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Reviewing Business Contracts: What to Look for and How to Look for It

Commercial and Contracts



Cheat Sheet

- **Be strategic**. Focus on what matters — don’t try to win every point.
- **Spotting issues.** Be on the lookout for problems relating to the deal, how the contract says what it says, how the law relates to the deal, and how boilerplate is handled.
- **Know the default rules.** When it comes to rules that apply when the contract is silent on a given issue, what you don’t know can hurt you.
- **Get help.** Use AI technology to help you review the other side’s draft.

There’s reading a contract, then there’s reviewing a contract.

When you read a business contract, you treat it as a done deal and mine it for what’s relevant. You read a contract if, for example, you’re a businessperson wondering how to address an issue that has arisen in your dealings with the other party. Or if you’re a litigator trying to determine who has the better of a contract dispute.

By contrast, if a contract hasn't been signed yet, you read it to review it. You treat it as a work in progress — you expect to play a part in what it says and how it says it.

Reviewing a contract involves much more than does just reading a contract. In this article, we suggest how to approach reviewing a contract and what you should look out for.

Be an active reader

When reviewing a contract, be an active reader. Assess how the contract addresses what your client cares about, instead of waiting for inspiration to strike.

Being an active reader requires knowing what to look for. Start by understanding what your side expects from the transaction. Discuss that with the relevant businesspeople and have on hand all relevant exchanges and any term sheet or letter of intent.

Pick your battles

Negotiating a contract involves finding common ground. It's prudent to assume that each side has a limited appetite for making concessions and a limited supply of goodwill. Restrict your demands to what matters. In reviewing a contract, focus on those parts that don't express the deal as you understand it, that are confusing, and that pose a substantial risk to your client if things don't go as planned.

Spot deal issues

Consider staking out reasonable positions on deal points instead of seeking to wring the maximum advantage possible. Reasonable terms help you close deals faster, reduce the risk of your losing deals, and help foster long-term relationships. Those benefits tend to outweigh whatever you might gain through protracted negotiations.

Ken Adams has prepared an annotated PDF of a representative big-company set of terms. It uses just one color for deal points. You could break deal-point issues down into subcategories, but it's more practical simply to categorize deal points by referring to the heading of the relevant section.

Spot drafting issues

Adams' annotated set of terms highlights, using different colors, language that raises various kinds of drafting issues (inconsistency, redundancy, structural issues, potential confusion, mistakes, or awkwardness). Being aware of that taxonomy before you review a contract can alert you to what you should be looking for.

Ignore archaisms that don't affect meaning (*in witness whereof* and the like). And don't tidy up verb structures that won't create confusion. Such changes are likely not worth anyone's time.

But do consider changing problematic phrases that lead to fights (for example, *indemnify and hold harmless*). And consider adjusting confusing verb-structure choices (for example, verb structures that fail to make it clear whether a party is transferring something at signing or has an obligation to transfer it in the future).

If you can show how a drafting issue has resulted in a fight, that should give you enough cover to request a change. It might help if you point to Adams' writings on the issue in question.

Spot issues relating to the law

Be on the lookout for ways the law relates to contracts.

The law determines whether the parties have an enforceable contract. For example, in common-law systems a contract promise must be supported by consideration or by some alternative, such as reliance.

One or more provisions might be unenforceable. For example, a court might be unwilling to enforce a governing-law provision if the law in question has no relation to the transaction.

The law might specify that to qualify for a particular status, a contract must contain one or more specific provisions. For example, for an offering of securities to qualify for one of the exemptions from registration under the US securities laws, the securities purchase agreement must include certain statements of fact.

Some common-law jurisdictions recognized an implied duty of good faith; others don't or allow it to be waived. That can affect how parties negotiate a transaction.

Spot boilerplate issues

It can be awkward to negotiate boilerplate — the "miscellaneous" provisions addressing the governing law of the contract, notices, amendment, and the like — that are found at the back of most contracts. Because boilerplate isn't central to the deal, clients might well consider it "lawyer stuff" and, after shrugging their shoulders or rolling their eyes, leave it to the lawyers.

