INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Settle for less…? Or for more! Tips on timing, confidentiality and strategy in (multijurisdictional) settlement arrangements

Antitrust, Commercial Fraud and Litigation Commissions

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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 procedure?

The term "settlement" can roughly be defined as any amicable solution to a dispute that the parties reach before the trial, during the trial or even – in some rare cases – after the verdict.

In the Finnish jurisdiction the matters in the civil procedure can be divided into two main categories: discretionary cases (the cases that can be settled out of court) and non-discretionary (mandatory) cases.

The discretionary cases form the vast majority of the cases in the Finnish civil procedure, including all disputes stemming from contracts, business transactions and acts according to the Law of Contracts [1]. The Finnish Civil Procedure Law [2] chapter 5, paragraph 26 describes discretionary cases as "cases, in which a settlement is allowed". The parties may freely settle the case and determine the content of the settlement as well as define the trial material and the course of the process.

The non-discretionary cases include matters dealing with the rights of an infant. These are called "cases, in which a settlement is not allowed" (Civil Procedure Law paragraph 12, chapter 18). Due to the public interest involved, a free disposition right cannot be given to the parties and the cases cannot be settled out of court. [3]

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

The main principle is that only discretionary cases can be settled out of court.

Whether the case is discretionary or non-discretionary is determined by material law. The freedom to settle a case during the trial is always at least as extensive as to settle the case out of court. If it is possible to settle a case before a trial, the settlement is always allowed during the trial as well. Sometimes the window to settle a case may even be more extensive during a trial than out of court: for example, disputes dealing with mandatory civil law (such as labor law or consumer law) are by foundation discretionary cases, but these kinds of disputes may not be freely settled out of court due to public interest and the need to guard the rights of the weaker party. [4] So the disputes may not be possible to settle out of court, but normally can be settled if the dispute is pending in a court.

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[1] "Laki varallisuusoikeudellisista oikeustoimista" in Finnish.

[2] "Oikeudenkäymiskaari" in Finnish.

[3] Lappalainen etc., pages 52-53.

[4] Ibid.

Other than the main principal described above, there are very few procedural or substantive rules dealing with settlements. The settlement can even obligate the parties more than the original dispute. In essence, the rules that apply to a settlement agreement are very similar to the ones that apply to any contract according to the Finnish Contract Law, chapter 3. Basically

- A party may not use coercion in order to settle
- A party may not use fraudulent misrepresentation in order to settle
- A party may not take advantage of the state of distress, lack of judgment or state of dependency of another party in order to settle
- The agreement may not be against good practice
- The agreement is void, if it would be a dishonorable and an unworthy act to invoke the agreement

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

The ethical rules of the Finnish Bar Association first and foremost require that an attorney must find out if there is a possibility of an amicable settlement to a dispute before filing a claim or undertaking other legal action. Failure to do so is a breach of the code of conduct of the Finnish Bar Association, unless seeking an amicable settlement is impossible due to statute of limitations or other time constraints of similar nature. [5] An attorney also has a general obligation to evaluate during an assignment, whether an amicable settlement is possible. [6]

The ethical rules of the Finnish Bar Association prohibit an attorney to mention or refer to the other party's settlement offer in the trial of the matter. [7] For example, let's assume Company A has filed a contractual damage compensation claim of 1.000.000 Euros against Company B for failure to deliver agreed services in time. Company B has denied the failure and the claim altogether in its written answer to the claim. The companies negotiate and see if there is a chance of a settlement. Company B agrees to compensate 500.000 Euros if the case can be settled without further process. Now, if the settlement negotiations eventually fall through and the matter will proceed to the trial, Company A's attorney cannot in any way mention the settlement offer made by Company B. This is to ensure dynamic settlement negotiations without the fear that the (rejected) offer will later have any negative impact to a party's case.

[5] The ethical rules of the Finnish Bar Association, paragraph 7.1.

[6] The ethical rules of the Finnish Bar Association, paragraph 5.6.

[7] The ethical rules of the Finnish Bar Association, paragraph 7.2.

The ethical rules of the Finnish Bar Association also prohibit attorneys from using any indecent threats, for example threats of improper request for criminal investigation, threats of negative publicity etc. [8]

If the settlement agreement is worded incorrectly – let's say the parties have agreed to a settlement amount of 100.000.000 Euros instead of 100.000 Euros by mistake and the parties sign the contract, the written contract can naturally be challenged. What matters is the intent of the parties. Of course, the burden of proof lies with the party that wishes to challenge the validity of the written agreement.

