

## MAKE 2022 THE YEAR OF BETTER CONTRACTS

Contracts are the single most important thing for any business, so why not start the new year with a resolution to improve how you deal with them. Here are six suggestions, and I promise that they are all more palatable than a diet or a gym membership

This wouldn't be a proper new year message if it didn't contain a special offer, so the first 10 contract reviews undertaken by SampsonLegal for POPAI members in January 2022 will receive a 50% discount provided you quote "POPAI CONTRACTS 50%" at the outset.

### 1. Make sure everything makes it into the contract

All sorts of assurances and promises are offered during discussions and negotiations, but it is not unusual to find that these have never been captured in the contract. There seems to be a widespread belief that the correspondence is sufficient. But the basic rule is that a contract stands as it is, and a court will not usually look at the negotiations leading up to it.

**Resolution:** Keep a record of every issue raised and check that all the agreed outcomes appear in the final contract.

**Note:** There are some important exceptions to the rule that a court will not look at the negotiations, so it is important to keep all those emails, minutes of meetings, and file notes of telephone calls. The point is that they're not enough by themselves.

### 2. Check that the contract says what you mean

Many disputes arise because of genuine differences in expectations. I suspect these occur so often because expressing something without ambiguity is incredibly difficult. It takes hard work and time, but in business time is often in short supply. And with a deal in sight, it is only natural that everybody wants to believe that the document makes things sufficiently clear, but we all have a tendency to assume that the other person knows what we know, when actually they don't. So it is only later, when differences in expectations have arisen, that the contract's weaknesses become apparent.

**Resolution:** Before a contract is approved for signature, have it reviewed by someone who hasn't been involved. Get them to imagine that they work for the other side and to read it through the other side's eyes, trying to find as many gaps as they can. This simple step will pay for itself many, many times over by catching potential problems when they can still be avoided. And if the reviewer simply says, "That looks good," I guarantee that they haven't done it properly.

### 3. Expect success but plan for failure

Sometimes things go wrong. It's frustrating and annoying, but it happens. A company can learn a lot from its mistakes and failures, and come back better and stronger, but in the meantime there will be financial consequences. And contractual obligations are usually strict, so a failure to comply will be a breach of contract no matter what the cause and irrespective of fault.

This could be eye-wateringly expensive. Missing a delivery date could impact an entire programme. There will nearly always be additional costs, but if the programme is time-critical (Christmas, Easter, film releases, sporting events, etc) the customer could claim for huge losses.

Managing liabilities is one of the most challenging aspects of preparing and negotiating contracts. Consider the simplest possible term: "*In no circumstances whatsoever will the supplier have any liability whatsoever for any breach of this contract.*" This appears to protect the supplier completely, but in most situations it will actually provide no protection at all.

**Resolution:** Take legal advice. If you only take legal advice on one thing in 2022, this should be it.

#### **4. Plan for Covid**

We will have to learn to live with Covid, but for now it is severely disrupting business and supply chains and it is likely to do so for some time to come. Because contractual obligations are usually strict, Covid will not excuse a breach. A typical "force majeure" clause is unlikely to help.

**Resolution:** Use the contract to set out the consequences of Covid-related issues.

#### **5. Apply your terms and conditions**

Arguments about which party's terms and conditions apply is one of the most common issues in contractual disputes. Negotiators have a tendency to rely on the fact that some legal terms were attached to some email at some point, and then hope that the absence of objections from the other side means that everything is OK. But all it actually means is that the negotiator on the other side is also relying on the fact that they attached their legal terms to some email at some point. It certainly doesn't mean that everything is OK. A professional approach to this is required.

**Resolution:** Put a legally robust process in place to ensure that your legal terms apply, not theirs.

#### **6. Make sure the contract is signed by the right people and that it can be found**

Even the largest company can struggle to produce the signed contract when it is needed. Perhaps this is not really surprising, given that so many of us spend so much time looking for reading glasses or car-keys. And of course people come and go, so the person who needs to find the contract several years later may not be the person who filed it. This can make a dispute far more complicated, uncertain and expensive to resolve than it needs to be.

**Resolution:** Implement a process that ensures that all the right signatures are obtained and that the contract is filed safely where it will be easy for anyone to find years later.

For help with any of these issues, contact:

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#### **Disclaimer**

This note is intended as a signpost to some important issues on which professional advice should be obtained. It is not comprehensive and it is not a substitute for proper advice.