

Court settlement with reference to the economic and civil law aspect

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Abstract

This paper will try to explain in more detail the institution of judicial settlement in the Republic of Croatia as well as in Bosnia and Herzegovina, together with its basic characteristics which are the same in both legal systems as well as with the specificities that we have in those two systems. The institute of judicial settlement is significant because the parties can settle their dispute by concluding it during the litigation process or before its initiation, with the fact that the settlement concluded in this way has the force of an executive document such as, for example, court ruling. While this institute is used much more in the world, especially in Western countries, it is still relatively little represented in the total number of resolved cases and is used mostly when resolving economic/commercial disputes. This paper is divided into two thematic units, the first of which refers to the Republic of Croatia and the second to Bosnia and Herzegovina with an emphasis on the Federation of Bosnia and Herzegovina. In the first thematic unit, emphasis is given on the general concept of judicial settlement and its fundamental characteristics that are common to both legal systems, together with some of the principles that apply to this institute. In the second thematic unit, topics such as the role of judges during court settlements are emphasized and statistics on the number of court settlements available to the population of Bosnia and Herzegovina are presented. The paper ends with a conclusion in which the subjective opinion of the author is presented regarding the subject of judicial settlement in the Republic of Croatia as well as in Bosnia and Herzegovina.

Keywords: Law, Civil Law, Economy, Court

Introduction

In order to determine the concept of court settlement, it is necessary to first present different understandings of the term court settlement. The concept of court settlement, its legal nature, procedural effects and legal remedies for refutation are defined differently in legal science, legislation and judicial practice.

A court settlement is considered exclusively a substantive civil law contract or is considered a procedural legal action for which the rules of substantive civil law do not apply. Some authors strictly demarcate a court settlement from a civil law settlement, while others understand a court settlement as a civil law business and a procedural action, which is judged according to the rules of substantive and procedural law.

Court settlement is an agreement that all or only some of the parties or possibly a third party, based on court approval, conclude during litigation (litigation court settlement) or some other court procedure (non-litigation court settlement) by signing the court record in which the agreement is entered. With this, its signatories fully

or partially regulate their relations in connection with the subject matter of the dispute or in connection with it, which may have the effects of a final court decision and, if it also establishes an obligation to do something, and enforcement documents.

A court settlement is a contract by which the parties regulate their civil law relations which they can freely dispose of, which was concluded in writing before the competent court and which was allowed by the court in civil or non-litigation proceedings and has the characteristics of a final judgment and especially an enforceable document, if it contracts an obligation to do something.

In court practice, a court settlement is a mixed procedural and civil law contract, so its validity is judged both according to civil procedural law and civil substantive law. Based on the above, the authorization of the party's attorney to conclude a court settlement is assessed according to the rules of procedural law, i.e. provisions of Article 95 of the Civil Procedure Act (hereinafter: ZPP), while the legal consequences of the absence of this authorization are the relevant provisions of substantive law, i.e. provisions of the Law on Obligatory Relations (hereinafter: ZOO).

Court settlement (*res iudicalliter transacta*) by its legal nature is a procedural act and civil law contract of the parties, by which they regulate their dispositive civil law relations, by concluding it in a special written form before the court, which gives it special procedural legal properties, so that it produces certain procedural legal effects. According to certain procedural effects, a court settlement is equated with a final court verdict. It has advantages over a judgment, primarily a judgment based on confession and a judgment based on renunciation, because it is a more effective means of protection against them. A court settlement concluded in civil proceedings leads to the end of the litigation, and concluded in non-litigation proceedings eliminates the need for litigation. A court settlement is a procedural impediment to the conduct of the proceedings, so the lawsuit filed on the subject of the dispute on which the court settlement was concluded should be rejected as inadmissible. The ZPP does not define the concept of a court settlement, procedural legal effects, or legal means for refuting it. Their determination is achieved indirectly, through the interpretation of certain provisions of the ZPP that govern the court settlement.

