

Settlement of Civil Disputes: Overview (Ireland)

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Practice note: overview | Law stated as at 01-Jul-2024 | Ireland

A Practice Note providing an overview on the key aspects of settling a civil dispute in Ireland, including statutory duties to attempt settlement, the form and formalities of settlement, how to ensure confidentiality of the settlement terms, whether negotiations are without prejudice, third-party rights, remedies for breach, enforcement of the settlement terms, and how to set aside a settlement agreement.

Litigation is expensive and can often take a long time. Courts in many jurisdictions actively encourage settlement, and some jurisdictions require the parties to attempt settlement procedures in certain types of civil litigation. Settlements, which can be reached before or during legal proceedings, can be a cost-effective alternative to engaging in protracted and costly court action.

Settlements are usually considered a form of contract to which general contract law principles apply. However, settlements can also become part of a court order, especially when litigation is ongoing. In the context of a civil dispute between two or more parties, a settlement comes about when they reach a mutually acceptable compromise to resolve their dispute. If the settlement covers the parties' entire dispute, the dispute ends, as do any ongoing legal proceedings related to the dispute. Generally, the parties cannot start a new action relating to that dispute, unless they specifically agree that the dispute can be revived in certain circumstances. It is important for parties and practitioners to be aware of the legal framework in which settlements will be negotiated, documented, and enforced and to consider the rights of third parties affected by a settlement agreement.

This Note covers Irish specific information on all aspects of settling a dispute by negotiation, mediation, and other alternative dispute resolution mechanisms, including:

- The legal or statutory duty and obligations, if any, to attempt settlement.
- The form and formalities of settlement, including the different ways the parties can record the settlement terms.
- Whether the terms of settlement require approval from the courts.
- How to ensure confidentiality of the settlement terms.
- The application of the without-prejudice rule, that is, how parties can ensure that anything said in the settlement negotiations cannot be held against them in any further litigation.
- Whether third parties have any rights under the settlement terms.
- Remedies for breach of settlement terms.
- Enforcement of the settlement terms and how to set aside a settlement.

For information on settlement in a cross-border context, see *Practice Note, Settlement of Civil Disputes: Overview (Cross-Border)*.

Legal Duty and Obligations

The courts in Ireland actively encourage mediation as it is a collaborative process that offers the opportunity to resolve disputes by way of negotiation and agreement rather than beginning or continuing with an adversarial litigation process.

The *Mediation Act 2017* (Mediation Act) generally imposes a legal requirement to consider mediation before issuing proceedings. However, some civil disputes fall outside the scope of the Mediation Act, for example:

- Arbitrations within the meaning of the *Arbitration Act 2010*.
- Disputes that fall under the functions of or are being considered by the Workplace Relations Commission.
- Judicial review proceedings in the High Court.
- Proceedings under the *Domestic Violence Acts 1996 to 2011*.
- Proceedings under the *Child Care Acts 1991 to 2015*.

The Mediation Act, among other things, requires solicitors to consider mediation and to confirm to the courts that they have done so. Solicitors must provide advice and information to clients before instituting proceedings. The Mediation Act also provides an avenue for the courts, either at their own instance or at the request of a party, to invite the parties to consider mediation.

Section 21 of the Mediation Act also enables the courts to take into account an unreasonable refusal to consider mediation when making a determination on the costs of a proceeding. This provision is intended to ensure that mediation is relied on as a method of dispute resolution.

Form of Settlement

Parties can record a settlement agreement by a number of mechanisms. The most common mechanisms are settlement agreements and court orders. Settlement agreements are legally binding contracts in Ireland, subject to them satisfying the basic principles of contract law.

It is common for parties to agree a verbal settlement and thereafter to confirm the terms of settlement, either by way of open correspondence or by entering into a separate settlement agreement.

