



Kemp Little LLP

Top Tips for TMT Lawyers in the Downturn
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With the international finance system shaken to the core, extreme volatility in stock markets and investors and consumers increasingly wary, technology, media and telecoms companies are finding that their strategic options are increasingly constrained. Drawing from the expertise of lawyers in our commercial technology, IP, Competition, Employment and Corporate Finance teams, we have set out below some tactical considerations and practical steps for in house counsel to take to stay on course through the downturn.

Key commercial issues

Review payment terms

- For suppliers, it is vital that contractual payment terms are clear and require prompt payment. Existing and standard form contracts should be reviewed to ensure they contain robust payment provisions clearly stating what is payable and when, and the remedies for late payment.
- Adjust the structure of payment terms to minimise risk. If the financial status of the customer is in doubt, consider requiring shorter payment terms, more frequent payments, or payments or deposits up front.
- Commercial terms such as prompt payment discounts can encourage customers to pay early. This can be backed up by a review of business processes to ensure that payments are collected as efficiently and promptly as possible.

Protect assets

- Review the retention of title and termination provisions in existing and prospective contracts to ensure they offer sufficient protection for assets where the other party becomes insolvent.
- Suppliers should seek to retain title to goods supplied until full payment is received. The supplier should have the right to enter the customer's premises to recover goods for which payment has not been made.
- Customers should ensure that title to goods passes on delivery and that risk passes at the point at which payment is made.
- Ensure that termination rights related to financial problems are comprehensive so that the contract can be terminated for the other party's insolvency or an event which may lead to insolvency, such as the appointment of an administrator.
- Rights to recover assets on termination will also be important. Consider requiring a right to terminate for convenience as a clean and quick way to exit the contract if problems arise with the other party.

Manage outsourcing risks

- If you outsource services, it will be more important than ever to monitor the performance and financial position of outsourced service providers more closely.
- Think about getting a "plan B" in place, particularly where the outsourcing involves a critical business function. For example, line up a replacement supplier or retain sufficient expertise in-house so that services can be transferred if necessary.
- "Worst case scenario" contractual rights such as step-in rights can sometimes be overlooked during contract negotiations, but may prove crucial to ensuring business continuity if the service provider suffers problems. Check whether the service provider is required to provide all the necessary information and materials to enable a smooth transition.
- Help the service provider to help you. If they have struck a bad deal or if cost increases mean that they are losing money from the outsourcing, be prepared to renegotiate terms rather than causing them to go under, as this may be the most cost-effective solution.

Key IP issues

Manage your portfolio

- IP assets are costly to maintain and protect. In an economic downturn it is crucial to review the strategy underpinning an IP portfolio to maximise its value and save costs.

- Conduct a review and decide whether it is necessary to maintain all patent, trade mark, domain name registrations and registered designs and consider the potential to abandon any registrations which are ancillary to the needs of the business, or which are not cost-effective to maintain.
- Bear in mind that some IP assets may not be of direct value to the business but could be licensed or assigned to third parties for a substantial fee instead of allowing them to lapse.

Capture and maximise value

- A company's know-how, ideas and confidential information are valuable assets, often created at a significant cost to the business. Instituting and enforcing effective policies for the capture and retention of innovative ideas, trade secrets and inventions can often lead to enhanced business value and direct commercial benefits, which are particularly important within a more financially challenging environment.
- Patent filings may also be possible, adding further tangible value.
- It is also important to maintain a contractual and policy framework to guard against the misuse of IP rights by members of staff, particularly departing employees who may have access to software code, customer lists, or research and development material.

Monitor infringement and enforce your rights

- Infringement of IP assets or other unauthorised use can have a severe impact on their value. It is important to review the systems in place to monitor infringement (for example, trade mark watch services) and to review the strategy for taking action against infringers.
- Taking pro-active steps to enforce your rights may also create an opportunity to recover lost licensing revenue through settlement or damages awards. By contrast, a failure to take action to prevent and address IP infringement may result in lost license fees and royalties.
- Similarly, being aware of the IP assets of your competitors and implementing clearance policies for new products or services can avoid unwanted and costly infringement claims.

Key competition issues

Get the best deal

- Consider how competition issues might apply to deals where the partner is potentially "dominant" (having a large market share) or is imposing restrictions which raise costs or reduce potential markets.

