Negotiation Process Factsheet By Chris Parr

Following on from our Contract Negotiation and Planning Factsheet, this Process Factsheet focuses on the next stages of negotiations. I share some best practice for what to do when you are in the negotiating room and what documents will help you on the way to the final contract.

If you would like to speak with me about supporting you in your business, please contact me on chris.parr@thelegaldirector.co.uk.

Minutes of meetings

These are the first building blocks of the negotiations. The minutes can create an effective "walking record" of your discussions, allowing a wider audience to be kept informed of progress and emerging issues.

If their status and purpose is agreed as such, they may also form the basis of the Memorandums of Understanding.

Memorandums of Understanding (MOU)

After the NDA, these might be the first formal statements about the negotiations.

These are typically and expressly non-binding, except for some key points.

The word "understanding" is important. MOUs can be written to express concepts and ideas rather than firm agreements. There's no harm in writing them in this way: "Our understanding is that you want X, Y and Z. On our part, we hope you understand that we will need A, B and C."

MOUs can develop over time as the understanding between the parties evolves and the negotiations progress.

Any legally binding parts of MOUs should be expressed as such. Dividing the document clearly will help. For example, these elements should be placed into a "Legally Binding"section:

- The confidentiality, restricted circulation and limited use of information;
- The non-binding nature of the document;
- A section stating that each party meets its own costs and expenses;
- The governing law in case of disputes and issues;
- Information expressing the right to stop negotiating at any time and walk away;
- A No Other Representations or Warranties provision which expresses no liability for anything said or given.

Heads of Agreement (HOA)

Heads of agreement bring you a stage closer to agreement.

They can change and develop over time, but it's more usual to settle the HOA in a final form. The "Heads" element indicates that the principles are firm, even though there is detail to be added. In this way, HOA act as a clear and genuine precursor to the contract documents.

It is good to use the MOU form as the "travelling" record of the negotiations and then deploy the HOA to "fix" the key elements prior to moving to full document drafting.

Remember to be clear about the "binding" and "non-binding" elements of the document. (As with MOU, most of the HOA will be non-binding.)

It is good practice to use the headings/index from a standard contract document and then identify what is "agreed in principle" - those terms that are not binding but on which the parties have "settled", at least in principle.

There's a protocol for HOA – once settled, the parties should not add, remove or change anything material, unless there is a material change in circumstances, or some other genuine reason. Put another way: it's not good practice to spring surprises at the last minute.

Letters of Intent (LOI)

These can be tricky!

They might be found to be conditional agreements – "If you do X, we intend to do Y." But what happens when X occurs? Is the other party legally obligated to do Y? The law provides some options to deal with this conundrum, but it is better not to get to that stage.

LOI can have serious consequences for some parties as they can be used to obtain action from third parties. Take the follow scenario:

A big customer writes to a supplier: "As discussed, we intend to buy £10m of goods from you during the year, provided that we can settle the final details of the contract." The supplier then goes off to its financiers and asks for cash to meet the demands of the deal, starts hiring people and invests other resources to make sure they can fulfil the supply.

Here, the LOI has set off a whole chain of costly events. BUT, if one of the "final details of the contract" is an irresolvable issue like price per unit, the "intent" can still easily come to nothing. So, take advice from a lawyer before any significant investment or material actions based on LOI.

Key Takeaways

- Plan the negotiation and use the "Wants Board" to try to collect the issues into a coherent order;
- Do not shy away from the "deal-breakers!";
- Use non-binding documents to "walk" towards the agreement;
- Control the process by being specific about what's binding and what's not. Until the final contract is in place, most things should be non-binding.

If you follow this advice, you will increase your chances of reaching a final agreement and creating a contract that is mutually beneficial, based on genuine understanding and less likely to end in dispute.

If you would like my help in your business, please contact on chris.parr@thelegaldirector.co.uk.

Get in touch

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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.