Settlement of Civil Disputes in Brazil: Overview

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A Practice Note providing an overview on the key aspects of settling a civil dispute in Brazil, including statutory duties to attempt settlement, the form and formalities of settlement, how to ensure confidentiality of the settlement terms, whether negotiations are without prejudice, third-party rights, remedies for breach, enforcement of the settlement terms, and how to set aside a settlement agreement.

Litigation is expensive and can often take a long time. Courts in many jurisdictions actively encourage settlement, and some jurisdictions require the parties to attempt settlement procedures in certain types of civil litigation. Settlements, which can be reached before or during legal proceedings, can be a cost-effective alternative to engaging in protracted and costly court action.

Settlements are usually considered a form of contract to which general contract law principles apply. However, settlements can also become part of a court order, especially when litigation is ongoing. In the context of a civil dispute between two or more parties, a settlement comes about when they reach a mutually acceptable compromise to resolve their dispute. If the settlement covers the parties' entire dispute, the dispute ends, as do any ongoing legal proceedings related to the dispute. Generally, the parties cannot start a new action relating to that dispute, unless they specifically agree that the dispute can be revived in certain circumstances.

This Note covers Brazil-specific information on all aspects of settling a dispute by negotiation, mediation, and other alternative dispute resolution mechanisms, including:

- The legal or statutory duty and obligations, if any, to attempt settlement.
- The form and formalities of settlement, including the different ways the parties can record the settlement terms.
- Whether the terms of settlement require approval from the courts.
- How to ensure confidentiality of the settlement terms.
- The application of the without-prejudice rule, that is, how parties can ensure that anything said in the settlement negotiations cannot be held against them in any subsequent litigation.
- Whether third parties have any rights under the settlement terms.
- Remedies for breach of settlement terms.
- Enforcement of the settlement terms and how to set aside a settlement.

For information on settlement in a cross-border context, see *Practice note, Settlements in cross-border disputes: overview*.

Statutory Obligations to Attempt Settlement

Recently enacted legislation introduced significant changes in Brazil to encourage parties to settle disputes before and during the course of a lawsuit.

The new Civil Procedure Code (Law No. 13.105/2015) (*Código de Processo Civil*) (CPC), which came into force on 18 March 2016, introduced new measures to encourage parties to settle disputes and avoid litigation.

For instance, Chapter V of the CPC imposes the duty to participate in a conciliatory or mediation hearing before the defendant presents their defence in a lawsuit. All the provisions under this chapter aim to promote and encourage the end of the litigation through dialogue and discussions between disputing parties.

Attendance at an initial conciliation or mediation hearing is mandatory, and any party who is absent without just cause may be held in violation and incur a penalty of up to 2% of the value of the claim amount or the total amount of the dispute under consideration (*Article 334, section 8, CPC*).

In addition to the mandatory initial hearing, parties may:

- Settle at any time during the course of the lawsuit.
- Reach an out-of-court settlement.
- At any time during proceedings, request that the judge schedule a conciliatory hearing.

A further development is the recent creation of Judicial Centres for Conflict Resolution and Citizenship (*Centros Judiciários de Solução de Conflitos e Cidadania*) (CEJUSC). The purpose of these centres is twofold; a party may:

- Before instituting a lawsuit, request that CEJUSC schedule a cost-free conciliation hearing in an attempt to avoid litigation.
- Before the Appellate Court renders its decision on an appeal submitted by the party(ies), request a conciliation hearing to encourage settlement discussions.

There are no adverse consequences for the parties if they do not come to an agreement in these hearings, the only possible sanction being incurring a penalty for not attending the mandatory initial hearing. Parties are under no obligation to attend hearings before CEJUSC, and failure to do so bears no further implications or penalties.

Form of Settlement

The terms of any settlement reached between parties in a lawsuit must be in writing, in accordance with the principle of the written procedure, which states that everything that takes place within the course of a lawsuit must be written down and filed in the case records. For the same reason, if an out-of-court settlement is reached, a judge must be petitioned to confirm its terms, and hold the matter in abeyance until the parties have proved that they have complied with the terms of the agreement. The lawsuit can only be considered disposed of as a result of a settlement agreement once the parties have complied with their stipulated obligations (*Article 487(I)(b), CPC*).

