



Resolution

Standing Committee on Alternative Dispute Resolution

Privileges relating to Settlement Negotiations and Compromise Offers

Background:

- 1) This Resolution is directed to the existence and extent of privileges or immunities relating to documents written for, and oral and written communications made by, parties in dispute for purposes of settlement negotiations and/or offers to compromise. This Resolution also examines mechanisms used to safeguard such privileges. By “privilege” we mean specifically “without prejudice privilege”, namely that any statement or document exchanged during the course of settlement negotiations between the parties to those negotiations may not be used in court or for any other purpose without the express permission of both parties. Thus, the document and communication become inadmissible and are immune from obligations (such as discovery obligations) to produce documents.
- 2) This Resolution is directed towards communications between parties in a dispute and therefore does not address issues relating to “client attorney/IP professional privileges”. Furthermore, use of potentially privileged information in criminal proceedings is not within the scope of this Resolution.
- 3) This Resolution was proposed by AIPPI’s Standing Committee on Alternative Dispute Resolution (“ADR”), as a result of discussions on the public policy of promoting out-of-court settlement of legal disputes. It was also prepared based on 16 reports received from AIPPI’s National and Regional Groups and Independent Members providing detailed information and analysis regarding national and regional laws relating to this Resolution. These reports were reviewed by the members of the Standing Committee on ADR and distilled into a Summary Report (see link below).

4) For the purpose of this Resolution:

- A reference to **international and cross-border disputes** means disputes between at least two parties which have their places of business in different jurisdictions.
- A reference to **labels** means any marks, words or expressions, in any language, used in documents or communications conveying that these have been produced or made “without prejudice” to the parties’ primary positions in a dispute for the purposes of bona fide negotiations.

5) At the AIPPI World Congress in San Francisco in September 2022, the subject-matter of this Resolution was further discussed within a full Plenary Session, following which the present Resolution was adopted by the Executive Committee of AIPPI.

AIPPI resolves that:

- 1) Documents created for, and oral and written communications made in the course of, *bona fide* negotiations for the settlement of a dispute or offer to compromise should be subject to privilege and should be inadmissible evidence in legal proceedings.
- 2) Such privilege should be harmonised across jurisdictions, so that it applies uniformly, particularly in international and cross-border disputes.
- 3) Exceptions to such privilege should be limited, but should be available in the following circumstances:
 - a) Proving bias or prejudice (e.g. by a witness, expert, arbitrator, etc.);
 - b) proving actual threats or bad faith;
 - c) negating a contention of undue delay, by permitting evidence of the fact or existence of settlement discussions, but without admitting the substance of any such discussions; or
 - a) proving the existence, the extent and/or scope of the settlement agreement.

An exceptional use in accordance with this paragraph can only be made if reasonable advance notice of a proposal for an exceptional use is given, which gives reasonable opportunities for any person opposing such use to seek remedies to prevent the exceptional use.

- 4) This privilege should be available for communications and documents made by anyone taking part in the negotiations, and should not be restricted to certain type of professionals, such as lawyers or outside IP counsel.

- 5) The existence of privilege should be based on the purpose and content of the relevant document or communication, regardless of the use of a particular label.
- 6) Effective remedies should be available against the wrongful disclosure and use of privileged information in legal proceedings, including injunctive relief prohibiting such use or disclosure, and/or making such documents or communications inadmissible.

Link:

- [Summary Report](#)