

Legal Report

Contract Terms

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This is my first Report in my new capacity as EuRA's Strategic Consultant Legal Services. I am now providing legal support to EuRA and its members, including writing an online Guide to Legal Compliance. The Guide is currently under preparation and as a "taster" I am devoting this Report to one of the topics covered in the Guide: the thorny issue of "fair" contract terms.

I always welcome your feedback on legal compliance issues, including any personal experiences which you are happy to share in confidence. So please feel free to e-mail me with any comments.

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Entering Contracts with your Corporate Clients: key issues

Overview

On one view, contracts only matter when things go wrong: for example, when your invoice is not paid or when there is a dispute over a service "failure". But, a well-prepared contract should actually make life easier for both parties, as it will clarify upfront exactly what services will be delivered for what fees and will create a mechanism for resolving any disagreements as amicably as possible.

The most common practical problem today, particularly for DSPs, is that lengthy, highly-technical, "standard agreements" are produced by the legal departments of RMCs or corporate clients and there may be very limited opportunity to negotiate terms. Even if such an opportunity exists, it is just not commercially viable to have every draft agreement fully vetted, on your behalf, by a lawyer. So, if you are checking over a contract without the benefit of legal

advice, what are the most important things you should be looking for?

Financial Clauses

These clauses will probably be your starting point when you are reviewing a new agreement and you will want to be clear about several things:-

- What are the payment terms - e.g. 30, 45 or 60 days from the client's receipt of your invoice?
- Are you entitled to interest on any late payments?
- Are you satisfied that you can comply with the details of the client's invoicing process? - e.g. a complicated process may mean payment delays which are outside your control;
- Will any third party costs require to be advanced by you and how quickly will you be reimbursed for these?
- Are you entitled to pro-rata payment for a work which is cancelled by the client prior to completion of service by you?
- Is the client entitled to refuse payment for any "late" invoices

submitted by you, e.g. more than 90 days after service delivery?

- Are there any penalty (or bonus) terms - e.g. a fee reduction (or addition) based on service quality scores? Are you comfortable that these are clear and will work fairly in practice?
- Is the client entitled to a discount based on volume of cases? If so, will the discount apply only to cases received after the agreed threshold has been reached, rather than applying to all cases?

Key Performance Indicators (KPIs), contained in an Agreement, can assist both parties to focus on the things that really matter in terms of achieving a successful business relationship. But, problems arise when the wording of KPIs becomes so detailed and complicated that they almost become meaningless. Particular care has to be taken when failure to achieve KPIs can incur financial penalties. If there is to be a link between KPIs and fees, you may want to also have the

opportunity to earn bonuses for high performance and not simply be subject to potential penalties.

Of course, it is not only the financial clauses in Relocation Service Agreements which can cause you difficulties. Below are some of the other main clauses which require particular attention:-

- Choice of law and courts

The agreement should set out which law will apply to the contract (e.g. English, French, German etc) and which country's courts will have jurisdiction to deal with disputes. Ideally, you will want the convenience of being able to use your national law and local courts. However, an international client will generally seek to link their relocation services contracts to the country or state of their global headquarters and it can sometimes be difficult to negotiate any change to this.

- Employee background checks

It is increasingly common to find that global relocation service contracts impose obligations on "the supplier" to carry out a variety of checks on its employees and contractors. These obligations can be particularly stringent when the client is a US-headquartered corporation. But, employee background checks and drug tests, which may be commonplace in the US, can often be impossible to replicate in countries where privacy laws are stronger. In EU countries, for example, individual privacy rights are now strongly protected and you should not accept obligations in a contract which are contrary to your national privacy laws.

- Data Protection clauses
DP clauses in contracts are getting longer and more complicated. This is because the general obligations placed upon suppliers, to handle personal data correctly, are now enhanced by very specific obligations arising, for example, from the EU General Data Protection Regulation ("GDPR"), the EU-US Privacy Shield and EU Standard Contract Clauses.

Wading through several pages of DP clauses is an unattractive prospect, but for EU-based businesses, already familiar with the high levels of data protection imposed under EU law, there should not be any real surprises contained in the contract wording. However, it always pays to read these clauses carefully, looking out for anything which you are uncomfortable with, e.g.:-

- The client may impose audit and penetration testing requirements, which may be unreasonable in terms of potential disruption and cost to your business;
- Potential penalties and indemnities for breaches of DP obligations may be unreasonable.

A client would reasonably expect you to accept the following basic obligations:-

- To use personal data of assignees only as necessary for the purposes of providing authorised services and for no other purpose;
- To maintain safeguards to protect personal data against loss, disclosure or access by third parties;
- To comply within a reasonable timeframe with any request from the client or the assignee

for access to or deletion of their personal data;

- To retain personal data only for as long as is necessary for the provision of relocation services or as required by law;
- Except with consent of client, not to a) disclose personal data to any third party and b) transfer personal data across international boundaries;
- Upon reasonable notice, to permit auditing by client of your data processing facilities and relevant data files.

- Anti-bribery clauses

Under the UK Bribery Act, which is the nearest thing we have to a global standard for anti-corruption law, clients may be held liable for failure to prevent bribery by their contractors. This means that relocation service agreements will usually contain very specific compliance obligations on suppliers. It is important to be aware of any penalties or indemnities which the client can impose for non-compliance. Could these be damaging to your business?

- Insurance clauses

Relocation service contracts will normally specify the types of insurance cover which the supplier must have in place and set financial levels for each category of cover (e.g. professional indemnity cover of not less than €1 million per claim). The wording of insurance clauses can be very technical and you may wish to refer the contract wording to your insurance broker, who can confirm if you are currently compliant or whether additional cover will be required - and at what cost.

- **Penalty Clause**

These are clauses which impose a financial penalty on the supplier for a failure to comply with particular obligations under the contract. It is clearly important to be aware of any penalties contained in a contract. In many countries, a contractual penalty is unenforceable unless it represents a genuine estimate of the likely cost to the client of the breach of contract; i.e. it should not be "penal" in nature.

- **Disputes and arbitration**

A clause which sets out a simple process for parties to attempt to resolve disputes amicably can be valuable. The next step, short of court action, will often be an arbitration process. Arbitration can also be very useful, but less so (from a European perspective) if the arbitration location is stated to be the client's HQ location, e.g. in the United States.

Negotiating the removal of "unreasonable" contract terms

The starting point, of course, is that you want to do business with this new client. But a contract which you believe contains unreasonable terms will require you to have a follow-up discussion with the client. You should highlight the clauses which are causing you serious concern and explain why.

It is not uncommon to find that inappropriate clauses have been copied from a previous contract in error and there should be no difficulty in having these removed or amended. On the other hand, it is clearly more challenging to negotiate contract wording which the client imposes in all their contracts as a "standard term". In

this latter situation, you may still be able to have a clause removed where it is inconsistent with your national law (e.g. an obligation to carry out certain "employee background checks").

Another approach, which may help to break a deadlock, is to accept a "side letter" from the client, confirming that a particular clause will not be enforced in practice (e.g. a client's standard clause relating to annual penetration testing of your IT systems). This can be a useful compromise in situations where the client is otherwise refusing to amend the wording of its standard clauses.

Conclusion

In my experience, the best clients are those which adopt a partnership approach to their suppliers and contractors. They will not seek to impose unfair contract terms and will take the time to explain why a "standard clause" is regarded as essential and also listen to your specific concerns.

I hope that this overview can assist your future contract negotiations - and will look forward to your feedback!



The Legal & Tax Report is produced for The EuRApean by Gordon Kerr, EuRA's Strategic Consultant Legal Services.

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