Formalities

To be legally enforceable in Ireland, a settlement agreement must be a valid contract and therefore must satisfy the basic principles of:

- Offer and acceptance.
- An intention to create legal relations.
- Consideration.
- That the parties to the agreement have capacity to contract.
- That the terms of the agreement are clear and unambiguous.

If all of these requirements are satisfied, then there are otherwise minimal formal requirements that only arise in specific circumstances under statute. For example, while an oral settlement agreement is sufficient to be enforced, if the agreement relates to the sale of land, then it must be reduced in writing to be enforceable. A settlement agreement reached through a mediation also must be in writing to be enforceable under the Mediation Act. If the parties only reach a settlement agreement in principle at mediation, then it is common for the heads of terms to be reduced in writing and signed by the parties, together with any further actions required of the parties and timelines for completion. A settlement agreement can be executed as a deed or under hand. A settlement agreement must be executed as a deed in certain limited circumstances, such as where there is no consideration passing between the parties or where either party requires a longer limitation period for claims of breach.

Counterpart or separate copies of a settlement agreement can be executed by different parties, with each copy being considered as an original. There is usually a clause in the settlement agreement to this effect. Also, section 32 of the *Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020* (2020 Act), which has not yet commenced (that is, become effective) at the time of writing of this Note, provides for the execution of documents in counterparts, with the counterparts to be treated as a single document. The 2020 Act provides that any hard copy document with two or more parties can be signed in counterpart (that is, in the case of two or more copies of the same document, with each copy signed by one or more of the parties), whether or not the document expressly allows for the method of signature. Section 32 further provides that any settlement agreement executed in counterpart becomes effective when both or all counterparts of the document are delivered to the party or parties who did not sign the relevant counterpart and any other step required (whether under statute or by law) for the document to become effective is taken.

In the case of a company, its ability to enter into a settlement agreement is determined by what it is authorised to do, whether by its company structure or by its constitution. In the case of a company limited by shares, this type of company does not have objects and therefore has full capacity to carry on any legal business. However, in the case of other company types (such as designated activity companies or companies limited by guarantee), the ability of the company to enter into a settlement agreement must be authorised by its constitution. The settlement agreement likely requires board approval, regardless of the type of company involved, unless the board has delegated this authority to a particular committee or particular officer (which must be confirmed). In terms of the execution of the settlement agreement by a company, if under hand, generally any director can sign, but the company must comply with any specific execution requirements in the company's constitution. In the case of deeds, the company seal must be applied, and the company must comply with the relevant process set out in the company's constitution regarding the use of the company seal. Usually two directors or one director and the company secretary need to be present for seal application, but a company's constitution can vary.

Terms of Settlement Subject to Court Ratification

The terms of settlement do not usually require the approval of the court unless the plaintiff is a minor, in which case any settlement must be ruled by the court and approved. In this situation, the court assesses the proposed settlement based on medical evidence and evidence from the next friend as to whether the settlement amount is sufficient. The court also takes into account whether the plaintiff's counsel has recommended it.

Settlement agreements do not need to be filed with the court, but in the context of extant proceedings where a hearing date has been assigned, it is open to the parties to hand them into court on the date of the hearing and seek that they be made a rule of court. Otherwise, the original settlement agreement or agreements should be kept on file in a safe place. Settlement agreements are not a matter of public record unless reported on by the media.

Confidentiality

Settlement agreements in Ireland are not automatically confidential. To keep the terms of settlement confidential, a confidentiality clause must be inserted into the settlement agreement. This is usually a standard clause. If there is a breach of the confidentiality clause, then the party affected by the breach can issue fresh proceedings as against the other party for

breach of contract in the usual way. Alternatively, if there is a monetary amount involved, it may be a condition that if the confidentiality clause is breached, immediate repayment of the monies is required. However, that is not commonly found in settlement agreements in Ireland.

A provision in the form set out in *Standard Document, Settlement agreement (UK Style, Civil Litigation) (Jurisdiction Neutral): Clause 13* is suitable for use in Ireland. In a clause like this in Ireland, there would also usually be reference to the fact that consent to the disclosing or communication of the terms to a third party cannot be unreasonably withheld.

