



Approaching a Commercial Contract



Preliminary

Whatever the nature of a commercial agreement, there are some matters which will usually be fundamental. For example: is the liability of your business limited under the agreement? If you have just been issued with a first draft of a commercial agreement, keep reading, as this Fact Sheet is intended for you.

Before you start reviewing a draft sent to you

The first thing you need to be aware of is that the first draft of any agreement sent to you could be *seriously* wide of the mark. This might be because the agreement has been borrowed from another similar but not identical business or prepared by someone who has not thought through the basics or is not skilled in contract drafting. It is essential that you take the time to read the agreement from beginning to end and make a note of everything you do not understand or which is plainly wrong. Whilst this may seem like a statement of the obvious, this basic step is often overlooked.

If heads of terms have been agreed, refer to these as you read through the draft agreement. If not, it may be advisable to go no further until they have. A heads of terms document sets out the key commercial (and sometimes legal) points in summary form. It is much quicker to negotiate the key issues using a document like this rather than amending a long-form draft agreement.

The description of the services, goods or software

Good commercial contracts begin with accurate and clear descriptions of the performance to be provided. Is the description of the goods, services or software precise, in clear language and sufficiently detailed? Are the timescales and other practical details of the performance covered and satisfactory?

If the agreement provides a framework under which specific projects will be agreed upon, or orders placed, check that the procedures described are compatible with your usual way of working.

What is the level of your liability?

Whatever the nature of the commercial agreement you are negotiating, it is advisable to ensure that an upper limit on your liability (or that of your company) is agreed.

Care should be taken in determining what the level of liability ought to be in relation to the different categories of damage which might be suffered by the other party (e.g. loss of profits, damage to physical property, etc). This is because in England and Wales, the parties to a contract do not have complete freedom to exclude or limit their liability. See the Everyman Fact Sheet 'Terms and Conditions of Business' for further information about this point.

You should ensure that you understand the cover under your insurance policies (both in terms of the types of losses covered and the maximum amount of the indemnity) and look into obtaining insurance cover if you do not have any relevant cover in existence.

What does the contract say about fitness for purpose?

Where goods, services or software are being provided, it may be that use for a specific purpose is contemplated. Ensure that the agreement allocates responsibility for ensuring fitness for purpose to one or other of the parties. If you are a supplier and will be taking responsibility for fitness, ensure that a detailed specification of purpose is produced and ensure that your duty is to ensure compliance with the specification only. Depending on the circumstances, it may be appropriate for the customer to be allowed to test a product being provided before committing to the agreement, in order to satisfy themselves as to its fitness.

Be clear about the limitations on your products or services

If you are supplying a product which might be thought to be suitable for many different purposes, give careful consideration to its limitations and make the customer aware of these.

Protect your Intellectual Property

If you are unsure about what intellectual property is, please refer to the Everyman Fact Sheet 'Glossary of Terms: Intellectual Property and Related Areas of Law'.

If your business is rich in intellectual property, e.g. because you are a software developer, protecting your intellectual property will be one of the most important legal issues in your commercial agreements. On a basic level, if you are agreeing to develop a software application, consider who will own the copyright on the developed application. If the program includes pre-existing copyright works, who owns these works and on what basis will the customer be able to use them?

Ensure that confidentiality provisions are understandable

The law relating to confidential information is complex. Poor and imprecise drafting in this area is unfortunately commonplace.

Take special care to ensure that confidential information is defined with sufficient clarity to enable you to understand what information is covered.

Exclusivity/Non-compete

Does the agreement ask you to restrict your other commercial options? For example, are you precluded from working with a competitor in the same industry or agreeing to grant exclusive rights? It goes without saying that accepting such clauses without good reason could be a very expensive



mistake. Careful consideration and negotiation is advisable.

Who are you dealing with?

There are around 2.5million companies registered in England and Wales and it is very common for business transactions to be between these entities rather than individual people. Searches and checks at Companies House will often reveal confusion as to the correct legal entity which is to be the contracting party.

Before accepting the signature of the person you are dealing with as binding on the company he represents, it is advisable in relation to important commercial agreements to request evidence of authority. On most occasions, this would be in the form of certified copy minutes from the proceedings of the board of directors. Under English company law, it is the directors as a group, who are empowered to exercise the powers of the company, but this authority would usually be capable of being delegated to less senior personnel on a specific or general basis.

The issue of authority is complicated where the other party is a foreign registered corporation. The advice of a lawyer qualified in the relevant foreign state may be required in order to verify that authority exists.

Is the agreement complete?

Most commercial agreements state that they record the complete agreement and

understanding of the parties and some also preclude the parties from placing any reliance on statements which may have been made to induce them to enter into the agreement in the first place. If the agreement says that it reflects the complete understanding of the parties, ensure that it does so. If it does not, additional terms are likely to be needed.

What law and what courts?

If the other party or one of the other parties to the agreement is a foreign registered company or the agreement has some other foreign element, ensure that you consider which law should apply and the courts of which country should apply it, in the event of a dispute arising. Your choice should be recorded in the agreement.

Many people do not realise that the courts of England and Wales will apply the law of foreign countries as well as the law of England and Wales, so it is important to deal with both the applicable law and the applicable courts.

Finally on this point, you should be aware that the UK contains several legal systems, of which England and Wales, Scotland and Northern Ireland are the three largest. A contract involving English and Scottish companies would therefore have a foreign element for legal purposes. There is no such law as "UK law".

Subject to contract

As a general rule, the law does not require a contract to be written or, where it is written, to be signed. There are of course some exceptions.

When you are negotiating a contract, in order to protect yourself from inadvertently binding your company to a contractual relationship, it is advisable to mark all correspondence and emails "Subject to contract". However, be aware that this will not necessarily prevent a contract from being formed if performance commences.

When to obtain legal advice

Whether you should seek legal advice in relation to a particular commercial agreement depends very much on the type and size of agreement and your level of knowledge and experience. The need to involve outside advisers can be minimized by putting in place a good standard terms and conditions document. However, if you are regularly dealing with valuable commercial agreements, it would be advisable as a minimum to develop a relationship with a solicitor who you can telephone to obtain a quick second opinion if you are unsure about whether you should seek detailed legal advice.



For anyone needing any corporate or technical legal support, there is no-one better to work with.

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