COURT SETTLEMENT

IN THE LEGAL SYSTEM OF BOSNIA AND HERZEGOVINA

COURT SETTLEMENT IN THE LEGAL SYSTEM OF BOSNIA AND HERZEGOVINA

ISBN 978-9926-475-16-1

Funded by the European Union

Visoko sudsko i tužilačko vijeće Bosne i Hercegovine
Visoko sudbeno i tužiteljsko vijeće Bosne i Hercegovine
Високи судски и тужилачки савјет Босне и Херцеговине
High Judicial and Prosecutorial Council of Bosnia and Herzegovina

Visoko sudsko i tužilačko vijeće Bosne i Hercegovine
Visoko sudbeno i tužiteljsko vijeće Bosne i Hercegovine
Високи судски и тужилачки савјет Босне и Херцеговине
High Judicial and Prosecutorial Council of Bosnia and Herzegovina

This publication has been produced with the financial support of the European Union. The content of the publication is the sole responsibility of the High Judicial and Prosecutorial Council of BiH and does not necessarily reflect the views of the European Union.

Title: Court settlement in the legal system of Bosnia and Herzegovina, Compilation of Papers
Publisher: High Judicial and Prosecutorial Council of BiH
On behalf of the publisher: Halil Lagumdžija

Authors: Smajo Šabić, LLD (PhD in Law)
Adnan Baručija, LLM (MSc in Law)
Mirjana Kevo, LLB (BA in Law)
Minja Belović, LLB (BA in Law)
Anisa Ruhotina, LLM (MA in Law)
Nasir Muftić, LLM (MA in Law)

Reviewers: Prof. dr. Senad Mulabdić
Prof. dr. Ranka Račić

Proofreading: Mirela Rožajac-Zulčić

First edition: 200 copies

Print: Grafičar d.o.o. Bihać

Smajo Šabić, Adnan Baručija, Mirjana Kevo,
Minja Belović, Anisa Ruhotina, Nasir Muftić

COURT SETTLEMENT

IN THE LEGAL SYSTEM OF BOSNIA AND HERZEGOVINA

Sarajevo, 2022

CONTENTS

FOREWORD

The subject-matter in dispute is a petition within whose boundaries the court rules, by upholding or rejecting it, in whole or in part. A lawsuit is based on the principle of two parties with opposing interests. A lawsuit between parties ends with passing of a resolution, to the success for the plaintiff is always a defeat for the defendant and *vice versa.* However, not every lawsuit must end with a court resolution. Within the framework of material standards, parties may end the lawsuit by reaching a court settlement until the final conclusion of the proceedings.

The technical role of the court in reaching a court settlement is manifested in its assessment whether the parties can dispose of the claims involved and, if this requirement is met, then it will, without prejudice, draw the attention of the parties to this option and assist them in reaching a court settlement in a manner that corresponds to their free will and to amicable solution of the dispute in accordance with their wishes. The benefits of such an amicable manner of dispute resolution are considerable, as the parties immediately get a final decision which is also an enforceable title. When parties reach an amicable resolution of a dispute, as a rule the defendant will willingly execute his/her obligations towards the plaintiff, which definitively ends the dispute. With a court settlement, there are no winners nor loses in the lawsuit, so the parties may mend their disrupted relations and maintain them in the future, whereby transferring their considerable life experience to the younger generation.

This professional publication may serve as everyday reading for citizens, judges and attorneys as it explains how a dispute can be resolved with contribution from all sides even without a decision of a court, when one party loses and the other wins, which can only impair relations between parties and the future generations.

For all these reasons, I am pleased to put forward this professional publication for release into circulation and made available to citizens, judges, and parties› attorneys.

Senad Mulabdić, LLD (PhD in Law), Professor
Judge of the Supreme Court
of the Federation of Bosnia and Herzegovina

Smajo Šabić

1. LEGAL STATUS OF THE PARTIES AT THE POINT OF CONCLUSION OF A COURT SETTLEMENT

Abstract

This article contains a scholarly examination of a modality of resolving a civil dispute through an agreement of the parties. Such an agreement constitutes an expression of the parties› free will achieved by mutual concessions in order to resolve a civil dispute. The agreement achieved between parties has different legal effect, which depends on whether the agreement was achieved in the course of civil proceedings or in out-of-court proceedings. In this regard, the legal status of the actors in a civil dispute when an out of court settlement is concluded was studied separately relatively to the legal status of the parties when a court settlement is concluded in the course of civil proceedings. In addition, this research particularly examined benefits and limitations that affect the parties legal status when a court settlement is concluded relative to the legal status of the parties when the civil proceedings are concluded with a decision on merits. Special attention was paid to examination of potential causes that consequently restrict or prevent the parties from availing themselves of the institution of court settlement as a possible alternative modality for resolving legal disputes.

Key words: Lawsuit, settlement, court settlement, civil dispute, agreement of the parties, civil proceedings, parties, decision on merits

1.1. Introduction

Citizens, as holders of civil rights, in everyday life enter in various civil law relationships to gain a certain benefit or exercise a certain right. In these legal relationships, certain disputed issues very often arise with regard to the scope of rights and obligations between such persons, which is why a person initiates civil proceedings before a competent court to obtain legal protection of rights that are endangered or infringed upon. After the petition is filed, the court, according to the rules of civil procedure, conducts the proceedings to

establish relevant facts about the disputed relationship in order to pass a decision on merits, thereby the court classifies the disputed facts within material law and by the adopted judgment creates a material-law relationship based on positive substantive legislation. Even though the civil proceedings are initiated at the initiative of the plaintiff exclusively because there was no willingness nor desire of one or both parties to the civil dispute to resolve the disputed civil law relationship peacefully, through compromise and mutual concessions, nevertheless even in the course of civil proceedings it often occurs that the parties express their willingness and desire for a peaceful resolution of the dispute, either by reaching an agreement out of court or by concluding a court settlement during the civil proceedings.[1]

1.2. Concept of settlement

A settlement, as an expression of the will of the parties to the dispute, represents a very significant legal institution which, as a rule, allows the parties to resolve a given disputed relationship on the basis of compromise and mutual concessions. Through a settlement, persons involved in civil law relationships resolve certain disputed issues from these relationships with mutual consent, without participation and intervention of the court. A settlement is most often reached before any proceedings are initiated before a competent body in connection with the civil dispute. A settlement may also be reached in the course of such proceedings, without involvement of the competent body that conducts the proceedings. A settlement may also be reached during the proceedings before the body that rules on the right of the parties from their civil dispute.[2] There are two possible modalities for resolving a civil dispute. The first modality relates to the resolution of a civil dispute between the persons involved in the given civil law relationship through achieving a peaceful agreement without the involvement of the court. A settlement achieved between the persons involved in a civil dispute outside court proceedings is inherently an agreement on the

1 For more on this general topic, see the doctoral thesis entitled "Pravni položaj parničnih stranaka u pogledu disponiranja tužbenim zahtjevom" (Legal Status of Parties in Terms of Disposition of the Petition), by Smajo Šabić, PhD, Zenica School of Law, June 2018.

2 For more on this: I. Grbin, *Nagodba u obveznom pravu te u parničnom i arbitražnom postupku (Settlement in Law on Obligations and in Civil and Arbitration Procedure),* Pravo u gospodarstvu, Časopis za gospodarsko pravnu teoriju i praksu, Zagreb, no. 4, 2007, p. 269 (hereinafter: I. Grbin).

modality of resolution of the disputed relationship. A settlement, as a contract about the achieved consensual settlement agreement about regulating property relations in a certain manner constitutes a contractual encumbrance governed by legal regulations on encumbrances.

Unlike the settlement reached out of court, the parties also have the option to reach a settlement or conciliation in the course of the civil proceedings. Such a settlement has a status of court settlement or court conciliation.[3] A court settlement is one of the options for ending civil proceedings and it is achieved by agreement between the parties which is concluded before the court and which ends the lawsuit. As a rule, the parties, by concluding a court settlement on the basis of its competences under procedural law, achieve agreement on the modality of arranging the dispute through mutual concessions and in this manner terminate the lawsuit. A court settlement is one of the modalities of resolving disputes that is typically reached by mutual concessions of the parties, but unlike the out-of-court settlement, the parties› concessions are not indispensable for the validity of the court settlement.[4] The court settlement (Ger. *gerichtlicher Vergleich,* Fr. *judicaire transaction*) is a contract concluded and recorded in the proceedings before the court, in which the parties, wholly or partly, regulate their disputed relations, which is in its effect equal to the final court decision *(res iudicialiter transacta).*[5]

1.3. Subject and legal nature of court settlement

The petition as the subject-matter in dispute must be the subject of a court settlement, although the settlement may relate to the entire petition, which would end the civil proceedings in their entirety, but it may also relate to a part of the petition.[6] In terms of the legal nature of the court settlement,

3 Art. 87 Para 1 of the FBiH Law on Civil Procedure – Parties may conclude a court settlement on the subject-matter in dispute during the entire course of the proceedings until their final termination (Court Settlement).

4 For more on this: S. Triva/V. Belajec/M. Dika, *"Građansko parnično procesno pravo" (Civil Litigation Procedural Law),* Zagreb, 1986, p. 473.

5 J. Čizmić, Novo uređenje instituta sudske nagodbe u bosanskohercegovačkom pravu, (New Regulation of the Institutions of Judicial Settlement in the Law in Bosnia and Herzegovina), Zbornik radova Pravnog fakulteta Sveučilišta u Mostaru (Conference Proceedings, Mostar University School of Law), Mostar, 2004, p. 211.

6 Art. 89 Para 1 of the FBiH Law on Civil Procedure (2003) – A court settlement may relate to the entire petition or just a part of it.

legal theory commonly sees it as dual in character. A court settlement constitutes a civil law contract whereby the parties regulate their material law relationships, but also a procedural action of the parties whereby they impact the outcome of the proceedings, which ultimately results in a final court decision, which is why the parties may not avoid the effects of the settlement by a subsequent agreement between them.[7] The court settlement is a mixed procedural law and material civil law contract,[8] and as such generates immediate legal effects both in the domain of the procedural relationship and in the domain of civil law relationships, so the validity of a court settlement should be assessed both from the standpoint of procedural law and of material civil law.[9] Regardless of the circumstances of its conclusion, the court settlement is also a contract between the parties whereby they regulate their civil law relationships, but due to all these circumstances it also entails significant procedural law effects.[10]

Both jurisprudence and the doctrine agree that court settlement is a type of mixed contract which partly extends to the provisions of substantive and partly to the provisions of procedural law.[11] The court settlement, despite its designation as „court", arises exclusively on the basis of dispositive motions of the parties, and it bears the designation „court settlement" exactly because that it is concluded before the court and that this assumption grants it the force of res judicata, i.e., the force of a court order. The court settlement in a procedural sense is equal with a final court decision, so the rule ne bis in idem

7 See *Komentar zakona o parničnom postupku Federacije Bosne i Hercegovine i Republike Srpske (Commentary of the FBiH and RS Law on Civil Procedure),* Sarajevo, 2005, Z. Kulenović/S. Mikulić/Svjetlana Milišić Veličkovski/Jadranka Stanišić/Danka Vučina, p. 168 – This view was generally accepted also in the earlier jurisprudence of the courts in former Yugoslavia, which is why the validity of a court settlement ought to be assessed both from the standpoint of the civil procedural law as well as civil law.

8 See decision: the Supreme Court of the Republic of Croatia, no. Rev 2351/92.

9 For more on this: S. Triva, *Osnovi za jednu raspravu o sudskoj nagodbi (Foundations for a Consideration of Court Settlement),* Naša zakonitost, 1960, no. 1–2, p. 69.

10 Earlier Yugoslav civil procedural legislation before 1956 was developed under a strong influence of the German and Austrian schools (it was nearly a literal copy of the Austrian legislation). This is the origin of the predominant influence of the Austrian and German schools on our civil procedural law. These deep traces of the specific German manner of processing and resolving legal issues remained even when a striving for emancipation for old models emerged. For more on this: S. Triva, *Osnovi za jednu raspravu o sudskoj nagodbi (Foundations for a Consideration of Court Settlement),* Naša zakonitost, 1960, no. 1–2, p. 61.

11 I. Grbin, 2007, p. 292.

applies as well as the objection rei judicialiter transactae, which is equal to the objection rei judicate.[12] A court settlement, which renders a court ruling unnecessary, constitutes a more flexible instrument for regulating legal relations between parties than a ruling, because of the option to substitute relatively rigid regulations on enforcement deadlines that accompany condemnatory decisions with such conditions for voluntary performance that will be more suitable to the particular relations in the given case.[13]

1.4. The role of the court in concluding a court settlement

With a court settlement concluded in the civil proceedings, the parties achieve own resolution of the dispute of common interest that makes them both winners and thereby permits a restoration of their temporarily disrupted relationship and a lasting preservation of such a positive relationship in the future.[14] Often the relations between the parties that opted to resolve their dispute in court remain quite disrupted even after the conclusion of the case. Frequently, the same parties, after the civil proceedings end, decide to launch other kinds of lawsuits against the same persons. This is certainly not beneficial for the parties, for their mutual relations nor for the overall social relations, so the option of concluding a court settlement appears imperative, both for the parties and for the court that is hearing the case. The subject-matter of a court settlement may as a rule involve the same civil relations that emerge as subject-matter contested in the lawsuit, which are governed by discretionary standards so parties are free to dispose of them.[15] If, when a court settlement is concluded, the court establishes that the settlement refers to an object that parties cannot dispose of, the court will disallow the conclusion of such court settlement. A settlement reached between the parties must be an expression of their free will and in no case a result of any pressure of influence of such nature that would in any way exclude free will of any of the parties.

12 J. Čizmić, Ibid., p. 212.

13 S. Triva, *Osnovi za jednu raspravu o sudskoj nagodbi (Foundations for a Consideration of Court Settlement),* Naša zakonitost, 1960, no. 1–2, p. 69, p. 62.

14 S. Šimac, *Sudskom nagodbom do bržeg rješenja parničnog postupka (With Court Settlement to Faster Resolution of Civil Proceedings),* Informator no. 5610–5611, Zagreb, 2007, p. 2.

15 S. Živković, Ibid., p. 44.

Pursuant to the existing legal solutions, the role of the court in regard to the availability of the option to conclude a court settlement is that throughout the course of the procedure the court should act in the sense of stimulating the parties to conclude a court settlement, with the proviso that, in such a case, the court must ensure its impartiality and free will of the parties.[16] The court shall not directly influence the will of the parties, insist on a resolution of the dispute through a court settlement nor impose such a manner of dispute resolution on the parties. Pursuant to the existing legal solutions, the role of the court in relation to conclusion of an agreement about peaceful dispute resolution is reflected in the court's efforts throughout the entire course of the proceedings to examine the readiness and will of the parties to consider the option of concluding a court settlement and to indicate availability of such an option.[17] In the new legal solution it is possible to detect the law-givers' intent to provide the court with a considerably more active role in concluding court settlements, by having the court not only indicate this option to the parties, but also to actively strive towards conclusion of a court settlement. The court may even suggest to the parties the manner of the settlement.[18] Before allowing a court settlement to be concluded between the parties, the court shall establish whether the parties' terms stated in the settlement are in conflict with enforcement regulations. If the court establishes that, in their settlement, the parties are disposing of a claim with which they cannot dispose by law, it will pass a decision to disallow such a settlement between the parties.[19] Following such a solution, dissatisfied parties are entitled to seek a remedy.[20] A concluded court settlement is by nature a peaceful dispute resolution, so

16 Art. 88 of the FBiH Law on Civil Procedure (2003) – (1) The court shall, in a manner that will not undermine its impartiality, seek to have the parties conclude a court settlement, both at the preliminary hearing and throughout the course of the proceedings. (2) To contribute to the conclusion of the settlement, when it determines that this is well-founded, the court may suggest to the parties how to settle, bearing in mind the parties' wishes, the nature of the dispute, relations between the parties, and other circumstances.

17 Z. Kulenović/S. Mikulić/Svjetlana Milišić Veličkovski/Jadranka Stanišić/Danka-Vučina, *Komentar zakona o parničnom postupku Federacije Bosne i Hercegovine i Republike Srpske (Commentary of the FBiH and RS Law on Civil Procedure),* Sarajevo, 2005, p. 170.

18 J. Čizmić, 2016, p. 316.

19 *Ibid.,* 318

20 Art. 88 Para 3 of the FBiH Law on Civil Procedure (2003) – When a court passes a decision disallowing a parties' settlement, it is required to suspend the proceedings until such a decision is final.

such a conciliation constitutes an agreement with a procedural legal effect. In the process of achieving a court settlement, the parties dispose of the subject-matter in dispute in consensus and in coordination, and after reaching a joint agreement about the manner of resolution of the subject-matter in dispute through mutual concessions and compromise, they communicate their agreement to the court and move for a court conclusion before the court on the basis of the agreement achieved in this manner and for a termination of the lawsuit in question. In such a case, the court takes into the record the achieved agreement and drafts an agreement about the court settlement which, upon signing, takes the place of a judgment and has the force of a court order.[21] The basic procedural legal effect of a court settlement is that it is a legal motion that terminates the lawsuit.[22] A particular feature of the termination of a lawsuit by a court settlement relative to the termination of a dispute through a decision on merits is reflected in the fact that a court settlement concluded in this manner cannot be appealed, but it can only be contested by a lawsuit and only if it was concluded in error or under the influence of duress or fraud.[23] Despite divergent views both in legal theory and in jurisprudence, the prevalent view is that the court settlement is not a court decision, even though it has the same procedural effect, but it constitutes an agreement of the parties concluded before the court and entered into the record as such, so it cannot be appealed, revised or countered with any extraordinary remedy, but it can be only contested by a lawsuit.[24]

As a legal institution, the court settlement had been an instrument of court regulation in the past. „Pursuant to the Serbian Law on Civil Procedure of 1865, the court was required to offer the parties conclusion of a court settlement. Pursuant to the French Law on Civil Procedure, which had been in

21 Art. 91 Para 3 of the FBiH Law on Civil Procedure (2003) – When a court adopts a decision that disallows the parties' settlement, it is required to suspend the proceedings until such a decision becomes final.

22 I. Grbin, 2007, p. 296.

23 Art. 92 of the FBiH Law on Civil Procedure (2003) – (1) A court settlement may only be contested by a lawsuit. (2) A court settlement may be contested if it was concluded in error or under the influence of duress or a fraud. (3) The lawsuit from Para 1 of this Article may be filed within three months of the day of discovery of the reasons for contestation, and no later than five years after the day when the court settlement was concluded. (4) If the court settlement is annulled, the proceedings resume as if the court settlement had not even been concluded.

24 J. Čizmić, *Komentar zakona o parničnom postupku (Commentary of the Law on Civil Procedure),* Drugo izmijenjeno i dopunjeno izdanje (Second amended edition), Sarajevo, 2016, p. 323.

force until 1949, a special reconciliation procedure was a requirement prior to submission of a lawsuit about the claim on which the parties could have in principle reached a settlement. Pursuant to the Italian legislation, the court is required to encourage the parties to settle, and in labor disputes a special reconciliation procedure is a prerequisite for initiating a lawsuit. In the theory of the Italian procedural law, it is emphasized that the reconciliation effort never aims at achieving a settlement at any cost, but its only purpose is to suggest a fair conciliation. Also in the proceedings before German first-instance courts (Amtsgerchte), a procedure to attempt to reach a settlement is required, with a series of very significant exceptions, but omitting this procedure cannot result in a nullity of the subsequent lawsuit. In general it is a duty of an individual judge to try to get parties to settle while preparing a hearing before the council. Pursuant to the provisions of the Hungarian civil procedure from 1911, the court could have, but did not need to attempt to intercede between the parties to reach a settlement, and to this end it could have also direct the parties to appear before a specific judge. The Soviet civil procedure emphasized the ban on courts› exerting pressure on parties to settle, but, on the other hand, it recommended that courts do not obstruct settlements in small value disputes, but to assist the parties as much as possible in such efforts. In accordance with the Swedish civil procedure of 1942, if the settlement is permissible in the given dispute, the court should encourage the parties to settle whenever it proves appropriate. From a succinct overview of important European legislation, there are two undisputed tendencies, to prevent litigation, particularly in small-value disputes, by enacting special procedures to attempt conciliation and, in more complex disputes, to emphasize the duty of the court to take the mediation role when necessary to achieve a court settlement.[25]

1.5. Legal effect of court settlement

With its determination to conclude a court settlement, the parties decide the legal destiny of the civil proceedings, and thereby consequently accept the legal effect of the court settlement. The procedural effect of the court settlement is reflected in the institution of res iudicata, so the concluded court settlement constitutes an obstacle for retrying the case on the same factual and legal basis. A concluded court settlement has the force of a court

25 For more on this: S. Triva, *Osnovi za jednu raspravu o sudskoj nagodbi (Foundations for a Consideration of Court Settlement),* Naša zakonitost, 1960, no. 1–2, pp. 64-65.

order. In a procedural legal sense, the court settlement is equal to the final court decision, which is why it is the court›s duty to dismiss the case when it is established that the lawsuit is related to a subject-matter for which a court settlement has already been concluded.[26] In terms of substantive law effect, the peculiarity of the court settlement is reflected in the fact that a concluded court settlement generates certain legal effects in substantive legal relations. A concluded settlement derogates an earlier dispute between the parties, and thereby the uncertainty with regard to the parties› rights and obligations, and after the conclusion of the court settlement the disputed relationship is regulated on the basis of the concluded agreement, thereupon a new material legal relationship is established.[27]

1.6. Legal status of the parties concluding a court settlement relative to the regular civil proceedings

Peaceful dispute resolution, or alternative dispute resolution (ADR), has unquestionable advantages as an alternative to a long and costly judicial proceedings.[28] Relative to dispute resolution by way of a court ruling, a court settlement has its own advantages that are particularly manifest in several significant qualitative features that make this modality of resolution of a give dispute more acceptable. Effects of concluding a court settlement are manifold. The relations of the parties when a court settlement is concluded are substantively different relative to the relations of the parties druing the court proceedings, because a conclusion of a court settlement creates neither winners nor losers. In a court settlement, both parties, through their own partial concessions and compromise attained their own primary objective or the major part of their objective which were the cause for starting the lawsuit, without any winners or losers upon the completion of the proceedings. Mutual concessions of the parties is not of profound significance for the court settlement. In the course of the proceedings, the parties agree to end continued uncertainty

26 J. Slovinić, *Nagodba u građanskom i procesno pravnom smislu (Settlement in Civil and Procedural Legal Sense),* Informator, no. 5394, 2005, p. 8.