Powers of the Parties to Settle Compromise

There are no categories of parties that may not be able to compromise their disputes, for example children and protected parties. Their settlements or compromises can be done via their next friend or, if they are a ward of court, for example, by approval of the committee.

There are no categories of disputes that cannot be compromised.

While it is common practice for legal advisors and representatives to informally approach and explore the possibility of settlement with their opposite number on a without prejudice, informal basis (for example, to interrogate the terms their opposite number would expect in any settlement), they should always obtain express instructions from their clients before formally settling a dispute. This is particularly important in circumstances where there may be costs consequences for their client if a dispute is settled or their client's avenue for redress may no longer be available. It is also good practice to put any settlement offers to a client in writing, so that the client can fully understand the proposed terms and make an informed decision before compromising their claim.

In the case of companies, for considerations regarding a company's ability to enter into a settlement agreement and execution formalities, see *Formalities*.

Timing of Settlement

Settlement discussions can be conducted at any time during litigation proceedings. The courts in Ireland encourage settlement discussions at all stages of the process. In some instances, the matter may be settled directly between the parties during the hearing. However, from a costs perspective, it is always recommended that parties engage in settlement discussions as soon as possible.

Without Prejudice Rule

For the without prejudice rule to apply, the communication must have been made in a genuine attempt to settle the dispute. To avail of the protection of the without prejudice rule, the written communication should be marked "without prejudice." If the communication is made verbally, the parties must clarify that the discussion is on a "without prejudice" basis or, more commonly, is made "off the record."

If the without prejudice rule applies, the communication generally is not admissible in court as evidence against the person making the statement. There are exceptions to the rule, as follows:

- The mere use of the words "without prejudice" is not sufficient. For the rule to apply, there must be a genuine attempt to reach a settlement in the matter.

- The without prejudice rule may be lifted if there is impropriety. For example, this may arise if improper or criminal conduct was disclosed.
- Where there is misrepresentation or fraud, the without prejudice rule may be withdrawn to consider whether an agreement was affected in this manner.
- A "without prejudice" letter may become admissible where it is part of a settlement agreement for the purpose of giving effect to the agreement.

Also, parties bound by the without prejudice rule are allowed to disclose the existence of a without prejudice communication to the courts, without disclosing the content of the communication, in certain circumstances. For example, when seeking an adjournment of a hearing date, parties commonly advise the court of ongoing without prejudice discussions as grounds for the application.

Once communications are made without prejudice, the without prejudice privilege can only be waived with the consent of both parties.

Terms of Settlement

There are no limitations on the scope of release clauses in Ireland.

Taxes on Settlements

If the settlement includes the payment of money, it may be subject to tax. This depends on the circumstances of the dispute. For example, personal injury payments made under Section 38 of the *Personal Injuries Assessment Board Act 2003* or arising from a civil action (an out-of-court settlement or damages awarded by the court) are exempt from tax.

There are also exemptions from income tax in respect of certain awards for the breach of employee's rights. For example, the exemption applies to awards made under a successful claim for discrimination or harassment but not for awards in respect of remuneration (for example, holiday pay).

The parties to a settlement should carefully consider whether any monetary sum may be liable to tax and obtain independent tax advice where necessary.

Severability

Whether a severability clause is incorporated as a term in a settlement agreement depends on the nature of the dispute. The inclusion of a severability clause means that the parties can enforce the terms of the settlement agreement, even if the agreement includes a term that is legally invalid or unenforceable. In brief, the remaining terms of the agreement can still be enforced. Severability clauses are more commonly included in commercial-type settlement agreements but can be included in any agreement.

Third-Party Rights

Third parties cannot enforce their rights under the terms of a settlement.

