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PARIS | GENÈVE

Best practice rules for the conduct of negotiations

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CULTURAL CONTEXT

A quote from a former managing director of a major European engineering group:

“The leitmotif of Iranian negotiations is:

Sign the contract first...

There will be plenty of time to negotiate the price later” ...

- Cultural knowledge may give you precious keys to anticipate your counterpart's demands
- Neglecting the cultural context may break down the deal...

CULTURAL CONTEXT

■ ILLUSTRATION

■ China v/ France:

- France: negotiate and sign the contract first - celebrate afterwards
- China: start by celebrating the idea of a future partnership and hang along for a while, *before* starting the negotiation process...

■ A Western African country: (a case involving a settlement agreement)

- No need for a payment guarantee because of an honoured commitment that payment will be made through the central bank...

■ The Japanese:

- Yes actually means no...

CULTURAL CONTEXT

COMMON LAW / CIVIL LAW

DIFFERENT PHILOSOPHY TO THE APPROACH OF NEGOTIATIONS

- **Common law tradition: bargaining**
 - A confrontation philosophy - the "maximalist technic":
 - Establish a draft of a contract which is extremely favourable to one party
 - Then negotiate the business terms
 - Major concessions are made afterwards
- **Civil law tradition: Mutual consent**
 - A consensus philosophy:
 - Establish a draft of a contract with reasonable suggestions and offers
 - Make few concessions afterwards

CULTURAL CONTEXT

COMMON LAW / CIVIL LAW

DIFFERENT TRADITIONS WHEN NEGOTIATING CONTRACTS

- **Common law tradition: a successive process**
 - Firm up gradually
 - Each provision agreed becomes final

- **Civil law tradition: a global consent**
 - Look for global consent
 - Hammer out the whole agreement until the final version is signed

DUE DILIGENCE

BEFORE STARTING TO NEGOTIATE

- Understand the regulatory and technical requirements of the industry/products
- Avoid exposure to negative publicity or unanticipated costs (child labour, local privacy law, tax requirements...)
- Carry out worldwide compliance (sanctions, anti-bribery, anti-money laundering regulations...)
- Carry out feasibility study
- Get reliable local legal and commercial experts

PRE-CONTRACTUAL INSTRUMENTS

NON-DISCLOSURE AGREEMENT (NDA)

- **Scope**
 - Disclosure of confidential information during the negotiation process
 - Ensure that such information is used only for the project
 - Protect from further disclosure

PRE-CONTRACTUAL INSTRUMENTS

NON DISCLOSURE AGREEMENT (NDA)

- **Definition of confidential information**

“means any and all information or data, or both, including, without limitation, any kind of business, commercial, financial, and/or technical information and data, the form, materials and design of any relevant plant and equipment or any part thereof, the methods of operation and the various applications thereof, processes, formulae, plans, strategies, know-how, designs, trade secrets, patent applications, software, market opportunities, photographs, drawings, specifications, technical literature and any other material made available by [●] (or any of their representatives or advisors) to [●] (or any of its representatives or advisors) or gained by the visit by [●] to any establishment of [●], for the Project (and any information derived from such information) except for information that is demonstrably non-confidential in nature. The information shall be Confidential Information, irrespective of the medium in which that information or data is embedded, and whether the Confidential Information is disclosed orally, visually or otherwise”.

- **Always provide**

- The terms and termination of the NDA – Survival of Obligation clause
- Controlling law – Resolution of dispute

PRE-CONTRACTUAL INSTRUMENTS

LETTER OF INTENT – MEMORUNDUM OF UNDERSTANDING

- **Definition**

- Reflect preliminary agreements or understandings
- Record the common intent between the parties
- Commit the parties to pursue a profitable project
- Help to make the arrangements clearer to speed up the process of negotiation

PRE-CONTRACTUAL INSTRUMENTS

LETTER OF INTENT – MEMORUNDUM OF UNDERSTANDING

- **Scope**
 - Define the framework of the negotiations
 - Identify and express the common interest of the parties
 - Set out principles to guide the parties in undertaking a collaboration
 - Set out mechanism for sharing information, reporting, communication
 - Outline actions to be performed within a specific period of time

PRE-CONTRACTUAL INSTRUMENTS

LETTER OF INTENT – MEMORUNDUM OF UNDERSTANDING

- **Binding or non-binding**
 - Subject to the wordings and the context of negotiations
 - For non-binding instruments
 - Include a clause denying any intention to create a binding relationship
 - Draw up generalities instead of going into details
 - Avoid imposing conditions
 - Avoid setting up prices

PRE-CONTRACTUAL INSTRUMENTS

LETTER OF INTENT – MEMORUNDUM OF UNDERSTANDING

- **Binding or non-binding**

A suitable disclaimer would be:

“This MOU is not intended to create legal obligations between the parties and has to be confirmed in a binding agreement to be negotiated and executed in good faith between the Parties”

PRE-CONTRACTUAL INSTRUMENTS

LETTER OF INTENT – MEMORUNDUM OF UNDERSTANDING

- **Example of a provision that lead to litigation**

“We refer to your proposal dated 1st September 2014 for the supply of stone.

*We confirm it is **our intention** to place an order with you to a value **not exceeding** €1,000,000.*

In the event of our being unable to place the intended order with you, we will reimburse you for all reasonable works incurred. An initial payment of 30% will be sent to you on 1st October 2014 ”.

PRE-CONTRACTUAL INSTRUMENTS

LETTER OF INTENT – MEMORUNDUM OF UNDERSTANDING

- **Example of a provision that lead to litigation**
 - Order placed for €300,000
 - Lower judge: The parties had entered into a sale contract for €1,000,000
 - Court of appeal (of Monaco):
 - Quashed the judgement
 - Qualified the above letter as a letter of intent providing the binding obligation to indemnify the supplier
 - The supplier was entitled to compensation of €50.000

PRE-CONTRACTUAL INSTRUMENTS

LETTER OF INTENT – MEMORUNDUM OF UNDERSTANDING

- **Main provisions**

- Describe the main principals which shall govern the project
- Identify the corporate and contractual framework
- Provide for an exclusivity clause

“the Parties undertake not to enter into any agreement whatsoever with third parties regarding any similar project for _____ months”

- Provide a duration clause for the negotiations

PRE-CONTRACTUAL INSTRUMENTS

LETTER OF INTENT – MEMORUNDUM OF UNDERSTANDING

- Choice of governing law
 - Choice of a systems of law
 - Consider how it is given effect
 - Interrelationship between the choice of governing law and dispute resolution forum
 - **Fairness and predictability**
 - Commonly used in international commercial contracts/in the relevant industry

PRE-CONTRACTUAL LIABILITIES

- **When the deal falls through**
 - Compensation for failure to have met one's expectation?
 - Compensation for incurred investment cost?

- **Negotiations rules**
 - Duty to negotiate in good faith
 - Common law / Civil law

PRE-CONTRACTUAL LIABILITIES

- **When negotiating a contract**

- Making unacceptable offer in a noticeable way
- Concealing crucial information during negotiations
- Denying afterwards an agreed provision without serious reasons

- **When breaking down negotiations**

- Letting the counterpart spend an important amount of money and time whilst one is not really interested in the project
- Stop negotiating in a manner that exposes the other party to negative publicity
- Raising a point that should have been raised from the beginning of the negotiations...

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