

Settlement (civil litigation) Q&A: Spain

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Spain - specific information on all aspects of settling a dispute by negotiation, mediation and other alternative dispute resolution mechanisms, including the statutory obligations to attempt settlement, form and formalities of settlement, how to ensure confidentiality of the settlement terms, the without prejudice status of negotiations, the law on third party rights, enforcement of the settlement terms and how to set aside a settlement.

This Q&A provides country-specific commentary on *Practice note, Settlements in cross-border disputes: an overview* and forms part of *Cross-border dispute resolution*.

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Statutory obligations

1. Do courts in your jurisdiction encourage settlement between parties? If so, by what means? Are there any implications for the parties that refuse to participate in settlement negotiations?

Under Spanish law a settlement agreement is regarded as a type of contract based on mutual consideration and entered into by the parties to avoid court proceedings or to bring court proceedings to an end.

The parties are free to voluntarily enter into a settlement agreement by mutual consent. The court has no power to impose a settlement agreement on the parties without their consent.

However, during the pre-trial court process in ordinary declarative proceedings the court can make procedural adjustments to favour the possibility of a negotiated agreement. For example, Article 415 allows the parties to apply for a stay of proceedings to facilitate mediation.

The parties are absolutely free to reject the possibility of settlement and there will be no adverse consequences for a party that refuses to agree to a particular settlement proposal. Spanish law makes no distinction between a failure to accept a particular settlement proposal or a refusal to negotiate any settlement proposal. However, when a party prolongs settlement proceedings using delaying tactics the court may consider that there have been bad faith negotiations and impose adverse legal cost consequences on that party.

Form of settlement

2. What are the different ways in which parties to a dispute can record a settlement between them (for example, a settlement agreement, deed or court order)? Are settlements agreed verbally or through emails or letters exchanged between the parties required to be recorded in separate agreement or court order to be considered valid?

A settlement agreement is a type of agreement regulated by Articles 1809 to 1819 of the Spanish Civil Code. The general rules stated in the Code for civil and commercial obligations apply to settlement agreements.

In general, a settlement agreement is recorded in writing whenever it is reached before the start of a court dispute. If a settlement agreement is reached in pre-trial court proceedings the court will approve it in a formal court order.

Both types of settlement agreement will have the same force and effect as a judgment issued by the court. However, only a settlement agreement approved by the court will be directly enforceable before a court without the need for proceedings to establish its validity.

Formalities

3. What formal requirements exist for executing a valid settlement? Is it possible to use counterparts to complete the process of executing a settlement agreement?

There are no specific requirements to be followed when drafting a settlement agreement. As settlement agreements are a type of contractual agreement, the

general rules stated in the Civil Code for the validity of civil and commercial obligations and contracts must be observed.

It is advisable to pay particular attention to the capacity of the parties to enter into a settlement agreement. A party must have full capacity to dispose of the relevant goods or rights to be able to conclude a settlement agreement.

Also, a settlement agreement cannot contain any provision that might damage a third party's rights or that is contrary to public order or public policy.

Usually each party to a settlement agreement must sign a counterpart agreement. There is one counterpart for every party and each counterpart can be used as evidence of the agreement between the parties.

Standard document, Settlement agreement (civil litigation): Cross-border: clause 18 is valid under Spanish law and there is no variation or modification to be made.

Terms of settlement subject to court ratification

4. Do the terms of settlement require court approval? Does the settlement agreement need to be filed with the court? If so, are (i) the fact of settlement and (ii) the settlement terms, a matter of public record?

When a settlement agreement is reached before the start of court proceedings the court is not involved and the settlement agreement is valid and binding on the parties. The agreement does not need to be filed at court. The agreement is only filed at court when one of the parties fails to comply with the agreement and the other asks the court to declare the agreement valid and enforceable.

If a settlement agreement is concluded in pre-trial proceedings the agreement must be approved by the court. In this situation the facts stated in the agreement and the settlement terms will be a matter of public record and the agreement will be directly enforceable before the court. When the parties want to keep confidential the terms of the settlement they should include a clause in the agreement that the agreement terms must not be disclosed unless the parties authorise this in writing.

Confidentiality

5. Are settlements in your jurisdiction automatically confidential? If not, what steps can parties take to seek to keep the settlement confidential?

A settlement agreement is not automatically confidential in the Spanish jurisdiction. If the parties want to keep the terms of a settlement agreement confidential they must include a specific clause in the agreement.

Standard document, Settlement agreement (civil litigation): Cross-border: clause 13 is valid under Spanish law and there is no variation or modification to be made.