If the settlement occurs during the mandatory initial hearing, or in a hearing before CEJUSC, its terms will be recorded by the judge, mediators, or conciliators, depending on who is presiding over the hearing. If a settlement is reached during the lawsuit, its terms will be entered as part of the case records, after which the judge will hold the matter in abeyance until the parties have proved that they have complied with the terms of the agreement. The lawsuit is considered disposed of once the parties have complied with their agreed/stipulated obligations.

As soon as a judge, CEJUSC's conciliator or mediator, or another public chamber ratifies or approves the settlement, it becomes a legally enforceable judgment (*Article 515, II, CPC*). If one of the parties fail to comply with the terms of such an agreement, the non-breaching party may revert to the court and obtain an order to enforce the breached terms of the settlement agreement.

If the settlement is reached during a mediatory or conciliatory hearing held within a private context, its terms will also be recorded by the mediators or conciliators who preside over the hearing, effectively making the settlement binding on the parties, and it will be considered as a legally binding document (*Article 20, sole paragraph, Law No. 13.140/15*).

Settlements agreed orally or through emails are valid, but are not deemed to be legally enforceable judgment orders (see *Formalities*). Consequently, if one of the parties fail to comply with the terms of such an agreement, the non-breaching party will have to commence usual legal proceedings, prove the terms of the agreement, as well as the obligations the breaching party has breached. If the prevailing party proceeds to register the settlement by submitting it to the court for confirmation, or if the terms of the agreement are recorded in writing, duly signed by the parties, and attested by two other and independent witnesses, the settlement will become legally binding and enforceable, thereby safeguarding the rights of both parties (see *Formalities*).

Formalities

To be valid and legally enforceable, a settlement agreement must conform to the following requirements:

- The parties must have legal capacity.
- The object of the settlement must be lawful, possible, and ascertainable.
- The agreement must be executed in accordance with the legally prescribed format and not be unlawful.

To ensure that it is legally enforceable, a settlement agreement must either be approved by the court or signed by the parties and by two competent witnesses (*Article 784, CPC*).

If the instrument purporting to be an agreement does not comply with these requirements, it can be submitted to court as part of an ordinary lawsuit, in which event the parties concerned must substantiate their respective claims for the court to adjudicate the case.

Because the majority of case records in Brazil are managed through an electronic filing system, there is no problem in presenting a counterpart or separate copies of the agreement to have it enforced. However, the court may order that the original agreement be presented in the event of any doubt concerning the authenticity of any signature on the settlement agreement (*Article 396, CPC*).

Similarly, any number of counterparts is permitted, provided all parties concerned have signed each counterpart, and that an original file can be presented to the court (*Article 11 and paragraphs, Law No. 11.419/06*).

Terms of Settlement Subject to Court Ratification

No court approval is required, and the terms of a settlement agreement can be kept private between the parties.

The settlement agreement only has to be submitted to court for its approval if a lawsuit has been instituted and a dispute is already being adjudicated by the courts.

The fact and terms of settlement agreements involving private parties and a public administration entity, such as the Office of the State Prosecutors, are in the public domain. This is because the Office of the State Prosecutors is responsible for cases involving:

- Public or social interest.
- Interests of people who lack legal capacity.
- Collective litigation for the possession of rural or urban land.

Consequently, all acts involving the Office of the State Prosecutors are in the public domain (*Article 6, LX, Federal Constitution*).

Confidentiality

The terms of a private out-of-court settlement, entered into during mediation or agreed in private chambers, remain confidential between the parties.

However, if the parties wish the terms of a privately settled agreement to be enforceable against third parties, they will need to publicise the terms of the settlement agreement officially. This can be done through one of two routes:

- Registration with the office of a notary public.
- Submission to the court for approval.

Court approval is not a legal requirement for the settlement agreement to be binding between the parties (see *Form of Settlement*).

However, if the settlement is reached during the course of a lawsuit, the fact and terms of the settlement will usually be submitted and incorporated into the case records. As a result, the settlement will generally only be confidential if the procedure is already confidential (*Article 189, CPC*).

Generally, all legal proceedings in Brazil are public (*Article 5, item LX, Federal Constitution of Brazil*). However, Article 189 of the CPC sets out examples of cases that must be processed in legal confidentiality. Therefore, if the parties consider that their case records or the terms of a settlement filed in a civil or commercial dispute must be kept confidential, they must make a request directly to the judge, who will consider the matter and decide on the merits if confidentiality should prevail over the public and social interest.