The legal nature and procedural legal effects it creates depend on the meaning given to the court settlement. Court settlement differs from settlement in the substantive legal sense. The settlement is an institute of substantive civil law and is governed by the provisions of Articles 150 to 159 of the ZOO. According to the provisions of Article 150 of the ZOO, which defines the concept of settlement, with a settlement agreement, persons between whom there is a dispute or uncertainty about a legal relationship, mutual concessions, end the dispute, that is, remove the uncertainty and determine their mutual rights and obligations. According to the provisions of Article 158, paragraph 1 of the ZOO, the settlement is void if it is based on the mistaken belief of both contracting parties that there is a legal relationship that does not actually exist, and if without that mistaken belief there would be no dispute or uncertainty between them. The same applies when the mistaken belief of both contractors refers to the facts according to Article 158, paragraph 2 of the ZOO. Waiver of this nullity has no legal effect and what was given in the name of fulfillment of obligations from such a settlement can be claimed back according to the provisions of Article 158, paragraph 3 of the ZOO. The provision of Article 159 of the ZOO stipulates that the provisions of the settlement form a whole, and if one provision is void, the entire settlement is void, unless it can be seen from it that it consists of independent parts.

In other provisions, the ZOO determines what constitutes mutual concession, the assumptions of the validity of the settlement, annulment, nullity and legal effects of the settlement.

1. Procedural provisions on Court settlement

Court settlement is an institute of procedural law. In our legal system, it is governed by the provisions of Articles 321 to 324 of the ZPP. According to the provisions of Article 321, paragraph 1 of the Civil Code, the parties may, during the entire procedure before the civil court until its final conclusion, conclude a settlement on the subject of the dispute (court settlement), even during the procedure before the second-instance court until the second-instance decision is made in the context of the settlement appeal. The settlement may refer to the entire claim or to one of its parts according to the provisions of Article 321, paragraph 2 of the Civil Code. During the procedure, the court will warn the parties about the possibility of a court settlement and help them to conclude a settlement according to the provisions of Article 321, paragraph 3 of the Civil Code. According to the provisions of Article 321, paragraph 4 of the ZPP, a settlement cannot be concluded before the court with regard to claims that the parties cannot dispose of (Article 3, paragraph 3 of the ZPP). According to the provisions of Article 321, paragraph 5 of the Civil Code, when the court issues a decision not to allow the parties to settle, it will stop the proceedings until that decision becomes final. The parties may conclude a

court settlement before the court that conducted the first-instance proceedings, that is, before the second-instance court if a panel session is held with the participation of the parties in accordance with the provisions of Article 362, paragraph 2 of the ZPP or a hearing in accordance with the provisions of Article 373b, paragraph 2 of the ZPP, when the settlement can also be concluded before that court in terms of the provisions of Article 321, paragraph 6 of the ZPP. According to the provisions of Article 321, paragraph 7 of the Civil Code, if a party wants to conclude a settlement before the first-instance court after the first-instance decision has been made while the appeal proceedings are ongoing before the second-instance court, the first-instance court will without delay request - by telephone, fax or e-mail - the second-instance court to inform it whether the appeal has already been decided and inform that court that the parties intend to conclude a court settlement. The first-instance court will allow the parties to conclude a settlement after the second-instance court informs it that it has not yet been decided on the appeal and that it has stopped the proceedings until the settlement conclusion procedure is completed. According to the provisions of Article 321, paragraph 8 of the ZPP, if the parties conclude a settlement after the first-instance decision has been made, and before the second-instance decision has been made in the context of an appeal, the court before which the settlement was concluded will annul the first-instance decision and determine that the lawsuit has been withdrawn, unless the parties have resolved the issue differently in the concluded settlement. The parties' agreement on the settlement is entered into the minutes (Article 322, paragraph 1 of the ZPP). The settlement is concluded when the parties, after reading the minutes of the settlement, sign the minutes (Article 322, paragraph 2 of the ZPP). At their request, the parties will be issued a certified copy of the minutes in which the settlement was entered (Article 322, paragraph 3 of the ZPP). According to the provisions of Article 323 of the ZPP, during the entire procedure, the court ex officio monitors whether litigation is being conducted on a case on which a court settlement was previously concluded. If he determines that the litigation is being conducted on a case on which a court settlement has already been concluded, he will dismiss the lawsuit. A person who intends to file a lawsuit can try to reach a settlement before the lower court of first instance in whose territory the opposing party resides. Then the court to which the proposal was submitted will summon the opposing party and inform them of the settlement proposal in accordance with the provisions of Article 324 of the Civil Code, and the costs of this procedure shall be covered by the applicant of the proposal. According to the provisions of Article 186.d. paragraph 1 of the ZPP, the court may, during the entire litigation process, propose to the parties to resolve the dispute in a conciliation procedure in court or out of court. If the parties unanimously propose or accept to settle the dispute peacefully before the court, a hearing will be scheduled without delay for the purpose of reconciliation, to which the parties, their representatives and proxies, if they have them, are invited (Article 186.d. paragraph 2. ZPP). According to the provisions of Article 186.d. paragraph 4 of the ZPP, the settlement concluded in the conciliation procedure carried out in court has the effect of a court settlement.

