



# Mind the gap

## Leaving the detail of a contract to be agreed later

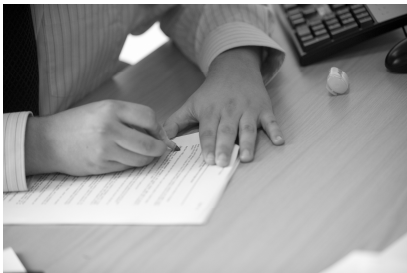
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It's late at night and you're negotiating the final details of a complex commercial deal. Can you just sign the contract and leave those last few details to be worked out later?

### The obvious risk

It's quite common for parties to sign contracts leaving some of the detail to be inserted later - and there may be situations where it's unavoidable. The most obvious risk you are running is that, for one reason or another, the detail never gets filled in - and you then get into a dispute with the other party on the very issue that the detail would have helped to resolve.

But let's assume that you're alive to that risk and have made sure that the detail was negotiated after the contract was entered into. Surely the "gap" has now been plugged? A recent case suggests that the position may not always be quite so straightforward.



### The less obvious risk

In *Crest Nicholson v Akaria* (2010), the owner of a newly-built property was obliged to pay the developer a profit in relation to any units which had not been let as at March 2008. However, the parties needed to reach agreement on an appropriate figure for this. If no agreement could be reached, the contract provided for the matter to be referred to a rental expert.

In the event, this was not necessary because the parties' representatives entered into an apparently amicable exchange of correspondence on the subject and appeared to have agreed on a figure. Subsequently, however, the

owner, Akaria, took issue with what was said to have been agreed.

The main problem was that the alleged agreement was based on a fairly involved chain of correspondence and one of the key documents from earlier on in that chain contained certain inconsistencies. This meant that, so far as the court was concerned, no agreement had been reached on the missing detail.

The end result was that the parties were effectively forced to go back to square one and agree a new figure or, failing that, refer the matter to the rental expert.

### Will the courts fill in the gaps?

Sometimes, the courts will be prepared to fill in detail that is missing from an agreement. For example, where the detail is clearly essential to make the contract work as the parties intended, then the courts may be prepared to imply terms which deal with the omissions from the express terms of the contract.

However, they do not generally see it as their job to write the contract for the parties and will only intervene in a limited way (if at all).

### Contractual mechanisms

In some situations, it may be possible to resolve a lack of detail by including a dispute resolution procedure, such as determination by an expert of the type envisaged in the *Crest Nicholson* case.

The courts will normally enforce such mechanisms, but they are rarely an ideal solution where a relationship has broken down and one party has no interest in cooperating. At best, the process can be protracted and difficult and, at worst, the other party may succeed in derailing it altogether (leaving the "gap" unfilled).

### Avoiding the pitfalls

The best advice is not to leave any issues for later agreement - but there are likely to be some situations where "gaps" in the detail of a contract can't be avoided. Where this is the case:

- try to agree at least the outline of what the missing provisions of the agreement should cover;
- consider providing for a contractual mechanism to resolve disputes;
- make sure the detail gets followed up after signature - the sooner, the better; and
- document your final agreement clearly in a way which will make sense to a court, preferably in a single document, using a reasonable degree of formality (see below).

*“Following up on missing detail is not enough; it needs to be documented in a way which will make sense to a court.”*

### Formal documentation

It will usually be preferable to treat the final text of the missing provisions of the agreement as a variation of the contract and to document it by a formal exchange of letters, signed by both parties.

Don't forget to follow any special procedures for variations set out in the agreement and make sure that you deal with consideration i.e. the need for each party to promise something of value in return for the other's obligations. If in doubt, the safest approach is to include "token" payments of e.g. £1 (to be paid by any party which is not agreeing to undertake additional obligations).

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### **Tom Purton, Head of Commercial**



tom.purton@traverssmith.com

+44 (0)20 7295 3277

### **Richard Brown, Partner**



richard.brown@traverssmith.com

+44 (0)20 7295 3254

### **Dan Reavill, Partner**



dan.reavill@traverssmith.com

+44 (0)20 7295 3260

### **Alistair Wilson, Consultant**



alistair.wilson@traverssmith.com

+44 (0)20 7295 3345