Resolution of Legal Proceedings

If legal proceedings have commenced, but the parties have reached a settlement, then generally the party who initiated the proceedings would file a Notice of Discontinuance with the relevant court office (and serve the notice on the other parties) once the parties have adhered to the terms of the settlement. The settlement agreement should clarify the timeframe for the parties to comply with their various obligations under the agreement, which may include when the Notice of Discontinuance should be filed. Once the Notice of Discontinuance is filed, the legal proceedings are at an end. The filing of a Notice of Discontinuance would in the ordinary course automatically entitle the other party to their costs, but that situation is usually dealt with in the settlement agreement by way of the payment of an "all in" sum.

In some instances, where the parties have reached a settlement agreement before or during a hearing (whether of the substantive matter or an interlocutory motion), then the terms of settlement could provide that on consent, the proceedings (and the interlocutory motion, where applicable) would be struck out on the occurrence of a certain event under the terms. For example, in the case of a settlement sum being paid by instalments, then the proceedings would be struck out on receipt of the final instalment.

Breach of Settlement Terms

The remedies available for a breach of settlement terms depend on how the terms of settlement were recorded. Where legal proceedings have been initiated, but the matter is not complex, sometimes the proceedings may be stayed (that is, paused) for a certain period of time, at the request of the parties, to enable the parties to comply with the settlement terms. However, this is not common in Ireland. Alternatively, if there is a hearing date fixed, then the parties may seek an adjournment to facilitate compliance with the terms of settlement. For example, this may occur where the settlement involves the payment of monies from one party to another. If the terms of the settlement are not honored, the proceedings can be re-entered and continued.

If the settlement terms were evidenced in writing by way of a settlement agreement, then contract law principles apply to any breach of those terms. In this case, the aggrieved party would need to issue separate legal proceedings for breach of contract to enforce the terms of the settlement. This remedy applies even if legal proceedings have not been initiated but the parties settled a dispute.

If the settlement terms were made a rule of court, then the parties can apply to the court to enforce the terms of the order. To obtain a court order, legal proceedings must have issued.

Enforcement Proceedings

The procedures to enforce a settlement contained in a settlement agreement or court order are identical to the procedures that should be followed for a breach of settlement terms.

If a party has not complied with a settlement agreement, an aggrieved party would need to issue separate legal proceedings for breach of contract to enforce the terms of the settlement.

If a party has not complied with a court order, an aggrieved party can bring an application to re-enter the proceedings before the court and can seek a direction from the court enforcing the terms of the court order. If the offending party continues its non-compliance with the terms of the order, then the court may find the party to be in contempt of a court order.

Legal Costs

A settlement agreement should always deal with the question of legal costs to avoid any uncertainty and should include what should occur in relation to any previous costs orders that may have been made in proceedings that are the subject of the settlement agreement.

The parties to a settlement agreement are free to agree the position on legal costs. However, in most instances, if the settlement involves a concession by one party (for example the payment of an agreed monetary sum), then this party would usually make a contribution towards costs as part of that settlement sum.

Settlement Agreements

Regarding *Standard Document, Settlement agreement (UK Style, Civil Litigation) (Jurisdiction Neutral): Clause 3.2* (interest) would not usually be found in a settlement agreement in Ireland. This is particularly the case where the settlement involves payment of an agreed sum by one party to another. That sum is generally an "all in" sum and does not attract interest. Any default in payment of the settlement sum would usually trigger a default provision that automatically entitles the party entitled to receive the settlement sum to obtain judgment against the defaulting party for an agreed sum. This amount may be either the reduced settlement sum or the larger sum originally sought in the proceedings, less any payments that may have been received, plus costs.

Clause 6 (agreement not to sue) would be unnecessary in a settlement agreement in Ireland due to the existence of the release under *clause 5*. *Clause 9* (indemnities) and *clause 17* (third-party rights) are not usually found in settlement agreements in Ireland. Where the settlement terms involve payment of an agreed sum, there would also be a clause including bank account details to which payment should be made. One would also expect to see a clause confirming that all parties have obtained independent legal advice before entering into the settlement agreement.

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