



Most Negotiated Terms

# Technology and software sector



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 **World Commerce & Contracting**

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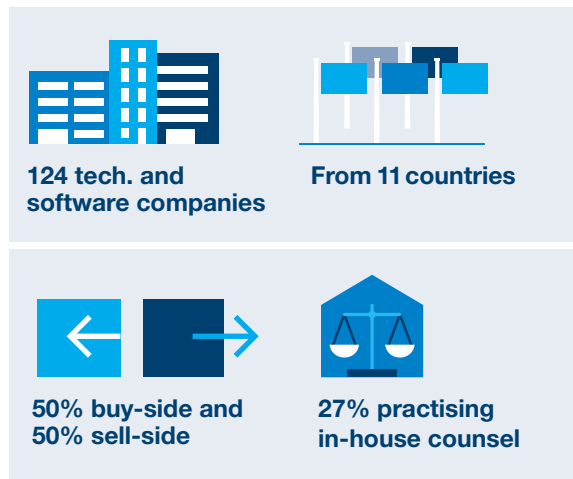
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# Scope and purpose

This report focuses exclusively on the negotiation of technology and software contracts between businesses and, to a degree, between businesses and governments. It reveals the terms and conditions that dominate those negotiations as well as the areas that negotiators consider most important and those that are most likely to result in subsequent disagreement or dispute.

Its purpose is to help negotiators and business leaders better understand and prepare for contract negotiations. The report highlights the current state, but also indicates where changes can be made – changes that would generate better outcomes for both parties. As such, a core objective is to encourage self-reflection, and to prompt businesses and their negotiators to examine and question current practices and identify a better way.

## Data demographics for this report



## Meaning of the report terms



# Forewords

## The drive for more effective technology

The technology and software sector has undergone a massive commercial transformation, with the rapid shift to cloud-based and ‘as-a-service’ offerings. Customers have often struggled to grasp the implications these changes have on contract terms and this creates major tensions for negotiators.

That trend – and those tensions – were heavily impacted by the pandemic. Subsequent supply disruption and inflationary pressures have added fuel to the fire. With so much to be negotiated and so many risks and uncertainties to be addressed, it is no wonder that negotiation cycle times have increased.

But how are these tensions playing out and how are they being resolved? This report offers insights into the state of the market and how it is evolving. It also confirms that today’s dynamic business conditions drive a need for more effective implementation and use of technology, to equip negotiators with the information, tools and terms that they need to develop and agree the right forms of agreement.



**Tim Cummins**

President  
World Commerce & Contracting

## Realizing the contract’s higher purpose

At Icertis, we believe every contract, every clause, has a purpose. When the intent of these contracts and clauses is realized, they collectively have the power to make companies better partners and the world a better place.

That’s why we are so proud to partner with World Commerce & Contracting on the latest ‘Most Negotiated Terms’ report and this deep dive into results from the technology and software sector.

For this year’s technology and software sector survey, the expectation, or at least the hope, was that two years of almost constant global disruption would precipitate a shift in how the sector approached their contracts: as not just tools to allocate risk, but create value and better define the full purpose of their relationships.

For technology and software companies, this year’s data bears this out – to a point. On the one hand, the most negotiated terms remain largely unchanged from years past, with a keen focus on liability limits, indemnification, and liquidation of damages, rather than value-creation clauses that more clearly define successful relationship and contractual outcomes.

On the other hand, nearly half (47%) said that collaboration between negotiation parties increased since the pandemic; increased collaboration reflects the fact that half (49%) of respondents say the role contracts play in the business is more important than in the past.

Furthermore, this sector report finds that leading companies are using data to determine which contract clauses are creating disputes and addressing that contract language before anything gets executed. This reflects a more mature understanding of the role contracts play in the business. As the report states: “Intelligent negotiators focus on how to avoid problems, rather than solely on how to protect against their consequences.”

I’m confident that trends like the above will become more and more common as contract data becomes more robust and readily available. This won’t just drive commerce but enable companies to leverage their contracts to address emerging imperatives like sustainability, equity, and ethical sourcing. That’s why at Icertis we make it our purpose to leverage contract intelligence to build trust, strengthen bonds, and create a better world. And it’s why we are so proud to support research for the benefit of the technology and software sector that advances the art and science of negotiation and achieving the higher purpose of each contract.



**Bernadette Bulacan**

Chief Evangelist  
Icertis

# The state of the market

Back in 2020, when the pandemic first disrupted traditional meetings and communications, almost 70% of negotiators in the technology and software sector expressed concern over the loss of face-to-face negotiation. They believed it would make reaching agreement much harder and increase the likelihood of misunderstandings. Even in this technology-oriented sector, before the pandemic less than 20% were making regular use of video technologies to support their customer and supplier relationships.

