



NJAGA & CO. ADVOCATES

TALENTED PERSONNEL, TIRELESS PREPARATION & PERFECT EXECUTION



The Importance of Written Contracts in Business & Tips for Negotiating Commercial Contracts in Kenya



+254 701 635 503

info@njagaadvocates.com
njagaadvocates@gmail.com

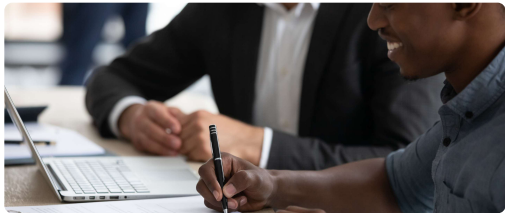
P. O. Box 20504-00100, Nairobi



www.njagaadvocates.com

Westlands Commercial Center,
Block D (Old Block) 2nd Floor, Suite 2,
Ring Road, Parklands

Introduction



Contracts form the backbone of business operations globally and in Kenya. They govern the relationship between parties, outlining their rights and obligations. A well-drafted, written contract provides clarity, legal protection, and a framework for dispute resolution, thus providing a clear framework for effectively doing business. Whether you're dealing with suppliers, clients, or joint venture partners, formalizing agreements ensures the parties' rights and obligations are clear, enforceable, and protected.

Unfortunately, most businesses in Kenya do not give contracts the required attention they deserve. This leads to companies hurriedly entering into contracts whose terms they are unaware of or have not fully comprehended, leading to future problems. This article explores the importance of written contracts, particularly in the context of commercial contracts in Kenya, while outlining key elements of contracts, the contract cycle, and important legal considerations.

What is a contract and the Legal Framework in Kenya

A contract is a legally binding agreement between two or more parties. It can be written or verbal, although written contracts are generally preferred as they provide more certainty and can be used as evidence in court.

The **Black's Law Dictionary** defines a contract as follows: -

An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.

Contracts differ in form and nature. Contracts can generally be classified into three categories:

- **written contracts,**
- **contracts requiring written evidence, and**
- **simple contracts.**

Certain agreements, such as hire-purchase, land sale, and transfers, must be in writing as provided under Section 3 of the **Law of Contract Act**, while contracts for guarantees or the sale of goods over 200 shillings require a written memorandum.

Contracts can be entirely in writing, oral, partly written and oral, or implied from conduct or trade custom/profession.

In Kenya, contracts are generally governed by **the Law of Contract Act**, CAP 23 Laws of Kenya. The Act provides for the application of English law of contract in Kenya, including the common law of England relating to contracts, as modified by the doctrines of equity.

The Sale of Goods Act, CAP 31 Laws of Kenya, is another critical law governing the contracts for the sale of goods and contracts of sale in Kenya.

Importance of Written Contracts in Business

In business, having a written contract is crucial for establishing clear, enforceable terms between the parties. It outlines each party's obligations, minimizing the risk of misunderstandings and disputes. Without a contract, verbal agreements can be misinterpreted, and enforcing responsibilities becomes difficult, often leading to financial loss or legal action. A well-drafted contract protects both parties' interests, helps build trust, and ensures a solid foundation for a successful business relationship. Below are some of the reasons why you should always put a contract in place when doing business:

1. Clarity and Certainty

Written contracts lay out specific terms that reduce ambiguity and misunderstandings. Both parties understand their roles, expectations, and obligations. This is particularly critical in Kenya, where verbal agreements may lead to disputes, as courts often require written proof of an agreement.

2. Legal Protection

A written contract serves as legal evidence if a breach occurs. This allows parties to seek remedies such as damages or contract rescission.

Written contracts also help minimize disputes by clearly defining each party's responsibilities, thus protecting both parties' interests.

3. Risk Management

A contract helps parties manage risks associated with the transaction. For instance, force majeure clauses can protect businesses from liabilities due to unforeseeable events such as political instability or economic downturns, which are common in Kenya's business environment.

4. Dispute Resolution

Contracts often outline how disputes will be handled through litigation, mediation, or arbitration. In Kenya, arbitration is increasingly preferred due to its efficiency and confidentiality. Including a dispute resolution clause can save time and money by preventing lengthy court battles.

4. Business Continuity

Well-structured contracts facilitate long-term relationships, ensuring the continued supply of goods or services. By outlining conditions for termination or renegotiation, contracts help businesses plan for future eventualities.

Key Elements of a Commercial Contract

For a contract to be enforceable, it must contain the following essential elements:

1. Offer and Acceptance

An agreement arises when one party makes an offer, and the other accepts it. This meeting of the minds is critical for the validity of any contract.

2. Consideration

Consideration refers to the value exchanged between the parties, whether money, goods, or services. Without this, the contract lacks a legal foundation.

3. Capacity and Consent

Parties must have the legal capacity to contract, meaning they must be of sound mind and not minors. Consent must be given freely, without duress or undue influence.

3. Lawful Purpose

The contract must be for a lawful purpose. Contracts for illegal activities are unenforceable under Kenyan law.

4. Certainty of Terms

A contract must clearly outline the specifics—terms related to goods or services, pricing, delivery timelines, and performance standards must be explicit.

5. Intention to Create Legal Relations

Parties must intend that the agreement will create legally enforceable obligations. This is usually presumed in commercial dealings.

