

Pitfalls to avoid when negotiating contracts

Corporate & Commercial

Who is negotiating for the other party?

Does the person representing the other party have the authority to negotiate for that other party?

Should negotiations be kept confidential?

If negotiations should be kept confidential, ensure that a confidentiality agreement is signed before starting negotiations. A confidentiality agreement (also known as a non-disclosure agreement or "NDA") should be signed before revealing any business sensitive information.

Is the company sharing business sensitive information?

- take legal advice before handing over any business sensitive information. It can be unlawful to hand over certain types of information, such as personal data about customers or employees
- as stated above, a confidentiality agreement may give some protection, but it must be signed before anything is handed over
- consider whether the other party actually needs the information or whether they are simply on a fishing expedition.

Do not exaggerate or mislead the other party

If the business exaggerates or misleads the other party during negotiations, the contract may be undone and compensation may be payable.

Do not offer or accept bribes or inducements

The Bribery Act 2010 sets out the following offences:

- bribing another person
- being bribed
- bribing a foreign public official
- failing to prevent bribery.

The penalties for committing an offence can be significant. For example, failing to prevent bribery can lead to an unlimited fine.

Might the other party try to poach employees or customers?

If the other party has access to the business' customers or employees, consider asking them to sign a non-poaching (or non-solicitation) agreement. This stops one party from approaching, for example, the employees, customers or clients of the other party.

Take care before signing any pre-contractual agreements

- if a business is negotiating a complex deal, it may be asked to sign a summary of the main terms before the main contract is agreed. This document can be called heads of terms, a term sheet or a memorandum of understanding
- take legal advice before signing any pre-contractual agreement. Even if the agreement is not meant to be legally binding, it may create legal obligations. In any event, it can create strong moral obligations which can affect a business' negotiating position.

Do not enter into a contract by mistake

- a contract does not need to be signed and in writing to be binding. For example, a business can enter into a binding contract over the phone or by e-mail. Starting to perform aspects of the contract may also indicate acceptance of the last terms offered
- to help clarify that negotiations are still ongoing, mark all correspondence "subject to contract" or "not legally binding".

Please note that the information contained in this fact sheet does not constitute legal advice. This fact sheet is not intended to be a full summary of the law and advice should be sought on individual situations. All statements of law are applicable to the laws of England and Wales only.