The concluded pre-bankruptcy settlement has the force of an enforcement document for all creditors whose claims are determined by that settlement. The due date of these claims is proven by the minutes of the pre-bankruptcy settlement hearing, i.e. the decision on the approval of the pre-bankruptcy settlement from Article 9 of the Act on Financial Operations and Pre-bankruptcy Settlement (Official Gazette, no. 108/12, 144/12, hereinafter: ZFPPN). A pre-bankruptcy settlement is a court settlement as referred to in Article 83 of the ZFPPN, which for creditors whose claims have been determined has the force of an enforcement document in accordance with the provisions of Article 66, paragraph 12 of the ZFPPN.

2. Ending the Court settlement

According to the provision of Article 321 of the Civil Code, the parties can conclude a court settlement on the subject of the dispute during the entire procedure before the civil court of the first instance. According to the provisions of Article 321, paragraph 7 of the ZPP, a party can conclude a settlement before the first-instance court after the first-instance decision has been made, while the appeal procedure is ongoing before the second-instance court, if the second-instance court has not yet decided on the appeal.

A court settlement can be concluded even before the initiation of litigation, as well as in out-of-court proceedings. The conclusion of a court settlement should be allowed as long as it can replace a court decision, i.e. until the legal termination of the litigation.

A court settlement could be concluded in an out-of-court proceeding, before the filing of a lawsuit before the competent first-instance court in whose territory at least one of the parties has a residence, before the first-instance civil court, in the appeal stage, until the litigation is finally concluded, in the adhesion procedure and before the requested court. Court settlement leads to the end of the litigation, and not the declaration of the

parties that they have concluded a settlement, but the procedural legal effect of ending the litigation occurs when the parties sign the court minutes in which the content of the settlement is entered. At that moment of conclusion, the court settlement has a direct and constitutive effect on ending the litigation. Then no other litigation action by the parties is necessary, not even a statement about the withdrawal of the lawsuit, or consent to the withdrawal. For the validity and admissibility of the court settlement and for it to lead to the end of the litigation, certain assumptions must be met. The court settlement should be concluded before the competent court of first instance, in a special form of court minutes. The litigants who conclude it should have legal interest and capacity, that is, procedural authorization to conclude it. The subject matter and content of the court settlement must be admissible. A court settlement can only be concluded within the framework of those legal relationships that the parties can freely dispose of, and it must be in accordance with mandatory regulations and rules of morality.

Court settlement is not allowed in status disputes, in which the parties cannot dispose of their claims. The court will not respect the dispositions of the parties that are in conflict with mandatory regulations and rules of public morality, and will issue a decision not allowing a court settlement. If a court settlement was concluded in a civil proceeding, it leads to the end of the litigation, and a court settlement concluded in an out-of-court proceeding eliminates the need for litigation. Given that the court settlement leads to the end of the litigation, litigation cannot be conducted again on the legal matter in which the court settlement was concluded. If a lawsuit has been filed in the same legal matter, it should be dismissed as inadmissible.

