

NEGOTIATING THE MINEFIELD OF INFORMATION TECHNOLOGY CONTRACTS

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As the technology sector presses further into business functions, processes, management analytics and even artificial intelligence (AI) enabled competitive advantage, businesses are required to adopt appropriate technology solutions in order to remain relevant, effective and profitable.

Contracting for these dynamically evolving systems and consumption-based landscapes is a minefield of complexity and frequently involves a significant level of commercial exposure.

Traditional corporate legal departments are distracted away from the critical elements because techie concepts and terms are typically outside of their comfort zone, and/or area of expertise. Instead they engage vigorously on terms relating to risk allocation and the consequences of failure, their more comfortable areas relating to limits of liability, indemnities, termination and warranties.

I concede that these terms and conditions are an indispensable foundation to the parties' engagement, however suggest that they consume an amount of time and focus that is inversely proportional to the risk that they mitigate or value they create.

The IACCM (International Association for Contract & Commercial Management) in their report, most negotiated terms 2018, propose that many of today's business to business negotiations fail to achieve their purpose of delivering mutual benefit. Having insight from more than 2100 organisations, IACCM confirms that limits of liability, indemnities, termination and warranties occupy four of the six most negotiated contract terms. (One needs to be mindful that this is to the exclusion of provisions relating to scope, responsibilities, price, delivery, performance and data protection & security).

In my view, the former historically power-based negotiations are able to be efficiently concluded and dispatched if the parties arrive at the table with an intent to be

reasonable and apply accepted market practices.

What's really important is ensuring that you get what you signed up for, are able to manage an inevitable amount of change with a reasonable level of flexibility, commercial transparency and certainty, and protection from regulatory and third-party threats.

Software houses will attempt to prevent customers from cancelling licenses they no longer need (thereby reducing annual maintenance), or transferring them either to another subsidiary or another entity acquiring a subsidiary, or swapping them for a different type of license that they do in fact need. The list abounds.

Infrastructure and cloud providers will similarly attempt to impose minimum revenue commitments, preclude customers from reducing consumption-based services, dilute their performance guarantees and/or impose unreasonable notice periods for the termination of commodity landscapes.

Consulting and implementation firms have their own recipe for avoiding delivery accountability and exploiting commercial loopholes.

These are the important items that need to be negotiated at the time of procurement, when customers have leverage.

Resolving these challenges in order to deliver value adding technology solutions to your business requires experience and expertise together with negotiating competence. The two ways of fulfilling this requirement are to either recruit someone internally or engage a specialist.

Our technology team at Cox Yeats has more than two decades experience in procuring and contracting technology systems, infrastructure and services from all the major software, technology and consulting houses both internationally and locally. ■

Please contact us should you wish to discuss your requirements.

The Information & Communications Technology Team is headed by partner- Jonathan Batho. If you require assistance or advice regarding Information & Communications Technology matters, contact us on T: 031 536 8500 or E: jbatho@coxyeats.co.za



Jonathan Batho, Partner



Carina Eriksson, Associate



Robyn Bronstring, Candidate Attorney



Adrian Krige, Candidate Attorney



Andrew Seymour, Candidate Attorney

NEW BLOOD AT COX YEATS

JONATHAN BATHO: Jonathan re-joined Cox Yeats at the beginning of 2020 as Team Leader of the firm's Information & Communications Technology practice, extending the firms' services portfolio to include its' clients' information technology requirements. Jonathan is an Information Technology specialist in procurement, commercial and contracting of IT systems and infrastructure landscapes.

Jonathan was admitted as an Attorney of the High Court of South Africa in 1996 after serving articles at Cox Yeats. After completing his articles of clerkship he joined SAB in 2000 after spending a few years abroad, heading up technology procurement and commercial in South Africa. He was then transferred to London in 2004 where he performed this role for the SABMiller group of companies. Jonathan spent the next ten years in the U.K. in various global technology commercial and procurement roles. During this time, Jonathan supplemented his legal qualifications with a certification in SAP financial systems and attended an executive finance programme at Insead in France. He subsequently returned to South Africa with his family and joined Aspen Pharmicare Holdings where he managed global systems and infrastructure procurement projects, commercial negotiations and their resulting contracts.

CARINA ERIKSSON: Carina practices in the Property team, where she is working towards qualifying as a conveyancer.

She commenced her studies

at the University of Cape Town, where she completed a Bachelor of Social Science (B.SocSc) degree, majoring in Psychology and International Relations, in 2012. She thereafter completed her L.LB degree at the University of KwaZulu-Natal (Howard College) in 2015. During her time at UKZN, she was selected as the Head Coordinator of Visually Impaired Positivism (VI+) - a university-managed organisation that raises awareness of students living with disabilities. She has also achieved a number of Deans Commendation and Merit Certificates in various modules.

She was admitted as a Legal Practitioner of the High Court in 2019 having completed her articles of clerkship at a Durban-based firm.

ROBYN BRONSTRING: Robyn is completing her articles as a member of the Corporate & Natural Resources Team where she would like to focus on Commercial Law. She obtained her B.A. Law degree followed by a Postgraduate LL.B from the University of Stellenbosch, graduating in 2019. During her time at University she was actively involved in mooting and served as Vice Chairperson of the University's Moot Society. Robyn was also employed by the law faculty as a university tutor for two years and completed a year of voluntary work at the Stellenbosch University Law Clinic.

ADRIAN KRIGE: Adrian is serving his articles as a member of the Corporate & Natural Resources Law Team. He graduated from UCT with a Bachelor of Social Sciences

(majoring in Political Science and Law) in 2016, and went on to complete his LL.B degree in 2018. He then took time to travel, returning to UCT in 2019 to graduate with a Masters in Law (specialising in Commercial Law). In 2016, during his time at UCT, Adrian was selected to serve on an organised sub-committee within the Law School Mentorship Programme. He is passionate about commercial endeavours and relating legal matters. While studying for his Masters' degree, Adrian gained exposure to corporate transactions (mergers, acquisitions, disposals, and takeovers) and looks forward to acquiring a deep knowledge in these fields, as well as in matters relating to corporate governance and corporate finance.

ANDREW SEYMOUR: Andrew joined Cox Yeats as a Candidate Attorney, and will be serving his articles as a member of the Construction, Engineering and Infrastructure team. completed his LL.B. degree through UNISA in June 2019, studying part-time. However, he initially obtained his B.Sc in Civil Engineering from the University of Kwa-Zulu Natal in 2005 and had been practicing as an Engineer since then. During this time he registered as a Professional Engineer through ECSA (the Engineering Council of South Africa) in 2013. Throughout the 14 years of his Engineering career, Andrew worked in construction and consulting, as well as in both the private and public sectors. He will be combining his qualifications and work experience to ultimately specialise in Engineering and Construction Law. ■

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