



# ADR & ARBITRATION GUIDE 2022

## CHAPTER 5

# COMPROMISES AND SETTLEMENTS

## 1. Methods of Reaching Settlement

A settlement is an agreement between the parties. It generally involves one party agreeing to pay compensation to the other party or meet the other party's demands, and the other party agreeing to take no further legal action on their claim. In a dispute, each party rarely knows with certainty the outcome of their case if their dispute is resolved by a court judgment or an arbitral award which often motivates them to reach a settlement. A settlement may take place in advance or parallel to the litigation process and is usually reached after direct negotiations between parties or negotiations between their attorneys. Accordingly, the parties can reach a settlement through (1) an in-person meeting or (2) correspondence.

### *1.1. Reaching a Settlement through an In-person Meeting*

A settlement does not have to happen face-to-face, but an in-person meeting often leads to better coordination, greater information exchange and more positive outcomes such as satisfaction and trust than negotiations occurring via email. A settlement meeting often involves both parties and their attorneys working together to seek solutions for their dispute. Usually, each party and his attorney will meet in a third conference room where the attorney has secured instructions from their respective clients to advance negotiations and pursue settlement. The meeting is a useful way of achieving agreement in a set time frame. Also, the parties often prefer in-person meetings for complex disputes with great value. However, it is necessary for both parties to attend the meeting with the understanding that they will need to negotiate and compromise.

### *1.2. Reaching a Settlement through Correspondence*

A settlement also can be reached by an exchange of written letters. A settlement agreement is a form of contract which parties can reach through the settlement offer and acceptance of the offer.

A settlement offer is an offer by one party to settle a dispute amicably to avoid or end a lawsuit or other legal actions. A settlement offer should include detailed essential information to determine the benefit of settling a case such as the statement of facts, the client's history, damages and evaluation. Remarkably, the terms of the offer of settlement must be clear and must show the intention to compromise and assume some obligations.

An acceptance of the offer of settlement often must be made within a reasonable time, and on the terms offered. In other words, the acceptance has to "mirror" the offer and does not modify the original terms of the offer.

Nonetheless, settlement is rarely a discussion of one issue. In most cases, the parties will have to compromise on many issues, each with its range of possible resolutions. The settlement, therefore, does not usually consist of exchanging offer and acceptance but is broken down into many offers, counter-offers and acceptances.

## **2. Attorney's Ethical Considerations**

### **2.1. Good Faith**

Attorneys should be fair in their conduct and their counseling of their clients concerning the settlement. Accordingly, in the course of compromising or settling, the attorney must not make a false statement of material fact (or law) to the opposing party. Unethical false statements of fact or law may occur in some ways: the attorney knowingly and affirmatively states a falsehood or makes a partially true but misleading statement that is equivalent to an affirmative false statement; the attorney incorporates or affirms the statement of another that the attorney knows to be false; the attorney remains silent or fails to disclose a material fact to the other party .

### **2.2. Acting within the Scope of Provided Authority and Abide by the Client's Decisions**

The client has the right to decide what scope of authority to give the attorney, and the attorney should operate exclusively within the scope of the authority the client has provided.

Early discussion with the attorney of the option of pursuing settlement may help the client to develop reasonable expectations and to make better-informed decisions about the course of the dispute. However, the decision of whether to pursue settlement discussions belongs to the client . The attorney should not initiate settlement discussions without authorization from the client. Similarly, when the opposing party first raises the possibility of settlement, the better practice is to offer no immediate response until the attorney consults the client. On the other hand, the attorney has to provide the client with information, relevant facts that help the client decide whether to make a decision regarding a settlement offer or acceptance of the offer from the other party.

### **2.3. Adhere to Ethical and Legal Rules**

Attorneys must comply with applicable codes of professional conduct and law during settlement negotiations and may not knowingly assist or advise clients to violate the law or other legal obligations. If an attorney discovers that a client will use the attorney's services or work product to further a course of criminal or fraudulent conduct, he must withdraw from representing the client. Especially, the attorney's obligation of allegiance to the client will not justify him in breaching, or

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knowingly assisting the client in breaching. A settlement agreement is a contract and once entered into is binding and conclusive. Therefore, when compromise produces a settlement agreement, it is subject to challenge in the same manner as other contracts. For instance, a settlement agreement may be void and unenforceable because the attorney fails to comply with the codes of professional conduct.

#### ***2.4. Protect the Interests of Client***

During settlement, attorneys often forget that they are representing the interests of a client, not to engage in a battle of wits with another attorney. Therefore, the attorney must reasonably consult with the client respecting the means of negotiation of settlement, including whether and how to present or request specific terms. This helps the attorney pursue settlement discussions with a measure of diligence corresponding with the client's goals. In other words, the degree of independence with which the attorney pursues the negotiation process should reflect the client's wishes, as expressed after the attorney's discussion with the client.