27 More on this: G. Stanković, 2010, p. 389.

28 D. Palačković, *Mirno rešavanje sporova iz građansko pravnih odnosa (Peaceful Dispute Resolution from Civil Legal Relations),* Zbornik radova Pravnog fakulteta u Kragujevcu (Collection of Papers, Kragujevac Law School, 2005, p. 385.

of litigation and thereby experss their willingness to agree on disputed issues. Therefore, for the conclusion of a court settlement, it is not decisive whether a settlement was reached through mutual concessions of both parties or only one party relented, or the latter agreed with the former.[29]

The most frequent cases of court settlement in which there are concessions on one side only are the cases when the parties conclude the court settlement after the presentment of evidence, because already at this stage of the civil proceedings, after all evidence has been presented, particularly evidence such as certain expert witness testimonies, the parties, assessing the possible outcome of the court proceedings conclude the court settlement by having only one party make concessions or recognize certain facts that had been disputed until that time and proposes a court settlement, while the other party agries with the proposal of the opposing part. When concluding a court settlement, the parties may regulate their relationship outside the boundaries of the subject-matter, while such regulation of their mutual relations through a conclusion of the proceedings is not possible. The option to conclude a court settlement has the character of a negative procedural requirement for the conduct of civil proceedings. A concluded court settlement is in its legal character equal to the final court decision, as the proceedings end with the conclusion of the court settlement, while any new petition regarding the subject-matter about which the court settlement has already been concluded will be rejected by the court because the achieved and concluded court settlement is to be considered res judicata.

The agreement on court settlement, although not explicitly mentioned in the Law, in its legal force is equal to a final decision.[30] Consequently, a concluded court settlement prevents the repetition of civil proceedings over the

29 More on this: S. Živković, p. 11.

30 This can be indirectly inferred from the provisions of Art. 93 of the FBiH Law on Civil Procedure, which stipulates that the court shall throughout the proceedings ex officio check whether the proceedings are conducted over a subject-matter about which a court settlement has previously been concluded, and, if it establishes that the proceedings are conducted over a subject-matter about which a court settlement has been concluded, the court will dismiss the lawsuit. Also, the same conclusion can be made on the basis of the provision of Art. 209, which stipulates reasons that constitute a material infringement of the provisions of civil proceedings, and which implies that there is a material infringement of the provisions of civil proceedings if the court had already made a judgment on the merits about the petition on which the proceedings are underway, or which the plaintiff gave up, or on which a final ruling had already been made, or on which a court settlement was already concluded, or a settlement that, following special regulations, has the force of a court settlement. More on this: J. Čizmić, Commentary, 2016, p. 324.

same subject-matter about which a court settlement has been concluded. The above leads to a clear conclusion that the position of the parties in terms of legal certainty when a court settlement is concluded is exactly the same as the position of the parties following a final court decision. Also, the agreement on court settlement has the force of a court order and can be used to institute an enforcement procedure, so in the enforcement procedure the assigned enforcement court does not have the jurisdiction to examine the suitability of the concluded court settlement for enforcement, as this presumption had been established by the court before which the settlement was concluded.[31] With regard to the legal effect of the concluded court settlement as a court order, the position of the parties is the same as with a final court decision as court order. The position of the parties may even be more favorable in the case of court settlement, because it becomes a court order at the point of its conclusion, so the parties, and particularly the party that will derive certain rights from the settlement, can use such a settlement as a court order immediately upon its conclusion. Unlike court settlement, a court ruling becomes final much later, after the second-instance court in the appeals procedure rules on the admissibility of the appeal. Taking into account all the above, we conclude that the legal effect of a court settlement is manifested immediately upon its conclusion, while the effect of the ruling made after the conclusion of the proceedings is by nature delayed. In this regard, the legal position of the parties is considerably more favorable when a court settlement is concluded.

The discretionary power of the parties is reflected in the fact that the parties may conclude a court settlement throughout the entire course of the proceedings, even during the proceedings before the second-instance court, which implies that the option is left to the parties to conclude a court settlement even after a decision on the merit (a first-instance judgment) has been passed, up to the point of its finality, i.e. until the passing of the second-instance decision on the parties› appeal.[32] Such a legal option has been left to

31 A. Jakšić, *Građansko procesno pravo (Civil Procedural Law),* Pravni fakultet Univerziteta u Beogradu (Belgrade University Law School), Beograd 2010, p. 498.

32 It is worth mentioning that this enhancement of the text is grounded in the recommendations of the Ministerial Committee of the Council of Europe, which in the measures to prevent overburdening of courts call for encouraging amicable dispute resolution and conclusion of settlements before the parties (a novel proposal, Explanation p. 41), in the Recommendation R (86) of the 12th Ministerial Committee of the Council of Europe call on the Member States, among other things, to encourage amicable dispute resolution and conclusion of settlements before the parties. Termination of a dispute through conclusion of a court settlement should be prioritized, so the proposed amendments clarify the time limits for conclusion

the parties to offer them a proper, amicable modality of dispute resolution in a peaceful manner, even if there is already a first-instance decision in the situation that, although not being final, still imparts in both parties a degree of uncertainty whether the second-instance court may rule differently on the subject-matter in question. This continuing uncertainty, as well as the possibility to resolve the dispute amicably, allows the parties to conclude an agreement on court settlement even after the adoption of the first-instance decision up until its finality, thereby resolving the dispute peacefully.[33]

In the event that the parties express interest to conclude a court settlement after a decision on merits was passed, the question emerges before which court would the parties conclude the court settlement and what would be the legal fate of the adopted court decision and which court would settle the decision›s legal fate. If there is an expression of agreement and will of the parties to conclude a court settlement even after the first-instance decision has been made, the parties will conclude the court settlement before the second-instance court which conducts the appeals proceedings. After the second-instance court accepts the court settlement that the parties signed and thereby concluded, the second-instance court shall return the entire file to the first-instance court to decide the legal fate of the first-instance decision, as regulated by the Law on Civil Procedure, in the manner that the first-instance court will in a decision declare the first-instance decision inoperative.[34]

of a court settlement, so the parties may conclude a court setlement during the entire course of the proceedings up to its final conclusion. J. Čizmić, 2016, p. 311.

33 An amicable relationship means reaching an agreement between the parties on the basis of a mutual agreement and findign the most acceptable solution for both parties relative to the dispute in question. Also, an amicable relationship means the relationship of the parties after the conclusion of the court settlement. In effect, it is highly likely that the relationship between the parties after the conclusion of a court settlement will not be the same as after a final decision. Resolution of a dispute by a final decision preserves, and in some cases even intensifies the hostile relationship and the gap between the parties, leading to the parties instituting other civil proceedings, all to widen the gap in civil law relations. On the other hand, a court settlement achieved by agreement and a degree of mutual understanding of the parties, such a mutual relationship of the parties preserves the possibility and the option that their relations after the conclusion of the court settlement may be better, and even amicable, which is ultimately in the interest of every society.

34 Art. 87 Para 2 of the FBiH Law on Civil Procedure (2003/2005) – If the court settlement was concluded after the first-instance decision had been passed, the first-instance court shall adopt a decision declaring the first-instance decision inoperative.

The court settlement is characterized by the discretionary power of the parties, as it can be concluded only with agreement and with action of both parties. Unlike the court decision, which can be appealed, a concluded court settlement does not leave such a option to the parties. The parties are not provided with the option to contest and lodge appeals against the concluded court settlement, which ultimately points to the conclusion that the conclusion of a court settlement offers the parties a greater legal certainty relative to the legal certainty they attain when a first-instance decision is made. In truth, the parties are given the option to contest the court settlement, but only in specifically defined cases. As the conclusion of a court settlement entails an essential requirement of agreement and will of the parties, if one of these conditions was missing, and the court settlement was still concluded, the party with legal interest may contest such a settlement, but only by a lawsuit, and in the process proving that the court settlement was concluded in error, under duress or fraudulently, as stipulated by the provision of Article 92 of the Law on Civil Procedure.[35] Only in the event that one of these three reasons exist, the dissatisfied party may contest the concluded court settlement by launching a lawsuit to annul the court settlement. The dissatisfied party may file a petition within three months of the day of discovery of the reasons for contestation, and no later than five years after the day when the court settlement was concluded.[36] In the event that the court settlement is annulled, the proceedings resume as if the court settlement had not even been concluded.

One of the possible reasons that make the outcome of the court proceedings more beneficial for one of the parties relative to the possibility of achieving a court settlement is a high likelihood of success of one of the parties during the proceedings. In fact, there are certain court proceedings that are of such nature that the outcome of the proceedings is predictable with a high likelihood. As in such a dispute, the party is nearly certain in the possible outcome of the proceedings, for this reason it has no interest to conclude any court settlement, because it strives for a more favorable right that it will attain through the court›s decision on merits than it could attain by concluding a court settlement.

35 Art. 92 of the FBiH Law on Civil Procedure – (1) A court settlement may be contested only by lawsuit. (2) A court settlement may be contested if it was concluded in error, under duress or fraudulently. (3) The lawsuit from Para 1 of this article may be filed within three months of the day of discovery of the reasons for contestation, and no later than five years after the day when the court settlement was concluded. (4) If the court settlement is annulled, the proceedings resume as if the court settlement had not even been concluded.

36 Art. 92 of the FBiH Law on Civil Procedure.

1.7. Circumstances that hinder conclusion of a court settlement

One of the most significant reasons that hinder conclusion of court settlements during civil proceedings is the legal status of attorneys, i.e. of the parties› legal representatives during the proceedings. It is most often the case that employees of the parties appear in the civil proceedings as their attorneys and they are not authorized to conclude a court settlement. As most such attorneys come from public enterprises, such actors adhere to an unwritten rule that it is better that a court rules on the subject-matter, even if it is less favorable for the public enterprise as the party to the dispute, relative to a potential outcome of the proceedings that is achieved by a court settlement and considerably more favorable for that same public enterprise.

The situation is nearly identical with attorneys for the state and its administrative units who appear in civil proceedings as attorneys of the parties by law. Public attorneys, who in accordance with the laws on public attorneys› offices have the jurisdiction to protect the property and property interests of the state and of its bodies appear most frequently in the role of attorneys by law in civil proceedings.[37] However, these same attorneys, unfortunately, are

37 *On the level of Bosnia and Herzegovina* the public defender function was established and is governed by the *Law on the Public Defender's Office of Bosnia and Herzegovina* („BiH Official Gazette" no. 8/02). *On the level of the Federation of Bosnia and Herzegovina,* the public defender function was established and is governed pursuant to the Law on the Federation Public Defender's Office („FBiH Official Gazette" no. 2/95, 12/98, 18/00, 61/06); *on the level of the Republika Srpska* the public defender function was governed and regulated by the Republika Srpska Law on Public Defender's Office („RS Official Gazette" no. 16 of February 25, 2005, 77/06, 119/08, 78/11); *on the level of the Una-Sana Canton and the municipalities in this canton,* the public defender function is regulated by the Una-Sana Canton Law on Public Defender's Office („Official Gazette" no. 20/04), *on the level of the Posavina Canton and the municipalities* in this canton, the public defender function is regulated by the Posavina Canton Law on Public Defender's Office („Public Gazette" no. 9/08); *on the level of the Tuzla Canton and the municipalities* in this canton, the public defender function is regulated by the Tuzla Canton Law on Public Defender's Office („Official Gazette" no. 4/04); *on the level of the Zenica-Doboj Canton and the municipalities* in this canton, the public defender function was regulated by the Tuzla Canton Law on Public Defender's Office („Official Gazette" no. 14/08); *on the level of the Bosnian Podrinje Canton and the municipalities* in this canton, the public defender function was regulated by the Bosnian Podrinje Law on Public Defender's Office („Official Gazette" no. 1/06, 14/08), *on the level of the Central Bosnia Canton and the municipalities* in this canton, the public defender function is regulated by the Central Bosnia Canton Law on Public Defender's Office („Official Gazette" no. 6/97, 8/98); *on the level of the Herzegovina-Neretva Canton and the municipalities* in

not empowered by law to accept the option of concluding a court settlement as a modality of resolution of a court dispute. The role of public attorneys and the scope of their competences were best exemplified in court proceedings in which the plaintiffs› labor rights were the subject-matter. Such court proceedings were conducted about the right of prosecutors as employees that arise from collective contracts, and in the past ten years such disputes arose with regularity. With regard to courts› legal opinions about the rights of prosecutors to claims related to their employment, these legal opinions were clear and well-known both to the court and to the parties in the proceedings where public attorneys appeared as attorneys for the plaintiffs, beginning with legal opinions of first-instance courts, legal opinions of second-instance courts, legal opinions of the FBiH Supreme Court, as well as of legal opinions of the BiH Constitutional Court. However, even so public attorneys as legal representatives regularly disputed the claims with the same factual and legal opinions, thereby consciously engaging in disputing the claims and court deliberations, knowing in advance what the outcome of such court proceedings will be. Such a role and conduct of public attorneys as legal representatives is to an extent quite understandable and expected exactley because legal defenders, in the course of court proceedings had neither the competence nor the jurisdiction to conclude court settlements in such court proceedings, which were numerous. Such a restriction on the competences of legal representatives of public attorneys or of attorneys – employees of public enterprises in regard of competences to, among other things, conclude court settlements was ultimately reflected in the harm to the parties they represented. If these attorneys by law or attorneys-employees had had the necessary competences to conclude corut settlements, in the above mentioned court proceedings, with a possible conclusions of court settlements or by finding a different manner to resolve court disputes could have spared the parties they represented very significant

this canton, the public defender function is regulated by the Herzegovina-Neretva Canton Law on Public Defender's Office („Public Gazette" no. 8/99); *on the level of the Herzegovina-Neretva Canton and the municipalities* in this canton, the public defender function is regulated by the Herzegovina-Neretva Canton Law on Public Defender's Office („Public Gazette" no. 8/99); *on the level of the West Herzegovina Canton and the municipalities* in this canton, the public defender function is regulated by the West Herzegovina Canton Law on Public Defender's Office („Public Gazette" no. 13/07); *on the level of the Sarajevo Canton and the municipalities* in this canton, the public defender function is regulated by the Sarajevo Canton Law on Public Defender's Office („Official Gazette" no. 33/08); *on the level of the Livno Canton and the municipalities* in this canton, the public defender function is regulated by the Livno Canton Law on Public Defender's Office („Public Gazette" no. 1/97).

liabilities, which involved statutory default interest and court costs. In all these conducted proceedings, such liabilities were ultimately found and awarded to plaintiffs, employees, at the expense of the defendants represented by their legal attorneys, public attorneys and attorneys-employees. In this way and with such legal approach by attorneys to public enterprises and by legal representatives of public attorneys, a large number of court proceedings would be resolved very quickly without unnecessary litigation.

The extent of actual application of termination of court proceedings by court settlement as a potential modality of resolution of court disputes is best demonstrated by the study conducted in the Zenica Municipal Court. The study in question covered calendar years 2015 and 2016.

During 2015, the Zenica Municipal Court received a total of 6,852 court cases. Of this total of case files in 2015, a total of 162 court cases, or, in percentage terms, 2.4%, relative to the total number of court cases initiated during 2015 were resolved by court settlement.

In the course of 2016, the Zenica Municipal Court received a total of 6,220 court cases. Of this total of received case files in 2016, a total of 193 court cases, or, in percentage terms, 3.1% of the total number of court cases initiated in 2016. The above numbers and percentages of concluded court settlements relative to the total of received civil cases clearly indicates that court settlement, as a potential alternative modality for resolution of civil proceedings is not appropriately regulated in civil proceedings.

To determine a clear cause of so negligible a number of cases closed by conclusion of a court settlement as a way of alternative dispute resolution, further study was conducted of the cases in which a court settlement had been concluded, i.e., in how many of court proceedings where the court settlement had been concluded did public attorneys or attorneys-employees of public enterprises appeared as legal representatives.

Of a total of 162 concluded court settlements in 2015, only three court settlements were concluded in civil proceedings in which public attorneys participated as legal representatives, which constitutes 1.1% of the total number of concluded court settlements or 0.043% of the total court cases in 2015.

With regard to attorneys who are employees of public enterprises, as the parties in court proceedings, out of the total of 162 concluded court settlements in 2015, court settlements were concluded in six civil proceedings in which employees of public enterprises participated as attorneys, which represents 4.6% of the total number of concluded court settlements or 0.087% of the total court cases in 2015.

In 2016, out of the total of 6,220 court proceedings conducted, court set-

tlements were concluded in 193 cases. Of the total number of concluded court settlements, attorneys public attorneys participated in four proceedings in which court settlements were concluded, which represents 2.1% of the total number of concluded court settlements or 0.064% relative to the total number of court proceedings conducted in 2016.

With regard to attorneys who are employees of public enterprises as the parties in court proceedings, out of the total of 193 concluded court settlements in 2016, court settlements were concluded in nine civil proceedings in which employees of public enterprises participated as attorneys, which represents 4.6% of the total number of concluded court settlements or 0.014 % of the total court cases in 2016.

In all proceedings in which public attorneys appeared as legal representatives when court settlements were concuded, public attorneys appeared in the role of plaintiff›s legal representatives. In these cases, when a court settlement was concluded, the defendant assumed all obligations from the claim in their entirety, and the parties only used the court settlement to arrange a more favorable repayment schedule for the defendant than the court would order in a decision on merits.

The resulted stated above clearly indicate that a very small, nearly negligible number of civil proceedings in which attorneys-employees of public enterprises or public attorneys as representatives of the state and its administrative units appeared were resolved through court settlements, although they take part in a very large number of civil proceedings. As noted before, the main and exclusive reason why attorneys-employees of the parties or attorneys public attorneys appeared as proxies in a very small number of court settlements is found in the fact that above attorneys lack legal discretionary powers to choose the modality of resolution of court disputes that would be the most suitable and acceptable to the parties they represent, including, among others, the termination of the dispute through conclusion of a court settlement. Although there are numerous advantages that make the legal position of the parties more favorable in the event of the conclusion of a court settlement relative to the legal position of the parties in the court proceedings, we may conclude that the number of proceedings terminated with a court settlement is still insufficient relative to the total number of civil proceedings conducted.

1.8. *De lege ferenda* proposal that would ensure greater application of court settlement as a modality of termination of civil proceedings.

In order to motivate the parties as much as possible to employ the option of concluding a court settlement as an alternative modality of dispute resolution during civil proceedings, I believe it necessary to expressly prescribe as an imperative duty of the court to inform the parties immediately before opening the preparatory hearing about the option they have to conclude a court settlement and to invite them to conclude a court settlement on the given subject-matter, with full respect for the right of the parties to access the court and to enjoy court protection and with mandatory attention to the principle of impartiality of courts. This imperative duty is necessary because the role and activity of the court in regard of initiating the option of concluding a court settlement, as regulated by the existing legal provisions, are not very well understood and accepted in judges› daily work, so that trial judges often launch into civil proceedings without inviting the parties to possibly resolve the dispute through court settlement. In the early stage of civil proceedings it is not realistic to expect that the parties will *en masse* accept court settlement as a modality of dispute resolution, however, after the presentment of evidence, in most cases the disputed matters become much clearer to the parties and, on the basis on the presented evidence, they may make a clear conclusion on the possible outcome of the proceedings, which is why I find it very useful to prescribe the imperative duty of the court to invite the parties to possibly conclude a court settlement even after the presentment of evidence.

