



INTERNATIONAL ASSOCIATION  
OF YOUNG LAWYERS

## **AIJA Annual Congress**

### **Commission Litigation**

**Prague, 2014 – ”Settle for less...? Or for more! Tips on timing, confidentiality and strategy in (multijurisdictional) settlement arrangements”**

#### **Litigation Commission**

#### **Prague - Working Session 5**

### **National Report of Germany**

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28 February 2014

# 1. QUESTIONNAIRE FOR CIVIL LITIGATION

## 1.1 General issues

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

An amicable solution of a dispute reached through mutual concessions of the parties which terminates the uncertain outcome of a legal dispute and tries to balance the conflicting interests of the parties.

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

In-court settlements are of a dual nature. On the one hand, a settlement leads to the termination of the pending judicial proceedings and of the legal dispute. On the other hand, it determines the legal position of the parties. In view hereof, a distinction must be made between provisions of procedural law and provisions of substantive law. Even though the German laws of procedure do not explicitly deal with settlements, the concept is acknowledged in numerous provisions, e.g. §§ 98, 278 Paragraph 6, 794 Par. 1 Number 1 of the German Code on Procedural Law ("Zivilprozessordnung", hereafter "ZPO"). § 779 of the German Federal Civil Code ("Bürgerliches Gesetzbuch", hereafter "BGB") is the provision of substantive law dealing with settlements.

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

There are neither ethical rules nor guidelines that affect negotiation strategies in practice.

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

There are several points in time which are suitable for reaching a settlement. A distinction must be made between suitable points in time before and after court action begins.

If proceedings are not yet pending, an out-of-court settlement ("außergerichtlicher Vergleich") is an option, in particular, if the parties wish to reach a mutually agreed solution through the interference of their lawyers, without court interference.

Once proceedings are pending, there are usually two points in time which are suitable for reaching an in-court settlement („Prozessvergleich“). Firstly, a settlement could be reached during the hearing before the court and, secondly, in the period between the hearing before the court and the issuance of the judgment.

Pursuant to the German laws of procedure, an in-court settlement must, as a rule, be entered into during the hearing before the court. An exception to this rule is foreseen in § 278 Par. 6 ZPO, which provides that the parties can also enter into an in-court settlement by submitting a written settlement proposal to the court or by accepting a written settlement proposal of the court in a brief of arguments. An in-court settlement can thus exceptionally be entered into outside the framework of the hearing before the court. Also while proceedings are pending, the parties can still enter into a settlement agreement without the interference of the court which would, however, have a different effect than the in-court settlement (see in more detail below).

- 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?

Courts often facilitate or push settlement discussions. They have the possibility to do so based on the principle of expedition of proceedings (“Beschleunigungsgrundsatz”) and § 278 ZPO. Based on the latter provision, a judge must not only focus on issuing a decision regarding the dispute. He also has a special obligation to encourage amicable solutions for disputes, as this is a means of realising judicial peace („Rechtsfrieden“) which is one of the purposes of court proceedings. Amicable agreements, which usually take the form of settlement agreements, are beneficial in view of other purposes of court proceedings too. Not only can they save costs, they can also prevent future proceedings between the parties. Finally, the focus on amicable agreements is intended to relieve the courts.

## **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?

While an in-court settlement constitutes an enforcement order in the sense of § 794 Par. 1 No. 1 ZPO, an out-of-court settlement only has an impact on the substantive legal position of the parties. The parties to an out-of-court settlement can directly rely upon the rights which they have been granted pursuant to the settlement agreement. However, if they wish to take enforcement actions based on the out-of-court settlement, they must first refer to the courts to get an enforcement order.

Differences further exist with regard to the applicable formalities. Pursuant to § 160 Par. 3 No. 1 ZPO, in-court settlements must mandatorily be included in the minutes of the hearings before the court. By way of exception, in-court settlements can be accepted by virtue of corresponding briefs of arguments, see §

278 Par. 6 ZPO. In principle, there are no formal requirements for the entry into an out-of-court settlement. Exceptions only exist for settlements dealing with legal transactions which are based on their nature subject to formal requirements.

Finally, there are differences with respect to the statute of limitations. Pursuant to § 197 Par. 1 No. 4 BGB, the limitation period for in-court settlements is 30 years. Out-of-court settlements are subject to § 212 Par. 1 No. 1 BGB. Based on this provision, the limitation period for an out-of-court settlement begins running anew whenever the debtor acknowledges the claim in his relationship with the creditor, for example by carrying out partial payments, by paying interests, by granting security interests, or in any other way.

Whereas an in-court settlement terminates court proceedings directly, an out of court settlement needs to stipulate how the pending legal procedure shall be terminated. Usually, the parties enter into an obligation that the claimant withdraws the legal action and the defendant approves the withdrawal. Further, the parties need to enter into an obligation regarding applications how costs shall be borne.

### **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?

One of the main principles of the German laws of procedure is the principle of public. Pursuant to § 169 GVG, the proceedings before the courts including the judgments and decisions must be public. Therefore, the negotiations leading to an in-court settlement are public. There is only a limited number of exceptions to this general principle, for example in family matters.

Nevertheless, the parties have the possibility to include a confidentiality clause in the settlement agreement.

With respect to out-of-court settlements, there is no general rule pursuant to which the settlement agreement or the negotiations leading thereto are confidential. The settlement agreement is therefore only confidential, if the parties explicitly agree upon this.

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

A clause protecting the confidentiality can be included in the settlement agreement. Furthermore, a contractual penalty which becomes due in the case of breaches of the confidentiality clause can be provided for in the settlement agreement. Furthermore, it is possible to bring an action for a prohibitory injunction.

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

If there is a breach of confidentiality which causes damage to the other party, damages can be claimed before the courts. In addition, an action for a prohibitory injunction can be brought and, provided that the parties have agreed upon a contractual penalty in case of breaches of confidentiality, a contractual penalty can be claimed.

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

#### a. between the same parties?

Yes, the parties are allowed to disclose the settlement agreement, unless they agreed confidentiality for other proceedings as well.

#### b. between other parties?

If the parties have agreed that the settlement agreement is confidential, the settlement can, in principle, only be disclosed if all parties agree to such a disclosure. However, the scope of the non-disclosure obligation is limited to the acts protected by the confidentiality clause. A non-disclosure obligation does therefore not exist, if a party has a legal obligation to disclose confidential information in proceedings before the court, administrative procedures or other procedures.