How to navigate power imbalances in contract negotiations

There are various factors that influence contract negotiations, depending on the nature of a transaction. This article explores the effects of unequal bargaining power in contract negotiations and highlights important factors to consider when concluding contracts.

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A contract can be described as an oral or written agreement entered into with the intention of creating a legal obligation. South African Contract Law grants individuals, including juristic persons, the right and freedom to conclude contracts. The principle of freedom of contract reflects an individual's autonomy to voluntarily engage in transactions on agreed terms, as long as those terms are legal. This principle is grounded in the belief that all individuals are capable and free to manage and regulate their affairs in a manner that serves their interests.

However, in commercial transactions, especially in the procurement of goods and services, this general freedom may be influenced by the bargaining positions of the contracting parties. A party's bargaining power is tied to its ability to influence and dictate the terms of the contract regulating the relationship between the parties. These terms may include pricing, payment terms, delivery, passing of risk and ownership, limitation of liability, and the ownership and use of intellectual property.

Suppliers and service providers increasingly use standardised terms and conditions that enforce fixed contractual terms and conditions for the supply of goods and/or services. The consequence is that a consumer's freedom and flexibility in choosing contractual terms are restricted to predetermined terms and conditions, which are often one-sided and provide consumers little to no protection.

While contractual terms are meant to be negotiated and agreed upon between the contracting parties, a party in a stronger bargaining position will often have the power to dictate the terms, leaving the other party with no alternative but to agree to such terms, regardless of how unfavourable they may be.

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Nicolene Schoeman-Louw 1 Sep 2023

Balancing the bargaining scale

In an effort to balance the bargaining scale, the Consumer Protection Act 68 of 2008 (CPA) was introduced to promote a fair, accessible and sustainable marketplace for consumer products and services. It aims to establish national norms and standards related to consumer protection, provide improved standards of consumer information, prohibit certain unfair marketing and business practices, promote responsible consumer behaviour, and establish a consistent legislative and enforcement framework for consumer transactions and agreements. The CPA grants consumers a range of rights, including:

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- the right to equality in the consumer market;
- the right to privacy;
- the right to choose;
- the right to disclosure of information;
- the right to fair and responsible marketing;
- the right to fair and honest dealing;
- the right to fair, just and reasonable terms and conditions;
- the right to fair value, good quality and safety; and
- the right to accountable suppliers.

Like the CPA, the National Credit Act 34 of 2005 (NCA) provides protection to consumers regarding credit agreements and transactions. The Act promotes a fair and non-discriminatory marketplace for access to consumer credit, regulating consumer credit and improving standards of consumer information. It's important to note that both the CPA and NCA grant consumers, including micro, small and medium enterprises, the right to challenge the so-called "big players" and enforce the minimum standards imposed by this legislation in the conclusion and performance of contracts.

Application to juristic persons

However, it is important to note that the CPA and the NCA have limited application when the consumer is a juristic person. Section 5(2)(b) of the CPA stipulates that the CPA does not apply to any transaction where the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister of Trade and Industry. In terms of section 6, this is currently set at R2m.

Similarly, section 4(1)(a)(i) of the NCA states that the NCA applies to every credit agreement between parties dealing at arm's length and either concluded or having an effect within the Republic. However, this excludes a credit agreement where the consumer is a juristic person whose asset value or annual turnover (together with the combined asset value or annual turnover of all related juristic persons) equals or exceeds the threshold value determined by the Minister of Trade and Industry in terms of section 7(1) at the time of the agreement. This level is currently set at R1m. The implication is that if a juristic person's asset value or annual turnover surpass the respective threshold values, the juristic person would be afforded very limited to no protection under the CPA and NCA.

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GRC policy protection

It is very important for a company to have a clearly defined governance, risk and compliance policy (GRC policy) that prescribes the company's rules and procedures for the evaluation, management, and mitigation of risks in all aspects of the company's business, including compliance with relevant laws. In the context of the conclusion of contracts, companies are required to have in place adequate resources, including experienced legal counsel, to ensure that its interests are protected as far as possible and that it is not subjected to onerous terms.

Companies may consider adopting a written playbook or guideline for the conclusion of contracts, outlining the company's position on various terms and conditions stipulated in a contract. This playbook may also specify the extent to which the company can deviate from its position to reach a compromise, subject to approval from the company's management.

Often, whether due to failed negotiations or other reasons, consumers find themselves in a position where they have no alternative but to accept the fixed contractual terms and conditions imposed by the supplier or service provider. It is essential to note that the decision to accept these terms should be informed by the operational requirements and readiness of the consumer. In cases of significant exposure to risk, consumers must consider their risk appetite in line with their GRC Policy rules and procedures.

We further advise that companies should seek proper legal guidance in concluding contracts. Contracting parties must always ensure that they are aware of their obligations and expectations around the timing of performance, as well as the risk associated with non-performance under the contract. This necessitates a comprehensive review and unpacking of the contractual terms and obligations, providing the contracting party with an overview of the far-reaching legal implications associated with the acceptance and non-performance of specific contractual provisions.

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