Many deal lawyers tend to rely on conventional wisdom and habit in choosing, for example, the governing law of a contract. They might also use boilerplate as an opportunity for negotiation theater — dickering over trivial or meaningless distinctions to appear to add value.

Being informed about boilerplate will allow you to determine what is or isn't at stake. Some boilerplate involves complex issues, for example force majeure provisions and indemnification provisions. Other boilerplate is pointless, for example the "successors and assigns" provision and the "counterparts" provision. It's probably not worth anyone's time to try to get the pointless stuff deleted, but you could tell those on your side of the deal that they can safely ignore it.

You might find useful Adams' list of materials on boilerplate and some of commentator Glenn West's blog posts on big-deal boilerplate issues.

Default rules

The term *default rule* refers to law (whether statutory or case law) that applies to a contract absent anything to the contrary in the contract. For example, the gap-filler provisions of Article 2 of the Uniform Commercial Code apply if parties have omitted one or more essential terms in their intended contract. And if you don't include a notices provision in a contract, default rules will determine when a notice will be deemed to have been received.

Default rules can pose a particular challenge for the reviewer, in that experience and imagination are required to determine what outside the contract might affect a transaction. If you limit yourself just to what's in the contract, you might get played by the other side.

In the case of a given default rule, consider whether the contract addresses the issue in question. If the contract does address it, does the provision in question vary the default rule? If so, does it do so effectively? And if the contract simply repeats the default rule, is the provision in question redundant, or does it serve a useful purpose by reminding the parties of the default rule?

Who could review contracts?

The process of drafting and negotiating contracts is associated with lawyers. Review of contracts by only non-lawyers is usually limited to high-volume, lower-value contracts.

But business contracts are business documents. The part of business contracts that relates directly to the law — the legal framework for the transaction and how disputes are handled — tends not to be what the parties care most about. People other than lawyers could handle that part of the transaction — not being a lawyer doesn't preclude you from being familiar with how the law works and being responsible for how the law applies to your affairs. Furthermore, nothing prevents nonlawyers from being informed consumers of contract language.

Although lawyers might have inbuilt advantages, non-lawyers could become as competent or more competent than lawyers in reviewing contracts, and not just high-volume, low-risk contracts.

Whoever is responsible for reviewing contracts, make sure businesspeople read the key commercial terms and make their views known.

Were you sent a locked document?

It makes review easier if you work with an editable electronic copy of the contract so you can mark comments and suggest changes. Some want to retain control of creating new versions of a contract, so they send it to you as a locked PDF or locked Word file. But that unnecessarily complicates the work of the other side by forcing them to state their comments outside of the draft.

If someone sends you a locked document, ask them to send you an unlocked version. If they don't, there are workarounds.

Should you read a printed copy or read it on a screen?

Reading documents on-screen is quick and convenient, but the consensus is that you're likely to understand something better if you read it in print, as opposed to reading it on a screen. Consider first reading a print copy of any contract you review. If that isn't practical, you might find it more comfortable to do your initial read-through on a tablet instead of a laptop or monitor.

Another benefit of print is that a paper copy allows you to more easily flip back and forth between pages and flag important sections. And if a definition section is long, separating that part of a printout from the rest of the document might allow you to consult it more easily.

But some technology aims to offer this sort of flexibility to those who read electronic versions of

contracts. There's RemarkableX, a Word add-on that helps users navigate contracts and automates routine tasks involved in drafting and reviewing. And there's CoParse, a viewer for PDFs and Word documents that turns defined terms and cross-references into clickable links, using picture-in-a-picture presentation to eliminate page flipping.

Should you enlist specialized expertise?

If you're fortunate enough to have others to consult, whether they're within your organization or outside, consider enlisting them if a contract you're reviewing presents issues you're not familiar with or if the governing law is new to you. Consider whether it would be helpful to meet with them, in addition to getting their comments on drafts.

