Gaby Hardwicke SOLICITORS

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 contract negotiations.

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

Briefing Note
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Summary:
Basic points to consider when negotiating on business contracts.

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

Mark Williams
Corporate Partner

mark.williams@gabyhardwicke.co.uk

or

Will Baker
Solicitor

will.baker@gabyhardwicke.co.uk

Who are you negotiating with?

Does the person acting for the other party have the authority to negotiate on their behalf?

Confidentiality agreements

If negotiations are to be kept confidential, ensure that a confidentiality agreement is signed before negotiations start. A confidentiality agreement (also known as a non-disclosure agreement or NDA) should be signed before disclosing any sensitive business information. The agreement should state that information disclosed during negotiations:

- Is confidential.
- Should only be used for a stated purpose.
- Should not be shown to anyone else.
- Should be shown only to those who need to know (possibly named individuals only) within the recipient organisation.
- Should be returned or destroyed if the deal does not proceed.

The organisation receiving confidential information should check that the non-disclosure agreement does not go further than is necessary.

Is the company sharing sensitive business information?

- Take legal advice before sharing any sensitive business information. It can be unlawful to share certain types of information, such as personal data about customers or employees, or data relating to sensitive areas such as defence. If information is highly sensitive, permission for its disclosure should be obtained at the highest level in the disclosing organisation.
- A confidentiality agreement may offer some protection, but it must be signed before anything is handed over.

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- Consider who in the receiving organisation will have access to the information.
- Consider whether the other party actually needs the information or whether they are simply on a 'fishing' expedition.

Do not exaggerate or mislead

If the business exaggerates or misleads the other party during negotiations, the contract may be voided and compensation payable.

Do not offer or accept bribes or inducements

The Bribery Act 2010 sets out the following offences:

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

The penalties for committing an offence can be considerable. For example, failing to prevent bribery can result in an unlimited fine.

The risk of staff or customer poaching

If the other party can access the business' customers or employees, consider asking them to sign a non-poaching (or non-solicitation) agreement. This can forbid them approaching your employees, customers or clients, but can be hard to enforce.

Pre-contractual agreements

- If a business is negotiating a big or complex deal, it may be asked to sign a summary of the main terms before the main contract is agreed. This summary may 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 intended to be legally binding, it may create legal obligations. At any rate, it can create strong moral obligations that may undermine 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, a business can enter into a binding contract by e-mail or phone. Starting to perform aspects of the contract may also indicate acceptance of the last terms offered.

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- To help clarify that negotiations are still ongoing, mark all correspondence “subject to contract” or “not legally binding”.

International agreements

- In some countries decision-making authority is restricted to the highest levels of an organisation. In such cases, consider carefully the authority of the other side’s negotiator. That which appears to have been agreed may actually require the CEO’s approval.

- Consider anti-corruption laws in the country or countries concerned. Failure to comply may not only attract fines but can lead to the withdrawal of permissions and prevent the business trading in that country. In some countries those involved in corruption, or who should have prevented it, may also face prison.

- Consider local business culture and practice around contract and commercial matters. In many countries written contracts are much harder to enforce than in the UK.

- Pre-contract promises or actions may be relied on and, in practice, treated as binding without a written contract. If handled incorrectly, such situations can render a particular country closed to a business for years.

Do not rely on a standard contract

When it comes to legal contracts standard ‘off the shelf’ documents, which can be bought online or from an office supply store, are, generally speaking, a false economy. Homogenous documents simply cannot address the particularities of most business agreements. A standard contract will offer your business little protection or precision, and while such a document may save you the cost of solicitors’ fees in the short-term, in the long-term it is likely to prove far more costly when the flaws in your agreement come to light. To avoid this scenario you should hire a solicitor who specialises in business agreements to draw up your contract.

Data Protection

If you are sharing any personal data (as defined in the Data Protection Act 2018) you must comply with the obligations set out in the Data Protection Act 2018. This may include preparing a bespoke data sharing agreement, or including special provisions in your NDA.

If you would like to know more about this topic or our legal services, please contact Mark Williams or Will Baker on 01323 435955 or mark.williams@gabyhardwicke.co.uk william.baker@gabyhardwicke.co.uk

Gaby Hardwicke Solicitors
33 The Avenue
Eastbourne
East Sussex
BN21 3YD

Tel: 01323 435900
info@gabyhardwicke.co.uk
www.gabyhardwicke.co.uk

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