#### ***2.5. Confidentiality***

Attorneys have a duty to keep the affairs of their clients confidential and the circumstances in which they are able to disclose client information is strictly limited. As one party's agent, the attorney will ordinarily be bound by the confidential agreement, since settlement terms and other matters concerning a lawsuit will ordinarily be confidential information that may not be disclosed without the client's consent after consultation. Therefore, in connection with a settlement, the general rule is that the attorney may agree not to reveal the settlement terms and other specified information that is subject to the attorney's confidentiality duty.

### **3. Matters to Consider Before Entering Settlement**

#### ***3.1. Merits of the case***

There are a number of factors to decide whether to compromise a dispute. They include, most obviously, the merits of the case that the client is in a strong or weak position in terms of the facts and evidence to support the case. Most disputes are settled for many reasons, including that it's often better to finalize a settlement than for either party to go through a long trial. But not all settlement offers are better than going to trial, especially where filing a lawsuit is likely to yield a higher amount of compensation. Therefore, the attorney can offer advice based on years of experience and careful evaluation as to whether initiating a settlement offer is a better idea than going to court or vice versa.

### ***3.2. Commercial Relationship***

It is necessary to consider the relationship between the parties. If the parties remain on good terms and want to maintain an existing relationship, compromise and settlement is the appropriate way to settle business disputes .

### ***3.3. Resources and Time***

Another main concern parties must deal with when considering before entering settlement is their own and their opponent's resources. If the respondent has limited financial resources, it may be better for the claimant to settle soon after the dispute arises instead of later, especially if the claimant anticipates incurring significant costs litigating the dispute. Similarly, it may not be worthwhile litigating a case against a respondent with extensive resources who can afford the high costs of litigation if the claimant can not. In this case, the claimant can create an incentive for speedy resolution by offering to settle for less than the full value of the claim (if the settlement value is reasonable) .

In addition, the parties should consider the burden, expense and opportunity costs if they must devote substantial time and other resources to support the litigation. This is because involving in litigation can typically lose a significant amount of work time to locating, collecting, reviewing and producing records requested for discovery, as well as the additional time spent preparing to submit a petition and trial.

### ***3.4. Timing of Settlement***

Settling the dispute as soon as it arises can be advantageous to both sides, mostly because of the cost savings involved in avoiding discovery and related attorney costs. This is particularly appropriate where maintaining the commercial relationship between parties is a priority, before the situation becomes irreversibly adversarial. However, if the respondent needs the time to assess the scope, nature of the dispute as well as strength of the claimant and the parties do not settle the dispute before proceedings begin, it is entirely possible for the parties to consider whether a settlement is possible during the litigation process. Furthermore, the parties also should consider all issues including the court's opinion, new evidence and information when deciding whether to engage in further settlement discussions during the course of the trial. In general, a settlement agreement should be reached before the litigation process although the prospect of settlement may be evaluated throughout the life of a dispute.



## 4. Matters to Consider in Negotiating and Drafting Settlement Agreements

### 4.1. Matters to Consider in Negotiating

#### *Attorney Possess Authority to Settle*

In many jurisdictions, an attorney can not settle a client's action without authorization from the client. An attorney's authority to settle is not incidental, rather it is essential that an attorney have express, special authority from his client to do so. If the compromise is arranged by an agent acting outside the scope of his authority, no settlement can exist regardless of whether the parties had a final settlement agreement. And the safer course (or a requirement in some jurisdictions, including Vietnam) is for the client and the lawyer to enter into a contract for legal services.

#### *Negotiating Procedures*

Under Vietnamese law, the negotiation between parties is not bound by legal regulations on the order and procedures for settlement. Therefore, the parties have the right to decide whether to compromise in a meeting or by correspondence, directly between the opposing parties or between their attorneys. This consideration may be based on the value of the dispute, geographical distance or the current commercial relationship between the parties.

Remarkably, Vietnamese law has no protection over communications made during settlement negotiations as 'without prejudice' principle in some common law nations. This means that any statements or documents parties make during settlement negotiations can be later used against them.

Therefore, each party should consider this element before choosing ways and procedures of settlement.

#### *Set Bargaining Range*

The parties should set the bargaining range during planning the negotiation. They first need to estimate the range of likely results if the case goes to settlement. Accordingly, the parties will set their bargaining range and establish the upper and lower limits. Compromising toward a specific goal will give the parties settlement structure, direction and focus.

