

Important clauses to include in settlement agreements

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It is increasingly common for parties of a dispute to reach a settlement, either prior to launching legal proceedings or before their conclusion. Parties may wish to settle their disputes outside of legal proceedings for a number of reasons, including in order to avoid the legal costs or time associated with legal proceedings (be it litigation or arbitration).



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Although it is not necessary for a settlement agreement to be reduced to writing, with verbal settlements equally as binding, we encourage parties to conclude a written settlement agreement in order to ensure that the terms of the resolution are accurately recorded and given effect to. Verbal agreements often become subject to the old adage of "he said, she said" and, in circumstances where the consequences of a settlement could be far reaching, any risks are substantially mitigated through the conclusion of a written settlement agreement.

In reaching a settlement (and ultimately recording the terms in a written settlement agreement), parties may want to consider the following:

The parties

- The settlement agreement should include all appropriate parties and the parties should be accurately identified. Appropriate parties may include the parties to the legal proceedings or an affiliate, holding or parent company.
- Where necessary, it should also be confirmed in the agreement that the signatories have the necessary authority to conclude the agreement.

Payment

- It is common for a settlement to be reached on the basis that one party will pay the other a sum of money. In this instance, it is crucial to ensure that all aspects relating to payment are canvassed in the settlement agreement. This includes how much will be paid (and whether it is inclusive or exclusive of VAT and/or interest) and by whom; when

payment will be made and to whom (including the accurate account details of the person receiving payment).

- Finally, parties should consider whether there will be any tax implications as a result of the payment and whether it is necessary to consult a tax specialist for the purposes of including any provisions in relation to tax in the agreement.

The settlement

- It sounds obvious, but the parties should be very clear about what is being settled.
- Are you merely settling an existing dispute or claim, or do you want the settlement to extend to any unknown and/or any potential future claims between the parties? Depending on what is being settled and the extent of the settlement, careful wording may need to be included in the settlement agreement to ensure there is no uncertainty about the scope of the settlement and/or its effects, and to ensure that any existing claim is accurately described.

Confidentiality

- Unless you include a confidentiality provision regarding either the existence of the settlement, its terms, or both, the parties to the settlement agreement will not be bound by any duty of confidentiality.
- If there are any potential adverse consequences that could arise if anyone has knowledge that you have reached a settlement and its terms, then a confidentiality clause should be included in your agreement.

The legal proceedings

There are a number of additional considerations if the parties intend settling existing legal proceedings:

- First, and as mentioned above, the parties should be clear that the legal proceedings are being settled fully and finally (if that is indeed the case) and that the dispute and/or claim subject to the proceedings is accurately described.
- Second, the parties might want to consider having the agreement made an order of court. It is worth noting that a settlement agreement can only be made an order of court where the legal proceedings are already before the court. The benefit of having the settlement agreement made an order of court is that, if a party breaches the agreement, then the other party can proceed to execute against the defaulting party immediately on the basis that a court order is final and binding.
- Third, the parties should consider who will be responsible for the legal costs that have been incurred to date in respect of the legal proceedings. The parties may want to include this in the settlement payment, share the costs equally or have one party pay the costs on an agreed scale.
- Finally, the parties should ensure that the pending legal proceedings are properly dealt with. This may involve the withdrawal of the matter on the basis of settlement, or agreeing to a stay of the proceedings.

Breach

- In circumstances where it is not possible to have the agreement made an order of court, then parties should consider whether they wish to include a separate provision dealing with a breach by either party of its obligations in terms of the agreement. This will be in addition to the rights that a party would otherwise have arising out of law.
- A breach clause may, if appropriate, provide for:
 - the cancellation of the agreement;
 - a liquidated damages claim;
 - interest to apply in respect of late payments.

The considerations set out above are by no means exhaustive and are merely intended to guide the discussion between the parties on issues that have proven to be contentious in the past. They are also largely applicable to disputes of a domestic

nature. Where the dispute being settled has cross-border implications, further considerations may arise, such as the governing law to apply to the agreement or the potential enforceability of the agreement. We therefore recommend that parties who wish to conclude a written settlement agreement should brief an attorney to properly review the terms of the agreement to ensure that all concerns and risks are adequately dealt with.

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