Powers of the parties to compromise

6. Are there any restrictions on parties' power to compromise their disputes? Are there rules on who may sign a settlement, especially on behalf of a company?

The first potential restriction on the parties' power to compromise their disputes is the capacity of the parties. Only those who have capacity to dispose of the relevant goods or rights have the capacity to enter into a settlement agreement related to them (see [Question 3](#)). In the case of a company, only the directors with power to transfer the company's goods or rights can conclude a settlement agreement on behalf of the company.

A representative acting on behalf of an individual must have a power of attorney authorising them to conclude a settlement agreement before they can validly enter into the settlement agreement.

A parent wishing to enter into an agreement on behalf of their child must have prior permission from the court to do so.

The guardian of a disabled person must have prior permission from the court to execute a settlement agreement on behalf of a disabled person.

In any event, the following matters cannot be the subject of a settlement agreement:

- Civil status.
- Future alimony.
- Questions related to marriage.

A settlement agreement only relates to the specific issues included in the agreement. Even a general waiver of rights is deemed to relate only to the specific issues included in the settlement agreement.

A legal adviser or representative must obtain express instructions from their client before settling a dispute on their client's behalf.

Timing of settlement

7. Can settlement discussions be conducted at any time during litigation proceedings? Are there any advantages, in terms of costs or otherwise, to entering into settlement negotiations sooner rather than later during litigation proceedings?

Settlement discussions can be conducted at any time during the litigation process. By agreement, the parties can ask the court to stay proceedings while discussions are in progress. The courts tend to grant a stay of proceedings for up to 60 days or for a term agreed by the parties. If discussions do not result in a settlement agreement, the parties can ask for a continuation of the legal procedure.

It is usual to include a clause in a settlement agreement stating that each party will bear its own legal costs. Therefore, it is best for both parties if the settlement discussions start early because procedural costs, including legal fees, can be saved.

Without prejudice rule

8. Does the “without prejudice” rule apply to settlement negotiations in your jurisdiction? Are there any exceptions to the applicability of the rule? Can it be waived with the consent of the parties?

In Spain, a distinction is made between documents exchanged between lawyers and documents exchanged between parties. The documents exchanged between the parties' lawyers cannot be produced as evidence at court.

Documents exchanged directly between the parties can be produced at court. However, the courts tend to consider these documents as pre-contractual documentation that does not necessarily prove that the parties have arrived at a final agreement or that they have consented to reciprocal propositions. If the parties want to keep their settlement agreement confidential they must include a non-disclosure clause to prevent the settlement agreement from being produced as evidence before the court.

Terms of settlement

9. Are there any limitations on the scope of release clauses that parties may agree with respect to existing and future claims? Please cite any relevant statutory provisions and case law.

A settlement agreement should refer to all existing disputes between the parties that it is intended to settle, whether or not the disputes have been the

subject of court proceedings. Any release clause and general waiver of rights is deemed only to refer to the dispute identified in the settlement document (see *Question 6*).

Standard document, Settlement agreement (civil litigation): Cross-border: clause 5 (d)-(e) could be considered too vague to cover any unspecified claims. Additionally, it could be challenged to the extent that it refers to unspecified disputes that might arise in the future. This is because:

- A settlement agreement is an agreement by which the parties give, promise or retain something either to avoid legal proceedings being started or to bring to an end legal proceedings that have already started (Article 1.809, Civil Code).
- As discussed above, a waiver of rights is deemed to relate only to the specific issues raised in a settlement agreement (Article 1.815, Civil Code).

Therefore, it is advisable to draft a release clause to refer to an existing dispute and not to future disputes, actions, claims or rights that might arise between the parties.

Taxes on settlements

10. Are taxes (such as income tax, capital gains tax or corporation tax) payable in relation to settlements involving payment of money?

Settlement agreements in themselves are not subject to tax. A different question is whether or not a new taxable fact arises as a consequence of a settlement agreement. However, it is difficult to imagine when revenue taxable to income tax, corporation tax or capital gains tax would arise from a settlement agreement. This is because, in the normal course of events, the result of a settlement agreement is the substitution of an initial claim for its economic equivalent and therefore there is no alteration in the net assets value of each party.

Specific tax advice should be sought from local tax experts on a case-by-case basis.

Severability

11. Are severability clauses commonly incorporated within settlement agreements to avoid the entire agreement being held void or unenforceable due to the illegality, invalidity or unenforceability of a part of the agreement?

Severability clauses are not common in Spanish contracts. This does not mean that severability clauses are not valid and enforceable under Spanish law.

