Fact Sheet – Contract pain points & common issues

LEGAL SERVICES

This resource is intended to help you quickly identify potential issues in draft contracts that you are reading over. However, it is not intended to be a substitute for legal advice for individual contracts.

If you spot something that you think might be problematic in a contract that you are asked to sign, ask for an explanation from whoever has sent the contract to you for signing and then, if you are still not satisfied, initiate a formal legal review through Legal Services.

1 Indemnity Clauses

These are the bugbear of many contracts; they always need to be considered carefully. For a person to indemnify someone else is to contractually promise to be 100% responsible for a particular eventuality or loss that the other person suffers, even though the person giving the indemnity might not be responsible for the event which caused the loss .

Where a contract has been prepared by the other contracting party, that party will often seek indemnities from the University. Some indemnities will be usual and acceptable; others will not (for example, where the other party seeks to make the University indemnify them for the consequences of their own negligence!).

If the University is being asked to give an indemnity, you should consider whether or not the indemnity and its scope are reasonable. Things to look out for are:

- *Indemnities that are more like insurance than an indemnity:* The proper scope for an indemnity is to cover the other party for loss or damage that results from the University's breach of contract, negligence or improper behaviour (sometimes called misfeasance) and not just any risk arising from the subject matter of the contract. Insurance companies provide cover against anything that might happen but the University doesn't!
- *Indemnities that extend too far:* Some indemnities overstep the mark in that they make the party giving the indemnity liable for everything that happens after something goes wrong (and not just the direct and foreseeable consequences of whatever has gone wrong). You can spot these types of clauses; they will refer to things like "indirect loss", "hold harmless", "loss or damage arising directly or indirectly from", "loss howsoever arising" or "loss of reputation, business opportunity or data." The University will not accept this sort of loss except in the most particular circumstances.
- *Indemnities that are one sided:* If the University is giving an indemnity, generally it should be reciprocated or, at the very least, it should acknowledge that the University's liability will not extend to indemnifying the other party against its own breach or negligence (and acknowledgements like that are called contributory negligence clauses). The University should not provide an indemnity that may extend to the consequences of an event brought about through the other party's fault.
- *Indemnities in favour of the University:* A contract or agreement which requires a party to provide a service or product to the University should ideally have an indemnity clause that requires that party to indemnify the University if an adverse impact upon the University arises from that party's actions or lack of action.

2 Insurance Clauses

Things to watch out for are:

- *Taking out new insurance:* Clauses that require the University to have a particular insurance that it doesn't already have are problematic (and you can check out Griffith's insurance policies at Insurance website). There will likely be a significant cost involved in obtaining new insurance. If in doubt, check with the University Insurance Officer - insurance@griffith.edu.au.
- *Noting the other party's interest:* Some contracts require the University to note another party's interest on the University's insurance policies. Griffith does not agree to this as it can be expensive or problematic. Some contracts go even further and ask that the policy be in the joint names of the University and the other party. This is not possible. You should check with the University's Insurance Office in the first instance.
- *Clauses requiring changes to the University's insurance policy:* Some contracts also require either specific clauses in the policy of insurance or require the University to get its insurer to change the terms of the University's insurance policy in favour of the other party. These clauses are somewhat relics of the past: modern insurers will simply refuse to change the policies in the manner required and then you have an intractable problem.
- *Waiver of the rights of subrogation*: if the University suffers loss because of the other party's breach of contract, the University could claim against the counter-party and also against the University's insurance. If a claim is made under the University's insurance, the insurer may want to seek to recover what it paid to the University from the party in breach. To do so, it needs to exercise its rights of subrogation in the insurance contract to allow it to sue the counter-party. So, do not agree to a clause in a contract that requires the insurance company to waive its rights of subrogation in the insurance policy (because insurers will not do this).

