



An Analysis of Offers to Settle in Common Law Courts: Are They Relevant in the Civil Law Context?

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Compromise is seen as an object worthy of promotion for compromise is better than contest, both for the litigants concerned, for the court and for the administration of justice as a whole.¹

1. Introduction

Offers to settle were introduced in the civil procedure with the purpose of encouraging early settlements and reducing legal costs. In money claims offers to settle are considered formal economic bids; they are made frequently by one party after a legal action has started with the purpose of reaching an agreement between litigants, resulting in the case being dropped. These offers have an additional consequence, if the offeree refuses to accept the offer to settle, and the case continues all the way to a judgment which ends up being less favourable than the previous offer, then the offeree will have to pay the legal costs of the offeror from the moment the offer was made. As to non-monetary claims, the trial judge must compare the terms of the offer with the judgment and decide whether the claimant has achieved a more favourable result than what was stipulated in the offer.

If the offer is accepted, the claimant generally recovers his costs from the defendant up to the date the offer was made. Importantly, these offers are not communicated to the trial judge before all liability and quantum have been decided.² Moreover once an offer of judgment is made it cannot be presented as evidence to the judge unless within a proceeding to determine the costs. This is to prevent the trial judges from thinking that the defendant has admitted liability. If this requirement is not respected the judge has discretion to order a new trial, although he would be unlikely do so if the prejudice can only operate against the party who has made the premature disclosure.

Offers to settle are very popular in common law jurisdictions, particularly in those jurisdictions where the English rule is followed, *i.e.* the loser pays the cost of the winning party. On the contrary, in civil law jurisdictions offers to settle are unknown.

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¹ *Carver v BAA Plc* [2008] EWCA Civ 412, para. 31.

² See e.g. Part 36.12(2) Civil Procedure Rules (England and Wales) 1999. Hereinafter CPR.

This paper will first examine how Part 36 of the CPR is employed in England and Wales after its amendments in 2007. Secondly, this procedure will be compared with Order 22 of the Rules of the Superior Courts (R.S.C.) in Ireland. Thirdly, the discussion will focus on Rule 68 of the Federal Rules of Civil Procedure in the United States with a further overview of State procedures. Fourthly, this paper will examine the reasons as in why civil law jurisdictions, in particular the Spanish Procedure, do not employ offers to settle. Lastly, this paper concludes by considering the need for a European regulation to promote settlement in cross-border litigation for disputes arising from the internal market.

2. England and Wales

When awarding the legal costs the English courts have significant discretion, though according to r. 44, courts must take into account two issues: the success of the party's pretensions and their conduct during the proceedings. The first issue may appear difficult to assess when there are counterclaims and where litigants succeed only in part of their pretensions; the courts often resolve this by considering who must pay the outstanding balance.³ The latter issue is mainly the attempts of the parties in following the directions of the court and resolving amicably their dispute before (e.g. pre-action protocols) and during the proceedings. Claimants are expected to give the defendant an opportunity to settle before and during the proceedings. The court will pay special attention to offers made under Part 36 given its cost consequences.

Offers to settle, aka Part 36 offers, were introduced in the CPR with the purpose of encouraging earlier settlements in civil disputes. They are being increasingly used in family and personal injury disputes. Part 36 offers can now be made any time, including before the commencement of legal proceedings and during the course of an appeal.⁴

Before its last amendment, which was implemented in April 2007, Part 36 offers attracted significant criticism due to the requirement of lodging the money offered under Part 36 in the court. This is a requirement still existing in many common law jurisdictions, such as Ireland. Criticisms came mainly from solvent entities, such as insurance and public bodies, which were dealing with many legal actions at any given time. Consequently, they had to tie up significant amounts of money for months in the courts. The Court of Appeal in the last few years decided to take a more flexible approach to Part 36 by removing the requirement of offerors to deposit the money in court, as long as the offerors were considered to be solvent.

In *Maersk Columbo* the Court of Appeal decided in 2001 that a Part 36 offer does not have to be followed by a payment in court, providing the eventual payment could be warranted.⁵ The Court of Appeal developed this proposition in the 2004 case of *Crouch v Kings Healthcare NHS Trust*.⁶ In this case the court stated that the NHS Trust did not need to make the payment in court before acceptance because the NHS Trust was "bound to be good for the money". Furthermore, the court argued that it was in the public interest not to retain valuable public resources in courts for long periods of time if they could meanwhile be better employed.

³ *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd and another (No 7)* [2008] EWHC 2280, para. 72.

