

Most Negotiated Terms 2022

Negotiating in a time of turmoil




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Data for this report came from




1,305 organizations




59 countries

Participants were



52% buy-side and
48% sell-side



22% practising
in-house counsel

Foreword by WorldCC

I believe passionately in the value contracting can provide

After so many years, my aspirations for the future remain undimmed. I know that better contracting leads to better business, yet I also understand why organizations struggle to make lasting changes to the process. What we negotiate is just one indicator of quality and performance – and once again, this report reveals the snail’s pace of progress.

Traditional attitudes to risk continue to dominate business relationships, at the expense of economic value and the adaptability we need to navigate today’s market conditions. Quite simply, we allow the wrong things to dominate our negotiations. ‘Preventism’ rules the day. As a result, contracts are often a source of frustration and prove to be of limited purpose in times of difficulty.

It does not have to be this way and there are growing efforts to change the agenda and the approach. There is no doubt that many of the current problems were created or amplified by technology: now, technology increasingly offers a solution, a path to new thinking and action. WorldCC’s recent benchmark reports spell out much of that journey.

In this, the study of the *Most Negotiated Terms 2022*, we focus on data and analysis. Subsequent reports will examine how we can make change happen, how we can realize the value we are losing as a result of today’s embedded approaches to negotiation.

It may be taking time, but I know there are better days ahead. Will you be among the first to arrive?



Tim Cummins
President
World Commerce & Contracting

Foreword by Icertis

Realizing the contract’s higher purpose

At Icertis, we believe every contract, every clause, has a purpose: be it an incentive that rewards a loyal customer, an investment in a strategic supplier, or a commitment to the communities you serve. 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.

For 20 years, this report has been the definitive look at what clauses contractual parties spend their negotiation capital on. For this year’s survey, the expectation, or at least the hope, was that two years of almost constant global disruption would precipitate a shift in how companies approached their contracts: as not just tools to allocate risk, but to create value and better define the full purpose of their relationships.

Sadly, the data did not bear this transformation out. As detailed in the report, negotiators continue to focus on liability limits, indemnification, and liquidation of damages, rather than value-creation clauses that more clearly define successful relationship and contractual outcomes.

There is promise, however. Throughout the report, you will learn about companies taking a different – often data-driven – approach to their contracts. For example, the Vice President of contract management at one IT company tells WorldCC that their company has been able to leverage data from its contract management system to understand which clauses most often result in disputes. Powered by technology and data, their negotiators have shifted focus to improving and clarifying these clauses, thereby reducing friction in their business relationships.

I’m confident that stories like this 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 like this that advances the art and science of negotiation and achieving the higher purpose of each contract.



Bernadette Bulacan
Chief Evangelist
Icertis

Introduction

Negotiating with purpose

We negotiate to build consensus, close gaps, reach a common position. We do not always succeed: there are times when we discover the gaps are too wide, that they cannot be bridged.

The scope of this report

This report focuses exclusively on the negotiation of contracts between businesses and, to a degree, between businesses and government. It reveals the terms and conditions that dominate those negotiations and the extent to which they vary between industries and jurisdictions.

Its purpose is to help negotiators and business leaders better understand and prepare for contract negotiations. The report highlights 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, to cause businesses to examine and question current practices and identify a better way.

What the report tells us

The report reveals a fundamental divide that compromises many negotiated outcomes. While in all cases the basis for working together is economic, this core purpose often becomes lost in a battle where self-interest dominates over shared interest. While for some, it is to establish a framework for mutual success; for others, it is to build protections against failure.

This divide results in time being spent on what many see as negative or divisive topics – an atmosphere of ‘preventism’ that undermines potential for value and distracts from the conversations needed for strong relationships. Ultimately, it reveals the challenges of establishing trust and collaboration – a fear that consensus may prove short-lived and shared interest is at best fragile. These attitudes are common among those charged with developing and writing contracts, whose work is founded on traditional legal and financial theories of risk transfer and classical law.