Confidentiality outside the situations set out in Article 189 of the CPC may be ordered at the discretion of the Superior Court of Justice, described by the judge of the Special Appeal 1082951.

In Brazil, it is common to include a confidentiality clause in settlement agreements. However, if an agreement is disputed and submitted to a court for any reason, no assurance can be given that the settlement in its entirety will not be made public, notwithstanding the confidentiality clause. While the parties can request that the judge preserve confidentiality, the courts are not bound by the provisions of a confidentiality clause, and therefore not compelled to give effect to its terms.

Powers of the Parties to Compromise

In the case of a company, anyone may agree a settlement on the company's behalf, provided this party is authorised by the company's bye-laws to do so. There is no standard for companies' bye-laws, and a power of attorney will be considered valid and

effective if it does not violate Brazilian legislation. While there is no common model, shareholders and officers are generally the individuals with legal powers to execute settlement agreements on behalf of a company.

To compromise their disputes, individuals must meet the standard legal requirements pertaining to legal capacity. They must, among other things:

- Be at least 18 years old, which is the age of legal capacity.
- Have mental capacity.
- Not suffer from drug or alcohol addiction, among others.

(*Chapter I, Title I, Civil Code*.)

For individuals who lack legal capacity, legal representatives can enter into settlement agreements on their behalf (*Articles 1.728 and 1.767, Civil Code*).

Attorneys must have a power of attorney containing specific authorisation and powers to compromise disputes on behalf of their clients to be able to agree to settlements on behalf of clients (*Article 334, paragraph 10, CPC*). This rule applies to every settlement agreement executed by attorneys, and not only in mediation or conciliation hearings.

Timing of Settlement

Parties can ask at any time during proceedings for a conciliatory hearing to be scheduled. If an agreement is reached, they can then enter into an out-of-court agreement and submit it through a motion to court, and then file a request to record that the matter has been settled and therefore disposed of.

On a practical level, the longer it takes to reach a settlement, the more costly the proceeding may become, due to certain measures being necessary during the proceeding (for instance, the filing of appeals that involve payment of court costs and additional legal fees to the legal representatives of the successful party).

There are no provisions limiting the whole amount of legal costs or damages a party can pay in a lawsuit, regardless of when settlement is reached.

Without Prejudice Rule

The without prejudice rule does not apply to settlement negotiations in Brazil. Any statement made by the parties, even when they are negotiating to settle, whether in writing or orally, may be admissible as evidence in court.

If either party is aware of a document that may help to prove their assertions, but is not in their possession, they can request the judge for an order to compel the other party to disclose the document, or the judge may order that an appropriate measure be taken to search for and obtain that document (*Articles 396 and 397, CPC*).

All email and letter correspondence, as well as other forms of communications between the parties, can be submitted to court. However, the parties can prevent settlement-related documents from being admitted in court as evidence by signing a confidentiality or non-disclosure agreement.

The only documents that are fully confidential are client-lawyer communications, under the rules of attorney-client privilege (*Article 5, XIII and XIV, Federal Constitution*).

While the without prejudice rule is not commonly included in settlement agreements in Brazil, a provision in this sense would not be considered illicit or illegal.

Terms of Settlement

There are no limitations on the scope of release clauses in settlements, since their scope will depend on the cause of the underlying dispute.

The parties can use a release clause to govern as many or as few obligations under the settlement agreement as they choose. Each party is responsible for taking the necessary steps to adequately protect their own interests.

Taxes on Settlements

Depending on the nature of the dispute, certain taxes may be payable following the conclusion of a settlement agreement. For example, if parties enter into a settlement regarding the ownership of real estate, considering that in Brazil the property must be registered within a Public Notary Office, they can agree that each party will be responsible to pay the registration taxes. The parties can also decide who will be responsible for paying the taxes resulting from the settlement agreement, and can also incorporate these terms in the agreement.

The terms of the agreement concerning tax matters are not binding on the Federal Revenue, so the party who had the original obligation to pay the tax could still be held liable for tax by the Federal Revenue.