⁴ The same cost penalties may apply when mediation is unreasonably refused by the other party. See *Burchell NF V Mr & Mrs Bullard* [2005] EWCA Civ 358. See also D. Cornes "Commercial Mediation: The Impact of the Courts" (2007) 73(1) *CI Arb Arbitration* 17.

⁵ *MGH & Co* [2001] EWCA Civ 717 (*Maersk Columbo*).

⁶ *Peter Crouch v King's Healthcare NHS Trust* [2004] EWCA Civ 1332.

Subsequently, in 2005 the Court of Appeal in *The Trustees of Stokes Pension Fund v Western Power Distribution* gave four conditions for recognising a Part 36 offer made by a defendant to have the desired cost consequences. These conditions applied even when the defendant has not made the payment to the court.⁷ The four conditions were as follow: The offer must be expressed in clear terms; it cannot be a sham; it must be opened for acceptance for at least 21 days; and the defendant must be good for the money at the time when the offer was made.

The Government decided to amend Part 36 in order to reduce legal uncertainty and satellite litigation in matters related to the new Part 36 (such as in deciding whether defendants can be considered good for the money). The Government issued a consultation paper in January 2006 entitled “Part 36 of the Civil Procedure Rules: Offer to Settle Payments into Court”.⁸ The results of this consultation formed the blueprint for the April 2007 Reform, which main change was the removal of the requirement to make the payment in the court, as foreseen in the first Woolf Report.⁹ It changed from a system of payments into an actual offer to settle.¹⁰ In addition a new standard form, N242A,¹¹ was created to assist offerors in ensuring that they include the necessary information for granting cost consequences. Under the new rules offers are deemed to be inclusive of interests.

According to the current rules, Part 36 offers must be opened for at least 21 days (the so-called relevant period) designed to stop undue pressure being imposed on the offeree.¹² Once made, the offeror cannot withdraw the offer, unless the offeror proposes better terms for the offeree or the court gives permission.¹³ To obtain court permission without informing the trial judge, the offeror must make an application under Part 23 to a judge (if made after the commencement of proceedings) other than the trial judge, except the parties agree that the same judge deals with the application. After the expiry of the relevant period of 21 days the offeror may withdraw the offer or propose a less advantageous offer without the permission of the court by serving a legal notice to the offeree or his legal representative. If a Part 36 offer is withdrawn, then it will not have its automatic cost consequences. It can however be taken into account under the court’s general discretion when deciding the allocation of costs.¹⁴ Arguably, this may lead to tactical offers being made and promptly withdrawn.¹⁵

A defendant who makes an offer of money will have to make the payment within 14 days after the acceptance. Once the offer is accepted the proceedings will be stayed. But, if payment is not made within the time limit, then the claimant may request a judgment over the amount offered and the defendant will lose the cost protection contained in Part 36.¹⁶

⁷ *The Trustees of Stokes Pension Fund v Western Power Distribution* (South West) Plc [2005] EWCA Civ 854.

⁸ Civil Procedure (Amendment No. 3) Rules 2006 (2006/3132).

⁹ Lord Woolf, Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales, (HMSO, 1995), Ch.2, para. 27.

¹⁰ Civil Procedure News, 6 June 2008, p. 6.

¹¹ Available at <<http://www.hmcourts-service.gov.uk>>.

¹² G. Slapper & D. Kelly, *The English Legal System* (Oxford, Routledge-Cavendish, 2009) p. 342.

¹³ Part 36.3(5). Court permission, unlike in other jurisdictions, is only required in this case.

¹⁴ Part 36.14(6) and Part 44.3. See *Johnsey Estates 1990 Ltd v. Secretary of State for Environment* [2001] EWCA Civ 535; *Straker v. Tudor Rose* [2007] EWCA Civ 368; and *Aspin v Metric Group* [2007] EWCA Civ 922.

¹⁵ S. Atherton, “Dispute Resolution: Part 36 Offers – New Provisions” College of Law of England and Wales, LNTV times, Programme 1292, 25 May 2007, p. 17.

¹⁶ Part 36.11(7).