As emphasized above, one of the essential reasons why the parties during the proceedings do not accept conclusion of a court settlement is exactly that such parties are represented by attorneys, most often employees of these parties or attorneys public attorneys, who have neither the authority nor the competence to conclude court settlements, which is why, although aware of the possible outcome of the proceedings, they very often do not accept a court settlement as a more favorable modality of dispute resolution and instead opt for a less favorable option for their parties, i.e. court proceedings. In fact, with regard to delegated public competences, our society embraces the rule of consistent, literal interpretation of law, which prevails ove the rule of a conscientious well-intentioned attitude towards delegated tasks. A change in social attitudes, and amendments to the legislation that would legally grant discretionary powers and duty to choose the most favorable rights for the parties they represent to attorneys-employees as well as attorneys public attorneys,

as legal experts, would ensure that court settlement, as a modality of resolving civil disputes, would certainly be more represented during court proceedings, which would result in disburdening of courts and a drastic reduction in the number of unvarying court proceedings, and all the above would have an important effect on the legal position of the parties in the civil proceedings.

Also, one of the changes that would essentially contribute to increasing the number of concluded court settlements would be the option for the parties to be exempted from the requirement to pay the court fee in the event a court settlement is concluded. In the existing legislation,[38] payment of a court fee on the concluded court settlement is required.

However, if the parties were fully exempt from payment of the court fee when they conclude a court settlement, this fact would certainly provide an additional motivation for the parties to choose dispute resolution through the conclusion of a court settlement for economic reasons, relative to court proceedings, thereby cutting their total costs. The court fee is a revenue of the state or of its bodies, however, I find that the state will generate a much greater revenue through avoiding unnecessary costs and thereby freeing the trial judge from unnecessary adjudication, relative to the revenue that can be realistically expected if the fee on court settlement is collected. All legal solutions proposed above would certainly create a legal precondition for the parties and for their attorneys and legal representatives in civil proceedings to recognize the most favorable licit legal mechanisms for the parties they represent and sometimes to accept as quite suitable the modalities of resolving civil proceedings through court settlement as the most favorable modality of dispute resolution relative to the termination of civil proceedings with a decision on merits.

38 The Zenica-Doboj Cantonal Law on Court Fees, no. 12/09, Zenica-Doboj Cantonal Law on Amendments to the Zenica-Doboj Cantonal Law on Court Fees, no. 4/22, Zenica-Doboj Cantonal Law on Amendments to the Zenica-Doboj Cantonal Law on Court Fees, no. 7/11, Zenica-Doboj Cantonal Law on Amendments to the Zenica-Doboj Cantonal Law on Court Fees, no. 9/11.

Adnan Baručija

2. COURT SETTLEMENT

2.1. Introduction

By its nature, court settlement constitutes an agreement of the parties, i.e., a contract through which the parties regulate their civil law relations with which they may freely dispose in civil proceedings, concluded in writing and approved by the court. This contract has validity and, if it establishes an obligation of performance, it also has finality. In the procedural sense, a court settlement has three characteristics. First, the proceedings end with the conclusion of a court settlement, because the need for court protection in the disputed relationship of the parties ceases. Second, a new lawsuit between the same parties about the subject-matter on which a court settlement had earlier been concluded is no longer admissible. Third, the effect of a court settlement which stipulates fulfillment of an obligation is in the fact that a court settlement has the force of a court order. On the basis of the record which contains the court settlement, a party may request the court to enforce collection of claims that party is entitled to according to the contents of the settlement. Court settlement is governed by the provisions of process laws on civil procedure on the level of the State of BiH,[39] the entities[40] and the Brčko District of Bosnia and Herzegovina.[41] In terms of the regulation of this process institution there are no legislative differences, and one concludes that court settlement is regulated uniformly throughout the territory of Bosnia and Herzegovina.

39 Law on Civil Procedure Before the Court of Bosnia and Herzegovina („BiH Official Gazette" no. 36/04, 84/07, 58/13 i 94/16, hereinafter BiH Law on Civil Procedure). In this law, the court settlement is regulated in seven articles, from Art. 54 to Art. 61.

40 Law on Civil Procedure („FBiH Official Gazette" no. 53/03, 73/05, 19/06 i 98/15, hereinafter FBiH Law on Civil Procedure), Law on Civil Procedure („RS Official Gazette" no. 58/03, 85/03, 74/05, 63/06, 49/09, and 61/13, hereinafter RS Law on Civil Procedure). In both these laws, the court settlement is also regulated in seven articles, from Art. 87 to Art. 94.

41 Law on Civil Procedure of the Brčko District of BiH („Official Gazette of the BD-BiH", no. 28/18, hereinafter BDBiH Law on Civil Procedure). In this law, the court settlement is also regulated in seven articles, from Art. 210 to Art. 217.

A material statute, the Law on Obligations, governs the out-of-court settlement, in its Chapter XL "Conciliation" in Articles 1089 through 1104. However, an out-of-court settlement that the parties may conclude in a dispute, which is also a contract between the parties, does not have validity, which in turn means not option to initiate enforcement, and this is just one of fundamental differences relative to court settlement. This paper on this topic aims to familiarize citizens with court settlement and acquaint them with the benefits of concluding a settlement in court proceedings, as well as to make it easier for judges and parties' attorneys to conclude settlements by answering certain disputed questions that emerge in the proceedings before courts on the occasion of conclusion and implementation of settlements. Also, an overview of court settlement as defined in theory will be provided, but also its practical application in case law.

Court settlement developed into a distinct legal institution as early as at the time of Roman law, and both (currently existing) legal formats of the settlement: out-of-court and court settlement, had already been developed then.[42] However, court settlement in the form we know it today was for the first time regulated by the Code of Proceedings in Civil Lawsuits of the Kingdom of Serbs, Croats, and Slovenes from 1929, then by the civil procedure laws of the Federal People's Republic of Yugoslavia/Socialist Federal Republic of Yugoslavia in 1957 and 1977, then in the Federation of BiH in 1998, in the Brčko District of BiH in 2000, and in both the Federation of BiH and the Republic of Srpska in 2003. There were no essential differences in the regulation of the settlement, so the parallels that may be found between these laws are that it is concluded about the subject-matter of the dispute, it is entered into the record, and it has the force of a court order, which is the basis for requesting enforced collection. Where the court order as regulated nowadays differs from earlier arrangements is with respect to the possibility to be contested. A theoretical, but also court dilemma regarding the possibility of contesting a court settlement (by a lawsuit or by an extraordinary legal remedy of a retrial) was resolved with the passage of the new Law on Civil Procedure, which expressly stipulated that a court settlement may be contested only by a lawsuit.

42 Čalija, B. – Omanović, S.; *Građansko procesno pravo (Civil Procedural Law),* Univerzitet u Sarajevu Pravni fakultet (Sarajevo University Law School), Sarajevo, 2000, p. 244.

2.2. Comparative overview of court settlements in successor states of the SFRY

This paper presents an overview of court settlement in the Republic of Croatia, Republic of Serbia and other successor states of the SFRY as their civil procedures are based on the provisions of civil procedures of the former Yugoslavia from 1957 and 1977 and due to the fact that the changes that emerged in their civil procedures to a great extent resemble the changes from civil procedures applied in BiH. Different solutions in regulation of court settlement, to the extent they are present, may serve as a useful foundation for possible consideration of *de lege ferenda*. In addition, the paper includes relevant case law of these states related to the institution of court settlement, so that the positions of courts from these states may be of assistance to domestic courts. In the Republic of Croatia, court settlement is regulated by the Law on Civil Procedure (hereinafter RoC Law on Civil Procedure), Chapter 22 "Court Settlement" in Articles 321 through 325, or in four articles only.[43] Art. 321 Para 1 of the RoC Law on Civil Procedure stipulates that throughout the course of the proceedings before the civil court until its valid termination the parties may conclude a settlement on the subject-matter (a court settlement), even during the proceedings before the second-instance court up to the adoption of the second-instance decision on appeal. The issue of the point in time until a settlement may be concluded is regulated in exactly the same manner as by the provisions of the laws on civil procedure in BiH, i.e., until a valid termination of the proceedings. The RoC Law on Civil Procedure prescribes that a settlement is, as a rule, concluded before the first-instance court,[44] while an exception would relate to the option to conclude a settlement even during the appeals procedure before the second-instance court if a session of the council

43 "SFRY Official Gazette", no. 4/77, 36/77, 6/80, 36/80, 43/82, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, "Public Gazette" no. 53/91, 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 148/11, 25/13, 43/13, and 89/14.

44 If the parties desire to conclude a settlement before the first-instance court after the first-instance decision has been rendered while the case is being appealed before a second-instance court, the first-instance court shall, without delay, request the second-instance court – by phone, fax or email – to be informed whether the decision on appeal has been made and advise the latter 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 the decision on appeal has not been made yet and that it suspended the proceedings until the procedure of concluding the court settlement is finalized (Art. 321 Para 7, of the RoC Law on Civil Procedure).

(Art. 363 Para 2) or a hearing (Art 373.b Para 2) is held with participation of the parties, in which case the settlement may also be concluded before this court.[45] If the parties conclude the settlement after the first-instance decision has been rendered, and before the rendering of the second-instance decision on appeal, the court before which the settlement was concluded will issue an order to abolish the rendered first-instance decision and will find that the petition has been withdrawn, unless the parties resolved this matter differently in the concluded settlement (Art. 321 Para 8 of the RoC Law on Civil Procedure).[46]

With regard to the content of the settlement, the solutions in BiH and the Republic of Croatia are identical, in the sense that a court settlement may relate to the entire petition or to one of its parts.

With regard to parties› dispositions that are in conflict with coercive law, so that the parties cannot conclude a settlement, the solution is identical in both the RoC Law on Civil Procedure and in the laws on civil procedure in BiH and this solution was adopted from the 1977 Law on Civil Procedure.[47]

The RoC Law on Civil Procedure fully retained the solution from the 1977 Law on Civil Procedure with regard to the form of concluding the settlement. Consequently, the agreement of the parties is entered into the record. The settlement is concluded when the parties, after the record of the settlement is read, sign the record. Upon request, the parties shall receive a certified copy of the record into which the settlement was entered. As evident relative to the solutions of the laws on civil procedure in BiH, pursuant to the RoC Law on Civil Procedure, a settlement is concluded after the record of the settlement has been read when the parties sign it, while in BiH a settlement is concluded when the parties sign the record. This implies that the law-giver, when regu-

45 The Law on Amendments to the Law on Civil Procedure ("People's Gazette", no 57&1) after Para 5 in Art. 321 adds Paras 6 through 8.

46 The laws on civil procedure in BiH regulate this situation in a different manner, in the sense that, if a court settlement is concluded after the first-instance decision was rendered, the first-instance court shall enact the order finding that the first-instance decision is inoperative (Art. 87 Para 2, laws on civil procedure of the FBiH/RS Art. 54 Para 2, BiH Law on Civil Procedure, and Art. 210 Para 2 of the BDBiH Law on Civil Procedure). In the order, the court shall find that the first-instance decision was inoperative and that the appellant abandoned the appeal if the parties concluded a court settlement during the appeals proceedings (Art. 224a. of the laws of civil procedure of the FBiH/RS, Art 191a of the BiH Law of Civil Procedure, and Art. 344 of the BDBiH Law on Civil Procedure).

47 A settlement of the claims that the parties do not dispose of may not be concluded before the court (Art. 3 Para 3). When the court adopts an order that disallows a conciliation of the parties, it shall halt the proceedings until such order becomes valid (Art. 321 of the 1977 Law on Civil Procedure).

lating the settlement in BIH, omitted the part that stipulated that the parties shall be required to read the record.[48]

With reference to the effect of court settlement, the solution in the laws on civil procedure in the Republic of Croatia and BiH are entirely identical, that the court shall, throughout the course of the proceedings, ex officio check whether the proceedings are about a subject-matter on which a court settlement was concluded previously and, if it finds that the proceedings are about a subject-matter that a court settlement was concluded previously, it shall dismiss the petition.

The RoC Law on Civil Procedure retained an earlier solution that a party that intends to file a petition may attempt to reach a settlement through the lower first-instance court in the territory where the opposing party has residence. The court that receives such a proposal shall summon the opposing party and inform it about the settlement proposal. The costs of this procedure shall be borne by the proponent.[49]

48 Although the record is composed by the judge dictating aloud to the recording clerk and that the parties are entitled to read the record or demand that it is read to them (Art. 375 of the laws of civil procedure of the FBiH/RS, Art 312 of the BiH Law on Civil Procedure, and Art. 85 of the BDBiH Law on Civil Procedure stipulate that the preparatory and main hearings are audio recorded, and the judge may order the audio recording to be written down, entirely or in part), we find that the previous solution that envisaged the parties being required to read the record of the settlement should have been retained in BiH, because the settlement is an agreement of the parties whereby they settle their relations, so it is advisable that they read it before signing. In addition to the above, the provisions of Art. 195 of the laws of civil procedure of the FBiH/RS, Art. 162 of the BiH Law of Civil Procedure, and Art. 315 of the BiH Law on Civil Procedure „Correcting the decision" relate exclusively to the option of correcting the decision and the order as court decisions, and in no sense to the possibility to correct the court settlement, regardless of it being concluded during civil proceedings, so that the parties, during the reading of the record, might instantly detect errors in names and numbers, as well as other obvious spelling and calculation mistakes and request their correction before signing the settlement.

49 Laws on civil procedure in BiH do not include provisions of earlier Art. 305 of the 1977 Law on Civil Procedure, which envisaged an option of concluding a so-called nonlitigious or praetorian settlement, although the draft entity laws on civil procedure had included it. We are of the opinion that it should be established whether the parties in the Republic of Croatia make use of the option to conclude a court settlement prior to filing a lawsuit, and, if such a provision yields results, that in this country it should be considered de lege ferenda to restore this provision in the laws on civil procedure.

The RoC Law on Civil Procedure does not include such a solution as is included in the laws on civil procedure in BiH that a court settlement may be contested only by a lawsuit.[50]

In the Law on Civil Procedure of the Republic of Serbia,[51] court settlement is regulated in Chapter XXIV entitled „Court Conciliation" and is also covered in four articles, starting with Art. 336 through 340. Art. 336 Para 1 of the above mentioned law stipulates that, during the proceedings, the court shall advise the parties about the possibility of court settlement.[52] Just as in BiH it is stipulated that a court settlement may be concluded throughout the entire course of the proceedings until their valid termination, the same stipulation is contained in the RoS Law on Civil Procedure. Unlike the regulations in BiH, in the Republic of Serbia the law-giver determined that, if a court settlement is concluded after the first-instance decision has been rendered, the court shall adopt an order finding the first-instance court inoperative and shall suspend the proceedings.[53] Consequently, in the Republic of Serbia proceedings shall be suspended, which has not been stipulated here, but only that it shall be found that the first-instance decision is inoperative, and, if the court settlement is concluded before the second-instance court, it is also established that the appellant abandoned the appeal, and that the proceedings are thereby terminated.

50 The law on civil procedure does not include provisions on the remedies to contest court settlement. However, in practice and in theory the prevailing view is that it cannot be contested with regular legal remedies exactly because of its equivalence with a valid court decision and, in view of its obligation law effects, a court settlement may be contested or found invalid in accordance with the rules of civil material law (the Supreme Court of the Republic of Croatia, Rev 505/2008-3, October 28, 2008).

51 The „RoS Official Gazette", no. 72/11, 49/13 – Decision of the Constitutional Court, 74/2013 – Decision of the Constitutional Court, 55/14, and 87/18.

52 Provisions of the laws on civil procedure in BiH in this domain prescribe courts' efforts to get the parties to settle in a somewhat different manner. In effect, according to the provisions of Art. 88 of the laws on civil procedure of the FBiH/RS, Art. 55 of the BiH Law on Civil Procedure, and Art. 211 of the BDBiH Law on Civil Procedure, the court shall, in a manner that does not undermine its impartiality, in the preliminary hearing as well throughout the entire course of the proceedings, strive for the parties to conclude a court settlement. To contribute to achieving a settlement, the court may, when it assesses this as justified, propose to the parties how to settle, taking into account the parties' wishes, the nature of the dispute, mutual relations between the parties, and other circumstances.

53 See Art. 336 Para 3 of the Law on Civil Procedure of the Republic of Serbia.

With regard to concluding a settlement concerning claims that the parties may not dispose of, the solutions in the laws on civil proceedings in BiH and the Republic of Serbia are identical – if in the contents of the settlement they proposed the parties dispose of claims they may not dispose of, the court adopts an order to disallow the parties› settlement and suspends the proceedings until such an order becomes valid.[54]

Art. 337 of the RoS Law on Civil Procedure stipulates that the agrement of the parties about a settlement is entered into the record. The settlement is concluded when the parties, after reading, sign the record. The parties receive certified copies of the record containing the settlement, which has the same force as a court decision. Evidently, there are no essential differences between the legislation in BiH and the Law on Civil Procedure of the Republic of Serbia with regard to conclusion of a settlement, with the exception that in the RoS Law on Civil Procedure, as had previously been regulated by civil procedure, and as still is so regulated in the Republic of Croatia, the parties are required to read the contents of the court settlement, which is not regulated in the laws on civil procedure in BiH. It is important to note here that neither the RoC Law on Civil Procedure nor the RoS Law on Civil Procedure contain provisions that are contained in our laws on civil procedure that determine that, unless the parties achieve an agreement on costs, they may agree for the court to rule on the costs. This paper will consider the costs of conclusion of a court settlement further in a separate section of this paper.

As both our laws on civil procedure and the RoS Law on Civil Procedure stipulate that the court shall ex officio check whether the proceedings are being conducted about a claim for which a court settlement had previously been concluded and, if such a settlement exists, the lawsuit shall be dismissed.[55] The solutions about contesting the settlement is identical, so a court settlement may be contested only in a lawsuit. Unlike our legislation, the RoS Law on Civil Procedure does not specify for what reasons a settlement may be contested, nor does it stipulate the periods of time when this is possible. However, in this segment, courts are applying the provisions of the Law on Obligations.

Lastly, the solution for the process after a court settlement is declared inoperative is also identical, so the procedure shall continue as if the settlement has never been concluded.[56]

54 See Art. 336 Paras 4 and 5 of the Law on Civil Procedure of the Republic of Serbia.

55 See Art. 338 of the Law on Civil Procedure of the Republic of Serbia.

56 See Art 339 Para 3 of the Law on Civil Procedure of the Republic of Serbia.

In addition to the above, in other successor states of the Former SFRY the court settlement as a modality for peaceful dispute resolution was adopted as it had been regulated in the 1977 Law on Civil Procedure in the (Montenegrin) Law on Civil Procedure,[57] (Macedonian) Law on Civil Procedure,[58] and (Slovenian) Law on Civil Procedure.[59]

2.3. Procedural requirements for conclusion of a court settlement

The parties may conclude a court settlement on the subject-matter of the dispute throughout the course of the proceedings until its valid termination. The civil proceedings are initiated by a petition, and the litigation starts when the petition is delivered to the defendant, so from the time of filing the petition with the court until the valid termination of the proceedings it is possible to conclude a court settlement. We are of the opinion tht a court settlement may be concluded even before the petition is filed in the process of instituting protective measures and even provisional protective measures. In fact, pursuant to Art. 276 Para 1 of the laws of civil procedure of the FBiH/RS, a protective measure may be proposed prior to initiation and during court proceedings as well as after the termination of such proceedings, until the enforcement has been completed. When a protective measure is instituted before prior to the

57 „Official Gazette of Montenegro, no. 22/04, 28/05, 76/06, 47/15, and 48/15. In this law, the court settlement is regulated in articles 322 through 329 and earlier solutions are retained in their entirety. Art. 327 of this law aded a solution on the possibility to contest a court settlement by a lawsuit. Only the provisions of this law relative to all solutions of the successor states of former Yugoslavia contain a solution about when a settlement is inoperative if it was concluded with regard to the claims that the parties may not dispose of (Art. 4 Para 3), which is a good solution and we believe that a solution of this type should be included in our laws on civil procedure as well.

