

## Negotiating Contracts: key practical points

Addressing technical legal issues is just one facet of contributing successfully to a contractual negotiation. To really add value to the process, those leading it must take a more holistic approach to their role, taking into consideration the commercial context of the negotiation, practical and operational realities, the way in which and with whom they communicate and the importance of well-developed interpersonal skills.

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### Introduction

In this article we will consider a number of practical steps which we believe GCs, CFOs and COOs should take when engaging in contractual negotiations and which we believe contribute to bringing negotiations to a timely and successful conclusion. We have assumed for these purposes that a considered business decision has been taken to proceed with a counterparty and that pre-contractual due diligence on the counterparty has been satisfactorily concluded.

### Contextualise the negotiation

When considering this point ask yourself the following questions:

- (a) What is the value of the contract to the business, both financially and strategically?
- (b) Will the contract be a short-term arrangement, or is it intended to underpin a longer-term relationship with the counterparty?
- (c) Will this be an exclusive contract, or will the parties be free to enter into contracts with others for the provisions of similar goods/services?
- (d) If the relationship is not exclusive or is terminated, how straightforward would it be to obtain similar goods or services from another counterparty?

As part of this stage of a negotiation it's important to identify timing pressures and tailor your approach accordingly. Distinguish here between a simple desire to get the contract signed and a genuine timing pressure (e.g. hard deadlines set by third parties (such as a competitive bid

process), regulatory, financial or investor reporting deadlines, responding to deadlines set by governments or regulators, responding to impending regulator changes, addressing funding pressures, etc).

It's also important to assess your negotiating leverage with the contractual counterparty. Some counterparties will be more inflexible than others (e.g. a private owner-managed business is likely to be more flexible than a pension fund or state sponsored investment vehicle).

Finally, and based on your assessment, manage stakeholder expectations with regard to what may realistically be achievable.

### Focus on and understand the key issues

Assess what the key issues are, taking into account the context of the negotiation and input from stakeholders. Ask for clarity if you do not understand the purpose of a clause or a piece of drafting. Ask stakeholders or the counterparty to explain or give their views and interrogate their responses if you still have questions.

Provide stakeholders with your assessment of the materiality of the points you raise for their consideration, giving options for addressing them, your assessment of the pros and cons of the different options and your recommendation.

Once identified, focus on the key points and don't allow yourself to be side-tracked by immaterial or esoteric issues.

Consider your tactics. Raising fewer material points may be beneficial because they can be conceded for those which are more valuable later in negotiations. However, bear in mind that raising

numerous smaller or immaterial points can be detrimental to the overall negotiation from a timing perspective and it may result in a counterparty being less willing to negotiate with you.

## Communicate clearly

This is a simple but important point with many hours wasted during the course of any given negotiation where communication breaks down:

- (a) Use clear and concise language.
- (b) Understand why you are raising or making a change. Simply pointing to precedent agreements (particularly those with unrelated third parties) isn't good enough. Be prepared to explain and defend your position in the context of the negotiation in question.
- (c) If industry-specific jargon is used, ensure that you understand it and that all parties are aligned on what it means.
- (d) Explain the issues clearly so that stakeholders can make informed decisions and provide you with their input effectively and efficiently.
- (e) Consider whether to provide a clear explanation to the counterparty for certain points you raise or amendments you make. It may be preferable to keep your rationale off the table, at least initially.

## Build a consensus

Building internal consensus on material points is key to a good process. The lead negotiator should ideally be acting with 'one voice', reflecting the agreed internal position:

- (a) Identify all stakeholders with an interest in the negotiation and ensure they are up to speed.
- (b) Ensure you have input from all relevant stakeholders and that there is internal alignment across the business regarding

the position the business will take on key issues.

- (c) Be patient. It is preferable to wait for input from all relevant stakeholders and to have reached an internal consensus on the key issues than to expend time, effort and (potentially) reputation/goodwill agreeing a position that subsequently needs to be renegotiated.

## Be reasonable

Adopting a commercially and legally reasonable position will almost invariably be vital to agreeing a negotiated position that both sides are comfortable with. There may from time to time be situations where one party to a negotiation has a significant negotiating advantage but in these circumstances, acting unreasonably doesn't generally result in the best end position; where one party to the agreement feels as though they have a bad deal:

- (a) Try not to make the agreement too one sided. Presenting an unbalanced document to the counterparty will only drag out negotiations and result in delay.
- (b) Be prepared to concede points and entertain compromises.
- (c) Stay positive and polite. Don't become frustrated if negotiations become protracted or fraught.

## Be practical

It's easy in any negotiation to get bogged down in technical and irrelevant points – particularly if objectively they add nothing to the agreement. Equally, it's vitally important that any contractual terms give the counterparties the latitude necessary to operate their respective businesses:

- (a) Don't expend time and effort redrafting clauses unless the changes are necessary.

- (b) Do not agree to undertakings with which the business will not practically be able to comply.
- (c) Look to reflect ongoing undertakings in the operations processes of the business where relevant.
  - (i) Bear in mind the risk of contractual undertakings being forgotten post-signing and of team members with knowledge of the contract leaving the business.
  - (ii) Create workflows and calendar reminders for key dates.

### Know your limits

Negotiating contracts is a specialised job which requires a solid grounding in contract law as well as an understanding of the commercial realities of business operations in any given sector. For material contracts, legal input should always be sought. Bad contracts will invariably impact the risk profile and value of a business:

- (a) Identify issues for which you require specialist external advice (e.g. tax)
  - (b) When seeking external advice, retain control over turnaround times and costs by ensuring that the advice is focussed, contextualised and appropriately priced.
  - (c) If stakeholders will be asked to assess or reassess a position in light of technical advice, endeavour to present that advice in a constructive, digestible way so as to facilitate efficient and informed decision-making.
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