If a party has been mistaken about the content of the settlement and agrees to settle under a false assumption, the following dispute may be more difficult to resolve, assuming that the other party has acted in good faith and has not mislead the other party. This may be one of the rare cases in which a party can appeal the settlement agreement. This is possible under the Finnish Civil Procedure Law, but extremely rarely used.

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

As the top two reasons for settling the case are willingness to save costs (both by saving the party's own legal fees and avoiding the risk of compensating the other party's legal fees in case of a loss) and willingness to avoid a time-consuming (and public) trial, the settlement discussions would be most suitable as early as possible in the process.

As noted earlier, an attorney must find out if there is a chance of an amicable settlement before filing a claim, the first possibility to discuss settlement would be before the trial.

In practice, another suitable time for settlement discussion is during written or oral preparation of the civil dispute, when both parties are aware of the oppositions arguments, the evidence and the undisputed and disputed facts of the case, but the trial is still at a relatively early stage, so the saving of the costs and time is still significant.

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?

It is in Finnish jurisdiction possible that the judge facilitates the settlement discussions between the parties. Due to the discretionary nature of the cases that can be settled out of court, there are no rules that prevent the court or the judge from do-

[8] The ethical rules of the Finnish Bar Association, paragraph 7.3.

ing so. As described before, the settlement procedure in the Finnish jurisdiction is relatively flexible and there are few rules dealing with it.

This happens quite frequently as well, as long as there is a chance that the parties' conflicting interests can be met. If the opposing parties' views are at the completely opposite ends of the spectrum and it is clear from the start that an amicable settlement is impossible, not much time will be wasted in the settlement negotiations, court facilitated or otherwise.

The activity of the judge in facilitating the settlement discussions primary depends of the character or the personality of the judge. Most active judges in the Finnish jurisdiction may even propose a draft for a settlement agreement.

It should be noted that in the Finnish jurisdiction (as presumably in most other jurisdictions) a standard settlement includes that the parties agree to bear their own legal costs in the matter. However, some legal fee insurance companies may require that the insured will demand the compensation of the legal fees from the opposing party, at least formally. If this is the case, a settlement may be agreed on in all other matters, but the parties may let the court give a verdict of the legal fees alone. Not surprisingly, the verdict in these cases very often obligates both parties to bear their own legal fees in the matter, if a settlement has been reached in all other matters of the dispute.

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?

According to the Finnish Civil Procedure Law chapter 20, paragraph 1 a court may ratify a settlement as the final resolution of *a pending case*. A ratified *in court* settlement may be enforced just like a final and non-appealable verdict and a monetary obligation agreed on in the settlement may be recovered via execution. This holds true to all settlements reached after a claim has been made in the court – the case is pending - regardless of at what stage the settlement have been reached at or whether the judge has or has not been facilitating the settlement discussions.

If a settlement has been reached completely out of court, i.e. in the negotiations before the plaintiff has filed the claim in a court, the settlement agreement is not examined by a court – not pending - and cannot be ratified as explained in the previous chapter. Therefore, a settlement reached completely out of court without the issue being filed in a court cannot be enforced like a verdict. However, if the parties sign a written agreement an one of the parties breach the agreement, the position of the other party or parties should be very strong and it shouldn't be difficult to get a verdict in case of a breach of the settlement agreement. Further-

more, a party may even collect for example each install payments of a settlement amount individually by summary judgments.

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 settlement discussions?

According to a main rule all the material of the case, including the legal briefs the written evidence and the settlement agreement are public documents and therefore obtainable by anyone who wished to order them from the court. There are exceptions: a document may be determined confidential partly or fully for up to 60 years if the grounds for confidentiality determined by law are fulfilled. [9] Grounds for confidentiality are for example if the document contains business or trade secrets (this probably is the main confidentiality interest with regards to this National Report). Other grounds for confidentiality include (but are not limited to) sensitive personal information (criminal record, health or financial records etc.) and confidential information about the national security.

So, as a result of the main rule, if the parties agree on a settlement after the case has been filed in court, all of the legal briefs (the claim, the answer, additional motions) submitted to the court as well as the written evidence and the settlement agreement itself will be public records unless the legal grounds for confidentiality are met and at least one of the parties demand that the documents will be determined confidential. The demand must be based on the legal grounds for confidentiality as publicity is the main rule. The court will then make a decision of whether the documents will be determined confidential partially or fully.