58 „Official Gazette of the Republic of Macedonia", no 79/05, 110/08, 83/09, 116/10, 7/11, consolidated text of the Law on Civil Procedure. In the provisions of this law court settlement is governed by Art. 306 through 310 and the solution from the 1977 Law on Civil Procedure has been adopted in its entirety.

59 *Uradni list RS", št. 73/07 – uradno prečiščeno besedilo, 45/08 – ZArbit, 45/08, 57/09 – odl. US, 12/10 – odl. US, 50/10 – odl. US, 107/10 – odl. US, 75/12 – odl. US, 40/13 – odl. US i 10/14 – odl. US: ZPP-NPB20.* In the provisions of this law the court settlement is regulated by Art. 306 through 310. The solutions are identical to those included in the 1977 Law on Civil Procedure.

filing of the petition, the time period not longer than 30 days for the proponent to file the petition will be set in the order to institute protective measures.[60] As the proposal for instituting a protective measure is submitted in writing, and as the proponent of a protective measure must state the demand in which the claim whose protection is sought in the proposal, therefore the claim in terms of the main subject-matter and subsidiary claims (petition) must be already established in the proposal, the opponent of the protective measure may, in a written response to the proposal to institute a protective measure propose the conclusion of a court settlement. The same conclusion may be drawn for a provisional protective measure that also must include the petition and the opponent of the protective measure in his response to the provisional measure may request that a court settlement be concluded,[61] and at the hearing the court may accept the parties' proposal to conclude a settlement. Therefore, concluding a court settlement is possible even during the process of instituting a protective measure prior to filing a claim.

As the court is required to render a decision and prepare a written copy no later than 30 days from the day when the main hearing was concluded, we believe that the parties may petition the first-instance court to schedule a hearing even after the termination of the main hearing, i.e. to receive a court settlement into the record, thereupon the need for rendering the first-instance decision is obviated. The same conclusion can be made for the hearing before the second-instance court, as the second-instance court is also required to render a decision within 30 days of the day the hearing was ended, so if a settlement is concluded subsequently, the need to render the second-instance decision lapses.

When a party personally acts in the proceedings, he/she may conclude a court settlement in such a situation. However, if the party acts in the proceedings through an attorney, then it is necessary to distinguish whether the party issued a power of attorney to a lawyer or the party issued a power of attorney to an attorney who is not a lawyer. If the party in his/her power of attorney has not precisely determined the attorney's powers, an attorney who is not a lawyer may take all actions in the proceedings, but he always requires an express authority to conclude a settlement.[62] Conversely, if a party issued the power

60 See Art. 280, the laws on civil procedure of the FBiH/RS.

61 See how a protective measure is introduced, R. Račić, Enforcement Procedural Law, Banja Luka University School of Law, Banja Luka, 2017.

62 The trial court must *ex officio* ensure that the attorney of the party – physical person who is not a lawyer meets the conditions of Art. 301 of the laws of civil

of attorney to a lawyer to act in the lawsuit, without specifically defining the competences in the power of attorney, the lawyer would be authorized to conclude a settlement. Whether the party's attorney who concluded the court settlement on his/her behalf had proper authorization, is assessed according to the rules of procedural law. For legal consequences of the absence of such power and of exceeding competences, however, the provisions of material law of the Law on Obligations apply. In fact, Art. 87 of the previously cited law regulates exceeding of power boundaries – when an attorney oversteps the limit of his/her powers, the represented party is bound only if he/she approves this such exceeding of boundaries. Art. 88 of the Law on Obligations governs the conclusion of contracts by unauthorized parties, and in accordance with this article the contract concluded by a person as an attorney on behalf of another, without his/her authorization is binding for the person represented without authorization only if he/she approves such a contract after the fact.

It is important to note that, even in the situation when a party's attorney holds a general power of attorney, deposited with the court, these are in general attorneys for legal persons, although this might apply to physical persons as well, the general power of attorney must include the party's express authorization that the attorney can conclude a settlement. We are of the opinion that, in the event that the party failed to present the power of attorney at the hearing when the concludion of the settlement is proposed, the court could not allow it to conclude the settlement. The reason for this would be that such a person could not be instructed to submit the power of attorney, or an ap-

procedure of the FBiH/RS, Art 241 of the BiH Law on Civil Procedure, and Art 50 of the Law on the Brčko District of BiH, i.e., that the party's attorney is his/her spouse, blood relation or an in-law. The view of the case law was that the statement of the party's on the degree of his relationship by blood or marriage with the party, which was not objected to by the other party, requires no additional verification through presentment of appropriate evidence. Although the Law on Civil Procedure does not regulate who and in what way is required to prove the connections by blood and marriage, this court assesses that, by the statement before the court of the nature and the degree of kinship the plaintiff's attorney sufficiently proved that she was related to the Party in this fashion. As the opposing party, the defendant, made no objections, nor did he request a deliberation of this matter, it was not necessary to procure evidence on the existence of a relationship by blood or marriage between the plaintiff and her attorney, so it cannot find that the party was represented in contravention of the provision of Art. 301 Para 1 of the Law on Civil Procedure (Decision of the Supreme Court of the Federation of Bosnia and Herzegovina, no. 070-0-Rev-09-000114 of March 23rd 2010, which wa published in the Case Law Bulletin of the Supreme Court of the Federation of Bosnia and Herzegovina, no. 1/2010, sentence no. 97, p. 66).

proval of the party for concluding the settlement, because the settlement is concluded when the parties sign the record. In fact, the court settlement, as a special contract which is ascribed the characteristics of a valid decision, may only be an unconditional instrument of procedural law, same as a court decision.[63] In such a situation, it would be advisable to postpone the hearing for a brief period. This would alllow the person who failed to submit the power of attorney to submit it at the continuation of the hearing, and to conclude the settlement at this hearing.

In the process of concluding a settlement, when the state, entities and lower levels of government appear as parties, the public attorney ought to have a special authorization to conclude a settlement.[64]

In the case of a settlement arising from the legal basis of damage compensation, or some other claim, that a parent may wish to conclude on behalf of his/her minor child with the other party or through a proxy, this does not require approval of the competent guardianship body because the settlement whose subject-matter is a damage compensation or another claim is not a legal transaction that alienates or encumbers property of a minor child.[65]

The parties may include in the settlement only one part of the claims or one of more stated demands, and in case of material co-litigants from Art 362 Para 1 Point 1 of the laws on civil procedure of the FBiH/RS, Art. 300 Para 1 Point 1 of the BiH Law on Civil Procedure, and Art. 167 Para 1 Point a. of the BDBiH Law on Civil Procedure, in which the rights and obligations arise from the same factual and legal basis, if they can be separated into independent claims or in case of formal co-litigants from Art 362 Para 1 Point 2 of the laws on civil procedure of the FBiH/RS, Art. 300 Para 1 Point 2 of the BiH Law on

63 Triva, S. – Dika, M., *Građansko parnično procesno pravo (Civil Procedural Law),* Zagreb, 2004, p. 473.

64 See Art. 13 Para 20 of the Law on BiH Public Attorney („BiH Official Gazette", no. 8/02, 10/02, 44/04, 102/09, and 47/14), Art 19 Para 3 of the Law on the Public Attorney of the Republic of Srpska („RS Official Gazette", no. 7/18), Art. 9 of the Law on the Public Attorney of the BDBiH („Official Gazette of the Brčko District of BiH", no. 28/06, 19/07, 17/08, 20/10, 15/15, and 28/18).

65 See Art. 266 of the FBiH Family Law („FBiH Official Gazette", no. 35/05, 41/05, and 31/14). In this regard even the case law „(...) a noncontentious settlement on compensation of material and nonmaterial damages to a minor plaintiff which was concluded by the attorney on the basis of the power of attorney conferred by the parents without approval of guardianship bodies, produces the legal effect (...)" Decision of the FBiH Supreme Court no. 51 0 P 001099 12 Rev of July 23rd, 2013, published in the Jurisprudence Bulletin of the FBiH Supreme Court no. 1-2/2013, sentence no. 60, p. 48.

Civil Procedure, and Art. 167 Para 1 Point b. of the BDBiH Law on Civil Procedure a settlement may cover only the part of the claim that is related to the material co-litigant, or a special request related to a formal co-litigant.

In court proceedings in which a counterclaim is being heard, it is possible to conclude a settlement both on the plaintiff›s claim and on the counterclaim, as well as by individual request. We find it possible, even when a counterclaim was not filed, that the parties may include a certain claim of the defendant towards the plaintiff. In the case of potential merger, pursuant to Art. 55 Para 4 of the laws on civil procedure of the FBiH/RS, when the plaintiff in a single claim poses two or more statements of claim, it is possible to conclude between the parties a settlement on one of these claims, even though a conclusion of a settlement on multiple such claims would be possible, because they are mutually exclusive, and a conclusion of the settlement on one claim fulfilled the target of requested legal protection in civil proceedings. In addition, we believe that, both for a potential or subsidiary co-litigation from Art. 363 of the laws on civil procedure of the FBiH/RS, when the prosecutor sues two or more defendant asking that the statement of claim be adopted for the next defendant in the event it is rejected towards the party named higher in the lawsuit, the parties have the option to conclude a settlement with one of the defendants. A court settlement maya also be concluded in the proceedings initiated on the claim of the main intervener.[66]

Only the parties, but no interveners, may conclude a court settlement during the proceedings. Interveners may only accede to the settlement concluded by the parties.[67]

The petitioned court that received a motion to take an action requested in the motion is entitled to enter into the record the agreement of the parties

66 Art 364 of the laws on civil procedure of the FBiH/RS, Art. 301 of the BiH Law on Civil Procedure, and Art 168 of the BDBiH stipulate that the person who claims an asset or right, wholly or in part, about which other people have already instituted court proceedings may sue both parties in the same lawsuit before the court which is conducting the proceedings until the proceedings are terminated and final. A fundamental presumption to create this legal co-litigation is that the proceedings are ongoing before a court about an asset or a right that a third party, the potential plaintiff, claims (pretender claim). The plaintiff may pose the same claim to both defendants (e.g. to establish some right of his) or different claims – e.g., to one of the parties in the earlier proceedings to surrender assets and towards the other to establish their property title or that the other party has no such title. More on this in J. Čizmić*; Komentar Zakona o parničnom postupku (Commentary of the Law on Civil Procedure),* Sarajevo, 2016, p. 1048.

67 High Commercial Court of the Republic of Croatia Pž-1251/05 of 8 September 2005.

on the conditions and the manner of regulating their dispute by a settlement in a hearing it holds, although we are of the opinion that the assessment of its admissibility must be conducted by the court from which it received a request for provision of legal aid where the proceedings are conducted, as the petitioned court, as a rule, was not fully cognizant of the subject-matter indispute, does not have the case file, so it cannot properly apply the provision of Art 3 Para 2 of the Law on Civil Procedure.

The parties have the option to conclude a court settlement during the enforcement procedure as well. The provision of Art. 21 of the Law on Civil Procedure stipulates that the provisions of the Law on Civil Procedure duly apply in the enforcement procedure, unless otherwise specified by this or another law. Pursuant to the provision of Art 3 of the Law on Civil Procedure, parties may freely dispose of the claims they lodged during the proceedings so, in line with this procedural authorization, which constitutes the foundation of the principle of disposition, parties may conclude a court settlement until the termination of the proceedings. Such disposal by parties does not contravene enforcement regulations, as, pursuant to Art. 87 of the Law on Civil Procedure, parties may conclude a settlement on the subject-matter in dispute (court settlement) during the entire course of the proceedings, and they also may conclude it until the termination of the enforcement procedure, in view of a due application of the provisions of the Law on Civil Procedure in the enforcement procedure. In this case, in a court settlement the enforcement court would have to note that the decision is without legal effect. In the same sense, parties have the option to conclude a court settlement also in such noncontentious proceedings in which they dispose of claims, as the provisions of the Law on Civil Procedure duly apply in non-contentious proceedings.

2.4. Subject-matter and contents of court settlements

The provisions of Art. 87 Para 1 of the laws on civil procedure of the FBiH/RS, Art. 56 Para 1 of the BiH Law on Civil Procedure, and Art. 212 Para 1 of the BDBiH Law on Civil Procedure stipulate that a court settlement may be concluded on the subject-matter in dispute. The above implies that all those civil law relationships tht may be the subject-matter of civil proceedings may be the subject-matter of a settlement. An exeption relates to those disputes in which the parties may not dispose of the claims involved (Art. 3 Para 2 of the Law on Civil Procedure). Legal theory has taken the position that it can encompass an even broader subject-matter than the subject-matter of the actual

dispute in question,[68] while the Law on Civil Procedure stipulates that a court settlement may relate to the entire statement of claim or to one of its parts. Judges, however, rarely resort to this, so a settlement typically covers the subject-matter of the dispute. We believe that the subject-matter of a court settlement as a rule should cover the subject-matter of the dispute, but the interest of the parties to use it to regulate other disputed legal relations connected with the subject-matter should be recognized so as to preempt institution of new proceedings between the same parties. If a court settlement is concluded about one part of the statement of claim, that part is deemed closed, and the civil proceedings shall continue over the remainder of the statement of claim. In Art. 1 of the Law on Civil Procedure it is stipulated that courts deliberate and decide in civil law disputes, without specifying in which disputes, i.e., listing specific relations and areas of regulation are omitted, unlike in earlier legislation, the 1998 Law on Civil Procedure as well as the 1977 Law on Civil Procedure, which had defined what civil law relations were. According to these latter laws, these are disputes in the domain of personal and family relations, labor relations, as well as property relations and other civil law relations between physical and legal persons. Existence of a dispute between a holder of a title and a holder of an obligation in a given legal relationship, infringement or endangerment of a subjective civil right is a prerequisite for instituting civil proceedings, which justifies involvement of a court for protection of rights.[69] Art. 16 of the Law on Civil Procedure stipulates that, until the finality of the decision, ex officio checks whether dispute resolution falls within the court›s jurisdiction. This provision leads to the conclusion that resolution of all disputes that may arise from civil law relations falls under courts' jurisdiction, unless some of these disputes is placed under the jurisdiction of another court or state body by a special law.

A court settlement may be concluded only in those disputes in which the parties dispose of the subject-matter.[70] Accordingly, neither marital dis-

68 Triva, S., Belajac, V., Dika, M., *Građansko parnično procesno pravo (Civil Procedural Law),* 6. ed., Zagreb, 1986, pp. 472–473.

69 J. Čizmić; *Komentar Zakona o parničnom postupku (Commentary of the Law on Civil Procedure),* Sarajevo, 2016, p. 36.

70 The plaintiff may not present a statement of claim that would order the defendant to conclude a court settlement, as the conclusion of a court settlement depends on disposition of the parties to the dispute. If the plaintiff presented to the first-instance court a petition with such a statement of claim, the court must declare improper jurisdiction, abolish any actions already implemented and dismiss the petition (High Commercial Court of the Republic of Croatia, Pž 1061/06 of February 24, 2009).

putes nor the disputes in relations between parents and children may be subject-matter of a court settlement. Art. 272 Para 1 of the Family Law of the Federation of Bosnia and Herzegovina stipulates that marital disputes are disputes over existence or non-existence of a marriage, over annullment of a marriage or divorce, while Para 2 of this article stipulates that the disputes in relations between parents and children are: disputes on establishing or contesting maternity or paternity, disputes about child custody, about the manner of maintaining personal relations and direct contacts of a child with the other parent and about parental care, and disputes about child support, irrespective of whether these are resolved independently or conjointly with marital disputes and disputes about maternity and paternity.

Mutual concessions by the parties is unimportant for court settlement, unlike for noncontentious settlement (Art. 1089 of the Law on Obligations).[71] We believe it possible that parties may conclude a court settlement through mutual concessions with regard to the subject-matter in dispute, but also that the defendant agrees to fulfill the claimed obligation or that the plaintiff abandons his/her claim.[72] A settlement may modify the legal relationship between the parties (agree on another performance, another time period for compliance, discharge in installmens). The case law demonstrates that a settlement typically occurs with the plaintiff giving up a portion of the claim, both the main and the subsidiary one (default interest), as well as in a situation when

71 Conversely, Branko Čalija and Sanjin Omanović *(Građansko procesno pravo/Civil Procedural Law)* find that a settlement is always a result of a compromise, i.e., of a mutual concessions of the parties with regard to the subject-matter in dispute.

72 Besides the provisions of the Law on Civil Procedure, the provisions of the Law on Obligations duly apply to court settlement, both in the sense of the general terms for conclusion of contracts and in the sense of special requirements for conclusion of court settlements as legal transactions. In the process of concluding a court settlement, the duty of the court is not only to enter the content of the court settlement into the record, but also to help the parties settle, while taking into accounts the wishes of the parties, the character of the disputes, relations between the parties, and other circumstances. This implies the duty of the court to take into account interests of both parties, with a requirement to investigate whether it is their true will to end the proceedings by concluding a settlement instead of by a recognition of the statement of claim or by abandonment of the statement of claim. Therefore it is essential that the court first finds out what the will of the parties really is, particularly the will of the party that completely concedes the right of the other party, and for what reason the former party recognizes the claim of the other party or renounces his/her claim in the form of court settlement instead of by a statement of recognition or abandonment of claim. In addition to the above, the court shall take into account the public interest, by establishing whether such disposition of the parties is admissible.

the defendant recognizes the statement of the claim, with the plaintiff accepting repayment in installments). A court settlement may be condemnatory, constitutive and declarative. A condemnatory court settlement constitutes an enforceable order. With reference to a petition for establishment, a settlement may relate to establishment of existence or non-existence of a right or a legal relationship, but it may also relate to establishment of existence or non-existence of a fact, if so envisaged by a special law or another regulation.[73]

2.5. Admissibility of court settlement

The court shall not allow the parties› dispositions that are in conflict with coercive regulations, so the court shall not allow a settlement in which the parties dispose with a claim which they may not dispose with. The subject-matter of a court settlement may be only such civil law relations that may be the subject-matter of deliberation and decision in civil proceedings and that are regulated by discretionary legal standards, so that the parties may freely dispose of them.[74] Coercive regulations are general cogent standards contained in legislation and in regulations derived from legislation. Cogency of regulations may follow from the formulation or from the purpose of a standard. Numerous subjective, property and other rights of parties› are governed by coercive regualtions, and partly by international treaties. Acquisition and loss of such rights, or their modification or circulation depend on the cogent regulation that excludes the disposition by parties. Provisions of coercive nature are included in many other material laws: on construction land, forests, waters, on roads, on tenancy, on hunting and fishing, etc. In addition to the above, the entity laws treat rights *in rem* as assets out of circulation, or their circulation is restricted or conditioned. When concluding a court settlement whose subject-matter would involve rights and obligations related to the above material regulations, the court would have to examine whether such disposition by the parties is admissible.

73 This refers to special claims for protection against discrimination pursuant to Art. 12 of the Law on the Prohibition of Discrimination („BiH Official Gazette", no. 59/09 and 66/16). This article governs petitions for protection against discrimination, and these include the petition to establish discrimination, petition to prohibit or elimination of discrimination, and petition for damage compensation. We find that a court settlement is possible in all these proceedings.

74 J. Čizmić; *Komentar Zakona o parničnom postupku (Commentary of the Law on Civil Procedure),* Sarajevo, 2016, p. 317.

When a court settlement is being concluded, the court is not required to pass an order that it is recognized, allowed or adopted, as it is typically stated in the records of the courts in which court settlements are concluded. If the court determines that a court settlement does not contravene Art. 3 Para 2 of the Law on Civil Procedure, the judge shall pass no order, as the duty of the court is to pass an order only if it finds the opposite, that the parties wish to dispose with the claims they may not dispose of. During the process of concluding a court settlement, the court examines whether the parties propose a court settlement to dispose of claims in contravention with coercive regulations.[75]

75 From the enclosed evidence it indisputably follows that, in the case at hand, this refers to the city's construction land. The contents of the court settlement as proposed by the parties implies that the shape and surface area of the parcels, specifically cadastral plots 6/1, 6/5, and 6/6 are altered, which means that the parties, in the proposed court settlement, alterh the shape and surface area of cadastral plots that are by nature plots of the city's construction land. As this specific case concerns both land built on and land built on, bearing in mind the provision of Art. 19 of the Law on Construction Land it is evident that the parties in proposing this court settlement dispose of a claim they may not dispose of. In fact, a cogent provision of the Law on Construction Land stipulates that the shape and surface area of the city's construction land may be changed only by the procedure to repurpose the land, on the basis of a spatial plan or a parcelization plan, i.e., in their proposed of court settlement the parties, outside the rules of repurposing land on the basis of a spatial plan or a parcelization plan, alter the shape and surface area of parcels that are the city's construction land, which is not possible, so this court did not accept the conclusion of a court settlement as the parties disposed of claims that they may not dispose with. The land repurposing procedure based on the adopted spatial plan and parcelization plan is regulated by the Law on Spatial Planning, and the same law stipulates which body adopts the spatial plan and parcelization plan, so the spatial plan of a canton, or the City, is a long-term plan, adopted by the legislative body of the canton, or the city council (Art. 15 of the Law on Spatial Planning), while the parcelization plan for areas of significance for the Federation is adopted by the body authorized by the Government and, for other areas, the body or agency authorized by the canton or the City (Art 56 Para 2 of the Law on Spatial Planning), which, in connection with this plan, adopts decisions on modification of the shape and surface area of plots repurposed for their ultimate purpose. It also means that, in court proceedings it is not possible in any case to alter the shape and surface area of the city's construction land, so the court would not have jurisdiction for such a procedure, but instead an administrative body, as stipulated by the Law on Spatial Planning (unpublished decision of the Zenica Municipal Court, no. 43 0 P 101548 13 P of May 21, 2015 confirmed by the decision of the Zenica Cantonal Court no. 43 0 P 101548 15 Gž of January 1, 016, and the request for revision of the second-instance decision was dismissed by the FBiH Supreme Court in its decision of April 9, 2019. From the explanation of the decision of the FBiH Supreme Court, it follows that the contested decision of the second-instance court was not the final decision that concluded the proceedings, as the petition and counter-petition still stand, as well as the duty of the first-instance court to decide on the merits of the statement and counter-statement of claim).