3 Limitations of Liability

A limitation of liability clause is used to cap one party's liability at a fixed amount (or capped at an amount determined in accordance with an agreed formula). It is common to see liability capped to a dollar value that matches the total value of goods or services being provided under the agreement, or to the value of assets being transferred from a seller to a buyer. However, the dollar value being paid for the goods or services usually bears no logical relationship to the magnitude of the risk being assumed by the party acquiring them. While such a cap on liability makes sense to the seller to prevent them suffering a loss greater than the sale price they receive, if the University (as buyer) accepts such terms, it could be exposed to substantial risk and this should be avoided. If the other party to the contract insists on a liablity cap (and the University is willing to agree to this), instead try to negotiate a cap equal to the amount of insurance they hold (provided that the contract also requires them to hold a reasonable level of cover).

4 Representations and Warranties

Representations and warranties are statements made in a contract verifying that particular states of affair do or do not exist. Review and understand the warranties and representations to be given by the University. Don't give any representation if you do not actually know that the representation is true or if the other party is in a better position to know the facts being represented. If you are buying goods or services, make sure that the other party has given appropriate warranties about them (such as that goods are of acceptable quality under the Australian Consumer Law and that services are rendered with due skill and care and in accordance with industry best practice).

5 References to Incorporated Documents

Some contract terms provide that another document also contains terms that are part of the contract (which is called incorporation by reference). When another document is incorporated by reference always ask for a copy of the incorporated document so you can review it. The University shouldn't accept a scenario where the other side is entitled to change the incorporated document without the University's consent because that gives the other party the right to unilaterally change the contract, likely to the University's disadvantage.

There is a very significant risk of accepting the terms of a "click through" contract that links to terms and conditions that have not been reviewed. In a recent case, a junior employee clicked to accept a contract to purchase packaging products and the unreviewed terms and conditions contained minimum purchase obligations. A court held that the click-through terms were legally binding, and the purchaser had to pay for packaging they didn't even receive or need.

6 Exclusivity Clauses

Sometimes clauses are included that make the relationship between the parties "exclusive" in some way – having the effect that one or more parties may be limited as to who or how they can deal with third parties in the future. Agreeing to these kinds of arrangements can be a criminal offence if they create a cartel arrangement (where two or more competitors agree to carve up a market). For the University, with so many outside partners and collaborators, exclusivity clauses should only be agreed to in very special and limited circumstances and only after obtaining legal advice. Remember, any exclusivity arrangements in your local agreement may extend to everyone in the University, not just your area. These types of arrangements should always be referred to Legal Services.

7 Intellectual Property Rights

Intellectual property rights are legal rights over certain intellectual creations. Such rights may be protected by legislation (e.g. copyright, patents, registered designs, trademarks), or may be protected under case law or common law (e.g. trade secrets, unregistered trademarks, confidential information). Where it is likely that the

activities under the contract will give rise to the development of intellectual property by either the University or the other party to the contract, the contract should specify who owns and who may use those intellectual property rights, both for the project as well as future use.

Generally, intellectual property rights belong to the person (or their employer) who creates the intellectual property. Where the University is paying full commercial rates for a contractor to create intellectual property, the University will usually want to own the intellectual property created. Therefore, the contract should specifically transfer the intellectual property rights created by the contractor under the agreement to the University.

Where the University's principal obligation is to create intellectual property for the other party then, at the very least, the University should be given the right to retain and use the intellectual property created for its teaching and research purposes.

8 Right to Publish

Any restrictions on rights to publish outcomes of research activities should be considered with the utmost caution. Why participate in a research activity if you can't publish? Ultimately restrictions of this nature are up to the academic or academics who will be conducting the project but if there are restrictions on the right to publish, you might want to make sure they are known and accepted. After all, it may be possible to negotiate a better outcome.

9 Moral Rights

Authors have legal rights to be acknowledged as the creator of their works and to insist on faithful reproduction of their works. The University should not agree to allowing false attribution (ie where someone else takes the credit) or non-attribution of the project material (where no credit is given) unless the academics concerned are comfortable with that. Again, it may be possible to negotiate a better outcome.

