

Contract REVIEW

Six tips & traps to look out for

When reviewing a contract there are a number of key things to look out for. The following should be specifically considered:

1: EXCLUSIVITY

An example of exclusivity in a contract, is a contract to use a particular service where the contract may be subject to you not using a similar service offered by another provider during the term of the agreement. In the event the contract is subject to exclusive dealings, consider the effect that this may have on you in the future and whether the benefits under the contract justify the exclusivity granted.

TIP – consider whether you want them to deal exclusively with you.

2: ASSIGNMENT RIGHTS

Terms giving a party the ability to assign the contract are often overlooked when a contract is drafted. Being able to assign a contract without the consent of the other party can be beneficial. Another option, if the consent of the other party is required, is to ensure that the consent must not be unreasonably withheld. Conversely, you may wish to ensure that the other party to the contract does not have the ability to assign the contract to a third party without your consent

TRAP – a transfer of shares in a party can also be deemed to be an assignment and require consent. Consider this clause carefully.

3: TERMINATION RIGHTS & PENALTIES

Review the termination rights under the contract and consider the effect of any notice periods or penalties that may exist in respect of early termination.

4: AUTOMATIC EXTENSION

Check whether the contract contains any provisions which provide that the contract is automatically extended at the conclusion of its term in the event neither party gives notice that the contract will terminate. It is especially important to note whether the fees payable under the contract will automatically increase on the commencement of the extended term.

TIP – consider having an option in your favour instead.

5: SECURITY (GUARANTEES)

Consider the effect and extent of any security (such as a security interest under the PPSA, charge, mortgage over land or a guarantee) you are giving under a contract. Also consider what, if any, security you could take under the contract against the other party in order to better secure performance of the contract.

EXAMPLE – in the event the other party is a company, you may wish to obtain personal guarantees by its directors that the company will perform its obligations.

TIP – if the other party is an unlisted company you should be getting guarantees from directors.

TRAP – the contract may say a party has a security interest in all present and after acquired assets/property – this must be carefully considered.

6: NO REPRESENTATIONS

It is generally best to include a clause in a contract to the effect that any representations made by either party prior to entry to the contract are excluded from the contract. The effect of this is that the agreement between the parties is reduced to what is in writing in the contract, which can assist to avoid confusion and disputes in the future. If this is included however, it is important that all representations made by the other party in relation to the subject of the contract are included.

EXAMPLE – if the other party represented that the service they would provide you would be of a particular standard, or comply with certain regulations, this must be included in the contract.

KEY TAKEAWAY MESSAGE

The above points are only a few of many key issues which must be considered when reviewing a contract. If you would like assistance with reviewing a particular contract, then get in touch with one of our team today.