

Aviation Advocacy

Introduction to Contract Negotiation

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Agenda

- Contract Law: Recap of Key Points
- Basic issues involved in contract negotiation
- Negotiation strategies & techniques
- Troublesome clauses
- Remedies

Recap: what is a Contract?

- A contract is a legally binding agreement between two or more competent persons to do, or not to do, a particular thing
- The agreement is regulated by the law of contract

Recap: the Elements of a Contract

- To be legally enforceable the contract **must** contain the following elements:
 - an offer
 - an acceptance of the offer
 - consideration
 - an intention to create legal relations
 - certainty of contractual terms
 - capacity of the parties to contract
- **All** of these elements are required for a valid and legally enforceable contract

Recap: Consideration (1)

- Every contract must be supported by **consideration**
- The law will not enforce a gratuitous or bare promise
- Exceptions: contracts made as deeds

Recap: Consideration (2)

What is consideration?

- “I will do x, if you do y in return”
- Consideration may take the form of:
 - a promise to do something
 - a promise not to do something
 - doing something
 - refraining from doing something
 - a benefit for the promisee
 - a benefit for a third person at the promisee’s direction
 - anything of real value to the promisee
 - a detriment to the promisor

Recap: Consideration (3)

Exception to need for Consideration: contracts executed as Deeds

- must be in writing
- must be clear on the document's face that it is executed as a "deed"
- maker of deed must sign, seal and deliver the document
- must be an independent witness to signing
- special signature block:

SIGNED SEALED AND DELIVERED)
by the said JOE BLOGGS [*maker*])
in the presence of [*witness*]:)

Recap: Certainty of Contractual Terms

The agreement must be certain

- As a general rule the courts will not enforce vague or incomplete agreements
- All essential elements of the agreement must be sufficiently clear, especially subject matter and price.
- The courts will strive to find and uphold a valid contract, having reference to other factors:
 - trade customs & usage
 - previous dealings between the parties

Contract Negotiation: Basic Issues

- **The process of “Getting the Deal Done”:**
 - Broad commercial agreement
 - MoU (more precise terms)
 - Assembling the pre-negotiation team & schedule
 - Preparing the draft Contract
 - Negotiating the Contract (the “fine detail”)
 - Finalizing the Contract
 - Executing the Contract

Pre- Negotiation

- **Put together action team: business principals, lawyers, third party specialists**
- **Agree an action plan & timetable with counterparty**
- **Agree commercial objectives & imperatives: identify “deal-breakers” and “horses for trading”; ensure lawyers are aware**
- **Instruct lawyers to prepare draft Contract in line with MoU, using suitable *template or precedent***
- **Review first draft of Contract and coordinate all internal input**
- **Instruct lawyers to provide draft Contract to the counterparty**

Handling the Negotiation



"Don't let it throw you - It's just a negotiating tactic."

Negotiating Techniques (1)

- **Break the negotiation into parts.** Avoid roadblocks by breaking negotiations into sections and reach an agreement on each part separately. This will feel like you are reaching a series of solutions, rather than fighting one “big” war
- **The "I'm only asking for what's fair" approach.** This approach emphasizes that one party's requests are simply in line with industry standards or current market prices. If you emphasize that you are asking only for standard deal terms, the burden shifts to the other party to convince you that you should make an exception in this case
- **The *Getting to Yes* approach.** This emphasizes that the negotiating parties must separate the people from the issues, and look beyond to see who or what is the real interest or influence affecting each party, in order to create a problem-solving environment

Negotiating Techniques (2)

- **Take control.** Controlling the location, timing, topics, and pace of negotiation (sometimes called "controlling the agenda") may create an advantage. For example, lawyers often believe that the attorney who first drafts the agreement is in the contractual driver's seat. Similarly, by controlling the negotiations, you get to decide which topics are discussed and in what order
- **Prioritize.** Know what your top priorities are -- usually the business or money-making opportunity offered by the deal -- and how your other priorities rank below that. This will help avoid getting bogged down in issues that are not as important
- **The "offer-concession" strategy.** Make sure the other side leaves the negotiation feeling they've made a good deal. The offers you make should always leave you enough wiggle room to make acceptable concessions to the other side

Negotiating Techniques (3)

- **Question, don't demand.** If the other party is taking a hard line on certain issues, ask why. Questions open up the discussion; arguments close communication down
- **Find points of agreement and end on a positive note.** This upbeat approach requires that you find opportunities to say, "You're right about that," or "I agree." However small these points of agreement may be, they help set a collaborative tone
- **Do your research.** The party with more information usually has more leverage

Negotiating Techniques (4)

- **Dealing with burn-outs and ultimata.** If the other party resorts to threats ("Agree to these terms or there's no deal") or wages a war of attrition by dragging out the negotiations, you'll have to decide what the underlying deal is really worth to you. Is the deal so important that you're willing to accept the other party's ultimatum endless haggling? Does the other party simply have all the bargaining power? Otherwise, the best strategy is sometimes to walk away from the negotiations. If the other party really needs you, it may re-evaluate its tactics and return to the table.
- **Use facts, not feelings.** Successful negotiators separate business from personal, facts from feelings. They avoid letting an unpleasant personality or style drag down the negotiations.

Troublesome Clauses (1)

- Financial
- Management
- Academic
- Legal

Troublesome Clauses (2)

- *Financial* clauses:
 - Payment Provisions
 - Documentation and Reporting
 - Ownership of Equipment
 - Audit

Troublesome Clauses (3)

- *Management* clauses:
 - Key Personnel/Approval of Staff
 - Technical Direction & Changes
 - Deliverables

Troublesome Clauses (4)

- *Academic* clauses:
 - Confidentiality and Non-Disclosure
 - Publicity
 - Rights in Data
 - Intellectual Property

Troublesome Clauses (5)

- *Legal* clauses:
 - Indemnification
 - Choice of Law
 - Arbitration
 - Termination

Troublesome Clauses (6)

- Why is indemnification a potential issue?
- How is an indemnification problem identified in a contract?
- Compromises? Alternative language?
Market standard?
- Your experience?

Troublesome Clauses (7)

- Why is Termination a potential issue?
- How is a Termination problem identified in a contract?
- Compromises? Alternative language?
Market standard?
- Your experience?

Troublesome Clauses (8)

- Mutual Termination
- Termination for Convenience
- Termination for Default/Cause (cure notice)

Troublesome Clauses (9)

Ensure that:

- the notification period for termination is adequate
- Your costs are adequately covered in the event of termination
- the parties agree how disputes are to be handled, particularly in the case of termination for cause

Remember

A contract is a *binding* agreement that your institution has a legal obligation to perform.

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