Initially offers to settle were only available to one party, the defendant, but the CPR was reformed bringing greater substantive equality to the civil procedure. However, this equality is not absolute, since a greater level of protection is afforded to the habitually weaker party, the claimant. In this regard, it is worthwhile to note that under the current Part 36 claimants and defendants are not on an equal footing. When Part 36 cost consequences applies in favour of defendants, they are only entitled to costs on the standard basis (i.e. proportionate amount) together with interest, while when it applies in favour of claimants, they are entitled to interest on any damages, together with indemnity costs (or punitive interest up to 10% above the base rate) and interest on those costs (i.e. the rule of proportionality of costs is displaced).¹⁷ According to Main and Park, punitive interest is the main persuasive element in encouraging parties to settle their dispute.¹⁸

Under r. 44.1 the court has considerable discretion to apply or not the above rules if the result would be otherwise unjust. It is arguable whether the court has a greater discretion under the new rules. Under the new rules Part 36 rise cost consequences when the offer is not “more advantageous” than the court’s result, while before the 2007 reform, the offeree only had “to beat” the Part 36 payment-in.¹⁹ This was recently illustrated in *Carver v BAA Plc* where a nominally less advantageous Part 36 offer (£51 below the court decision) was sufficient to order the claimant to pay defendant’s costs.²⁰ It must be noted that if the offer to settle were nominally higher than the amount awarded in the judgment, then the judge would not be hesitant in granting legal costs in favour of the offeror.²¹ As shown in *Carver v BAA* a claimant who beats Part 36 may not automatically be awarded costs when the claimant had not bettered a Part 36 offer; consequently, the court will take into account, not only hard numbers, but a “more wide-review of all the facts and circumstances of the case in deciding whether the judgment, which is the fruit of the litigation, was worth the fight.”²²

This new interpretation of Part 36 introduces a degree of uncertainty that is arguably justified on the account of proportionality of costs and the promotion of settlement.²³ By contrast, Jackson LJ has argued that this case should be reversed by rule change because the new interpretation puts additional pressure on claimants to settle with offers that may not be high enough.²⁴ Conversely, it can be argued that this additional pressure aims to avoid disproportional results which should not be justified by a nominal difference.²⁵ In the case at hand Ward L.J. stated: “This was a small claim in which the defendants admitted liability within months of the accident. To have incurred about £80,000 in costs to contest a claim under £5,000 fills one with despair.”²⁶ On a similar line of argumentation, Ward LJ previously stated in *Egan v Motor Services (Bath)*:

¹⁷ Part 36.14.

¹⁸ B. Main and A. Park, *The Impact of Defendant Offers into Court on Negotiation in the Shadow of the Law: Experimental Evidence*, 22 (2002) *International Review of Law and Economics* 189.

¹⁹ See the original rule CPR r.36.20 and the reformed rule CPR R.36.14. Cf. J. Sorabji, “Costs: CPR Part 36 – When Success is not to Your Advantage – *Carver v BAA Plc and Multiplex Construction (UK) Ltd v Cleveland Bridge UK Ltd*” 28(1) (2009) *Civil Justice Quarterly* 15.

²⁰ *Carver v BAA Plc* [2008] EWCA Civ 412, para. 31.

²¹ Part 36.10. and r. 36.14.(6)(a).

²² *Carver v BAA Plc* [2008] EWCA Civ 412, para. 30.

²³ Sorabji (2009) *op. cit.* 17.

²⁴ See R. Jackson, LJ. *Review of Civil Litigation Costs* 8 May 2009, p. 476.

²⁵ A similar approach has been adopted in Scotland under Part 35 ECCPR (the equivalent to the English Part 36). See Jackson (2009) *op. cit.* p. 643.

²⁶ *Carver v BAA Plc* [2008] EWCA Civ 412, para. 30.

What I have found profoundly unsatisfactory, and made my views clear in the course of argument, is the fact that the parties have between them spent in the region of £100,000 arguing over a claim which is worth about £6,000. In the florid language of the argument, I regarded them, one or other, if not both, of them, as completely cuckoo to have engaged in such expensive litigation with so little at stake [...] This case cries out for mediation.²⁷

Under the new Part 36, it appears that at the time of deciding the costs the court will take into account the attempts to negotiate and the replies from the offerees. This is when, for instance, an offer that in the eyes of the offeree is close to a reasonable settlement, is or is not responded with a counteroffer.²⁸ In personal injury claims, however, it may be difficult to assess the value of the compensation, since in part it will depend on the strength of the evidence of the claimant.

