

# Under Contract

*Following these basic steps and addressing key issues can help seal the deal on your next agreement*



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**Y**ou just negotiated the deal of the century. Everything has been worked out, now it just has to be put into writing. Or, alternatively, you just found the right vendor, and now all you have to do is review the one-page form agreement. We see all sorts of contracts, but there are a few topics that come up almost every time. And in our experience, an ounce of prevention is worth a pound of cure. Thinking through the issues and questions

below can make for a more effective negotiation, a better working relationship under the agreement going forward, and better protection for your organization.

**Is the contract clear?** This may sound obvious, but the problem of ambiguity can come up in a few different ways. First, does the contract use any special terms that need to be defined? Do not rely on your prior negotiations or communications to explain what you mean, as anything outside the contract may not be admissible later in court. Second, is the language of the agreement easy to follow? Again, you might only have the contract as evidence if there is a dispute, and if you cannot follow it, a judge might not be able to, either. And remember, just because a lawyer drafted the language does not mean that you are wrong if you do not understand it. Ask. If the explanation makes sense, fine, but if not, you may want to revise.

**Is your intellectual property protected?** Depending on the contract, various types of intellectual property (or IP) may come into play. In a sponsorship deal, for example, the parties often get some limited use of each other's trademarks. In a media deal, one company may be creating footage of your event, and in turn, you are licensing the use of that footage to another party. The questions you need to ask yourself are: (1) What IP is being used in this deal? Copyrighted works? Trademarks? (2) How is that IP being used? Is ownership of the IP changing hands, am I licensing it, or something else? (3) How is the use of the IP limited? For example, do I have the power to review and approve uses of my trademark? (4) What happens to the IP when the contract terminates? For example, if you license the use of your trademark, does that license terminate, too? In a media deal, who gets to keep the footage created during the term of the agreement?

**Under what conditions can you terminate?** Thinking about this question is about as exciting to most businesspeo-

ple as considering a prenup. But it is worth thinking about how you are protected if something goes wrong. What if the other party goes bankrupt? Some contracts provide for automatic termination in that event, although this is often unenforceable. What if the other party simply breaches the agreement? Can you terminate immediately or do you have to wait? Are there any special procedures for terminating, such as written notice to a specific address? One particular twist to watch out for is that some agreements will provide for "cure" periods, meaning that the breaching party has a certain period within which to cure the breach before you can terminate the agreement completely. If you have a cure period in your agreement, consider whether there is the possibility of a breach during which you could not afford to wait out the cure period.

**What are your remedies?** Many contracts contain arbitration clauses in the event of a dispute arising from the contract.

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But whether your contract provides for arbitration or litigation, it is important to review your actual remedies in the event of a dispute, and whether they address the biggest concerns you would have if there were a problem in the business relationship. For some smaller agreements, if

the other party breaches, you simply want to be able to walk away with no strings attached. For other agreements, it is most important that you be able to stop the other party from exercising certain rights under the agreement. But beware that if your remedies exclude the ability to obtain injunctions, for example, you could be limited only to money damages in a situation where, more than anything, you need to prevent the other party from taking certain actions.

While basic contract terms like the ones we've discussed may seem like the least exciting piece of the puzzle, they are part of the fundamental structure of an agreement. In our experience, when something is missing in one of these areas, there may be larger problems with the agreement. More importantly, if you don't get these issues addressed up front, they could hurt you down the road. ■

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