

GUIDANCE NOTE

Settling Commercial Disputes

February 2012

This guidance note highlights the factors your business should consider if you are thinking of settling a commercial dispute.

1. Why settle?

- A settlement gives your 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 you win in court and are awarded costs, you will rarely get all of your costs back from the other side.
- Your 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 increasingly popular.

2. 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 your business does not want to be bound by a settlement until after you have spoken to a solicitor, you should make sure any oral settlement is made subject to contract, to take binding effect only on entering into a written settlement agreement.

3. Extent of your opponent’s resources

If your 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 your opponent cannot pay the sums awarded or your legal costs.

4. Extent of your 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?

5. Cost-benefit analysis

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

6. Adverse publicity and precedents

Settlement is likely to be a priority if:

- Your business is concerned about the publicity associated with going to trial.
- You want to avoid setting an unhelpful precedent that might lead to further claims.

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

7. Management time

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

8. Relationship with the other party

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

9. Other commercial considerations

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

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

10. Instalment payments

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

11. Alternatives to money

- Consider providing free or discounted goods or services instead of, or in conjunction with, money. A composite agreement may help your business reach an agreement when you 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.

12. 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).

The comments in this guidance note are of a general nature only. Full advice should be sought on any specific problems or issues

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