On the other hand, the discussions and/or the correspondence leading to the settlement is normally not included in the material of the case and therefore will not be public and will remain known only for the parties.

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

If a court has ratified the settlement, a party or all of the parties may demand that the material of the case will be determined confidential as explained above. As the publicity of the trial is the principal rule, it is very unlikely that the court will determine all of the material confidential. As for the correspondence and the discussions that will remain only known for the interested parties, a non-disclosure agreement may be signed.

[9] Trial Publicity Law, chapter 3 (“laki oikeudenkäynnin julkisuudesta yleisissä tuomioistuimissa” in Finnish).

If the settlement has been reached completely out of court, without the claim been filed in a court, none of the material will become public or otherwise known outside the interested parties (including the settlement agreement), if the parties honor the agreement and it will not have to be enforced. In this case the interested parties may secure the confidentiality by a non-disclosure agreement.

If the case is filed in a court and a settlement is later reached, it is very likely that at least some of the material will become public. Therefore, if confidentiality issues are involved in a case, a settlement completely out of court or arbitration would be more appealing alternatives. The problem with these alternatives is that settling the case completely out of court may lead to a deadlocked negotiation as there is no incentive or coercive to settle the case and arbitration, on the other hand, requires the consent of all of the parties (or a contractual clause) and is naturally much more expensive than dispute resolution in general civil court.

1.3.3 What are the possible consequences of a breach of confidentiality?

The breach of confidentiality may lead to a contractual penalty determined in the non-disclosure agreement or in the settlement agreement itself.

In some cases, especially if the settlement agreement is ratified by court and the court has determined some documents confidential, the breach of such confidentiality may lead to a criminal prosecution. According to the Publicity Law of Authorities [10] chapter 24, paragraph 20, a document in an authority's (such as a court of law) possession that contains business or trade secrets is confidential by nature and, according to the Trial Publicity Law paragraph 10, can be determined confidential. If someone breaches the confidentiality enacted by law, the person may be convicted of a secrecy offense according to the Penal Code [11] chapter 38, paragraph 1. Secrecy offense is punishable for up to one year of imprisonment and there may be a significant damage compensation claim by the damaged party involved as well.

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

a) between the same parties?

There wouldn't seem to be a problem in disclosing the settlement agreement in other proceedings between the exact same parties. Both parties should be aware of the settlement agreement anyway.

b) between other parties?

If the settlement agreement is determined confidential, it may not be disclosed at all. According to the ethical rules of the Finnish Bar Association, even the public documents of a client must be kept confidential (regardless of the fact

[10] "Laki viranomaisten toiminnan julkisuudesta" in Finnish.

[11] "Rikoslaki" in Finnish.

that they may be ordered from the court by anybody) without the client's consent. Therefore, disclosing the settlement agreement in other proceedings between other parties will require consent of the client in the case where the settlement was reached.

2. QUESTIONNAIRE FOR ANTRITRUST PROCEDURES (MAÏTE OTTES)

2.1 General issues

2.1.1 Does your jurisdiction provide for settlement procedures with the competent competition authority?

The Finnish Competition and Consumer Authority (FCCA) does not offer settlement procedures to parties in breach of antitrust rules. In Finland, leniency is the main channel for companies to avoid or lessen the penalty payment for breach of competition law. The absence of settlement procedures at the FCCA follows already from the fact that the FCCA can only propose to the Market Court that a penalty payment should be imposed on a company. It is the Market Court that makes the final decision, whether or not the fine will be imposed. As the FCCA lacks the power to impose penalty payments for breaches of the antitrust legislation, it also lacks the power to offer settlement procedures.

The trend within the EU regarding settlement procedures in antitrust matters has however been discussed in Finland in connection with drafting the new Competition Act (Kilpailulaki, 948/2011), which came into force on 1.11.2011. Namely, the trend was discussed by the working group consisting of amongst others the Chief Director for the FCCA, Chief Justice of the Market Court, representatives from the government, the Ministry of Trade and Industry, the Confederation of Finnish Industries and Federation of Finnish Enterprises. The working group was assigned to prepare a consultation process and a report on material issues in view of the new legislation. In its report ("Kilpailulaki 2010 työryhmän keskeiset ehdotukset"), the working group concludes, that there is a need to give the FCCA more effective tools to investigate and charge companies in breach of competition law. However, as regards settlements, the working group states that although settlement procedures do offer a faster system to handle breaches of competition law, it would not noticeably hasten the handling of such cases nor would it lessen the resources used by the FCCA in its investigations. This is due to the broad investigation that must none the less be carried out when there is a suspicion that competition law has been breached.

