

## COMMON SENSE DISPUTE RESOLUTION

This article sets out some simple steps business people can take to both prevent disputes arising and improve the chances of satisfactorily resolving them if they do arise. You might think most of these steps are no more than common sense. Nonetheless, the author has, over the past 22 years, litigated or arbitrated the consequences of ignoring virtually all of them. If they are no more than common sense, it nonetheless seems a reminder of them is in order.

### CHOOSE YOUR BUSINESS ASSOCIATES CAREFULLY

Perhaps most importantly of all, exercise good judgment in choosing your business associates. At bottom, many legal disputes are really personal disputes among those involved in the business or transaction. Even if they're not, the personalities of the people involved will greatly influence the dispute's resolution.

So, conduct some due diligence before entering into a business relationship with someone. Find out who you are dealing with. Ask your industry contacts. Use the internet. Ask the hard questions during your negotiations. ("Will you put me in touch with your colleagues from previous ventures? Have you ever been involved in a bankruptcy? What litigation have you been involved in?") Follow up the answers.

Try to get to know the person on the other side of the transaction as a person. Take them out for dinner, or to an entertainment or sporting event. Involve colleagues who you know to be good judges of people.

Most importantly, trust your own judgment. If you're not getting along with the person you're renegotiating with or if you're starting to feel uncomfortable about the business situation, there are probably good reasons for that. Determine what they are. Take the appropriate steps to address them. Reconsider whether you should be doing the deal with this person at all. Don't let the possible prize blind you to the potential problems.

### HAVE A WRITTEN CONTRACT

If you are going to enter into a new transaction or business relationship, document it in a comprehensive written contract.

It is quite possible to have a legally enforceable contract without anything at all being written down. Verbal discussions, business conduct and even industry custom can all, separately or together, amount to a legally enforceable contract. But the precise content of such a contract is difficult to determine, and will not likely include anything beyond the bare business necessities. Most importantly, when disputes arise, you will likely have to go to a court or arbitrator to determine what the parties' obligations are.

To avoid all that uncertainty, expense and delay, write down the terms of your contract. A written contract doesn't have to be long, complex or full of defined terms or Legalese. It just has to accurately record the parties' agreement.

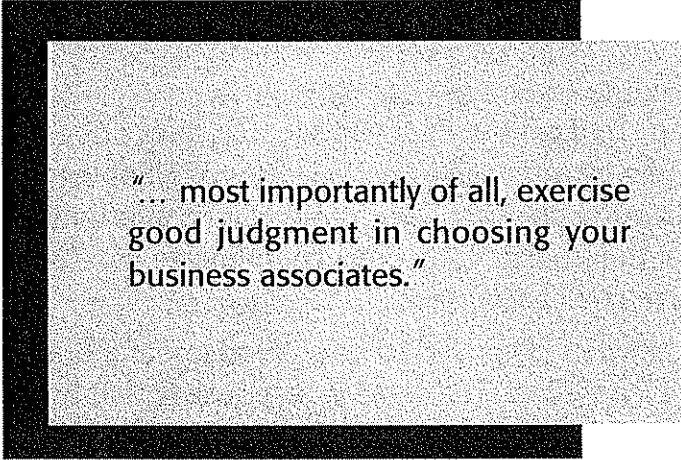
Ensure that contract deals with the following issues:

- Pre-contractual representations. If the other party's negotiating statements are important, then include them in the contract. If you do not, and they turn out to be untrue or misleading, it will be difficult to obtain any legal remedy. It is standard for contracts to include an "entire agreement" provision, stating there are no legally binding representations other than those in the contract. If they're important, put them in the contract. If the other party objects, you have to wonder why.
- Choice of law. The contract will be governed by some substantive law. Obviously, it is crucial to know what that law is. If the parties don't expressly agree on it, a court or arbitrator will have to decide what it is. Particularly in multi-jurisdictional transactions, that can be an unpredictable exercise.
- Dispute resolution. There are advantages and disadvantages to all of negotiation, mediation, arbitration and litigation. The point is to expressly agree on the form of dispute resolution which best suits your circumstances. If you do not, the default will be litigation, which you may have very good reasons for not wanting. In addition, if there is more than one contract involved in the transaction, ensure they all have the same dispute resolution provision (or at least provisions which will work together). You don't want to be litigating and arbitrating different aspects of the same dispute at the same time.
- Termination. Ensure the contract is either for a specified term or contains a provision entitling the parties to terminate it on agreed notice. If you do not, the contract will likely be indefinite. The parties' only way out will be to terminate it on "reasonable notice". If that is not agreed at the time (unlikely), whether the notice given was in fact reasonable in the circumstances will be a fertile ground for litigation.

Some business people balk at the expense of hiring a lawyer to draft a written contract, trusting everything to work out for the best. Rest assured, that expense pales in comparison to the cost of hiring a lawyer to litigate or arbitrate a dispute under an undocumented contract. Not to mention the commercial risk of the court or arbitrator not agreeing with your expectation of the contract. You can pay your lawyer now or risk paying them much more later.

## NO GOOD FAITH

Under Canadian law a party owes no general obligation to negotiate a contract in good faith. (They do, in some circumstances, owe an obligation to perform their contractual obligations in good faith.) So, again, if the other party's statements during the negotiations are important, include them in the contract. That way they should be legally enforceable.



