

Settlement Arrangements

Litigation Commission

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National Report of Brazil

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1. QUESTIONNAIRE FOR CIVIL LITIGATION

1.1 General issues

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

In Brazilian civil procedures, it is possible to define the term “settlement” as the agreement through which the parties prevent or extinguish obligations by making mutual concessions, declaring/acknowledging rights, or even establishing new obligations.

The Brazilian Civil Code classifies “settlement” as a type of contract, providing in article 840 that “*It is licit for interested parties to prevent or terminate litigation through mutual concessions*”.

Such contract may be concluded: (i) before the filing of a lawsuit, whenever the parties predict a possible dispute and want to prevent it by agreeing not to litigate (“*transação preventiva de litígio*”); or (ii) during the lawsuit, when the parties want to finish a dispute which already exists (“*transação extintiva de litígio*”).

According to scholar Caio Mario Pereira da Silva¹, settlement “*stands for a specific legal act of a contractual nature, and is performed through a meeting of wills, with the aim to prevent or terminate a dispute, in which the parties make mutual concessions (Civil Code, article 840)*”.

It is important to highlight that settlement is only allowed with respect to private patrimonial rights, as provided by the article 841 of the Civil Code². Also, the settlement agreement must always be interpreted restrictively and it can only serve to declare or acknowledge rights - never to transfer them (article 843 of the Civil Code)³.

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

Yes, in both the Civil Code (articles 840 to 850), and the Civil Procedure Code (articles 267, VI, 269, III, and 585, II).

As demonstrated in item 1.1.1., the Civil Code establishes the contractual nature of the settlement and defines it as the instrument that can be used to prevent or finish a dispute in connection with private patrimonial rights (articles 840 and 841 of the Civil Code).

¹ Pereira, Caio Mario da Silva. *Instituições de Direito Civil*, 16th ed. Rio de Janeiro: Forense, 2012.

² Article 841. Settlement is permitted only with respect to private patrimonial rights.

³ Article 843. A settlement is interpreted restrictively. Rights are not transmitted by a settlement, merely declared or acknowledged.

In its turn, article 842 of the Civil Code⁴ determines the formality that the settlement must follow to be considered valid, which may vary from case to case. Whenever the parties agree to settle before the filing of the lawsuit, the settlement agreement has to be in writing (as a general rule, through a private instrument) and be executed by the parties and two witnesses. However, in cases involving obligations that require a public deed (e.g. sale of a property that is worth more than 30 minimum wages), the settlement must obey that specific form – the settlement must follow the same formality required for its substantial obligation. If the parties agree to settle in the course of a lawsuit, the agreement must be concluded via: (i) a public deed; or (ii) an instrument attached to the case docket, executed by the settling parties (or by their lawyers, if they have specific powers to settle), and ratified by the judge.

The parties may also include a clause in the settlement agreement providing for a penalty or fine if one of the parties breaches its obligations (article 847 of the Civil Code)⁵.

Finally, articles 848⁶ and 849⁷ of the Civil Code present the circumstances in which the settlement can be declared null and void.

The Brazilian Civil Procedure Code also refers to settlement in its articles 269, III, and 585, II⁸, providing the consequences of a settlement agreement to a judicial dispute.

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

Yes. In the Brazilian legal system, there are ethical rules that restrict the direct contact between a lawyer of one party and the opposing party (provided the latter is represented already by a lawyer).

Article 34, VIII of the Law n. 8.906/1994 (Statute of the Practice of Law and of the Brazilian Bar Association – OAB) provides that lawyers commit a disciplinary infraction whenever they establish an understanding directly with the opposing party without: (i) their client's authorization; or (ii) the awareness of the opposing

⁴ Article 842. Settlement shall be made by public writing, for obligations that the law requires to take that form, or by private instrument, when the law allows the obligation to be made by private writing. If the settlement involves right contested in court, it shall be made by public writing, or by an instrument in the case files of the proceeding, signed by the settling parties and homologated by the judge.

⁵ Article 847. A contractual penalty is admissible in settlements.