The working group report also discusses the possibility of settlements during the proceedings in the Market Court. However, it concludes that this kind of "plea bargaining" is a foreign concept to the Finish legal system and would thus be difficult to incorporate into the administrative judicial procedure in Finland. Further, as the possibility of a settlement probably could be used only in marginal cases, the working group concludes that it would not have the desired effects. [12]

[12] Kilpailulaki 2010 työryhmän keskeiset ehdotukset, pages 24-25

2.1.2 If your jurisdiction does not provide for settlement procedures, does your jurisdiction provide for commitment decisions?

Commitment decisions are not as such used in Finland. However, a feature of the leniency procedure is that whistleblowers must immediately cease participation in the competition restraint, cooperate with the FCCA during the entire investigation, not destroy evidence and keep the procedure confidential from other parties. In essence, this means that a whistleblower has to make these commitments in order to be eligible for the immunity from fines due to the competition restraint. There is however no independent commitment procedure whereby an investigation may be laid down due to commitments made to the FCCA by the companies in breach of competition law.

2.1.3 If your jurisdiction does not provide for settlement procedures, please answer the following questions from the perspective of such commitment decision procedure.

N/A

2.1.4 What is the general stance towards settlement procedures in cartel matters? Are these generally considered to be a preferred route?

N/A

2.2 Procedural issues

2.2.1 At what stage can a settlement be reached? E.g.: (i) only in the investigative procedure, (ii) before publishing a statement of objections, (iii) at any stage before an infringement decision has been taken, or (iv) at any time?

N/A

2.2.2 Is it possible to settle with only one, or several parties involved in the alleged cartel, or do all accused parties need to be involved? Are there any constraints with whom a settlement can be reached (cartel leaders, recidivists, etc.)?

N/A

2.2.3 Could you elaborate on the possible settlement arrangements. Are these only pecuniary measures or could these involve behavioral measures as well? How are the terms of a settlement being determined?

N/A

2.2.4 Which party can take the initiative for a settlement: is this the administrative authority only, or the suspected parties as well?

N/A

2.2.5 Are there any other institutions involved other than the competition authority? Does a settlement, e.g., require any court approval? Please elaborate on the relevant procedure.

N/A

2.2.6 Is it necessary for reaching a settlement to admit being guilty?

N/A

2.3 Enforcement of settlement

2.3.1 Are there any rules as to the enforcement of a settlement? E.g. in monitoring any possible behavioral measures? What are the consequences if a settlement agreement is breached?

N/A

2.3.2 Is a settlement subject to appeal? Can the parties agree to waive the right of appeal?

N/A

2.3.3 Would it e.g. be possible for a party reaching a settlement with a public authority to be prosecuted for the same behavior by a criminal prosecutor?

N/A

2.4 Confidentiality and privilege

2.4.1 Is a settlement arrangement made public? What information is made public? Does this, e.g. include the settlement agreement itself, any documents and/or statements leading to such settlement?

N/A

2.4.2 If the parties do not reach a settlement, can statements and/or documents used in trying to reach a settlement, be used against the accused (or other) parties?

N/A

2.4.3 Do parties who have settled their case get any protection from any possible follow-on damage claims in civil proceedings?

N/A

3. QUESTIONNAIRE FOR CRIMINAL PROCEDURES (ALEXANDER SAUCKEN)

3.1 General issues

3.1.1 Does your jurisdiction provide for settlement procedures with the prosecution authorities and/or the Courts in criminal procedures?

The Finnish jurisdiction does not provide for settlement procedures with the prosecution and the courts in criminal procedures at the moment. There is a legislation bill dealing with plea negotiation and waiving of the charges currently being processed in the Finnish Parliament. [13]

This National Report will examine the issues in the Finnish jurisdiction in light of the current legislation as well as the proposed new legislation.

The current legislation

In the Finnish criminal process there can be – and usually are – three individual parties: the prosecutor, the defendant(s) and the plaintiff(s) (i.e. damaged party or the victim of the suspected crime). The plaintiff has always the status of a party in criminal proceedings and a civil procedural claim (for example a damage compensation claim) can always be handled in the same trial as the criminal charge, rather than in a separate civil court. The plaintiff has an independent right to demand punishment for the defendant, either along with the prosecutor or even for a different rubric (for example for aggravated form of a crime instead of the regular form). The plaintiff naturally has the right to use a counsel in the criminal procedure. With regards to these aspects the Finnish criminal justice system has some unique and special features, although it is relatively uniform with the criminal justice systems of other Nordic Countries.