How to use these findings

As a benchmark, a planning guide and a strategy review. These are three of the most common uses for the findings contained in this report. We will expand on this in subsequent reports and if you would like to discuss, please get in touch, our contact details are on page 17.

Meaning of the report terms

	Terms believed to be negotiated with the greatest frequency
	Terms believed to impact the most on outcomes or results
	Terms believed to most often cause disagreements or disputes
	Terms that are most changed or renegotiated due to business conditions

Part I: A clear case of inappropriate behavior

As organizations focus on streamlining processes, generating value and operating at speed, the approach to contract negotiations typically lags far behind. Once more, the list of Most Negotiated Terms shows little change and remains dominated by time spent on risk allocation, rather than value creation. We know that many are frustrated by this – for negotiators, repetitively discussing the same topics; for business leaders and sales personnel, because of the delays which they feel should be avoided. Yet, as we will discuss later in the report, weaknesses in negotiation planning and embedded constraints on what we negotiate combine to limit progress.

Figure 1 – Most Negotiated Terms top 30

1	Limitation of Liability	3.1
2	Price / Charge / Price Changes	3.0
3	Indemnities	2.9
4	Liquidated Damages	2.7
5	Termination	2.7
6	Scope and Goals / Specification	2.6
7	Payment / Payment Options	2.6
8	Warranty	2.6
9	Cybersecurity / Data Privacy	2.5
10	Intellectual Property	2.5
11	Responsibilities of the Parties	2.5
12	Delivery	2.5
13	Term (Period / Length)	2.4
14	Service Levels	2.4
15	Confidential Information / Non-disclosure	2.3
16	Amendments / Changes to Contract	2.3
17	Invoices / Late Payment	2.3
18	Performance Guarantees / Undertakings	2.2
19	Acceptance	2.1
20	Insurance	2.1
21	Product Specification	2.0
22	Adherence to Policies*	2.0
23	Regulatory Compliance	2.0
24	Information Access and Management	2.0
25	Applicable Law / Jurisdiction	1.8
26	Force Majeure	1.8
27	Entirety of Agreement	1.7
28	Dispute Resolution	1.7
29	Rights of Use	1.7
30	Right of Delay	1.5

Score basis for Most Negotiated Terms
Average 0–4 scale
0 = Not important
1 = Slightly important
2 = Moderately important
3 = Very important
4 = Extremely important

*e.g. environmental, security, etc.

Part I (continued)

Figure 2 shows the ranking of the Most Negotiated Terms, based on the items identified as being negotiated ‘often’ (in excess of half the time) and ‘always / most of the time’. The top 6 in the column ‘All participants’ have not altered since our last survey in 2020. Cybersecurity and Data Protection is a ‘new entrant’, but largely because they were treated as separate items in previous studies. Intellectual Property has climbed from 12th place and Responsibilities of the Parties has dropped five places from 7th to 12th. The only other significant movement in the top 20 is Service Levels, falling from 11th to 16th.

The slight variations in sell-side versus buy-side perspectives are not of great significance. While it is notable that Warranties does not feature in the sell-side top 10 and Liquidated Damages is absent from the buy-side list, the

actual variation in those saying they are ‘often’ or ‘always’ negotiated is only 5% (60% versus 55% for Warranties) and 6% (53% versus 59% for Liquidated Damages). Of greater significance is the ranking provided by participants from Legal, which shows a distinctly different perception of the terms that are most negotiated. It is, in this context, important to remember that the survey does not ask participants to declare what it is that they personally negotiate most often, but rather to indicate what they perceive to be the terms that are most frequently subject to negotiation with counter-parties. Hence, for example, when buy-side procurement and contracts personnel select Limitation of Liability in top place, this does not necessarily mean that they are directly responsible for negotiating this term.

The impact on forecasting

For one Head of Sales, the Most Negotiated Terms represent a source of friction with his CEO. *“I can resolve questions over the business or technical terms fast and predictably. But when it comes to the legal and risk topics, I have no control. Time after time, my sales and revenue forecasts are derailed because of the redlining and debates going on between opposing legal or contracts teams, who seem to operate to their own agenda. Yet ultimately, it is me who is held to account.”*

My sales and revenue forecasts are derailed by redlining and debates between legal and contracts teams.



