



THE NEW NORM

CRAZY CONTRACTS AND HOW TO FIGHT BACK

By JACK GARSON

December 2014 – As seen in the Huffington Post.

Businesses – large and small – are producing insanely one-sided contracts. In the past, you could find fair contracts. Most were short and simple, too. You do this and I do that. But now we've arrived at crazy. And these agreements are putting your business in jeopardy.

Keep your eyes pried open and actually read an entire contract. You'll see what I mean. I do it every day and it makes me want to either fight or cry. The formula is simple. You lose. They win. Sign here.

These contracts are like the tagline for a new SAW movie: "How Do I Get Out of this Contract Alive?" Spoiler alert: you don't. And, all too often, these deals are take-it-or-leave-it.

Let me be specific:

- Read your typical office lease. It literally says that the Landlord does not have to provide the heat or air conditioning or elevators or electricity or water, but you still have to pay the rent. Seriously.
- Large developers are writing construction contracts that spell out the contractors' requirements in excruciatingly detailed agreements that drag on for over one hundred pages. I just read one that requires the contractor to list when every piece of equipment in the building must be lubricated. Now, that's too much information!
- Remember the American dream? Build a business. Sell it for millions. Lay on a beach drinking Mai Tais. Well, you've got a surprise coming when you go to sell your business. Plenty of purchase agreements are loaded with "gotcha" provisions that allow the buyer to claw back chunks of the sales price after you sell. So, be careful. You're planning to sell your company, but you may end up donating it.
- Then there are those click-but-never-read agreements for social media sites. They own everything you post, even your own picture. Some sites take your contact list and even monitor your location through your cell phone.

What's happened? Plenty.

Business Got Tough. Contracts have always been a tug of war. But then we had this little blip we like to call the Great Recession. When business got tough, so did people and bargaining turned into beatings. After 2008, it's been Lord of the Flies in 10 –point font.

Take-it-or-leave-it. Companies can't drive a Porsche. So, instead, they have macho contracts that are misguided ego trips: "My contract is bigger than yours." These businesses think "winning" = crushing you. They create contracts that annihilate the other side. It's like Darth Vader went to law school. Then, for kicks, they have a battalion of attorneys regularly toughen those contracts, adding new clauses and making old provisions even more one-sided. Now, they've painted themselves into a corner. Even when they should bargain, they feel that compromise is a defeat. Doing business with them is a take-it-or-leave-it relationship.

Attention Deficit Nation. After responding to emails 23 hours a day, our attention spans can handle Tweets, not inch-thick contracts. So, begrudgingly, you skim the business terms on the first few pages. Next, you wish/hope/rationalize — our new national pastime — that the rest of the agreement is harmless "boilerplate." That's wishful thinking. Savvy contract drafters take advantage of this mistake. They bury traps in those rarely read pages. Consider the one-sided attorneys' fee provision. If your opponent wins, you pay their legal fees and your own attorney. Even if you win, you still have to pay your own attorney. That means it may cost more to fight and win than to do nothing at all.

Computer Power. Technology has allowed some companies to make the problem worse. Computers enable businesses to have contracts of unlimited length that can be emailed and signed with a tap on your phone. Maybe if they had to put a staple through some of these behemoths, they'd think twice.

Finally, add the fact that many businesspeople don't know what's normal. You might be great at your business. But unless you are regularly entering into the same type of deal, you're a rookie when it comes to the contract. You say to yourself: "Who am I to disagree?" The other party wants you to think that their fifty — page contract is normal, despite all of the complicated and unfair provisions. You have to know how to fight back or it could cost you your company.

Fighting Back

It is a colossal waste of time and energy to try to hack your way through the jungle and avoid the quicksand that you find in many contracts today. You just want a fair contract. You do this. They do that. You both win.

Here's how you get this win-win result:

Time. Start with plenty of time. The party that runs out of time also runs out of bargaining power. I've seen countless opponents give us fits throughout months of negotiations and then crumble when they ran out of time. Start early, schedule everything, and keep time on your side.

Information. Information is power. That's especially true when negotiating a contract. Recently, one client was frustrated by the other party's one-sided contract. But my client had no idea that because the economy had changed, there was tremendous demand for his business. He could get a far better deal elsewhere. I convinced him to test the waters. Sure enough, my client was able to get 25 better offers in a matter of days once he started surveying the market.

Alternatives. If you start out negotiating with only one party, you run the risk that they will take advantage of you. Instead, try to create an auction. If two or three parties compete for your business, you're likely to get a better bargain. Also, don't let anyone talk you into dealing with just one party too soon. Wait until you have a term sheet setting forth all of the key contract provisions and a good reason to believe you are dealing with a company that will make a fair deal.

There's more:

- Create your own contract. Don't think that you're saving money using the other party's form. It could be an expensive "bargain." Countless times, I've seen the party who writes the contract gets the better deal. It's like getting home field advantage in every negotiation.
- Add experts to your team, especially if you're negotiating in an area where you're not experienced. You want advisors who have done the same deals many, if not hundreds, of times before. They add instant expertise to your deal team.
- Change the way you think about contracts. Too many people think these agreements are far-fetched "what if" documents written by lawyers with too much time on their hands (that last part could be true). "What if" scenarios happen every day.
- It only takes one bad deal to wipe you out. That one-sided agreement can tie you up in court, drain your resources and distract you from running and growing your business. It's worth the effort to treat each deal as if it could be the one that goes bad. Plan ahead. Negotiate with discipline and expertise. Fight for a contract that works for both sides.

Jack Garson is the author of *How To Build a Business and Sell It for Millions* (St. Martin's Press) and writes a business law column called *The Legal Edge* for *SmartCEO Magazine*. As founder of the law firm *Garson Law LLC*, he leads the business and real estate practice groups. Jack serves as a legal advisor for numerous local, regional and national companies, focusing on business transactions, commercial real estate and construction law. In addition to providing legal counsel, he services as a strategic advisor and negotiator for many clients, providing guidance on issues such as the growth and sale of businesses, liability and risk reduction, the hiring and retention of key personnel, and protecting and enhancing profitability, as well as negotiating the resolution of complex commercial disputes. Jack has been selected to be included in *The Best Lawyers of America* and he has repeatedly received the *Super Lawyer* designation. He has been recognized as a DC region *Legal Elite* and has received a *Martindale-Hubbell Peer Review Rating* of "AV" since 1995, representing the highest possible ratings for legal ability and ethical standards.

Jack Garson
Garson Law LLC
(301) 280-2700
jgarson@garsonlaw.com