

HOW TO APPROACH CONTRACT REVIEWS

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1. OVERVIEW

1.1 This session will cover:

- 1.1.1 understanding the role that contract reviews play in modern businesses;
- 1.1.2 the features of a good contract review;
- 1.1.3 the things you should consider / ask before even opening the contract; and
- 1.1.4 a step-by-step approach on what to do when you're reading through the contract.

2. ROLE OF CONTRACT REVIEWS

2.1 Contract reviews

2.1.1 Identify and summarise how the contract works:

- (a) flagging key risks;
- (b) making sure the contract processes are workable (notices etc);
- (c) checking that the commercial terms (e.g. the timeframes and deliverables) are correct.

2.1.2 The business could use it for:

- (a) negotiation / pricing new contracts
- (b) turning their minds to questions from the contract that may not have come out of the commercial negotiations
- (c) making sure there's appropriate insurance coverage
- (d) briefing their supervisors / executives
- (e) getting approval to enter into the contract (sign off from directors etc)
- (f) renegotiating or deciding to terminate existing (unprofitable / unworkable) contracts

2.1.3 Example of how a business might decide to carry out a contract review:

ASSESSING WHETHER YOUR CONTRACT NEEDS LEGAL REVIEW

		RISKS			
		Financial Impact. What is the worst case scenario financial impact on VU? (at a <i>minimum</i> , this will be the contract amount)	People	Reputation	Business/ Infrastructure
CONSEQUENCE RATING	Catastrophic 5	>\$1m impact	Possible fatality Intensive care hospital treatment Severe irreversible disability Long term hospitalisation	Long term reputation affected internationally & nationally Ongoing negative media coverage Industry abandons links to VU	Severe business interruption to a business unit or College greater 6 weeks
	Critical 4	>\$500k - \$1m impact	Long term injury Short term hospitalisation	Negative media coverage in state, national or international media Govt. agency question or enquiry	Major business interruption to a business unit or College between 4 - 6 weeks Loss of a genuine opportunity to commercialise VU generated IP
	Significant 3	>\$100k - \$500k impact	Minor injury requiring treatment with minor loss of time	Student body and/or community concern Industry review links to VU	Business interruption to a business unit or College between 2 - 4 weeks with a significant impact on service Final contract may not allow VU to achieve its necessary ends
	Disruptive 2	>\$25k - \$100k impact	Injury requiring first aid	Issues raised by local press Issue raised by more than directly affected students Industry concerns	Business interruption to a business unit or College between 1 - 2 weeks with a significant impact on service (despite any interim work-around)
	Minor 1	Up to \$25k impact	No injury.	Public awareness but little public concern Issue resolved promptly by management	Business interruption to a business unit or College up to 1 week with negligible impact on service

2.2 What does a contract review look like

Contract reviews come in a variety of forms depending on the detail and use for the specific matter / industry. Some examples:

2.2.1 complete table of issues / proposed changes;

2.2.2 email list;

2.2.3 (in some cases) comments in the document.

3. STAGES OF A CONTRACT REVIEW

3.1 Summarising what's in the contract

"Clause 10 states that the Contractor will be entitled to additional costs plus a 5% margin for variations."

3.2 Identifying what's not in the contract (if any)

"However, there is no express provision for margin if the Principal omits work from the scope."

3.3 Linking to the practical implications / the client's situation

"We understand that it is not uncommon for projects of this nature, and your previous projects with this Principal, to involve omitted scope."

3.4 Evaluating according to market standards

"In our experience, requesting an entitlement to margin for works omitted by the Principal is common in market-standard contracts for projects of this size."

3.5 Providing a recommendation (KEY)

"Based on the above, and your lump sum pricing model, we suggest a departure in relation to a margin if the Principal removes works from your scope. If you agree, please let us know the percentage amount."

