

Contract assessment – Risks and opportunities

Over the past 6 months, many businesses have been forced to assess their contractual rights, obligations, and associated risks as a result of COVID-19. Some of these risks are obvious, for example, the impact of delays to a project, whereas others are less so. Businesses have had to 'deep dive' into their contracts and whilst the predominant purpose of such an exercise is to assess immediate risks, it also has other benefits which might give rise to opportunities. During the upheaval and uncertainty of recent months, these opportunities may have been missed while attention was (understandably) focused elsewhere. Below we explore some of the considerations, benefits, and opportunities of undertaking a contract assessment.

Carrying out a contract assessment

It is not uncommon for a contract, once executed, to be placed aside and only referred to once a dispute or potential claim arises. A contract assessment can help to ensure that you obtain the full benefit of the contract, whilst limiting the risks that may arise.

Before undertaking a contract assessment, it is important to identify the scope and purpose of the review. This will likely be driven by a number of factors, including:

- the number of contracts that form part of such a review (if this needs to be restricted, you may wish to focus on contacts over a certain value);
- the needs and resources of the business;
- existing familiarity with contract risks; and
- whether you utilise standard form contracts in some or all instances (industry standard form or your own standard form contract).

In relation to the last point, it is worth noting that even standard form contracts generally contain bespoke amendments such that, ideally, every contract should form part of the review.

Five step approach

- **Step 1** – Undertake a desk review of the contract(s)
- **Step 2** – Interview key members of the project team and internal legal advisors
- **Step 3** – Prepare a report for each project, identifying key risks and opportunities
- **Step 4** – Update the project and commercial teams
- **Step 5** – Implement change in future contracts to mitigate known risks and improve return

Common risks and opportunities

The scope of any contract assessment will likely be driven by a range of factors, including business needs, previous or existing issues and resources that may be dedicated to such an exercise. However, there are some common issues or provisions that may warrant review, including:

1. Notice requirements and time restrictions

It is not uncommon that personnel responsible for implementing a contract is unaware of, or loses sight of, notice requirements under a contract. This can lead to personnel proceeding on the (usually incorrect) basis that informal notice is sufficient and/or overlooking their contractual obligations entirely. At worst, where a party's right to make a claim under the contract is conditional upon notice being given in accordance with the contract (known as a 'condition precedent'), this may result in a party foregoing such entitlements. Notice requirements ordinarily require that notice be given within a particular time period but may also require that notice be given in a particular form and/or accompanied by specific information. In simple terms, a risk assessment helps to identify whether and how notices should be issued under the contract and whether such notice requirements have been complied with as of the date of the assessment. It can also be beneficial to have key time limits and condition precedents reproduced into a shorter document so that the person responsible for managing the contract can keep in mind the deadlines they (or their counterparty) are required to meet. You must exercise care in preparing such a document, to ensure it accurately reflects the contract terms.

2. "Force majeure"

The question of what does and does not constitute a 'force majeure' event, and what relief a party is entitled to in such circumstances, depends upon the precise wording of the applicable clause. A contract review allows you to consider:

- whether the clause provides adequate protection – for some parties this involves assessing their entitlement to relief; for others, whether the relief that may be granted to their counterparty is appropriate;
- what steps you (or your counterparty) may need to take to preserve or assert such rights; and
- whether, going forward, your contracts ought to include a clause that provides more expansive or restrictive protection.

3. Dispute resolution

Dispute resolution clauses are frequently a belated and last-minute consideration for parties negotiating a contract, often on the assumption that they will not find themselves in a dispute or, instead, because parties do

not wish to think about such things when execution of the contract is imminent. As a result, insufficient thought might be given to issues that may later come to be of significant impact or importance. Even where the issue seems uncontroversial, once the parties are in a dispute, it can be highly difficult to reach agreement on any issue, procedural or otherwise. The benefits of a contract review are twofold – first, allowing you to familiarise yourself with the clause, including whether there are any steps that must be satisfied before formal dispute resolution may be commenced; second, to consider whether the business is taking a consistent or considered approach to such clauses and, if not, how this could be remedied going forward. If a dispute resolution clause does not reflect what the parties had intended to agree, you may wish to consider seeking to amend it when the relationship with your counterparty is amicable.

4. Termination provisions

Whereas some termination clauses allow for immediate termination following the occurrence of a particular event, it is more common for a contract to require that certain notice requirements are satisfied first. A contract review enables you to identify the termination rights specific to each contract, the applicable notice requirements and/or cure periods, the circumstances which may give rise to an event of termination, and any other procedural requirements to be aware of. In addition to contract-specific risks / issues, personnel managing the contract should also be aware of the (potentially significant) risks of terminating a contract where such termination is not permitted under, or effected in accordance with, the contract. This can itself give rise to claims against the terminating party for repudiatory breach. We recommend that you obtain legal advice before terminating a contract.

5. Contract amendment or variation

Contracts commonly specify how they may be modified or amended, ordinarily stating that the parties must agree such amendments in writing. Personnel implementing the contract should be aware of such clauses, and the importance of compliance. Contracts in particular sectors, such as construction, also contain clauses which provide for the scope of work to be varied. These provisions usually contain notice requirements and time restrictions – if such provisions are not complied with this may result in the affected party not being able to rely upon the clause. A risk assessment can assist with identifying:

- how a contract may be amended or varied, so that personnel can be made aware of the contractual requirements;
- whether there have been any amendments, modifications or variations to date; and
- whether the latter are in compliance with the contract and, if so, what their impact has been on the contract.

6. Insurance

Insurance coverage may be dealt with separately from a contract and/or may form part of your or your counterparty's contractual obligations. In either case, but particularly in relation to the latter, it is important to ensure that appropriate (and contractually compliant) insurance coverage is in place. Since some contracts also contain other relevant details, such as who may submit or handle any claim and who shall be liable for any deductibles/excess, insurance related provisions form an important part of any contract review. This should assist you in identifying or revisiting these obligations and establishing whether or not the coverage that is being maintained is consistent with your contractual obligations.

7. Warranties and Indemnities

Properly used, an indemnity allows the parties to a contract to allocate risk. As such, you should be aware of any specific indemnities included in your contract and whether an indemnity may fall within any cap on liability. It is equally important to identify warranty requirements under the contract and whether any specific statements or assurances regarding project specific matters have been designated as warranties.

8. Limitation and exclusion of liability

Limitation and exclusion of liability clauses form a critical aspect of any contract review, providing an important picture of what you (or your counterparty) may or may not be liable for if a breach or particular event occurs. Being aware of such clauses (and related issues) enables

you to develop a strategy to manage such risks before they arise, and to assess your likely maximum exposure under the contract. Most limitation or exclusion clauses also exclude indirect or consequential loss, which raises questions of how the particular loss in question is, or will be, categorised (and whether it is excluded as a result). This can be a complex issue and is outside the scope of this article – for further information, please see our [CMS Expert Guide](#) to consequential loss in the energy sector, which covers more than 30 jurisdictions.

Conclusions and implications

Although recent upheaval and uncertainty may have led to a focused assessment of contract risk, the benefits of carrying out such an exercise on a broader scale cannot be underestimated. As Albert Einstein said, "in the middle of every difficulty lies opportunity". As such, there is an opportunity to identify and manage existing risks and opportunities, informing business strategy and allowing for a more consistent approach to be adopted going forward. In addition, a contract assessment can facilitate an improved understanding of document management (which can prove critical if a dispute arises) and (where necessary) the involvement of the legal team, who may assist in early resolution of disputes or, where that is not possible, provide a head start as regards any claim preparation.



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