When the court establishes that claims involved are not at the disposal of the parties, then it is required to counsel the parties that they may not conclude a court settlement. If the parties even after the court›s advice that they may not conclude a court settlement request its conclusion, then the court settlement should be entered into the record upon the motion of the parties with the remark that this is a statement of the parties, and the court should adopt an order disallowing the parties› settlement and halt the proceedings until this order becomes valid.[76] This halt represents only factual temporary stoppage of some procedural activities and it has no legal consequences.[77] We believe that the first-instance court should not pass a decision to halt the proceedings. In order for the court to even be able to assess whether the given proposal of the parties to conclude a settlement indicates that these are the parties› dispositions that are in contravention of coercive regulations, we believe that the court should postpone the hearing and schedule the continuation after a brief period of time so as to determine in the meantime whether the dispositions in question are such that the parties may not dispose of them. This is a practical solution for the courts, as the parties at the hearing submit a proposal of the court settlement, and the judge at that hearing, in view of the complexity of the dispue, is not in position to immediately rule whether the proposal of the settlement is in contravention of Art. 3 Para 2 of the Law on Civil Procedure.

The view of the case law is that a court settlement cannot be concluded about the nullity or validity of a certain legal transaction.[78]

76 A proposal of court settlement may not be rejected by claiming that it contravenes coercive regulations without permitting the parties to present its contents. The first-instance court needed to enter the contents of the proposal of court settlement into the minutes of the hearing of August 15, 2007, and only then assess whether the given proposal indicates that the disposition in question contravenes coercive regulations and societal rules of morality, and such dispositions may not be allowed, pursuant to the provision of Art. 3 Para 2 of the Law on Civil Procedure (Decision of the Appelate Court of the Brčko District of Bosnia and Herzegovina, no. 097-0-Gž-07-000521 of May 8, 2008, published in „Domaća i strana sudska praksa" (Domestic and Foreign Case Law), no. 39, 2010, p. 53).

77 Also Čizmić, p. 319.

78 Supreme Court of the Republic of Croatia, no. Rev-1411/99 of July 7 2002, published in „Domaća i strana sudska praksa" (Domestic and Foreign Case Law), no. 21, 2007, p. 87.

2.6. Concluding a court settlement

A court settlement must be concluded in writing before the competent court. The agreement of the parties on the settlement is entered into the record. From this it follows that, during the conclusion of a court settlement, the court does not adopt an order, but it enters the contents of the settlement into the record, whereupon, in line with the proposal of the parties on record declares that the parties concluded a settlement with the proposed content. It is unnecessary and pointless to include a statement on the abandonment of the petition into the text of the statement, as a court statement has a direct constitutive effect on the termination of the proceedings. If the settlement was concluded at the hearing, it is entered into the record of the hearing, and if the agreement of the parties was reached outside the hearing, it is entered into a special record. When the parties reach agreement about the settlement during a local inspection, then it is entered into the inspection record, which is signed by the parties. Since it is, as a rule, a record handwritten by the typist, this is no obstacle from concluding a settlement of the parties in this fashion, because the settlement between the parties is most credibly concluded during a local inspection, in line with the parties› proposal and with the assistance of expert witnesses. This record is typed up to allow issuance of a certified copy of the record to the parties, while the original record remains in the file. It is also possible that the parties may proceed from the local inspection directly to the court and that the record of the parties› agreement is composed there. We are of the opinion that the parties to a court settlementy may invoke findings and opinion evidence of expert witnesses, which may constitute part of the findings, as such one-sided dispositive procedural actions fully determine the subject-matter of the settlement, and such procedure would enable the parties to implement the settlement with competent bodies (e.g., the cadaster, land registry).

Within the meaning of the provision of Art. 90 Para 1 of the laws on civil procedure of the FBiH/RS, Art 57 Para 1 of the BiH Law on Civil Procedure, and Art 213 para 1 of the BDBiH Law on Civil Procedure, the court shall not adopt an order approving the concluded settlement. If the court were to adopt such an order, it would have no legal effect, consequently no appeal against that decision or that settlement is admissible.

The duty of the court is to ensure that the concluded court settlement, if it involves performance, is enforceable, and time periods for fulfillment of the obligation set.[79] In the same way, it is an obligation of the court to draw the

79 A court conciliation is enforceable if the claim to be satisfied is due. The maturity

parties› attention to unclear and vague provisions in the settlement and to assist them in this regard to conclude a settlement that would be implementable. A settlement could not be concluded conditionally, because, as it had been noted, a court settlement has the attributes of a final decision, so, as an instrument of procedural law it can only be unconditional.

When financial claims are the subject-matter of a court settlement, the parties may agree that, in the event of the debtor›s delay in debt repayment, the claimant is entitled to default interest from the due date to the time of payment. In the event that the parties do not stipulate payment of default interest in this manner, they may not seek it in enforcement procedure. In fact, the principle of formal legality is one of the principles of enforcement procedure, which means that, in an enforcement procedure, the court is bound by the content of the final order. In the event that default interest was not stipulated in the final order, the court settlement, then the court cannot make that stipulation.

If, when concluding the court settlement, the parties disagree which one of them will bear the cost of the proceedings, the court may not decide outside the authorization of Art. 391 of the laws on civil procedure of the FBiH/RS, Art 328 of the BiH Law on Civil Procedure, and Art 125 of the BDBiH Law on Civil Procedure. In that case, each party bears his/he own costs incurred in proceedings.[80]

The parties may abandon the settlement, for instance if they disagree about the costs of the proceedings that did not enter the text of the settlement or if one party reconsiders before signing. In that case, the hearing continues, i.e., if the parties tried to settle in another stage of the proceedings, the proceedings will continue.

The record of a court settlement has the force of an official document, and its contents are assumed to be true until proved otherwise.[81]

---

of a claim is proven by the record of conciliation, an official document or a legally certified instrument. The maturity that may not be proven in this manner is proved by a valid decision in civil proceedings to determine maturity (Art. 26 of the Law on Enforcement Procedure).

80 As the parties, when they concluded the court settlement, failed to agree on the costs of the proceedings, nor did they agree to leave the decision on the costs to the court (Art. 90 Para 3 of the Law on Civil Procedure), the first-instance court properly applied the provision of Art 391 Para 1 of the Law on Civil Procedure, when it instructed each party to bear his/her own costs. The term „own costs" refers to such costs that the party incurred during the proceedings, or that he/she is legally required to pay (e.g., the court fee). (Decision of the Bihać Cantonal Court, no. Gž-881/04 of January 25, 2007, published in „Domaća i strana sudska praksa" (Domestic and Foreign Case Law), no. 21, 2007, p. 47.

81 BiH Supreme Court, no. Rev-660/88 of July 14, 1989, published in Porobić et al.,

2.7. Effect of a court settlement

A court settlement has the same legal effect as a final court decision. It regulates with finality the disputed relationship of the parties. Civil proceedings may no longer be conducted over the subject-matter of the court settlement, just like for a final *res judicata.* It is for this reason that the court is required to check whether a court settlement has previously been concluded on the subject-matter in dispute in each stage of the proceedings (in the preparatory stage for the main hearing, during the main hearing, in the second-instance proceedings and in the procedure of application of extraordinary legal remedies).

When the court determines that the subject-matter disputed by the parties in the civil proceedings has already been resolved by a court order in a previous dispute, it will dismiss the petition. The validity affected by the court settlement would not, therefore, even tacitly been annulled by a new settlement of the parties over the same subject-matter in dispute, if that is recognized or discovered by the court. The court discovers the existence of a court settlement from the objections of the parties, althought the court may establish the existence of a previously concluded settlement in another way (a settlement concluded before a judge, from conversation with other judges, by accessing the Case Management System – BiH HJPC's CMS).

An appeal against the decision to dismiss the petition because a court settlement over the same subject-matter had already been concluded may be lodged with a second-instance court. Only a court settlement is an enforceable order, as per the legal rules of the enforcement procedure.[82] A noncontentious settlement does not have that attribute, but represents only an agreement of the parties about the manner of regulating the disputed relationship, which can be achieved only in civil proceedings. Out of court, the parties may conclude a noncontentious settlement verbally or in writing. It has no effect on the actual termination of the civil proceedings if the plaintiff subsequently does not withdraw his/her petition in the civil proceedings. However, in the continuation of the proceedings, both the plaintiff and the defendant may refer to the concluded noncontentious settlement and prove that they regulated their rights and obligations in a different manner, so the final ruling on the statement of claim may depend on such noncontentious settlement.

Zakoni o parničnom postupku sa komentarom i sudskom praksom (Laws on Civil Procedure, with Commentary and Case Law), Sarajevo, 2004, p. 581.

82 Art. 23 of the Law on Enforcement Procedure.

2.8. Contesting a court settlement

A theoretical, but also judicial dilemma with respect to the contestability of court settlements (by a lawsuit or by an extraordinary legal remedy of retrial) has been resolved with the passing of the new Law on Civil Procedure.[83] Consequently, a court settlement may not be contested in a lawsuit and if a party appeals, such an appeal should be thrown out as inadmissible. A court settlement also cannot be contested by the motion for retrial, and in the event that a party submits a motion for retrial, such a motion is to be thrown out as inadmissible.

A court settlement may be contested if it was concluded in error, under coercion or fraudulently, meaning when it is the matter of a lack of consent. During the proceedings, the plaintiff needs to prove that there are reasons from Art 111 of the Law on Obligations for the court to annul the court settlement. The petition may be filed within three months of the day when the reasons for contestation were established (the subjective deadline) and no later than five years from the day the court settlement had been concluded (the objective deadline).

Although a court settlement is by its nature a contract, the rules that apply in the event of contract non-compliance do not apply to this legal institution because a court settlement has the force of a final court order and it may be enforced in the judiciary enforcement procedure.

On the pasive side, all parties that participated in the conclusion of the court settlement must be included, as necessary co-litigants.[84]

The updated provisions of the Law on Civil Procedure stipulate that, if a court settlement is annulled, the proceedings will resume as if the court settlement has never been concluded.

2.9. Concluding observations

A settlement is a contract between the parties. This applies to the court settlement as well. It is concluded through the parties› disposition, so for it to

83 More on contestation: Marija Salma, *Pobijanje sudskog poravnjanja (Contesting Court Conciliation),* Zbornik radova Pravnog fakulteta u Novom Sadu (Collection of Papers of the Novi Sad Law School), 2/2011, pp. 139–154.

84 Decision of the Supreme Court of the Federation of Bosnia and Herzegovina no. 070-0-Rev-08-001725 of January 26 2007, published in the Case Law Bulletin of the Supreme Court of the Federation of Bosnia and Herzegovina no. 1/2010, p. 67.

be valid, all procedural and material preconditions need to be in place just as for any other contract: freely expressed will, that it was not expressed under coercion, fraudulenty or in error. If these material conditions are non-existent, as a rule both the court and noncontentious settlements may be contested in civil proceedings, just as any other contract. The court *ex officio* checks the presence of procedural and material conditions.

By concluding a court settlement, the parties have the option to arrange their disputed relationship as it suits them best. The parties reach the settlement potentially by concessions, but also by recognition or renunciation of their claim. In the settlement, the parties determine who bears the costs and what the costs are. In the proceedings, the court will notify the parties of the option to conclude a court settlement and will assist them with it. The court should not exert any pressure, influence the will of one party, present the likelihood of an unfavorable outcome of the dispute so that party would decide to conclude the settlement, instead that will must be free. The parties decide freely whether to enter into conclusion of a court settlement and in the course of that process may make mutual concessions on their claims. The court shall assist the parties to identify the right solution to resolve the disputed relationship through a settlement, taking into account the will of the parties, nature of the dispute, the parties› relations, and other circumstances. It will also ensure that the settlement is enforceable, if it involves performance, and that the time periods for fulfillment of the obligations are set, etc.

In addition to its duty to remind of the settlement and to assist the parties to conclude it, the court is also required to prevent any dispositions that the party wish to make in the settlement (avoiding the court decision) and that are in contravention of Art. 3 Para 2 of the Law on Civil Procedure.

The decision of the parties whether and when potentially they will conclude a court settlement still mainly depends on their assessment of the duration of the proceedings, level of costs, and, naturally, the most important criterion, the likelihood of success in the dispute. Ultimately, concluding a court settlement allows the parties to maintain in the future good relations they had before the dispute arose, while this cannot be expected if civil proceedings are concluded with a final court decision. We believe that, by promoting a culture of peaceful dispute resolution through motivating courts to end disputes peacefully by concluding court settlements, certain favorable effects may be achieved in the sense of a greater share of court settlements in the total number of completed civil proceedings, which certainly constitutes a strong contribution to the protection of human rights and to the effectiveness of the judiciary.

To increase the number of concluded court settlements, and thereby achieve a greater effectiveness of courts, we are of the opinion that additional training and continuing education of the judges in civil law departments on application and learning of the methodology and techniques of peaceful dispute resolution, which should be achieved through constant training within the framework of continuous professional training implemented by the entity centers for training of judges and prosecutors. In this respect, it is also necessary to follow the trends from other countries that record high percentages of concluded settlements in civil proceedings, and apply their experiences here. In addition, the focus on peaceful dispute resolution through concluding settlements should include other major stakeholders in the proceedings, which primarily means lawyers. We believe it to be necessary to also conduct additional training of lawyers within the framework of the entity bar associations in order to increase the number of proceedings that end in concluded settlements. To achieve this, all stakeholder in this process must be appropriately motivated. If a concluded court settlement would be valued twice as much as a verdict passed after conduct of the main hearing, judges would be more motivated to actively direct the parties toward concluding a settlement. Adequate compensation would be an additional motivation for lawyers, and exemption from payment of the court fee on a settlement, through appropriate amendments to the law on court fees, for the parties.

Lastly, to increase the number of concluded settlements, and consequently of disputes resolved in alternative ways, we are of the opinion that the consciousness and settled habits of how the proceedings are conducted of all participants in this process need to change. In fact, although the possibility to reach a settlement exists in many proceedings, most end only with the validity of a court decision, and some not even then, because parties resort to extraordinary legal remedies, appeals to the BiH Constitutional Court, and even to filing new petitions, all of which is related to the authority of the courts. And it is the authority of the ourts that should be used as a way to end disputes in civil proceedings peacefully by conclusion of court settlements.

Mirjana Kevo
Minja Belović

3. COURT SETTLEMENT

A court settlement or court conciliation is a special legal institution governed by the provisions of Art 87-93 of the Law on Civil Procedure which effectively represents a way to resolve disputes which is typically achieved by mutual concessions of the parties (the plaintiff and the defendant). If the proposal of one party to conclude a settlement/conciliation is rejected by the other party, the dispute continues following the rules of civil proceedings. Then the litigation, as a rule, ends in a ruling. If the proposal to conclude a settlement/conciliation is accepted, the litigation ends in an agreement of the parties before the court. Therefore, the court settlement/conciliation is one of the forms to end civil proceedings without a court decision on merits. However, the agreement on concluding a court conciliation has the force of a valid court decision.

The purpose of this paper is to examine the institution of court settlement/conciliation, stages when it can be concluded, procedural legitimacy for its conclusion, the subject-matter of the court setlement, procedural legal effects of the court settlement, the moment of conclusion of the court settlement and its contestability.

Key words: court settlement, legal nature, contesting the settlement.

3.1. Introduction

A court settlement represents a procedural law contract whereby the parties regulate their civil law relations that they may freely dispose with, and is one of the options for termination of civil proceedings. Instead of the procedure leading to a court decision, the parties, by concluding a court settlement, renounce the request for involvement of the judicial authority to resolve a disputed material law relationship. The option to conclude a court settlement is derived from the principle of disposition in civil proceedings. This means that instituting the proceedings, their continuation, succession of procedural stages, and the termination of the proceedings depend on the will of the parties. On the basis of this principle, all procedural laws in BiH, i.e., the FBiH Law on

Civil Procedure,[85] Republic of Srpska Law on Civil Procedure,[86] BDBiH Law on Civil Procedure,[87] and the Law on Civil Procedure before the Court of Bosnia and Herzegovina[88] regulate the conclusion of court settlements in the identical way: „the parties may conclude a settlement about the subject-matter in dispute throughout the course of the proceedings until their final conclusion (court settlement)". The parties themselves determine the contents of the court settlement while, naturally, taking into account the legal limitations. The plaintiff concedes in his/her attack, the defendant in his/her defense.

3.2. Notion and legal nature of court settlement

A court settlement (conciliation, *res iudicialiter transacta*) is a contract whereby the parties regulate their civil law relations that they may freely dispose with, concluded in writing within or outside civil proceedings, before a competent court and allowed by the court, with the property of a final order, and, if it creates an obligation of performance, also the property of a court order.[89] Conclusion of a court settlement causes termination of the proceedings, so the law-giver always had an interest to encourage parties to resolve their disputes peacefully.

The legal nature of court settlement in legal theory had been much disputed, and the differences in views created various practical ramifications. According to one view *(Rosenberg, ZPR, 1954, p. 58),* a court settlement is a material law contract and does not include elements of procedural law. Therefore, according

85 FBiH Law on Civil Procedure, "FBiH Official Gazette" no. 53/03, 73/05, and 19/06, hereinafter the FBiH Law on Civil Procedure of 2003, FBiH Law on Amendments to the FBiH Law on Civil Procedure, "FBiH Official Gazette", no. 98/15, hereinafter the Amendments to the FBiH Law on Civil Procedure.

86 The Republic of Srpska Law on Civil Procedure, „RS Official Gazette", no. 59/2003, 85/03, 74/05, 63/07, hereinafter the RS Law on Civil Procedure. Law on Amendments to the RS Law on Civil Procedure, „RS Official Gazette", no. 6/13, hereinafter the 2013 Amendments to the RS Law on Civil Procedure.

87 The Brčko District of Bosna and Herzegovina Law on Civil Procedure, „BDBiH Official Gazette", no. 28/18, hereinafter the BDBiH Law on Civil Procedure.

88 The Law on Civil Procedure before the Court of Bosnia and Herzegovina, „BiH Official Gazette", no. 36/04, 84/07, 58/13, and 94/16, hereinafter the BiH Law on Civil Procedure.

89 S. Triva, V. Belajec, M. Dika, *"Građansko parnično procesno pravo" (Civil Litigation Procedural Law),* 6th ed. Zagreb, 1986, pp. 470-478. Compare S. Triva, M. Dika, *"Građansko parnično procesno pravo" (Civil Litigation Procedural Law),* 7th modified and amended ed. Zagreb, 2004, pp. 569-578.

to this view, which can be termed material law view, by its nature a court settlement is no different from the settlement on rights and obligations which are not the subject of civil proceedings (noncontentious, material law). It differs from the noncontentious settlement only that, in addition to material, it also has procedural legal effects. However, this view has been criticized because a court settlement cannot be conceived without elements of procedural law: it must be declared before a court, a court assesses its admissibility, a record is composed about the court settlement, a court settlement has effects in the domain of procedural law (finality and enforceability).

According to a second, contrary view, *(Baumbach-Lauterbach, ZPO, 1966, p. 635, Pollak, p. 414, Petchek, p. 291),* a court settlement is only a procedural act. Only procedural law is applicable in assessing the validity of a court settlement. This theory was criticized because it departed from reality: the will of the parties for the civil proceedings to end has its cause regularly in the agreement whereby they eliminate their dispute in material law relations.

