

SETTLEMENT (CIVIL LITIGATION) Q&A: RUSSIA

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Russian Federation - specific information on all aspects of settling a dispute by negotiation, mediation and other alternative dispute resolution mechanisms, including the statutory obligations to attempt settlement, form and formalities of settlement, how to ensure confidentiality of the settlement terms, the without prejudice status of negotiations, the law on third party rights, enforcement of the settlement terms and how to set aside a settlement.

This Q&A provides country-specific commentary on Practice note, Settlement (civil litigation): Cross-border and forms part of Cross-border dispute resolution.

RESOURCE INFORMATION

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Russian Federation

STATUTORY OBLIGATIONS

1. Do courts in your jurisdiction encourage settlement between parties? If so, by what means? Are there any implications for the parties that refuse to participate in settlement negotiations?

When hearing a case, the courts are obliged to take measures to encourage settlement between parties and assist them in resolving a dispute. This obligation applies at any stage of the proceedings, including the pre-hearing stage. The courts may adopt the following measures to encourage settlement between the parties:

- Explain to the parties that they have the right to:
 - conclude a settlement agreement; and
 - seek assistance from an intermediary, including a mediator.
- Explain to the parties the terms and conditions of, and procedure for, exercise of their right to seek settlement, as well as the substance and advantages of settlement procedures, and their legal implications.

Parties are not obliged to take measures to settle a dispute voluntarily before the commencement of court proceedings, however, and may refuse to participate in any negotiations with the opposing party without any adverse consequences.

The court may, however, impose sanctions on a party that applied for postponement of the court hearing in connection with the settlement procedure but then failed to participate, and so acted in bad faith. In these circumstances, the court may award all legal costs in the case to the other party if it finds that that the party in default attempted to delay the court proceedings

or otherwise committed an abuse of procedural rights (*Article 111(2), Commercial Procedural Code*).

FORM OF SETTLEMENT

2. What are the different ways in which parties to a dispute can record a settlement between them (for example, a settlement agreement, deed or court order)? Are settlements agreed verbally or through emails or letters exchanged between the parties required to be recorded in separate agreement or court order to be considered valid?

Commercial disputes

In disputes under the Commercial Procedural Code of the Russian Federation, which governs the procedure for resolving commercial disputes, the parties must submit to the court a settlement agreement signed by all parties (as a single document) for the court's approval. The settlement agreement must contain all of the terms and conditions agreed by the parties, the value of the settlement and time limit for performance of their obligations to each other (*Article 140 (1), Commercial Procedural Code*).

The parties should each sign and retain a counterpart of the settlement agreement. They should reserve one additional counterpart signed by all of the parties which can be provided to and retained by the court for filing with its case files.

Civil disputes

In disputes under the Civil Procedural Code of the Russian Federation, which governs the resolution of general civil disputes, if a settlement agreement has not been provided to the court before the hearing, the



terms and conditions of the settlement agreement may be recorded in the minutes of the court hearing in accordance with the oral submissions provided by the parties. The hearing minutes shall be signed by the parties to the settlement agreement (*Article 173(1), Civil Procedural Code*).

Out-of-court settlement agreements

When the settlement does not involve court proceedings, the parties can execute an out-of-court settlement agreement. Such agreement may provide for:

- A debt restructuring, which involves a reduction of debt or interest and/or an extension of payment terms.
- Substitution of a new obligation for an old one (novation).
- A debt release.

FORMALITIES

3. What formal requirements exist for executing a valid settlement? Is it possible to use counterparts to complete the process of executing a settlement agreement?

Requirements for the contents of a settlement agreement

By virtue of the principle of freedom of contract, parties may agree a settlement agreement on any terms and conditions which are not contrary to civil law or other regulations, or breach the rights and lawful interests of other persons (*Article 421, Civil Procedural Code*). In particular, a settlement agreement may contain terms and conditions relating to:

- The deferral or extension of performance of parties' obligations.
- Assignment of receivables, assets and money/income.
- Full or partial waiver or acknowledgement of debt.
- Payment of parties' legal costs.

In practice, it is common for the parties to a settlement agreement to indicate which payments made under the settlement agreement account for which aspects of the settlement (for example, repayment of a loan, payment for goods supplied or indemnification for losses).