As a result of the relatively strong position of a plaintiff in a criminal case, there are some constructions that resemble plea bargaining in the current legislation.

The plaintiff and the defendant can undertake a special mediation process for criminal cases. The mediator is an impartial person (usually an attorney), who has received a special training by for mediation and who works under the supervision of the Mediation Office. The mediation process is very informal and somewhat casual negotiation that can lead to settlement between the plaintiff and the defendant and as a result the damage compensation claim may be settled before the actual trial and the plaintiff may not demand punishment for the defendant anymore. In addition to an actual monetary damage compensation the settlement may also

[13] Government's bill 58/2013 to Parliament for legislation dealing with plea negotiation and for renewal of the legislation dealing with waiving of the charges ("Hallituksen esitys eduskunnalle syyteneuvottelua koskevaksi lainsäädännöksi ja syyttämättä jättämistä koskevien säännösten uudistamiseksi, HE 58/2013).

include for example a work performance as compensation or a mere apology. [14] The mediation settlement between the plaintiff and the defendant does not, however, bind the prosecutor in any way. The minor forms of crimes (minor assault, minor theft, minor fraud, minor embezzlement etc.) and the crimes that are especially "personal" in nature (for example defamation, unlawful threat etc.) are dependent on the plaintiff's motion to demand punishment, but the vast majority of crimes can be prosecuted without the co-operation of the plaintiff in the name of the public interest. Therefore the prosecutor may still press charges even though the plaintiff and the defendant have reached a settlement and despite the fact that the plaintiff has no claims whatsoever against the defendant.

In practice, if the crime is not a particularly serious one and the settlement between the plaintiff and the defendant has in fact been reached, the prosecutor may decide to waive the charges. According to the Finnish Criminal Procedure Law [15] chapter 1, paragraphs 7 and 8, the prosecutor may waive the charges, if

- the expected punishment for the crime is not harsher than a fine and the crime can be considered minor
- the perpetrator was under the age of 18 at the time the crime was committed
- the trial and the punishment could be considered unreasonable considering the settlement between the defendant and the plaintiff or the defendants other contributions in solving the case or removing the negative consequences of the crime or
- according to the rules of determining a joint punishment for several crimes, the charge in question would not make a difference in the verdict.

Furthermore, the defendant and the plaintiff may reach a settlement just by negotiating, without undergoing the official mediation process. As a result, the damage compensation may be settled and the plaintiff may not wish to demand punishment for the defendant anymore. This unofficial settlement does not bind the prosecutor any more than the settlement via the official mediation process.

In any case, the settlement between the plaintiff and the defendant usually has an impact on the sentencing of the defendant if the charges are not waived. According to the Finnish Penal Code chapter 6, paragraph 6, the sentence may be decided using a lenient punishment scale for example if the defendant

- has reached an amicable settlement with the victim
- compensated the damages caused by the crime or otherwise removed or tried to remove the negative consequences of the crime or
- has contributed in solving the crime (primary by confessing).

[14] Lappi-Seppälä, p. 502.

[15] "Laki oikeudenkäynnistä rikosasioissa" in Finnish.

Using the lenient punishment scale means that the maximum punishment is reduced to three quarters of the maximum punishment for the crime in question and the minimum punishment is the general minimum punishment for that type of punishment. [16] For example: the normal punishment scale for manslaughter according to the Penal Code chapter 21, paragraph 1 is eight to 12 years of imprisonment. The lenient scale for manslaughter would be 14 days to eight years of imprisonment [17]

One element in the current Finnish legislation that at least somewhat resembles plea bargaining negotiations is that the defendant and the prosecutor may stipulate some facts of the case undisputed. Furthermore, there are crimes where there is no actual plaintiff (victim), but the crime may produce monetary profit (such as drug trafficking offenses) that the state demands to be confiscated, but is hard to estimate. In these situations it is possible that the prosecutor and the defense stipulate a certain amount.

The proposed legislation

According to the proposed legislation the prosecutor and the defendant (with the consent of the plaintiff) would be able to negotiate and submit a *verdict proposal* [18] to the court. The verdict proposal includes that the defendant confesses the crime or crimes he or she is charged with and the prosecutor agrees to demand punishment using a more lenient scale and/or waive charges on one or several crimes. [19]

3.1.2 Are settlement procedures well-accepted part of criminal procedures in your jurisdiction or are they considered as being critical with regard to the function of a criminal procedure aiming at the "search for the truth"?