⁶ Article 848. If any of the clauses of a settlement is null, the settlement shall be null. Sole paragraph. When the settlement concerns various contested rights, each independent of the others, the fact that the settlement does not prevail in relation to one of the rights shall not harm the others.

⁷ Article 849. A settlement is annulled only for wrongful conduct, coercion or essential mistake as to the person or thing in controversy. Sole paragraph. The settlement is not annulled for mistake of law as to the questions that were in controversy between the parties.

⁸ Article 585. The extrajudicial enforcement instruments are the following: II- (...) settlement signed by the Public Attorney's Office, the Public Defender's Office or the lawyers of the settling parties.

party's lawyer. In the same sense, article 2, sole paragraph, VIII of the Code of Ethics and Discipline of the Brazilian Bar Association – OAB provides that a lawyer must abstain from communicating directly with the opposing party without the previous agreement of his/her lawyer.

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

There is not a general guideline on this matter. It is a case-by-case analysis. However, it is always important to take into consideration that the duration of a lawsuit in Brasil is usually long, especially because the Civil Procedure Code offers a large range of appeals. For that reason, as a general rule, the plaintiff is more interested in settling earlier in the lawsuit, with the aim of preventing it from lasting too long. On the other hand, the defendant can use time in his/her favor. Another relevant element of a settlement discussion is the party's probability of win/loss. For obvious reasons, the party that is more likely to win will always have a stronger position in the negotiation.

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?

Yes, it is frequent in Brazil's jurisdiction that the court or the judge facilitates settlement discussions between the parties.

Article 331 of the Civil Procedure Code provides that the judge must schedule a preliminary hearing (conciliation hearing) with the specific purpose of introducing settlement discussions. In general, the judge inquires if the parties have interest in such hearing before actually scheduling it.

Also, whenever the parties demonstrate their willingness to settle – regardless of the stage of the lawsuit -, the judge can schedule a special hearing with that purpose.

Furthermore, some Appellate Courts schedule a conciliation hearing before the judgment of the appeal. It is also an attempt to reduce the large number of lawsuits with which the Judiciary has to render a decision, with the aim of improving the quality of its service.

It is also important to mention that the Brazilian's New Civil Procedure Code Bill - which is currently in progress at the House of Representatives – embraces the conciliation as one of its ground rules. For instance, article 3, paragraphs 2, and 3 provides that: (i) the State shall promote the consensual solution of disputes, whenever possible; and (ii) all judges, lawyers, and members of the Public Attorney's Office must stimulate settlement discussions between parties at all times during the lawsuit.

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?

Both in court settlement and out of court settlement enable the parties to file an enforcement proceeding. However, the proceedings are different in practice, since the court settlement consists in a judicial enforcement instrument, while the out of court settlement consists in an extrajudicial enforcement instrument.

The enforcement of the court settlement must follow the proceeding provided by articles 475-A to 475-R of the Civil Procedure Code, exactly as if it was a merits decision (“*cumprimento de sentença*”). In this case, the enforcement will be an additional phase of the proceeding. For this reason, it will happen in the same case docket, with no need to summon the defendant once again.

On the other hand, the enforcement of the out of court settlement must follow the proceeding provided by articles 585 to 587, 621 to 645, 652 to 658, and 736 to 740 of the Civil Procedure Code. In this case, the defendant will have to be personally summoned and may present a substantial defense (“*embargos*”).

However, is essential to highlight that the obligation provided by the out of court settlement must meet certain requirements in order to be considered an extrajudicial enforcement instrument (articles 580⁹ and 586¹⁰ of the Civil Procedure Code). Thus, the agreement has to (i) be certain (the document must be clear about the existence of the obligation); (ii) have a fixed amount (the object of the obligation, as well as its value must be certain); and (iii) provide for an outstanding amount and/or obligation at that precise time. In case the agreement lacks any of these requirements, it won't be possible to file an enforcement lawsuit (the interested party will have to follow the ordinary proceeding, typically lengthier and more expensive).

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?

⁹ Article 580. The enforcement proceeding may begin when the debtor breaches an obligation that is certain, enforceable and clear.

¹⁰ Article 586. The enforcement regarding collection of credit must be based on an enforcement document that contains a certain, enforceable and clear obligation.