Failure to comply with the following requirements may result in the court's refusal to approve a settlement agreement:

- A settlement agreement must comply with the law and not breach the rights of third parties.
- The terms and conditions of a settlement agreement must be precise, clear and well-defined.

- A settlement agreement may contain only provisions that are connected with the proceedings before the court.

Use of counterparts

The use of counterparts is not acceptable in Russia to complete the process of executing a settlement agreement. Settlement agreements must be signed by all parties as a single document.

TERMS OF SETTLEMENT SUBJECT TO COURT RATIFICATION

4. Do the terms of settlement require court approval? Does the settlement agreement need to be filed with the court? If so, are (i) the fact of settlement and (ii) the settlement terms, a matter of public record?

For a settlement agreement to be legally binding it must be approved by a court. When it approves a settlement agreement, the court will hand down an order setting out all of the settlement agreement's terms and conditions.

A settlement agreement which is signed by the parties but not approved by the court is of no effect in court proceedings and any of the parties may withdraw from the agreement (*Ruling of the Supreme Court of the Russian Federation No. 307-ЭС16-5129 (31 May 2016), case number A56-33553/2013*).

If approval of the settlement agreement is refused by the court, proceedings will continue unless the parties appeal the refusal. If a party does appeal against the court's refusal to approve the settlement agreement, the court of the first instance will adjourn hearings or stay the proceedings until the appeal court has its say. If the appeal is successful, the appeal court will remand the issue to the court of first instance.

Procedural law does not permit the court to approve a settlement agreement in part or to amend or exclude from it any terms and conditions agreed by the parties. However, the court may advise that the parties exclude from the settlement agreement certain terms and conditions which would be unlawful or breach the rights and lawful interests of other persons.

All court rulings, including a court's approval of settlement agreements, are generally made publicly available notwithstanding any confidentiality clauses. This includes the terms and conditions of settlement agreements.

Out-of-court private settlement agreements do not require court approval.

CONFIDENTIALITY

5. Are settlements in your jurisdiction automatically confidential? If not, what steps can parties take to seek to keep the settlement confidential?

It is rare for settlements to be confidential, as a settlement must be approved by the court to be binding (see *Question 4*).

The only exception is where a case is heard in private, in which case the ruling, including the settlement agreement and its terms and conditions may be withheld from the public domain. A party will need to apply to a judge if it wants a hearing to be in private and will need to prove that confidential information might be disclosed during the hearings.

POWERS OF THE PARTIES TO COMPROMISE

6. Are there any restrictions on parties' power to compromise their disputes? Are there rules on who may sign a settlement, especially on behalf of a company?

A settlement agreement may be concluded in any dispute, except in certain types of cases or unless otherwise provided by law. In particular, a settlement agreement may not be concluded in non-contentious civil proceedings, or in some administrative and other public law cases (relating to the imposition of an administrative liability, for example).

A party to a dispute who has legal capacity may conclude a settlement agreement and be bound by its terms. Citizens of minor age and citizens who have no or limited legal capacity may only act in court proceedings and conclude settlement agreements through their lawful representatives (parents, adoptive parents, conservators or guardians).

A sole executive body of an entity may execute a settlement agreement on its behalf, in which case the rules for approval of major transactions and interested party transactions also apply (*Ruling of the Plenum of the Supreme Commercial Court of the Russian Federation No. 28 (16 May 2014)*).

If a party to the dispute acts in court through a representative, their representative may execute a settlement agreement only if the party's authority is specifically provided through a power of attorney.

It is worth noting that the right of individuals and companies to conclude contracts, including settlement agreements, may be restricted by bankruptcy laws.

TIMING OF SETTLEMENT

7. Can settlement discussions be conducted at any time during litigation proceedings? Are there any advantages, in terms of costs or otherwise, to entering into settlement negotiations sooner rather than later during litigation proceedings?

Parties may conclude a settlement agreement at any stage of the litigation proceedings, including once a judgment has been handed down in the dispute. In the latter case, the court will issue a ruling to approve the settlement agreement and to confirm that the court judgment in the dispute is non enforceable.

In the event of the conclusion of a settlement agreement in relation to a dispute heard by a commercial court, half of the court administration fees paid by the claimant will be returned to them, unless the settlement agreement is concluded during enforcement of a judgment.

