



INTERNATIONAL ASSOCIATION
OF YOUNG LAWYERS

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

Commissions Antitrust, Commercial Fraud and Litigation

Prague, 2014 - working session 5

National Report of Japan / Antitrust Commission

Takahiko Itoh

Bingham Sakai Mimura Aizawa
4F 4-2-13 Toranomon, Minatoku, Tokyo
105-0001, Japan
+81-3-6721-3207

takahiko.itoh@bingham.com

General Reporters:

Maïte Ottés, Van Doorne, Amsterdam, Netherlands
Alexander Saucken, Roxin, Düsseldorf, Germany
Karin Graf, Wenger Plattner, Zürich, Switzerland

28 February 2014



INTERNATIONAL ASSOCIATION
OF YOUNG LAWYERS

1. Answer for Civil Litigation

1.1 General Issues

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

It can be defined as a concession between the parties to resolve and finish the dispute.

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

Yes. Settlement is recognized in the Civil Procedure Law of Japan as one of the events which finish the civil proceedings. The term appears, for example, in the following context: (i) authority of an attorney to settle; (ii) judge’s power to solicit settlement; (iii) effect of the settlement equivalent to final judgment. In other words, the Civil Procedure Law of Japan recognizes settlement as one of the important methods to resolve the dispute.

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

A lawyer must comply with Lawyers Act and ethical rules of Japan Federal Bar Association. Under such laws and rules, a lawyer must inform the client and obtain consent from her/him to settle the case. To persuade the client is sometimes more challenging than to negotiate with the counter party.

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

There are two points: (i) before witness testimonies and (ii) after the witness testimonies. The former is from the perspective of cost and time saving as preparation for witness testimonies is time and cost consuming activities. The latter is also effective, especially if solicited by a judge, because the judge is ready to make decision on his own judgment and both the plaintiff and defendant take the judge’s suggestion very seriously.

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?

The answer is yes. One of the motivations for judges to settle the case may be because they want to settle the case finally. Another reason may be that by settling the cases, judges do not have to draft the judgment.

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?

In court settlement has the same effect as the final decision. In other words, in court settlement can be directly used as a basis to request for compulsory execution. The parties cannot bring the same subject matter to the court after the in court settlement. Out of court settlement does not have these effects.

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?

Civil settlement agreement and the settlement discussions are not automatically treated as confidential, and therefore the parties must agree to confidentiality in their settlement.

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

Injunction is theoretically possible but it is not often used to protect the confidentiality of the settlement or related discussions.

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

As settlement is recognized as one form of agreements, damages claim is available for breach of confidentiality obligation.

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

- a) between the same parties?
- b) between other parties?

The answer all depends on how the confidentiality obligation is drafted. We often see the confidentiality obligation which prohibits the disclosure without justification.

2. Answer for antitrust procedures

2.1 General issues

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

The answer is no.

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

The answer is no.

Until 2005, Anti-monopoly Act of Japan (“AMA”) had (i) a “recommended decision” which was a summary decision rendered by the Japan Fair Trade Commission (“JFTC”) if the JFTC’s recommendation of remedy is accepted by breaching company before going into an administrative trial and (ii) a “decision with consent” which is a decision rendered by the JFTC if a breaching company admitted the facts and application of law found by the JFTC. A cease and desist order and/or administrative fine order was issued as a decision.

However, because it took very long until the decision by the JFTC is rendered, 2005 amendment of AMA changed the system. Under the current AMA, a cease and desist order and/or administrative fine order will be issued first and then an accused company can make a complaint in the administrative trial against the JFTC (an appeal to JFTC decision can be further made to Tokyo High Court). Under the current system, there is no settlement or commitment decision.

In 2013, the AMA was further amended and JFTC trial is abolished. Once an amended AMA is implemented, all the complaint against JFTC will be made to Tokyo District Court (and to Tokyo High Court for appeal).

Because of the absence of the settlement or commitment decision in Japan, the procedure to complain against JFTC’s cease and desist order and/or administrative fine order are lacking flexibility and still take very long, in my view.

[Because Japan does not have settlement or commitment decision system in antitrust proceedings, I will leave the rest of questionnaire in Section 2 unanswered.]

3. Answer for criminal procedures

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 answer is no.

However, a prosecutor has a wide discretion whether or not to bring a criminal case in front of the court. As such, although it is different from plea agreement in the US, settlement with a victim will be recognized as one of the factors in favor of the suspect not to bring a case in front of the court.

3.2 Procedural issue

3.3 Enforcement of settlement

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?

A victim of the criminal procedures can review/copy the criminal files in order to gather evidence for potential civil litigation (e.g. damages claim). This is often used typically in car accident cases.

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

A civil court will not be bound by the criminal court's decisions and vice versa. However, findings in the judgment by the criminal court is usually very detailed (because it is based on evidence gathered by police and prosecutor) and the civil court will generally respect the criminal judgment and evidence in the criminal files unless otherwise refuted.

[Because Japan does not have settlement or commitment decision system in criminal proceedings, I will leave the rest of questionnaire in Section 3 unanswered.]

* * *