As a matter of principle, the parties are free to agree on any civil and commercial obligations they think

fit, provided these obligations are not contrary to law, morality or public order. In this sense, *Standard document, Settlement agreement (civil litigation): Cross-border: clause 11* is valid and enforceable under Spanish law without any change or modification.

Third party rights

12. Can third parties enforce their rights under the terms of the settlement? If so, can parties exclude the application of third party rights in the agreement?

The general rule is that any agreement affects only the parties to it. As a settlement agreement is a type of agreement, it is only valid and binding between the parties who have executed it.

If a settlement agreement purports to confer rights on a third party, the third party must approve and sign the agreement if it wishes to be able to claim and enforce these rights before a court. If the settlement agreement has not been signed by the third party it will have no rights under the agreement.

Based on the above, *Standard document, Settlement agreement (civil litigation): Cross-border: clause 17* is valid in the Spanish jurisdiction and no change or alteration of it is needed.

Disposal of legal proceedings

13. What are the formalities to dispose of court or litigation proceedings once the dispute has been settled?

Once legal proceedings have started, how they are disposed of depends on several factors such as:

- Whether any settlement agreement has been agreed.
- The stage at which the legal proceedings have reached.

Settlement before the pre-trial hearing

If the parties reach a settlement before the pre-trial hearing they can draft a settlement agreement and file it before the court at the hearing. The court will examine the agreement and decide on its validity. If the court considers the agreement to be valid; it will issue a formal court order approving the terms agreed by the parties.

It is also possible that the parties reach a settlement agreement after the pre-trial hearing. In that case the parties will notify the court that they have reached a settlement and will ask the court to issue a court order approving the settlement agreement reached.

The court will then also terminate the legal proceedings because they lack substance once the dispute has been settled.

It is also possible to arrive to a settlement even after the court has issued a judgment or in the course of an appeal and even during the enforcement proceedings. In such cases the parties will notify the competent court in order to have the court order approving the settlement agreement reached.

Negotiations but no settlement before the pre-trial hearing

If the parties have started settlement negotiations before the pre-trial hearing but they have not reached a final agreement because of certain issues yet to be agreed on, the parties can jointly ask the court for a stay in the proceedings for a specified period of time.

Usually the court will grant the parties the requested time to reach a final agreement, provided that it does not exceed 60 days. If the parties do not arrive at a final settlement then any party can ask the court to continue the legal proceedings, although it is usually the plaintiff. If none of the parties asks the court to continue the proceedings within the 60-day period the court will order a provisional stay of the proceedings until one of the parties applies for their continuation.

If none of the parties applies for a continuation within two years at first instance (one year for appeals before either the provincial court or the Supreme Court) from the last notice received from the court, the legal procedure is deemed expired and the proceedings are finally discontinued by the court.

Breach of settlement terms

14. What are the remedies available for breach of the settlement terms? Is it possible to revive the original claim, or is it necessary to bring a fresh claim for breach of the settlement agreement?

Under Spanish law, a settlement agreement is deemed to extinguish an existing dispute and prior obligations between the parties so that the settlement agreement replaces and supersedes the previous obligations and agreements. Therefore, when there is a breach of the settlement agreement it is not possible to revive the original claim and it is necessary to bring a fresh claim for breach of the settlement agreement.

However, if the court has approved the settlement agreement the approved agreement can be enforced directly at court without the need to start a new claim for breach of the settlement agreement.

Any indemnity clause included in a settlement agreement should refer to breach of the settlement agreement rather than to breach of the released claims or obligations.

The wording of the indemnity clause could be as follows:

“Each party hereby indemnifies, and shall keep indemnified, the other party against all costs and damages incurred in all future actions, claims and proceedings due to the breach by each party of the terms stated in this settlement agreement.”

Enforcement proceedings

15. What are the procedures to enforce a settlement contained in a:

- **Settlement deed/agreement?**
- **Court order?**

The procedure necessary to enforce a settlement agreement differs depending on the way it has been recorded.

Settlement agreement recorded privately

If the parties reach a settlement agreement before court proceedings have been issued and the agreement has not been confirmed by a formal court order, then there is a two-stage process if a party wishes to enforce the settlement agreement. The party wishing to enforce the agreement must:

- First, start declarative proceedings to obtain a judgment confirming that any outstanding obligations under the agreement are enforceable.
- Second, enforce the judgment obtained in the declarative proceedings.

Settlement agreement recorded in previous court proceedings

If the settlement agreement has been confirmed by the court (see [Question 2](#)) and recorded in a formal court order then it is enforceable without the need for declarative proceedings confirming its validity and enforceability.