This approach is of general application and not just followed in personal injury claims;²⁹ although they will have significant effect on the latter claims since they are often disproportionate, where the average costs are higher than the awarded damages.³⁰ Part 36 would also be very relevant in cases where one party has entered into a Conditional Fee Agreement, particularly in cases of medical malpractice where, on average, legal costs are four times higher than the awarded damages.³¹

Following the Woolf Reports, the new rules reinforce the courts' tools to robustly encourage parties to settle.³² Now the courts have also the discretion to impose financial penalties for unreasonable refusal to consider a settlement.³³ Yet, "without prejudice" negotiations are only disclosed to the court when both parties waive their rights of non-disclosure privilege.³⁴ This is complemented by the courts powers to encourage parties to use alternative dispute resolution (ADR) methods and to stay the proceedings while parties are attempting to settle their dispute.³⁵ In other words, this approach follows the Woolf spirit of putting greater emphasis on access to justice and distributing limited resources available in the administration

²⁷ [2007] EWCA Civ 1002, para. 53.

²⁸ *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd and another (No 7)* [2008] EWHC 2280, para. 72.

²⁹ *Ibid*, para. 70-71.

³⁰ Sorabji (2009) *op. cit.* 18. See also Association of British Insurers "Analysis of Personal Injury Legal Costs" Research Brief, (January 2009) p. 4.

³¹ Medical Defense Union "Put An End to Excessive Legal Costs" 9 February 2009. For full report see (2009) 25(1) *MDU Journal*.

³² Lord Woolf, Access to Justice, Final Report, Ch. 10, p. 107, para. 2.

³³ Woolf (1995) *ibid* Ch. 2, para. 7. *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 para. 11 regarding the unreasonable refusal to participate in mediation and *7Earl of Malmesbury v Strutt & Parker* [2008] EWHC 424 regarding unreasonable attitude at the mediation process. See also *Nigel Witham Ltd v Smith & Isaacs (No.2)* [2008] EWHC 12 (TCC). See Allocation Questionnaire (Forms N150 and 151 for the fast track and multi track and Form 149 for the small claims track) requiring parties to answer whether they have considered the use of mediation.

³⁴ *Walker v Wilshire* [1889] 23 QBD 335 and *Reed v Reed* [2004] EWCA Civ. 159.

³⁵ CPR 1.4. (2) (e) and 3.1. (2) (f). Cf. M. Brunson-Tully, "There is an A in ADR but Does Anyone Know What it Means Anymore?" 28(2) (2009) *Civil Justice Quarterly* 218-236.

of justice than on rectitude of decision at all costs.³⁶ As a result the English law tends to consider litigation as the last resort of all the available methods of dispute resolution.³⁷

3. Ireland

Order 22 (rule 6) of the Rules of Superior Courts (RSC) provide for penalty costs against those claimants who have failed to obtain a judgment that is higher than a sum of money lodged in court by the defendant, in satisfaction of a cause of action.³⁸ Inferior courts also use the lodgements in courts with cost consequences under their own rules.³⁹ Lodgements have different requirements and restrictions depending whether they fall in or out of the scope of s. 1(1) of the Courts Act 1988, but generally speaking the scope of application of offers to settle in Ireland are more restricted than in the UK. The most striking differences between Order 22 and Part 36 are as follows. Firstly, in Ireland only defendants may benefit from the effect of lodgements in court while in England claimants may also benefit from using offers to settle. Secondly, Order 22 requires the defendant to lodge the sum of money in the court. Thirdly, under Order 22 there are more circumstances where the leave of the court is needed before the lodgement can be made. Finally, under Order 22 the cost consequences start having effect after the defendant has notified the plaintiff of the lodgement. By contrast, as mentioned above, under Part 36 the effect takes place when the relevant period (21 days) expires.

In Ireland, one of the issues most discussed by the courts is their own discretion in deciding whether late lodgements are allowed. Back in 1967, in *Ely v Dargan* the court found that it was a matter of public policy to avoid litigation, whenever this is possible and reasonable.⁴⁰ In this case the court let the defendant increase the lodgement previously made in court. However, it appears that Irish courts may be aware of the tactical element and abuses that this may create. In *Brennan v Iarnród Éireann*, after two failed attempts of the parties to reach a settlement, the defendant sought the leave of the court to make a lodgement.⁴¹ The court denied this on the grounds that the defendant should not be allowed to take advantage of on information disclosed by the claimant during previous settlement meetings.⁴² This reveals the potential dangers of mixing offers to settle and mediation, since in these cases defendants may be able to make a tight offer. In my view, both processes may be compatible as long as there is no evidence of defendants going to mediation in bad faith, i.e. with the main intention of gaining information on the claimant's case strength. Nonetheless, mediation and negotiation processes do not need to discuss evidence for reaching a fair settlement, but rather focus on a

³⁶ A. Zuckerman, "The Second Great English Reform of Civil Justice, A Triumph of Hope over Experience" 1(2) (2000) *Hibernian Law Journal* 178-197.

