

Briefing Note: Contract Negotiations – Pitfalls to Avoid

An Introduction to the Briefing Note

This briefing note highlights some of the major pitfalls that your business needs be aware of, and should avoid, during a contract negotiation.

You should always take legal advice if your business is negotiating a large or unusual. This briefing note should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

Who are you negotiating with?

Does the person you are dealing with have the authority to negotiate and on whose behalf are they negotiating?

Do you want negotiations to be kept confidential?

If so, get the other party to sign a confidentiality agreement **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 explain that the information given:

- 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 handing over 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 dismissed and compensation payable.

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Summary:

Basic points to consider when negotiating on business contract

For detailed advice on all company and commercial matters please contact:

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Do not offer or accept bribes or inducements

The Bribery Act 2010, scheduled to come into force in April 2011, has been introduced to strengthen the existing bribery and corruption laws in the UK. It creates a number of offences:

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

The penalties for committing an offence can be very significant. For example, the new corporate offence of failing to prevent bribery is punishable on indictment by 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 getting them to sign a “non-poaching agreement”. A non-poaching or non-solicitation agreement 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.
- You should 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 weaken 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 provided the key terms are agreed.
- To help clarify that you are still in negotiations, you can mark all correspondence “subject to contract” or “not legally binding”.

If you would like to know more about this topic or our other legal services, please contact Mark Williams:

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