Severability

Severability clauses are not commonly incorporated in settlement agreements in Brazil. However, the incorporation of such a clause would not have an adverse effect on the parties' rights under the settlement agreement, because Brazilian law already states that the unenforceability of an individual clause does not render the balance of the contract or settlement agreement unenforceable (*Article 184, Civil Code*).

Third-Party Rights

Settlement agreements do not typically include a clause on third-party rights pertaining to the settlement, because a clause that excludes the application of third-party rights would be considered unlawful.

Disposal of Legal Proceedings

If the parties reach a settlement when there is a pending lawsuit regarding the dispute, they only need to submit the settlement to the court for approval.

Once the settlement agreement is approved, the judge will hold the lawsuit in abeyance while the terms of the settlement agreement are being complied with by the parties. As soon as the parties can prove that they have complied with all their obligations as stipulated in the settlement agreement, the court will enter into the record that the lawsuit has been disposed of (see *Form of Settlement*).

Breach of Settlement Terms

If the terms of the settlement are breached, the non-breaching party can enforce the terms of the settlement agreement regardless of its nature (a legally enforceable judgment or an extra-judicial agreement). If the terms of the settlement are not automatically enforceable, the non-breaching party can remedy this aspect by filing an ordinary lawsuit (see *Formalities*).

If a settlement is reached in relation to a previous ongoing lawsuit, the parties can stipulate in the settlement agreement, whether, in event of a breach, they prefer to either:

- Return to the original litigation and continue the dispute.
- Enforce the settlement agreement within the same case records, to compel the breaching party to comply with the terms.

Enforcement Proceedings

Non-breaching parties can enforce the terms of settlement agreements concluded during the course of legal proceedings using the same case records, provided that the settlement agreement was approved by the judge at the time when the parties entered into an agreement (*Article 487, III, b and Article 516, CPC*).

While settlement agreements entered into in hearings before CEJUSC are also legally enforceable court judgments, the non-breaching party must submit a claim before a court to enforce them. Likewise, a settlement agreement made in a private context is a legally enforceable but extra-judicial document under the provisions of mediation law, and the non-breaching party will therefore have to submit a claim before a court to enforce the agreement (see *Form of Settlement*).

A settlement agreement can be varied by the signatory parties by executing a new agreement or by amending it.

A settlement can be set aside when it is declared to be void. The requirements for voidance are that:

- It was entered into by an absolutely incapable person.
- Its purpose is unlawful, impossible, or undeterminable.
- The common purpose of the parties is unlawful.
- It does not fulfil the legal formal validity requirements.
- Its purpose is to avoid the application of a superior law.
- The law specifically declares it null or prohibits it without specifying a sanction.

(*Article 166, Civil Code.*)

The settlement agreement can also be set aside in the following situations:

- If is voidable for reasons such as the agent's relative incapacity (people who are under 16 years old or have a transitory or permanent inability to manifest their will, in accordance with Article 4 of the Civil Code) (*Article 171, item I, Civil Code*).
- Due to a defect resulting from an error, wilful misconduct, coercion, state of danger, violation, or fraud against creditors (*Article 171, item II, Civil Code*).

When the settlement agreement was entered into by a party, or both parties, meeting one of the criteria above, making it voidable or annullable, the parties must submit the question to the court, which will review the terms of the settlement agreement and decide whether the settlement must be declared voidable or annullable.

Legal Costs

It is very common to come across clauses in settlement agreements that deal with legal costs, and parties are free to agree which party will be responsible for the payment of legal costs.

In the absence of a legal costs clause in the settlement agreement, each party will be responsible for their own legal costs (*Article 86, CPC*).

If circumstances warrant, legal costs already paid by one of the parties may need to be reimbursed by the other party, depending on the terms of the agreement and the concessions agreed between the parties.

In instances where the court had apportioned responsibility for payment of the legal costs, and the parties then want to agree to apportion costs differently, they must make it clear which party has assumed the obligation to pay legal costs (*Article 86, CPC*).

Settlement Agreements

Standard document, Settlement agreement (civil litigation): Cross-border: clause 17 (third party rights) would not be included in a settlement agreement as it is not enforceable under Brazilian law (see *Third-Party Rights*).

There are no other clauses that would be usual to see in a settlement agreement, nor are there any which should be removed.

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