

BCS Consulting SG

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# Contractual Issues in Consulting Engagements

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# AGENDA



Setting the scene / context

Liability

Indemnities

Intellectual Property

Scope of Work

Change control

Acceptance testing

Remedies for delay

Termination

Protections for the Consultant

Data Protection

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# Setting the Scene

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- SME and large consultancy firms
- Terminology
  - Consulting Agreement, Terms of Engagement, Engagement Letter, Ts&Cs
  - Consulting Proposal
- Whose form of contract should be used (consultant vs. client)
- Use of templates
- Agreements do not need to be in writing or in specified format
  - inadvertent variations
- Pre-contractual liability

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# Liability | 1

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- Position when silent
- Limitation of liability / exclusions of liability
- Losses which cannot be excluded by law
  - Death or personal injury caused by negligence
  - Misrepresentation
  - Breach of terms implied by law
    - warranties as to title and quiet possession [Supply of Goods and Services Act 1982]
    - warranties as to the quality of goods [The Sale of Goods Act 1979 (as amended by the Sale and Supply of Goods Act 1994)]
- Setting a liability cap
- Indirect / consequential losses
- “Devil is in the detail” (see next slide)
- Liability provisions and interplay with insurance



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## Liability | 2

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- Exclusions of liability – the devil is in the detail
- **Example 1**
- *“The Consultant excludes indirect losses, consequential losses, loss of profit, loss of revenue, loss of business ...”*
- **Example 2**
- *“The Consultant excludes indirect losses, consequential losses including loss of profit, loss of revenue, loss of business ...”*
- Unfair Contract Terms Act 1977 (UCTA)



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# Indemnities

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Concept of an indemnity is similar to that of an insurance policy i.e. the insurer says that you will not be “harmed” by particular types of events.



## Without an indemnity a party claiming loss:

- would have to prove its loss
- take steps to mitigate its loss
- may not be able to recover all or any of its ancillary costs or expenses
- has to show that the loss has been caused as a result of a breach by the other party

## An indemnity:

- is a promise to reimburse the other party for a particular type of liability, should it arise
- is a guaranteed remedy (pound-for-pound)
- removes the usual obligation upon the claiming party to mitigate its loss
- allow for recovery of costs and expenses that may not otherwise have been recoverable

**Consider very carefully prior to committing to giving any indemnities**

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# Intellectual Property (IP)

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## Types of IP

Copyright

Patents

Database rights



### Protection of “know how”

- confidentiality provisions

### Key questions the consulting engagement needs to answer:

- what IP is owned by the Consultant
- what IP is owned by the Client
- what IP is retained by the Client after the Consultant has delivered the service
- what license terms apply to any IP the Consultant transfers to the Client
- what IP is to be returned or destroyed on project completion

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# Scope of Work/Services

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## Problem areas

- “cut and paste” of consulting proposal
- open-ended obligations
- not drafted to be contractually enforceable
- lack of precision and specificity

