

Contract vs. Settlement Agreement in Common Law

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Settlement agreements in the common law context : Do they enjoy a different status than a contract?

United States: a jurisdiction comprised of 50 states (and 14 territories): difficult to generalize

Florida: Florida Bar is currently working on a draft International Commercial Conciliation Statute

General conclusion:

Settlement agreements have the same legal status as the original contract and are enforceable as contracts under the applicable state law.

Conversely, they can be subject to the same defenses as a contract.

Still of interest:

- * Problems regarding enforcement
- * Statutory Regime
- * How to proceed
- * Enforcing/resisting enforcement of settlement agreement
- * International considerations
- * Confidentiality

“... [W]hen a commercial dispute arises from a contractual relationship, conciliation may not be an attractive option ... if a successful conciliation would result in a settlement that **would merely have the same legal status as the original contract and would have to be the subject of litigation under contract law.**”

... Assuming parties are able to enforce settlements under contract law ... enforcement of conciliated settlements is still seen as too difficult in the cross-border context.”

Statutory Regime

USA (federal)

No over-arching federal legislation regulating the conduct of mediation (conciliation) and the guarantees of confidentiality.

States

Under existing state law, settlement agreements generally would be enforceable as contracts.

Many states have enacted statutes that encourage and regulate the conduct of domestic and international conciliation.

In order provide a degree of unification, the Uniform Law Commission in collaboration with the American Bar Association's Section on Dispute Resolution drafted a **Uniform Mediation Act**.

Uniform Law Commission, like UNCITRAL, researches, drafts and promotes uniform acts.

2001 Uniform Mediation Act

Enacted in District of Columbia, Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington
New York and Massachusetts pending.

Other states comparable statutes, including Florida.

2003: UMA amended following the 2002 adoption of the UNCITRAL Model Law on International Conciliation to facilitate adoption by states of the Model Law.

Section 11(b) of the UMA now provides that unless the parties agree otherwise, “if a mediation is an international commercial mediation, the mediation is governed by the Model Law”.

Adopted by District of Columbia, Idaho, South Dakota and Utah

UMA: only provision on enforcement is Art. 14 of the Model Law

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable . . . [the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement.].

Florida

Florida Mediation Statute: Mediation Alternatives to Judicial Action

Court ordered or court related mediation
“Voluntary mediation” embedded in text
No provision on the enforcement a settlement
agreement

2008: Mediation Confidentiality and Privileges Act

Florida Bar: Draft Florida International Commercial Conciliation Statute

Similar to California, Texas, Ohio (UMA), North Carolina and Oregon

“If the parties conclude an agreement settling a dispute **prior to the commencement of arbitration proceedings or before the arbitral tribunal is constituted**, that settlement agreement is binding and enforceable as follows:

If the result of the Conciliation is reduced to **writing** in the form of an **arbitral award on agreed terms** and **signed by the parties**, the written agreement shall, with the **consent of the parties**, state that it is an **award**. Such an award shall be treated as an arbitral award rendered by an arbitral tribunal duly constituted in and pursuant to the laws of this state, and shall have the **same force and effect as a final award in arbitration**.

The award shall be deemed to be **made at the place in this state** where the Conciliation was **successfully concluded**.

Distinction: lawsuit or not

Usual practice in Florida: potential claimants file a claim in court before engaging in a mediation

Preserve the opportunity to return to court if necessary to enforce the settlement

Trial court may incorporate settlement agreement into a final judgment or approve settlement by order and enforce its terms

VALIDITY

Mutual intent to be bound

Meeting of the minds

Capacity of parties (mental and age)

(E.g., authority of attorney to act on behalf of client)

Entered willingly

Fulfill a legal purpose

(I.e., not an illegal purpose)

Writing, signed and dated (if required)

Consideration

INVALIDITY

Mistake

Ambiguity

Incapacity

Lack of consent

Duress (threat)

Undue Influence

Misrepresentation

Material or Fraudulent (intent)

Impossibility or Impracticability

Illegality

Unconscionability (see Duress and
Undue Influence)

Lack of consideration

Frustration of purpose

Violation of public policy

REMEDIES

Award of damages

Specific performance

Injunctive relief

[Promissory estoppel if otherwise unenforceable as a contract]

International Considerations

USA:

- * No bilateral or multilateral convention regarding the enforcement of judgment from another country
- * No federal law regarding the enforcement of judgments from foreign countries
- * Comity

Florida:

Uniform Out-of-Country Foreign Money Judgments
Recognition Act
Judgments for a sum of money

CONFIDENTIALITY: FLORIDA

2004 Mediation Confidentiality and Privilege Act

- * All mediation communications confidential and all mediation participants, unable to disclose confidential communications with a few exceptions
- * No confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise
- * Parties may opt out



How things can go wrong in Florida as a result of a breach of confidentiality

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Thank you for your attention.