Negotiation Planning Factsheet By Chris Parr

In this factsheet, we consider some practical aspects of the negotiation process, focussing on the planning stage. We will deal with a simple, two-party negotiation that will culminate in an in-person meeting. Multi-party negotiations are considerably more complex to organise, but these principles hold good.

We give you some tips about what to consider when entering contract negotiations and what tools to employ beforehand. We aim to help ensure that you are fully prepared when negotiations begin and can maximise productivity by concentrating on resolving the most challenging aspects of the deal.

Who?

- Pick the team who will be present at negotiations. We recommend that you choose at least two people because, generally, there will be too much for one person to deal with. One person can be speaking while the other listens and watches.
- Roles can be reversed during the process to give people the chance to rest their minds.
- Ensure you make contingency plans for if anyone becomes unavailable during the process.

Where?

- There is an argument for home advantage, but do not assume that this is the better option as other factors can come into play. For example, if negotiations have broken down, there is no scope for leaving your own premises or making a dramatic exit.
- Consider the practicalities: costs, geography and the balance of power.
- If you are in negotiations with a larger, more powerful party, you may be expected to make the journey to their premises.
- Courtesy and culture can play a part. So, do your homework and be pragmatic. If the location of the negotiations becomes a source of conflict, it can set an unnecessarily antagonistic tone before discussions have even begun.
- Neutral ground can be agreed, if venue is a concern.

The "Wants Board"

- Creating a Wants Board in advance of negotiations is an effective tool to help you think about the whole picture.
- During the discussions, it also provides a mechanism to manage the process and focus on the key issues that need to be addressed if a mutually beneficial conclusion is going to be reached.

Before the meeting

- On a whiteboard or flip chart, create two columns. In the first, list your own requirements, wants and needs. In the second, detail what you believe are the other party's requirements, wants and needs.
- You can add additional columns for the "Why?" element for each item on the list. This can help clarify the thinking behind the ideas. However, you can also have those discussions without setting them down in writing.

Analyse the columns

- When you examine both columns together, you will typically find that agreement already exists at some level (i.e. from 100% to 1%). For example:

  - We want to supply excellent products. They want excellent products.
  - We can provide excellent after-sales services. They want excellent after-sales services.

  You will often find elements where there is some divergence, for example:

  - We have a great UK distribution system. They want delivery in the UK but also to the USA.
  - We deliver in 100-unit packages. They want 500-unit packages.

  Then you meet the hard points, for example:

  - We charge £1000 per unit. They are pressing for "budget" pricing.
  - We offer a 30-day warranty. They want a 1-year minimum warranty.

At the meeting

When you open the meeting with a Wants Board, you are managing the meeting.

- List the other party's wants first and invite them to add to the list or change the expression of the wants that you have created for them.
- Once they are happy with the list, they are (in effect) saying that "if you can give us all these things, we have a deal." That's powerful information as it gives you a route map to follow.
- Then list your wants and cross-connect them to the first column. This brings out the "agreed" and "close to agreed" elements, but also highlights the "gaps" and the "hard points".

Typically, negotiators want to talk long and hard about the "agreed" and "close to agreed" points! The level of conflict is low, and everyone avoids the difficult issues – the "break points".

It's more productive to spend most of the time on the hard things. If they are not settled, there will be no deal. It is important to be honest at this stage. If you can't agree on the break points, the discussion is ultimately futile.

Confidentiality, Non-Disclosure Agreements (NDAs) and Non-Use/ Restricted-Use arrangements

These are three distinct concepts and should be addressed as such.

Confidentiality

- This determines that everything that is communicated between the parties, in whatever format, is confidential, unless it's subject to an express exception – e.g., information in the public domain.

Non-Disclosure

- This controls the groups of people to whom confidential information can be disclosed. (In most circumstances, it's unrealistic to think that information will not be disclosed, to some extent.)

Non-Use

- This arrangement stipulates that confidential information can only be used for the purposes of the discussions, or for some other, specified purpose.

General points

- Though it is understood that NDAs are hard to enforce, it is important to establish the principles of discretion and to clarify some expectations.
- Remember that in some circumstances, e.g. M&A deals, some players might be on a "fishing expedition" and want to look in the data room and tour the plants, etc. just to find out information! In those cases, phased release of information might be the best approach.
- It is important to establish from the outset that there is no deal until there is a deal – as it is easy, in English law, to form a contract between business players.
- Make a binding obligation/commitment that there is no binding agreement until the terms are set out in writing and the papers signed by a properly authorised person from each party.
- Establish the necessity for confidentiality. An NDA is legally binding.

Next stages

The negotiation process that follows will likely involve several meetings. Our next factsheet will cover the procedures and documents that come after the planning stage but before the final contract: Memorandums of Understanding (MOU), Heads of Agreement (HOA), Letters of Intent and "side letters".

How TLD can help

Having the right people on your team in the run up and during contract negotiations can make all the difference. And that doesn't mean engaging the most aggressive negotiator who will inevitably make the process unnecessarily combative.

Good contract negotiations culminate in both sides getting as much of what they want as is possible in the circumstances. And when that happens, relationships are more likely to flourish and are less likely to end up in expensive and time-consuming legal battles.

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Get in touch

At TLD, our Client Legal Directors are experienced and pragmatic lawyers who will work with their clients to bring about effective, workable, commercially viable and long-lasting contracts.

If you would like to know more about how we could work in your business, please contact us on 020 3056 8538 or info@thelegaldirector.co.uk.

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