



INTERNATIONAL ASSOCIATION
OF YOUNG LAWYERS

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

Litigation Commission

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Jean-Rodolphe Fiechter
Kellerhals Attorneys at Law
Effingerstrasse 1,
P.O. Box 6916
3001 Berne, Switzerland
+41 58 200 35 36
jean-rodolphe.fiechter@kellerhals.ch

and

Joëlle Berger
VISCHER AG
Aeschenvorstadt 4,
4010 Basel, Switzerland
+41 58 211 33 10
jberger@vischer.com

General Reporter:
Karin Graf
WENGER PLATTNER
Seestrasse 39, Goldbach-Center
P.O. Box
8700 Küsnacht-Zürich

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1.1 General issues

1.1.1 Definition of the term "settlement" in civil procedures

Although the Swiss substantive and procedural laws mention settlements in several places (e.g. in the Code of Obligations: special powers of the agent and of the liquidator), they do not provide a legal definition and do not contain specific rules on settlements.

Jumping into the breach, the Swiss Federal Court defines the term "settlement" (*Vergleich, transaction, transazione*) as a "**contractual resolution of a dispute or of an uncertainty regarding an existing legal relationship reached through mutual concessions**" (ATF 132 III 737). The doctrine uses the same definition.

The settlement can be reached before or after the introduction of a claim. In case the settlement is reached in front of court or submitted to the judge, it is qualified as "in court settlement", whereas it is qualified as "out of court settlement" in the other cases.

1.1.2 Are there statutory provisions dealing with settlements?

Yes, in the Swiss Civil Procedure Code (CPC). On 1st January 2011, the Swiss civil procedure laws were unified with this Code. Before then, the 26 States of Switzerland (cantons) had the competence to issue their own respective laws. The differences between the various cantonal civil procedure codes were substantial.

Now, four provisions of the CPC deal with settlements:

1) Settlements during the preliminary conciliation stage:

Art. 208 Agreement between the parties

¹ If an agreement is reached, the conciliation authority shall place on record the terms of the settlement, the acceptance of the claim or the unconditional withdrawal of the action, and have the record signed by the parties. Each party receives a copy of the record.

² The settlement, acceptance or unconditional withdrawal shall have the effect of a binding decision.

2) Settlements during the main stage of the proceedings

Art. 241 Settlement, acceptance, withdrawal

¹ If notice of a settlement, acceptance of the claim or withdrawal of the action is placed on record in court, the parties must sign the record.

² A settlement, acceptance of the claim or withdrawal of the action has the same effect as a binding decision.

³ The court shall dismiss the proceedings.

3) Provision regarding the costs

Art. 109 Allocation in the event of a settlement

¹ If a case is settled in court, the costs are charged to the parties according to the terms of the settlement.

² The costs are allocated according to Articles 106-108:

- a. if the settlement does not provide for the allocation of costs; or
- b. if, in terms of the settlement, the costs are charged solely to a party that has been granted legal aid.

4) Provision regarding the review of decisions/settlements

Art. 328 Grounds for review

1 A party may request the court that has decided as final instance to review the final decision if:

...

- c. it is claimed that the acceptance, withdrawal or settlement of the claim is invalid.

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

According to the Swiss Lawyers' customs and practice (Art. 9), the lawyers shall encourage amicable settlements, if it is in the interest of their clients, and respect their wish for mediation proceedings.

General ethical rules (good faith), rules of customs and practice applicable to lawyers (such as not contacting the opposing counsel's client directly) and confidentiality rules (see below) apply to negotiations.

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

a. Pre-Litigation

Before litigation is initiated, before a lot of time and money is invested in drafting briefs and motions, there is a chance to settle the dispute. Through their exchange of correspondence, lawyers can assess whether there is a chance to reach an agreement at this early stage. A meeting among lawyers, without their clients, can be very beneficial for such an outcome.

b. Conciliation proceedings

Under the Swiss Civil Procedure Code (CPC), any litigation is generally preceded by a conciliation hearing before a conciliation authority (Art. 197). The purpose of conciliation proceedings is to reconcile the parties in an informal manner with the assistance of a state authority which principally does not have judicial powers (Art. 201).

Unlike court proceedings, conciliation proceedings are informal. It is at the conciliation authority's discretion how to proceed and organise the conciliation hearing. Usually, the hearing takes place in the form of a discussion between the parties and the conciliator. Unlike a judge, a conciliator has some creative leeway as he may include contentious matters that were not subject to the application for conciliation if he deems it fit to promote a settlement and to resolve the dispute.

Depending on the kind of subject and the judicial organisation of the canton, the conciliation authority can be a single (lay or professional) conciliator or delegated judge or a board representing employers and employees or landlords and tenants. In some cantons, the conciliation proceedings are taken more seriously than in others; this has to do with the practice in place before the unification of the procedural laws. The constitution of the conciliation authority can also have a significant impact on the conciliation proceedings and foster settlements. Indeed, statistics show that a conciliation authority formed as a board “representing” both parties tends to achieve higher settlement rates than single-judge authorities in cantons otherwise not used to conciliation proceedings.

In short: The conciliator attempts to settle the parties’ dispute informally. A settlement may also include contentious matters that are not part of the proceedings (Art. 201 CPC).