4. **BEFORE LOOKING AT THE CONTRACT**

4.1 **Understand the client / project**

- 4.1.1 Who are you acting for? (e.g. acting for a principal vs a contractor could essentially flip the risk profile)
- 4.1.2 Where do they fit in the contracting chain? (can be helpful to prepare a contract map to understand where the commercial pressures come from)
- 4.1.3 How to do they make their money? (e.g. if the client makes money from salvaging, then may need a new clause giving them the right to reclaim material)
- 4.1.4 What is involved in the project? Any particular risks / opportunities? (e.g. if this is for a demolition project, then the insurance requirements could be different for building something)

4.2 **Is there a contract review guideline?**

- 4.2.1 Sets out what the client considers to be key risks, for example:
 - (a) indemnities;
 - (b) limitation of liability / consequential loss;
 - (c) rights to additional time / cost;
 - (d) particular requirements to comply with certain laws;
 - (e) particular areas where the client has been 'burned' before.
- 4.2.2 Sometimes includes acceptable compromise positions on common issues
- 4.2.3 Example of what might be in a contract review guideline:

Item	Risk issue	Comments
Liability caps	<p>The contract must provide for a cap on liability for damages under or in connection with a contract.</p> <p>The cap on all liabilities (including liability for any abatement/ liquidated damages) must not exceed an amount equal to:</p> <ul style="list-style-type: none">• 50% of annual payment in any single year• in aggregate 300% of the annual payment <p>Limitation clauses must be stated to survive termination.</p>	<ul style="list-style-type: none">• Uncapped liability must not be accepted.• The annual payment amount is the amount derived from the value of services regularly performed along with overheads and margin for that work (i.e. it does not include one off fees from services such as capital upgrades).• Contractual caps on liability are not an accurate measure of liability exposure. For example, a liability cap will not provide any protection if the contract price is inadequate (as the cap does not limit exposure to the costs of carrying out the services).

4.3 **What is the form of contract review?**

- 4.3.1 Is there a template form for your client's internal approval process?
- 4.3.2 Is this a comprehensive contract review or more concise red-flag review?

5. APPROACHING THE CONTRACT REVIEW

5.1 First read through

5.1.1 Keep note of:

- (a) Index – gives a snapshot of the key structure / issues in the contract
- (b) Contract documents
 - (i) Sometimes contracts are split up into multiple documents, or may be supplemented by other documents (e.g. letters of intent / amendment deeds).
 - (ii) Also good to note the order or precedence of the contract documents (e.g. sometimes the scope document could supersede the terms of the contract).
- (c) Main body of contract – usually contains the bulk of the legal terms that we're concerned with reviewing.
- (d) Schedules / scope – can contain legal terms (or even worse, 'legalese') that cuts across the main body.

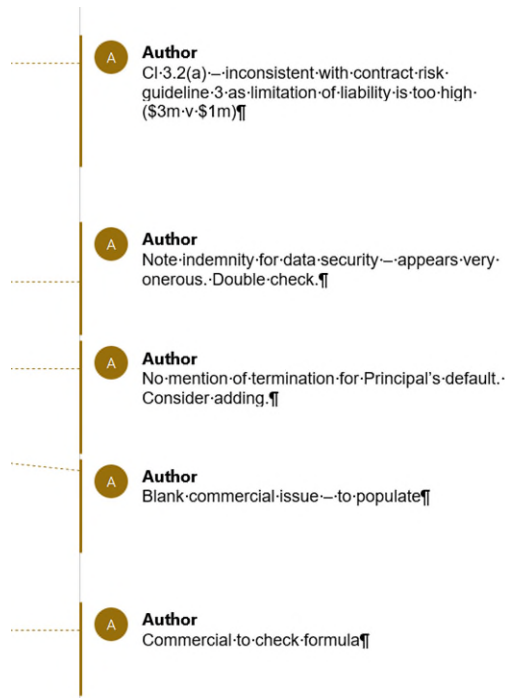
5.1.2 What we do for the review

- (a) Most helpful for the first 2 stages of a contract review: (1) summarising what's in the contract, and (2) identifying what's not in the contract.
- (b) In this first read through, we like to set out comment bubbles / notes throughout the contract or in a separate document (almost like stream of consciousness).
- (c) Flag relevant issues – what is 'relevant' varies between practice groups / clients but as a general rule, anything that affects time / money / quality.
- (d) More things to keep note:
 - (i) Party entities / execution blocks – are they correct?
 - (ii) Blank areas to be filled in
 - (iii) Commercial terms to be confirmed? (e.g. mathematical formulas, references to indexes etc)
 - (iv) Are there missing definitions?

