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Settling Out-of-Court in Spanish Personal Injury Cases A Comparison with the English & Welsh System

When can a personal injury case claim be settled out of court?

As in England & Wales a potential personal injury claim between parties may be settled in Spain at various stages:

- In an agreement before court proceedings are begun;
- In a "compromise" or "settlement" after proceedings have started, at any time before the judge has given judgment.

Under Spanish Law however there are no pre-action protocols designed to promote early settlement and judges will not necessarily assist parties in reaching a settlement, e.g. by allowing more time for negotiations, even if it looks as though there are real prospects of an agreement being reached.

The advantages of settlement

Spanish rules of court differ substantially from the new court rules in England & Wales. In particular they are not designed to promote cooperation between the parties (nor to discourage so-called 'strategic games'). In fact, litigation in Spain is unpredictable and for that reason it can be unexpectedly expensive and surprisingly stressful for the parties involved. A fundamental difference between the Spanish and the English & Welsh judicial systems is partly responsible for this, namely the principle that in Spain lawyers have a duty to their clients not to the Court.

Despite the fact that a Spanish criminal judge undertakes an investigation of the facts in an attempt to uncover the truth, the parties still have to present their alternative versions of events, plus supporting evidence, to allow the judge to decide between them.

In Spain there are no Fast-Track cases and a case may take considerable time to go through the courts; it is not unusual for the trial to take place some years after, for instance, the accident has occurred. First, the initial stages of obtaining medical reports, particularly with the lack of pre-action protocols, may take considerable time. Moreover, courts are busier and slower than in England & Wales, and trial dates are often fixed far ahead, particularly if the case is not heard in a criminal court or if there are to be any appeals.

Therefore, settlement of a case prevents further costs being incurred, a vital point in Spain, since costs in personal injury matters are often not recoverable. If money is involved, the payer need not incur any further interest (calculated in Spain from the date of the accident) on damages, and the payee receives his or her money sooner.

How and when to negotiate

As in England & Wales it is imperative for Spanish lawyers to seek the client's specific instructions prior to settling a claim and any negotiations should be carried out "subject to the client's instructions". The purpose of negotiation is to find the "ideal sum"; in an ideal world this will be the highest a claimant can obtain and the least the defendant will pay. The tariffs set up by Spanish law in 1995 which are compulsory for road-traffic accidents will be taken as the main reference in calculating this ideal sum.

The right to represent a client has to be documented in Spain, by means of a power of attorney. The lawyer acting for the defendant will have to produce a copy of this Spanish power of attorney granted in his favour by the client in order to be able to undertake any negotiations with an insurance company, for instance. The power of attorney is also required by Spanish courts in order for a lawyer to represent a client.

In Spain as in England & Wales negotiations are not drawn to the court's attention until a deal is struck. In England & Wales all negotiations are just that and discussions are "without prejudice" to the party's case. In Spain there is no such rule but almost all out of court negotiations are carried out over the telephone and no documents relating to the out-of-court negotiation will as a general rule be used by the lawyers involved in the case.

Claimant solicitors in England & Wales have in the past considered that defendant insurers will not make reasonable offers for settlement prior to issue of proceedings and this situation persists very much in Spain.

The terms of the settlement

As in England & Wales, the settlement in Spain will bring all litigation between the parties to an end. The settlement must tie up all loose ends, as generally it is not possible to go back to court with fresh issues, further complaints or new calculations. In Spain the main type of settlement will involve the payment of money by the defendant to the claimant. Money is paid and each party agrees to end the litigation, each giving up his right to pursue his claim or defence. A settlement may contain the following terms:

- The amount of damages and interest to be paid, by whom, to whom;
- The date of payment of the whole amount (or the dates of installments);

In Spain, unlike in England & Wales, the amount of costs to be paid by a party is not normally included in the settlement, since in out-of-court agreements each side bears his or her own costs.

The form of a settlement

1. *Before filing court proceedings:* in Spain most insurance companies will require the agreed terms to be contained or confirmed in writing and to be signed before a notary public in what is known as Deed of Renunciation. It is important to make it clear that the contract is in "full and final settlement" of matters arising from the accident. Once agreed, the notarised document is a defence to any future claim between the parties arising from the accident.
2. *Once court proceedings have been filed:* in Spain as in England & Wales the parties may come to an agreement at any time before the judge gives his judgment. It is not, however, required, as it is in England & Wales, for the parties to put their agreement before the judge and ask him to make a "consent order", where a child (anyone under the age of 18) or "patient" (someone who has a mental disorder within the meaning of the Mental Health Act 1983 and is incapable of managing their own affairs) is involved in the case. Parents in Spain are the legal representatives of their children and therefore no consent order is required.

Payments into court and "Part 36 offers"

There is no equivalent under Spanish law to payments into Court and "Part 36 Offers". Nor is any alternative instrument available to exercise some degree of pressure on the other party to compromise in an out-of-court settlement. The only payments that are effected into court are those destined to prevent interest from accruing from the date of the accident. The amounts deposited in Court with that purpose are not in any event paid to the defendant.