Figure 2 – Most Negotiated Terms: Differing Perspectives

	All participants	Sell-side	Buy-side	Legal
1	Limitation of Liability	Price / Charge / Price Change	Limitation of Liability	Limitation of Liability
2	Price / Charge / Price Change	Limitation of Liability	Price / Charge / Price Change	Indemnities
3	Indemnities	Indemnities	Indemnities	Cybersecurity / Data Privacy
4	Scope and Goals / Specification	Scope and Goals / Specification	Payment / Payment Options	Termination
5	Termination	Warranties	Termination	Warranties
6	Payment / Payment Options	Termination	Scope and Goals / Specification	Intellectual Property
7	Warranties	Payment / Payment Options	Liquidated Damages	Confidential Information. / Non-Disclosure
8	Cybersecurity / Data Privacy	Delivery	Responsibilities of the Parties	Responsibilities of the Parties
9	Intellectual Property	Cybersecurity / Data Privacy	Delivery	Liquidated Damages
10	Liquidated Damages	Responsibilities of the Parties	Cybersecurity / Data Privacy	Price / Charge / Price Change

Part I (continued)

At times of tension, double down

First there was the pandemic, promptly followed by large scale supply disruptions and now by inflation and exchange rate volatility. A forecaster would surely have suggested these events would have a sizeable impact on the focus of negotiations. Back in 2020, we assumed that perhaps events were too fresh and survey participants had not yet registered a substantial shift. But as described already in this report, the results in 2022 reveal little fundamental change. When it comes to risk, many negotiators appear to have ‘doubled down’ in their wish to either impose or avoid the financial consequences of failure. This means that 76% find themselves negotiating Limitation of Liability often or all of the time, with 71% saying the same of Indemnities, 60% identifying Termination, 57% Cybersecurity and Data Protection and 56% Liquidated Damages.

Given the volatility of market conditions, it might be expected that clauses such as Business Continuity and Rights of Delay would receive greater attention, but each is cited around 25% of the time and fails to make the top 30 Most Negotiated.

Other areas that corporate policies suggest are viewed as strategically important also struggle – for example, Adherence to Policies (e.g. environmental, social) is in 22nd place, with Governance, Communications and Reporting in 31st and Gainshare / Innovation languishing in 44th.

To be fair, not all contracts are the same – they vary in the products or services they cover, their duration, their scope. Hence not every term is necessarily either present or important in every form of agreement. Yet in times of such uncertainty, it is surprising that topics such as Delivery, Payment and Amendments / Changes to Contract do not feature more frequently. These, along with terms covering Rights of Delay, Assignment and Transfer, are examples of clauses that provide flexibility and offer potential for better management of risk. Many negotiators prefer to avoid terms that support future adaptability, perhaps fearing the way that events may unfold and the rights or obligations these could confer. As we will see in a subsequent section, this often creates a need for revision and renegotiation.

Escaping the swamp

One large business services company is notable because of its very different list of Most Negotiated Terms. *“In the past, we found ourselves stuck in the swamp of liabilities, indemnities, data security – all the traditional topics that quite literally bog us down in almost every negotiation. Most of our clients are large corporates, so we found ourselves in an endless ‘battle of the forms’. It was when we became involved with the WorldCC Contracting Principles¹ that we suddenly saw a glimmer of light – the possibility to do things differently. The Principles provide a reliable view of market norms, an indication of where most negotiations finish up. By introducing these early in the process, we have found that around 70% of our clients are happy to work with us and be guided by the relevant Principle. Typically, this accelerates closure on these topics by 60–80%. We get to deals faster, more harmoniously and free up time for other issues that have more direct business value.”*

1. WorldCC Contracting Principles >

We found that most clients were happy to work with the WorldCC Contracting Principles and typically, this accelerates closure by 60–80%.