³⁷ J. Jolowicz, "Civil Litigation: What's it for?" 67(3) (2008) *Cambridge Law Journal* 516. Lord Woolf stated: "My approach to civil justice is that disputes should, whenever possible, be resolved without litigation. Where litigation is unavoidable, it should be conducted with a view to encouraging settlement at the earliest appropriate stage." Lord Woolf, Access to Justice, Final Report, Ch. 10, p. 107, para. 2. See also Lord Woolf's comments at *Frank Cowl v Plymouth CC* [2001] EWCA Civ 1935.

³⁸ Order 22 of the Rules of the Superior Courts (as amended by the Rules of the Superior Courts (No.3) 1990 (S.I. No. 229 of 1990); Rules of the Superior Courts (No.2) 1993 (S.I. No. 265 of 1993); Rules of the Superior Courts (No.1) 1997 (S.I. No. 52 of 1997); and Rules of the Superior Courts (No.5) (Offer of payment in lieu of lodgement) 2000 (S.I. No. 328 of 2000)).

³⁹ See District Court Rules (S.I. No 510 of 2001) Order 41(5) and Circuit Court Rules (S.I. No. 93 of 1997) Order 15(15).

⁴⁰ [1967] I.R. 89.

⁴¹ [1992] 2 I.R. 167.

⁴² P. Lyons, "Recent Developments Relating to Lodgments and Tenders" (2005) 1(2) *Journal of Civil Practice and Procedure* 6.

settlement. Despite this, it is clear that to some extent the objective of mediation and offers (or lodgements) are to discover the bottom line offer of the parties, thus facilitating settlements.

In *Noble v Gleeson McGrath Baldwin*,⁴³ the court did not follow the ratio in *Brennan* and distinguished it by stating that in the present case the parties had been negotiating in good faith, therefore the principles set out in *Ely* were followed. Subsequently, in *Kearney v Barrett* the court somehow discredited the *Brennan* decision and held that it was not unjust to allow the defendant to make a lodgement in court knowing the strength of the claimant's case.⁴⁴ It appears that courts will consider the report submitted by the mediator, even when parties have not reached an agreement, in order to decide whether one party was uncooperative during the mediation. This power of the court raises important issues regarding the confidentiality of the mediation process. These aspects are however outside the scope of this article.

As a general rule, lodgements in court may be made either by admitting or without admitting liability, except with lodgements in defamation cases and questions of title to land that can only be made when the defence admits liability.⁴⁵

In addition to the RSC, in Ireland there are other legal provisions that provide for cost penalties. The Civil Liability Act 2004 contains two sections that encourage settlement by way of cost awards. Firstly, according to s. 15 any party may apply to the court for a mediation conference. It must be noted that this can only take place by request of one of the parties and not by the discretion of the court. However, if one of the parties fails to comply with the direction of the court, i.e. not attending the mediation conference, the court may make an order for that party to pay the legal costs. Secondly, s. 17 also encourages settlements in personal injury claims; this provision states that the court, when determining legal costs, must consider written offers of settlement made by the claimant.⁴⁶ The amount of money offered, unlike the one made under Order 22, does not have to be lodged in court and does not carry automatic cost consequences. This type of offer carries similarities with Part 36. In other words, it can be done at any stage of the proceedings without permission of the court; must be communicated to the defendant in writing; and lodged in the court without informing the judge until after the judgment is delivered.⁴⁷

A similar cost rule is used to discourage legal actions regarding the awards decided by the Personal Injuries Assessment Board (PIAB). PIAB assessments are not binding to any of the parties, thus the claimant and the respondent may commence a legal action. According to s. 51A of the Personal Injuries Assessment Board (Amendment 2007) Act 2003 there will be cost consequences for a claimant who rejects a PIAB assessment that has been accepted by the respondent and where the claimant fails in a subsequent proceeding to obtain more than the amount awarded by the PIAB assessment. In the latter case, a claimant will not be entitled to their legal costs; in addition, the court in its discretion may award costs against the claimant.⁴⁸ It must be noted that this provision will apply only as a default of Order 22 and s. 17 of the Civil Liability Act.⁴⁹

⁴³ Unreported, High Court, February 19, 2000.

⁴⁴ [2004] 1 I.R. 1.

⁴⁵ Order 22 rule 1(3).

⁴⁶ Civil Liability and Courts Act 2004 (S.I. No. 31).

⁴⁷ S. 17(3) and (4).

