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Avoiding Legal Traps In Settlement Negotiations

VIETNAM COURT TACTICS

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Summary

In litigation, you will almost certainly be involved in settlement negotiations at some point. However, most people, when approaching settlement negotiations, usually focus solely on how to get the best deal and forget to keep their guard up in the event negotiations fail. As a result, people tend to fall into legal traps set by the opposing party during mediation or informal discussions and lose their case later.

It should always be kept in mind that Vietnamese law currently has no protection over communications made during settlement negotiations as in some common law countries. This means that any statements you make during settlement negotiations can be later used against you.

Generally, there are two common ways that your settlement communications may harm your case:

- They can be interpreted as a partial admission of liability, providing the opposing party a reset of their statute of limitations timeline for filing a lawsuit. This may potentially destroy your defense based on the statute of limitations.
- The information and documents you provide to the opposing parties can be later used as evidence against you. As a result, it is often difficult for you to challenge such evidence (since you are the one providing such evidence in the first place).

Overall, any misstep in settlement negotiations can greatly undermine your case or defense. Thus, it is prudent to always keep you guard up during any communications with the opposing party.

Read full article

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Some signs that the opposing party is trying to trap you during settlement negotiations

You should exercise special caution when:

- The opposing party is paying too much attention to the form of your offer. Specifically, the opposing side may request you to make the offer in writing or sign the meeting minutes recording the negotiations with them, etc. Normally, the finalized form and validity of the settlement offer is inconsequential during the negotiation stage. If the offer is agreeable, an informal acceptance may be given before the parties move to drafting the actual settlement agreement in the correct form that will ensure legal validity. If the offer is not agreeable, then there is no reason to be concerned about the form and validity at all. Requesting the other party to make a formal and legally valid offer, while being vague about whether such offer is agreeable, is highly suspicious and often is a signal of a bad-faith intention to use such offer as evidence for litigation.

  A common method to minimize risks when proposing a settlement offer is to propose the offer verbally to the judge and request the judge to assist in discussing the matter with the opposing party. Judges in Vietnam often welcome settlement offers and will usually be willing to provide such help. This method will minimize the risk of the opposing party using any evidence against you in the future. In addition, it may also make your offer more convincing as it was conveyed by the judge.

- The opposing party is concerned more about the underlying reasons of your offer than the numbers you give them. Settlement negotiations primarily involve money payment and the parties will normally be more focused on how much they will be paid, rather than rationale behind the computation. For instance, the opposing party makes a request during negotiations for payment of 03 amounts at USD10,000; USD20,000 and USD30,000. After self-evaluation of the strength of your case, you may consider that you are likely to lose 100% in the third amount (USD30,000) and 50% in the second amount (USD20,000).

  As a result, you offer settlement in the amount of USD40,000. From the opposing party's perspective (if they are genuinely interested in a settlement deal), this USD40,000 is for all 03 amounts and it should not be important which amounts you believe you can defend against and which you cannot. The only factor that should count is whether the USD40,000 is acceptable to the opposing party. If it is not, they should reject the offer and/or send a counter offer with a different number.

  If the opposing party neither accepts nor rejects your offer, but instead questions how you computed the USD40,000, then it is likely that they are luring you into admitting that their requests for the second and third amounts are reasonable. This will also likely to undermine your defenses against the second and third amounts at trial. For this reason, by default, you should always make your offer in general terms, i.e. a total amount and conditions (if any) for settlement of the entire case. Detailing how you computed the offered amount, especially if you mention that you agree with any of the claims of the opposing party, can be interpreted as an admission of liability.

- The opposing party asks for specific information or documents that support or prove your defense. It is common practice (and reasonable) for the opposing party to ask for your evidence to determine how strong your defense is. However, you should always be careful when providing the opposing party with any information or documents that they do not currently possess. Certain information and documents may currently appear disadvantageous to the legal claims of the opposing party, but in the future the opposing party may change or alter their arguments or claims resulting in such information and documents becoming advantageous for them. Litigators may intentionally build faulty or unsupported arguments or claims at the outset of the case (e.g. leaving an intentional omission in the arguments) just to lure you into disclosing certain information and documents during pretrial negotiations.

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In litigation, all evidence has its own pros and cons and there is always a risk when disclosing any information or documents. Thus, before freely providing any potential evidence, you should carefully consider whether such information or documents may harm your defense at trial should the negotiations fail. It must always be borne in mind that the opposing parties may have been hiding their true strategies and arguments to cause you to lower your guard.

