

THE MISSING PIECE



Welcome....

to the latest edition of *The Missing Piece*, the monthly legal briefing from *In House Lawyer*. *In House Lawyer* is my individual and exclusive legal service with strong ideals and a bespoke approach.

In this issue I'll bringing the focus on contracts to an end with checklists of key issues and pitfalls to avoid in contract negotiations.

For more bulletins and information on *In House Lawyer*, go to www.inhouselawyer.uk.com.



CONTRACT NEGOTIATIONS – KEY ISSUES

This article highlights the key issues you should consider during contract negotiations. Always take legal advice when negotiating a large or unusual contract.

Who is the other party to the contract?

- What is the reputation of the other party? Have you done business with the other party before?
- Consider doing a credit check if you have not dealt with the other party before.
- If the other party is based overseas, take legal advice to ensure that the business is adequately protected if things go wrong.
- Is there any other party that is vital to the deal? If so, consider whether they should be made a party to the contract so they are also bound.
- Describe the goods and services as clearly and accurately as possible to avoid risk of disputes.
- Any important issues and assumptions should be confirmed in the contract. Do not rely on verbal assurances or points agreed during negotiations.
- List what the other party should and should not be doing regarding the services or goods being sold under the contract.

Is the identity of the other party important to the performance of the contract?

- Are there specific individuals that you want to perform the services?
- Are you happy to allow the other party to sub-contract some or all of the work or pass on the benefits of the contract to others? If not, this must be made clear in the contract.
- If the other party is a company, would you object if ownership changed, for example, if a competitor took control?

What are you buying or selling?

- The majority of contractual disputes relate to what services are to be performed or goods delivered.

What is the price and how is payment to be made?

- Is it a fixed sum? If not, how is it to be determined?
- If the price is linked to variable factors, what are the mechanics for determining the price and at what points during the term of the contract will the price be determined?
- Is tax included in the price (notably VAT)? Take tax advice if goods or services are being delivered or performed in a foreign country to ensure there is no unexpected tax liability.
- What are the delivery terms? Are delivery costs included in the price?
- How is payment to be made (for example, cash, electronic bank transfer or bankers' draft)?
- When is payment due? Is it a single lump sum or by instalments?

What happens if things go wrong?

- What could go wrong with the deal and what loss could you suffer as a result? Consider all possible consequences. For example, could you be prevented from fulfilling obligations to another company and face financial penalties as a result?
- If you are buying goods and services under the contract, try to ensure that the seller is responsible for all possible losses and that liability is not limited in any way.
- If you are selling goods and services, try to limit liability to a fixed sum. Damages for breach of contract may be far greater than the price and hard to quantify.
- Take legal advice before agreeing any clause that seeks to limit liability under a contract.

Is the deal time-critical?

- When do you want the work done or goods delivered?
- A clear timetable is essential, especially if price is tied to delivery or performance dates.
- Do you want to be able to end the contract or to impose a financial penalty if work or goods are delivered late?

In what circumstances might you want to pull out of the contract?

- How long do you want to be tied to the contract?
- Should the contract be for a fixed period of time or do you need to include a right to terminate by giving notice to the other party?
- Are there any circumstances in which you may want to terminate the contract immediately, for example, if the other party damages the business' reputation or goes bust?
- Should there be a fee for early termination?

Are there any brand, copyright or other intellectual property issues?

- Is the other party creating something specifically for you (for example, an advertisement or bespoke computer software)?
- Are you going to use the other party's brand or will the other party use the business' brand?
- Take legal advice to ensure that the correct formalities are followed otherwise valuable intellectual property assets may be lost or infringed.

Is there a payment, performance or enforcement risk?

Remember that if anything goes wrong, the protections in a contract are only as good as the person giving them. If they have no money it will be very difficult to get any compensation. Consider requiring security (for example, a guarantee or retention).

Are you dealing on standard terms?

- Most companies have standard terms of business drafted in their favour. If a business' terms conflict with the other party's, it will be difficult to decide which terms will apply (for further discussion on this point you should read Issue 2 of The Missing Piece, available at www.inhouselawyer.uk.com/the-missing-piece/c503).
- Be wary of purchase orders or delivery notes. These can have a party's standard terms of business included on them. By signing a delivery note, the business may inadvertently commit itself to the seller's terms.
- Always be clear about the terms on which the business is dealing. If in doubt, take legal advice.



CONTRACT NEGOTIATIONS – PITFALLS TO AVOID

This article highlights some of the major pitfalls and issues that may arise during contract negotiations.

Who is negotiating for the other party?

Does the person representing the other party have the authority to negotiate for that other party?

Should negotiations be kept confidential?

If negotiations should be kept confidential, ensure that a confidentiality agreement is signed **before** starting negotiations. A confidentiality agreement (also known as a non-disclosure agreement or NDA) should be signed before giving away any business sensitive information. The agreement should stipulate that information disclosed during negotiations:

- Is confidential.
- Should only be used for a stated purpose.
- Should not be shown to anyone else.
- Should be returned or destroyed if the deal does not go ahead.

Are you sharing business sensitive information?

- Take legal advice before handing over any business sensitive information. It can be unlawful to hand over certain types of information, such as personal data about customers or employees.
- A confidentiality agreement may give some protection, but it must be signed before anything is handed over.
- Consider whether the other party actually needs the information or whether they are simply on a fishing expedition.

Do not exaggerate or mislead the other party

If you exaggerate or mislead the other party during negotiations, the contract may be undone and compensation may payable.

Do not offer or accept bribes or inducements

The Bribery Act 2010 sets out the following offences:

- Bribing another person.
- Bribing a foreign public official.
- Being bribed.
- Failing to prevent bribery.

The penalties for committing an offence can be very significant. For example, failing to prevent bribery can lead to an unlimited fine.

Might the other party try to poach employees or customers?

If the other party has access to your customers or employees, consider asking them to sign a non-poaching (or non-solicitation) agreement. This stops one party from approaching, for example, the employees, customers or clients of the other party.

Take care before signing any pre-contractual agreements

- If you are negotiating a big or complex deal, you may be asked to sign a summary of the main terms before the main contract is agreed. This document can be called heads of terms, a term sheet or a memorandum of understanding.
- Take legal advice before signing any pre-contractual agreement. Even if the agreement is not meant to be legally binding, it may create legal obligations. In any event, it can create strong moral obligations which can affect your negotiating position.

Do not enter into a contract by mistake

- A contract does not need to be signed and in writing to be binding. For example, you can enter into a binding contract over the phone or by e-mail. Starting to perform aspects of the contract may also indicate acceptance of the last terms offered.
- To help clarify that negotiations are still ongoing, mark all correspondence “subject to contract” or “not legally binding”.

THAT’S ALL FOR THIS MONTH...

Next month I’ll be moving onto corporate matters and explaining how a typical share sale works. If you have any queries, comments or request for future bulletins then get in touch, I would be delighted to talk to you or meet at your convenience.



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