



Settlement During the Arbitration Proceedings – Role of Counsel





"Disputes resolution is a war. It needs careful strategy."

(Gao Feng & Paul Starr, King & Wood Mallesons)

"The best resolution of a dispute, at least from a party's perspective, will usually be no dispute at all."

(Michael Mcilwrath, Global Chief Litigation Counsel, GE Oil & Gas)

"Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."

(Abraham Lincoln)





Clients' view?

"Respondents believe that arbitration counsel could be better at <u>working together with opposing counsel</u> to narrow issues and <u>limit document production</u>, <u>encouraging settlement</u> (including the use of mediation) during an arbitration, and <u>not</u> 'overlawyering'."

(2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, conducted by Queen Mary , University of London and White&Case)





Should we settle?

- ▶ Driving factors:
 - assessment of party's position
 - weighing the chances of success against a number of different factors, e.g.
 - weighing of evidence,
 - ▶ who are the arbitrators? can we asses their legal position? with what certainty?
 - ▶ what is the strategy of the opposing party, can we expect some unpleasant surprises?
 - will we be able to enforce the award, even if it is a favorable for our party?

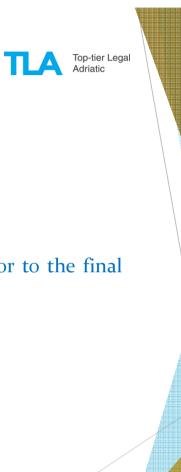




Should we settle?

- ► Shall we dispose of the uncertainty regarding the outcome?
- ▶ Possible incentives for settlement:
 - desire to reduce costs,
 - desire to avoid time-consuming arbitral proceedings and
 - desire to remain on friendly terms with the other party





Statistics

- Different estimates:
 - **4**0-65 %?
 - ▶ At least 25 % of international disputes are settled prior to the final award;
 - ► In East Asia: 30 %
 - ▶ In European and Amercican regions: 48 % on average
- ► Many settlements are recorded as consent awards:
 - ▶ In 2013, approx. 8 % of ICC awards,
 - ▶ Between 2014 and 2015 approx. 10 % of LAC awards.



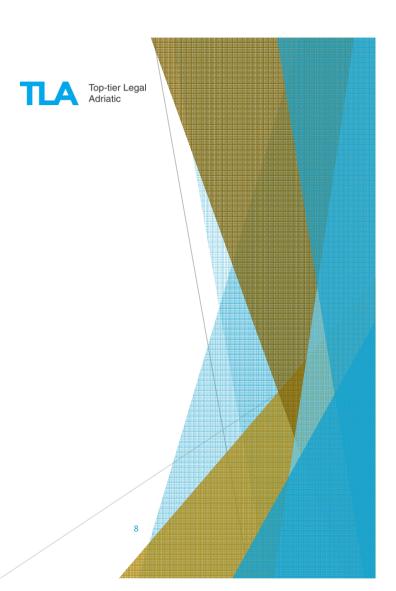


► Role of counsel

- Duty to protect the client's interest while observing the boundaries of law and professional conducts rules and standards
- Duty to develop and present its client's case in a convincing way such that the client would prevail
- Duty to advise the client as to the likelihood of success



- ► Role of counsel
 - ► Integrity and Honesty
 - **▶** Obstructing tactics?
 - ► Causing unnecessary delay or expense?







► Role of counsel pre-arbitration

- **▶** Contract drafting
 - **▶** Dispute resolution clause
 - ► Arbitration rules encouraging settlement facilitation?
 - ► Multi-tier dispute resolution clauses:
 - cooling-off period to negotiate, mediate, or escalate disputes to senior management
- Documenting settlement efforts
 - ► Will these documents be disclosed in the arbitration proceedings?





- ► Role of counsel after commencement of arbitral proceedings
 - determine a proper settlement strategy
 - ► analyse the opposing party's likely approach to the settlement (legal system, tradition?)
 - consider requesting the tribunal to give an early provisional view on law or fact that could facilitate the parties' settlement discussions caution!





- **►** Useful to know
 - opposing party's pressure points
 - any change in the circumstances?
 - ▶ short, long-term business plan of the opposing party?
 - any restructuring, M&A activities?
 - **change in management?**





- ► Role of counsel after commencement of arbitral proceedings
 - Counsel should not reveal any relevant information that would not be disclosed to the tribunal otherwise
 - ► NDA?
 - In international arbitration rules applicable to the opposing party may vary significantly
 - ▶ Offer to settle?
 - large effect on costs award





Settlement reached

▶ should the arbitration be terminated right away or once certain obligations under the settlement agreement have been performed?

out-of-arbitration-settlement or settlement recorded as a consent award?

▶ should the settlement agreement contain an arbitration clause?



Thank you for your attention!

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