OLIVIA WHITCROFT

"My client had been playing an annoying game with me, but it was actually a good exercise"

Contract length isn't everything: clear drafting and prioritising key issues matter most, as Olivia explains succinctly (but not too succinctly)

I was recently sent two agreements to review in the same week by two companies. The relationships they covered were not dissimilar. Under each agreement, one party granted rights to the other party to carry on particular activities, involving the use of data and intellectual property (IP).

One contract was five pages long. The other was 205 pages.

The first was short on detail. I read it quickly and was sad there wasn't more of it to get my teeth into. The second was *wordy*. Each clause had thick chunks of text, and many sentences had up to 100 words. I needed multiple cups of tea and biscuits to get through it.

I had a similar concern with both agreements: how did the parties intend the provisions to work in practice? Some terms of the first were quite vague, and there may not have been enough there to establish what the parties wanted to happen. The second was at the other extreme. A lot of provisions were so complex, it seemed unlikely the parties would be capable of implementing them fully.

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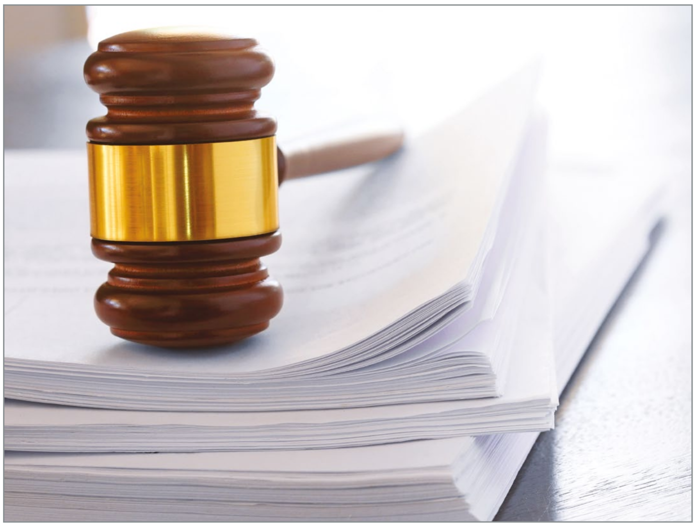
Short or long?

A short agreement ensures you have something in place to govern the relationship, and, if well drafted, can help to manage the key terms. But if it's too short, there's a risk you aren't clearly addressing all relevant issues. If there's a dispute, the contract may be missing details to help to resolve it. It may lack certainty on intended duties and remedies under the contract to determine, for example, what steps are expected to protect IP and data, what happens if they're misused, and who does what if there's a security breach. Nevertheless, there may be other drivers to keep a contract concise, such as creating a friendlier impression, speed of agreement, and ease and flexibility of implementation.

A longer agreement can address more issues and eventualities. If there is a dispute, the contract may (again, if well drafted) more clearly address what the duties and remedies are. Terms may include, for example, standards of quality in use of IP and data, rights to terminate if they're misused, and notification of security breaches. But it can take longer to prepare, negotiate and agree. There's also a risk that the parties get bogged down in so much detail that the contract is hard to understand, too rigid to implement, or has inconsistent provisions. It then goes full circle and lacks certainty on intended duties and remedies. But a more detailed agreement can provide a clearer legal position than a shorter one. This may be preferred by legally sophisticated contracting parties.

Of course, the length of a contract doesn't in itself determine its quality or suitability. I'm often approached by smaller tech businesses, who think they must have an extensive set of complex-sounding terms to be "legally covered", such as: long-drawn-out IP protection and infringement clauses; cumbersome data management and security breach processes; and heavy liability exclusions and indemnities. However, they're secretly wishing they had some concise and easy-to-understand terms that won't scare off their customers and contractors. We work together to produce something that isn't too complex, while giving comfort that areas of particular concern are being addressed.

Rather than worrying just about length, a focus on clear drafting and prioritising key issues can help you to achieve what you want from having a contract at all.



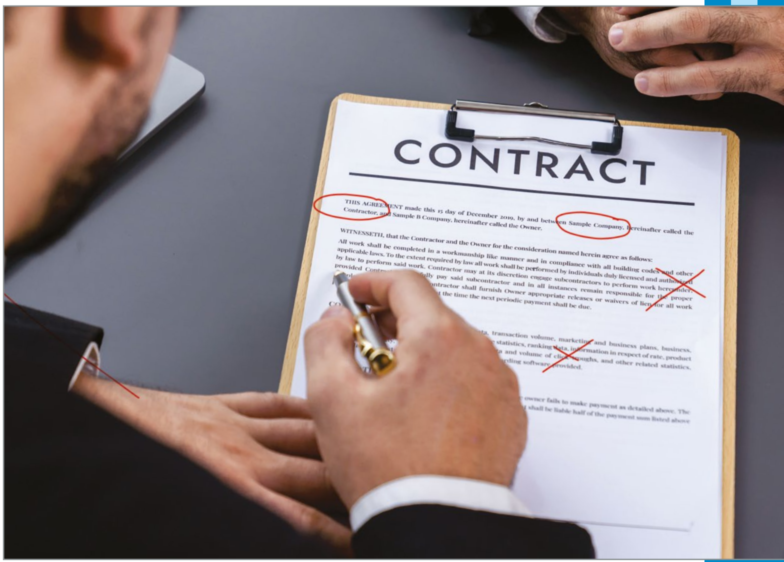
BELOW Long contracts can be offputting, but it's the terms within that are important

Cutting down a long agreement

Several years ago, my first draft of a services agreement ran to 20 pages, based on the client's instructions and standard provisions for that type of relationship. My client gave me some feedback on the various parts, and asked me to cut it down to ten pages.

