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

1.1 General Issues

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

Despite Polish Civil Procedure Code ("**PCPC**") contains a number of provisions dealing with settlements (see point 1.1.2. below), it does not provide a legal definition of the term "settlement". The concept of the settlement should be therefore derived from the provisions of the Polish Civil Code ("**PCC**") briefly regulating the statutory defined contract of "settlement" (only two articles pertain this specific contract – articles 917 and 918 PCC). Pursuant to art. 917 of the PCC:

"By the contract of settlement the parties shall make reciprocal concessions within the scope of the legal relation existing between them for the purpose of setting aside uncertainty as to the claims arising from that relation or ensuring their performance or setting aside a dispute which exists or which might arise."

The understanding of a settlement does not differ within the frames of civil procedure, subject to the additional procedural requirements and limitations provided by the PCPC.

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

As indicated in point 1.1.1., PCC contains (yet short) regulation of the settlement contract. Article 917 PCC defines the essential elements of settlement agreement while article 918 PCC deals with specific rules of evading the legal consequences of concluded settlement when acting under the influence of an error. These two provisions constitute the core of the settlement contract as regulated by PCC.

In terms of civil procedure rules, the PCPC contains a number of provisions providing frames for settlement in course of a lawsuit. There are also two specific procedures for reaching a settlement regulated in PCPC – mediation and conciliation proceedings.

First, parties may conclude a settlement through mediation. This is an ADR instrument, which can be used by parties either before the commencement of court proceedings or (subject to parties consent) during the lawsuit. In both cases the basis for mediation is a contract between the parties or a court ruling directing the parties to mediation. In the latter case parties are not obliged to obey court's ruling – it becomes effective if neither of the parties raises objection within a week from publication/delivery of the ruling.

The mediation is a classified proceeding and parties cannot successfully invoke settlement proposals from mediation during lawsuit.

Once and as far as a settlement is reached in mediation, it is subject to court's validation. If the settlement is enforceable by way of enforcement proceedings the validation is made in the form of declaration of enforceability.

A settlement reached in mediation and validated by the court has the binding effect of a settlement reached before court.

PCPC gives the parties also the possibility to reach a settlement before court in a special procedure, specifically designed for that purpose, called "conciliation". This procedure is available for the parties before starting the lawsuit, i.e. before filing the statement of claims.

The conciliation proceedings are short and low-cost – one motion of the claimant and no further written presentations (the respondent may of course – if wills so – present his arguments), one court hearing without examination of evidences and a court fee of 40 PLN (approximately 10 EUR).

If parties do not reach an agreement, the court indicates that circumstance in the minutes of the hearing. If an agreement is reached, its content is part of the court minutes and is enforced just as an "ordinary" court settlement.

In practice, these proceedings seldom lead to an agreement. They are mostly used to interrupt the periods of limitation of claims. In that aspect filing a motion for conciliation with the court has the same effect as filing a lawsuit.

As far as the main proceedings are concerned, PCPC contains a number of provisions dealing with settlements, the majority of which containing conditions for finding the settlement admissible. The general rule in that respect is that the court shall consider a settlement to be inadmissible if the content thereof is incompliant with the law or social norms, or is intended to circumvent the law (and in employment matters also where it is *against the justified interest of an employee or insured person*). This rule applies both to settlements concluded before court (in conciliation proceedings and lawsuit) and settlements concluded in mediation. In the latter case, the above rules are applied by the court in course of the validation of mediation settlements.

By operation of law a settlement is inadmissible in social security matters and in cases in which a request is made to declare that a standard contractual provision is prohibited (consumer rights).

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

PCC acknowledges the doctrine of *culpa in contrahendo* providing that the party that commenced or conducted negotiations in violation of good practices, in particular with no intention of concluding the contract, shall be obliged to redress the damage that the other party suffered as a result of his reliance on the conclusion of the contract.

Apart from the material consequences of *culpa in contrahendo* regulated in the PCC, which are applicable to all participants of negotiations, professional proxies are also subject to corporate deontology provisions. In terms of professional ethics an attorney is obliged to strive for solutions minimising client's costs and advise amicable termination of a case if such an advice is compliant with client's interests.

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

One of the general rules of PCPC is that in cases where an amicable settlement is admissible, the court should strive to reach an amicable settlement to a case at any stage of the proceedings. In course of the lawsuit a settlement can be reached until the end of the proceedings in second instance court, i.e. until the court issues a final judgment. The practice is that most of all courts of first instance induce the parties (whenever the court finds grounds in a particular case to do so) to consider reaching settlement. It is much more seldom in courts of second instance, but that does not prevent the parties from taking the initiative in that respect.

Having that broad scope of procedural possibilities in mind, it is difficult to point one universal, best moment in history of each case, particularly suitable for concluding a settlement. Obviously, parties' aspirations to reach potential settlement would be matching much more often before the judgment of court of first instance is issued.

The dynamics of a given case would show parties' interests in reaching a settlement before court of second instance. It must be kept in mind that pursuant to PCPC courts of second instance examine the case as to the merits, i.e. any judgement is possible including repealing the judgement of court of first instance and sending back the case to the latter court for re-examination. However, in practice parties reach settlements before courts of second instance very seldom.