WITHOUT PREJUDICE RULE

8. Does the 'without prejudice' rule apply to settlement negotiations in your jurisdiction? Are there any exceptions to the applicability of the rule? Can it be waived with the consent of the parties?

Russian law contains no provisions preventing the use of communications and documents related to the conclusion of a settlement agreement as evidence in judicial proceedings.

It should be noted that there are examples in Russian court practice when the court has adversely interpreted a party's readiness to enter into a settlement agreement in the dispute.

For example, in a case concerning the recovery of a loan, in which the fact that the loan agreement had been concluded was disputed, the Supreme Court of the Russian Federation held that the defendant's intention to enter into a settlement agreement with the claimant was a material consideration and should have been evaluated by the lower courts (*Ruling of the Supreme Court of the Russian Federation No. 12-K175-3 (1 December 2015)*).

In another case, the parties' correspondence regarding the conclusion of the settlement agreement was interpreted as evidence of the defendant's debt (*Ruling of the Federal Commercial Court for the Moscow District number 05-6134/2014 (16 July 2014), case number A40-101343/13-41-943*).

A non-disclosure agreement would not be effective to prevent disclosure of pre-settlement correspondence, as only illegally obtained evidence is excluded from court.

Parties should therefore be cautious about the content of correspondence in negotiations over settlement agreements. It is recommended that any correspondence regarding settlements contain clear reservations that participation in negotiations do not constitute acknowledgement of debt or waiver of a claim, and that no other adverse consequences may be inferred against any of the parties.

TERMS OF SETTLEMENT

9. Are there any limitations on the scope of release clauses that parties may agree with respect to existing and future claims? Please cite any relevant statutory provisions and case law.

A settlement agreement may contain only provisions connected with the proceedings (see *Question 3*). As a result, the courts will refuse to approve a settlement agreement that includes a release clause with too broad a scope. A settlement agreement with a release clause that waives any future claims by a defendant against the claimant, for example, whether connected with the subject of the claim or not, will be refused by the court (see *Ruling of the Commercial Court for the Moscow District No. 05-16432/2015 (8 December 2015)*, case number A40-19251/15).

Once the court approves the parties' settlement agreement, however, the parties lose the right to make new claims, whether arising from the main obligation or ancillary obligations, by way of estoppel (this may include any unknown/future claims if arising from the same legal relation as the settled claim). The courts have held, for example, that after a settlement agreement was executed in a case on recovery of unjust enrichment, the claimant could not issue a new claim for recovery of the statutory interest accrued for the period during which the defendant retained the other party's funds (*Ruling of the Presidium of the Supreme Commercial Court of the Russian Federation No. 13903/10 (22 March 2011)*, case No. A60-62482/2009-C7).

TAXES ON SETTLEMENTS

10. Are taxes (such as income tax, capital gains tax or corporation tax) payable in relation to settlements involving payment of money?

Payments made under a settlement agreement are accorded the same tax treatment that would apply to payments relating to obligations underlying the settlement agreement.

SEVERABILITY

11. Are severability clauses commonly incorporated within settlement agreements to avoid the entire agreement being held void or unenforceable due to the illegality, invalidity or unenforceability of a part of the agreement?

The legality, validity and enforceability of a settlement agreement are assessed by the court during its approval process. Therefore, severability clauses are usually not incorporated within settlement agreements.

THIRD PARTY RIGHTS

12. Can third parties enforce their rights under the terms of the settlement? If so, can parties exclude the application of third party rights in the agreement?

The issue of third party rights is not relevant to Russian contract law. An agreement may only be considered to be executed in favour of a third party if the parties have specified that the debtor must discharge an obligation to a third party and not to a creditor, whether the third party is mentioned in the agreement or not, and that such third party has the right to demand performance of the obligation in its favour (*Article 430, Russian Civil Code*).

A settlement agreement which is not performed voluntarily is subject to enforcement under a writ of execution issued by a court (*Article 142(2), Commercial Procedural Code*). A party to the settlement agreement is required to file an application for a writ of execution with the court in the same way as it would for enforcement of a judgment. Subject to the writ of execution being granted by the court at the instance of the parties to a settlement agreement, third parties will not be able to enforce a settlement agreement to which they are not a party, irrespective of the interest they have in performance of the settlement agreement.

