

Bargains With the Devil

How to Dissect Third Party Vendor Contracts



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Knowing how.

CUs' reputation among too many vendors: “Cheap & Easy”

- A. They despise paying legal fees to dissect contracts.
- B. The longer the contract, the less likely they'll read the boilerplate.
- C. If price & delivery date are right, they'll sign it!

“Food on a Train”

- A. Vendors’ take-it-or-leave-it attitude is usually unjustified
- B. Sales reps create false impressions of urgency or inflexibility
- C. Unless the product is **unique and indispensable**, everything’s negotiable

The Contract of Adhesion

- A. Vendor's legal department holds huge "pride of authorship"
- B. Single-spaced eight point type like this in Times New Roman font discourages scrutiny
- C. Sales materials & cover letters are irrelevant unless incorporated

The “necklace” contract: incorporation by reference:

- A. Master Agreement + Appendix A + Schedule 1 + Addendum + Schedule of charges
- B. Reference to “standard terms & conditions” with Internet URL
- C. “Procedures and protocols” in unattached, unprovided materials

Exactly what are you buying?

- A. Vendor-assigned trade names are unhelpful
- B. If it has a serial no., URL, street address, trademark, service mark, edition number, etc, spell them out.
- C. Anything can be incorporated by reference. Try incorporating sales materials, and watch the rep's reaction.

Watch out for merger clauses & language of exclusivity:

- A. Example” This Agreement describes the entire [product or service] being acquired, and any other terms, specifications, agreements and communications not contained herein are entirely excluded and not made any part hereof.”
- B. Translation: “If it is not described here, it doesn’t exist.”
- C. How does a CU claim a breach of performance, without a description of performance standards?

Can the vendor sell what you are buying?

- A. Verify explicit statement that vendor has the right to sell or license the product
- B. Verify vendor's indemnity against third-party infringement claims
- C. Seek escrow of software source codes, with current updates

“The Invisible Contract” – when the Master Agreement isn’t a master, and isn’t the agreement

- A. Example: “We agree that the standard terms and conditions apply to this agreement, as found at [URL citation], which may be revised and updated from time to time.”
- B. Lengthy, complicated contracts look short and chatty.
- C. The unpleasant stuff is in the URL, and even that is unreliable.

The Invisible Contract becomes a moving target:

“[CU] will... comply with and be subject to all rules, procedures, guidelines, specifications, regulations and other provisions as from time to time may be set forth or referenced in the Rules... all of which of the foregoing may be amended from time to time. [CU] agrees that [vendor] may amend or supplement the Rules from time to time at its discretion”

What were “The Rules”?

- A. 402 pages long
- B. Available only over the Internet
- C. Sales rep had never read them.

Too flexible is as alarming as inflexible

- A. Master Agreements with URL references to web-based documents contain conflict-of-terms provisions.
- B. URL prevails over paper agreements, in case of a conflict.
- C. Schedules & Addenda prevail over master agreements, in case of a conflict.

The Frankenstein contract

- A. Cut-*&*-paste monsters with internal inconsistencies
& ambiguous references
- B. The Capitalized Common Word that is never defined
- C. Incomplete sentences, obscure references, jargon, &
nonsense result

A fixed price that isn't fixed

- A. Automatic price increases in periodic billings, like a premises lease
- B. Tech support billing for “prevailing hourly rate then in effect”
- C. Vendors' unilateral right to increase prices at will after a specific term
- D. When is it an “update” vs. an “enhancement”?

“Due on signing” payment requirements are inherently unfair

- A. Delivery in stages justifies payment in stages
- B. Sales rep’s commission usually tied to initial payments
- C. Retainage buys post-delivery attention

“Due on installation” – the preferred payment method

- A. Vendor has an interest in assuring your satisfaction
- B. If installation fails, revoke acceptance or demand replacement
- C. Training issues must be resolved before payment.

Travel expense traps

- A. “Reasonable” according to whose definition?
- B. Best: “CU will reimburse travel expenses in conformity with its own internal reimbursement policies then in effect”
- C. Next best: “CU will review & approve proposed travel expenses in advance”.
- D. Least appealing (& most common): “CU will reimburse travel expenses within 30 days of invoicing.” This is a blank check.

Assignment vs. subcontracting: who are you really dealing with?

- A. “Assignment” is usually prohibited but
- B. “Subcontracting” without limitation is usually permitted and
- C. Functionally, there is no difference

“Damage limitation” terms – how indemnity agreements are made meaningless

- A. Excuses vendor from any substantial liability
- B. Partial (or even complete) refund is no remedy at all
- C. Always unilateral, in vendors' favor

The Velvet Divorce vs. Indentured Servitude

- A. What are the deconversion & termination requirements?
- B. What are the hidden “decon” fees?
- C. Does confidentiality survive termination?
- D. Restoration to original condition vs forfeiture of fixtures

Automatic renewal-of-term triggers

- A. Dual-notice methods or special addresses required
- B. “Not more than” confused with “at least”
- C. Ninety days prior” means a single date, not a minimum or maximum

Early termination restrictions abound

- A. Liquidated damages + contract buyout
- B. The “do-over” notice opportunity for vendors
- C. Notice-of-breach requirements (usually by snail-mail)
- D. Seek limits on number & frequency of “do-over” rights.

Unfair indemnity terms always favor lenders

- A. CU indemnifies vendor for everything forever.
- B. Vendor's indemnity usually tied to damage limitation provisions
- C. Demand mutuality

Litigation restrictions

- A. *Always* demand that the plaintiff be allowed to choose the courthouse
- B. Arbitration over trials is OK, but loser pays all costs
- C. Statutes of Limitations usually reduced to 1 year from discovery

“If you signed it, you bought it. Negotiate it first, or find someone who will.”

Thank you.



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Knowing how.

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