3. Validity

Court settlement is not a court decision, but a procedural act and a civil contract of the parties, which is concluded in a special form before the court, which determines its legal nature, gives it a special procedural character and special properties. Court decisions are verdicts and decisions. A court decision is also a decision that does not allow a court settlement. Due to its legal nature, a court settlement is, in certain aspects, equated with a final court judgment in procedural law.

The property of the legality of a court settlement is not explicitly determined by the provisions of the ZPP, but it is concluded indirectly, through the interpretation of certain provisions on court settlement. Due to its legal nature, a court settlement by the fact that it has been concluded in a valid manner leads to the final conclusion of the litigation. A court settlement becomes legally binding at the moment of its conclusion, that is, when the parties to the dispute sign it, and in terms of procedural law, it is equated with a legally binding court judgment. A claim determined by a court settlement expires in ten years, the same as a claim determined by a final court judgment according to the provision of Article 333, paragraph 1 of the ZOO.

By legal nature, a court settlement can be condemnatory, constitutive and declaratory. A court settlement is condemnatory when it contracts an obligation to do, suffer or omit something. The fulfillment of obligations from a court settlement can be agreed upon in different ways and within different deadlines, as opposed to the strict Parisian deadlines of the judgment. Constitutive court settlement creates new legal relationships, modifies or terminates existing legal relationships. A declaratory court settlement establishes the existence or non-existence of a right or legal relationship, as well as the truth or falsity of a document.

The judgment becomes final when it can no longer be disputed by appeal, that is, when the appeal is legally rejected or rejected, while the court settlement is final when, after the parties have signed the court minutes in which the contents of the settlement have been entered, the judge reads the minutes to the parties and certifies them. A legal matter on which a court settlement has been concluded cannot be litigated again, just as in the case of a final court verdict. Thus, the *rei iudicatae* objection is equated with the *rei iudicatae* objection. The *ne bis in idem* rule applies to court settlements, as well as to final judgments. This understanding of court settlement is represented in our legal system and it derives from the provisions of civil procedural law. Proceeding from this, the court during the entire procedure, in accordance with the provisions of Article 323 of the ZPP, *ex officio* monitors whether litigation is being conducted on a case in which a court settlement was previously concluded. If the court determines that the litigation is being conducted on a case on which a court settlement has already been concluded, the lawsuit will be dismissed. A court settlement is a procedural impediment to the conduct of identical litigation between the same parties, and the judge is authorized to dismiss the lawsuit, at the stage of the preliminary examination of the lawsuit, as well as at the preliminary hearing in accordance with the provisions of Article 288, paragraph 2 of the Civil Code, until the end of the proceedings. The legal nature of the finality of a court settlement, according to which it is equated with a final court verdict, is also reflected in the provisions on absolutely essential violations of the provisions of the civil procedure. There is always a significant violation of the provisions of the civil procedure if a

decision has been made on a claim on which a court settlement has been concluded, according to the provision of Article 354, paragraph 2, point 9 of the Civil Code. The second-instance court is then obliged ex officio to cancel the verdict and dismiss the lawsuit, referring to the provisions of Article 369, paragraph 2 in connection with Article 366, paragraph 1 of the Civil Code. The same will be done by the Supreme Court of the Republic of Croatia when it decides on the declared audit, in accordance with the provisions of Article 385, Paragraph 1, Point 1 of the ZPP.

Due to the fact that a court settlement is given the same meaning as a final judgment and therefore it is not allowed to conduct a new lawsuit on the legal matter on which the court settlement was concluded. In that case, the party has no legal interest in passing a judgment, so the lawsuit, in the same legal dispute in which the court settlement was concluded, should be dismissed. If the settlement would not have the meaning of a final judgment, that is, the meaning of a decided matter, there would be a legal interest in passing a judgment after a court settlement has been concluded, because the judgment in that case would provide more complete protection. However, while the litigation is ongoing, the parties can, on the subject of the dispute, conclude a settlement outside the court. An out-of-court settlement does not have a direct procedural legal effect on the litigation, nor does the parties lose their legal interest in litigation and legal protection because of it. An out-of-court settlement, that is, an objection to the *rei transactae* in a lawsuit, does not lead to the rejection of the claim, but to the acceptance or rejection of the claim.

