

## Renegotiating Contracts

Trial lawyers joke that litigation is just a way of renegotiating the contract. There may be some truth to that—American business owners are often reluctant to renegotiate on their own. Given today's economy, companies will need to renegotiate contracts themselves before litigation sucks them dry.

### Ask the Hard Questions First

- **Is the Contract Worth it?** Tough economic times force businesses to question contracts as never before. Is the customer slow pay or almost no pay? How much of a pain is this contract for your company? Is the customer high maintenance, demanding and driving your already slim profit margins into the ground? Will your company die without this contract?
- **Customer Financials.** Is this customer credit worthy? Pull credit reports, have your accounts receivables people do on the ground reconnaissance (calling their contacts at the customer), have the CFO call the CFOs of the vendors and customers of your customer.
- **Are there any specific circumstances (not just the current economic recession) why this contract should not be resuscitated?**
- **If the contract is not worth renegotiating, what are the costs of simply terminating it?** The customer may also be dissatisfied and willing to move on.

### Understand How Renegotiation is Different

- **Existing Relationship.** You and the customer have a track record with each other. Like marriage, you know each other's faults and vices.
- **More Disagreement and Blaming is Likely.** When losses and costs are involved, people tend to be less cooperative, blame others and fight harder to avoid losses, even if it means no agreement.

- **Less Mutual Benefit in Renegotiated Contracts.** It's easier to be "fairer", to take a win/win approach when negotiating the original contract. Allocating losses and increased risks is much harder.

### **Strategies to Use in Renegotiation**

- **Use the Right Parties to Renegotiate.** If there have been problems, you do not want those parties arguably responsible for those disputes now renegotiating the contract. Moreover, if someone has been heavily involved in the contract they may want to keep the contract alive at all costs, i.e. throw good money after bad. You need a negotiator with fresh perspective and a keen eye on your bottom line.
- **Put Yourself in Other Side's Position.** Now more than ever, you need to let the other side know that you understand their position, feel their pain and empathize with them. They likely expect you to talk/complain only about your own problems, issues and concerns. From the outset, this empathetic approach defuses the other side. Moreover, it allows you to come up with more creative solutions than if you are mired only in your company's pain.
- **Reframe the issues.** Loss and risk are volatile, emotional issues. If the parties can accept that expectations have not been met, they are more likely to focus on creative future solutions as opposed to focusing on potential future losses.

### **Key Contract Provisions to Consider—Both Past and Future**

- **Term of Contract and Renewals—**what's the length of the contract and what triggers renewal? Have those been satisfied? Offering a shorter term or eliminating automatic renewals may help you keep the contract alive.
- **Dispute Resolution—**Avoid contracts that allow you only to arbitrate. Venue and choice of law provisions become more important in tough times—long distance fights are more expensive. Look for dispute

escalation and mediation provisions that allow you to resolve problems short of litigation.

- **Liability provisions**—those boilerplate disclaimer and liability limits are very important in determining your contract rights at default.
- **Bankruptcy provisions**—what happens under the contract if one side files for bankruptcy? And is that contract provision enforceable under bankruptcy law? The threat of bankruptcy filing is often used in renegotiation efforts to force concessions. Know if the contract limits your options in the event of the other side's bankruptcy.
- **Contingency provisions**—if certain benchmarks are met or not met, contracts may specify penalties or rewards. These types of provisions may help keep your contract alive so that you can work on fulfilling contract obligations.

Renegotiation is an art that requires an understanding of the psychology of the other side. It is an essential art for surviving in tough economic times.