracts, tax and patrimonial responsibility of the Administration.

c) Other cases whose object of litigation was not subject to a singular prohibition in transactional matters.

77.4 If the parties reach an agreement through mediation or any other alternative system of conflict resolution that leads to the disappearance of the dispute, the Judge or Court will issue an Order declaring the procedure terminated, provided that what was agreed is not manifestly contrary to the legal system, nor harmful to the public interest or third parties".

Secondly, it is proposed to add a new article 77.1.bis, to be included in the LJCA, with the following wording:

"Article 77.1.bis. Intrajudicial contentious mediation is voluntary. However, once the administrative procedure has been completed and the admission requirements of article 25 of this jurisdictional law have been met, the interested parties shall prove that they have attempted administrative mediation prior to filing an administrative appeal in cases of conventional termination and/or as a substitute for an appeal and an optional appeal, when the laws of sectoral scope so provide, according to articles 86 and 112.2 of Law 39/2015, of 1 October, on the Common Administrative Procedure of Public Administrations".

Thirdly, it is proposed to add an article 77.2.bis in the LJCA, as a supplementary clause of Law 5/2012, of 6 July on mediation in civil and commercial matters in the following terms:

"Article 77.2.bis In what is not provided for by this Law to regulate intrajudicial mediation and in what is applicable, Law 5/2012, of 6 July on mediation in civil and commercial matters will govern as a supplement".

Regardless of the convenience and need for a complete regulation of mediation in the contentious-administrative jurisdictional order, it is necessary to activate it in its current state. As discussed above, mediation has a wide range of practical applications, since it is the courts themselves, with the agreement of the parties, that can refer, in the matters indicated in the previous sections, the resolution of the conflict to mediation at any stage of the process. This is verified by the content of the Guide for the Practice of Intrajudicial Mediation of the General Council of the Judiciary and the protocols indicated above, since they contemplate the

possibility that, even in its current state, the courts and the parties involved may refer matters to mediation.

X. CONCLUSIONS

In recent years, interest in intrajudicial mediation has grown enormously in Spain, increasing in percentage by very significant amounts, such as in the High Court of Justice of Madrid which, from 2021 to 2023 increased its referral rate to mediation by 500% (from 12 cases to 60).

However, this substantial increase in numbers does not imply, *de facto*, that the system has begun to take root in Spanish legal practice. As pointed out by the discouragement evidenced by the data from the High Courts of Justice of Madrid and Murcia, the legal uncertainty caused by not having its own regulation implies a very significant quantitative decrease in the agreements reached. The actors in general seem to prefer the traditional system, which they know and whose guarantees are within the regulations.

The information and data worked on in this report evidence the need for specific regulation regarding this matter, which would allow the judiciary to initiate administrative mediation procedures in those conflicts in which it can be observed to be beneficial. This would be advantageous not only for decongesting the judicial administration, but also for reaching agreements based on a dialogue and the equity typical of this mechanism and which a judicial sentence would not allow. The judicial promotion of mediation in Spain can be seen in pilot projects carried out by courts who seek justice and believe that these equitable agreements will resolve certain conflicts better than the solutions that the law obliges them to adopt.