Part I (continued)

The curse of the template

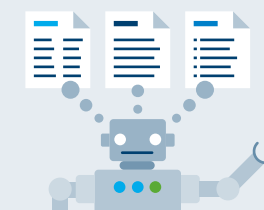
Contract templates have become the norm, with more than 92% of organizations now having adopted them.² Internally, they bring obvious efficiencies and are viewed as a way to reduce risk. However, they have been accompanied by a compliance culture and inevitably add to the ‘battle of the forms’ as organizations each seek to impose their standard on the other. Short-term, technology may be making things more adversarial as organizations standardize and consolidate their portfolio, reducing flexibility for negotiators. For most, the idea of the intelligent clause library remains a dream, yet this is increasingly achievable and will support far less rigid and more streamlined negotiation and approval processes. Equally, as software providers start to embed greater intelligence in their products, organizations will start to benefit from greater visibility into market standards and norms, allowing real-time benchmarking and update of their templates.

Who is driving the agenda?

Contract terms have multiple owners and varying levels of authority to make or agree amendments. While it is entirely appropriate for negotiators to operate within boundaries, many enter into negotiations with little or no ability to alter substantive terms. WorldCC surveys have shown that as many as 57% of negotiations are in fact non-negotiations³ – situations where the counter-party simply seeks to impose their standard terms. In reviewing the most negotiated, elements of this become evident. Among the top 10, Limitation of Liability, Indemnity and Intellectual Property, Cybersecurity, Data Privacy, some aspects of Warranty and Termination are typically ‘powers-reserved’ to the Legal team and this often pushes them to the top of the list. Except in the most significant negotiations, it is unusual for counsel to become involved in the early stages of negotiation – as demonstrated by the differing perspectives revealed in Figure 2, page 6. The fact that the Legal position is often represented by an intermediary with little or no authority inevitably prolongs the process of reaching agreement. In most cases, imposing this barrier is deliberate. It may be due to lack of resource, but it is also driven by the hope that the counter-party will lose patience and agree to the proposed terms.

The contract as a source of differentiation
 ‘Ease of doing business’ is an elusive trait, especially when it comes to ease of contracting. Yet one major technology and services corporation has achieved exactly that through regularly testing its agreements against the market. It utilizes services powered by Artificial Intelligence and Natural Language Processing to undertake comparisons with its competitors, evaluating characteristics such as simplicity of language and structure and the fairness or balance contained in its terms. This comparative data has reduced both the frequency and extent of negotiation.

Artificial Intelligence is being used to compare the simplicity and structure of contract terms – thus reducing negotiation.



2. WorldCC, *Benchmark Report*, 2021

3. Commitment Matters, *Negotiation in an age of automation*, 2020

Part II: Negotiating for marriage or divorce?

The most important terms

Negotiators understand that the terms they often spend most time agreeing are not always the most important when it comes to achieving successful contract outcomes. While the personnel from sellers and buyers have slightly different perspectives on relative priorities, there is a high degree of consistency in the lists of the terms they consider important. In some cases, those differences represent opportunities for bargaining. Once again, the Legal rankings show greater divergence, with Payment / Payment Options in 12th place and Amendments / Changes to Contract in 19th, but overall there is appreciation of the terms that really matter.

As the previous section indicated, many negotiations are dominated by issues that imply a lack of trust and buyers seek to impose negative consequences for failure by the supplier to meet its commitments. This is both a form of

protection and an incentive on the supplier to perform. In situations where the supplier has power, they concentrate their efforts on limiting their commitments and reducing the scale of those consequences. In neither case does this lead to any positive incentives to perform and it is possible that this focus on failure also contributes to elements of vagueness or lack of clarity around critical issues such as scope and goals and roles and responsibilities. This is especially reflected in the views from Legal, where Indemnities and Termination both feature in the top 10, pushing Payment / Payment Options to 12th and Amendments / Changes to Contract to 19th.

Only four of the Most Negotiated Terms feature on the list of the Most Important. Survey participants generally appreciate the need for a different balance and recognize

the typical causes of disagreement (e.g. scope and goals, delivery, service levels, responsibilities) as well as the mechanisms that support managing the contract (e.g. amendments, communication and reporting). It is elements such as these that keep the marriage on-track – so the fact that they are often relegated to lower levels in the negotiation helps us understand why relationships may result in acrimony, if not divorce.