Settlement recorded in a public deed

If a settlement agreement has been recorded in a public deed before a notary public then any obligation that is clearly stated to have fallen immediately due under the deed has executive force and can be enforced using an executive procedure. When dealing with instalment agreements it is usual to include a penalty clause in the settlement agreement stating that any default in the payment of any single instalment will produce the immediate maturity of the whole obligation and the debtor will lose the benefit of payment in instalments because the debt will become immediately due.

Setting aside a settlement

16. On what grounds can a settlement be varied or set aside? Please outline the procedure to be followed.

A settlement agreement can only be varied or set aside by mutual agreement between the parties. In other words, a settlement agreement can only be modified or altered by a new agreement.

There is no special procedure to be followed by the parties when entering into a new settlement agreement. Spanish law does not provide for any court involvement in formalising a new settlement agreement. In the normal course of events a new settlement agreement will be drafted and executed by the parties. It may be advisable to record any new agreement in a public deed before a notary, given the issue of enforceability (see [Question 15, Settlement recorded in a public deed](#)).

Legal costs

17. Would you expect to see a clause dealing with legal costs in the settlement agreement? Are parties free to agree on arrangements regarding payment of legal costs? What is the position if the parties do not include a separate clause dealing with legal costs?

A settlement agreement should indicate how the costs related to the settled dispute are to be borne by the parties. The parties are completely free to agree how they will share the costs related to the settled dispute. As a settlement agreement can deal only with an existing claim, it is not possible to agree on allocation of potential future legal costs arising from breach of the settlement agreement.

When the parties have not included a separate clause dealing with legal costs it is understood that each party must bear its own costs, and the costs incurred due to the common initiative of the parties will be borne equally.

Standard document, Settlement agreement (civil litigation): Cross-border: clause 7 is valid under Spanish law and there is nothing to be amended or added.

Settlement agreements

18. Are there any other clauses that would be usual to see in a settlement agreement and/or that are standard practice in your jurisdiction which do not appear in the *Standard document*,

Settlement agreement (civil litigation): Cross-border?

After a careful review of the draft settlement agreement we have the following comments:

Clause 1: definitions and interpretation.

It is not common to include a definitions and interpretation clause in Spain. The Spanish legal system is codified and is not based on common law. Therefore, most of the legal concepts are already defined in the codified law. However, there is nothing to prevent the inclusion of this clause in a settlement agreement because Spanish contract law recognises the principle of freedom of the parties, provided that the clauses included in an agreement are not contrary to law, morality or public order.

Clause 4: stay or dismissal of action.

While a clause stating the dismissal of an action is the essence of a settlement agreement, a clause staying proceedings is not usually included in a settlement agreement, at least not in those agreements that are intended to be approved by the court (see [Question 4](#)).

When settlement agreements are negotiated during the course of legal proceedings, it is usual for the parties to ask the court for a stay of proceedings to negotiate and reach a settlement. Parties usually request a stay by mutual agreement, notifying the court that negotiations are in progress between the parties and that these negotiations could result in a settlement agreement that will be communicated to the court in due course.

If settlement negotiations are started before the start of legal proceedings this clause has no purpose because there are no legal proceedings in place and therefore no stay order can be obtained from the court.

Clause 8: warranties and authority.

This clause is not common in Spain. If the court is being asked to approve the settlement agreement (see [Question 4](#)) it must check the right, title and authority of the parties executing the settlement agreement.

In an out of court settlement agreement, each party is liable to the other if it has no right, title and capacity to enter into the settlement agreement. In some cases a criminal offence could be committed if a party does not have the authority to enter into the agreement.

However, it is usual for an agreement to identify the parties and for each party to acknowledge that it has

full right, title and authority to grant and execute the settlement agreement.

Clause 9: indemnities.

Please refer to [Question 14](#) and the text proposed there.

Clause 10: no admission.

This clause is not common in Spain. Once a settlement agreement has been executed any party's liability and any wrongdoing related to the settled dispute are irrelevant because the settlement agreement creates a new framework for the parties' relationship, no matter what has happened in the past.

If in the future one of the parties fails to comply with the settlement agreement any claim for breach of contract must be analysed in relation to the settlement agreement and not in relation to the situation that existed before the execution of the settlement agreement.

Clause 15: jurisdiction.

This clause is not common in settlement agreements recorded at court because jurisdiction is automatically attributed to the court that has formally confirmed the agreement.

It is possible to include this clause in a settlement agreement recorded in either a private document or a public deed.

Clause 17: third party rights.

This clause is not usual in Spain because the ability to enforce a settlement agreement is already limited by law to the parties who execute the agreement, and the contract does not affect any third parties (see [Question 12](#)).

Other

Clauses other than those mentioned above are valid and enforceable in Spain.

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