

Contracts are not made for Lawyers

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The title will have undoubtedly made many readers blink, read it again, and then ask themselves “Is this a serious article?”

In over a decade of working as legal counsel in the business sector, one of the consistencies I have noticed is that business people generally tend to wash their hands of any aspect of ownership of contracts. There are many possible reasons for this, but that is a different discussion.

As a legal professional one first of all has to, almost invariably, beg and plead for sufficient information in order to produce a workable and effective document. And once finalised and duly executed, it is very quickly handed back to the Legal Department to “keep on file”. The message, although unspoken, is abundantly clear – “This contract is for the lawyers, not for us”. So how do I substantiate the complete opposite view as stated in the title?

I see business relationships and the way they develop and run their course as a game of some sort. You have two players or teams, each with a clear objective of winning, and each with a strategy to do so. The major difference that this particular type of relationship has when compared to any other game is that both players can and should come out as winners, rather than just one of them. This is well-captured in the sometimes-excessively used business term “win-win”. In order for both players to come out as winners, not only do the rules need to be carefully crafted to allow that to happen, those rules must then be followed.

Aside from the unique aspect of allowing for both payers to win, the rules of this business game are, in principle, the same as any other rules. They set out what *must* be done; what *must not* be done; what can be done optionally; the times that these things should be done; and what the penalty is for breaking the rules. In any game it goes without saying that the players need to know the rules of the game before they attempt to start playing.

A business contract, for all intents and purposes, captures the rules of the game. It forms the rule-book. In many cases, the rules can be quite complex such that they cannot be easily memorised. This necessitates referring back to the “rule-book” from time to time, and there is absolutely nothing wrong with doing that. But how is this possible if one simply hands over the rule book to someone else as quickly as possible, and then attempts to play the game without it?

Of course there are complex legal aspects to any contract, aspects that require a legal professional to have most of the input. But the meat of a contract takes the form of the commercial, operational and administrative terms. These are the very reason that the contract has come into existence at all. These aspects form the day-to-day guide as to how the game is supposed to be played, while the legal aspects, for the main part, capture what will happen if one of the players breaks the rules.

So while most contracts are prepared *by* lawyers, they are all prepared *for* the benefit of the parties that are cited in that contract. The players of the game. The players of the game must take ownership of this rule-book right from the onset to ensure that it is drafted according to what suits them best as they embark on this win-win game that they are agreeing to play. And this ownership extends even to many of the legal aspects of the contract.

A common example is the provision relating to breach. Most business people simply leave this to the lawyer and, unfortunately, a lot of lawyers allow this to simply be left to them. The common result is that a one-size-fits-all approach is taken, and you find provisions such as “*In the event of breach of any of the terms of this agreement, and subsequent failure to remedy that breach within 14 days of having been called upon in writing to do so ...*”

What happens in business transactions where time is of the essence and fourteen days is too long for something to be remedied? Conversely, what happens where action and resources required to remedy a particular breach render it impossible to accomplish within 14 days? As the business people who intend to play this game, you must know how you would like the game to work. You must know what is realistic and what is not realistic given your preferences and overall purpose you are trying to achieve.

The conclusion is a simple one and a free piece of advice to the business people out there:

Take ownership of your business contracts from the very onset and through their operational life. They are made by your lawyers not for themselves. They are made *by* your lawyers *for you!*

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