Six steps to mitigate contracting-related problems

Based on the experience and knowledge acquired over the years from drafting and revising many contracts, as well as from overseeing the negotiation phase and the step succeeding the execution of contracts (the stage where the contract is effectively managed), below are some recommendations and suggestions aimed at mitigating the most common problems related to the signing of contracts and its consequences, in line with some of the current compliance practices:

1 – Check the powers of signatories. Not rarely, proposals are formally accepted or contracts are executed by persons with no powers to do so, which may generate future discussions as to the validity and/or effectiveness of the corresponding business and/or its effects. Even if the applicability of the Theory of Appearance can be defended, the mere existence of this type of discussion triggers undesirable results, such as costs (with legal proceedings, for example) and/or slow development and closure of negotiations.

2 –Whenever possible, investigate the situation, financial health and reputation of the person or entity you wish to execute a contract with. Currently, the Internet allows quick and often free access to a lot of information about individuals or legal entities, such as the existence of proceedings, the registration situation (activity/inactivity, corporate structure), reputation, etc. A research on some search engines, the Federal Revenue Service, the Ordinary or Federal Courts and some Commercial Registries, or even on some credit protection institutions, can prevent the execution of businesses or partnerships that might prove to be problematic in the future, or even that are contrary to the company's compliance rules.

3 – Keep complete and organized documentation. The huge variety and complexity of business which we can encounter currently implies that current contracts are often composed of several documents: the main contract or general contracting conditions and its attachments (tables, proposals, manuals, internal codes, amendments, and other materials). This pool of documents – the main clauses, as well as their annexes and amendments – is part of the contract and must not only be read and interpreted together, but also be stored and maintained in an organized manner. This simple procedure prevents wrong and incomplete interpretations with regard to what was agreed between the parties and what is in force and is effectively applicable.

4 – Follow the deadlines and procedures set forth in the contract. The contract must be regarded by the parties as a kind of manual of conduct with respect to the fulfilment of obligations on both sides. Deadlines and procedures described, such as delivery deadlines or communication procedures, were – or,

at least, should have been - widely discussed between the parties and were established with different purposes (to make the obligations feasible, to facilitate the proof of compliance with the obligations, etc.). Failure to comply with the deadlines and procedures can bring about the application of contractual penalties, such as fines and indemnities, wears out the commercial and legal relationship between the parties, and generates costs (with legal proceedings, for example).

5 – Remember that certain procedures can create contractual relationships. The placement and acceptance of proposals and offers, even if by e-mail (and provided that the e-mail does not open the chance of retraction or any other circumstance that, as established by law, prevent the bindingness of the act or remove the effects of the act in these cases) can lead to the construction of a contractual relationship. Therefore, it is important to bear in mind that the acceptance of a proposal without reservation implies the formation of a contract to be governed under the conditions offered, including those with legal, more than commercial, effect. Likewise, the presentation of a proposal, if it is not retracted in the form and terms established by the law, is binding upon the proposing party. Not rarely, proposals fail to cover all the necessary conditions for the contractual relationship to run smoothly, which means more conflict between the parties and greater need to resort to law, jurists' opinions and the case law to resolve disputes that lacked contract provision, resulting in greater reliance on judicial or arbitration routes for the solution of conflicts.

6 – Whenever possible, ensure that the contract is the result of the joint work between the related areas. In general, contracts are documents drawn up by lawyers to be managed by other professionals and areas, such as engineers, accountants, and financial, commercial, marketing departments, etc. Therefore, ideally, contracts must be the result of the work and activity of related areas together, so that the resulting document reflects not only the will of the parties, but effectively what is practiced on the daily basis. In this regard, it is also important that the contracts are clear and to avoid, to the extent possible, a purely legal language.

This newsletter contains information and general comments on legal matters that may interest our clients and friends. It does not represent the legal opinion of our firm on the subjects addressed herein. In specific cases, readers should rely on proper legal assistance before adopting any concrete action relating to the matters addressed herein.

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