



Farrer & Co

Commercial Contracts Checklist

1. Status of the Document	Notes
<p>Is the document a contract (i.e. is it intended to be legally binding)? If a party to a contract does not fulfil his obligations under the contract he may be sued if another party is aggrieved by the breach.</p> <p>If you do not intend the document to be legally binding the document should include a statement as follows: "This document is not intended to be legally binding". As an alternative (where a formal contract will follow in due course) the document can be headed "subject to contract". Be particularly careful in relation to a document that calls itself "Heads of Contract" or "a letter of intent", "a Memorandum of Understanding" or a "Memorandum of Intent". Such documents can be contractually binding. If you do not intend the document to be legally binding make sure that the document includes a statement to that effect.</p>	

2. The Parties	Notes
<p>Who is the other contracting party? Are they a company, an individual or a partnership? If you do not know, ask them for confirmation of their "legal personality". You need to know the legal status of the person with whom you are contracting.</p>	
<p>Where are they based? If they are based overseas, do they have a UK subsidiary that (from your point of view) would make a better contracting party?</p>	
<p>Have you done any "due diligence" on them (e.g. investigated their credit-worthiness)?</p>	

3. The Terms	
<p>Are there any "conditions precedent" (i.e. things that must happen before the arrangements set out in the contract can be put into motion)? If yes, does the contract set them out in writing?</p>	
<p>Does the contract set out <u>everything</u> you are expecting them to do?</p>	
<p>What (if anything) must the other side promise <u>not</u> to do? (E.g. not to poach your staff for a period of x months). Make sure the contract clearly states any negative promises.</p>	

<p>Is the contract complete i.e. does it contain all the terms that have been agreed between the parties? Ensure that all the terms of the contract are included in the written contract.</p> <p>Remember that you may not be able to rely on a promise contained in a separate document (e.g. an earlier email) or agreed orally. If you are entering into the Contract because of something you have been told orally (e.g. "the product will do x, y and z"), make sure that the other side repeats the statements (as warranties) in the Contract.</p>	
<p>What are you promising to do in the contract? Are you capable of fulfilling all these promises in full and at the times specified in the contract? If not, you should dilute the promises e.g. "<i>we will use all reasonable endeavours to.....</i>" or "<i>Provided x happens, we will do y</i>"</p>	

<p>4. Anticipate Problems</p>	
<p>What could go wrong? Anticipate both little problems and the disaster scenario. If you can envisage a particular problem that might arise if the other party does not do everything they are supposed to do, consider asking them to give you an indemnity to cover all costs and expenses that you may incur in that situation.</p>	
<p>Do you need to get a guarantee from a third party (to protect yourself against the danger that the party with whom you are contracting becomes insolvent or fails to perform its obligations under the Contract)?</p>	
<p>Does the Contract allow you to terminate the Contract if things do not go well?</p>	
<p>What loss or damage could the other contracting party suffer if you breach the Contract? If their loss could be significant, consider whether you should put a provision in the Contract capping your liability to them for claims under the Contract. Such a provision will be enforceable if the limit is reasonable in all the circumstances.</p>	

<p>5. Onerous and Unfair Terms</p> <p>Are there any provisions in the Contract which:</p> <ul style="list-style-type: none"> • exclude the other party's liability for particular things (e.g. "<i>the Contractor shall not be liable for...</i>"); or • restrict the other party's liability to you ("<i>the Contractor's maximum liability for all claims under this Contract shall not exceed £x</i>"); or • require you to give an indemnity; or • seem onerous or unfair on you <p>If yes, consider whether you should accept these provisions. More negotiation may well be required.</p>	
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6. Financial Provisions	
Is the Contract clear and precise about how much money is going to be paid and when?	
Does the Contract state how payment will be made (e.g. bank transfer)?	
If payment will be made to you, put a clause in the Contract stating that if the other party pays late, interest accrues (e.g. at 4% over base rate) until they pay you in full.	
Does the contract specify whether payments are inclusive or exclusive of VAT?	

7. Confidentiality and Data Protection	
Are you going to be giving the other party any confidential information? If yes, ensure the contract requires them to keep it confidential at all times and to return it to you on request.	
Will you be handing over or receiving personal data about individuals (e.g. names, addresses etc). If yes, check that the arrangements will comply with the Data Protection Act and consider putting a clause in the Contract requiring the parties to comply with the Act when performing their obligations under the Contract.	

8. Intellectual Property	
Does the Contract contain any provisions relating to intellectual property (e.g. a copyright licence)? If yes, check that the provisions are OK from your point of view. In particular, make sure that you are not giving away intellectual property that you should in fact be retaining.	
If the other party is licensing you to use intellectual property, ensure the contract contains a warranty by them that they own the intellectual property in question and/or have the right to grant you the licence.	

9. Governing Law and Jurisdiction	
Does the Contract state that English law applies to the Contract? Preferably it should.	
Does the Contract state that English Courts have jurisdiction to hear disputes arising from the Contract? Again, preferably it should. If litigation does arise you want it to take place in the UK, not abroad.	

10. Signatories	
Who is going to sign the contract on the other party's behalf? If he/she is not a director and you are not sure of his/her seniority, ask for evidence of his/her authority to sign the contract (e.g. a letter from a director). If the proposed signatory does not have authority to sign the contract it will not be binding upon his/her organisation.	

This Checklist sets out issues you should be considering when negotiating and before signing a commercial contract. It is not a substitute for specific legal advice. Please contact Farrer & Co (020 7242 2022) if you would like our help in the negotiation or drafting of any commercial contract.

**Katy Jones,
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