According to a third view *(Fasching, Kommentar II, p. 967, Holzhammer, p. 186, Bruns, p. 260),* a court settlement is a sum of two acts, material and procedural legal contracts. After the parties consensually eliminated the dispute in their relationship, with one mind they declare their will for the proceedings to end. The two elements are independent from each other and their validity is assessed separately according to respective laws.

According to a fourth view *(Rosenberg, ZPR, 1986, p. 816, Lent – Jauering, p. 145, Nikisch, p. 272, Thomas – Putzo, 1970, p. 876, Arens, p. 173, Blomeyer, p. 323),* the court settlement has the nature of a mixed contract. It differs from the preceding opinion because the two above mentioned elements do not retain their independence, but they are inseparable and in essence constitute a single act. This interpretation fully takes into account the will of the parties, because it is correct to start from the fact that, with a court settlement, they seek not only to regulate their relationship, but at the same time to end the proceedings and in such a way that the court settlement will replace a court decision. The procedural theory embraced the dominant view that the court settlement is a mixed, procedural and material legal contract.[90] Its validity should be assessed

90 For more details on the legal nature of court settlement, see in B. Poznić, V. Rakić-Vodinelić, *Građansko procesno pravo (Civil Procedural Law),* 15th modified and amended ed. Belgrade, Savremena administracija (hereinafter: Poznić – Rakić-Vodinelić), 1999, pp. 333-338, B. Poznić, *Građansko procesno pravo (Civil Procedural Law),* 5th amended ed., Savremena administracija (hereinafter: Poznić), 1976, p. 344.

from the standpoint of civil procedural and civil material law.[91] Besides having certain procedural legal effects, it is also a contract whereby the parties regulate their civil relations which they can freely dispose with. Its conclusion before a court in a strictly prescribed format signifies that it is a strictly formal contract. Relative to its content, it is always a civil contract, so its validity is also assessed relative to the rules that apply to the material law side of such a legal transaction. The material legal nature of the court settlement is also reflected in the fact that it is contested on the basis of the lack of consent.

3.3. Prerequisites for concluding a court settlement

The following prerequisites need to be met for a court settlement to be admissible:

1. jurisdiction of the court;
2. proper composition of the court;
3. capacity of contracting parties;
4. legal interest;
5. admissibility of subject-matter and contents; and
6. proper form of the contract on court settlement.[92]

The settlement concluded before an unqualified court may be contested only in the case of the absolute absence of jurisdiction of the court.

The composition of the court is proper if the settlement was concluded before a judge of a first-instance court, or before the president of the council of a second-instance court. In a broader sense, the court was not properly composed if a judge who should have been exempted took part in making the decision.

To conclude a court settlement, the parties must possess both the capacity to appear in court and the capacity to sue and be sued, i.e., they must be properly represented, otherwise the settlement is deemed absolutely null and void.

To conclude a court settlement, the parties must have certain legal interest, and it does not exist if the issue was *res judicata,* if a settlement had already been concluded about the same subject-matter or if the plaintiff in a

91 See in S. Triva, *Građansko procesno pravo I (Civil Procedural Law I),* Narodne novine, Zagreb (hereinafter: Triva), 1965, p. 480.

92 Also Triva – Dika, *op. cit.,* p. 570.

previous lawsuit abjured the statement of claim. In civil proceedings parties need not prove a particular legal interest to conclude a court settlement, in such proceedings legal interest is unquestionable, a settlement renders further litigation redundant.[93]

The next prerequisite for admissibility of a court settlement is that the subject-matter and contents are allowed. The court will not allow a settlement to be concluded if it determines that in its contents it is in contravention of coercive regulations.

Proper format is an essential prerequisite for admissibility of a court settlement. A court settlement is a strictly formal, written contract, and maintaining proper format is an essential prerequisite for its admissibility and validity.

3.4. Stages when a court settlement may be concluded and the role of the court

The parties may conclude a settlement on the subject-matter in dispute throughout the course of the proceedings until their final conclusion (court settlement),[94] both before the first-instance court and during the proceedings before the second-instance court until the passage of the second-instance decision on appeal. In this way, the need to pass the first-instance decision is obviated if the settlement is concluded after the end of the main hearing but before the adoption of the first-instance decision, or the need to pass the second-instance decision.[95] If, however, the parties conclude a settlement after the passing of the first-instance decision, the first-instance court shall adopt an order finding the first-instance decision inoperative.

When attempting to conclude a court settlement, the tactfulness of the judge and his/her ability to mediate in peaceful dispute resolution become particularly evident.[96] Certain judges possess innate or learned abilities (high

93 *Ibid.*

94 See Art. 87 Para 1 of the FBiH Law on Civil Procedure, Art 87 Para 1 of the RS Law on Civil Procedure, as well as Art. 210 Para 1 of the BDBiH Law on Civil Procedure, and Art. 54 Para 1 of the BiH Law on Civil Procedure.

95 L. Drakulić, *Sudska nagodba kao način rješavanja spora (Court Settlement as a Mode of Dispute Resolution),* sourced from the webpage: http://www.iusinfo.hr/DailyContent/Topical.aspx?id=12250.

96 Also G. Stanković, *Građansko procesno pravo (Civil Procedural Law),* Vol. I, Parnično procesno pravo (Procedural Law), Niš, 2010, p. 386.

emotional intelligence) that they use successfully to encourage conclusion of large numbers of court settlements, while some, on the other hand, lack such abilities, so they naturally lean towards contradictory argument and authoritative termination of disputes by passing judgments. Therefore the trend of strengthening alternative modes of dispute resolution requires additional training and continuing education of judges, although successful conclusion of a court settlement requires all participants in civil proceedings to be motivated. Presence of the will of the parties to peacefully resolve the dispute is of crucial importance, but if the judge and the parties› lawyers to not encourage that, the prospects for concluding a court settlement will be diminished. Moreover, the settlement itself must primarily be a result of the parties› free will, which the court must not directly influence, i.e., insist on its conclusion. However, the court cannot be passive, either. The duty of the court is to remind of the option to conclude a court settlement when, in its view, this is likely.[97] The court›s efforts throughout the course of the proceedings, and particularly at the preparatory hearing, that the parties conclude a court settlement, in a manner that does not undermine its impartiality and objectivity, means testing the willingness and will of the parties to consider the possibility to conclude a court settlement. The court should suggest this possibility to the parties, while taking into account their wishes and interests, the nature of the court dispute, relations between the parties, and other circumstances. Therefore, the court, striving to preserve its impartiality and objectivity, must not exert pressure or influence on the will of one party, nor must it prejudge the outcome of the dispute if the settlement is not concluded.

3.4.1. Procedural legitimacy for concluding a court settlement

A court settlement may be concluded by the parties to the dispute, plaintiff and defendant, but not interveners. Interveners may only join the settlement concluded by the parties to the dispute.[98] When multiple persons appear

97 Also Poznić, *op. cit.*, p. 344.

98 High Commercial Court of the Republic of Croatia, Pž-1251/05, September 8, 2005. Information in J. Čizmić, *Komentar zakona o parničnom postupku (Commentary of the Law on Civil Procedure),* 2nd modified and amended ed., Sarajevo (hereinafter: Čizmić – Komentar), 2016, p. 312.

as parties as co-litigants, there are two different situations: whether they appear as common, formal co-litigants, who retain an independent position in the proceedings, so actions they take neither benefit nor harm others, or as joint litigants. With common, formal co-litigants, if an individual co-litigant concludes a court settlement with the opposing party, its effects are restricted to that co-litigant and the opposing party. In the case of joint litigants, they all must join the conclusion of the court settlement with the opposing party or parties that are on the opposing side as joint litigants.

If a party granted a power of attorney to conduct the litigation, without precisely determining the authorizations in the power of attorney, on the basis of such a power of attorney he/she is authorized to conclude a court settlement (Art. 305 Para 1 Point 1 of the FBiH Law on Civil Procedure),[99] while the attorney who is not a lawyer always needs an express authorization for conclusion of a court settlement (Art. 307 of the FBiH Law on Civil Procedure).[100] The legal representative of a party incapable of suing and being sued may conclude a court settlement if he/she holds special authorization when in the proceedings it is stipulated by special regulations that he/she must hold special authorizations (Art. 294 Para 1 of the FBiH Law on Civil Procedure).[101]

3.5. Subject-matter of court settlement

The subject-matter of a court settlement is a statement of claim, as the subject-matter in dispute, although the settlement may refer to the entire statement of claim or to one of its parts, i.e., to one of more submitted statements of claim.[102] Only the claims with which the parties may freely dispose can be the subject-matter of court settlements, which the court checks *ex officio*. When it is established that the claims in question may not be disposed

99 The provisions of Art. 305 Para 1 of the RS Law on Civil Procedure, as well as Art. 54 Para 1 of the BDBiH Law on Civil Procedure, and Art. 245 Para 1 of the BiH Law on Civil Procedure are identical.

100 The provisions of Art. 307 Para 1 of the RS Law on Civil Procedure, as well as Art. 56 Para 1 of the BDBiH Law on Civil Procedure, and Art. 247 Para 1 of the BiH Law on Civil Procedure are identical.

101 The same solution was envisaged in the provisions of Art. 294 Para 1 of the RS Law on Civil Procedure, as well as in the provisions of Art. 43 of the BDBiH Law on Civil Procedure, and Art. 238 of the BiH Law on Civil Procedure.

102 See Art. 89 Para 1 of the FBiH Law on Civil Procedure, Art. 89 Para 1 of the RS Law on Civil Procedure, as well as Art 212 Para 1 of the BDBiH Law on Civil Procedure, and Art 56 Para 1 of the BiH Law on Civil Procedure.

by the parties, i.e., when the settlement, by its subject-matter of contents is in contravention of coercive regulations, the court will advise the parties of this deficiency and, if the parties continue to insist on concluding the settlement, their agreement will be entered into the court record, and a order will be adopted in which the court rules that agreement to be without legal effect. Until this order becomes final, the court will halt the proceedings.[103] When it establishes that the settlement in question is not allowed, the court will adopt an order disallowing the settlement. When it issues such a decision, the court halts the proceedings until it becomes final or until the decision of the second-instance court. If the second-instance court assesses that these are not the claims that the parties cannot dispose of, and that the settlement is therefore allowed, it shall reverse this decision of the first-instance court.[104]

When the subject-matter of a court settlement is one of multiple statements of claim or just a part of a single statement of claim, the proceedings continue in the part on which the parties did not settle. To establish in which part the proceedings terminate, and in which continue, it is necessary to clearly determine the contents of the court settlement. The settlement may not be concluded in the proceedings in which the principles of officiality and of ex-officio enquiry apply, such as proceedings in marital, maternity and paternity disputes. The agreement about the settlement should include a settlement on all main and subsidiary claims, including the costs of the proceedings. If the parties fail to reach agreement on costs, they may agree for the court to make the decision on the costs.[105] In that case, the court makes the decision immediately and enters it into the record. If the parties do not proceed in that manner, either, the provision of Art. 391 of the FBiH Law on Civil Procedure stipulates that each party will bear his/her own costs.[106] The subject-matter of a court

103 See E. Zečević, *Komentar zakona o parničnom postupku (Commentary of the Law on Civil Procedure),* Logos, Sarajevo, p. 98. Compare B. Poznić, *Građansko procesno pravo (Civil Procedural Law),* Belgrade, 1989, p. 337.

104 Also Z. Kulenović, S. Mikulić, S. Milišić-Veličovski, J. Stanišić, D. Vučinić, *Komentar Zakona o parničnom postupku FBiH/RS (Commentary of the Civil Procedure Laws of the FBiH/RS),* 2nd modified and amended ed., Mostar (hereinafter: Kulenović), 2011, p. 213.

105 See Art. 90 Para 3 of the FBiH Law on Civil Procedure, Art. 90 Para 2 of the RS Law on Civil Procedure, as well as Art. 213 Para 3 of the BDBiH Law on Civil Procedure, and Art 57 Para 3 of the BiH Law on Civil Procedure.

106 Case law takes the same view: „When during the conclusion of a court settlement, the parties failed to agree on the costs of the proceedings, nor did they agree to leave the decision about the costs to the court (Art. 90 Para 3 of the FBiH Law on Civil Procedure), the first-instance court properly applied the provision of Art. 391

settlement may not be a claim that the parties cannot dispose of, nor a claim which is in contravention of coercive regulations (Art 3 Para 2 of the FBiH Law on Civil Procedure),[107],[108] nor such subject-matter about which a court settlement had previously been concluded. Throughout the entire course of the proceedings, the court *ex officio* checks whether the proceedings are conducted about the subject-matter about which a court settlement had previously been concluded and, if it establishes that the proceedings are conducted about the subject-matter about which a court settlement had been concluded, it shall dismiss the petition (Art. 93 of the FBiH Law on Civil Procedure).[109]

3.6. Effects of court settlement

A court settlement generates twofold effects: material and procedural.

a) Material legal effects

The standards of material law determine the general conditions that control admissibility and validity of a court settlement: legal personality and business capacity, authorization of the parties to dispose of rights and obligations, and defficiencies in the statement of will which may lead to contestation of a court settlement are also considered. In addition, from their material legal relations, which cause them to reach a settlement, the parties provide a new legal basis *(novatio),* and for this reason a court settlement has a constitutive nature.

Para 1 of the FBiH Law on Civil Procedure when it ruled that each party should bear his/her own costs of the proceedings." See Decision of the Bihać Cantonal Court, no. Gž-881/04 of January 25, 2007, *Domaća i strana sudska praksa (Domestic and Foreign Case Law),* no. 21, 2007, p. 47.

107 The provisions of Art. 3 Para 3 of the RS Law on Civil Procedure, as well as Art. 3 Para 2 of the BDBiH Law on Civil Procedure, and Art. 8 Para 2 of the BiH Law on Civil Procedure are identical.

108 Thus, according to case law, a court settlement is null and void if, at the time of its conclusion the plaintiff was not represented by his/her legal representative (Split Municipal Court, Gž-1406/88 of July 22, 1988, PSP 39/120), as well as the court settlement concluded on behalf of the local community council by its president, instead of the public attorney, who is by law authorized to represent local community councils in court proceedings (BiH Supreme Court, Rev-162/83 of June 9, 1982, Bulletin of the BiH Supreme Court, no. 2/84). Information in Čizmić – Komentar, *op. cit.,* p. 317.

109 The provisions of Art. 93 of the RS Law on Civil Procedure, as well as Art. 190 Para 1 Point e. of the BDBiH Law on Civil Procedure, and Art. 34 Para 1 Point 5 of the BiH Law on Civil Procedure are identical.

b) Procedural legal effects

Procedural effects of a court settlement consist in, first, that by concluding a court settlement the proceedings end. Second, any new proceedings with the same subject-matter in dispute are not admissible. The court *ex officio* checks the termination of the previous proceedings through the conclusion of a court settlement, although it is regularly discovered from objections. If this fact is established, it dismisses the petition. The objection *rei judicialiter transactae* becomes particularly prominent.[110] Therefore, in a procedural sense a court settlement is equal with a final court decision.[111] A third procedural effect of a court settlement consists in the fact that the record containing the court settlement has the attribute of an enforcement order. On the basis of this document, an authorized party may petition the court for enforced performance to which he/she is entitled in accordance with the contents of the court settlement on condition that the enforcement deadline has expired and that the claim that is to be satisfied to his/her benefit has matured.

3.7. Time of conclusion of court settlement

The parties› agreement on the settlement is entered into the record, and the settlement is concluded when the parties sign the record. Consequently, no decision is passed about the concluded settlement, but the parties› agreement is entered into the record. In case law, orders allowing or adopting the settlement are occasionally entered into the records of court settlements. However, the law-giver stipulated the requirement to pass an order only if

110 The matter resolved by the court settlement.

111 A court settlement has an equal legal force as a final court decision. In addition to the material effect of a contract between the parties has legal effect of a court decision. When petitioned for enforcement of a court settlement, the enforcement court may not examine the settlement's fitness for enforcement, as the settlement in question has already been subjected to the scrutiny of the court before which it was concluded. The court before which the settlement was concluded was by law itself required, when accepting the settlement into the record, verify that it is not helping the parties achieve objectives that cross the boundaries left to their disposition by the public order or public morality. The court *ex officio* determines whether the settlement is admissible, although it does not declare it, as the law does not require it, but if the court finds that the settlement is in contravention of the law or of public morality, it *ex officio* rules that the settlement is inadmissible (the Supreme Court of Serbia, Gžž. 334/69). R. Ćosić, T. Krsmanović, *Aktualna sudska praksa iz građanskog procesnog prava (Current Case Law in Civil Procedural Law),* 1st ed., Belgrade (hereinafter Ćosić – Krsmanović), 2003, p. 106.

the court assesses that the settlement is inadmissible.[112] Neither the statement on withdrawal of the petition should be entered into the record with which a court settlement is concluded, because through a court settlement the proceedings are terminated by dispositive actions of the parties, and with a withdrawal of the petition the proceedings halt, in this particular case because of the plaintiff›s discontinuance in this particular case. If, after achievement of the verbal agreement or dictation into the record, one of the parties reconsiders and refuses to sign the record, the court settlement is not concluded and the proceedings will resume. The court is required to issue a certified copy of the record into which the settlement was entered to the parties. A court settlement has the same effect as a final court decision and constitutes an enforcement order, so, just as a copy of a court decision must be delivered to the parties, so the record into which a settlement was entered must mandatorily be delivered to the parties.

3.8. Contesting court settlement

A court settlement may be contested only in a lawsuit (Art. 92 Para 1 of the FBiH Law on Civil Procedure).[113] The right of contestation belongs primarily to the parties, as they are the ones who concluded the settlement. Besides the parties, a court settlement, just as any other contract, may be contested by any third party with legal interest, and/or whose rights have been infringed by the settlement.[114] A court settlement may also be contested by the public attorney for reasons stipulated in Art. 3 Para 2 of the FBiH Law on Civil Procedure, and/or if the contract was concluded in contravention of coercive regulations. A court settlement may be contested by a lawsuit if it was concluded in error, under coercion or fraudulently (Art. 92 Para 2 of the FBiH Law on Civil

112 The court does not adopt an order approving a concluded court settlement, and if the court adopted such an order, it would have no legal effect, and consequently an appeal against this order is inadmissible, just as no appeal against that court settlement is admissible. The Supreme Court of Montenegro, Gž.-250/65. Information in Kulenović, *op. cit.,* p. 214.

113 The provisions of Art. 92 Para 1 of the RS Law on Civil Procedure, as well as of the BDBiH and BiH laws on civil procedure are identical.

114 The Supreme Court of Serbia – Gž.-1883/73, information in Janković, p. 336. As any other contract, a court conciliation may be contested by any third party with legal interest, and/or whose rights are infringed upon by the conciliation (Supreme Court of Serbia, Gzz-15/81), Ćosić – Krsmanović, *op. cit.,* p. 107.

Procedure).[115] With regard to the lack of consent, in the process of scrutiny the court is not required to check whether the will of the parties was free, without coercion, fraud or error. Thus what is left to the parties when contesting is to cite the lack of consent. A petition against contestation is filed with the court which has jurisdiction to adjudicate disputes related to the statement of claim in the first-instance within three months of the day of discovery of the reason for contestation (the subjective deadline), and no later than five years from the day of the conclusion of the court settlement (the objective deadline). An appeal is admissible against the ruling on contestation of the court settlement. Admissibility of extraordinary legal remedies depends on whether the court settlement was concluded in general civil proceedings or in some of the special civil proceedings, which due to the nature of the subject-matter deviate from the application of the rules of general procedure.[116] The main effect of a successfully contested court settlement is stipulated in the provision of Art. 92 Para 4 of the FBiH Law on Civil Procedure.[117]

3.9. Conclusion

A larger number of disputes resolved through court settlements would reduce the burden on courts, increase their effectiveness and shorten the duration of court proceedings. In this regard, court settlement as a peaceful and effective modality of dispute resolution, whose conclusion causes the termination of the proceedings or even precludes an origination of the proceedings in the first place should be consistently encouraged and promoted. A court settlement is concuded in the form of a written contract before a competent court, with the character of a final court decision, and in the event that an obligation of performance is contracted, it has the force of an enforcement order. When concluding a court settlement, the judge›s tactfulness

115 The provisions of Art. 92 Para 2 of the RS Law on Civil Procedure, as well as of the BDBiH and BiH laws on civil procedure are identical.

116 Same in M. Salma, *Pobijanje sudskog poravnanja (Contesting Court Conciliation) (Concept, legal nature and forms of contestation in domestic and comparative law),* p. 146, Zbornik radova Pravnog fakulteta (Collection of Law School Papers), Novi Sad, 2011, vol. 45, no. 2, pp. 139-154, Information on the webpage zbornik.pf.uns.ac.rs>content>article>73-izdavaštvo.

