# STRATEGIES FOR PROTECTING WEAKER PARTIES IN BUSINESS CONTRACTS.

*If you consider yourself the weaker party in a contract, this piece is for you.*

The equality of interests under a contract is subjective; depending on factors such as the status and capacity of the parties, the context of the contract, the obligations of and benefits to each party under the contract, to mention a few. However, in certain situations it is glaring that a party signed a contract on a 'take it or leave it' basis' or under some form of duress. Such contracts in, in legal parlance, are called Contracts of Adhesion.

***The freedom to contract and the sanctity of contracts. These principles form the pillars on which the world of business stands and the courts are very reluctant to avoid them.***

Nigerian law recognises the existence of these kind of contracts and makes provisions for the weaker party. By Nigerian law, I mean court decisions. There is no legislation that precludes unfair terms in a contract. Nigerian case law on this subject, despite having its nuance, derives mostly from its Common Law heritage. These provisions in my opinion, do not cater to the larger instance of unfairness in contracts; when a small business or individual out of desperation enters into a contractual relationship with a more established business or person and agrees to terms out of desperation.

The fact that there is no legislation precluding unfair terms in a contract means that in effect, other than at the negotiating table there is no avenue for the consideration of the unfairness of certain terms in a contract at the time of making them. Each party is left to her own device and/or the negotiating skills of the lawyers involved.

In the marketplace, one finds that, more often than not, the unfairness of a term in a contract comes to the fore 'after the fact'; when a party is unable to meet an obligation or unable to derive a benefit under the contract or because of the contract. While many cut their losses or renegotiate the contracts, as a last resort, the weaker party may go to court.

The recourse to the court is not likely to avail the aggrieved party because of the principles of **the freedom to contract** and **the sanctity of contracts**. These principles form the pillars on which the world of business stands and the courts are very reluctant to avoid them, except in cases of breach, fraud, duress, undue influence or mistake (which all have standards of proof that must be met). Nigerian courts are reluctant to void the terms of a contract which a party freely agreed to, simply because the obligations have become too hard to fulfil and this, in my opinion, is the proper disposition.

In light of the foregoing, the 'weaker party' must gather its wits when entering into a contract. The following strategies should help the weaker party make the most out of the contract during negotiations:

**Maintain proprietary interest in the subject matter of the contract**.

This can be achieved in different ways. If you own the subject matter of the contract, then you should at all points in the contract endeavour to maintain ownership of the subject matter. This works effectively for incorporeal products such as music, art, software etc.


If full-on ownership is not attainable, the weaker party should endeavour to have exclusivity of supply or access

to the service/product. This works for services and perishable products to mention a few.

If the first two are not attainable, the weaker party should endeavour to have a right of first refusal. That is, the other party must ascertain that you are unable to meet its demand for the product or service before it can reach out to a third party.

**Right of Audit/Evaluation**


For mid to long-term contracts, especially those in which the other party is deploying your product/service to its business or on your behalf, you may insert language that imposes an obligation on the other party to maintain records of its exploitation of your product/service and grant you periodic access (on demand) to those records.

**Periodic review of the contract**

In the life of a contract, it is advisable to make the contract dynamic; evolving with the context of the contract and fortunes of the parties.

**Upfront payments**

This swings either way depending on what side you are on and your objectives per time. As a buyer, you want to ensure that the product/service meets your objectives before you make any payments. On the other hand as seller, you want to ensure that you receive as much of the money as early as possible at the first point of exchange.

As the seller, this position may be hard to attain early on, because, you are trying to build trust and get ahead of competition. In such a case, it's best to stagger supply of the product/service, if it's possible.

**Comparative Default/Mitigation of Loss**

Writing into the contract, the obligation on the other party to notify you of any circumstances within its knowledge, which it believes could affect your ability to fulfil your obligations under the contract.

**Bonus point**: It is also necessary to interact with your contract in the course of its Term. Many sign contracts and abandon the terms for convenience sake. The effect being that they vary the terms of the contract by conduct and when things go south, it becomes the classic case of the imperfect case; with extenuating factors that lessen their abilities to fully enforce their rights under the contract, following a breach.

**Conclusion**

The effectiveness of strategy is underscored by context. These are not 'one-size fits all' approaches, as such you will do well to evaluate your preferred approach with a qualified advisor before making a decision.

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