EQUALS GLOBAL PARTNERSHIP

BUSINESS & LEADERSHIP COURSE
FOR WOMEN IN THE TECH SECTOR

#EQUALSinTech

Session # 8: Negotiating Contracts
29 May 2019
15:00 - 16:00 BST time

Hosted by ITC, EQUALS and EY LLP
Session Objective: Key considerations for negotiating contracts

Proposed Agenda:

1. Guest Presentation and Follow-up Assignment Instructions (40 min)
2. Q&A (10 min)
3. Closing Discussion (5 min)

Questions from the Audience:

- Please type your question in the chat box, including your name and organization.
- If time does not allow your question to be answered during the session, the moderator will send it to the guest speaker to respond in writing.
Colette Withey

Director in Commercial and Digital Law at EY LLP, United Kingdom

Senior legal and business advisor focusing on a range of commercial contract issues

Studied BSc Psychology and Post Graduate Diploma in Law
TOPIC #1: WHAT IS A CONTRACT?
1. **What is a contract?**

- Legally binding promise between two or more people or entities to perform obligations usually in return for ‘consideration’;
- Consideration may not always be money;
- Written or oral;
- Offer/acceptance.

2. **What are the benefits of documenting your agreement in writing?**

- Contemporaneous evidence;
- Certainty;
- Mutual understanding of each party’s objectives and expectations;
- Helpful in the event of dispute.
TOPIC #2: PREPARING FOR NEGOTIATION

ARE YOU PREPARED?
Preparing for negotiation

Remember:

- Negotiation gives insight into your counterparty and your potential future relationship - and vice versa – but still do your research.

- Be prepared and develop your own style but learn to flex.

- For all but the simplest contracts or those with large corporates, it is usual to have a period of negotiation – don’t be afraid to question the offer.

- The length and complexity of negotiations will depend on a number of factors:
  - First time dealing or non-arm’s length;
  - Complexity of arrangements;
  - Bargaining power;
  - Industry norm of conducting business.
TOPIC #3: REDLINE OR NICE TO HAVE
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<th>Redline or nice to have</th>
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<tr>
<td><strong>Subject Matter</strong></td>
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<tr>
<td>- Alignment on the nature of the contract;</td>
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<td>- Clear roles and responsibilities;</td>
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<td>- Specification/performance measures;</td>
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<td><strong>Term/Termination</strong></td>
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<td>- One off or long term;</td>
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<td>- Flexibility of exit vs. certainty of term;</td>
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<td>- Early termination penalty;</td>
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<td>- Rights on breach;</td>
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<td>- Notice;</td>
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<td><strong>Price/Payment</strong></td>
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<td>- Pricing mechanism – fixed/variable;</td>
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<td>- Risk – cost increases, currency fluctuation;</td>
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<td>- Security for payment;</td>
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<td>- Due date/penalties/interest;</td>
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<td><strong>Liability</strong></td>
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<td>- Penalties for breach/non-performance;</td>
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<td>- Warranties and representations;</td>
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<td>- Limitations and exclusions;</td>
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<td>- Insurance;</td>
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<td>- Force majeure;</td>
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<td><strong>Disputes/enforcement</strong></td>
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<td>- Transparency of local courts;</td>
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<td>- Arbitration – binding or not;</td>
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<td>- Mediation;</td>
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<td><strong>Applicable Law</strong></td>
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<td>- Which law will apply – your local law/their (if different);</td>
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<td>- Understand associated compliance – who responsible?</td>
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① Negotiation – Have you negotiated terms that strike the right balance of risk and reward?

② Terms – Does the agreement you’re entering into accurately reflect the terms you have agreed?

③ Certainty – Be clear on overall outcomes.

④ Performance – Properly set out the requirements and specifications. Business relationships can only work effectively if parties have documented properly what they want from each other.

⑤ Breach of contract – Have you planned for the worst case scenario?

