

# Cerno

Distinguish; determine; resolve.

Date 9 November 2012

## Welcome

Welcome to this newsletter from Cerno, a consultancy providing dispute resolution advice and services to the construction, engineering, industrial and maritime industries and related professions such as lawyers, architects and engineers.

The purpose of Cerno's newsletters is to provide information on matters of general interest and updates on latest the developments in the field of dispute resolution and related case law. In this article consideration is made of the protection afforded by heading communications as being "Without Prejudice".

## "Without Prejudice – Not as absolute as you think!"

When there is a dispute, and in particular disputes involving money, one party or another often couches statements that it intends to facilitate a settlement under the banner that such are made 'Without Prejudice'; but what does that really mean and how much reliance can be placed upon it?

Letters, written and oral communications made during a dispute which are made for the purpose of settling the dispute and which are expressed as being made 'without prejudice', or which are proven to have been made on that basis cannot, in general be admitted in evidence. The rule does not apply to communications that have a purpose other than settlement of the dispute and the privilege attaches only to for the purposes of the proceedings in which the communication was made.

Where the privilege exists it covers the particular letter itself and subsequent parts of the same correspondence, from both disputants, even if they are not expressed as being 'without prejudice'. Where there is a clear break in the chain of correspondence showing that ensuing letters are open, the privilege does not continue through.

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*'Without prejudice' offers allow a party to reserve and rely upon its original position if litigation ensues.*

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Sending communications with the words 'without prejudice' means that the communication and its contents cannot, in general, be used in court proceedings against the interest of the party making the statement. Any party involved in a dispute that might result in litigation can communicate on a without prejudice basis; it is not limited only to communications between attorneys or between attorneys and their clients.

When a party makes a without prejudice offer it does so to reserve its right to assert its original position if the offer is rejected and litigation follows. Use of the words 'without prejudice' does not of itself invoke the protection being sought; the courts will look beyond the simple label. It is, therefore, important to consider the true purpose of the communication before adding the 'without prejudice' banner.

The protection offered by the 'without prejudice' rule is not absolute; there are some ten widely recognized exceptions, the last being added in 2010. The purpose remains that things said and done subjectively during off the record exchanges in seeking a settlement will remain admissible and the courts still promote that disputants should speak frankly to promote settlement.

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### *Ten situations to be wary of.*

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The following is intended as a practical list of the current exceptions to the 'without prejudice' rule:

Delay – Evidence of the fact of 'without prejudice' negotiations may be admitted in order to explain any delay.

Estoppel – If a statement was made during negotiations that did not result in a settlement agreement and the statement gave rise to an estoppel, the 'without prejudice' material may be admitted to prove that the statement was made.

Interpretation – Evidence of the facts within the disputants' common knowledge is admissible where those facts have a bearing on the intended meaning of an agreement, even where the knowledge of those facts is communicated in 'without prejudice' negotiations.

Misrepresentation, fraud or undue influence – 'Without prejudice' material may be admissible to show that a concluded settlement should be set aside on the grounds of misrepresentation, fraud or undue influence.

Perjury, blackmail or other impropriety – A party may be permitted to give evidence of the other party's communications in 'without prejudice' negotiations if the exclusion of evidence would conceal perjury or blackmail.

Reasonableness of a settlement – Evidence of negotiations made on a 'without prejudice' basis can be admitted in relation to whether a party acted reasonably to mitigate any loss.

Save as to costs – Disputants can agree to limit the operation of the 'without prejudice' rule to allow courts to consider 'without prejudice' communications in determining the question of costs.

Settlement Agreements – 'Without prejudice' communications are admissible to determine whether a concluded compromise/settlement agreement has been reached.

Terms of a settlement agreement – The terms of a settlement agreement may be subject to legal disclosure even if the relevant and commercially sensitive material can be redacted.

Without notice applications – In certain types of without notice applications the fact of 'without prejudice' correspondence should be drawn to the judge's attention in order that the without notice application may comply with the duty and obligations of the Parties for full and frank disclosure and that they must not mislead the court.

## CIArb News

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### *New Patron for the Caribbean Region*

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The Chartered Institute of Arbitrators is pleased to announce that The Right Honourable Sir Dennis Byron has consented to be the Patron of the Caribbean Branch of the Chartered Institute of Arbitrators.

The Trinidad & Tobago chapter of the Chartered Institute of Arbitrators (CIArb) is a sub-branch of the regional, Caribbean Chapter and is looking to host regular meetings for its members; however it needs one or more venues.

If anyone can provide a suitable meeting place preferably with light refreshment facilities, to accommodate up to 50 persons, please contact Cerno.

Anyone interested in joining the CIArb can obtain information directly from the Institute ([www.ciarb.org](http://www.ciarb.org)) or by writing to [info@cerno.org](mailto:info@cerno.org).

## Upcoming Events

It is intended that Cerno's newsletters will include details of local happenings and events of interest. Anyone wishing to have details of an event considered for inclusion here should write to [info@cerno.org](mailto:info@cerno.org) and provide relevant details.

**22-23 & 26-27 November 2012:** Hyatt Regency, Trinidad: "The Practical Use of the 1999 FIDIC Conditions of Contract for EPC Turnkey Projects & Comparison with the Plant & Design Build Contract " & "The Practical Use of the 2008 Conditions of Contract for Design Build and Operate Projects." For details and registration e-mail to [jccfidic2@gmail.com](mailto:jccfidic2@gmail.com).

**24-30 November 2012:** Mediation Week & 3<sup>rd</sup> Annual Mediation Symposium. For details and registration e-mail to Janelle Luke; [jluke@ttlawcourts.org](mailto:jluke@ttlawcourts.org).

## Contact Information

Cerno can be contacted by e-mail to [info@cerno.org](mailto:info@cerno.org).

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