Karen Hart, Esq.

Properly Document Your Deal and Avoid Pitfalls of Casual Contracting

Credit managers often negotiate with customers, vendors and others. You probably talk with business partners on the phone. And you likely send copious emails in your business transactions. As we discussed last month, we all need to pay attention to what we are saying in our emails and how we are saying it. With respect to email communications, credit managers need to be cognizant of how and what they are negotiating, whether they are, or could be, forming new contracts, and the potential impact their communications could have on existing agreements. Despite all of the potential risks, emailing is an essential business function. Email can be a critical component to ensuring important discussions are documented and deal terms discussed are summarized, clarified, and ultimately agreed to and finalized. Below are considerations for documenting negotiations in emails and avoiding the perils of casual contracting.

Is That a Contract in Your Inbox?

Just because business points are discussed in emails sent back and forth does not mean that a contract is automatically formed. However, a contract *can* be formed if the requisite elements for formation are met in email exchanges. To have a valid and binding contract, the following elements must typically be met under applicable state law:

A contract can be formed if the requisite elements for formation are met in email exchanges.

- an offer;
- an acceptance;
- a meeting of the minds;
- a communication that each party has consented to the agreement's terms;
- execution and delivery of the contract; and
- consideration.

Whether a binding agreement exists is often a question of whether the parties agreed to all "material terms" and whether the parties intended to be bound. Material terms, as defined by applicable state law, generally include subject matter (*e.g.*, product or service), price, payment terms, quantity, quality, and duration.

Courts are charged with evaluating whether these elements have been met in adjudicating contract formation questions. Thus, any email exchanges at issue must meet these criteria before a contract will be deemed formed.

Nevertheless, casual negotiations in email exchanges may be misunderstood or misinterpreted after the fact, particularly by a party who believes "the deal" was "done" through email messages and related telephone calls. As such, there may be just enough of a fact issue to take the question of whether or not a contract was formed to trial. Thus, with the potential for litigation, it is a good practice to be deliberate and cautious in your email negotiations, clarifying in writing that exchanges are only negotiations until a final written agreement is approved by management and formally memorialized in full and physically (as opposed to electronically) signed by the parties.

What About the Statute of Frauds?

Courts are becoming more receptive to contract formation via email, particularly with the advent and adoption of such laws as the Uniform Electronic Transactions Act (UETA) in a majority of the states. The UETA recognizes electronic signatures and the enforceability of electronic contracts, generally, where the parties have consented to contracting electronically. Thus, in light of the UETA, an email with a signature, particularly where a party has typed their name at the end of the message, may meet the written contract and signature requirements of the "statute of frauds." The statute of frauds is a contract law widely adopted under state laws that requires certain contracts (typically agreements not performable within one year and real estate agreements) to be signed and in writing. Thus, it is also possible to orally form a contract if a signed writing is not required under applicable state law. But proving an oral agreement can be difficult without corroborating evidence—which may be found in emails.

Can You Bind Your Company?

As an employee, you are an agent of your company. As an agent, you may have authority to bind your company to contractual terms with third parties. This authority may arise from your actual authority or your apparent authority.

Actual Authority

Actual authority includes express authority or implied authority. Express authority is delegated to an agent by the words of the principal (*e.g.*, your company) that expressly and directly authorize the agent to do an act or series of acts on behalf of the principal. Implied authority is the authority of an agent to do whatever is necessary and proper to carry out the agent's express powers. An agent who does not have express authority cannot have implied authority. Thus, as a credit manager, you may have express or implied authority to negotiate and accept contracts for your company, pursuant to express directives of your company or implied expectations, given your job description and functions.

Apparent Authority

Apparent authority can arise when an agent holds himself or herself out to third parties as having authority to take a certain action for his principal or employer and the principal or employer knowingly permits the agent to hold himself or herself out as having authority or where the principal or employer, through a failure to act with ordinary care, leads a reasonably prudent person to believe that the agent has authority to act. Thus, even if you or others at your company do not have actual authority to bind the company in negotiations, apparent authority may arise, particularly if management permits the discussions or acquiesces, either actively or passively, to negotiations.

As a credit manager, you may have express or implied authority to negotiate and accept contracts for your company.

Tips You Can Use

Here are some tips that you can implement in your email negotiations to help avoid an unintended contract or to assist in sealing the deal at the right time:

- Be cautious and deliberate in your use of terms like "offer" and "accept." Know that these words can be trigger terms for contract formation.
- Be further cautious and deliberate when expressing a willingness to agree. Simple words like "OK" or "agreed" could spell trouble if you did not intend to agree without concurrence on additional contingencies.
- Express contingencies and express them often. Provide yourself wiggle room. Clearly state that agreement to the items at hand is subject to agreement on other terms and contingent on certain events, including further review or approval by management and a fully memorialized and mutually agreed upon final agreement that is executed by all parties.
- Watch commentary when exchanging drafts of an agreement as email attachments. A remark such as, "I will have Jane sign the attached," may indicate that the offer embodied in a draft is accepted. On the other hand, if you are ready to accept and want to minimize back peddling by the other party, you may want to be more forceful in stating acceptance of the proposed agreement in an email response back, particularly if signatures will come later.
- Fully document discussions. If you are going to document what was discussed in a negotiation call, be sure to capture what was agreed *and* what was *not* agreed to, as applicable, in the call and the necessary follow up required to achieve a final agreement.

Once all material terms are agreed upon and approved, document the agreement with a contract signed by the parties that covers material terms and all other contractual essentials.

Tie It All Together with a Final Contract

Once all material terms are agreed upon and approved, document the agreement with a contract signed by the parties that covers material terms and all other contractual essentials. Before execution and during negotiations, work with an attorney to ensure all necessary terms are addressed in the final agreement. Other important contract terms may include a merger clause specifying that prior negotiations and agreements are superseded by the final contract, a provision providing for the award of attorneys' fees and expenses in the event of a breach, venue and choice of law provisions, and a no oral modification clause specifying that the agreement cannot be verbally modified and can only be changed by written amendment signed by the parties.

Don't be left in a contractual lurch. Make it your practice to formally document important customer agreements with complete contracts. Require your customers to enter and sign, as applicable, credit applications, guarantee agreements, payout or repayment agreements, account settlement agreements, and promissory notes and security agreements.

Karen Hart is a litigation partner at Bell Nunnally & Martin LLP based in Dallas, TX. Karen has been litigating commercial disputes and creditor's rights cases for approximately 15 years. Karen can be reached at 214-740-1444 or khart@bellnunnally.com.