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?*

As discussed in point 1.1.4. above, courts tend to persuade parties to reach settlement whenever the circumstances of a case indicate such possibility. However the provisions of PCPC are not precise as to the type of settlement that the court should induce the parties to reach (court settlement or out of court settlement), in legal doctrine a view is presented that court's efforts should result in court settlement. Nevertheless, there are no procedural sanctions or burdens if the consequence of parties' negotiations is reaching an out of court settlement.

Taking this into account it could be stated that the court facilitates the reaching of any kind of amicable solution of examined cases. There are no specific instruments for "facilitation" of parties' negotiations. However, in most cases courts tend to postpone the hearing of a case if parties request the court to do so. It is also possible to file a joint request for stay of proceedings. The latter is not particularly convenient, since the court may decide to resume proceedings not before three months have lapsed from the stay.

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?*

There are significant differences between in court and out of court settlements in terms of enforcement. Both settlements reached before court and during mediation (if validated by court) constitute an enforcement order, i.e. it authorises the creditor to pursue its dues before a court bailiff or otherwise depending on the nature of the claim.

In order to start enforcement proceedings, pursuant to PCPC an enforcement order needs to be provided with a writ of execution. In a typical situation, the writ of execution is granted by court in a formal, in-chamber and relatively short procedure – usually it takes no longer than a week.

Out of court settlements on the other hand do not constitute an enforcement order in the understanding of PCPC – it is simply a contract between the parties. Breach of that contract authorises the suffering party to pursue its claims before court in a lawsuit.

PCPC gives parties a possibility to include in any contract a clause that either of the party may submit to execution, by stipulating the obligation to pay a certain amount of money or provide things of the type and quantity specified in the contract. In order to be effective, such contract should be drafted in the form of a

notary deed. An out of court settlement can also be prepared in that form and contain a clause for submission to execution. A notary deed of that kind also constitutes an enforcement order and can be provided with a writ of execution (in the short, formal, in-chamber proceedings indicated above) without the need to carry a full lawsuit in pursue of the claims from the settlement.

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?

Both settlement negotiations and the settlement agreement as such are not confidential by operation of law. However, pursuant to article 72^1 PCC, if during negotiations a party discloses information with the reservation of confidentiality, the other party shall be obliged neither to disclose it nor to hand it over to other persons nor to use the information for its own purposes, unless parties agree otherwise. Failing to comply with this obligation enables the suffering party to claim redress of the damage or the return of the profits obtained by the infringing party.

The provision of article 72^1 PCC explicitly refers to “information” (eg. commercial, production, know-how) and not settlement proposals as such. However, the amicable proposals made during the negotiations cannot be successfully raised as an argument during a lawsuit (unless of course offers made during negotiations were accepted and bind parties) and as far as do not contain commercial information relating to the negotiating party are less sensitive data for the negotiating parties.

Additionally, by virtue of these corporate rules attorneys are obliged to keep undisclosed any information they learned in course of performing their professional obligations. In particular that obligation refers to any conciliation negotiations. The above rules of confidentiality of course bind only the professional proxies, not the clients.

In respect of settlement proposals made during the mediation the lack of possibility to successfully raise arguments based on negotiation proposals has been explicitly excluded by the provisions of PCPC (see point 1.1.2. above).

The settlement agreement confidentiality in turn is neither subject to statutory nor professional deontology provisions. Habitually, if parties wish to keep the settlement agreement as such confidential, they agree on that by inserting a confidentiality clause to the settlement. It is also good to regulate in the settlement agreement the consequences of unauthorised disclosure. Failing to do so does not prevent a suffering party to claim damages but will have to rely on

general principles, while given the fact that there is no statutory protection of settlement confidentiality it is always better to have the whole issue regulated in the contract.

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

There are no specific, statutory instruments dedicated to the protection of settlements' confidentiality in civil or other proceedings. As indicated in point 1.3.1. above, if parties wish to keep the confidentiality of their settlement and related discussions, it is strongly advisable to cover both the settlement itself and the negotiations leading to it, with a confidentiality clause regulating the consequences of a potential unauthorised disclosure.

1.3.3 What are possible consequences of a breach of confidentiality?

According to professional proxies' ethics regulations, if an attorney uses computers or other electronic equipment of data storage, he is obliged to use a software and other means to protect the data from unauthorised disclosure. Failing to meet this requirement may result in disciplinary liability of the proxy. If that breach caused damage to the client, the latter may pursue its claims on general principles. The same rule applies if a proxy is disclosing negotiation details or any other information received during performance of proxy's professional activities, results in disciplinary liability and may also be subject to damage claims addressed by the suffering party.

Also, if pursuant to article 72^1 PCC (please refer to point 1.3.1. above) a negotiating party has reserved confidentiality of information disclosed during the negotiation process or parties have included a confidentiality clause in the settlement, the suffering party may seek redress of damages on general principles.

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

a) between the same parties?

b) between other parties?

As described in point 1.3.1 above, by operation of the settlement is not subject to confidentiality obligation. Therefore, if neither of the parties reserved confidentiality by way of art. 72^1 PCC and there has been no confidentiality agreement between the parties, it is allowed to disclose the settlement agreement in other proceedings – regardless of the parties involved.