Article Information

Author: Lis Boyce, Ben McLeod, Meriel Steadman
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Webinar Q&As: 2023 'Beat the Clock' Series: Professional skills | The contract review toolkit

Piper Alderman provides our Answers in response to the Questions received during our 'Beat the Clock' 2023 – Professional skills | The contract review toolkit Webinar on 16 February 2023.
To view the recording of the on demand webinar, please register here.

Q1: If a contract's governing law is different to your preferred jurisdiction, does this require that the lawyer has awareness of how that foreign law works and applies?

A1: I recommend that you obtain a general understanding of how the particular foreign law operates. For example, some jurisdictions have codified contract law, so the rules are very clear. In other jurisdictions, the courts may have a lot of leeway in how they interpret the contract, which leaves you vulnerable. Of course, you may be in a position where it's a choice between accepting foreign jurisdiction or not entering into the contract, so if you have a reasonable understanding of the other jurisdiction, you at least go in with your eyes open.

Q2: What changes have you seen recently (if any) in the negotiations side of contracting? i.e. post review? Has the current economic climate impacted on these types of matters?

A2: In the construction sector, we are seeing more collaborative contracting models being used (e.g. Early Contractor Involvement), as well as Principals starting to become more open to contractor departures and accepting that some risk-sharing is in the best interests of the project, particularly after high profile contractor insolvencies.

Q3: Why do lawyers advising the government on construction projects think it's a good idea to include uninsurable clauses and push risk down to contractors and consultants?

A3: Great question! The culture of parties passing down as much risk as possible down the contracting food chain is embedded in the construction industry. For this culture to change (which I believe it is – slowly), my view is that government needs to take the lead on this. Also, in my experience lawyers acting for principals often lack experience / understanding of the insurance market and tend to propose provisions which are not acceptable to insurers and / or may void coverage if accepted.

Q4: Does your team utilise artificial intelligence to review or draft contracts, if so, how?

A4: We don't at present. There are some contract review programs around, though we're not aware of anyone using AI for contract drafting.

Q5: Ben McLeod: Do you use Ctrl %2B F for contracts reviews (or Command %2B F on a Mac)? If so, how do you use it, and what tips do you have?

A5: I don't, actually! Thanks for the tip.

Q6: Any tips for "active reading" of contract in paperless office?

A6: Yes! I always ensure I have a word searchable version and use my mouse and comment bubbles to make notes and highlight important bits as I work through the document. I also keep my navigation pane open and split out the definitions into a separate viewing pane.

Q7: What comparison software do you find is best please?

A7: We use Litera Compare (formerly CompareDocs), which is more advanced than the Word comparison tool.

Q8: What is the best way to track versions?

A8: If a contract is going back and forth with successive mark ups, I like to do a "compare" of the new one against the last version I'd seen, in order to ensure that I isolate all the changes that have been made in the most recent review. If the contract is being marked-up cumulatively, I often highlight the latest changes a particular colour in order to distinguish them from previous changes. I also include in the document "name" in our filing system a note of whose mark ups are in it (e.g 20230303 Sale Agreement with Seller mark ups and Purchaser responses).

Q9: What are your views on AI taking over contract reviews (at least for the standard form, bread and butter sort) given the recent media noise about chatGPT?

A9: We are aware of a number of AI contract review tools, though we don't believe they will replace the human decision-making component, at least in the near term. One example is Luminance that assists with bulk contract reviews (for due diligence of takeovers, mergers etc). Luminance will group together common documents and identify documents that differ from the standard, such as those with different jurisdictions or different force majeure clauses.

Q10: I am often asked to review contracts which say things like 'X must comply with all privacy legislation including the Privacy Act 1988 (Cth)'. Everyone has to comply with the law. What is the point, or value, of including clauses like this? Is it just to remind people of their obligations? Should I put them in my contracts?

A10: Yes, it does seem like "stating the obvious" to simply identify a law that a party must comply with. If privacy compliance is important in the context of a contract, I would include the general requirement and list some key obligations such as ensuring that appropriate consents are received, ensuring that information is only used and disclosed for the purposes for which it was collected, and ensuring that personal information is protected from unauthorised access and use.

Q11: It is commonplace for larger institutions to demand acceptance of template grossly one-sided terms, accepting minor immaterial amendments only. Without reference to UCT related arguments, any tips for negotiating commercially reasonable terms?

