

Contracts

The best way for you to lose a friend or stop talking to a relative would be to get into a dispute. What do you think happens when you get in a dispute with a good customer? You lose them forever. Remember that good paper makes good friends.

How many times have you made a collection call that starts off with a dispute about terms or service which delays getting to the root of the problem: Why is the payment late? Often this is just a delay tactic on the debtor's behalf but in many cases, there is some merit. A contract is essential to protect all parties from unnecessary litigation and loss. On the following pages are some of the basics that make a binding contract.

Having a contract written by a lawyer with knowledge in contract law is necessary. The more complicated your business the more important this becomes. There are both federal and provincial acts that may affect the content your contract and to expect to write your own would be difficult without special training and knowledge. You can assist your lawyer by giving them a list of all the types of disputes and places where you have lost money in the past and ask them to protect you from it happening in the future.

A contract may be on your credit application, on your invoice or on a separate document. A contract doesn't always have to be signed for each transaction. Generally a contract signed at the beginning of your relationship should be good for all your transactions as long as the nature of those transactions is consistent. The biggest objection to overcome is your own! Professionals expect this type of documentation and question your professionalism when a contract isn't present.

Ideally we would eliminate all of these types of disputes. Here are some tips on how to cut down the number of disputes, which will allow you the time to spend 100% of your efforts on the real collection issues.

Credit is a contract and as such a credit agreement needs to clearly outline the terms of that contract:

- Clearly outline payment dates and amounts.
- Clearly outline your expectations if payment terms cannot be met. Do you expect a call, Post-dated cheques etc.
- What are the consequences for being late: Late fees, interest rates etc. must be clearly outlined and signed to stand up in court. You may charge up to 5% per month (60% per annum). Fees can be an excellent incentive for payment.
- Any special collection activity, i.e. wage assignment will be placed at 30 days. If you have a security agreement you will retain the right to act on it at a given point in time etc.
- You should send a welcome letter or make a welcome call to all your credit customers and review your terms. This is particularly necessary if you have outside sales people. Sales people often spend more effort on closing and focusing on product than terms.

Here are some points to consider for your contract in general.

- What you promise to do
- Warranties if any and specify no other warranties are implied if not specified.

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- If chattels are involved, at what point does ownership transfer insurance?
- What are your expectations of the other party?
- Time frames for completion and liquidated damages for not completing on time.
- Alternative dispute resolution (ADR) Negotiation, Mediation and Arbitration.
- Monitoring (super priority) protects your rights to security under the PPSA.
- Security agreements need to be signed before they can be registered.
- Any third parties handling information that falls under PIPEDA should be under contract to protect that information.

The stronger your contract is, the less likely you will encounter a dispute. If you have a good contract, you should be able to obtain your judgment more quickly and successfully or better yet avoid the litigation process all together.

Unfortunately the day of the handshake seems to have passed us by. Without a solid contract in place for every transaction, we are exposing ourselves to losses and possible litigation. Getting control of your accounts receivable starts with the documentation you put in place anytime you enter an agreement. ALWAYS document all conversations with dates, times and results of the communication for all your business transactions. This will become invaluable in the event a dispute arises.

Nature and Form of a Contract

In Canada simple contracts may be enforceable whether oral or written. Contracts for real property must be in writing and specialty contracts which require a seal must also be in writing. Consider that when an issue arises in an oral contract, the dispute becomes a he said she said argument which is never a guarantee for success. To simplify matters you should always make your contracts written so that terms can be proven.

In order for any type of contract to be valid there has to be intent to create a legally binding agreement between all parties. Any parties you expect to be bound by the contract must have knowledge of the contract and if it is in writing they should sign it. You cannot bind someone to a contract that forces behaviour which is contrary to law. It is difficult to take rights away from a consumer but a business can waive its rights in many instances.

Offer Acceptance and Consideration

In order for a contract to be valid there has to be a seriously intended offer, unconditional acceptance and legal consideration. The offer can be oral, written or implied by an action. Acceptance can be the same but must be unconditional. If anything is changed, it becomes a counter offer. For a contract to be legal there must be consideration. Consideration does not have to be equitable or of fair value but it has to exist. Consideration could be \$1.00. Consideration is often described as "Some right, interest profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility to another". In other words someone has to gain something and someone has to lose something.

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An offer remains in effect until it is accepted, withdrawn or a reasonable amount of time has passed. The latter could be a grey area which might result in issues when trying to establish when the offer expired. Your contract should always have an expiry date on it.

When you think about a contract, it is not a bad idea to keep a real-estate contract in mind because it is a formal transaction that many of us have been exposed to:

- The offer or counter offer always has an expiry attached
- You would never make an oral change to a written contract
- You would specify clearly in writing any exceptions (exclusions)
- It has a firm completion date
- Offers or counter offers can be conditional on another action

Misrepresentation

If any of the material facts upon which either party bases a decision where misrepresented, then the contract is void. If misrepresentation was intentional, the affected party may seek compensation.

Breach of Contract

Any time a condition of a contract is broken, the affected party has an obligation to mitigate or reduce the impact of damages resulting from the breach. Ultimately any compensation sought will be reduced by the steps a reasonable person would have taken to keep losses to a minimum. An example of this would be a broken lease for an office space. The landlord could not sue for the unpaid remaining months. The landlord would have to advertise the space and after a reasonable effort was made to replace the tenant, he would then be able to sue for any vacant period. Either way, the affected parties may be entitled, marketing cost and the difference in the rent. He would have to prove the economic loss to the court.

Minor breaches in a contract do not release the affected parties from their obligations whereas a breach of a substantial term might. Either way the affected parties may be entitled to damages.

Liquidated Damages

If a legal action is commenced for a debt, bad cheque or invoice that has not been paid, the amount of the claim is straight forward and requires no further assessment by the court. If a claim is based on a damage of some sort, damage for breach or even physical damage, the plaintiff will at some point have to justify to the court what the actual economic loss is. This can be a costly and time consuming process which can in some cases be avoided. When it comes to a breach of contract or not completing the terms of a contract on time, we can anticipate the economic loss and call it a liquidated damage. For instance in construction we might say that for everyday the foundation is not completed on schedule, the contractor is liable for a \$2500 liquidated damage. This has to be representative of our economic loss such as (but not limited

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t) idle equipment and employees. By having this signed as part of our contract we can avoid the assessment of damages hearing. Therefore, 2 days late = \$5000 owed.

There are a lot of ways protecting yourself or your organization. Spending time and money on a well written contract will pay for itself time and time again when conflict arises. Remember less disputes + easier judgments = less money spent on a lawyer.