

Negotiation of Contracts. Planning for the Unknown with Boilerplate Clauses

Abstract: Fiona Fogden gave a very practical talk at the BIALL Conference 2010 in Brighton on contract negotiation with online vendors and it has been held over to this issue of LIM as it fits so well with our vendor relations theme.

Keywords: negotiation skills; contracts; law librarians; online services

Boilerplate *noun*

1. Rolled steel plates for making boilers
2. **Standardized pieces of writing for use as clauses in contracts.**
3. N. Amer. Stereotyped or clichéd writing.¹

Introduction

As law librarians you may have seen books on your shelves or on your online sources about boilerplate clauses; there a good few of them about. The audience for these books of course are lawyers, more specifically those drafting and reworking contracts. The audience for this article is not the lawyer but the librarian who deals with contracts for online subscriptions, whether or not you have the final say. A definition of “boilerplate” is given above and you can envisage a piece of metal welded over joins of something previously imperfect, but now working due to the addition. You can imagine all the hot gas of the words trying to escape, but being secured by the well-crafted plate. This article is a write up of a talk given at the BIALL conference in Brighton in June 2010 so apologies to those delegates who attended and have seen most of this already. Thank you though to those who said they felt it worth writing up for the benefit of a wider audience.

Why negotiate clauses?

Very often in negotiation there is a focus on price. Price is of course a valuable thing to be able to negotiate. The correct working of contract terms (or clauses) can add value, change value and ultimately have a bearing not just on price, but also on many other aspects of your

experience with an online subscription. Good contract terms can also support a sustainable relationship with your representative and avoid awkwardness and misunderstandings. Well negotiated clauses can support your professional role in your organisation, at a time when volunteers are often being drafted in. Clauses that protect your organisation in times of uncertainty are therefore doubly valued as you are planning for the unknown and mitigating risks that may or may not arise, with a relatively small investment of time and a lot of expertise.

Some assumptions

For the purposes of this article I am going to make a few assumptions. They will not always exist, but from experience they very often do.

1. The contract you are looking at does not work for you as it currently stands.
2. We are negotiating a contract and the supplier is amenable to reasonable suggestions as to changes.
3. You understand the need for balance. You cannot put all the risk on the supplier.
4. You are fascinated, at least in part, by contract terms and their negotiation, have read this far and will use this article as a guide, not necessarily literally.

Some sample clauses

The wordings of the clauses appearing at the end of the article are suggestions only and individual circumstances and policies of the organisation should take precedence. As these clauses are likely to be used in legal documents, it has to be pointed out that the author is not a lawyer and this article does not constitute legal advice.

The location and delivery of these clauses can vary. They may be merged into the body of the original, used in a side letter, which is a mechanism for adding specific

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terms to a contract without interfering with the original, appear in an appendix, or wherever works for both parties. These are just samples, many more can be used.

Getting the clauses right can add a huge amount of value to a contract. For example, the dissemination clause in the right format can mean that something is worth a subscription, whereas previously you could not justify the price, so you are the winner and the supplier is the winner as they have new or continued revenue. However, from my experience, it is not about getting the contract water-tight. It may sound bizarre, but there needs to be some wriggle room for all those unknowns. One of the examples talks only about appropriate compensation and does not try to pin down what that compensation may exactly be. What it does do is put an obligation on the supplier to acknowledge that you have suffered a loss and need to talk about it. Compensation can then be something that works for that particular eventuality. It may be money to offset the cost (do not expect the full cost to be covered, although you can hope!) of buying the content you have just lost elsewhere, or it may be the addition of a new module.

The few examples included here are intended to be the most common changes one might consider including or amending in a contract, but the options, unlike time, are endless. It is not as simple as going through with a fine-toothed comb and getting exactly what you want. As previously mentioned the ideal contract needs to be balanced. Unless you are the large subscriber with mega clout, ultimately yes, money and size does

help. You need to know which battles to pick and which issues most require your attention. In any other situation the previously mentioned desired sustainable relationship with your supplier will be at jeopardy and you will get a reputation for nit-picking where it may not always be necessary and will risk being rebuffed on points that are vital to you whilst only winning insignificant changes. When looking at a contract and considering desired changes classify every change you want as follows:

- 1) **Deal breaker:** unless a change is effected you cannot proceed with the contract as it stands.
- 2) **Highly desirable:** to mitigate the most likely unknowns or issues you need to change these terms
- 3) **Nice to haves:** if possible and practicable you would like to change these terms, but read back on the entire contract and see whether it would unbalance the contract if you included them all.

Conclusion

It is up to your judgment to know how far you can put your case and how much on your wish list you can change. Ultimately this is a prime example of the value that a librarian adds to an organisation. Your final task is to remind your employer that you perform a valuable role, and emphasise the positive effect of your experience in effectively negotiating contracts for the benefit of the business as a whole.

Footnote

¹ Compact Oxford English Dictionary of Current English, 3rd ed, 2005

Biography

Fiona Fogden is National Information Services Manager at Baker Tilly Management Ltd. She was a law librarian for many years before this and is a well-known author and speaker at legal information courses and events.