⁴⁸ S. 51A(3) Personal Injuries Assessment Board Act (Amendment) 2007 No 35 of 2007.

⁴⁹ S. 51A(6).

Offers may also take place anytime during the proceedings in a confidential manner “without prejudice save as to costs”, through the so called Calderbank formula.⁵⁰ However, its legal standing in Ireland is rather confusing and there is a lack of authority under which circumstances they may be used.⁵¹ It has been argued that these types of offers will have greater impact whenever they are submitted after the time for a lodgement in court has expired.⁵²

4. United States

Offers to settle in the US civil procedure are called offers of judgments. They were introduced as a tort reform. It is regulated under rule 68 of the Federal Rules of Civil Procedure (FRCP). In practice these offers have very little impact in the federal jurisdiction because costs are typically limited to items such as copies and court reporter charges, and rarely include attorneys’ fees.

There is a wide disparity amongst individual States. Some States have adopted robust offers of judgment while in other States they have less significance. It is not surprising to mention that the more stringent the rule is, the more persuasive the rules would be in encouraging parties to settle their disputes. Indeed, empirical studies have demonstrated that when the rule is robust, litigants tend to settle earlier.⁵³

For instance, in Connecticut, New Jersey and Wisconsin, the court may add a substantial amount of interest on top of the amount awarded in the judgment. In Alaska, Florida, Idaho, Michigan, New Jersey and Texas, the court may also allocate the attorney’s fees.⁵⁴ Other States have opted for restricting the application of this rule. This is the case in Maryland where the offer to settle applies only to medical malpractice, while in Georgia the court decision must be at least 25% more favourable to pay the attorney’s fees of the offeror.

According to rule 68 (both the federal rule as well as the rules in most States) an offer must be made 10 days before the trial begins, but unlike Part 36, the offer is considered rejected and deemed withdrawn after the 10th day.⁵⁵ If the judgment is less favourable for the offeree then he would not be able to recover any costs or attorney’s fees and he would not receive any interest on the awarded amount from the moment the offer was made.

The main limitation of Rule 68 FRCP, in my opinion, is that it benefits the claimant allowing the defendant only the recovery of nominal costs. Hence, this rule does not give an incentive to settle a case, particularly when a settlement would generally require the defendant to pay all the costs.⁵⁶ Conversely, in some states this rule carries weight, especially in those states

⁵⁰ These offers were originally used in matrimonial proceedings. See *Calderbank v Calderbank* [1975] 3 All ER 333.

⁵¹ See *O’Neill v Ryanair (No.3)* [1992] 1 I.R. 166. Lyons (2005) *op. cit.* 6.

⁵² Lyons (2005) *op. cit.* 6.

⁵³ A. Yoon and T. Baker, “Offer of Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East” (2006) 59(1) *Vanderbilt Law Review* 155.

⁵⁴ American College of Trial Lawyers, Survey of State Offer of Judgment Provisions, Survey conducted by the American College of Trial Lawyers, Federal Civil Procedure Committee, October 2004.

⁵⁵ Rule 68 (e).

⁵⁶ See the example of Massachusetts at J. Desmond, Rule 68 Offer of Judgment: A Toothless Tiger for the Defense, Morrison, Mahoney & Miller (web).

where if the offeree does not beat the offer in court, he will be required pay the offeror's post-offer costs, applicable interest and reasonable attorney's fees (excluding contingent fees).⁵⁷

The American rule of costs, unlike the English rule and in fact the rule in most common law jurisdictions, provides that each party must cover its own costs. This rule has only two exceptions. Firstly, it does not apply when the parties agree by contract before litigation; and secondly, it does not apply if a specific legal provision states otherwise. It has been suggested that this system contributes towards making the US a litigious society. It has also been argued that the English rule potentially hinders access to justice by increasing the economic risks of litigation. This is because the English rule on costs encourages parties to spend whatever is necessary to ensure the case is won and the fees recovered, thereby increasing the overall costs of litigation. On the continent, by contrast, the costs rule interestingly takes a half way solution allowing fixed recovery of costs.⁵⁸

Main and Park observe that the main factor in encouraging settlement is the perception that the parties have about their own case.⁵⁹ If they believe that their chances for succeeding is high, they will be reluctant to settle, but if they are pessimistic about the trial outcome, then they will be more willing to settle the case in order to save legal costs. It seems logical that an additional factor is the overall (or potential) cost of litigation.

5. Civil Law Jurisdictions: The Spanish Jurisdiction

Civil law jurisdictions do not have offers to settle. This section explores how Spanish courts respond to lodgements by the defendant and the impact, if any, that these lodgements have on the courts at the time of allocating legal costs to the parties.