STAY OR DISMISSAL OF LEGAL PROCEEDINGS

13. What are the formalities to dispose of court or litigation proceedings once the dispute has been settled?

Approval of a settlement agreement results in termination of the proceedings.

If the parties have executed a settlement agreement relating to a part of the claim, the court will continue hearing the case on its merits only to the extent not covered by the agreement between the parties (*Ruling of the Presidium of the Supreme Commercial Court of the Russian Federation (29 February 2000), case number 2192*).

BREACH OF SETTLEMENT TERMS

14. What are the remedies available for breach of the settlement terms? Is it possible to revive the original claim, or is it necessary to bring a fresh claim for breach of the settlement agreement?

A settlement agreement which is not discharged voluntarily is subject to enforcement under a writ of execution (see *Question 12*).

A writ of execution is issued by the same court that approved the settlement agreement without a hearing and without the court verifying if the settlement agreement has actually been discharged. This process will not incur a further fee.

It is not, therefore, necessary to revive the original claim or file a new claim for enforcement of the settlement agreement in the event that a settlement agreement is breached.

ENFORCEMENT PROCEEDINGS

15. What are the procedures to enforce a settlement contained in a:

- Settlement deed/agreement?
- Court order?

Any settlement in a court case is contained in a court order (see *Question 2*). A court order can be enforced by way of a writ of execution, for which a party needs to apply to the court (see *Question 14*).

An out-of-court settlement agreement is regarded as a contract and enforced as such.

SETTING ASIDE A SETTLEMENT

16. On what grounds can a settlement be varied or set aside? Please outline the procedure to be followed.

Amendments to a settlement agreement

Parties wishing to amend a settlement agreement previously approved by the court may file an amended settlement agreement with the court for its approval. In such circumstances, the court must state on the amended settlement agreement that the initial, superseded settlement agreement has no effect (*Clause 23 of Ruling of the Plenum of the Supreme Commercial Court of the Russian Federation No. 50 (18 July 2014): "On Settlement between Parties to Commercial Proceedings"*).

Challenging a settlement agreement

As a settlement agreement becomes effective only if approved by the court (see *Question 4*), the only way to set aside the agreement is to challenge the court order by which it was approved (*Clause 23 of Ruling of the Plenum of the Supreme Commercial Court of the Russian Federation number 50 (18 July 2014): "On Settlement between Parties to Commercial Proceedings"*).

A court order that approves a settlement agreement may be set aside on the following grounds:

- The parties' representatives have no powers to execute a settlement agreement.
- The executed settlement agreement breaches a third party's rights (in particular, when a settlement agreement provides for the transfer of property owned by third parties).
- The settlement agreement was executed in breach of the rules for approval of major transactions and interested party transactions (see *Question 6*).
- There are new circumstances relevant to the case which have arisen or have become known to the parties since the court's approval of the settlement agreement.

LEGAL COSTS

17. Would you expect to see a clause dealing with legal costs in the settlement agreement? Are parties free to agree on arrangements regarding payment of legal costs? What is the position if the parties do not include a separate clause dealing with legal costs?

Procedural law expressly provides for the parties' right to agree in a settlement agreement the allocation of legal costs incurred by each party to the case. If

the parties do not agree on costs, they shall bear their own legal costs incurred before the execution of the settlement agreement, and such costs shall not be allocated (*Clause 27 of Ruling of the Plenum of the Supreme Court of the Russian Federation No. 1 (21 January 2016): "On Certain Issues of Application of Legislation Relating to Indemnification of Costs Connected with Hearing of a Case"*).

SETTLEMENT AGREEMENTS

18. Are there any other clauses that would be usual to see in a settlement agreement and/or that are standard practice in your jurisdiction which do not appear in the *Standard document, Settlement agreement and release: Cross-border?*

As a rule, a settlement agreement executed under Russian law contains a provision that it will come into force only after it has been approved by the court.

Clauses relating to third party rights, severability, governing law and jurisdiction, confidentiality and indemnification of losses are not typical or necessarily relevant in Russian practice.

With regards to governing law and jurisdiction clauses, these are not relevant since once approved by the court, the settlement agreement is enforced as a court order subject to Russian law.

An out-of-court settlement would typically include governing law and jurisdiction clauses, which generally correspond to the same clauses in a main agreement (out of which a dispute has arisen).

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