In case there is no settlement at this stage, the claimant has to file his claim with the court within three months. Depending on the settlement discussions held during the conciliation hearing and the impression left behind with the parties, it occurs from time to time that the parties settle out of court during those three months. This time frame is in fact a good opportunity to finalise a settlement, since the parties have heard a third party’s opinion, they both know their potential risks, not much time or money has been invested so far, there can be a quick solution forthwith.

c. Mediation

Upon request of all parties, mediation can replace the conciliation proceedings (Art. 213 CPC). The parties may also agree on mediation at any time during the court proceedings, which will then be suspended

until conclusion of the mediation. The court can recommend mediation to the parties at any time during the proceedings, but cannot compel the parties to submit to mediation. Mediation is conducted independently from the court and remains confidential. If an agreement is reached during mediation, the parties may jointly apply for court approval. If their agreement is approved by the court, it will, as a result, have the effect of an enforceable judgment (Art. 217 CPC).

c. Instruction hearings

Once a claim has been filed and the defendant has submitted his answer, the court may hold so-called instruction hearings. Such hearings can be held at any time, also at a later stage. Instruction hearings are, among other things, held to discuss the matter in dispute in an informal manner and to attempt to reach an agreement (Art. 226 CPC).

Although a lot of work has already been invested in the case, the parties can still save time and money by reaching an agreement. As opposed to the previously held conciliation hearing, the defendant may have filed a counterclaim and therefore built up a stronger position, which can help finding an agreement somewhere between the respective positions.

d. Post-Litigation

This scenario seems surprising – why would a winning party want to settle after a positive judgment has been rendered for her? This happens, however, in practice, especially where the judgment treats only one aspect of the parties' relationship. The parties can decide, for example, to pursue their relationship in a new way, beneficial to both of them. This shows that in some cases, a win-win situation can be achieved even after a lost law suit!

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 or prevents the court from doing so?

The law gives the Swiss courts the opportunity to facilitate settlements discussions at any time: “The court may at any time attempt to achieve an agreement between the parties.” (Art. 125(3) CPC; see also above: conciliation, mediation and instruction hearings). And courts do actually use this opportunity (or even push it outright), as they can spare a lot of time and effort.

In commercial matters, it is very frequent that the court, on the first day of trial, after having reviewed the claim and the response and after having heard both parties' opening statements, attempts one more time to achieve an agreement between the parties. It even sometimes submits to the parties a settlement proposal, an *a priori* judgment under the caveat that evidence has not yet been

taken. The circumstances here are pretty good for a settlement: The parties now concretely face several days in court, they do not know the outcome of the evidence (especially witness statements), they face high lawyers' and court fees; they have a third-party opinion by a learned court based on both sides' arguments; they both want to return to their business, the litigation could be over immediately with a known outcome; they could both keep face. Now tough negotiations can ideally be conducted under the supervision of the court, they can last a few hours. But they are very likely to end with a signed settlement.

1.2 Enforcement of settlement

1.2.1 Are there any differences between the in court and the out of court settlement?

Yes. The in court settlements – i.e. settlements actually concluded in court or those brought to the court's attention in case they have been negotiated outside while the case is pending – are considered as a binding decisions (Art. 208 and 241 CPC: “A settlement [...] has the same effect as a binding decision.”). In court settlements have two effects: a material one (*res iudicata*) and a formal one (enforceability). As such, they prevent the parties from bringing a new lawsuit on the same object, and they are directly enforceable. The party which has been awarded a sum of money in a settlement (“creditor”) may commence enforcement proceedings.

This solution under Swiss law is quite convenient. The settlement equals a judgment and is immediately enforceable like any other final judgment. Settlements do not even have to be transposed into a judgment; the court only acknowledges that the case is closed and dismisses the proceedings. But is this sufficient in an international context? Will foreign courts deem such an in court settlement sufficient to be enforced just like a judgment? Should the minutes of the court repeat the settlement and be structured like a judgment in order to facilitate international enforcement?

The out of court settlement, on the other hand, is just like any other contract and has no influence on the (possibly pending) proceedings. In order to terminate a pending case, action is required by one or the other party, i.e. acceptance of the claim or withdrawal of the action. Otherwise the case remains pending. However, an out of court settlement can nonetheless be useful in enforcement proceedings, especially if it contains a formal acknowledgement of debt.

1.3 Confidentiality and privilege

1.3.1 Confidentiality

Confidentiality is one of the most important aspects in settlement discussions. In order to reach an agreement, the parties must feel totally free to talk, to express opinions and to submit offers without having to fear that their words will be used against them in a future lawsuit or judgment.

This is why – as an exception to the general rule that hearings are conducted in public – conciliation proceedings are confidential and the statements of the parties may generally not be recorded or used subsequently in court proceedings (Art. 205(1) CPC).

As to mediation, it is conducted independently from the court and remains strictly confidential.

The parties to out of court settlement negotiations usually agree on confidentiality. Their proposals may not be used by the other party in subsequent proceedings.

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

Settlement discussions and proposals in the course of conciliation hearings are confidential by law and, accordingly, may not be used subsequently.

Settlement discussions and correspondence between lawyers are protected by the Swiss Lawyers' customs and practice (Art. 26), if designated accordingly. Such documents may not be submitted to court.

Settlements may contain a confidentiality clause and provide for a respective penalty.

1.3.3 Consequences of breach of confidentiality

In case a party submits such evidence regarding confidential settlement discussions, the court should strike it and not consider it, since legitimate interests of one of the parties are at stake (Art. 156 CPC).

Furthermore, the lawyer in breach of the customs will face disciplinary measures.

Where the parties agreed on a penalty in case of a violation of the confidentiality obligations set out in the settlement agreement, the respective party will be obliged to pay the penalty. The payment of the contractual penalty does usually not release the parties from their confidentiality obligations set out in the settlement agreement.

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

a. Between the same parties:

Yes: Since both parties are the same, there is no problem of confidentiality. Due to the principle of *res iudicata*, the parties to a settlement may not file a new claim over the same object as the one settled. By presenting the settlement agreement, the defendant can ask the judge to dismiss the case immediately.

b. Between other parties

There might be a problem of confidentiality. However, where a settlement agreement releases at the same time third parties, those third parties must be able to disclose the settlement to avoid having to pay undue amounts.

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