Under the Spanish Code of Civil Procedure (CCP) a party may lodge an amount of money in court in two different processes: conciliatory proceedings (*jurisdicción voluntaria*) and in adversarial proceedings (*juicio contencioso*).⁶⁰ In the conciliatory proceedings the defendant may lodge an amount of money but the claimant is not obliged to accept a partial payment. In this proceeding the court will not issue a judgment but only a resolution (*auto*) which will state whether the parties have reached an agreement or not. This resolution does not include a decision on legal costs.

For adversarial proceedings the CCP provides that the claimant shall pay all the legal costs if he does not inform the defendant in advance of initiating a legal action. This will only occur when the defendant admits and pays the debt with the response to the claim. Surprisingly, if the defendant lodges in court a partial amount of the claim (the amount that the defendant considers to be owed) even if the judge awards the same amount lodged or less, the judge will not make an award on costs, on the grounds that the claim was partially recognised. Notwithstanding, in the case that the defendant had previously started a conciliatory proceeding, and offered the same amount or more than the one awarded by the judge in an

⁵⁷ Rule 68 (f) NRS.

⁵⁸ See for example Civil Procedure Rules in Germany and Spain.

⁵⁹ Main and Park (2002) *op. cit.* 178.

⁶⁰ See *Ley de Enjuiciamiento Civil* 2001 for the *juicio contencioso* and *Ley de Enjuiciamiento Civil* of 1881 for the *jurisdicción voluntaria*.

adversarial proceeding, the judge would consider the claimant as a vexatious or unreasonable litigant.⁶¹ This would be very unusual in practice.

According to Article 394 of the CCP, only the party who had succeeded in all their pretensions may plea for an award on costs.⁶² This amount though, may not exceed one third of the value of the claim (i.e. not the judicial award). In reality most awards are in between 10 and 20 per cent of the value of the claim, and very rarely go over this range. This limit may only be overcome when the court considers that the loser party has acted in bad faith (i.e. vexatious litigants) or/and when the claim was made recklessly (i.e. frivolous claims). Furthermore, the court has discretion not to allocate costs in favour of the winning party when it considers that there was a reasonable doubt in law or in fact.

Under Spanish law when parties succeed in their pretensions partially, each party pays his own costs and both parties share the payment of common expenses.

There are certain litigants who are excluded from paying the costs of the other party; these are litigants that benefit from free legal aid and public prosecutors. It must be noted that in civil law jurisdictions penal and civil actions may be dealt with together within the same proceedings. Case law has relevance in the allocation of costs in practice. But, clearly, there are not offers to settle with cost penalties.

It is possible to draw a parallelism between offers to settle and the rule of “costs follow the event”, since both put an initial pressure of not continuing with a legal action. Both rules reflect how the English civil procedure puts greater emphasis on rectitude of decision, while the civil law jurisdictions take a more cost-efficient approach to civil litigation.⁶³ This in part explains why the cost of litigation is higher in common law countries. Nonetheless, under the English rule only reasonable costs are recoverable.⁶⁴ Moreover, the rule that “costs follow the event” is observed only in Multi and Fast Tracks, thus is not applied to Small Claims Track where only limited costs, such as fixed court fees, are usually awarded.⁶⁵

There is a direct correlation between the English rule and the strict application of Part 36. The fact that a party may win the case for a nominal amount of money and be granted the legal costs may make the process disproportionate, especially when there is a conditional fee agreement as in *Naomi Campbell v MGN*.⁶⁶ Under the law in England and Wales the loser pays the winner’s legal costs, which often makes the losing party’s detriment “immeasurably greater than the benefit of winning”.⁶⁷

⁶¹ See Article 394.2 of the CCP. See also the French CCP.

⁶² Ley de Enjuiciamiento Civil 1/2000 of 7 January.

⁶³ A. Zuckerman, *Civil Justice in Crisis – Comparative Perspectives of Civil Procedure*, (Great Britain, Oxford University Press, 2001).

⁶⁴ Rule 44.4(1).

⁶⁵ It must be noted that Part 36 would apply if the Part 36 offer was made before the start of the proceedings and when a case is relocated from the Small Claims track to any of the other two tracks.

⁶⁶ (No 2) [2005] UKHL 61. Note that an application to the European Court of Human Rights remains under consideration in that court.