117 The same solution is envisaged in the provisions of Art 92 Para 4 of the RS Law on Civil Procedure, as well as in the provisions of Art. 215 Para 4 of the BDBiH Law on Civil Procedure, and Art. 56 Para 3 of the BiH Law on Civil Procedure.

and his/her capacity to mediate in peaceful dispute resolution are important, as well as the duty of the court to advise the parties about the possibility to conclude a court settlement, when in its view there is a chance of that to happen. However, the decision of the parties whether and when to conclude a court settlement still mainly depends on their assessment of the duration of the proceedings, the level of the costs of the proceedings, etc. The institution of court settlement will gain its deserved place when the parties realize that the resolution of all problems related to their disputes is actually in their own hands. From that point on, they will become *dominus litis,* and thereby also of their time and their material resources. At that point, court proceedings will actually become an alternative to court settlements.

Anisa Ruhotina
Nasir Muftić

4. Court Settlement in the Light of the Law on Civil Procedure of the Federation of Bosnia and Herzegovina

4.1. Introduction

Modern legal systems recognize as important the need to offer the parties in a dispute an option to resolve that dispute in a manner that need not imply a conventional litigation that ends in a ruling. In accordance with this idea, various procedural systems emerged in which parties are permitted to resolve their disputes under circumstances that do not involve the court›s typical role of conducting proceedings and passing decisions. Still, the predominant view is that the parties that expect the court to rule on their dispute still should not be deprived of the option to, within the framework of civil proceedings, by consent of their wills, reach a settlement on the subject-matter in dispute or one of its parts. Using the institution of court settlement, parties have the option to reach an agreement that would, instead of a court decision, terminate the proceedings and resolve their dispute. The legal systems of Bosnia and Herzegovina are no exception from the legal systems that adhere to the above view, as the laws governing civil procedure not only permit parties to conclude court settlements, but also encourage it in numerous provisions, which will discussed below. Although the legislation of both the Republic of Srpska and the Brčko District of BiH regulate this matter, the treatment of court settlement in the Federation of Bosnia and Herzegovina (hereinafter also: FBiH) will be in the focus of this paper.

4.2. Concept of court settlement

A court settlement is defined as a contract concluded and entered into the record in the proceedings before a court, whereby the parties, wholly or in part, regulate their disputed relations that are the subject-matter in dispute, and in its procedural legal effect it equals a final court decision.[118] A court

118 J. Čizmić (2016), *Komentar zakona o parničnom postupku (Commentary of the Law on Civil Procedure),* Sarajevo: Privredna štampa, p. 313.

settlement is an emanation of the disposition principle, as the parties to the proceedings, by taking dispositive actions, by their will may terminate the proceedings. Viewed in this manner, a court settlement represents a possible modality of termination of civil proceedings. Instead of the proceedings leading to a decision of the court, the parties themselves, on the basis of procedural disposition, terminate the proceedings. In this manner, the parties have the option to resolve the dispute peacefully, without a decision of the court, even after the proceedings were initiated, which implies their more active participation in the proceedings. This also means that the parties› dispositions in the proceedings which will lead to the conclusion of a court settlement will have special importance, which on the other hand affects the role of the court in the proceedings, it being modified relative to the conventional view, according to which the court passes a decision that terminates the dispute which is the cause of the proceedings.

4.3. Legal nature and effects of court settlement

The issue of the legal nature of the court settlement has been debated for a long time, both by legal theorists and in case law. Today, the prevalent view is that a court settlement is a mixed procedural and material legal contract. Because of this, the validity of a court settlement is to be assessed both from the standpoint of civil procedural law and material civil law.[119] Parties conclude a court settlement to regulate their material law relationship, but also to terminate the proceedings, so a court settlement is simultaneously a strictly formal civil contract and an immediate procedural action of the parties.[120]

Material law effects of court settlement are reflected in the fact that the material law standards determine the general conditions that control its admissibility and validity.[121] Therefore a court settlement is not considered an act of the court, but of the parties, i.e., that it has the nature of a material law contract of the parties concluded before the court.[122] The general conditions for validity

119 *Ibid.*

120 L. Karamarković (2004), *Poravnanje i medijacija (Conciliation and Mediation).* Belgrade: School of Business Law, p. 211.

121 S. Mulabdić (2010), *Građansko procesno pravo (Civil Procedural Law),* Pravni fakultet Univerziteta u Tuzli (Tuzla University School of Law), p. 314.

122 M. Salma (2011) *Pobijanje sudskog poravnanja (Contesting Court Conciliation) (Concept, legal nature and forms of contestation in domestic and comparative law),* p. 146, Zbornik radova Pravnog fakulteta (Collection of Papers of the Novi Sad

of a court settlement should be considered on the basis of the provisions of the material civil law, such as those that regulate the matters of the business capacity of contracting parties, consent of the wills, existence and admissibility of the subject-matter, the basis of the contractual relationship, etc.[123]

The above material legal aspects of court settlement are indicated in the provision of the Law on Civil Procedure of the Federation of Bosnia and Herzegovina (hereinafter also: FBiH Law on Civil Procedure)[124], that stipulates that a court settlement may be contested only by a lawsuit, and not by an appeal or extraordinary legal remedies.[125] The reason is that a court settlement is considered an agreement of the parties and not a decision of the court, which will be discussed below.

Procedural effects of court settlements are:

1. The conclusion of a court settlement leads to termination of the proceedings, but without a court ruling.
2. It prevents conducting proceedings about the subject-matter on which a court settlement had previously been concluded, i.e., it has an effect of a negative procedural presumption.
3. A court settlement has the force of an enforcement order.

A court settlement leads to termination of the proceedings without a court ruling, but with all effects created by a judgment as a final act of the court.[126] Naturally, these effects will arise on condition that the court settlement relates to the entire statement of claim. If the parties, however, settled only on one part of the settlement of claim, the proceedings continue for the remainder and will terminate with a court ruling. Certain procedural aspects of the court settlement are indicated in the provisions of the FBiH Law on Civil Procedure, which describe the stages of the proceedings when it is possible to conclude a court settlement, provisions about the scope of the settlement, provisions about the role of the court, and provisions about the limitations of disposition with the subject-matter.[127]

Law School), vol. XLV, no. 2/2011, pp. 139-154. Available at: *http://zbornik.pf.uns.ac.rs/zbornik-radova-pravnog-fakulteta-u-novom-sadu/zbornik-radova-pravnog-fakulteta-u-novom-sadu-2011/zbornik-2, accessed on March 8, 2019.*

123 S. Mulabdić (2010), *Građansko procesno pravo (Civil Procedural Law),* p. 314.

124 FBiH Official Gazette, no. 53/03, 73/05, 19/06, and 98/15.

125 Art. 92 of the FBiH Law on Civil Procedure.

126 B. Čalija and S. Omanović (2000), *Građansko procesno pravo (Civil Procedural Law),* Sarajevo, Univerzitet u Sarajevo – Pravni fakultet (Sarajevo University School of Law), p. 245.

127 M. Salma (2011) *Pobijanje sudskog poravnanja (Pojam, pravna priroda i oblici*

4.4. Advantages of court settlement

In terms of whom it concerns, advantages of a court settlement may be considered from the standpoint of the parties that will be gaining them in the proceedings on one side, and from the standpoint of the entire justice system on the other.

The first set relates to the advantages enjoyed directly by the parties to the proceedings. A court settlement constitutes a manner of dispute termination with which both parties will eventually be satisfied because the only way to reach a court settlement is to achieve a consensus of wills of the parties about its contents. If the parties fail to reach mutually acceptable agreement, they are in no way constrained to conclude a court settlement. Therefore the termination of the proceedings in a court settlement has a positive psychological effect on the parties to the proceedings, because neither will be just a winner or a loser.[128] Due to its consensual character, a court settlement prevents disruption of relations between the parties. If, however, the relations between the parties have been disrupted because of the dispute, it is natural that there are better prospects of restoring them if the court proceedings end with their agreement instead of a court ruling.

The next advantage for the parties to the proceedings to enjoy is avoiding the entire course of the proceedings. By concluding a court settlement, the parties will be spared the loss of time and energy on conducting generally long-lasting and exhausting civil proceedings which is necessarily accompanied by costs, followed by often uncertain enforcement.[129]

Furthermore, an advantage of the court settlement is found in its expedience for enforcement, pursuant to the FBiH Law on Civil Procedure. As it will be discussed in more detail below, a court settlement constitutes an enforcement title, which offers to the parties the certainty that their agreement will actually be implemented with the efficiency enjoyed by the rights and

pobijanja u domaćem i uporednom pravu) (Contesting Court Conciliation)(Concept, legal nature and forms of contestation in domestic and comparative law), pp. 139-146.

128 A. Jakšić (2008*) Građansko procesno pravo (Civil Procedural Law).* Belgrade: Pravni fakultet Univerziteta u Beogradu (Belgrade University School of Law), p. 471.

129 Moreover, the legislature encourages parties to the proceedings to conclude court settlements also by stipulating lower costs of the proceedings in that case. For instance, in the Law on Court Fees of the Sarajevo Canton (Sarajevo Canton Official Gazette, no. 36/14 and 23/16) it is stipulated that the court fee payable for a court settlement concluded during first-instance proceedings is half the court fee payable if the court rules in first-instance proceedings.

obligations established by court judgments.[130] At the same time, having the nature of an enforcement title is an advantage of the court settlement relative to a settlement concluded out of court. While a noncontentious settlement constitutes a relationship in law of obligations whose enforced implementation requires conducting civil proceedings, and subsequently often also enforcement proceedings, a court settlement allows the parties, in the event of non-fulfillment of rights and obligations from the agreement, to initiate enforcement proceedings directly.

The second set of advantages of the court settlement has the effect of improving the judicial system. By its nature, the judicial system is more effective the fewer cases it is processing. Also, the effectiveness increases because the cases being processed are terminated sooner. Naturally, the proceedings in which court settlements are reached will end sooner than those in which courts need to rule. Consequently, this means that courts will have more time to devote to other cases. Therefore, a court settlement permits disburdening of courts from those cases in which the parties reach agreement.

On the other hand, court settlements do not constitute a potential risk for the judicial system, nor for other social interests it protects. Such risks are eliminated as the FBiH Law on Civil Procedure prohibits the parties to conclude court settlements when they do not freely dispose of the subject-matter.[131] When in some proceedings there is interest which is not exclusively private, but is of broader public significance, the parties will not have the option to determine its outcome by agreement. When the subject-matter of the dispute does not concern only the parties to the proceedings, it is envisaged that only the court decides. Therefore, the risks are eliminated through limitation of the parties› autonomy of will in this manner. In addition, the court is always required to check the contents of parties› agreements and ensure that parties do not exceed their authorizations, which will be further discussed below.
Therefore, the court settlement has systemic significance for operation of the entire justice system, as it reduces the number of court cases and increases the effectiveness of the entire system.

130 Art. 91 of the FBiH Law on Civil Procedure.

131 Art. 89 Para 2 of the FBiH Law on Civil Procedure.

4.5. Until which stage of the proceedings is it possible to conclude a court settlement?

The FBiH Law on Civil Procedure regulated the issue of the time period, or more precisely, until which stage of the proceedings it is possible to conclude a court settlement.[132] The provisions that govern this matter underwent some modifications from the time of the passage of the reformist FBiH Law on Civil Procedure in 2003. In fact, the 2003 FBiH Law on Civil Procedure originally stipulated that parties may conclude court settlements throughout the entire course of the proceedings. This was a vague stipulation that did not offer an unequivocal answer to the question to which point in the unfolding of the proceedings a court settlement may be concluded.[133] The question arose whether the term „the entire course of the proceedings" was intended to permit conclusion of court settlements until the termination of the first-instance proceedings or it, however, refered also to the proceedings on legal remedies and the enforcement procedure.

With the provisions of the Law on Amendments of the Law on Civil Procedure[134] of 2015, this provision was amended in such a manner that it was clearly specified until which time it is possible to conclude a court settlement, which eliminated the possibility of different interpretation of the term „the entire course of the proceedings". This is a relatively new provision that is a result of the law-giver›s effort to improve effectiveness of courts in dispute resolution by dispelling any doubts with regard to the time period for concluding court settlements.

The provision of the FBiH Law on Civil Procedure was amended in the sense that a court settlement can be concluded throughout the entire course of the proceedings until their final termination.[135] This allows parties to regulate their legal relations throughout the entire course of the proceedings, until their inal termination, which implies the option to conclude a court settlement even before the second-instance court until the adoption of the second-instance decision on appeal. In this way, the need to pass a first-instance decision if the settlement is concluded after the end of the main hearing, but before the adoption of the first-instance decision was eliminated, as well as

132 Art. 87 of the FBiH Law on Civil Procedure.

133 L. Karamarković (2004*) Poravnanje i medijacija (Conciliation and Mediation),* p. 200.

134 Art. 19 of the Law on Amendments to the Law on Civil Procedure, FBiH Official Gazette, no. 98/2015.

135 Art. 87 Para 1 of the FBiH Law on Civil Procedure.

the need to pass the second-instance decision.[136]

In addition to the above amendment, the Law on the Amendments to the Law on Civil Procedure also stipulated the court procedure in the event that the court settlement was concluded only after the first-instance decision had been passed. Thus the FBiH Law on Civil Procedure stipulated that the first-instance court shall pass on order finding the first-instance order to be without effect if a court settlement is concluded after the first-instance decision had been passed.[137] Conclusion of a court settlement after the adoption of the first-instance decision would otherwise mean that there are two enforcement orders coexisting on the same legal matter: the court settlement, which, as mentioned above, has the force of an enforcement order, and the first-instance decision.[138]

Furthermore, the Art. 42 of the Law on Amendments to the FBiH Law on Civil Procedure, after Art. 224 of the FBiH Law on Civil Procedure, added a new article 224a which governs the procedure in the event that the court settlement occurs during the appeals process. Pursuant to Art. 224a, of the FBiH Law on Civil Procedure, if the parties conclude a court settlement in the course of the appeals process, the second-instance court shall determine in an order that the first-instance decision is without effect and that the plaintiff abandoned the petition. The above provision fully settles the dilemma with regard to the fate of the first-instance decision and the previously lodged appeal.

On the basis of the above, we conclude that a court settlement may be concluded both before the first- and second-instance courts. The FBiH Law on Civil Procedure expressly does not regulate the matter of concluding a court settlement before another, assigned or commissioned judge.

4.6. Procedure of concluding a court settlement

The procedure of concluding a court settlement is regulated in accordance with the disposition principle. The parties are free to start negotiations about concluding a settlement, to determine its contents and dynamics with-

136 Lj. Drakulić (2012*) Sudska nagodba kao način rješavanja spora (Court Settlement as a Modality of Dispute Resolution).* Accessed at: http://www.iusinfo.hr/DailyContent/Topical.aspx?id=12250 on March 3, 2019.

137 Art. 87 Para 2 of the FBiH Law on Civil Procedure.

138 J. Čizmić (2016). *Komentar zakona o parničnom postupku (Commentary of the Law on Civil Procedure),* p. 312.

out coercion. Still, the FBiH Law on Civil Procedure stipulates certain elements deemed essential for this agreement.

The FBiH Law on Civil Procedure stipulates that the following conditions need to be met for a court settlement to be enforceable:

1. Parties must have an agreement on the settlement.
2. The agreement of the parties on the settlement is entered into the court record.
3. The parties› signatures on the record.

The FBiH Law on Civil Procedure stipulates that a court settlement is concluded by entering the parties› agreement into the record.[139] Therefore, a special format is prescribed as an essential element of court settlement. Although regulated as a formal legal transaction, the court settlement is not regulated very restrictively. In this regard, legal provisions leave the parties the option to conclude an agreement about the entire statement of claim or one of its parts. In the event that the settlement refers to just one part of the statement of claim, the civil proceedings shall continue about the remainder.[140] Furthermore, if there is an option to conclude a court settlement, the court is authorized to postpone an ongoing hearing upon the motion of both parties to allow them the necessary time and space to reach agreement.[141] The negotiation procedure for conclusion of the agreement may itself create legal consequences, regardless of its ultimate outcome. In this regard, the FBiH Supreme Court determined that an acknowledgment made in the negotiations between the debtor and creditor on the settlement may be considered an acknowledgment of debt, regardless of whether they ultimately conclude a court settlement or not.[142]

After an agreement is reached and entered into the record, it is considered concluded after signed by the parties. Thereupon, the court shall issue them certified copies of the record. The parties may use the record to initiate the enforcement procedur. In this regard, the Law on Civil Procedure stipulates that a court settlement is enforceable if the obligation stated therein became dure, while enforceability may, among other options, also be established with

139 Art. 90 of the FBiH Law on Civil Procedure.

140 J. Čizmić (2016). *Komentar zakona o parničnom postupku (Commentary of the Law on Civil Procedure),* p. 316.

141 Art. 116 of the FBiH Law on Civil Procedure.

142 Decision of the FBiH Supreme Court, no. 63 0 P 000967 09 Rev of April 13, 2010.

the record.[143]

The FBiH Law on Civil Procedure regulates the issue of authorizations of agents or attorneys for conclusion of a court settlements differently. When its legal agent appears on behalf of a party to the proceedings the FBiH Law on Civil Procedure establishes as a general rule that he/she is authorized to conclude a court settlement, if a special regulation does not determine otherwise.[144] If the party authorized an attorney to litigate, the issue of his/her authorization to conclude a court settlement depends in the first place on whether it was expressly established or forbidden in the power of attorney. If the power of attorney does not precisely determine whether the attorney has this authorization, its existence depends on whether the attorney is a lawyer or not. If the attorney is a lawyer, than it is deemed that a power of attorney that does not address this issue authorizes him/her to conclude a court settlement.[145] Conversely, if the attorney is not a lawyer, he/she will not have this authorization, unless it is expressly granted in the power of attorney.[146]

4.7. The role of the court in concluding a court settlement

For a court settlement to be concluded, active participation of only the parties is not sufficient, but also active participation of the court. When concluding a court settlement, the civil court has a dual role. On the one hand, the role of the court is to continuously strive for a court settlement to even be concluded and to assist the parties. On the other, the activity of the court implies its duty to investigate and determine whether the parties› dispositions are admissible and in line with coercive regulations. In both above cases the court has an active role. However, since it is a dispositive act of the parties, it is necessary to keep in mind that, ultimately, the parties decide whether the disputed legal relationship will be resolved with a court settlement and what its contents will be.

The court›s procedure and its role when concuding a court settlement are

143 Art. 26 Paras 1 and 2 of the FBiH Law on Civil Procedure.
144 Art. 294 of the FBiH Law on Civil Procedure.
145 Art. 305 of the FBiH Law on Civil Procedure.
146 Art. 307 of the FBiH Law on Civil Procedure.

stipulated by the provisions of the FBiH Law on Civil Procedure.[147] The court shall strive for the parties to conclude a court settlement in a manner that does not undermine its impartiality, both in the preparatory hearing and throughout the entire course of the proceedings. Such conduct of the court certainly must not turn into constant guidance and insistence that the parties conclude a court settlement[148] even if it assesses that it would be in the parties› interest. The court must not directly influence the will of the parties nor insist on the resolution of the dispute through a court settlement, nor impose such resolution of the dispute on the parties. Therefore, the „striving" of the court should be understood as testing the willingness and will of the parties to consider the option to conclude a settlement throughout the entire course of the proceedings, as well as drawing attention to this option.[149] In addition to the above, the provisions of the FBiH Law on Civil Procedure stipulate that the court may, to support conclusion of a settlement, when it assesses that this is well-founded, propose to the parties how to settle. Here the wishes of the parties, nature of the dispute, relations between the parties, and other circumstances need to be taken into account. The above provision implies that the will of the parties to resolve the dispute by concluding a court settlement must have been present since earlier. To the parties whose will to resolve the dispute peacefully has already been present earlier, the court may propose how to settle. In earlier legal theory, the view prevailed that the court might assist the parties by indicating the conditions for reaching a court settlement or, when deemed necessary, by asking questions of the parties it might clarify the scope and the contents of their agreement.[150] The court may propose the parties how to settle only if this is intended to contribute to the conclusion of the settlement and if it respects the parties› wishes. Therefore, this in no case means that the court determines the contents of the court settlement nor it imposes specific solutions on the parties. Ultimately, the contents of the settlement itself depends on the parties, and this will be further discussed below.

147 Art. 88 of the FBiH Law on Civil Procedure.

148 M. Dika and J. Čizmić (2000) *Komentar Zakona o parničnom postupku Federacije Bosne i Hercegovine (Commentary of the Law on Civil Procedure of the Federation of Bosnia and Herzegovina).* Sarajevo: OSCE – Democratization Office, p. 532.