If you have several people offering comments, consider having them all mark their comments on a shared copy, either within a document-management system or online, to spare you having to transcribe comments from separate versions and to allow commenters to see what others are saying. But beware of having comments by different people all unexpectedly attributed to "Author" when you save the document.

How should you mark comments?

You could mark comments in pen on paper or on a tablet, at least for your initial take. If you don't have others make their comments on a shared copy, consider using different colors to distinguish your comments from those you receive from others.

When sharing your comments with others, marking them electronically makes the process quicker and simpler. If you're using Word, that means using track changes or adding comments, or doing both.

Be scrupulous in using track changes or any other comparison technology (referred to generically as "redlining"). For example, if you don't mark some of your changes, even unintentionally, you risk sowing distrust. And if the draft you're reviewing is a revised version of what you sent the other side, it's best not to rely on the other side's comparison — do your own.

To whom are you directing your comments?

You might send comments initially to others on your side of the deal. Depending on your role in the transaction, you might then send comments to the other side.

Who your intended readers are will determine the scope of your comments. For those on your side of the deal, you might ask questions and point out issues you ultimately don't raise with the other side. That's the kind of analysis offered in Adams's annotated set of terms. Consider color-coding your comments, so it's easier to distinguish comments intended for your side from comments intended for the other side.

Playbooks

If you review enough contracts, it can be challenging to be consistent in, and keep track of, the positions you take from deal to deal. That becomes even harder if a team is responsible for reviewing contracts. If everyone is left to their own devices, your

organization risks being erratic in the positions it takes.

The standard way to address that is by using a playbook — a list of different issues that might appear in the other side's draft, your position on them, and who decides whether to accept a position that goes beyond what the playbook offers.

Don't provide in-depth analysis in a playbook, as that would detract from the key points; instead, include links to any analysis. And keep playbooks up to date, supplementing them to reflect issues encountered in reviewing drafts and during negotiations. If you find that your playbooks are becoming too detailed, reconsider the positions you've been taking.

Resist the urge to find reasons not to apply a playbook position to a given deal — the whole point of playbooks is to encourage you to be consistent in the positions you take. But consider being flexible by incorporating in your playbook variations on a given scenario.

Technology can help

Reviewing contracts is demanding and time-consuming. Anyone who routinely reviews contracts could get help from technology. Or more specifically, artificial intelligence (AI). AI contract-review technology can in effect function as a playbook, offering you advice relating to specific provisions in a contract you're reviewing.

That sort of help comes in two forms. One way is to have AI learn decisions made in your signed contracts, then apply those decisions to a new draft by marking it to show changes. But that approach has its limitations.

The company LegalSifter takes a different approach — it combines AI and expertise. (Adams is their chief content officer.) LegalSifter trains algorithms (it calls them "Sifters") to recognize specific contracts issues. You upload a draft and have it "sifted" — scrutinized by a collection of relevant Sifters. In a minute or two you have a report that tells you which Sifters found nothing relevant and shows you what contract language was flagged as relevant by the remaining Sifters. In each case, the user is offered advice, either LegalSifter's general advice or the user's own customized advice.

Given the potential cost of missing an issue when working on a contract for a high-value deal, this sort of help is not just for the inexperienced or those overwhelmed by high-volume, low-value deals. Anyone might benefit from technology looking over their shoulder.

Tidying up

While you're reviewing a contract, take the opportunity to tidy things up. To the extent possible, fill in blanks and eliminate brackets. If an issue flagged in a comment has been addressed, delete the comment or use Word's "Resolved" function. Check cross-references; if they aren't automated, consider automating them so they update automatically. And before you send your comments to the other side, deleting anything intended only for people on your side of the deal would spare you embarrassment, or worse.

Once more, with feeling

You might think you’re done, but you aren’t, not yet — go back to the top and give it one more pass!

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