## Key areas to address

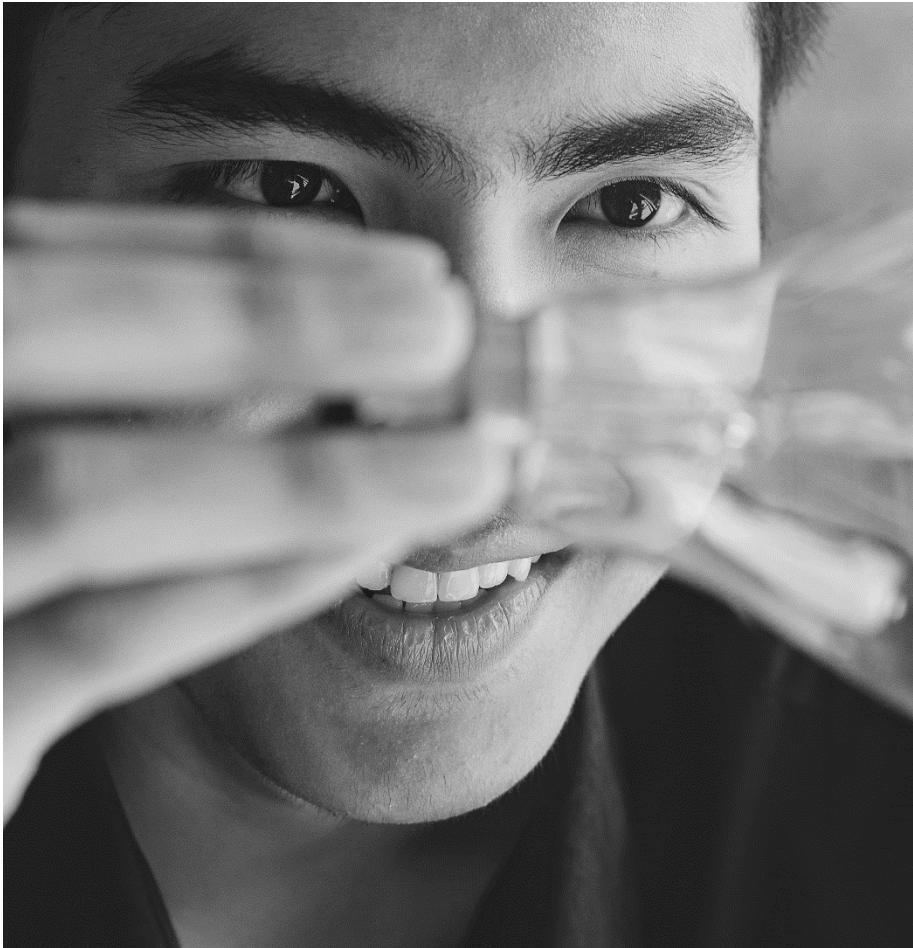
- purpose of the consultancy - state outcomes that are specific and measurable
- timeframes for work to be achieved, including milestones with defined outcomes and service standards
- resources to be allocated to the project
- customer requirements
- dependencies
- exclusions



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# Acceptance Testing

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- What is acceptance testing
- Need for staged testing
  - developmental testing
  - user acceptance testing
  - volume / stress testing
- Acceptance Certificate - what does it trigger
- Disagreement on results of acceptance testing
- Avoiding “continuous loop”
- Consequences of failure to give Acceptance Certificate
- “Deemed” acceptance

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# Change Control | 1

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## Key Features

- pricing
- requirement for notification / impact assessment
- flexibility

## Changes which don't attract charges

- minor technological changes
- changes in law
- continuous improvement



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## Change Control | 2

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“Agreement to agree”



“Get out” for the Consultant



Forcing the Consultant to implement changes



Rationalising / reinstatement of new “baseline” contract



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# Termination

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## Termination triggers – narrow as possible



- any breach or material breach
- material breach capable of remedy
- deemed material breach
- Insolvency
- change of control

## Termination for Convenience (TfC)



- does client have a TfC right
- de-mobilisation costs
- unrecovered investment/ “sunk costs”
- payment for WIP

## Exit management



- scope
- duration
- fees

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# Protections for Consultant

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- Assumptions
- Force majeure
- Subcontracting
- Risk of insolvency of customer
  - payment profile
  - right to suspend
  - right to terminate
  - due diligence prior to contracting
- Limit audit rights
- Limit step-in
- Limit benchmarking

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# Data Protection | Identifying the roles of the contracting parties