#### *Basic Principles - Cooperation and Flexibility*

Cooperation is the road to a successful settlement. Distrust, stubbornness and attempts to gain unjustified advantages beget non-cooperation rather than concessions and tend to cause a breakdown in the communication necessary to reach a settlement. Therefore, the key to a successful

settlement is mutual cooperation. Moreover, there is a possibility that one party fails to evaluate the issue and sets the wrong bargaining range because there is some evidence that they were not aware of before. Therefore, during the settlement process, each party should be flexible to modify their original expectations. Many attorneys have flexible language negotiation but they never reconsider initial goals even after new information changes the merits of the case. This will lead to an ineffective compromise and settlement process and it will be difficult for parties to reach a settlement.

#### *Gather and Prepare Supporting Documents*

During negotiation, parties should gather the necessary documents, including not only the primary contract but also any subcontracts and relevant documents. Information is at the heart of negotiation. Adequate attention to gathering information and documents during the negotiation can significantly enhance the likelihood of a mutually satisfactory agreement. In addition, if one party has more information about the case, the opposing party's financial situation, needs and costs, it will be easier to develop negotiating proposals and have a stronger negotiating position.

#### **4.2. Matters to Consider in Drafting Settlement Agreements**

A settlement agreement, like any contract, should be about the performance of mutually agreed-upon terms. Therefore, before drafting the settlement agreement, the parties should consider some crucial elements to ensure the performance of the terms and protect one party if the other party fails to perform the agreement.

#### *Form of Settlement Agreement*

Settlement agreements are contracts subject to the same rules of formation, validity, and interpretation as other contracts. Because of this, many jurisdictions require settlement agreements to be in writing to be enforceable. In cases where the law does not require settlement agreements to be made in writing, the parties also should record any terms of the agreement in writing so that rights and obligations are clear and enforceable. Verbal settlement agreements should be avoided as they may open to dispute at a later date. If the settlement involves a stay or dismissal of court proceedings, the parties will need to prepare a court order so that the case can be brought to an end and the settlement terms enforced within the existing proceedings if necessary.

#### *Parties*

It is important to ensure that the correct parties are identified as parties to the settlement agreement. Normally, the parties to a settlement agreement would be the parties to the contracts at issue or the

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parties to the pending litigation or arbitration.

In certain trading relationships, however, the party with whom dealings are made may not be the contractual counterparty against whom rights or obligations are held. In addition, where a group of companies is involved, it is important to ensure the correct entity or entities are bound by the agreement. Therefore, it is necessary to check the list of all individuals and entities - both for the claimant and respondent - that the agreement will cover .

### *Scope of Settlement Agreement*

It is necessary to identify the scope of the agreement. Accordingly, parties should carefully consider which claims they want to release as part of a settlement agreement and whether the language in the settlement agreement captures those precise claims. Furthermore, it is also important to clarify in the settlement agreement whether the release of claims is mutual. The settlement agreement should explicitly release all known and unknown claims because the general release of claims is not always sufficient to release claims that were unknown at the time of settlement.

### *Recitals*

A settlement agreement should have recitals explaining the facts involving the dispute and state that the parties have reached a settlement. Recitals appear at the start of the agreement and provide a background of the settlement and underlying dispute, such as the settlement's date of execution, the parties to the settlement, a description of the claims that are subject to the settlement, a statement that the parties have voluntarily entered into the settlement to fully resolve the dispute. Although the recitals are not an enforceable part of the settlement agreement, they provide guidance for parties on how and why the settlement agreement was entered into. Moreover, recitals may prove useful in informing the parties' intent if disputes arise over specific terms or their performance.

### *Consideration*

Like any contract, a valid settlement agreement must be supported by valid consideration. For example, under the settlement agreement, the respondent agrees to pay the claimant an amount in exchange for the claimant having to withdraw the claim. The obligation for payment of any money or other obligations should be clear and a time limit for performance should be expressed in the settlement agreement. There is little value in a settlement agreement if it was made unclear around payment terms. This is especially the case if the payment is made in installments or by a third party.

## *Confidentiality*

One benefit to settling out of court is that the details are not part of the public record. Therefore, many settlement agreements incorporate a confidentiality clause that strictly prohibits the parties from disclosing certain details of the case. When considering the need for confidentiality in the agreement, the parties should give the confidentiality explicitly level and state the penalty for violation of the confidential terms.

Nevertheless, disclosure is usually necessary for some situations. A party will need or want to disclose the settlement to its accountant, financial/tax advisor, attorneys, and others with a need to know to render professional services. Therefore, the agreement also should provide that confidentiality is not required if a party must disclose to enforce the agreement.

## *Legal Costs & Tax consequences*

Where compensation is paid, the tax implications should be considered. The parties must discuss the tax implications of financial payment to settle a claim, as well as the timing of a settlement payout and the jurisdiction in which the payment is made.

The parties also should consider how the legal costs of the dispute will be treated. Usually, each party bears its own costs.