At the moment the criminal procedure in Finland emphasizes the "search for the truth" and thus the settlement procedures have traditionally not been a part of the criminal procedure. The criminal cases are prime examples of non-discretionary cases (as defined in chapter 1.1.1).

The proposed legislation dealing with plea negotiations would introduce a completely new element to the Finnish criminal procedure.

3.1.3 Are settlements commonly used in criminal procedures in your jurisdiction?

Under the current legislation the possibility and the parties' willingness for mediation between the plaintiff and the defendant is always examined during the pre-

[16] Penal Code, chapter 6, paragraph 8.

[17] The minimum length of a *fixed-period* prison sentence in Finland is 14 days. When the crime is punishable only by a life imprisonment and the lenient scale is applied, the scale would be 2 years to 12 years instead of life.

[18] "Tuomioesitys" in Finnish.

[19] Bill 58/2013, p. 24.

investigation. The mediation requires mutual consent. The usage of the mediation is somewhat hindered by the fact that the settlement does not bind the prosecutor and a trial and a punishment may still result. It is used in case of lesser crimes from time to time.

3.2 Procedural issues

3.2.1 What are the conditions for settlements in criminal procedure?

The current legislation

According to the Law of Mediation in Criminal Procedures and Some Civil Procedures [20] chapter 1, paragraphs 2 and 3 the parties of the process (the plaintiff and the defendant) must have voluntarily and free-willingly agreed to mediation and must understand the consequences of mediation. Both parties have the right to cancel their consent to the mediation at any point.

The crimes that are suitable to be processed in the mediation are individually decided case to case considering the seriousness of the crime, the relationship between the defendant and the plaintiff and other factors. Crimes committed against minors cannot in principle be mediated.

The proposed legislation

According to the legislation proposal, the new provisions dealing with settlement in the Finnish Criminal Procedure Law require first of all, that the maximum penalty of the suspected crime that can be settled is six years of imprisonment. In addition, some crimes that have a lower maximum punishment than six years are excluded from the settlement process, including but not limited to:

- rape
- other lesser sexual offenses
- infanticide
- battery
- minor battery
- involuntary manslaughter
- aggravated involuntary manslaughter
- reckless endangerment

Secondly, the prosecutor must find that entering the settlement negotiations is justifiable taken into consideration the nature of the case, the cost and duration of the trial and other factors. [21]

[20] ”Laki rikosasioiden ja eräiden riita-asioiden sovittelusta” in Finnish.

[21] Bill 58/2013, p. 22.

The settlement requires that the defendant confesses the crime and all parties (the defendant, the prosecutor, the plaintiff) agree on the settlement. [22]

The prosecutor agrees to demand punishment according to the lenient punishment scale (as described in chapter 3.1.1.). The prosecutor may also agree to waive some of the charges. [23]

After the settlement has been reached, the parties sign a written *verdict proposal* and the prosecutor submits the proposal to the court. The court must then arrange a *confession trial* [24] no later than 30 days after the court has received the verdict proposal. The defendant must be present in the confession trial and has the right to use an attorney. [25]

In the confession trial the case is presented to the court and other related matters (such as damage compensation claims) are presented and handled as well. The defendant will confirm the confession – but has the right to cancel it.

The court has two options: 1) to give the verdict according to the verdict proposal or 2) to leave the matter in status quo (for example in a case the confession is cancelled or if the court finds that the actions described in the verdict proposal do not constitute a crime). [26] The court cannot reject or in any way amend the verdict proposal. [27]

3.2.2 Can the settlement be reached at any time of the procedure (investigation and court proceeding) or is this option restricted to a certain stage (e.g. only investigative procedure)?

The current legislation

The mediation process usually takes place during the pre-investigation or during the charge consideration, but it could also take place during the trial or even after the verdict. [28] As described earlier in chapter 3.1.1., the current mediation does not in any way bind the prosecutor, who can press charges regardless of the mediation outcome between the defendant and the plaintiff. The rationalizing behind the prosecutor's strong independent right to press charges lies with the prosecutor's role in advocating the public interest of the society and upholding the law. Other reason is to prevent the avoidance of the trial and punishment in cases where the

[22] Bill 58/2013, p. 24.

[23] Bill 58/2013, p. 24.

[24] "Tunnustamisoikeudenkäynti" in Finnish.

[25] Bill 58/2013, p. 29.