Move forward three years and attitudes have changed. Now, just 5% believe that moving to a virtual environment had a negative impact on their ability to negotiate and

conclude agreements, with 34% saying it made no difference and 32% believing it had a positive impact (the remainder believe it varied depending on the type of contract and the nature of the relationship). This finding tends to confirm an old idea that we all know – people do not like change and often assume it will be negative.

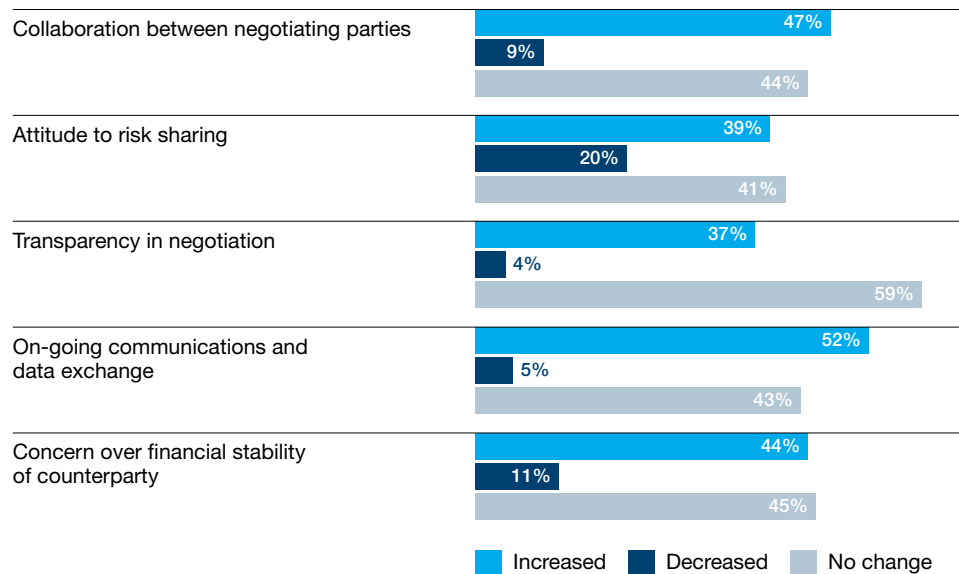
In many ways, the Most Negotiated Terms also reflect this aversion to change. Even as market conditions or strategic goals alter, we remain fixated on the things we have always done. Yet the disruption of the pandemic and subsequent market volatility have perhaps broken those embedded habits. Figure 1, below, provides some examples.

In the past, periods of uncertainty have often created increased contention in negotiations; this time, they appear to have had a broadly positive impact, with a higher proportion sensing a positive increase / impressive improvement. This is further reflected in levels of internal collaboration – that is, across business functions – where 60% identify improvement.

Behind the scenes, there is also growing appreciation that contracts matter. Many in this sector are aware that ‘the contract’ often provided limited support or purpose in navigating market disruption. This has led to increased discussion over the content of the core agreement, versus perhaps more formal governance and relationship management. 49% report that the contract and its role within the business is now viewed as more important than in the past.

It is factors such as these that are setting the scene for today’s negotiations and prompting altered thinking and planning. Together these may allow a continued shift of negotiation away from risk allocation and ‘preventism’ to a stronger focus on the factors – and terms – that support positive outcomes and shared value.

**Figure 1. To what extent have the events of the last three years resulted in a shift**





# Some old habits die hard

The switch to virtual negotiation was imposed – there was no choice. In the case of what we negotiate, we remained free to select the agenda. While all around us there was dramatic change, it did not permeate in any meaningful way into the negotiation agenda. As one General Counsel observed, ‘It’s the same list as it was twenty years ago’.

Figure 2, below, tracks the **Most Negotiated Terms** for the technology and software sector since 2015 – and, if anything, shows backward steps. Critical areas such as Service Levels, Responsibilities of the Parties and Scope and Goals have moved out of the top ten, to be replaced by terms such as Liquidated Damages and Confidential Information. The shift to ‘as-a-Service’ delivery models seems scarcely to have altered the negotiation agenda.