⑥ Remedies – Never rely on good faith; have clear procedures in place in case things go wrong.
TOPIC #4: PROTECTING YOUR BRAND
Protecting your brand

- Entrepreneurs in the tech sector particularly should take care to consider what pre-contractual protections may be advisable to protect their “idea” before entering a binding contract/licence.

- Much of the value in digital businesses derives from intellectual property (IP). IP is a type of property right relating to intangible items which gives the owner certain exclusive rights, whether that be copyright, service or trademarks, software, databases or patents.

- Protecting your IP can give you the right to stop others from using or copying your brand, inventions and other work.

- Things to consider:
  - Is it worth protecting your IP rights (how much value do they hold)?
  - Can/should your IP be registered and if so, where (i.e. everywhere you trade)?
  - If yes, how can you register?
  - If not, how else can you protect your IP? Non-disclosure agreements, confidentiality arrangements, co-founder agreements, employee/consultant contracts.
Protecting your brand

- Speak to a specialist in your country and in the countries where you intend to commercialise your brand/product so you are familiar with the local laws, regulations and processes.

- When speaking with parties you wish to contract with, don’t release, showcase or otherwise discuss your valuable ideas, products, solutions without a non-disclosure agreement in place.

- If you disclose sensitive information without such an agreement in place it could significantly compromise the value of your business – i.e. non-disclosure agreements; confidentiality arrangements; local statutory or other legal rights to protect intellectual property rights.
TOPIC #7: AND FINALLY...
And finally...

- Protect yourself – don’t assume anyone is going to look after you or your interests.
- Trust your gut – if a deal doesn’t feel right, for whatever reason, don’t do it.
- Build a network - the road to success is difficult already, find your village.
- Don’t release, show or otherwise discuss your ideas, products, solutions without an NDA.
- It’s never too early to formally establish your company.
- Don’t ignore or delay protecting your intellectual property. In the digital space your IP rights are more important than if you have a tangible product.
- Protect your income – if needs be, look to established third parties to help collect payment.
- Don’t be blinded by the value – get into the detail and get the right terms!
Please use the things you have learned from this webinar to draw up your own heads of terms for either:

- A specific contract which you are currently discussing; or
- Where you have no specific contract, a form of contract that you expect to find yourself negotiating most often for your business.

Once you have your preferred heads of terms, find a willing volunteer (a friend, partner or someone in your network) and role play a negotiation.

Seek constructive feedback and reflect on what went well – and what didn’t - then practise.
Local legal advice centres – in the UK we have the citizens advice bureau but elsewhere this could be a local embassy.

Many large law firms now offer ‘start-up’ terms of business or give ‘pro bono’ (i.e. free) legal advice where there is a social enterprise element to a business.

There are numerous websites focused on providing advice to start-up ventures, particularly in the tech sector. Some of these have a UK/EU focus, but the overall content is a helpful reminder of things to think about:

- [https://www.startupdonut.co.uk/](https://www.startupdonut.co.uk/)
- [https://startups.co.uk/](https://startups.co.uk/)

You will also find online a number of technical legal resources:

- [https://www.intracen.org/](https://www.intracen.org/)
- [https://iccwbo.org/](https://iccwbo.org/)
- [https://www.wipo.int/](https://www.wipo.int/)
- [http://www.worldlii.org/](http://www.worldlii.org/)
- [https://www.unidroit.org/](https://www.unidroit.org/)
THANK YOU!
Q&A
EQUALS BUSINESS & LEADERSHIP COURSE FOR WOMEN IN TECH

HAVE YOU SIGNED UP?

Learn

How to Digitize Your Business and Maximize User Experience
26 June 2019

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Marketing and Communications Strategies
31 July 2019

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For any course-related inquiries, please contact: womenandtrade@intracen.org (using subject line: “EQUALS Business and Leadership Course”)

For any questions about the EQUALS Global Partnership, please contact: equals@itu.int

Thank you!