[26] Leaving the matter in status quo basically means that the court neither rejects nor accepts the charges. The decision to leave the matter in status quo doesn't have a res judicata or lis pendens effect: the prosecutor may press the same charges against the same defendant again.

[27] Bill 58/2013, p. 33.

[28] Lappi-Seppälä, p. 500-501.

defendant can coerce the plaintiff to reach a mediation settlement. This is somewhat likely for example in domestic abuse cases.

Despite the fact that the mediation process usually takes place before the trial, it is in practice also possible that the defendant and the plaintiff reach an amicable settlement just before the trial or in the middle of the trial in a case in which the charge is not that serious. In this kind of situation the prosecutor may agree to drop the charges in the middle of the trial.

The proposed legislation

According to the proposed new provisions to the Finnish Criminal Procedure Law, the settlement negotiations leading would seem to usually happen before the trial – during per-investigation, during charge consideration (after the conclusion of the pre-investigation) or after the prosecutor has filed the charges. There seems to be, however, no provisions in the proposed legislation preventing the settlement from happening during the trial, so settlement negotiations should be possible even during a trial.

3.2.3 What parties of the criminal procedure have to be involved in the settlement discussions?

The current legislation

As described earlier, the current mediation process involves only the plaintiff and the defendant. The prosecutor is not involved in mediation and the settlement has no direct impact on prosecutor's decisions or on the trial.

The proposed legislation

The discussions are conducted between the prosecutor and the defendant. The plaintiff must agree to the settlement procedure.

3.2.4 Which party can take the iniative for settlement: The court/the prosecutor/the accused or all of them

The current legislation

As a standard procedure the willingness of the defendant and the plaintiff for the current mediation process is inquired by the investigation authority (normally the police) during the pre-investigation. If both parties agree to the mediation freewillingly and voluntarily, the mediation may commence. The actual iniative may come from the defendant, the plaintiff, the prosecutor, the police, the social authorities or the Mediation Office. [29]

[29] Lappi-Seppälä, p. 501.

The proposed legislation

According to the proposed law, the prosecutor makes the decision to begin negotiations for verdict proposal. The iniative for settlement may, however, come from the prosecutor, the defendant, the plaintiff or even from the court or the police.

3.2.5 Please explain the formalities that have to be met for a valid settlement? What are the consequences of a formally invalid settlement?

The current legislation

The outcome of the official mediation process is a standard written form that describes the mediation process and the outcome of the negotiations and indicates, if the plaintiff has any claims left against the defendant after the mediation.

However, the defendant and the plaintiff may also reach an unofficial settlement that has no formalities to be met – it may be even be a verbal agreement (although it usually is in writing).

As the current settlement – by official mediation or by unofficial negotiations – does not have direct binding consequences on the charges, there is no actual invalidity.

The proposed legislation

In the proposed new settlement process the prosecutor drafts the verdict proposal, where the prosecutor agrees to demand punishment applying the lenient scale and may also agree to waive some of the charges in exchange for the confession (of the more serious charge/charges) by the defendant. Both aforementioned parties must agree on the rubrics of the confessed crimes. The verdict proposal must be in written form and both parties must undersign it. The verdict proposal must confirm the plaintiff's consent. [30] The verdict proposal must meet the basic formalities of a charge document. [31]

As the Finnish Criminal Procedure Law include provisions of correcting a simple error in writing, the chances that the verdict proposal would be deemed invalid due to error in formality are small.

3.2.6 Will the settlement be executed itself or will the settlement results only become part of the final court judgement?

According to the proposed new legislation, the court only has the option to verify the verdict proposal or leave the matter in status quo. If the verdict proposal is verified, it will be executed itself – it will be the final court judgement.

[30] Bill 58/2013, p. 48.

[31] Written form, name of the court, names and domiciles of the parties, the crime the defendant is charged with, the place and date of the crime, the competence of the court.

The provisions of the proposed legislation also allow charges of some defendants to be handled via verdict proposal in the confession trial while (disputed) charges of other defendants are handled in a normal criminal trial procedure and these two procedures can be combined into one single trial. In this case the settlement would become a part of the final judgement. [32]

3.2.7 Is it possible to settle any relevant question or is the settlement procedure restricted to a certain questions only (e.g. settlement only with regard to a minimum / maximum sentence; no settlements with regard to the question of guilt)?

The verdict proposal will be a complete and final outcome to solve all the charges in the verdict proposal completely – including the question of guilt as well as the minimum and maximum sentence. As explained in the previous chapter, some charges may remain disputed and therefore not be included in the verdict proposal. Those will be handled in a normal criminal procedure that can be combined to the settlement process and tried together in the same trial. In this case the outcome would be one verdict that includes the outcome of the confession trial and the normal criminal trial.