*“It’s the same list as it was twenty years ago.”*

A General Counsel in the technology and software sector

**Figure 2. Most Negotiated Terms in the technology and software sector**

	2015 Pre-pandemic	2018 Pre-pandemic	2020 Pandemic	2022 Post-pandemic	All sectors 2022
1	Limitation of Liability	Limitation of Liability	Limitation of Liability	Limitation of Liability	1 Limitation of Liability
2	Indemnities	Indemnities	Cybersecurity / Data Privacy	Indemnities	2 Price / Charge / Price Changes
3	Intellectual Property	Intellectual Property	Indemnities	Cybersecurity / Data Privacy	3 Indemnities
4	Service Levels	Price / Charge / Price Changes	Termination	Price / Charge / Price Changes	4 Liquidated Damages
5	Payment / Payment Options	Delivery	Payment / Payment Options	Termination	5 Termination
6	Price / Charge / Price Changes	Service Levels	Price / Charge / Price Changes	Intellectual Property	6 Scope and Goals / Specification
7	Warranties	Warranties	Service Levels	Liquidated Damages	7 Payment / Payment Options
8	Delivery	Scope and Goals / Specification	Intellectual Property	Payment / Payment Options	8 Warranties
9	Confidential Info. / Non-Disclosure	Cybersecurity / Data Privacy	Responsibilities of the Parties	Confidential Info. / Non-Disclosure	9 Cybersecurity / Data Privacy
10	Invoices / Late Payment	Termination	Scope and Goals / Specification	Amendments / Changes to Contract	10 Intellectual Property



Tech. and software sector top 10 compared to all sector average (2022)

## Some old habits die hard (continued)

By comparison, the list of terms that negotiators deem **most important** has changed, though it appears somewhat out of step with the suggestions of increased collaboration, greater risk sharing and improved data exchange.

There is some suggestion that the ‘increased collaboration, data sharing and communications’ are evident in more structured and better defined governance frameworks.

There is much to recommend such frameworks and strong arguments to keep them separate from the contract – not least because this allows greater flexibility to make changes and also results in a design that may be more user-friendly. However, if such frameworks are being established, negotiators appear either not to consider them as part of the formal negotiation, or perhaps are not involved in their formation.

**Figure 3. Most Important Terms in the technology and software sector**

	2015 Pre-pandemic	2018 Pre-pandemic	2020 Pandemic	2022 Post-pandemic	All sectors 2022
1	Responsibilities of the Parties	Scope and Goals / Specification	Cybersecurity / Data Privacy	Service Levels	1 Scope and Goals / Specification
2	Scope and Goals / Specification	Responsibilities of the Parties	Scope and Goals / Specification	Acceptance	2 Price / Charge / Price Change
3	Service Levels	Price / Charge / Price Changes	Service Levels	Price / Charge / Price Changes	3 Delivery
4	Delivery	Delivery	Limitation of Liability	Scope and Goals / Specification	4 Service Levels
5	Intellectual Property	Service Levels	Acceptance	Delivery	5 Responsibilities of the Parties
6	Performance	Performance / Guarantees	Intellectual Property	Limitation of Liability	6 Acceptance
7	Guarantees	Limitation of Liability	Responsibilities of the Parties	Cybersecurity / Data Privacy	7 Amendments / Changes to Contract
8	Warranties	Payment / Payment Options	Delivery	Termination	8 Payment / Payment Options
9	Price / Charge / Price Changes	Cybersecurity / Data Privacy	Price / Charge / Price Changes	Indemnities	9 Product Specification
10	Communication and Reporting	Amendments / Changes to Contract	Termination	Product Specification	10 Limitation of Liability



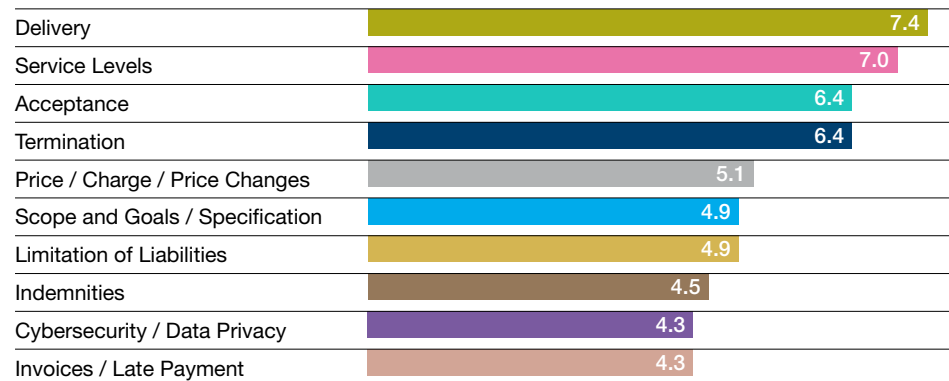
Tech. and software sector top 10 compared to all sector average (2022)

# What goes wrong?

Approximately 4.5% of agreements in the technology and software sector encounter one or more significant disagreements during performance. This is slightly below the all-sector average, but still represents a significant level of risk and exposure. Figure 4, below, shows the terms that most often lie at the core of these disagreements.