4. Enforceability

A court verdict, as well as a court settlement, in order to have the force of an enforceable document, must first have the property of finality. Validity is a prerequisite for the enforceability of judgments and court settlements. No time limit is required for the conclusion and acquisition of this status, but only the signing of the court minutes, i.e. its certification, leads to the final conclusion of the proceedings. In order for the claim determined by the court settlement to be realized, it must have the character of an enforceable document. Enforceability is the property of the enforcement document that the claim specified in it can be enforced through the court. A court settlement has the legal force of an enforceable document, and this property is expressly determined by the provisions of Article 23, paragraph 1, point 1 of the Enforcement Act (hereinafter: OZ), according to which, among other things, enforceable documents are an enforceable court decision and an enforceable court settlement. According to the provisions of Article 24 paragraph 1. of OZ, a court settlement is considered a settlement concluded in the proceedings before the court and before the chosen court. The court decision is enforceable if it has become final and if the deadline for voluntary fulfillment of the claim specified in it has passed. A judicial or administrative settlement is enforceable if the claim to be fulfilled according to it is due. The due date of the claim is proven by the record of the settlement or by a public document or by a legally certified document according to the provisions of Article 27, paragraphs 1 and 2 of the Civil Code. A settlement concluded before the court, regardless of whether it was concluded in a civil proceeding, before the litigation began or in an out-of-court proceeding, according to the provisions of the enforcement procedure, constitutes an enforcement document. All final judgments and court settlements do not have the force of an enforceable document. Only those court settlements that are condemnatory in nature have the property of an enforcement document, i.e. those to whom an obligation is contracted to give, do, suffer or omit. Enforcement documents are not, nor can they become, court settlements, nor court judgments, declaratory and constitutive in nature. A court settlement is equated with a final judgment in this capacity as an enforceable document as well. In relation to a judgment, and especially a judgment based on recognition and a judgment based on waiver, court settlement has certain advantages. Legal relations between the parties can be regulated more quickly with a court settlement, and deadlines for the performance of actions can be determined as it suits the contracting parties, regardless of the legal deadlines for the judgment. This is why a court settlement is a more flexible and effective procedural tool than a verdict.

Conclusion

As already mentioned in the paper, court settlement is an institution that greatly facilitates the resolution of certain types of disputes, in which the parties can freely and unhindered dispose of their rights. This institute greatly contributes to reducing the number of pending cases in the courts and speeds up the process of resolving disputes between the parties. By signing the court record, the court settlement becomes legally binding and has the force of an enforceable document. A later possible cancellation of the court settlement

cannot be requested by a motion to repeat the procedure, but only by a special lawsuit requesting its cancellation and which does not enter into the subject of the dispute.

While in Western countries such as the United States of America, most civil disputes are resolved in this way, in the Republic of Croatia and Bosnia and Herzegovina the situation is slightly different. As we can see in the statistics, especially the annual ones of the Federal Statistical Office, court settlement is still used very rarely and mostly in economic disputes, with the fact that we have a slight increase in the number of court settlements in the period 2014-2021.

Furthermore, we can also notice the problem that, considering only the Federation of Bosnia and Herzegovina, a large number of courts do not have annual data on the number of court settlements and do not submit them to the competent institutions, where we come across only a few cantons where these data are transparent. Transparency in the work of the courts is still a big obstacle to increasing the number of court settlements in these areas. Active workshops to inform the public about the procedure itself and the benefits that settlement brings would greatly contribute to increasing its number. These workshops should be organized by the courts for only a few days a year with the aim of informing the general public.

Just by increasing the population's awareness of all the advantages of this institute, it would contribute to increasing the quality of the judicial system and the satisfaction of both the litigants and society as a whole. In which case, as a small country, Bosnia and Herzegovina would strive for modern values and be a model for other countries that are facing similar difficulties.

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