A11: Yes, this is very common and hopefully the coming changes to the UCT regime will see a change in these behaviours. The short answer to this question is you cannot control how your counterpart negotiates. But in my view you can set yourself up for success by considering the following
(a) work out what really matters to your business, and focus only on that;
(b) work out who from the counterparty is the key decision maker and who is the 'blocker' in the negotiation, and have a clear negotiation strategy based on that;
(c) what leverage does your business have in the deal (e.g. are you the expert, do you own the IP, are you already working and have a good knowledge of the project, are you the cheapest?). The less leverage you have the less open the counterparty will be to negotiate.

Q12: Meriel, how did you resolve the RAT example?

A12: The client decided that the risk was too great to purchase even the named brand RAT (due to the amount of money at stake). Instead, the client entered into a sales agent contract, where the client was paid commission for each customer it introduced to the seller. That contract still required some amendments, but it provided better protection for the client, and no financial exposure.

Q13: I missed the 'cold towel' approach sorry which sounds interesting, would it be possible to repeat this at the end?

A13: The 'cold towel' approach is tongue-in-cheek. When you have a complicated or daunting task, if you put a cold towel on your head it is supposed to de-stress you and help you to better focus on the task in hand.

Q14: I am seeing a number of contracts coming through using ABN rather than ACN. As ABN's can be cancelled or changed is this an issue? I have always used ACN's but have come across this recently.

A14: As long as you check that the ABN is still referrable to the entity you understand that you are contracting with and it has not been cancelled or changed as at the date of execution of the contract, I do not see an issue with using ABN's.

Q15: How can you future proof the 'notices' clause to take account of organisational changes?

A15: Often a notices clause will allow the parties to update contact details by notice in writing. Hopefully as part of the transition process you would identify contracts for which a person was responsible and update the counterparty as to the new contact person. If you have a contract with a long "life" you could also consider using a generic email address that is actively monitored (e.g. "ceo@organisation.com") so that changes in personnel don't affect the channel of communication.

Q16: In case of BCG how long was the contract?

A16: To be clear: neither I nor my firm was involved in negotiating or preparing the contract. The contract was over 100 pages long, but it dated back to 2013 and was therefore closely typed, unlike the more modern contracts which tend to have a bigger font and more spacing between paragraphs. It had also been amended three times, with the amendments extending to over 40 pages in two instances and over 20 pages in the third instance.

Q17: Given recent caselaw suggests where notice with signature is required to amend/vary contract that can occur via email given application of electronic transactions legislation, do you consider an express clause prohibiting amendments/variations by email is prudent moving forward?

A17: As long as the variation clause is clear that a signature needs to be applied, whether an electronic signature or a 'wet' signature on a hard copy, the client is protected in my view. I would not advise agreeing to terms which allow a contract to be amended electronically unless the requirement of a signature is included. There is no need to include a clause expressly prohibiting amendments or variations by email, I would simply specify that amendments must be in writing and signed by all of the parties.

Q18: Does the panel think that there is an argument in favour of shorter clearer contracts? (to avoid inconsistency) (not an easy task)

A18: I do think it's a good discipline to keep your contracts as short as they can be, so that the parties' rights and obligations are very clear. Of course, it usually takes longer to draft a short contract than a long contract, but it's worth the effort.

Q19: Interested on your view please on situations where the parties have agreed a limitation of liability, yet a party insists on the maintenance of insurance for the benefit of that party seeking coverage at a higher level than the cap. In this case is the cap now the higher value of the insurance cover?

A19: In my experience, contacts usually contain separate clauses (or sub-clauses) limiting liability and placing a cap on total liability. If a counterparty wanted my client to maintain insurance at a level higher than the agreed cap on my client's liability, I would ask why the request was being made. It could be a lack of attention to detail on the part of the counterparty. It could also be the counterparty (B) seeking to prepare itself for an argument down the track that, although the cap on A's liability was $X, as A had agreed to maintain insurance at a level higher than $X, this was an inconsistency in the drafting and the counterparty (B) should be entitled to successfully claim against A up to the higher insurance coverage sum. I am not saying that argument would be successful, but just because an argument is unlikely to be successful, does not mean that a party will not try to run that argument in order to reach a settlement which is higher than the cap, gambling on the fact that the threat of litigation would lead to a more successful outcome.