Finally, it is interesting to note some of the lowest ranking provisions, which might be considered critical in addressing recent market conditions. These include Right of Delay (selected by less than 5%), Freight and Shipping (6%), Information Access and Management (8%) and Business Continuity / Disaster Recovery (10%).

Figure 3 – Most Important Terms

	All participants	Sell-side	Buy-side	Legal
1	Scope and Goals / Specification	Scope and Goals / Specification	Scope and Goals / Specification	Service Levels
2	Price / Charge / Price Change	Service Levels	Price / Charge / Price Change	Scope and Goals / Specification
3	Delivery	Price / Charge / Price Change	Delivery	Delivery
4	Service Levels	Delivery	Acceptance	Price / Charge / Price Change
5	Responsibilities of the Parties	Responsibilities of the Parties	Responsibilities of the Parties	Responsibilities of the Parties
6	Acceptance	Product Specification	Amendments / Changes to Contract	Acceptance
7	Amendments / Changes to Contract	Payment and Payment Options	Service Levels	Indemnities
8	Payment / Payment Options	Acceptance	Payment and Payment Options	Termination
9	Product Specification	Performance Guarantees	Limitation of Liability	Product Specification
10	Limitation of Liability	Amendments / Changes to Contract	Product Specification	Limitation of Liability

Part III: Claims, disagreements and disputes

We know that litigation is rare – a non-scientific assessment suggested perhaps 0.0007% of business-to-business agreements end up in court. There are many incentives to limit escalation and settle disputes long before they reach a court. This minute percentage leads us to question why so much time is spent drafting contracts in the expectation of litigation. The costs associated with this approach are likely to far outweigh any benefits. Many may assert that it is the excellence of their drafting that drives early settlement – but there is no evidence to support such a claim.

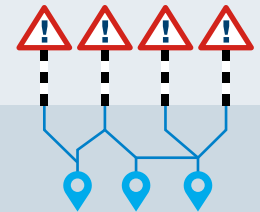
If litigated is rare, how frequent are disagreements? The survey tells us that sellers and buyers have a very similar view – 45% say that 3% or less of their agreements suffer from a serious disagreement, claim or dispute.

But that means 55% of organizations suffer from more than 3% of their agreements generating discord – and 18% suffer from more than one in ten creating contention.⁴ These numbers represent a significant (almost 25%) increase on previous studies and most likely reflect the challenges created by the pandemic and subsequent events. For some, this is generating increased appreciation of the need for better defined governance principles – methods to improve data flows and communications, to streamline decision-making and problem resolution. Meanwhile, this upsurge in discord has translated into a substantial uplift in operational workload – identified as the number one issue facing contract management groups in the WorldCC *benchmark study 2021*.

Improving relationships / streamlining operations

Gaining insight to the most frequent causes of disagreement allowed one software and IT services company to reduce friction points in its post-award contract management by more than 40%. *“We have moved from reactive to increasing proactive management”*, said their Vice President of Contract Management. *“Technology has been the big enabler. It supported monitoring of the issues that most frequently arose. Through this, we were able to undertake diagnostics and map the issues back to root causes. It led us to shift priorities for our negotiators, anticipating the things that could go wrong. With an automated obligation management system now in place, performance risks are identified much earlier, allowing actions to prevent or mitigate their consequences. These days, we don’t just manage our contracts – we learn from them.”*

Technology enabled us to monitor frequent issues, undertake diagnostics and map the issues back to root causes.



4. Legal teams perceive a lower percentage of disagreements, citing an average of 45% and 11% respectively.

Part III (continued)

A key first step in reducing disagreements, claims and disputes is to understand their cause – and Figure 4 helps us with that insight. It also tells us that there is once again some divergence in views, with those in the Legal team having a significantly different view. This is in part due to the topics that most require Legal involvement – for example, Liabilities and Indemnities feature at the top of their list, yet do not feature in the consolidated top 10.