Forward-looking organizations – especially suppliers – increasingly monitor these sources of disagreement, appreciating that they are the cause of value loss and damaged relationships. For a few, it is leading to more comprehensive negotiation planning and greater engagement with sales account teams to alter the focus of customer conversations. Intelligent negotiators focus on how to avoid problems, rather than solely on how to protect against their consequences.

**Figure 4. Terms with most significant disagreements (relative frequency)**

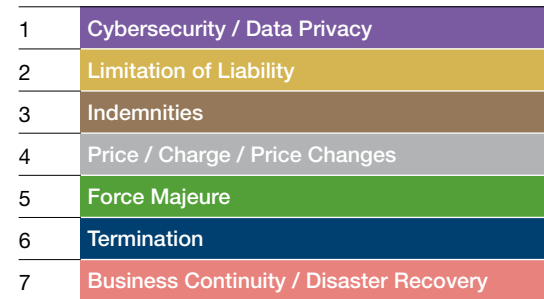


# Impacts of market volatility

2022 was the year of endless **renegotiation**, according to an executive at one technology and services company. WorldCC research endorsed this view, with ‘operational workload’ proving overwhelming for many contracting groups.

What was it that they were kept busy renegotiating? The technology and software sector experienced many issues that were consistent with others, but again there has been more focus on what might be deemed legal risk – as opposed to business risk.

**Figure 5. Most Renegotiated Terms in the technology and Software sector (2022)**



Force Majeure became an issue in many sectors, even if the reality of claims was not always so significant. The technology and software sector actually experienced a much lower average of claims, with 75% of organizations saying there were ‘very few’. Of those they received or sent, the acceptance level was high – 22% made or received ‘multiple claims’ that were mostly accepted.

# Conclusions

Leading organizations are doing things differently. Increasingly, this involves using modern technology to streamline and develop competitive advantage through contracts and negotiations that draw on market intelligence. Look outward, not inward!



## 1. Market intelligence

Are you generating increased negotiation because your positions are unreasonable and out of line with market norms? Investing in market intelligence to access this kind of data and an evaluation of your ‘ease of doing business’ is increasingly easy to achieve. It can cut your frequency of negotiation by 50% or more.



## 2. Consistency of standards

There is growing appreciation of the value that can be gained from the adoption of standards. In areas such as Environmental, Social, and Governance (ESG) compliance and reporting, progress in many ways depends on consistency of approach, certainly within organisations and in some cases across sectors.



## 3. Contract simplification

The steady spread of contract simplification and design recognises that contracts do not need to be documents, they do not have to be written and they do not require ‘legalese’ to be enforceable. A key component of reduced cycle times and improved performance is designing contracts for users; early evidence shows that when organizations make contracts easier to understand, the amount and nature of negotiation changes.



## 4. Intelligent clause libraries

Short-term, technology may be making things more adversarial as organizations standardize and consolidate their contract portfolio, reducing flexibility for negotiators. For most, the idea of the intelligent clause library remains a dream – but it is increasingly achievable and will steadily replace the templates that underpin the traditional ‘battle of the forms’.

## Call-to-action

Plan, Plan, Plan! While there are some negotiators who truly do plan – and seek to move beyond today’s Most Negotiated Terms – they are very much the exception. Most organizations do not have a standardized approach to contract negotiation – they see it and handle it as an exercise in compliance and risk, not as a source of value management. **Perhaps the most important and easily actionable take-away from this report is to consider how your negotiations can shift their emphasis away from ‘the most negotiated’ and towards ‘the most important’.**



### About World Commerce & Contracting

World Commerce & Contracting is a not-for-profit association dedicated to helping its global members achieve high performing and trusted trading relationships. With 75,000 members from over 20,000 companies across 180 countries worldwide, the association welcomes everyone with an interest in better contracting: business leaders, practitioners, experts and newcomers. It is independent, provocative and disciplined existing for its members, the contracting community and society at large.

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### About Icertis

With unmatched technology and category-defining innovation, Icertis pushes the boundaries of what's possible with contract lifecycle management (CLM). The AI-powered, analyst-validated Icertis Contract Intelligence (ICI) platform turns contracts from static documents into strategic advantage by structuring and connecting the critical contract information that defines how an organization runs. Today, the world's most iconic brands and disruptive innovators trust Icertis to fully realize the intent of their combined 10 million+ contracts worth more than \$1 trillion, in 40+ languages and 90+ countries.

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#### Find out how WorldCC can help

We provide members with market insight and data. We can work with you to evaluate your current status and assist in identifying the critical areas for improvement.

If your negotiations are creating long cycle-times and failing to generate the outcomes you want to achieve, WorldCC can help. [Get in touch.](#)