149 S. Milišić-Veličković, in: Z. Kulenović et al. (2005) *Komentari zakona o parničnom postupku u Federaciji Bosne i Hercegovine i Republici Srpskoj (Commentaries on the laws on civil procedur of the Federation of Bosnia and Herzegovina and Republic of Srpska),* Sarajevo: Joint Project of the Council of Europe and the European Commission, p. 170, comment with Art. 88 Point 2.

150 *Ibid.*

Limitations of the court›s actions in connection with conclusion of a court settlement are related to the following: maintenance of the court›s impartiality, non-exertion of pressure or influence of the will of the parties to conclude a court settlement, non-imposition of the court settlement on the parties, even when certain solution favor the parties, and avoiding any discussion of potentially unfavorable outcomes for a given party.[151]

With reference to its other role, the court›s duty is to investigate and determine whether the parties› dispositions are admissible and in accordance with coercive regulations. In this case, the role of the court is to provide scrutiny. If the court determines that the parties seek to dispose of the claims they cannot dispose of, it will warn them accordingly and advise about the inadmissibility of such a settlement.[152] However, if, despite the court›s warning, the parties conclude a court settlement about the claims with which they cannot dispose, the court will adopt an order disallowing the parties› settlement and halt the proceedings until the decision becomes final.[153]

4.8. Contents of a court settlement

As the agreement which is the basis for the termination of the proceedings is entered into the record, its contents will be known, beside the parties, to the court as well. If the contents of the agreement itself would not be entered into the record, but only a statement that the parties reached a settlement, then such an agreement would be considered a noncontentious settlement.[154]

The doctrinal view is that the contents of a court settlement ought to be assessed in accordance with the provisions of material civil law.[155] Primarily these would be the provisions of the Law on Obligations, which regulate the fundamental issues in connection with conclusion of legal transactions, such as parties› business capacity, admissibility and certainty or precision of the subject-matter of the legal transactions, the lack of consent, etc. If the

151 A. Bešić (2015) *Sudska nagodba – novi pristup u rješavanju sporova (Court Settlement – a New Approach to Dispute Resolution),* Društveni ogledi – Časopis za pravnu teoriju i praksu, no. 1-2/2015, pp. 251-275. Available at: https://www.ceeol.com/search/article-detail?id=424610, accessed on: March 5, 2019.

152 L. Karamarković (2004) *Poravnanje i medijacija (Conciliation and Mediation),* p. 182.

153 S. Mulabdić (2010*) Građansko procesno pravo (Civil Procedural Law),* p. 313.

154 L. Karamarković (2004) *Poravnanje i medijacija (Conciliation and Mediation),* p. 239.

155 S. Mulabdić (2010), *Građansko procesno pravo (Civil Procedural Law),* Pravni fakultet Univerziteta u Tuzli (Tuzla University School of Law), p. 315.

civil law relationship between the parties is regulated by other material law regulations, then the validity of the court settlement will be also assessed in accordance with such regulations.

In previous sections we described the role of the court in concluding a court settlement and stated the circumstances that the court will check. Here we wish to bring to mind that the court›s duty is to check the contents of the concluded agreement so as to disallow conclusion of a settlement on claims that the parties cannot dispose with. The doctrine holds that under such conditions there are implied issues derived from legal relations that cannot be the subject-matter in the proceedings and that are not regulated by dispositive standards.[156] The FBiH Supreme Court took the position that no expert witness of any profession, not even an expert witness specialized in finance, is authorized to assess contents of a court settlement, but that this is a legal matter which only the court is authorized to assess.[157]

In terms of covering the costs of the proceedings, the parties were given the option to agree. They were also allowed to submit the matter of covering the costs for the court to decide. As stated above, achieving an agreement on the costs of the proceedings is easier for the parties inasmuch they will for the most part be lower than they would be if the first-instance court passed a decision. If the parties choose to leave it to the court to decide on costs, the question arises which court should make the decision. The FBiH Law on Civil Procedure does not conclusively regulate this matter, leaving room for various interpretations. Comparative law knows of a solution according to which, in the event a court settlement is concluded, each of the parties to the proceedings covers such costs it incurred.[158] Domestic case law treated this issue in the identical manner, and it was clarified that the term „own costs" „implies such costs that a party had during the proceedings or for which it is liable by law (e.g., payment of the court fee)."[159]

156 J. Čizmić (2016). *Komentar zakona o parničnom postupku (Commentary of the Law on Civil Procedure),* p. 317.

157 Decision of the FBiH Supreme Court no: 65 0 P 259793 12 Rev of February 21, 2013.

158 For instance, the Croatian Law on Civil Procedure, in Art. 159 Para 1 stipulates: „Each party shall bear his/her own costs if the proceedings terminate in a court settlement, and it has not been otherwise provided in the settlement." The Serbian Law on Civil Procedure, in Art. 158 Para 1 regulates this matter in the identical way, by stipulating: „Each party bears his/her own costs if the proceedings are concluded in a court conciliation or a conciliation following a successful mediation, unless the parties agree otherwise or otherwise provided by a special law."

159 Decision of the Bihać Cantonal Court, no. Gž-881/04 of January 25, 2007.

In practice, court settlements will arise as a result of compromises between parties. In other words, the parties will realize their interests by means of an agreement if both parties are prepared for mutual concessions. This is natural because the parties have at their disposal other procedural institutions if only one of them wanted to give up his/her initial position in the proceedings. For instance, when only the party that appears as the plaintiff is willing to yield, it can withdraw the petition or abandon the petition. The same example may be provided for situations when only the defendant is willing to yield, because this can be achieved by acknowledging the statement of claim. Also, the parties to the proceedings may unilaterally make concessions and in such a way to acknowledge facts in the proceedings, which the other party therefore will not need to establish.[160] Therefore, court settlement will be attractive for the parties if both parties are prepared to yield to some extent to reach agreement on a solution acceptable for both sides.[161]

Still, the doctrine has not fully clarified the issue whether, in the event of a court settlement, the provisions of the FBiH Law on Obligations (hereinafter: FBiH Law on Obligations) which declares mutual concessions as a condition of the settlement›s validity should be consistently applied. The FBiH Law on Obligations expressly states that in the absence of mutual concessions, the concluded legal transaction shall not be considered a settlement contract.[162] According to one view, unlike with noncontentious settlement, in a court settlement mutual concessions by the parties are not required.[163] A court settlement shall therefore remain valid even when only one party makes a concession.[164] According to another view,[165] mutual concessions constitute an

160 Art. 125 Para 1 of the FBiH Law on Civil Procedure.

161 Art. 1090 of the Law on Obligations in this regard provides examples of actions that will be considered as yielding, declaring that, among others, this includes „partial or full acknowledgment of a claim of the other party, or in abandonment of a claim of one's own; assuming a new obligations; reduction of the interest rate; extension of the deadlline; acceptance of partial repayment; granting a waiver."

162 Art. 1089 and 1090 of the Law on Obligations.

163 Numerous authors advocate the view that conclusion of a court settlement does not require mutual concessions, incuding: Zuglia, Aranđelović, Jakšić, Triva, Dika, Belajac, Mulabdić, et al.

164 J. Čizmić (2016). *Komentar zakona o parničnom postupku (Commentary of the Law on Civil Procedure)*. Sarajevo: Privredna štampa, p. 313.

165 This view is particularly strongly defended by the authors from the German legal area, such as Horten and Liebig. In principle, they take the position that mutual concessions are essential for concluding a court settlement, but when discussing the extent of such yielding, they almost reach the conclusion that yielding is not necessary. L. Karamakrović (2004) *Poravnanje i medijacija (Conciliation and*

essential element of the settlement, but also the basis on which the parties even conclude a court settlement. In the absence of mutual concessions in this legal transaction, pursuant to the FBiH Law on Obligations the contract will be null and void.[166]

4.9. Court settlement as enforcement order

A court settlement has the force of an enforcement order. As such, a court settlemetn constitutes a material law authorization to conduct the procedure. Pursuant to the Law on Enforcement Procedure, the duty of the court to permit and carry out enforcement upon request of a judgment credits emanates from the enforcement order.[167]

The above is expressly stipulated in two laws, in the part of the FBiH Law on Civil Procedure that relates to court settlement[168] and in the provisions of the FBiH Law on Enforcement Procedure that deal with enforcement orders and verbatim records.[169] The FBiH Law on Enforcement Procedure stipulates the following exhaustive list of enforcement orders:

1. enforcement order by courts and enforced judicial composition;
2. enforcement decision rendered in administrative procedure and settlement in administrative procedure, if involves discharging a monetary liability, unless otherwise provided by law;
3. enforceable notarial deed;
4. other instruments stipulated by law as enforcement instruments.

The above provision of the Law on Enforcement Procedure signifies that every settlement concluded before the court is considered an enforcement instrument, on condition that it is by condemnatory by nature.[170] A condemnatory court settlement will be enforceable if the defendant has not met the due claim

Mediation), po. 186-188.

166 Art. 52 of the Law on Obligations.

167 A. Daupović, in: A. Daupović et al (2005) *Komentari zakona o izvršnom postupku u Federaciji Bosne i Hercegovine i Republici Srpskoj (Commentary on the Laws on Enforcement Procedure in the FBiH and RS),* p. 82, comment with Art. 23, Point 3.

168 Art. 91 of the FBiH Law on Civil Procedure.

169 Art. 23 Para 1 of the FBiH Law on Enforcement Procedure.

170 J. Čizmić, (2016). *Komentar zakona o parničnom postupku (Commentary of the Law on Civil Procedure)*, p. 321.

within the time period specified in the settlement.[171] Besides condemnatory a court settlement will can be constitutive and declarative. Only a condemnatory settlement has the force of an enforcement order.

4.10. Court settlement as *res judicata*

As we stated above, a court settlement has the nature of an enforceable title. From this feature, one concludes that, to an extent, it resembles a final court decision.[172] Once concluded, a court settlement generates other legal consequences which additionally emphasize this resemblance. Here we particularly note that the conventional effect of a final court decision – effect *res judicata* is also an effect of the court settlement, which is stated in multiple legal provisions.

In the provisions of the FBiH Law on Civil Procedure that treat violations of civil procedure, the law-giver separated those violations that are of such significance for the procedure that, when present in the proceedings, they are always to be considered important, i.e. violations that affected passage of a lawful and proper judgment. The court›s ruling in a case in which a court settlement or a settlement which according to special regulations has the character of a court settlement had been concluded constitutes one such violation.[173]

Furthermore, the FBiH Law on Civil Procedure stipulates the duty of the court to check *ex officio* whether the party is conducted about a subject-matter about which a court settlement had previously been concluded. If established that the proceedings are conducted about such subject-matter, the court is required to dismiss the petition.[174] The situation is the same when the second-instance court determines that, in the first-instance proceedings a decision was passed in a case in which a court settlement had previously been concluded. The second-instance court is then required to set aside the first-instance decision and dismiss the petition.[175] The same requirement is also envisaged for the review court, which will set aside previous decisions and dismiss the petition.[176]

171 S. Mulabdić (2010) *Građansko procesno pravo (Civil Procedural Law)*, p. 317.

172 J. Čizmić, (2016). *Komentar zakona o parničnom postupku (Commentary of the Law on Civil Procedure)*, p. 324.

173 Art. 209 Para 2 of the FBiH Law on Civil Procedure.

174 Art. 93 of the FBiH Law on Civil Procedure.

175 Art. 227 Para 2 of the FBiH Law on Civil Procedure.

176 Art. 249 Para 2 of the FBiH Law on Civil Procedure.

4.11. Contesting court settlement

The mixed character of court settlement is particularly evident when it comes to contesting it. The manner of contesting a court settlement greatly depends on whether the court settlement by its legal nature is deemed an agreement of the parties before the court or a court decision. Despite different viewpoints in legal theory and practice, the prevailing view is that a court settlement is not a decision of the court, although it has the same procedural effect, but instead it is an agreement of the parties concluded before the court and entered into the record.[177] Our law-giver is explicit in this regard, which is evident from the frequently used phrase „the parties› agreement about the settlement". Therefore, the view in which the court settlement is not a decision of the court, although it has the same procedural effects, is a point of departure to determine the manner of contesting the court settlement.

Until the adoption of the reformist 2003 FBiH Law on Civil Procedure, the matter of contesting court settlement had not been regulated, and a range of views and opinions emerged in legal practice and theory based effectively on different understanding of the legal nature of the court settlement. Theory and practice were divided between the view that a court settlement may be contested by a motion for a retrial, on the one hand, or by a lawsuit, on the other. The justification for contesting the court settlement with a motion for retrial the authors derived from procedural legal effects of the court settlement.[178] As the court settlement has the same procedural legal effects as a final court decision, it was demed that it might be contested with an extraordinary legal remedy – the motion for retrial.

In the present, the situation is clearer. The FBiH Law on Civil Procedure contains express provisions that treat contesting of the court settlement.[179] A court settlement may be contested only by a lawsuit.[180] The above signifies that the determination that the court settlement may be contested only by a lawsuit arose from the perception of the court settlement as an agreement of the parties. As the court settlement is not a decision of the court, it cannot be contested either by ordinary or by extraordinary legal remedies.

177 J. Čizmić, (2016). *Komentar zakona o parničnom postupku (Commentary of the Law on Civil Procedure),* p. 323.

178 L. Karamarković (2004), *Poravnanje i medijacija (Conciliation and Mediation),* pp. 279-292.

179 Art. 92 of the FBiH Law on Civil Procedure.

180 Art. 92 Para 2 of the FBiH Law on Civil Procedure.

Such an explicit provision of the FBiH Law on Civil Procedure eliminated potential disagreements with regard to the manner of contesting the court settlement. Moreover, it was clearly stipulated that the subjective deadline for filing a petition was three months from the day of discovery of reasons for contesttion, and the objective deadline is five years from the day of the conclusion of the court settlement. The above deadlines are preclusive, and the right to legal protection is lost when they expire. This means that a court settlement may not be contested after the expiry of the three-month period from the day of discovery of the reason for contesting, or the five-year period since the conclusion of the court settlement.

A court settlement may be contested only on the basis of the lack of consent, i.e., if it wa concluded in error, under coercion or fraudulently. As the reasons for contesting, the law-giver accepts reasons for which, pursuant to the Law on Obligations, contracts may be contested, and therefore the presence of the lack of consent is to be assessed according to the provisions of this law.[181]

With the 2015 Law on Amendments to the Law on Civil Procedure,[182] the FBiH Law on Civil Procedure was amended with a provision that prescribes the procedure in the event that a court settlement is annulled. If a court settlement is annulled, it is stipulated that the proceedings will resume as if the court settlement has never been concluded.

4.12. Conclusion

A court settlement is a mixed material and procedural legal institution which is concluded by parties to simultaneously regulate their material law relationship and terminate civil proceedings. This is an institution which in its procedural effects constitutes an effective substitution for a court decision. As a legal institution that permits a departure from the conventional course of court proceedings, and its adaptation to particular needs of the parties, the court settlement has deservedly found its place in modern legal systems.

The Law on Civil Procedure constitutes the legal framework for application of the court settlement in the positive legislation of the FBiH, with Art. 87-93 regulating the procedure of concluding court settlements, the role of the court in concluding court settlements, the stages of the proceedings when

181 J. Čizmić, (2016). *Komentar zakona o parničnom postupku (Commentary of the Law on Civil Procedure)*, p. 323.

182 BiH Official Gazette, no. 98/15.

it is possible to conclude court settlements, the contents of a court settlement, its procedural legal effects and the manner of contesting a court settlement. This created an environment in which parties can freely negotiate (with the assistance of the court, if necessary), the security that the legal system will protect the existence of the agreement they reach as well as the certainty that their agreement will be implemented. This is supported by the flexibility envisaged in positive law with regard to the time when it is possible to conclude court settlements, which speaks about the determination of the law-giver to encourage the use of this institution. In fact, parties are permitted to regulate their legal relationship throughout the entire course of the proceedings until their final conclusion, which implies a possibility to conclude a court settlement even before the second-instance court until the adoption of the second-instance decision on appeal.

To take the place that the law-giver intended for it in civil procedure, it is imperative that parties understand the advantages offered by the court settlement. Its fundamental advantage arises from the fact that the agreement on the settlement is a result of a compromise of the parties, and not a solution "imposed" by a third party – the court. If the parties find a solution acceptable for everyone, the court settlement permits to resolve the existing dispute swiftly, efficiently and in mutual interest, thereby avoiding often prolonged and financially draining litigation. Perhaps most importantly, the court settlement permits the parties that, through resolution of the particular dispute improve their mutual relations and develop them for the long term on sound foundations, even beyond the dispute about which they are concluding the settlement. At the same time, resolution of the dispute by concluding an agreement about the settlement indirectly impacts the effectiveness of the entire legal system, as in this way courts are disburdened and freed to adjudicate more complex cases.

5. REVIEW

***

In the papers on court settlement which were submitted for this publication, the authors presented in a satisfactory manner all advantages of ending litigation by a court settlement relative to adopting a court decision, which may only further worsen the disrupted relations between the parties if one party loses the dispute.

Proper emphasis was devoted to the professional role of the court, which must assess whether the parties in the subject-matter can dispose with claims and in which imperative disputes it is inadmissible to conclude court settlements, regardless of the expressed will of the parties to end litigation in this manner. Although concluding court settlements is only possible in dispositive disputes, this does not diminish its significance in resolving as many disputes as possible by consent of the wills of the parties. The authors specifically described new elements in the practical application of the court settlement, including the active role also of the parties' attorneys, who ought to support every reasonable proposal of the court and themselves draw the attention of the parties, who are likely to have greater trust in them than in the court, to the great advantages of the peaceful manner of ending litigation.

When the court demonstrates the same degree of impartiality with regard to both parties in recommending and proposing the contents of the court settlement, citizens will regain confidence in the judiciary, as the authors of the papers on court settlement properly recognized.

Senad Mulabdić, LLD (PhD in Law), Professor
Judge of the Supreme Court
of the Federation of Bosnia and Herzegovina

***

Court settlement, as a litigation action resolving a dispute, constitutes a regulator of mutual relations of the litigants and a substitute for a decision of the court. Regulation of disputed relations with a court settlement has manifold significance both for the litigation parties themselves and for the judiciary in

general. If the litigants conclude a court settlement and resolve their dispute peacefully, not only that the demands set in the principle of effectiveness and cost-effectiveness are met, but also for legal and political reasons. In favor of dispute resolution by court settlement, Professor Aranđelović wrote long time ago that „a lean conciliation is better than a costly litigation".The High Judicial and Prosecutorial Council has also for some time been promoting dispute resolution by court settlement in the judicial system of Bosnia and Herzegovina. Regardless of the advantages of the court settlement as a procedural phenomenon relative to the contradictory, long-lasting and exhausting litigation, the court settlement still does not have the significance and place it should have before the courts in Bosnia and Herzegovina. There are multiple reasons for this. First of all, citizens who chose to initiate civil proceedings, as a rule, want the court to pass a decision on merits and to "judge" the right of the party in the given case. In those cases when the parties are represented by attorneys – lawyers, as a rule, the proceedings end with a court decision and not in conclusion of a court settlement. Also, judges themselves are not overly motivated to resolve disputes by court settlement. All reasons that demotivate parties, their attorneys and even courts could be subsumed under one major reason, which is that all the advantages that a concluded court settlement has, both in the domain of procedural law and in material law relations.

This collection of papers on court settlement is characterized by inventiveness in taking stock of the advantages and potential disadvantages that become apparent when a court settlement is concluded. This collection includes four papers which treat the procedural phenomenon of court settlement in various ways.

The desire of the authors to give their contribution to decoding the legal nature of the court settlement, which is no easy task. The legal nature of the court settlement also defines the legal remedy. Even though the law-giver specified an exclusive legal remedy – a lawsuit to contest the court settlement, many dilemmas and issues connected with court settlement remain unresolved. The contribution of this collection of papers is exactly in the fact that certain question about the court settlement have been identified and posed. The authors quite successfully answered some of those, while others remain open. The questions that still await answers always represent a stimulus for the process theory and for legal theoreticians to take certain positions and offer answers.

The papers on court settlement, which are included in this collection, are of significance both for legal theory and for practicing lawyers who, sometimes quite without justification, neglect the advantages of court settlement and conduct litigation by default, so it lasts long for no reason

and end with a decision on merits, but at the same time in dissatisfaction and disappointment of one of the litigants, not only in the outcome of the dispute, but also in the judiciary in general. In contrast, a concluded court settlement does not produce a decision on "a winner and a loser", but the conclusion of the dispute peacefully with participation and to the satisfaction of all participants in the proceedings, which should not be neglected in the resolution of disputes in any particular case.

Ranka Račić, LLD (PhD in Law), Professor