Figure 4 – Most Frequent Sources of Disagreements, Claims and Disputes

	All participants	Sell-side	Buy-side	Legal
1	Price / Charge / Price Changes	Price / Charge / Price Change	Delivery	Service Levels
2	Delivery	Delivery	Price / Charge / Price Change	Limitation of Liability
3	Service Levels	Scope and Goals / Specification	Service Levels	Indemnities
4	Scope and Goals / Specification	Service Levels	Scope and Goals / Specification	Delivery
5	Liquidated Damages	Amendments / Changes to Contract	Acceptance	Termination
6	Acceptance	Force Majeure	Liquidated Damages	Liquidated Damages
7	Amendments / Changes to Contract	Limitation of Liability	Limitation of Liability	Price / Charge / Price Change
8	Force Majeure	Liquidated Damages	Invoices / Late Payment	Invoices / Late Payment
9	Termination	Invoices / Late Payment	Termination	Responsibilities of the Parties
10	Invoices / Late Payment	Indemnities	Payment / Payment Options	Scope and Goals / Specification

Part IV: Coping with chaos – the most renegotiated terms

For the first time, our survey sought to understand which contract terms are most frequently undergoing change or renegotiation. We asked this in the context of the chaotic market conditions created by the pandemic, supply disruption and inflation. In general, the list is easy to understand. It shows that buyers have a strong focus on controlling the price and safeguarding supply; sellers share this concern over pricing, but then concentrate on terms that expose them to financial losses. Legal once more identifies similar topics, but with a different perception of frequencies.

Figure 5 shows the results – and should lead us to ask whether we have the right focus, whether these are the terms that are going to provide the flexibility and governance that we need to manage relationships in these uncertain times, or will tend to reinforce rigidity and positional behavior.

Figure 5 – Terms we are changing or renegotiating

	All participants	Sell-side	Buy-side	Legal
1	Price / Charge / Price Changes	Price / Charge / Price Changes	Price / Charge / Price Changes	Service Levels
2	Limitation of Liability	Force Majeure	Limitation of Liability	Limitation of Liability
3	Cybersecurity / Data Privacy	Limitation of Liability	Cybersecurity / Data Privacy	Delivery
4	Force Majeure	Amendments / Changes to Contract	Force Majeure	Indemnities
5	Indemnities	Cybersecurity / Data Privacy	Indemnities	Termination
6	Termination	Indemnities	Termination	Liquidated Damages
7	Amendments / Changes to Contract	Delivery	Amendments / Changes to Contract	Price / Charge / Price Changes
8	Payment / Payment Options	Payment / Payment Options	Payment / Payment Options	Scope and Goals / Specification
9	Liquidated Damages	Termination	Liquidated Damages	Responsibilities of the Parties
10	Delivery	Bus. Continuity / Disaster Recovery	Delivery	Invoices / Late Payment

Part V: Functions, industries and jurisdictions

The results to this point have distinguished between the sell-side functions of Commercial and Contract Management and the buy-side functions of Procurement, Supply Management and Contract Management. The data for Legal provides a consolidated buy-side / sell-side view.

Logically, since the study is examining the terms that are most negotiated, there should be no significant variation between buyers and sellers. The fact that functional differences exist is relatively easy to understand and explain, reflecting in part, perceptions based on differing interests and priorities, plus the fact that different groups are engaged on different topics.

Sector variations are more interesting and important to understand, especially for anyone from a different sector who seeks to do business with that sector. A future report will examine and explain sector variations in detail, but Figure 6 sets out the terms that have been most renegotiated because of the pandemic and disrupted supply relationships. It compares nine different industries, in each case showing the top 6 terms that were most often renegotiated or changed.

The variations are not difficult to understand. They reflect differences between product-based versus service-based industries and contracts. They are impacted by the level of regulation and the nature and degree of the disruptions experienced.

Jurisdiction is another factor that impacts the nature of the terms that are negotiated, although global business conditions appear at this time to have created greater consistency. Variations are in part due to the underlying legal system – for example, statute, civil or common law – and partly linked to business culture – for example, levels of trust, relational versus transactional. On this occasion, issues around Price, Amendments to Contract, Cybersecurity and Force Majeure have transcended traditional differences. Again, this is an area that will be examined in more detail in a subsequent report.