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## Controller or processor

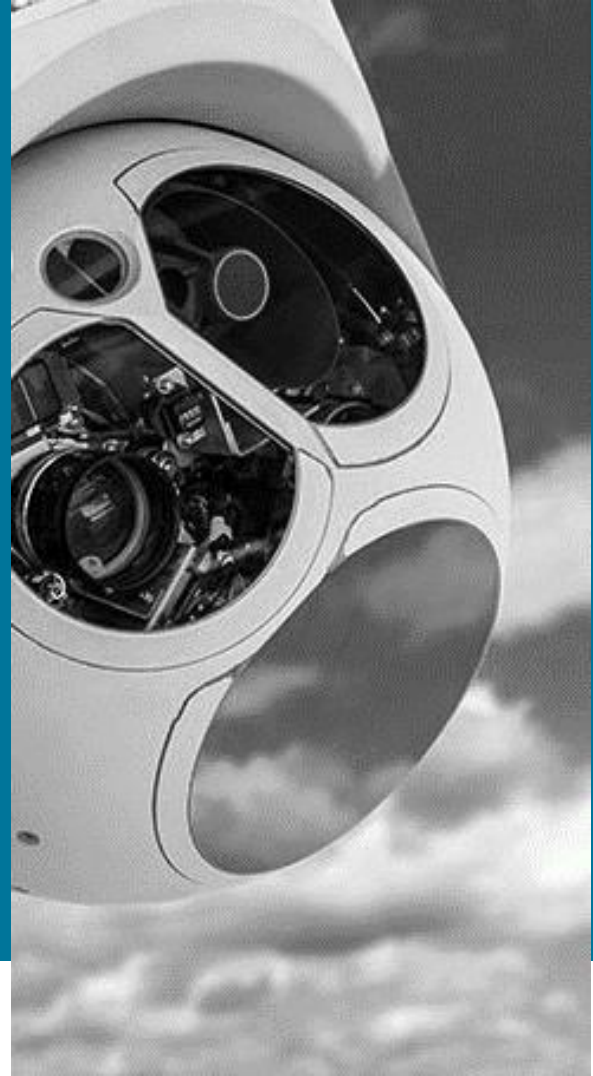
- controller determines the purposes and means of the processing of personal data
- processor processes personal data on behalf of the controller
- Article 28 GDPR sets out the contract requirements

## Joint controllers

- two or more controllers jointly determine the purposes and means of processing
- Article 26 GDPR sets out the “arrangement” requirements

## Controllers in common (independent controllers)

- two or more controllers share a pool of personal data that they process independently of each other
- GDPR contains no prescriptive requirements



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# Data Protection | Other considerations

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- What types of personal data are involved
  - special categories
- Who are the data subjects
  - any children
- What are the data flows
- If data sharing, is it one-way or two-way
  - will there be any onward transfers inside or outside the UK / EEA
  - if so, to which countries
  - where will the data be stored
- Does Consultant intend to engage other processors/sub-processors
- Is there any automated decision-making and profiling
- Is there any processing for direct marketing purposes
- Any other specific issues revealed through pre-contract DD or DPIAs



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# Negotiating Different Types of Data Protection Clauses: Controller-Processor | 1

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Article 28 GDPR requires a contract containing details of the processing (subject matter, duration, nature, purpose, type of personal data, categories of data subject, and the obligations and rights of the controller) and the Consultant's obligations to:

- process personal data only on documented instructions from the controller (unless required to do so by EU or Member State law)
- impose confidentiality obligations on persons authorised to process personal data
- take all measures required by Article 32 GDPR (security of processing)
- only engage sub-processors with the prior specific or general written authorisation of the controller; flow down equivalent obligations; remain fully liable to the controller for its sub-processors



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# Negotiating Different Types of Data Protection Clauses: Controller-Processor | 2

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- Consultant must assist the controller with:
  - security of processing
  - data subject requests
  - data breach notifications
  - DPIAs
  - prior consultation with supervisory authorities
  - delete/return personal data (unless EU or Member State law requires storage)
  - make available to the controller all information necessary to demonstrate compliance and allow for/contribute to audits and inspections
- The Consultant must immediately inform the Client if it believes an instruction infringes UK or Member State data protection provisions



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# Negotiating Different Types of Data Protection Clauses: Joint controllers

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- Article 26 GDPR
- Must have an “arrangement” between the joint controllers that determines their respective responsibilities for compliance with GDPR
- In particular, the arrangement should address:
  - the parties’ roles and relationships vis-à-vis data subjects (but data subjects can still exercise their rights against each controller)
  - the parties’ respective duties to provide the information referred to in Articles 13 and 14 GDPR (i.e. a privacy notice)
  - a designated contact point for data subjects
- “Essence” of the arrangement must be made available to data subjects



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# Negotiating Different Types of Data Protection Clauses: Controller-controller (controllers in common)

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- No prescriptive clauses set down by GDPR
- One controller must not instruct the other to process personal data on their instructions (otherwise this would be a controller-processor relationship)
- See ICO Data Sharing Code of Practice - suggests the clauses should address:
  - organisations involved
  - purpose and legal basis of data sharing
  - types of data shared
  - procedure for responding to data subject requests
  - other governance issues e.g. security and data breaches



# Questions?



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