3.2.8 Is it necessary for reaching a settlement to admit being guilty? If so, will the confession remain valid in case the settlement eventually fails?

As explained earlier in chapter 3.2.1., according to the proposed new legislation it *is* necessary for the defendant to admit being guilty to the crime described in the verdict proposal.

If the settlement eventually fails, the confession will *not* remain valid. Any statements made in the confession trial are inadmissible as evidence. [33]

3.3 Enforcement of settlement

3.3.1 Is the settlement binding for the criminal court or is it possible – and under which conditions – to deviate from the settlement in its final judgement?

The court can only accept the verdict proposal as proposed or leave the matter in status quo. The court cannot deviate from the verdict proposal or amend it in any way.

If the court leaves the matter in status quo, it is up to the prosecutor to decide how to proceed. The prosecutor can charge the defendant again with the original charges, negotiate a new verdict proposal or also decide to drop the charges if, for example, it became clear in the confession trial that the conduct of the defendant does not meet the definition of any crime in the Penal Code. There may also be a

[32] Bill 58/2013, p. 23.
[33] Bill 58/2013, p. 34.

statute of limitations or a *ne bis in idem* issue that causes the dismissal of the case but didn't become evident until the confession trial. [34]

3.3.2 Is a settlement/a court decision based on a settlement always subject to appeal or can the parties agree to waive the right to appeal?

According to the proposed legislation, the court decision based on the settlement (the verdict proposal and the confession trial) is subject to a normal appeal. The parties cannot efficiently agree to waive the right to appeal in criminal cases.

If the court decides to leave the matter in status quo, this decision is non-appealable.

3.4 Confidentiality and privilege

3.4.1 Does the individual / company being damaged by criminal behavior have a right of access to the criminal files in order to gather evidence for potential damage claims?

As described earlier in chapter 3.1.1., the individual or company being damaged by criminal behavior is always a party - the plaintiff - in the Finnish criminal proceedings. The damage claims are normally handled in connection with the criminal case, in the same trial. As plaintiff, the damaged party of the crime has access to all of the pre-investigation files and the evidence submitted in the case.

In case the damage compensation claim is not handled in connection to the criminal case for some reason, the plaintiff still has the same access to all of the files of the case. The reason for handling the damage compensation claim in a separate trial could be for example if the extent of the damage could not be determined by the time of the trial of the criminal case or the exceptionally large number of damaged parties.

The term "criminal files" in the question is a little bit open for interpretation, but if the purpose was to refer to the pre-investigation files and the evidence of the case in question, the plaintiff has full access just like the other parties of the case. Furthermore, if the defendant has had previous criminal cases, in principle the pre-investigation files and evidence of those cases are public records as well. Even if the trial (or the appeal) is still pending, the pre-investigation protocol is a public record once the charges are read in the oral proceedings in a court.

On the other hand, the for example the criminal record of the defendant is confidential.

[34] Bill 58/2013, p. 33.

3.4.2 What impact does the criminal court's decision that the accused is guilty have on potential damage claims? Will a civil court be bound by the criminal court's decisions and vice versa?

In the Finnish jurisdiction there are no separate criminal and civil courts, only different procedures for criminal and civil matters. As the damage claims are normally handled in connection to the criminal case (with criminal procedure rules), the court will hand down one verdict that decides both the criminal and damage claims presented in the case. If the court finds the defendant not guilty, the damage claims are normally rejected. Vice versa, if the court finds the defendant guilty, the court is naturally bound by this outcome with regards to the damage claims and normally the defendant is obligated to pay damage compensation as well. In this case the court still has to decide if the amount of the damage claims is acceptable, if the damage claims have proper cause-and-effect relation to the crime, if the claimed damages are compensable by the law and so on.

As the criminal and connected civil matters are normally handled on the same trial, the verdicts in both matters have a direct connection.

If, however, the damage claim is handled in a separate trial, usually the court in that trial will accept the other court's verdict in the guilt issue, especially if said verdict is final and non-appealable. The verdict given in the criminal case is most likely submitted as evidence in the damage claim trial. In theory the verdict could be disputed, but in this case the burden of proof that the final verdict in the criminal case is wrong lies with the defendant. It would be an extremely difficult task to prove that, particularly since the same defendant was also the defendant in the criminal case and had the normal appeal route and other remedies in that case.

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