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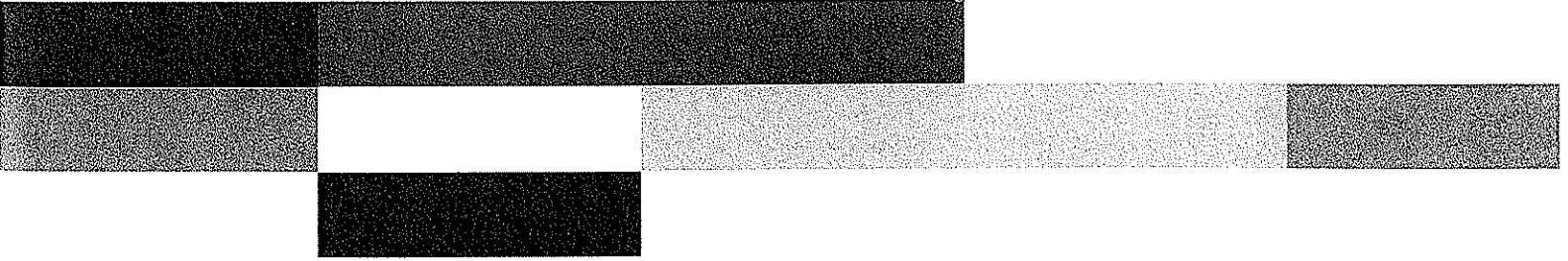
## UNDERSTAND THE CONTRACT

Although you have paid your lawyers well to negotiate and draft the contract, you are ultimately responsible for ensuring it accurately reflects your business deal. Read it. All of it. Make sure you understand it. Work through the likely scenarios and ensure you understand what the contract will require of the parties in each case and that that is what you agreed to. If you don't understand the contract, have your lawyers explain it to you, and rewrite it if necessary.

## KEEP GOOD RECORDS

Keep clear and contemporaneous records of your communications with the others involved in the transaction or relationship. These include notes of telephone conversations, minutes of meetings and copies of letters confirming important communications.

As the transaction or relationship unfolds, problems will inevitably arise. The parties are likely to put forward different versions of events. Clear contemporaneous records will be the most persuasive factor in resolving those differences, whether informally



or in litigation or arbitration. Don't wait until things go off the rails to start keeping these kinds of records.

### GET LEGAL ADVICE

When problems do arise, get appropriate legal advice. Do not wait until the situation escalates to the point of a demand letter, writ of summons or notice to arbitrate.

When difficulties arise, there are usually several practical and legal ways to react. You may not be aware of all of them. You may not understand the legal ramifications of all of them. Take the situation to your lawyer and get their advice about what options are open to you, and the advantages and disadvantages of each.

If you react first and seek legal advice later, you will likely find that your reaction has foreclosed some of your options. It may even have prejudiced your legal position in the dispute. Again, saving the cost of legal advice at the time may expose you to much greater legal costs, and commercial risk, later.

### NO TIT FOR TAT BREACH

Under Canadian law if the other party to a contract breaches it, that does not entitle you to breach it in return (for example by not paying their invoices or shipping their product). If the other party breaches the contract, your remedy is to sue them for an order requiring them to perform their obligations or to compensate you for the damage their failure to perform them has caused you.

Unless the other party's breach is sufficiently serious to be a "fundamental breach" (which is very rare) and you take the legally required steps in response to that breach to terminate the contract, the contract remains in force. Both you and the other party continue to be required to honour your legal obligations under it. There may be practical reasons for you not to honour the contract. But understand that, if you don't, you yourself will have breached the contract. You yourself will become liable for an order for specific performance or damages. Most importantly you will have forfeited the moral high ground and probably much of your negotiating leverage.

### NO DE MINIMIS BREACH

Under Canadian law there is no concept of a *de minimis* breach of contract. A party has either breached the contract, in which case they are liable for a specific performance order or damages, or they have not. There is no concept of a breach of contract so small that the breaching party is not liable for its consequences.

## DAMAGES

If the other party has breached the contract, they will be liable to pay you damages as compensation for the harm caused by their breach. But only for that harm.

You will have to persuade the court or an arbitrator that their specific breach of the contract factually caused the harm for which you seek to be compensated. You will have to show, on a balance of probabilities, that the breach actually caused the loss. Then you will have to show on a balance of probabilities the amount of that loss.

So, if the other party does breach the contract, document the losses their breach causes. Document both how their breach caused each loss and the amount of that loss. Include copies of relevant documents. That will greatly assist you in recovering compensation for as much of your loss as possible.

## NO UNSCRAMBLING THE OMELET

Once a dispute has arisen, the reality is that you are faced with a damage limitation exercise. There is usually no unscrambling the omelet. We do not live in a perfect world. We do not have a perfect legal system.

Even if the other party has breached the contract and caused you damage, and even if you persuade the court or an arbitrator of that, you will not likely be made whole. More likely than not, you will not be compensated for all the losses you believe the breach caused you. If nothing else, when you factor in the hard legal costs of resolving the dispute and the intangible costs of business disruption and personal stress, you will likely find your compensation inadequate.

So, take the common sense steps set out above to prevent disputes arising in the first place. Understand the realities of dispute resolution and respond to disputes appropriately. Maximize your chances of the most successful resolution as possible.



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