Exploit regulatory issues

- For example, in the telecoms sector, think about who has significant market power and whether they are complying with their obligations.
- In the telecoms sector, the Services Directive (to come into force at the end of this year) could result in the avoidance of costly establishments across the EEA as head offices will have greater freedom to provide cross-border services. This can also have beneficial tax consequences if rationalisation is undertaken in conjunction with a pan-European tax efficiency review.

Are you 'gold plating' on regulatory compliance?

- If you are providing software or technology can your product or service be adjusted so that as well as providing e.g. CRM or accounting or data management functions it also covers regulatory compliance in a particular sector? This may just give the differentiating factor to improve sales into a target sector.

Key employment issues

Consider alternatives to redundancy

- The reflex reaction of many organisations looking to cut their cost base is to make redundancies. However, making redundancies can be time consuming, damaging for morale and can leave businesses under-resourced when the market picks up again. Redundancies are also often more expensive than businesses anticipate.
- Before deciding to make redundancies, look at alternatives such as offering employees the opportunity to

take sabbaticals or to work from home (to reduce the requirement for office space) or to move to reduced working hours or new flexible working arrangements.

- Look at whether there is any flexibility to pay reduced bonuses or other discretionary amounts (although it should be noted that even where a bonus is stated to be discretionary a court will not interpret this as giving employers a completely unlimited discretion).

Pro-actively manage under-performance

- In the good times it can be relatively easy to avoid paying too much attention to under-performing employees. However, if an employee's performance is not properly managed, they may be able to bring a claim if their employment is subsequently terminated. A more challenging market presents the opportunity to address under-performance in a more structured and rigorous way.
- This should either improve an individual's performance for the benefit of the business or make it cheaper and easier to dismiss the individual if ultimately their performance doesn't improve.

Plan redundancies carefully

- If, despite the above, you find yourself having to make redundancies, the key to ensuring that the process is as smooth as possible is to put plenty of time into the planning stages.
- Two areas in which employers often slip up are:
 - Pre-judging (or being seen to pre-judge) from the outset who is to be made redundant. This decision should only be made after an appropriate selection and consultation process has been completed.
 - Failing to consult sufficiently widely.
- Be aware that if you are making 20 or more employees redundant within 90 days at one "establishment" you will need to go through a collective consultation process lasting at least 30 days. Proper planning at the outset will enable you to avoid these and other common pitfalls.

Key corporate finance issues

Make sure acquisitions are worthwhile

- Even some attractive companies with strong IP, management teams or a large customer base will struggle to make it through the downturn and may well be looking to dispose of themselves or of non-core assets. It may be that your organisation is looking to acquire these assets at what is perceived to be a reduced cost.
- However, some questions you should ask include:
 - How does the acquisition sit with your business' strategic focus and other internal demands on time and resources?
 - How long will it take this acquisition to get to positive cash flow?
 - What are you buying (for example, people, technology, revenue or customers)?
 - Have the projections been internally verified?
 - Will you need to finance the acquisition? Could it lead to you needing to re-finance in the near future?

Make sure the target is a going concern

- Give early attention to whether the board is in a position to give a going concern statement in annual reports and whether this statement is to be qualified.
- Many directors will be reluctant to give an unqualified going concern statement as they may be held personally liable if the statement proves to be incorrect (particularly given that there is likely to be more regulatory oversight and more litigation in the current environment).
- Also, bear in mind that any going concern issues are likely to lead to significantly increased audit costs and that, if the statement is qualified, the qualifications are likely to be used and referred to by competitors during competitive bidding situations.

Focus on financing

- Some technology companies are awash with cash but many are not in this position and will be seeking to re-negotiate their financial covenants to avoid a breach.
- In the current environment, deal terms are becoming more favourable to investors and banks.
- In many cases, existing investors and bankers are being left to fund companies as new investors and bankers cannot be identified.
- Before starting negotiations, bear in mind that the terms and structure of financing in this market are not likely to follow the relatively predictable range of terms we have seen over the last four or five years. Also remember that in the future, these terms may well be subject to hostile scrutiny, for example by a shareholder.
- Appropriate records should be kept, reasonable alternatives should be demonstrably considered and board approval should be sought (including from any non-executive or independent directors).
- Where practicable, there should be complete transparency as to the terms.

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