

NAP Contact Meeting

The Root Causes of, and Ways to manage complex Commercial Contracts

May 23rd, 2024

Patric Jansen

Introduction

“ In our attempt to clarify terms, terms have become more unclear”

- Patric Jansen
- Independent legal consultant



Let's start with a question



- Who thinks that commercial contracts are often too long and too complex?
- And who thinks that this is potentially damaging your business?

Setting the stage (1)

- Numerous contracts mean different formats and conditions in the first place.
- In addition contracts have become increasingly more lengthy and complex.
- Different causes:
 - Desire to transfer (theoretical) risks/ risk aversity
 - Desire to over-clarify every (theoretical) situation
 - Lack of trust between contracting parties
 - Anglo-American influences
- Consequences are:
 - Inefficiencies in processing and reviewing contracts (high work load vs low capacity)
 - Increase costs
 - potential loss of business
 - Or: potential bad business: too easy acceptance of terms and increased risk that important clauses or conditions will be overlooked
- Back to the good ol' times?

Back to good
ol' times?

- That train left the station!



Setting the stage (2)

Contract Life Cycle

- Contract life cycle: from initiation to termination, every contract goes through various phases.
- It is important to manage contracts through the entire life cycle.
- Focus for today is on the contract initiation, the pre-execution phase:



How can we manage the pre-execution phase?

- Organizations with high volume of contracts simply can't have all contracts reviewed by the law department:
 - Limited 'turn around time' for review
 - Limited resources
 - Limited budget
 - Higher costs for review do not always outweigh higher risk for having contracts not review
- And...they probably should not need to.
- We won't get rid of long & complex contracts.
- But: there are ways to effectively manage higher volumes or longer and more complex contracts.
- Not only a task for the law department!

Another question



- Who reads contracts he/she is supposed to sign in full?

A simple framework

- Focus on four pillars for more effective contract management in pre-execution phase:
 - Standardization
 - Policies & Processes (with clear roles & responsibilities)
 - People & collaboration
 - Technology
- Controlled by performance/process audits
- A framework for contract management should be an interplay of processes and collaboration you should rely upon when signing a contract.

Standardization

- Effective approach to address high volume and/or complexity: standardized contracts / contract templates and/or contracts that can be used for multiple purposes.
- Can be long and complex in itself, but effectively the same terms for multiple contracts for commonly used contract types.
- Few examples of standardization:
 - General term & conditions
 - Framework agreements (one master with agreed terms and various work orders)
 - Umbrella agreements (one master for future transactions for multiple entities)
 - Industry standard agreements (UAV-GC, FIDIC, EFET, LOGIC)
 - Standard templates for contracts that are often used (NDA's, PO's)
- By using standardized contracts and templates, companies can:
 - Significantly reduce review time and speed up the process of creating contracts
 - Maintaining contract consistency which minimizes the likelihood of errors
-  Tip: if working with templates, don't use earlier completed templates by just changing a few metadata: sensitive to errors.

Policies & processes (1)



- Proper policies and processes filter the relevant contracts to be reviewed and make risk visible.
- What is a good process to manage your contracts in pre execution phase?
- How do I filter the good from the bad?
- No 'one size fits all': You need a process that is tailored to your business and contract requirements.
- But this applies to every organization:
 - A lack of process management increases risk exposure and could (unknowingly) bind organizations to potentially unfavorable terms
 - Proper policies and processes are a combination of internal regulations and requirements and external regulations set by governing bodies
- Example to discuss: review of a 20 page contract for one off sale of a turbine part of 15K with 24 month warranty to be shipped to Indonesia
 - Proper process would probably intercept this transaction before we even start looking at it

Policies and processes (2)

The benefits

- Improved efficiency in contract management:
 - Less time to contract
- Reduction of contracts to only relevant contracts.
- Reduced risk due to following processes:
 - Less non-compliance to (internal) policies, statutory guidelines and regulatory requirements
- Clarity about roles and responsibilities of people :
 - Who owns what part of a contract
 - Legitimation for professionals to claim their role
- Strengthened compliance.
- Cost savings.

Policies and processes (3)

practical examples

- Risk & Compliance policies.
- Contracting playbook or guidance document.
- Risk appetite.
- Clause library.
- Installation specific committees for large opportunities ('tender board').
- Policy on contract storage & retrieval:
 - Systematic storage ensures possible loss or damage, but also accessibility for reference or inspection purposes (or claims!)
- Contract approval workflow: lead to contract
 - Review/evaluation multiple stakeholders: part of process
 - Auto-approvals using conditional triggers (no deviations from standard etc)
- All with proper roles & responsibilities of participating stakeholders.

People & collaboration



- Have the right people and right competences in the team(s).
- People who
 - take ownership and create alignment among different stakeholders.
 - Also dare to take risk to a certain extent.
 - Have business acumen.
 - For lawyers: who actively engage and reach out to the business, not 60% redline every contract.
- A siloed way of working of the company's teams leads to inefficiency, wrong allocation of work and sub-optimal results.
- Processes do not work without collaboration. It connects all parts of the company.
- Equally (or even more) important in post execution phase!

Technology

- Technology can be important facilitator in managing contract complexity.
- There are many solutions (AI powered) for optimizing contract life cycle management:
 - Data extraction and analysis
 - AI to detect missing clauses and clause deviations in contracts to reduce exposure from non-compliant contracting
- By capturing data with technology you may be able to see trends sooner and act upon these.
- Whatever solution you have in place: it can't work without proper processes as solid foundation.
- Technological solutions require expert input upfront to actually enable these to learn and generate relevant results.
- Think not only AI but also low hanging fruit:
 - Electronic signatures: speed up the signing process
 - Tools (trackers) that easily search for specific contracts, quickly retrieve information when needed, and ensure contracts are up to date
 - Tools that enable automatic alerts and notifications

Performance audits



- Any organization must take care to ensure that processes and tools are robust, properly implemented, applied consistently and supported with plans for ongoing improvements.
- The consistent application of processes is an important responsibility for managers.
- Conduct regular performance and compliance audits and use the outcome as input for improvement.

Conclusion

- Lengthy and complex commercial contracts will remain to exist.
- We need to find ways to deal with only the relevant contracts and only the relevant information and terms in these contracts.
- A combination of standardization, proper policies and procedures, people with the right competences and technology will help companies to at least be more efficient in handling contracts and reduce the -sometimes overwhelming- length and complexity.
- The company profile, its strategy and requirements determine how and to what extent you would need to apply the contract management framework.

Questions?

