

# **Settle for less...? Or more! Tips on timing, confidentiality and strategy (multijurisdictional) settlement arrangements**

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## **1. QUESTIONNAIRE FOR CIVIL LITIGATION (KARIN GRAF)**

### **1.1. General issues**

#### **1.1.1. How do you define the term "settlement" in civil procedures?**

There is no definition of “settlement” (“*transação*” in Portuguese) in the Civil Procedural Code. Even the Civil Code does not define “settlement” in a straightforward way, even though it regulates its conditions in details. The closest to a definition is given by Article 840 of the Civil Code, which rules that “it is legitimate to the parties to avoid or terminate litigation through reciprocal concession”.

In Brazil, the antitrust investigations are carried out by an administrative agency (CADE – *Conselho Administrativo de Defesa Econômica*). One of its branches, called Directorate General (*Superintendência Geral*) plays a prosecutorial role in the administrative process, which is decided by CADE’s Administrative Tribunal. As a rule, every administrative decision is subject to judicial review, as long as the challenge refers to the merits of the administrative act.

For this reason, the answers below refer to judicial disputes, which may arise after the settlement of the case in the administrative sphere or in an antitrust private claim.

#### **1.1.2. Are there statutory provisions (e.g., in your civil procedural rules or substantive rules) dealing with settlements?**

There are several provisions spread throughout the Civil Procedure Code. Most of the rules are in the Civil Code (from article 840 to 850).

#### **1.1.3. Are there ethical rules and guidelines that affect your negotiation strategies in practice?**

Besides very general provisions of the Lawyer’s Ethics Code, there are no provisions affecting the negotiation strategies.

#### **1.1.4 Is there a specific point in time in the history of a case that is particularly suitable for settlement discussions?**

No, there is not: settlement discussions can take place at any time, either before the courts or outside the courts. However, nearly every civil proceedings have rules about the in-court settlement. When it comes to litigation against the government, these rules mostly do not apply or are subject to a far more detailed scrutiny.

#### **1.1.5 We assume that all jurisdictions know the out of court settlement. Is it, however, frequent in your jurisdiction that the court or the judge**

**facilitates settlement discussions between the parties? What enables (if yes) or prevents (if no) the court from doing so?**

Given the long duration of civil litigation and the limited resources of the courts, the Judiciary branch has been putting a lot of pressure on the litigators to settle in order to decrease the workload and increase the efficiency. In theory, the speech of the judges is favourable to the settlement, even though most of them lack the skills and the will of reaching an agreement good for the parties.

## **1.2. Enforcement of settlement**

**1.2.1 Are there differences between the in court and the out of court settlement, for example with respect to their effect in enforcement proceedings? Are there other practically relevant differences?**

To the best of my knowledge, there is no practical difference.

It is important to take some precautions when it comes to out of court settlements, in order to eliminate the risk of having the settlement declared null and void. First, the parties must be capable and full aware of the content of the settlement, and must also agree on it. Second, it is recommendable that the parties are assisted by a lawyer when writing and/or signing the terms of the settlement. Third, it is advisable to have two people serving as witnesses when signing the document.

## **1.3. Confidentiality and privilege**

**1.3.1. Does your jurisdiction consider a civil settlement agreement and the discussions/correspondence leading to such a settlement confidential by law or other rules (e.g., ethical rules) or do the parties have to agree on confidentiality in the context of their settlement or the settlement discussions?**

Generally speaking, what led to an agreement is not relevant to – there is not a pervasive discovery in Brazil. If these discussions and correspondences are attached to the case filings, they automatically become public, unless there are solid grounds to sustain their confidentiality. In other words, confidentiality is not the rule in the proceedings.

In this sense, the settlement also tends to be public, if it is reached in the proceedings.

Of course, the discussions and correspondences may turn out to be relevant if they are useful evidence to argue that the settlement was void (validity of the agreement) or it was reached with defect.

As article 104 of the Civil Code rules, the validity of an agreement requires a) a capable agent, b) a legitimate object, which must be determined or determinable, and c) formal compliance with the legislation or at least that it is not prohibited by the legislation.

In relation to the possible defects of the agreement, there are five types: a) malice or deceit; b) coercion; c) state of danger for oneself or his/her family; d) excessive obligation deriving from great need or lack of experience; and e) fraudulent conveyance.

**1.3.2. What means do you have to protect the confidentiality of your settlement and related discussions/correspondence for civil and other procedures?**

Article 155 of the Civil Procedural Code rules that every proceeding is public, except for the following conditions:

I – the public interest requires; and

II – wedding, filiation, divorce, alimonies and minors are under dispute;

The request must be addressed to the judge, who will decide whether the case will be given confidential treatment in a rather discretionary way – after all, it is hard to know what falls within the scope of “public interest”.

**1.3.3. What are possible consequences of a breach of confidentiality?**

Besides the payment of indemnification to the innocent party, there are several crimes ruling out such a conduct – there may be an up to 4-year imprisonment sentence.

**1.3.4. Are you allowed to disclose the settlement agreement in other proceedings a) between the same parties? b) between other parties?**

Unless otherwise agreed, there is no restriction to disclosing the agreement with the same parties in other proceedings. In reality, even if agreed, such a restriction can be seen as questionable.

In relation to other parties, the scenario is a bit more complicated. Assuming the other party is the antitrust authority or any other state entity, the settlement tends to be public as a rule, even though the public interest may justify its exceptional confidentiality. In reality, as a settlement with a state entity is reached, the state entity is probably “giving up” part of its request, which is something quite serious from an administrative law’s perspective. Keeping such an agreement out of the society’s scrutiny would be difficult.