LOLs are no laughing matter:
Top 10 tips on negotiating limitation of liability clauses

As a supplier of goods or services, it makes commercial sense to ensure your liability under a contract is limited. As the purchaser of those goods or services, you will want to ensure that you have recourse to the supplier in the event that you suffer loss or damage.

Negotiating this risk allocation between the parties and drafting a limitation of liability (LOL) clause is a fine art and, if not given due consideration, may not be a laughing matter.

Whether you are a supplier or a purchaser, there are a few things you should consider when negotiating a LOL clause:

1. If you are a supplier:
   a) Ensure your exposure is proportionate to your commercial risk. If the value of your supply is small, accepting an unlimited liability cap is not reasonable.
   b) It may be difficult to negotiate a cap on liability for breach of clauses relating to intellectual property or confidentiality obligations. Where such liability is uncapped, ensure you have appropriate internal processes and personnel training to manage this risk.
   c) Be aware of mandatory local laws. For example, if you sell a faulty good to a consumer, the Competition and Consumer Act requires you to replace or repair that good, regardless of the cost.
   d) When determining a dollar cap, consider whether a multiple of the fees rendered, a fixed amount or your insurance levels are sufficient.
   e) If indirect loss is not carved out of the contract, ensure it is included under your LOL clause.
2. If you are the purchaser:
   a) Consider what damages you would incur in the worst case scenario, and ensure any limitation on the supplier’s liability is enough to cover such loss.
   b) Consider what remedies are appropriate if something goes wrong. Monetary compensation may not always be the most practical solution.
   c) Will you be exposed to any third party liability claims? If so, ensure the supplier’s LOL clause covers such exposure so you have appropriate recourse.
   d) If you have any obligations under the contract such as the provision of indemnities, then you may want to consider requesting your own LOL clause.
   e) Review any exclusions from the supplier’s LOL clauses to ensure you do not inadvertently agree to exclude more than you intended to.

Questions? Give us a call.