I removed some terms the client said weren't important to them. These included practical matters that the parties could address separately, such as processes for project management meetings and reporting. I also took out some interpretative clauses on how to calculate time periods and the meaning of "person". I made the drafting of other clauses more concise; for example, reducing detail within *force majeure* and data-handling provisions, and within boiler plate clauses. In making those changes, there was more scope for disagreement in how these matters should be addressed in practice. However, the client's key business and legal issues were still covered.

My client was now happy with the scope of matters covered by the agreement. However, they wanted something simpler to present to other stakeholders, and requested that I please reduce the length even more, to five pages. I removed the definitions section at the top, instead defining key terms in the first place they were used; this made it more difficult to navigate, but it still worked. I left out other definitions and removed "for the avoidance of doubt" wording, where the intention of the parties was likely to be clear without them. We lost some precision, though they were areas where there was less likely to be a dispute. I also took out some boiler plate, such as "severability" and "no waiver" terms, and some details of remedies



and liabilities. This could lead to uncertainties if these issues arose, and general contract law would determine what should be done.

I could have predicted what came next: "Two pages now, please." It was time to throw the boiler plate section out of the window completely, except for covering two or three of the most important issues very briefly. I had another stab at making each clause even more concise; provisions covering higher-risk issues were heavily condensed. I then removed the odd word here and there to stop clauses running into new lines, and sneakily reduced the line spacing.

And then the final blow: "I want it on one page." This was a big challenge. I couldn't see ways of cutting it down without removing core elements of the agreement, and the client probably wouldn't take kindly to a size 6 font. I advised them that cutting out even more risked losing the whole benefit of the contract. I think we settled on about a page and a half, with some terms slipping into the signature page.

My client had been playing a slightly annoying game with me, but it was actually a good exercise, and I regularly use a similar technique to reduce complexity in agreements.

I should add that each provision I reduced or removed during the cutting-down process wasn't originally pointless. At each stage, we lost some precision or clarity, or changed how risks were addressed, and I explained the potential legal impact of the shorter terms. If a contract has clauses that add no value at all, then it is of course a much easier job to simply remove them.

Building up a short agreement

On the flip side, short agreements may need to be built up to cover all intended business and legal issues. We don't want to needlessly convert all contracts into 20 (or 205) pages just to look impressive, but playing the reverse of the cutting-down game could be a fun way to lead us through the process, to get where we want to be.

Let's say we start with the bare bones of an agreement at two pages long. First, two pages to five: improving fundamental contract elements; adding provisions on important issues not yet addressed; and clarifying any vagueness and ambiguities.

Next, five pages to ten: beefing up provisions to be more specific and clearer on their intention; developing the contractual structure and interpretative provisions to give more precision; and to allow clearer navigation and understanding.

Finally, ten to 20 pages: adding provisions to address lower risk areas; expanding the drafting of existing clauses to cover a wider range of eventualities; increasing font to size 16 and doubling the line spacing.

Picking the right battles

Where did we end up with my two reviews? Maybe surprisingly, length wasn't a chief concern for my client with the 205-page contract. However, we used a similar approach to the cutting-down game to provide a focus for assessing risks and negotiation. The company wanted to ensure it had the rights it needed for the relationship to work, without removing or overly amending provisions that were important to the other party.

For the five-page contract, we landed on eight pages. We added terms to address priority issues, and expanded on others to be clearer on their intention. But we didn't make it too bulky, which may have been unappealing to the other party.

These outcomes may be completely different in other cutting-down or building-up exercises. In deciding what battles to pick, we need to take into account the nature of the relationship, the client's risk appetite and the priorities of each party. The goal wasn't just to achieve perfect terms, but also to avoid lengthy and costly negotiations, and wrecking the relationship with the other party before it even got started.

Can AI help?

What's an article these days without mention of AI? There are some amazing AI tools that can help to draft and review contracts, and those that I've used have done a good job at pulling out and summarising key issues. When tackling longer contracts, AI has identified a similar concern to that I raised above – the risk of practical inconsistencies and disputes over overlapping or competing obligations.

Having said that, the same AI also did its best to convince me of a regulation I needed to address in my contract that didn't actually exist. And the finesse of legal drafting, in the wider commercial context, may still need a human touch. AI itself advised me that legal professionals should review and refine AI-generated draft contracts to ensure accuracy and compliance. So my expertise is still valuable for the timing being (phew!).

ABOVE **If you still like printing, you can always use a red pen to cut down contracts**

"There are some amazing AI tools that can help to draft and review contracts"

Build on experience

Once you've put a contract in place, your experience of how it operates in practice will help to guide priorities for future contracts. A few examples from my experience: you discover your customers find your standard terms too long and confusing, so you create a shorter version. Suppliers always negotiate removal of a term in your data processing contracts, and it saves time (and legal fees!) to simply not include it going forward. You receive multiple queries on the meaning of a particular service standard, so you expand on it to clarify. You experience difficulties in terminating contracts under "material breach" provisions where the problem is late payment or a reputational concern, so you build in additional termination rights for these eventualities.

The five-page agreement (converted to eight pages) was finalised and put in place relatively smoothly. The 205-page agreement rumbled on through an assessment and negotiation process. Maybe it ended up being a more watertight agreement, but with a significantly higher investment of time and costs along the way.

BELOW **AI can help, but you'll still need a legal professional to check everything**

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