First of all, it is important to stress that lawyers must maintain the confidentiality of any information provided by their clients, due to ethical rules. Article 25 of the Code of Ethics and Discipline of the Brazilian Bar Association – OAB provides that professional confidentiality is inherent to the profession, and must always be respected. Thus, all discussions/correspondence leading to a settlement are confidential by law, in order to protect the client’s interest in the negotiation. However, there is no rule regarding the confidentiality of the civil settlement itself. As a general rule, the settlement is not confidential, especially when it comes to a court settlement, since the general rule is that the case dockets are public (excluding a few exceptions, provided by law, such as lawsuits dealing with family matters). Nevertheless, if the parties desire to keep a settlement confidential, they may/should agree on that through a confidentiality clause. Nevertheless there are certain ways of preventing the presentation of settlement agreement to the court, which, of course, have to be assessed case-by-case. For example, (i) the parties may present a simple motion informing the judge that the parties have settled, and wish to dismiss the lawsuit (article 269, III of the Civil Procedure Code) – in this case, some judges require the presentation of the settlement agreement before dismissing the case –, or (ii) the plaintiff may request the dismissal of the lawsuit with prejudice (article 267, VIII of the Civil Procedure Code).

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

Provided that the parties have agreed on the confidentiality of the settlement, it is possible to file (i) an injunction lawsuit (“*ação de obrigação de fazer*” or “*ação de obrigação de não fazer*”), to prevent the other party from breaching of the confidentiality clause, or (ii) a lawsuit seeking compensation for damages arising from the breach of the confidentiality clause (“*ação indenizatória*”).

In the latter case, in order to obtain indemnification, the plaintiff will have to prove that: (a) the parties agreed on the confidentiality; (b) the defendant breached such obligation; and (c) an actual damage or loss has arisen directly from the breach. In the Brazilian system, whoever causes damages by committing an illicit act must pay the proper indemnification. In its turn, an illicit act can be defined as the action through which someone violates a right and causes damages (articles 186¹¹ and 927¹² of the Civil Code).

¹¹ Article 186. A person who, by voluntary act or omission, negligence or imprudence, violates rights and causes damage to another, even though the damage is exclusively moral, commits an illicit act.

¹² Article 927. Anyone who, through an illicit act (arts. 186 and 187), causes damage to another is obliged to repair it. Sole paragraph. The obligation to repair the damage will exist, regardless of fault, in the cases specified by law or when the activity normally carried out by the person who caused the damage entails, by its nature, risk to the right of others.

It is important to stress that no indemnification shall be awarded if the plaintiff cannot prove to have suffered damages or losses, even if the contractual breach is undisputable. This is one of the reasons for the parties contemplate in the agreement a penalty clause (article 847 of the Civil Code). Through such clause, the parties may previously establish the exact value of the indemnification that shall be paid upon the breach of the confidentiality clause (articles 408 to 416 and 847 of the Civil Code).

1.3.3 What are possible consequences of a breach of confidentiality?

As demonstrated in item 1.3.2, provided that the parties agreed on the confidentiality of the settlement, it is possible to file a lawsuit seeking compensation for damages arising from the breach of confidentiality.

Besides, based on their free will, the parties may include others types of clauses in the settlement establishing possible consequences of a breach of confidentiality, as long as they do not violate any law (article 421 of the Civil Code¹³, and article 5, II of the Federal Constitution).

1.3.4 Are you allowed to disclose the settlement agreement in other proceedings

a) between the same parties?

Yes, if the parties have not agreed on the contrary. In the Brazilian system, there is no rule regarding the confidentiality of the civil settlement. Moreover, if any court or authority requires the disclosure of the agreement, it is considered an exception to any confidentiality undertaking.

b) between other parties?

Yes, if the parties have not agreed on the contrary. In the Brazilian system, there is no rule regarding the confidentiality of the civil settlement. Moreover, if any court or authority requires the disclosure of the agreement, it is considered an exception to any confidentiality undertaking.

¹³ Article 421. The freedom to contract shall be exercised by virtue, and within the limits, of the social function of contracts.