

COMMERCIAL SERVICES

Starting a business can be fraught with risk and there are a lot of things to consider, some that may not readily spring to mind. It is for this reason that it is sensible to seek legal advice at an early stage to ensure that your business has solid foundations in place and so as to mitigate any risks or liabilities that may arise as your business grows.

Indeed, many risks and liabilities can be avoided by having well-drafted contracts in place at the outset which are tailored to your business. This is particularly the case when it comes to commercial law.

Commercial law can be described as the law applying to businesses doing trade and is a complex, varied and pervasive area of the law, touching on many other areas, such as employment, corporate and property law, just to name a few.

Having a foundation of well-drafted, tailored contracts in place for your business should be a priority and seeking out the right legal advice at an early stage may save you from the stress, and significant expense, of dealing with disputes and litigation further down the line. Disputes are an intrinsic risk of being in business but it is possible to mitigate such risk, and even avoid them altogether, by getting the right legal advice from the start.

The Foundations – What risks are there?

In the early stages of any business, major milestones are those such as engaging with customers, investors and suppliers. Whenever a business engages with a third party, there is inherent risk. For instance, if you are selling your products or services to customers, will these customers be "consumers"? Consumers have the benefit of enhanced statutory protection so if your business will be selling products or services to the public, it is important to ensure that you have correctly drafted terms and conditions and policies, and that you adhere to any applicable statutory obligations (i.e. Consumer Protection (Distance Selling) Regulations 2000), otherwise you could face complaints from your customers and/or regulatory action, which may also detrimentally affect your business's image or reputation.

When engaging with employees, contractors, suppliers, investors, agents, distributors and so on without seeking legal advice, it is very easy for you to unwittingly divulge important confidential information that can have serious consequences for your business. It is possible to lose the protection of the various intellectual property rights once your confidential information is in the public domain so it is important to consider non-disclosure agreements when first engaging with third parties or include appropriate confidentiality clauses within all contracts.

It must also be borne in mind that some intellectual property rights, such as copyright and design rights, arise automatically and, as a general rule, belong to the person that created them. This may be an employee or contractor in your business but without the appropriate intellectual property provisions within either the employee's contract of employment or the contractor's services agreement, any intellectual property rights created will not belong to your business, which may cause problems for you if you intend to leverage such intellectual property rights as part of your business model.

This may also cause problems where you engage with a design or marketing agency to design a logo or branding for your business. Without appropriate provisions in an agreement with such an agency, any intellectual property in the logo or branding created may belong to the agency, and not your business. This may result in your business having to pay extra to assign or license the intellectual property rights in your own logo or branding!

It is very easy to accept the terms and conditions of another party that do not favour your business, or place an unduly onerous burden on you for which you may be entirely liable. It is advisable to contract on your own terms and conditions that have been drafted for your particular business but if you are not able to do so, a third party's terms and conditions should be reviewed and negotiated by a suitably qualified and experienced legal professional in order to mitigate any risk that contracting on a third party's terms may involve.

Your own terms and conditions will be vitally important to your business, as these will be the contractual basis on which you engage with your customers. These should be tailored to your business and to the particular products and/or services that you offer. Terms and conditions for the sale of shoes would be of little use if your business designs and licenses software, so it is important that your terms and conditions reflect your business's needs.

Most, if not all, businesses now have a web presence and a significant proportion of products are now bought online. Whilst the internet is hugely advantageous to even the smallest business because it grants access to a global marketplace, it is also

important to ensure you have in place appropriate website terms as well as associated policies, such as a privacy policy, data protection policy and cookies policy, all of which will need to be updated from time to time to reflect developments in the law.

If your business will be selling products to the public online, potentially to those outside the UK (the EU, for instance), it may be necessary for you to comply with local laws, such as those relating to competition. This is likely to be an extremely fast-changing and relevant concern to all such businesses following the result of the recent EU Referendum.

Another vital consideration for your business will be how it is structured internally. Almost every business has to have computer systems, internet access, emails, telephones, management software applications, stock control systems, server capacity (whether accessed internally or externally, via the "cloud"); the list of considerations is significant and it will be prudent for your business to seek legal advice when engaging with the suppliers of such services, as these are usually on supplier terms and can be heavily weighted in such supplier's favour.

Collaboration in Action

This scenario is typical of the kind we advise on: ABC* (a small start-up business) has developed a piece of hardware which attaches to a mobile phone and acts as both a mobile charger and a portable speaker. ABC needs advice on how best to get its product to market and also what other legal issues it should be aware of. In particular, we would expect ABC to request the following types of advice:

- ▶ ABC has identified a suitable manufacturer located in China and now needs to put in place a manufacturing agreement which ensures that the product is made to the correct specification. The agreement also needs to enable ABC to meet its own customer orders, given that demand may fluctuate over time. Crucially, ABC needs to be able to take action if quality is below standard, or the manufacturer fails to complete orders in full and on time.
- ▶ ABC intends to sell the product to a number of high street retailers and therefore needs to agree trading terms with them. ABC is keen to ensure that the retailers actively market the product. However, the retailers are concerned to ensure that ABC takes full responsibility for the consequences of any of the products being defective.
- ▶ ABC also intends to sell the product directly to customers via a website. It requires advice on its contract with the website developer, as well as terms and conditions of sale. ABC expects that individual consumers will buy the product from its website and so needs advice on the particular laws that apply to sales of goods to consumers.
- ▶ ABC is aware that there are laws which require products (especially electronic products) to be labelled correctly, and is keen to understand what it needs to do to be compliant.

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