

# Drafting a Settlement Agreement

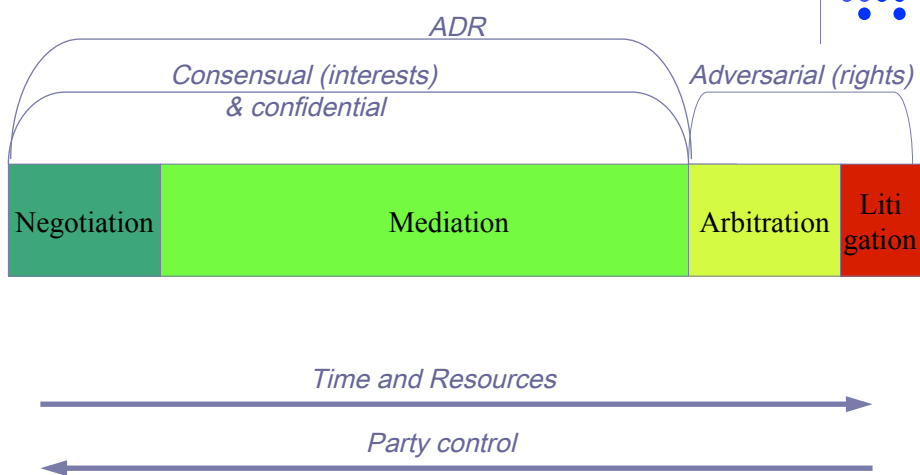
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6 November 2015



## Dispute Resolution Continuum



## Key Issues - Outline



- Who decides how the settlement will be recorded?
- Who drafts the agreement?
- Is the agreement binding?
- Should lawyers review the settlement?
- How do the mediation confidentiality rules affect mediated agreements?

## General Considerations



- Most cases settle but not all cases are capable of settlement
- Purpose of settlement is to arrive at an agreement that is satisfactory to your client consistent with law and relevant rules of professional responsibility.
- Settlement allows your client to have some control over the final resolution and may provide relief not available at trial.

## Assess Settlement with your client



- Before discussing with client, lawyers must evaluate the case:
  - What is the relevant? Is client's objective supported by law?
  - What is reasonably expected outcome?
  - What are other possible outcomes including unfavorable outcomes?
- Explain concept of settlement
- Discuss with client your evaluation
- Explain pros and cons of court litigation, arbitration and settlement

## Keys to Drafting Effective and Enforceable Agreements



Do your due diligence – Key considerations:

- Settlement agreements as beginnings and/or ends
- Understand your & your opponent's needs
- Draft lasting robust clauses
- Engage the experts

## Settlements as End Points



- No continuing obligations
- Lump sum payments
- No monitoring requirements
- Arbitration clauses
- Liquidated damages
- Press releases/non-disclosure clauses



## Press Releases / Non-Disclosure Clauses



Only where possible and/or necessary

- Do not leave to the last minute
- Corporate clients: Clear through all channels
- Manage disclosures



## Settlement Agreements as Beginnings



- Take time to understand opponent's goals & needs
- Know your goals:
  - Being free of future litigation / arbitration
  - Ongoing relationship/joint venture
- Draft to all parties' goals
  - Engage lawyers



## Knowing the Parties' Needs – Due Diligence



- Understand your clients needs & limits
  - Define wins & break evens
- Robust discussion before drafting
  - Avoid “lawyerly” hang-ups
- Do not just exchange revisions - DISCUSS



## Draft Robust Binding and Enforceable Clauses



- Do not skimp on dispute resolution:
  - Arbitration
- Confidentiality/non-disclosure
  - Know your limits
  - Set limits your Client & opponent can meet
    - Public reporting
- Press releases
  - Draft & approve early
  - Approve language & timing
- Avoid legalese



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## General Drafting Terms



- Record facts that have brought parties to the point of settlement
- Mutual Releases: A broad release of all claims each party has against the other. Do not release potential claims that might arise in the future especially if parties have an ongoing relationship
- Each party to bear their own costs and lawyers' fees.
- Be aware that the settlement may result in tax consequences to you client
- Signature lines for client and counsel

## INVESTOR-STATE MEDIATION



## Key Issues



- Who can negotiate on behalf of the state?
  - State representative
  - Law firm
  - Others?
- Who can authorise settlement?
  - Government committees
  - DPM
- Who can authorise money settlement?

## Emerging Institutionalisation



- ICSID
  - 9 recorded cases
  - Limited or no publicity
- UNCTAD
- IBA
  - Investor-State Mediation Project
- IMI
  - Investor State Mediation Taskforce





## Recent experience

- Settlements after the arbitration has started
  - Egypt
  - Oman
  - others
- Settlements before arbitration has started
  - VERY RARE!
  - Nigeria
- Settlement after the arbitration has been completed
  - Argentina



## Key problems

- States are very reluctant to settle if the settlement includes a money obligation on their part
- Most common settlement would be a renegotiation of concession agreement
- States use settlement for reasons of confidentiality (and safeguarding their credit rating)
- Reluctance to use ISM in BITs and other IIA

## Way forward



- It is important for states to develop a DPM (Dispute Prevention Mechanism), typically an inter-ministerial committee that monitors investments and assesses risks in relation to disputes
  - UNCTAD work
  - From Panama to Korea

## Any Questions?



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