Are Unsigned Contracts Enforceable In California?

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The Law Offices of Tyler Q. Dahl

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As an owner or employee of a business, you may frequently negotiate business deals with customers, vendors, and other third parties. After negotiations, parties may fail to actually sign written contracts, relying on each other's word. If the business deal falls through or the relationship goes sour, this may leave one party wondering whether they have any recourse against the other party, and specifically whether the unsigned contract is enforceable.

First, it is necessary to understand the essential factors to form a contract, which are (a) the contract terms must be clear enough that the parties can understand what each is required to do, (b) the parties must agree to exchange something of value (goods or services), and (c) the parties must agree to the material terms of the contract. Contracts can be implied by the parties' conduct absent an oral or written agreement. Furthermore, the California Civil Code permits oral contracts, except where the Civil Code specifically requires a written contract. Some of the more common contracts that must be in writing are those that cannot be performed within 1 year, promises to pay the debt of another, leases of real property for more than 1 year, and contracts for the sale of real property (referred to as the "Statute of Frauds").

If you negotiated a contract with a third party and you both began performing in a manner similar to the terms of the unsigned contract, a court would almost undoubtedly find that a contract exists. First, if the law does not require a written

contract regarding the subject matter, then an implied contract by conduct may have been formed. A court would likely look to the terms of the unsigned contract as evidence of the terms of the implied contract.

Furthermore, if the law does not require a written contract regarding the subject matter and one party claims there was an oral contract, then a court may find that an oral contract was formed (especially if there are witnesses that can attest to the oral contract). Again, a court would likely view the terms of the unsigned contract as evidence of the terms of the oral contract. In addition, if there are emails, letters, or other written communications, a court would likely also use that evidence to further define the terms of the oral contract. Any such correspondence may also be evidence of an offer and acceptance of a contract by either party if the language in the correspondence suggests this, and the correspondence may even constitute a written agreement (for example, email signatures are valid signatures under the law).

Therefore, the terms of an unsigned contract may be enforceable against a party depending on the circumstances. The determination depends heavily on the facts and communications between the parties. If you have any questions about a contract dispute or need assistance drafting or reviewing a contract, please do not hesitate to **contact** the Law Offices of Tyler Q. Dahl.

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Enforceability of letters of intent and memorandums of understanding

By Owen Bourns

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Parties from time to time will enter into a letter of intent, memorandum of understanding or similar such preliminary agreements. Often they precede the execution of a more fulsome and detailed ultimate agreement. They range in content from vague agreements setting out conditions governing subsequent negotiations to more detailed documents setting out the terms the parties agree on to date and leaving open those parts left to be negotiated.

It is trite law that mere agreements to agree or agreements to negotiate are not enforceable because they lack certainty. With respect to more detailed letters of intent or memoranda of understanding the law is somewhat more convoluted in terms of determining whether some or all of the agreement can be enforced.

To form a binding agreement it is required that the "essential terms" be settled. Where the contract is too general or uncertain then it will not be valid.

In the recent case of *Georgian Windopwer Corp. v. Stelco. Inc.*, (2012) ONSC 3759 (Ont. S.C.J.) ("*Stelco*") the parties entered into two preliminary agreements pertaining to the development of "industrial biotricity strategy" and to establish a land lease agreement for wind energy generation. The plaintiff brought an action for breach of the memorandum of understanding and the other preliminary agreement. Pattillo J. stated that, in certain circumstances, these types of preliminary agreements to agree can be binding:

> *If the concept is sufficiently certain to enable agreement, the fact that the agreement provides for future mutual agreement does not result in it being too uncertain if there is a mechanism or formula set out. The issue is whether the provision for the future agreement is directory or mechanical as opposed to the substance of the provision.*

In *Stelco* Pattillo J. held that the memorandum of understanding was generally unenforceable as it was an agreement to "confirm the general principles pertaining to the ongoing discussions between GWC and Stelco". However, it was also determined that specific provisions in the memorandum of understanding were enforceable, including provisions binding the parties not to pursue "other interests", not aligning themselves with competitors, restricting any public announcements, and requiring 60 days' notice to terminate the memorandum of understanding. Stelco was found to have breached at least the notice provision.

Further, in *Darnley v. Tennant,* (2006) ABQB 575 (A.C.Q.B.) the letter of intent was found to be fully enforceable as it contained all the requirements of a binding contract,

including agreement on the essential terms. The owner of certain land signed a letter of intent permitting a neighbour to purchase a small access road for $1 in the event that a larger part of the parcel no longer required access via that access road and the subdivision approval was obtained. Slatter J. determined that the letter of intent was essentially a conditional agreement to sell the access road for $1 when the condition precedents were met. There was nothing that indicated the parties intended or were required to agree on other details in the future.

Some memoranda of understanding and letters of intent contain purported obligations to negotiate in good faith and/or to use best efforts to negotiate. In other circumstances, counsel have argued that these duties are implied as part of agreements to agree. However, the *Stelco* decision specifically explains that no such duties impliedly exist and where they are written into an agreement to agree they are unenforceable:

> *[A]n agreement to negotiate in good faith is unenforceable. […] the concept of a duty to carry on negotiations in good faith is repugnant to the adversarial position of the parties when involved in negotiations.*

Therefore, where a memorandum of understanding or letters of intent leave some of the essential terms of the agreement to be negotiated they will not be enforceable. However, the courts will enforce; (a) letters of intent and memoranda of understanding that contain all the requirements of binding contract including agreement on the essential terms, and (b) obligations in memoranda of understanding and letters of intent that are intended to bind the parties' behaviour during the period leading up to the execution of some ultimate agreement.

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