

SHARED RESOURCES – LEGAL CONSIDERATIONS FOR COLLABORATIVE WORKING

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Understanding law, understanding you

Agenda

- Form of agreement – legally binding, not legally binding or a hybrid?
- In what areas can parties collaborate?
- Procurement law considerations
- Key terms
- Boilerplate
- Questions

Form of agreement

- Choice of agreement – legally binding, not legally binding or a mixture?
 - Legally binding – parties may bring action to enforce rights and obligations.
 - Not legally binding – parties may not (usually) bring action to enforce rights and obligations.
 - Hybrid agreements – parties may (usually) only bring action to enforce rights and obligations stated to be legally binding.
- Key considerations:
 - Speed – approvals may be easier to obtain for agreements which do not impose binding obligations
 - Risk – performance cannot be guaranteed, loss which results from non-performance cannot (usually) be recovered.

Legally binding agreements

- Will be either a “simple contract” or a deed.
- A simple contract must have:
 - Offer
 - Acceptance
 - Consideration
 - Intention to create legal relations
 - Certainty of terms
- A deed must be:
 - In writing
 - Clear on its face it is a deed
 - Executed as a deed
 - Delivered

Simple contract or deed?

- Specified in law in certain cases.
- In this context, choice for parties.
- Longer limitation period for deeds
- Deed may require a longer internal approvals process

Non-legally binding

- No formal requirements at law
- Will often be referred to as an “arrangement” or “memorandum of understanding”
- Should make clear they are not legally binding to avoid creating an accidental contract
- Generally considered morally binding and so parties should not accept obligations or make commitments which they cannot or do not wish to comply with.
- Although generally not legally enforceable, the doctrine of promissory estoppel may prevent a party from going back on a promise in a non-legally binding arrangement.

Hybrid agreement

- Contains a mixture of legally binding and non-legally binding clauses
- Should clearly differentiate between the clauses which are legally binding and those which are not
- Don't forget the requirements for a contract (or deed) will apply to those sections which are legally binding
- Typically clauses such as confidentiality, data protection, limits on liability and IP will be legally binding. Service specific details will not. But (with some specific exceptions) there are no hard and fast rules

Areas for collaboration

- Not generally a legal question
- Determined by powers of parties, relationships and sector pressures
- Typically back office services, purchasing and IT
- Collaboration doesn't have to be formal but formalising requirements assists to apportion and limit liabilities and risk
- Beware competition law risk

Procurement law considerations

- Will agreement between parties be a contract for goods, works or services?
- If yes, will it be above threshold?
- If no, is there the potential for cross border interest?
- Regulation 12(7) PCR excludes contracts between contracting authorities which implement co-operation with the aim of ensuring public services are provided – subject to conditions
- In the current climate regulation 32(2)(c) may apply – is the collaboration strictly necessary, and is there extreme urgency to award without competition?
- Where regulation 32(2)(c) is relied upon, consider publication of a VEAT.

Key terms - services

- Services – in a binding agreement will usually be clearly defined, usually in a separate SoR
- In a non-binding agreement, may be more fluid and so able to be adapted to changing circumstances
- What must the parties provide and when?
- Ensure drafted in contractual language and language is consistent with contract
- Often drafted by technical team – does it make sense from a commercial / legal perspective?
- Absolutely fundamental to success of the contract

Key terms - IPR

- Are there any IPR considerations? Not usually key consideration in shared services.
- But may be issues around use of parties logos or other copyrighted material
- NB – handbooks, user guides etc.
- Will any other IPR be used by either party or created?
- Consider background and foreground IPR – who will own it, how may it be used, what happens at the end of the contract?

Key terms - termination

- How and when can the parties terminate the contract?
- Should termination rights be in whole or in part?
- Material breach
- Insolvency events
- Anti-bribery / slavery etc.
- For convenience
- Nb – consequences of termination; clauses which remain in effect, impact on accrued rights, transition plans

Key terms - warranties

- Standard warranties:
 - Power to enter into agreement
 - Due diligence
 - Not in breach of other obligations
- Supply of goods and services:
 - Limited warranties implied into a B2B contract
 - Correspond with description / specification
 - Of satisfactory quality

Key terms limit of liability and indemnities

- Will the parties have the benefit of any limit of liability? Will it be mutual or are differing limits appropriate?
- At what level? What is likely level of any losses?
- Any carve outs – e.g. data protection, indemnified matters, deliberate breaches?
- What indemnities are required / will be given?
- Consider where risk areas are and whether an all breaches indemnity really is required
- Will indemnities be mutual?

Key terms - payment

- What payment is the supplying party entitled to receive and when?
- Price should be clear from the agreement
- Are invoices required? When, submitted by whom? Does the recipient need to verify them, how long does it need? Payment terms – 30 days
- Consequences of late / non-payment:
 - Interest – set a level otherwise Contracts (Payment of Late Debts) Act may apply
 - Force majeure – does it apply to payment obligations?
 - Termination / damages
 - Set-off
 - Suspension of services

Key terms - data protection / FOIA

- What are the personal data flows?
- Are data processing clauses required or a joint control arrangement?
- Penalties are high – not always easy to identify the data flows but it is an important task
- Are you subject to FOIA? If so, ensure relevant clauses are included – CA standard approach / bespoke drafting
- Data processing agreement (if required) must be legally binding

Key terms - dispute resolution

- Contract usually governed by laws of England and Wales
- How will disputes be managed?
- Tiered dispute resolution process:
 - How many tiers are appropriate?
 - How long does each need?
 - Who should be responsible at each level?
- If no resolution Court or ADR? Mediation or arbitration?

Boilerplate

- Term used to describe provisions of the contract which are virtually always included without amendment.
- Nevertheless, ensure they are appropriate for each contract.
- In particular:
 - Entire agreement – are there any other documents, representations etc. upon which the CA would seek to rely?
 - Third party rights – are there any third parties which should be able to enforce the terms of the contract
- Definitions - ensure all defined terms are used in the contract and define all capitalised terms except
- Consistency in language: shall vs will

Any Questions?



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