

# 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 working together with opposing counsel to narrow issues and limit document production, encouraging settlement (including the use of mediation) during an arbitration, and not ‘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 assess 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 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:
  - ▶ 40-65 %?
  - ▶ At least 25 % of international disputes are settled prior to the final award;
  - ▶ In East Asia: 30 %
  - ▶ In European and American 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?**
    - ▶ **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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