

A Business Lawyer's Guide to Contract Reviews & Negotiations

Just like people, no two contracts are the same and in most commercial contracts there are a myriad of issues to consider. In fact, it is more than fair to say that there is so very rarely such a thing as a “standard contract”, and especially if there are “special conditions” involved...

This article is intended to provide you with a basic understanding of contract law and reviews, which will assist you in your preliminary review of contracts and negotiations.

Please note this article is not able to equip you with the requisite legal skills and experience required for a comprehensive, competent contract review nor to train you to become a quasi-contracts lawyer.

1. Heads of Agreement and Memorandums of Understanding

Some parties may present a “Heads of Agreement” (also commonly referred to as an “Agreement to Agree”, “Memorandum of Understanding” or Term Sheet) before a formal contract. The Heads of Agreement typically sets out only the key terms of the contract. You should peruse the Heads of Agreement carefully and ensure that you agree to the broad terms.

However, please note that there are risks presented by a Heads of Agreement especially if it is intended to be a legally binding contract. In some circumstances, they can also be construed as non-binding.

It is strongly advised that you provide your business lawyer with any Heads of Agreement for their advice. Further and if possible, it is preferable and less risky for you to request for the draft formal contract and not to sign the Heads of Agreement (unless you have sought proper legal advice).

Please also note that a Heads of Agreement often does not contain important details, which are essential for informed decision-making and understanding what are all the risks and obligations in the ‘full contract’ (“Offers to Lease” are a classic example of this).

2. Common Provisions in Modern Business Contracts

The following are some of the important issues/ provisions that you will commonly find in most contemporary commercial contracts and for which you should carefully consider. These are set out on the basis that you are either:

- Doing the work for a customer or client and, most preferably you are ‘putting forward’ your approved Terms of Trade/ Terms and Conditions (“**T&Cs**”); or
- You are engaging someone (say subcontractor) to do some work for your business and again you putting forward’ your approved Subcontractor Agreement.



You should be aware of and understand the effects (and differences) the following clauses:

- Insurances;
- Indemnities and Warranties;
- Defects and Liability;
- Limitations of liability;
- Liquidated damages (think 'monetary penalty' but not exactly);
- Default and Termination (tip: watch for 'termination for convenience' clauses);
- Retention of title, Retention Sums and the *Personal Property Security Act*;
- Direct and consequential losses;
- Notices; and
- Incorporation of other 'documents' into the contract eg. annexures, schedules, policies, head contracts (note these can be just as legally binding as the main T&Cs, so be sure that you've obtained and agreed to all of these).

You should ensure the following clauses are acceptable and/or incorporated:

- Satisfactory payment terms;
- Security for payment;
- Ability (or first right) to rectify any defects in the goods and/or services;
- Ownership of Intellectual Property Rights;
- Variations to the works;
- Extension of time;
- Protective Covenants (e.g. 'anti-poaching' of key staff, clients, suppliers etc.) and Restraints of Trade* (limited enforceability but can be done subject to specific legal advice);
- Confidentiality;
- Assignment, novation, sub-contracting;
- Dispute resolution;
- Force Majeure/ 'Acts of God'
- Jurisdiction/ Governing Laws
- Entire agreement clause; and
- Further assurances.

3. Committing to or Accepting a Contract

For many reasons you should not commit or execute any contract before seeking proper legal advice. Once a contract is entered into, you may find it very difficult to negotiate variations or amendments.

If you do not fully or properly perform the contract or are unable to carry out all of its obligations, this can and often attract serious adverse legal and financial consequences; including but not limited to claims for damages (e.g. loss of profits) and also your insurers may not agree to indemnify you for any insurable claims, if they haven't approved another party's contract you accepted.

For these reasons, we recommend that you seek our advice and approach us at an early stage for our inputs, before any formal negotiations begin.

Lastly, we understand that from time to time clients and other parties may present their T&Cs to you after they have received and accepted your T&Cs. In contract law, this is known as "battle of the forms". Each T&C constitutes a counter-offer and the last offered T&Cs (and even with variations), that are "accepted", stands.

It is therefore important to be vigilant and ensure that you, your employees, agents or subcontractors do not mistakenly or inadvertently accept the client's T&Cs after the client had purportedly accepted your T&Cs.

In addition, it may be more prudent for you not to perform or commence any work (if commercially viable) before the client formally acknowledges and confirms it has accepted your T&Cs. We also recommend drafting appropriate provisions in T&Cs to expressly state that they will prevail in the event the client purports to present its T&Cs at a later stage.

4. How to Properly Engage and Use a Business Lawyer

When you are presented with another party's contract, the best way to utilise your business lawyer's skills and experience is, after your preliminary but careful review of same, to then send it on to your business lawyer (with any specific queries or issues you may have) so that we can assist you to identify any additional key legal risks and provide you with appropriate advice on the entire contract.

Further a good business lawyer can also add value by advising you of other options and provisions that could apply to a contract (and its contemplated commercial transactions(s)), which you may not have considered or even known about.

Also whilst some inexperienced clients think that they may only need one particular provision or area of their contract reviewed but, as "you won't know what you don't know" about the intricacies of contract law and commercial negotiations, we always recommend that you instruct us to undertake a full legal review of the contract.

Otherwise it could be like: if you had severe chest/ heart pains but instructed your doctor that you only wanted them to check your blood pressure...

5. Making an Informed Decision

Once we have provided you with our advice, your options and our recommendations in relation to the Contract (yes, a good business lawyer should provide you with

appropriate, practical recommendations – not just the contract restated to you in ‘legalese’ and telling you all the problems with it!).

You will then be in a position to make a *fully informed decision* about, and effectively negotiate and then accept, the Contract with the other party.

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