The Contract Cycle

Understanding the typical cycle of a contract is essential for businesses:

1. Pre-Contractual Negotiations

The initial stage involves negotiations to settle key terms. Legal teams must be involved to ensure compliance with both commercial and legal obligations, such as intellectual property rights, tax liabilities, and operational constraints.

2. Drafting the Contract

Once terms are agreed upon, they are written into a formal contract. Key terms such as pricing, deliverables, payment schedules, and governing laws must be clearly stated. In Kenya, legal teams often include specialists from various fields, like tax or IT, for complex commercial contracts.

3. Review of the draft contract

Each party reviews the contract to ensure clarity and understanding of obligations and whether they agree to the terms drafted. Contract review is critical as it allows a party to identify any onerous or punitive clauses.

4. Execution and Signing

After the contract is reviewed and the parties agree to its terms, it must be signed. Depending on the contract type (e.g., land agreements), formal witnessing or notarization may be required for enforceability.

5. Contract Performance

Both parties are now obligated to perform their respective duties. Regular checks on compliance ensure the contract is being fulfilled as agreed.

6. Breach and Remedies

If one party fails to fulfill its obligations, it constitutes a breach. Kenyan law offers several remedies, such as damages, specific performance, or contract rescission.

7. Termination

Contracts may end upon completion or mutual agreement. In some cases, unforeseen circumstances may force termination under a force majeure clause. It's crucial to include clear terms for the ending or renewal of the contract.

Legal Tips for Negotiating Commercial Contracts in Kenya

1. Understand the Legal Framework

Ensure the contract complies with all relevant Kenyan statutes. Consult the **Law of Contract Act** and other industry-specific regulations to avoid creating unenforceable contracts.

2. Identify the parties involved

The contract should clearly identify the parties involved in the agreement, including their names and contact details.

3. Define the purpose of the agreement

The contract should clearly define the agreement's purpose and what each party is expected to do.

4. Clearly Define Terms

All terms, including payment schedules, deliverables, and deadlines, should be clearly spelled out. Avoid ambiguous language to reduce potential disputes.

5. Negotiate Fair Payment Terms

Payment terms should reflect both parties' interests. Ensure the contract addresses delays, interest on late payments, and currency fluctuations, particularly in international deals.

6. Define consequences for non-compliance

The contract should clearly define the consequences for non-compliance, such as penalties or agreement termination.

7. Include a Force Majeure Clause

Kenya's business environment can be unpredictable due to political and economic conditions. A force majeure clause protects both parties from liabilities caused by unforeseen events such as natural disasters or civil unrest.

8. Consider Alternative Dispute Resolution (ADR)

Mediation or arbitration clauses can save time and cost in resolving disputes. Arbitration is often preferred in Kenya because it is faster and less formal than court proceedings.

9. Regulatory Compliance

Contracts must comply with local regulatory frameworks. For example, government contracts often have additional regulatory oversight.

10. Governing law and jurisdictional clauses

Ensure that the contract specifies which governing law is governed by and the jurisdiction responsible for its interpretation and enforcement.

11. Protect Intellectual Property

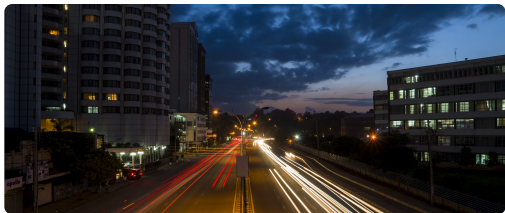
Intellectual property (IP) clauses are crucial for contracts for technology or creative works. Ensure that the IP created during the contract is clearly assigned to the right party and add clauses to prevent unauthorized use.

12. Seek Legal Advice

Even seemingly simple contracts can involve complex legal considerations. Hiring a skilled lawyer to draft or review the contract can prevent costly mistakes and ensure the contract aligns with Kenyan laws.

13. Consider Future

Kenya's business environment can be unpredictable due to political and economic conditions. A force majeure clause protects both parties from liabilities caused by unforeseen events such as natural disasters or civil unrest.



Conclusion

Written contracts are essential tools for safeguarding business interests in Kenya. They ensure clarity, manage risks, and provide legal protection, helping businesses avoid disputes and navigate the complexities associated with contracts.

Businesses can secure beneficial commercial relationships by understanding key elements, following the contract cycle, and employing best practices for negotiation. Seeking professional legal advice throughout the process remains crucial to ensuring contracts meet Kenyan legal standards and serve their intended purpose effectively.

How we can help you

For expert assistance with your business contract needs, [Njaga & Co Advocates](#) is here to support you. Contracts are fundamental to ensuring clarity, protecting interests, and avoiding disputes in business.

Our skilled legal team can guide you through drafting, reviewing, and negotiating contracts that meet legal obligations and safeguard your business. At [Njaga & Co Advocates](#), we take contract work seriously to ensure your business is legally secure. [Contact us](#) today for professional advice on all your contractual matters.



NIAGA & CO. ADVOCATES

P: +254 701 635 503

W: www.njagaadvocates.com

M: info@njagaadvocates.com

njagaadvocates@gmail.com

A: Westlands Commercial Center,
Block D (Old Block) 2nd Floor,
Suite 2, Ring Road, Parklands