If the opposing party agrees to the settlement offer, what are the next steps?

Reaching a consensus as to the terms of the settlement is only the first step in settling a lawsuit. Following this, the parties need to formally establish and execute a settlement agreement and there are many legal issues and risks that could arise from this process. Normally, there are 02 methods of finalizing a settlement agreement:

The parties sign a settlement agreement outside of Court and then the claims are withdrawn

This method is simple, fast to process and there are no court fees involved (as the fees will be refunded when the parties withdraw their claims). However, there may be potential issues with this method:

- It cannot prevent the parties from re-filing their claims again in the future

  When settling a lawsuit, the parties almost always desire such lawsuit to be closed permanently and to bar the claims from being brought before the Court again. Settlement agreements often include such a commitment from the parties. Nevertheless, this commitment is often unenforceable because the right to file a lawsuit with the Court is a statutory right that cannot be waived.

  Normally, a well-drafted settlement agreement will eliminate the underlying grounds for the claims. Therefore, even if such claims are filed with the Court again, the Court will ultimately reject the claims based on the agreement.

  For instance, to close a claim for illegal unilateral employment termination, the settlement agreement should stipulate that the parties agree to mutually terminate the employment and, as a result, extinguish the "unilateral" element so that such claim will become groundless.

  However, eliminating the underlying grounds may not be possible in some cases. This usually occurs with compulsory statutory payments that cannot be waived by an agreement. To illustrate, the law requires that, in some cases, the employer must pay severance allowance (i.e. half of a month's salary for each year of service) to the employee upon termination of employment. The employee's waiver of the severance allowance may be deemed invalid and unenforceable due to the statutory labor protection. Thus, if a settlement agreement requires the employee to withdraw and waive his/her severance allowance claim (in return for some concessions from the employer), it may not be enforceable. There is also a risk that the employee may later re-file the claim for the same severance allowance.

- The settlement agreement cannot be enforced without initiating a lawsuit for a final judgment by the Court

  The settlement agreement is simply a normal contract, which means that if there is a breach, a lawsuit must be filed with the Court for resolution via a judgment. This process will undoubtedly be quite time-consuming and it may be even unachievable in some cases. For example, in a debt recovery lawsuit, the creditor may agree to settle with the debtor at a lower amount in order to avoid spending further time and expense on litigation. However, if there is risk that the debtor will breach the settlement agreement and place the parties back into the dispute resolution process, there would be no motivation for the creditor to settle the case. Instead, these types of cases should usually be settled via the second method as mentioned below.

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Settlement agreement recognized by the Court

This method requires that the parties inform the Court that they wish to amicably settle the case. The Court will create meeting minutes to record the settlement agreement of the parties and then, after 7 days, issue a decision to recognize such settlement agreement. This decision of the Court is the equivalent of a judgment, which means that it can be directly enforced and will prevent the parties from re-filing their claims.

Though this method will solve the issues of the first method above, it is not always a perfect solution. There are some potential issues this method may create:

- The parties will incur court fee

  In this settlement method, the Court will leave the parties to decide on how the court fee will be paid, e.g. one party will pay in full, or both parties will pay. As agreement concerning the court fee is compulsory with this method, it is necessary to stipulate to court fee during the outset of settlement negotiations to minimize issues in the future. The sudden appearance of the court fee issue, when negotiations have been closed, could create further disagreement between the parties and potentially sabotage the entire settlement. Usually, a disagreement over court fee is not a matter of money, but rather that the payment of court fee will give an impression of being on the losing side of a settlement. Thus, it is common to split the court fee equally between the parties to show that they are "equal" in settlement.

- The parties are not free to control the settlement terms and conditions

  For this method, the Court will draft the settlement documents, not the parties. Though the Court will try to preserve the terms and conditions agreed to by the parties as much as possible, there is a clear limitation that the settlement cannot exceed the scope of the lawsuit or the jurisdiction of the Court. For instance, A agrees to withdraw and waive Lawsuit C, in return for B to withdraw and waive Lawsuit D. This manner of settlement agreement can neither be recognized by the judge in Lawsuit C nor the judge in Lawsuit D, because the judge in Lawsuit C has no power over Lawsuit D and vice versa. Thus, having this type of settlement agreement recognized by the Court will not be possible without first consolidating Lawsuit C and Lawsuit D. However, conducting such a consolidation may be difficult and time-consuming in practice. This can be a significant concern because the longer it takes for the settlement to be legally closed, the more it is likely that the parties may have a change of heart and cancel the settlement./.

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