Formal dispute resolution procedures such as litigation and arbitration can involve significant financial and time investment which can detract from a company’s key business and be an unwelcome drain on resources. In addition, parties in litigation are positively encouraged to settle their disputes without a full trial, and can be penalised in costs for failing to make a genuine attempt to do so. As a result, the overwhelming majority of disputes are resolved by some form of negotiated compromise between the parties, rather than by a final decision from a court or other tribunal. But finding a workable commercial compromise is only the first step in settlement. In this insight we look at the key considerations in reaching, documenting and enforcing settlement of disputes.

- What is settlement?
- When should I consider settlement?
- Will settlement negotiations prejudice my position in legal proceedings?
- How do I document a settlement?
- What should a settlement or compromise agreement contain?
- How do I end legal proceedings that have been settled?

What is a settlement?

In essence, settlement or compromise is when the parties come to a binding agreement for the resolution of a dispute - they settle their differences. Like any other agreement, it can be formed orally and does not necessarily need to be documented, although it is best practice to ensure it is captured in writing to avoid satellite disputes as to the terms of settlement.
When should I consider settlement?

In short, at all times. Disputes can be settled at an early stage, before legal proceedings are commenced, or much later "on the steps of the court" - before, during or even (in rare cases) after a final hearing. Many commercial contracts will contain dispute resolution provisions, which expressly require the parties to negotiate at an early stage of their dispute, with a view to resolving it without recourse to litigation or arbitration. However, there is a risk with this approach that if early negotiations do not resolve a dispute, the parties (and their lawyers) then become absorbed in the ensuing legal proceedings and are drawn inexorably towards a trial that may not be in their best interests. Parties should therefore avoid compartmentalising negotiations and instead keep settlement in mind and revisit whether a compromise is possible at regular intervals as a dispute unfolds.

Will settlement negotiations prejudice my position in legal proceedings?

No, provided settlement negotiations are conducted on a "without prejudice" basis.

How do I document a settlement?

As referred to above, there is usually no strict requirement to document settlement, but it is advisable in order to avoid subsequent disputes. Settlement can be documented simply by an exchange of emails or letters between the parties. In all but the simplest cases though, parties are advised to document settlement in a more detailed written settlement or compromise agreement (or, in some cases, deed).

What should a settlement or compromise agreement contain?

The key driver of settlement, and usually the first element to be agreed is the commercial deal. Usually (but not always) this amounts to what one party is prepared to pay to resolve another’s claim against it, taking into account not only the risks of losing at trial, but also the management time which would be spent and the irrecoverable costs which would be incurred even in the event of winning at trial. But the commercial agreement is only one element of a settlement agreement, and there are other important considerations which interact with it, including the following.
Parties - it may be obvious who the parties to settlement will be but, particularly where a group of companies is involved, it is important to ensure the correct entity or entities are bound by the agreement. You should consider whether a party should (and is able to) settle claims on behalf of its parents and subsidiaries too, or should they be parties to the agreement in their own right? In a multi-party dispute, bear in mind that settling with only one party may leave you open to a claim for contribution from another party - so it is advisable to settle in a way which means you cannot be dragged back into proceedings between the remaining disputants.

Consideration - what is being given in return for the settlement of claims? As outlined above, often this will be financial (whether a lump sum payment or payment in instalments). But in some cases where parties have claims and counterclaims against one another, the mutual release of those claims might be consideration enough. Alternatively, settlement may involve one party transferring a disputed asset to the other or, if the parties are to continue their working relationship, they may agree that one of them will provide goods or services of a certain value free of charge. If no consideration will be given for the settlement, then the parties should document their agreement in a deed rather than a simple contract in order to ensure the agreement is valid and enforceable.

Extent of settlement - subject matter - it's vital to give careful consideration to exactly what is being settled and ensure this is clearly described in any settlement agreement. A range of possible options include settling:
- some or all of the particular claims set out in the claim form (a narrow definition);
- all claims arising out of the facts underlying the dispute;
- all claims arising out of a particular contract (whether or not relating to the current dispute); or
- all claims arising out of the entire relationship between the parties (a much wider ranging definition).

Extent of settlement - future and unknown claims - it is possible for parties to agree to settle claims which have not yet arisen, and claims which they do not know they have.

Parties therefore need to give careful consideration to the terms of settlement in the context of the nature of the dispute and the relationship between them, to ensure that they are not inadvertently making the release too narrow (so it does not fully settle the dispute at hand) or wide (so it settles disputes which may arise between them in future). For an illustration of the importance of considering the extent of settlement, see our insight "How wide is your settlement agreement?"
• **Statements & Confidentiality** - it is also important to consider what the parties can say about settlement, and to whom. In many cases, the parties will want both the terms and the very fact of settlement to remain confidential, except to the extent the parties need to disclose it to their professional advisers. But you should consider whether the parties would like to prepare an **agreed statement** on the settlement which the parties can either release freely, or issue in response to a specific request for comment. Related considerations may include **non-disparagement** clauses (where, in addition to not mentioning the dispute or its settlement, the parties agree not to make any generally disparaging remarks about one another), **non-admission** wording (which reflects that the settlement is not an admission of liability) or, at the opposite end of the spectrum, the release (privately or publicly) of a **formal apology** - something which can in some cases be just as valuable to a party as monetary settlement.

• **Costs** - the parties should consider how their costs of the dispute will be treated. Often the settlement agreement will say that each party bears their own costs, but in practice these are commonly factored into any agreed settlement payment. To the extent any costs orders have been made by a court or tribunal, the parties should address how any such costs liabilities are to be treated.

• **Tax consequences** - advice should be sought on the tax treatment of any settlement payment. Don't forget **VAT** if appropriate.

• A settlement agreement should also address how the parties will co-operate to bring an end to any extant legal proceedings.

### How do I end legal proceedings that have been settled?

There are three main ways that litigation can be brought to a formal close following settlement:

• **Discontinuance** - in this process, governed by **Civil Procedure Rule 38**, the claimant simply withdraws their claim (although in some cases it may require the court's permission to do so). Note though that the default position on discontinuance is that the claimant is liable for the defendant's costs of the proceedings. For this reason, discontinuance may not be an attractive option, and if it is to be used then a claimant should seek to agree an alternative position on costs.

• **Dismissal** - the parties can agree to seek an order from the court that the proceedings be dismissed by consent. If the court agrees, the proceedings are then closed. If there
is a further dispute (e.g. settlement monies are not paid) the parties would then have to commence new court proceedings to deal with this.

- **Stay** - unlike with dismissal, if proceedings are stayed, they are held in abeyance until a party applies to the court to lift the stay in order to take further action. There is little practical difference between dismissal and a stay unless and until there is a dispute over settlement. In those circumstances though, the advantage of a stay is that a party can resurrect the original proceedings to enforce the terms of the settlement agreement, which will be more time and cost-effective than starting new proceedings. A stay is documented using a particular form of consent order known as a Tomlin order. The parties can either append the settlement agreement as a confidential schedule to the Tomlin order, or simply identify the settlement agreement in the order itself without filing it at court. If the terms of settlement are particularly sensitive, then the latter approach may be preferable to ensure confidentiality is not lost (although practice in different courts does differ on this point).

In the case of arbitral proceedings, the method of bringing the proceedings to a close will depend on the rules of the chosen arbitral institution or otherwise any agreement between the parties.

If you have any questions on settlement or dispute resolution generally, please contact one of the authors listed above.

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