10 Privacy

The University has extensive obligations to protect and not misuse the personal information (such as name, address, date of birth, nationality, etc) which it receives and stores about students, employees and other individuals. If an arrangement requires the University to share personal information with a third party, the University is obliged to secure protections for the personal information before it is shared. Any arrangement of this nature should be referred to Legal Services.

Arrangements that impose an outright prohibition on the export of data from Australia are also problematic. The University's email system and other cloud based technologies involve the transfer and storage of data outside of Australia. Significant effort and vigilance goes into ensuring these arrangements comply with privacy and data management standards so export of data does not constitute a breach of privacy legislation. Government organisations from time to time issue contracts prohibiting export of data – such clauses should not be accepted, as agreeing to them can cause issues.

11 Contract Extension and Renewals

Some contracts will be for a fixed term or come to an end when the underlying project is completed. Other contracts can be for an initial fixed term with rights of renewal or can even be ongoing indefinitely (until terminated).

Where it is likely that the University will wish to continue with the contract past the expiry of the initial term, you should consider whether you would like clauses included that provide either:

- an option to renew – check whose option it is, the University's or the counterparty's. An option to renew held by the University will enable the University to decide whether to renew the agreement, usually by providing written notice by a certain date. It is undersirable for the option to be the counter-party's to exercise, potentilally locking the University to a long or perpetual contract; or
- a provision for negotiation prior to the end of the term, with a view to agreeing to an extension.

It is possible for a contract to specify that it will automatically be renewed unless early notice is given by one party that it wishes not to renew, or unless some event has already ended the contract before its expiry. Such clauses are undesirable because if an employee of the University forgets to give notice not to renew, the University will be obliged to perform (or pay for services) under a contract it no longer needs or wants. Be sure to check any contracts drafted externally to make sure there isn't an automatic renewal clause.

12 Term and minimum commitments

Once a contract has been signed, then both parties are committed to perform their obligations. Unless the contract allows a party to terminate "for convenience" or "without cause" by giving some relatively short period of notice, then it must be performed for the whole term. For example, if the University contracts to receive services over time, ensure there are clear clauses that ensure the delivery of high quality services and give the University the right to terminate for convenience or if it is not satisifed with the quality. Otherwise, if the University no longer wants to keep engaging the counter-party because of poor quality it will need to pay out the entire contract value for the remaining duration of the contract (unduly rewarding a sub-standard counter-party).

For a contract for the ongoing supply of goods or services, such as the supply of stationery or packaging, beware of any clause in the fine print that requires the University to acquire a minimum quantity of goods or services. If you don't order the minimum, the consequence is that the University would nonethless need to pay for them.

13 Governing Law or Jurisdiction Clauses

These are clauses through which the parties specify which law (ie the law of which state in which country) will govern the agreement for the purposes of resolving any disputes. Laws vary from place to place, so when the parties are engaging in the contract across state or country lines, it is important that the contracting parties agree at the outset which laws will be applied if things end up going wrong. Sometimes, contracts also specify a forum (or specific court) in which cases would need to be brought. If a contract that is presented to the University has the law of any place other than Queensland proposed as its governing law, you should consider insisting that Queensland law applies or request a formal legal review of the contract.

14 Does It Achieve Its Purpose and Does It All Make Sense?

Finally, ask yourself if the contract actually make sense when you've looked through it and does it use clear language? Does it actually describe who is to do what, when, where and how? If the contract doesn't make this clear, then it is likely to cause problems down the track.

A contract should accurately document the commercial or other objectives the parties wish to achieve. The principal responsibilty for checking this lies with the staff member responsible for the underlying project. If the document doesn't match your understanding of the project, then don't arrange for it to be signed until after appropriate changes have been made to the contract terms.

For more information contact:
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