⁶⁷ Phillips, L.J., “Alternative Dispute Resolution: An English View-Point” Speech by Lord Chief Justice in England and Wales, India, 29 March 2008. p. 2. Furthermore, legal fees are generally very high even at the High Court level, particularly when adding the costs of both parties. In the case of *Mosley v News Group* the High Court ordered compensation in favour of the claimant for the amount of £60,000 and the legal fees amounted to c. £850,000; See *Max Mosley v News Group Newspaper Limited* [2008] EWHC 1777 (QB).

6. Offers to Settle in European Procedures

The legal basis for the harmonisation of civil processes rests on Article 65(a) of the EC Treaty which provides that judicial cooperation on civil matters having cross-border implications is necessary for the proper functioning of the internal market.⁶⁸

The European Order of Payment (EOP), implemented in the UK since 12 December 2008, is a standard procedure to deal with cross-border money claims.⁶⁹ The EOP deals with both, contested and uncontested money claims of any amount. When the EOP is contested, and there is opposition, the case will continue under the domestic procedure,⁷⁰ which if held in England, Part 36 will be applied. It is this authors contention that the EOP should include offers to settle with cost penalties, so promoting the settlement of disputes where enforcement is costly and complicated. The same procedural figure should be introduced within the European Small Claims Procedure, which currently does not have restrictions on its costs regime.⁷¹ There should however be caps, for instance, up to one third of the amount awarded.

According to the subsidiarity principle, the EU does not have competence to regulate the cost regime of civil procedures, except when it deals with cross border claims. The House of Lords expressed their disappointment when agreement within the EU was not reached for regulating a common cost regime of the European Small Claims Procedure.⁷²

There may be some drawbacks in promoting offers to settle when they are not appropriate, particularly in issues where a judgment would be appropriate in order to avoid the weaker party from being coerced into a disadvantageous agreement.⁷³ In addition, a claimant with significantly less resources than the respondent will be at risk of paying higher legal fees than the defendant when the latter had higher-priced counsel.⁷⁴ The rules therefore should provide the trial judge with enough discretion and legal tools to correct the power imbalance of the parties.

7. Conclusion

Offers to settle are a good procedural resort to cap the limit of legal costs. This is particularly useful in those disputes where the defendant is willing to admit liability, but cannot settle because the claimant requests an arguably high settlement amount. Also, when the defendant wants to “get away” with paying low, if any, compensation. It appears that common law jurisdictions, in particular England, take advantage of this procedural tool, which could be implemented in the civil procedures on the continent. The reason for the lack of use may be due to lower costs in litigation, less tradition and procedural emphasis encouraging parties to

⁶⁸ Judicial Cooperation Articles 61-65 Treaty of Maastricht establishing the European Community, 7 February 1992 1 C.M.L.R. 573 (Hereinafter ECT). Article 65 ECT states that Member States have the obligation of (a) “improving and simplifying ... the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases”.

⁶⁹ Regulation 1896/2006/EC of 12 July 2006 implemented in the Civil Procedure (Amendment) Rules (SI 2008/2178) Part 78.

⁷⁰ CPR Part 7.

⁷¹ See article 16 of the Regulation 861/2007/EC of 11 July 2007 and its implementation in the England and Wales through the Civil Procedure (Amendment) Rules (SI 2008/2178) Part 78.

⁷² House of Lords, “European Union Committee: European Small Claims Procedure” (23rd Report of Sessions 2005-06) <http://www.oecd.org/document/51/0,2340,en_2649_201185_1824435_1_1_1_1,00.html>.

⁷³ O. Fiss, “Against Settlement” (1984) 93 *Yale Law Review* 1076.

⁷⁴ *Ibid*, 1077.

use mediation, caps on the recovery of legal costs, or perhaps just ignorance about such provision.

Offers of settlement are more relevant in England than in the US because of the different costs rules used. The English rule tends to allocate the costs to the loser or an unreasonable party. By contrast the American rule is reluctant to order cost payments, with the exception of some States, to the losing party. The English civil procedure is generally regarded as expensive and elitist; accordingly the promotion of ADR and Part 36 are necessary to reserve litigation for those disputes where judgments are worth the expense. However, on the continent litigation is not as expensive and there are already stringent caps in the recovery of costs, which shows a greater emphasis on access to justice. This perhaps explains the lack of interest in seeking methods that could reduce costs and litigation.

The amendment of the EOP introducing offers to settle for contested claims would raise awareness contributing to more settlements, and thus will reduce the caseload in civil law jurisdictions. Accordingly, those involved in evaluating the operation of courts in civil law jurisdictions ought to consider Part 36 as the main starting point.

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