Figure 6 – Most Renegotiated or Changed, by sector (top-6)

	Aerospace / Defence	Banking / Financial Services	Business Services	Consumer Goods	Engineering / Construction	Legal	Oil, Gas and Energy	Software	Telecoms
Delivery	3								
Force Majeure	2		3	1	4	2	5	4	
Limitation of Liability	4	3	2	5	1	6	2	3	
Cybersecurity / Data Privacy		1	4	4		2		1	1
Amendments / Changes to Contract		5	5	5	4		1		5
Scope and Goals / Specification			6						
Liquidated Damages	5				2		4		
Payment / Payment Options	6			1		6			
Price / Charge / Price Change	1	2	1	2	3		3	4	2
Termination		4	6			5			6
Indemnities					6	3		3	
Invoices / Late Payment			3				5		
Service Levels		6		6					
Term (Period / Length)		6		6					

Part VI – There is always hope: beacons of light

More important- but for what purpose?

There are encouraging signs for the future. According to almost 60% of the survey participants executives care more about contracts than they did in the past. But why?

The reasons for this increased focus appear to vary. For some, it is the sense of frustration that we observed in our first case study – reaching signature takes too long, it slows the business down. Others have recognized that there is important management information in contracts, especially in these uncertain times, and their frustration is the difficulty they have in extracting it. There is a third group, those who sense the value that can be achieved through more integrated data flows, supporting increased business intelligence and decision-making.

The increase is relatively consistent across industries, with only the Education sector and Non-profits and Charities reporting less than a 40% increase and some, such as Oil and Gas, Engineering and Construction and Manufacturing indicating an increase of 70% or more.

Overall, the good news is that greater attention is translating to greater investment, especially in developing digitized processes and implementing tools and systems. These are fundamental to our ability to escape the traditions of contract negotiation and move on from the classical legal theory that continues to dominate many negotiations.

Collaboration is increasing

There is an undercurrent among negotiators that relationships between buyers and suppliers are improving, even if slowly – and over time this should contribute to change in the Most Negotiated Terms. As Figure 7 shows, there is a sense of progress in several key areas and this is broadly shared by buyers, sellers and legal teams.

Figure 7 – How many are observing improvement in key areas

	Sell-side	Buy-side	Legal
Collaboration	64%	54%	49%
Risk-sharing	50%	40%	37%
Transparency	45%	42%	39%
On-going communication and data exchange	65%	59%	58%

There is wide agreement that increased collaboration is critical to achieving overall improvements to speed and the value of negotiated outcomes, so the survey dug deeper into this topic. We wanted to look at it in two dimensions – internal and external – and also the extent of change. Past studies have told us that many negotiators feel constrained by the difficulty of building internal consensus and there is no question that failures of internal collaboration directly affect the possibility of external collaboration. Those studies have also revealed a tendency to blame the other side – “We want to collaborate – it is the counter-party preventing us”. Figure 8 therefore offers important insights. First, it reveals the extent of change, focusing only on those who say the extent of improvement is significant or high. It then confirms this is occurring both internally and externally. And finally, it indicates a similar level of movement by both buyers and suppliers.”

Figure 8 – The state of collaboration

		Sell-side	Buy-side	Legal
Internal	Major improvement	25%	30%	26%
	Getting worse	6%	5%	5%
External	Major improvement	26%	20%	15%
	Getting worse	6%	8%	9%

The data in Figures 7 and 8 is interesting from two perspectives. First, sell-side personnel are in most cases more positive about relationships improving than buy-side and more positive than Legal. There is no immediate explanation for this, although it may be linked to shifts in buyer / supplier power. For example, Consumer Goods / Retail shows a net deterioration of 12% in buyer / supplier collaboration, whereas Oil and Gas shows a net improvement of 32%. Second, the greater sense of internal collaboration reported by buy-side and Legal personnel may indicate that efforts to integrate more with the business are succeeding.

