

A Litigator's Guide to...

Commercial Settlement Agreements



Commercial disputes arise in many different guises and similarly there are numerous ways to resolve a dispute. Sometimes there is no formal resolution at all. An opponent might be persuaded they should take no further action or to cease unlawful acts and the matter goes no further.

But where there is an agreement - namely a binding contract to settle the claim - this may take many forms including an exchange of letters or emails, a formally drafted settlement agreement or a court order (where settlement terms are approved by a judge). The approach you take will depend on the scenario faced and, as with any contract, it is the substance not the form, which is most important.

While some settlements are quite straightforward, involving a payment of money to resolve a dispute, very often important ancillary issues need to be addressed to avoid unexpected consequences. As litigators, we have drafted all manner of settlements and therefore see common issues emerge. In this guide, we will highlight some of the areas to consider to maximise your chances of bringing a lasting and satisfactory conclusion for your client.

Parties

It may seem obvious, but it is important to get the parties right. There might be more than one potential claimant or defendant, particularly where one or other form part of a wider corporate structure or the parties to a contract aren't neatly recorded. It may be that you want other parties to benefit from the agreement in some way, such as an extinguishment of any claims against employees or directors of a company.

Full and Final Settlement

The 'compromise' provision is one of the key terms of a settlement agreement; it provides for the resolution of the dispute. But what exactly are you settling? Is it just a narrowly defined dispute or any and all possible disputes between the parties relating to a wider commercial relationship?

Real care is needed here. The temptation can be to make the settlement wide-ranging. Yet the commercial relationship might be ongoing or, even if at an end, some obligations might need to survive. By way of example, if one party has provided services or goods, something might go wrong further down the line. Your client may well want to preserve rights that it would usually have under such a contract.

Payment Terms

Very often (though not always) a key settlement obligation is payment of a sum of money. Clarity is needed over when and how and to whom payment is to be made.

Sometimes there might be a need (eg for tax or accounting reasons) to record a 'split' in the overall settlement sum. Equally, payments are sometimes by instalments and these will need to be set out with clear payment dates and amounts.

Consideration should also be given to what happens if the payment is not made, since this will give rise to a debt claim. If money is due to your client, you will most likely want potentially punitive interest provisions (to encourage compliance) plus an indemnity for enforcement costs, given that there is usually a shortfall in recovering the legal fees involved in enforcing debt claims.

If payments are by instalments, you might want to consider a 'wrap up' provision whereby, if one or more payments are missed, the entire debt falls due immediately.

You may also want security if payment will not be immediate, for example in the form of a guarantee or charge over property.

Confidentiality

Sometimes confidentiality is important to one or more parties. There are fairly standard confidentiality provisions in existence though thought should be given to *what* is intended to be kept confidential: the terms of settlement, the wider negotiations or the entirety of the dispute? The latter will be difficult if court proceedings are underway as the dispute will already be in the public forum.

Is there adequate consideration on all sides?

Occasionally there can be question marks, for example if several parties are taking the benefit of a full and final settlement, but only one party is paying. If there is any doubt, it may be necessary to record the agreement in a deed.

Wider obligations

More complicated settlements can arise beyond mere payment of money, for example the resolution of a shareholder dispute, which might commonly involve the sale/purchase of one parties' shares, resignation of directors and ongoing obligations such as covenants or warranties. If that is the case, it will be necessary to ensure that any settlement agreement gives effect to, and is consistent with, the wider transaction. Very often the settlement agreement will act as an overarching 'umbrella' agreement linking with other transactional documents. We commonly work as a team with other specialist solicitors to ensure that a settlement of this nature is properly implemented.

Settlement agreements may also need to grapple with other ongoing rights/obligations such as intellectual property rights, restrictive covenants or other non-monetary obligations such as delivery up or co-operation in achieving certain outcomes. As well as the immediate concern of making sure these are accurately recorded, again, consideration should be given as to how to enforce these obligations, if breached, as

you may wish to address this in the settlement terms. Commercial context will naturally be key in each case.

How We Can Help

Having drafted settlement agreements of all shapes and sizes, we can help identify the issues that need addressing and assist with negotiating the best terms for the client.

We encourage our business partners to reach out to us. We are always happy to speak informally in the first instance and help where we can. Our fee structures are transparent, and we offer a high level of service from our experienced team. So, please get in touch if you would like our help.

Contact Details

Daniel Scarrott | **Partner**
Loney Stewart Holland LLP
07726 677250
dscarrott@loneystewartholland.co.uk

Alistair Stewart | **Partner**
Loney Stewart Holland LLP
07869 435226
astewart@loneystewartholland.co.uk