

Settling A Commercial Dispute

This guide highlights the factors a business should consider if it is thinking of settling a commercial dispute.

Why settle?

- A settlement gives the business certainty and closure, and avoids the anxiety of having to wait for a judgment from court and the uncertainty about that outcome.
- Reaching a settlement avoids the expense of continuing with litigation. Even if the business wins in court and is awarded costs, it will rarely get all of its costs back from the other side.
- The business should not consider it a sign of weakness to approach the other side to explore the chances of a settlement. This can be done at any time during the litigation process, even during a trial. Settlement negotiations facilitated by a neutral third party (generally in the form of mediation) are becoming increasingly popular.
- The COVID19 pandemic has impacted both businesses and Court processes in various ways, from businesses falling short of their financial obligations, to significant delays in the Courts progressing claims. It is worth considering whether the dispute has risen as a result of the pandemic and if so, if arrangements can be made in light of this. Moreover, litigation can be a time-consuming process and even more so now.

Settlement discussions

- Make sure settlement discussions are conducted on a “without prejudice basis”. This means that anything said about the dispute during the settlement negotiations or in any written settlement offer cannot be used later at the trial. This protection only applies to statements made purely in an attempt to settle the case.
- If the business does not want to be bound by a settlement until after it has spoken to a solicitor, it should make sure any oral settlement is made subject to contract, to take binding effect only on entering into a written settlement agreement.

The extent of the opponent’s resources

If the opponent does not have significant funds, it may be better to settle early rather than incurring significant costs. There is no point pursuing the dispute to trial if the opponent cannot pay the sums awarded or the business’s legal costs.

The extent of the business’ resources

Bear in mind the balance between trying to get a return on the costs already incurred, as against the risks associated with incurring further costs. Is it better to settle straight away or is it feasible to continue to pursue or defend proceedings in the hope of achieving a better result?

Cost-benefit analysis

- Early on in the dispute, conduct a cost-benefit analysis of continuing to fight the case. The business should compare its analysis with possible settlement outcomes.
- If an offer is made, the business should consider its present-day value, bearing in mind how long it will take to get to trial and the potential cost of litigation.

Adverse publicity and precedents

Settlement is likely to be a priority if the business:

- Is concerned about the publicity associated with going to trial.
- Wants to avoid setting an unhelpful precedent that may lead to further claims.

If the business knows the other side is more concerned about these factors, this can provide negotiation leverage.

Management time

Consider the strain on the business's management team and its employees in investigating and defending or pursuing the proceedings.

Relationship with the other party

What relationship does the business have with the other party, and what relationship does it want to have with them in the future? Sometimes reaching an amicable settlement may be the best way forward for both parties.

Other commercial considerations

Are there any other commercial reasons for settling? For example, is the dispute:

- Damaging the business more broadly.
- Causing other losses because it is restricting the business from carrying out its normal business activities.

Instalment payments

- If the business is owed money, and is in a position to wait for payment, an overall higher amount may be achievable through an instalment programme, although it will take longer to collect.
- If the business owes money, and has the liquidity, offering a lesser total amount as a lump sum up front may be attractive.

Alternatives to money

- Consider providing free or discounted goods or services instead of, or in conjunction with, money. A composite agreement may help the business reach an agreement when it would have been too far apart in terms of cash sums alone.
- Agreeing not to do something can also be a useful tool in agreeing a settlement.

Taxation

Always take specialist tax advice and make sure it is factored into the settlement negotiations (for example, VAT may be payable on the settlement).

For further information or advice please contact our Specialist Team on 0800 088 6004