Finally, the jurisdictional analysis also reveals some interesting insights – or perhaps just confirms what we already know. Pre-existing levels of collaboration are highest in countries such as Germany, Japan and Switzerland. Germany and Japan are also better at risk-sharing; communication and data-exchange is highest in Japan. As we dig deeper into findings such as these, it will be interesting to test the extent to which more positive buyer-supplier relationships are linked to greater business success and profitability.

Concluding thoughts

More reports on the way

A subsequent series of reports will focus on the leaders who 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 outwards, not inwards!

Standards and consistency

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

Contract simplification and design

There is a recognition 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 achieved by designing contracts for users. Early evidence shows that when organizations make contracts easier to understand, the amount and nature of negotiation changes.

Intelligent clause libraries, not templates

In the 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’.

From most negotiated to most important

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’.





Appendix – MNT over the years

Rank 2022	Average 0-4 scale 2022	Term	Change from 2020	2020	2018	2015	2014/13	2012	2011	2010	2009	2008	2007
1	3.1	Limitation of Liability	0	1	1	1	1	1	1	1	1	1	1
2	3.0	Price / Charge / Price Changes	0	2	3	3	2	3	3	3	3	3	4
3	2.9	Indemnities	0	3	2	2	3	2	2	2	2	2	2
4	2.7	Liquidated Damages	+6	10	11	10	10	12	8	8	7	9	8
5	2.7	Termination	+1	6	5	11	5	6	5	6	8	8	9
6	2.6	Scope and Goals / Specification	-1	5	4	9	4	8	11	7	6	7	11
7	2.6	Payment / Payment Options	0	7	8	5	9	16	7	18	-	15	15
8	2.6	Warranty	+1	9	12	12	12	4	16	12	14	-	-
9	2.5	Cybersecurity / Data Privacy	+5	14	6	7	8	7	4	4	4	4	3
10	2.5	Intellectual Property	+2	12	10	13	6	20	14	13	12	5	5
11	2.5	Responsibilities of the Parties	-3	8	15	4	15	14	10	5	5	10	7
12	2.5	Delivery	-8	4	13	6	13	11	17	15	13	-	-
13	2.4	Term (Period / Length)	+2	15	16	14	14	17	19	16	19	14	19
14	2.4	Service Levels	-3	11	9	18	17	18	15	5	5	10	7
15	2.3	Confidential Information / Non-disclosure	-2	13	17	17	16	10	13	11	15	12	12
16	2.3	Amendments / Changes to Contract	+1	17	14	15	11	5	6	9	9	11	10
17	2.3	Invoices / Late Payment	-1	16	17	-	-	-	-	-	-	-	-
18	2.2	Performance Guarantees / Undertakings	0	18	7	8	7	9	12	10	11	13	14
19	2.1	Acceptance	New	-	-	-	-	-	-	-	-	-	-
20	2.1	Insurance	-1	19	20	-	-	-	-	-	-	-	-
21	2.0	Product Specification	+1	22	-	-	-	-	-	-	-	-	-
22	2.0	Adherence to Policies (e.g. environmental, security, etc.)	-2	20	21	20	19	13	23	22	22	18	15
23	2.0	Regulatory Compliance	0	23	19	22	18	34	-	-	-	-	-
24	2.0	Information Access and Management	0	24	22	24	20	15	21	19	16	16	17
25	1.8	Applicable Law / Jurisdiction	+5	30	-	-	-	-	-	-	-	-	-
26	1.8	Force Majeure	0	26	20	23	30	27	-	-	-	-	-
27	1.7	Entirety of Agreement	New	-	-	-	-	-	-	-	-	-	-
28	1.7	Dispute Resolution	-1	27	-	-	-	-	-	-	-	-	-
29	1.7	Rights of Use	-1	28	-	-	-	-	-	-	-	-	-
30	1.5	Right of Delay	0	30	-	-	-	-	-	-	-	-	-

Score basis 0 = Rarely / Never 1 = Sometimes 2 = About half of the time 3 = Often 4 = Most of the time / Always

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