Some Sample Clauses

Clause name	Objective	Ideal scenarios	Wording	Risks & ongoing commitments
Take down	<ul style="list-style-type: none"> □ in the eventuality that one particular dataset is removed from a database that has multiple sources you are able to: <ul style="list-style-type: none"> ■ Demonstrate to your employer you have made efforts to cover this eventuality ■ You get compensation that may either totally cover or at least offset the cost of buying the content elsewhere 	<ul style="list-style-type: none"> ■ aggregators of information ■ Where you have chosen one product over another based on its particular content which may differ only in part from the competition 	<p>Top ten In the event that one of the top 10 most used sources is removed or ceases to be added in a timely manner to the supplier's data-sets the subscriber is entitled to a refund equivalent to the % use of the source, where the sum does not exceed 25% of the cost of the subscription</p> <p>Identified source In the event that a source listed in Appendix II is either removed or ceases to be updated, the supplier agrees to enter into discussion with the subscriber as to appropriate compensation</p> <p>Notification of change The supplier agrees to notify the subscriber regarding any change to content at least 30 days prior to any planned change. In the event that the change is perceived as detrimental to the subscriber then the parties agree to enter into discussions regarding compensation. Only in the event of a material change in content is the subscriber entitled to give notice to end the contract and will be entitled to a pro-rated refund.</p>	<p>Risks include the supplier claiming that the item taken down is not in the top ten most used sources (if that is the variety of clause you chose to use) as your top ten was 'all UK broadsheets' and not a specific title in that file.</p> <p>Ongoing commitments include monitoring what is removed, understanding the implications for your organisation, serving the supplier notice of your intention to make a claim under a clause in the event that it happens.</p>

<p>Modular variations</p>	<p>The subscriber is not penalised if the product is restructured or content is moved into different practice areas or topics.</p>	<p>Where a product consists of various modules which can be subscribed to independently and you subscribe to only a selection, rather than all</p>	<p>The supplier agrees that at no time will content that is available at the time of signing of the contract cease to be made available to the subscriber as a result of reclassification of content into other modules. This does not apply to content that is removed to all subscribers due to it ceasing to be current or relevant.</p>	<p>The subscriber needs to understand what they have subscribed to. This may be a simple print-out of a contents section or may be more complex.</p>
<p>Dissemination</p>	<ul style="list-style-type: none"> ■ To get maximum value out of the subscription ■ To minimise risk. Can you control dissemination if it is not permitted? 	<ul style="list-style-type: none"> ■ All contracts that do not already give clear permissions ■ Databases which are used by a small group of people such as research librarians with the intended benefit of a wider audience ■ Downsizing from an “all-you can eat” contract 	<p>Permission is granted to disseminate to third parties small portions of data on a non-persistent basis in the normal course of business.</p>	<p>You will need to clarify ‘third parties’ and internal v external clients. You also need to consider whether planned use in the normal course of business is required and works for your organisation.</p>
<p>Material change in business model</p>	<p>To prevent you from looking like an idiot, in the event that a subscription database suddenly becomes free or makes a large portion of its content free, soon after you have paid a lot of money for that same content.</p>	<ul style="list-style-type: none"> ■ When it is a new product ■ When it is a new business model, e.g. going from free to fee (who is to say it won’t go back again) ■ When there are rumours that it might happen, but you still need to go ahead with a subscription at the time in question 	<p>In the event the supplier materially changes their business model the subscriber is entitled to renegotiate or cancel. The subscriber is entitled to a refund not exceeding the pro-rated amount of sums already paid should the content be made available on a non-fee or similar basis.</p>	<p>Keep an eye out in relevant professional publications such as VIP, Freepint and <i>Information World Review</i> about changes to products you subscribe to.</p>

<p>Merger or outsourcing</p>	<ul style="list-style-type: none"> ■ Not to have to negotiate the minutiae of the deal in the event of a significant change ■ To manage discussions about when and under what circumstances your subscription should be renegotiated 	<p>Any organisation</p>	<p>In the event of a merger of the subscriber resulting in the size changing by less than 20% this agreement still stands. In the event of an element of the firm which may have used the content referred to being outsourced, then the agreement will be understood to apply to the new entity only in its relationship to the pre-existing organisation and not in any wider context to other organisations which they service.</p>	<p>This clause is the one most likely to be hard to negotiate with the suppliers as there are too many unknowns. The author has successfully used the merger element of this clause with a number of suppliers.</p>
<p>Break clause</p>	<p>To give you the right to cancel the contract at agreed points in the contract in certain agreed eventualities. To provide a safety net and allow a contract to be negotiated despite some worries.</p>	<ul style="list-style-type: none"> ■ Multi-year deals ■ Where the provider has made promises and you need an incentive for them to deliver 	<p>Break during a multi-year deal In the event that the subscriber's tax practice revenues decrease by more than 25% during the first or second year of the three year deal, the subscriber has the option to cancel the contract at the end of year one or year two, if they are unable to agree new terms with the supplier.</p> <p>Break due to non-performance In the event that the supplier fails to update the product on at least a monthly basis, then the subscriber is entitled to renegotiate terms or cancel by giving 30 days notice and will be entitled to a pro-rated refund of any subscription fee paid in advance.</p>	<p>You need to consider that confidential information will need to be shared if you asking a supplier to agree to a clause about letting you out of a contract if revenues decrease by a lot. This may be commercially sensitive and need clearance from management and/or a confidentiality clause if it does not already exist. Ongoing work would entail checking that they were upholding their end of the bargain, although anything entitling you to break the contract should not need checking as it should be quite obvious. If there are major issues of non-performance these may be better dealt with in a separate Service Level Agreement.</p>