5.1.3 Here's what it might look like

- (a) Set out questions for the client – e.g. whether they are willing to take certain risks or whether things are incorporated / assumed in their price.
- (b) Identify areas that may be different to the client's commercial risk requirements / what's market. (Also check off areas that comply / should be acceptable)

- (c) Flagging any areas that may require further research / deep dives into the documents (e.g. references to particular legislative requirements)



5.2 Second read through

5.2.1 Helpful for:

- (a) the next two stages of the contract review: (3) linking to practical implications and (4) evaluating according to market standards;
- (b) trimming out non-material issues;
- (c) identifying the areas that need input from the client;
- (d) flagging / completing the deep dives;

5.2.2 What we do for this second review:

- (a) Turn your notes from the first review into client-facing narratives.
- (b) See if you can group the issues (e.g. list of indemnities that are market / not market).
- (c) Add commentary on how you think the problem areas will have a practical effect / what the market position usually is.
- (d) Highlight any questions for the client / areas of the contract review that require their input.
- (e) Initial prioritisation of the key / lesser issues.

5.2.3 Here's what it might look like

- (a) Note: at this stage, you may have a further call with the client to walk through your initial findings.

Russell Westbrook's contract value is currently \$44.2M for the 2020-21 season. This presents an issue for the Los Angeles Lakers given his inefficiency shooting from 3 point range and above average turnover rate. For comparison, Chris Paul's contract value of \$30M is also above market rates for point guards but he has significantly higher impact on his team's winning percentage. [Query for commercial – please confirm whether contribution to winning percentage should still be the determining factor.]

5.3 Finalising the contract review

5.3.1 Provide recommendation (KEY) – set out what you recommend should be done in relation to the material risks, for example:

- (a) Negotiate a different position
- (b) Price the risk
- (c) Check insurance coverage

5.3.2 Incorporate input from client (from the initial client briefing or subsequent run-through of the draft contract review findings)

5.3.3 Set out material assumptions

- (a) Are there any documents (e.g. commercial schedules) that the client is responsible for reviewing?
- (b) Any documents that haven't been provided? (not unusual for procurement)
- (c) Commercial terms that are still being finalised?

5.3.4 Prioritise key issues over lesser issues

5.3.5 Example of a finalised contract review

[INSERT PROJECT]

RED FLAG REVIEW OF TRANSACTION PHASE DOCUMENTS

[Date]

In connection with [insert client] ("Client") involvement in the procurement process for the [insert project] ("Project"), you have asked us to carry out a red flag review to identify any material risks or liabilities in respect of the following documents that will govern the participation of the consortium between [consortium parties] ("Consortium") in the Transaction Phase for the Project for [insert principal] ("Principal"):

- [list of contract documents]

No.	Issue	Comment
1.	Limitation of Liability and Exclusion of Consequential Loss (cl 12)	1. While the amount of the cap is currently in square brackets, the Deed does propose to cap the Consortium's liability to the Principal arising under or in connection with the Deed. The proposed cap will be subject to a number of carve outs (eg. liability that cannot be excluded by law, insurance, fraud, wilful misconduct, personal injury, death, breach of confidence or breach of obligations in relation to IP Rights) which are generally consistent with our expectations for a project of this size and nature. However, consistent with the position reflected in the ECI Deed, we recommend that the carve-out from the cap on liability for insurable loss in clause 31.3(b)(2) should be amended from amounts which the Contractor "is (or should be) entitled to be indemnified" to amounts "recovered" under the relevant insurance policy.
2.	Program (cl 11)	The Consortium is required to warrant that the agreed Program for the delivery of the Project contains sufficient allowances for the assumption of the obligations and risks contained in the Term Sheets. As such, the Consortium will need to be comfortable at the time of executing the Deed that the proposed Program is reasonable and achievable, bearing in mind the risk profile that has been accepted in the agreed Term Sheets. Again, programming assumptions to be included in the Binding Offer (e.g. around staging/access/State approvals etc) will be key.
3.	Suspension (cl 2)	1. Similar to the provisions in the ECI Deed, the Principal has a unilateral right to suspend the Transaction Phase or any of the Consortium's obligations immediately by written notice. 2. If the Principal exercises its right to suspend, the Consortium will bear any costs and expenses it incurs associated with the suspension (refer clause X). The Consortium might consider requesting a termination right (or a right to claim additional costs) for protracted suspensions by the Principal.

If you're interested:



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