

## The Top Negotiated Terms Negotiators Admit That They Are On The Wrong Agenda

This is the 8<sup>th</sup> year that IACCM has conducted its annual survey of the 'most frequently negotiated terms and conditions'. The study attracted a record input from more than 4,000 qualified participants from legal, procurement, contract and commercial management groups worldwide. Almost 1,000 corporations and organizations were represented.

Negotiators tell us that they remain entrenched in fighting traditional battles. The top negotiated terms remain largely unchanged. If anything, the focus has become more protective and risk averse. For example, the biggest mover (up 5 places to number 5) is Confidentiality / Non-disclosure – in a sense oddly symbolic in an era when public pressure is for increased openness and transparency.

And in the end, that is the startling thing about this year's survey. It has become increasingly apparent that what we negotiate is out of step with business needs. This year, we have confirmed that many of the negotiators themselves believe they are negotiating the wrong things.

### **A New Environment Needs New Contracting Practices**

In a series of surveys and follow-on discussion groups, it has become clear that the commitments and obligations required to compete in today's highly competitive and fast-changing environment have changed. Yet the rules and the procedures by which contracts are governed have not. External influences such as regulation have combined with the traditionalism and parochialism of the law to stifle adaptation.

Specifically, the global economy has swung increasingly towards services. Most major manufacturers have sought to avoid the pressures of 'commoditization' by moving towards packaged solutions and services. In addition, new forms of contract relationship – such as outsourcing – have become common. All these relationship types demand outcome-based commitments, weakening the traditional principle of caveat emptor and making the ability to bear and manage risk into a source of competitive advantage.

As if this shift in value propositions were not enough, we have also witnessed an era in which the speed of change has augmented the role and purpose of contracting. Successful deals that deliver economic value require lifetime management. The contract and the process through which it is created and managed become key instruments for relationship governance. Traditional contract standards and the focal areas for negotiation help little in providing such a framework. Liabilities, Indemnities, IP rights, Liquidated Damages are all topics that prepare for failure and disagreement. They are at best negative incentives and in general, imbalance in the negotiated allocation of risk results in an environment of self-protection, constrained information flows and a culture of blame.

So if today's contracts are focused on protection, is that really a bad thing? After all, lawyers and contract negotiators are charged with protecting the company or organization from risk.

The reason today's focus is wrong is because it is lop-sided. It concentrates on assumed failure and does little to establish the framework for success. Therefore it does not manage risk because it fails to enable opportunities, growth, mutual benefit. The focus of negotiation today stifles collaboration and results in many contracts being dangerously incomplete when they are signed. This is because battles over the allocation of risk frequently prolong negotiations and divert attention from the real issues, which are what the parties want to achieve and how best they can do it.

## The Negotiators' View

How do we know that negotiators themselves sense this weakness? Because this year we asked them whether they believed the terms that receive greatest focus today are resulting in optimised business outcomes. And 75% said no.



When asked where negotiating time should be focused, the Top Ten list was transformed to reflect the business reality of a world where agreements are more complex, subject to faster and more regular change, and increasingly focused on services, solutions and outcomes. The 'new' top terms are dominated by the need to ensure certainty over the basic intentions of the deal and then to ensure it remains on track and is adjusted in the face of changed conditions or requirements. This revised focus for negotiations presumes that the parties will establish procedures for more open information flows and greater transparency – implying their intent to collaborate and to work together to manage risks and optimise results. Terms such as liability and indemnities occupy the place they should – as last-resort fall-backs in the event that well-crafted intentions become derailed.

### So what is preventing the change?

Since both buy-side and sell-side negotiators feel similar shifts are desirable, it is perhaps surprising that the current Top Ten shows no sign of movement. But in fact, it seems that few are translating their belief into action – and that is because they feel they are alone in their belief. Two thirds say that they could not achieve this change because the other side would not support it. Large numbers also blame internal forces – term and policy stakeholders who would not allow such a move. Yet our interviews suggest that none have actually tested their hypothesis – they simply assume no one else would be willing to change.

A shift of this sort is not easy. It demands different involvement in the negotiation and probably – for many – much earlier introduction to the team. There are a range of obstacles to this change, but that does not mean they could not be overcome – and the rewards in doing so could be very significant.

In subsequent articles, IACCM will lay out the steps needed for change and will also describe the projects it is undertaking to make this shift possible.

Our first chart reflects the terms most frequently negotiated today (as at Dec 2008 / Jan 2009).

TOP 30 TERMS in 2008		↑↓	2007	2006	2005
1	Limitation of Liability	-	1	1	1
2	Indemnification	-	2	2	2
3	Price / Charge / Price Changes	-	3	4	6
4	Intellectual Property	-	4	3	3
5	Confidential Information / Data Protection	↑	10	7	8
6	Service Levels and Warranties	↑	7	11	10
7	Delivery / Acceptance	↑	9	8	9
8	Payment	-	8	9	4
9	Liquidated Damages	↑	11	10	12
10	Applicable law / Jurisdiction	↓	6	6	5
11	Warranty	↑	13	14	14
12	Service Withdrawal or Termination	↓	5	5	7
13	Responsibilities of the Parties	New	-	-	-
14	Scope and Goals	New	-	-	-
15	Insurance	↓	12	12	15
16	Dispute Resolution	-	16	17	-
17	Change Management	New	-	-	-
18	Audits / Benchmarking	↓	17	18	17
19	Invoices / Late Payment	↓	14	19	-
20	Assignment / Transfer	↓	19	16	16
21	Business Continuity / Disaster Recovery	↑	24	22	19
22	Rights of Use	↓	18	15	-
23	Freight / Shipping	↓	21	21	22
24	Communications and Reporting	New	-	-	-
25	Entirety of Agreement	↓	23	23	21
26	Force Majeure	↓	22	27	20
27	Most Favored Client	↓	20	20	18
28	Export / Import Regulations	-	28	28	23
29	Information Access and Management	New	-	-	-
30	Security	↓	25	24	24

	<b>Top 30 Today</b>	<b>Top 30 in the future</b>
<b>1</b>	Limitation of Liability	Scope and Goals
<b>2</b>	Indemnification	Change Management
<b>3</b>	Price / Charge / Price Changes	Responsibilities of the Parties
<b>4</b>	Intellectual Property	Communications and Reporting
<b>5</b>	Confidential Information / Data Protection	Service Levels and Warranties
<b>6</b>	Service Levels and Warranties	Price / Charge / Price Changes
<b>7</b>	Delivery / Acceptance	Delivery / Acceptance
<b>8</b>	Payment	Limitation of Liability
<b>9</b>	Liquidated Damages	Dispute Resolution
<b>10</b>	Applicable law / Jurisdiction	Indemnification
<b>11</b>	Warranty	Audits / Benchmarking
<b>12</b>	Service Withdrawal or Termination (cause / convenience)	Intellectual Property
<b>13</b>	Responsibilities of the Parties	Confidential Information / Data Protection
<b>14</b>	Scope and Goals	Payment
<b>15</b>	Insurance	Information Access and Management
<b>16</b>	Dispute Resolution	Business Continuity / Disaster Recovery
<b>17</b>	Change Management	Applicable law / Jurisdiction
<b>18</b>	Audits / Benchmarking	Most Favored Client
<b>19</b>	Invoices / Late Payment	Entirety of Agreement
<b>20</b>	Assignment / Transfer	Warranty
<b>21</b>	Business Continuity / Disaster Recovery	Liquidated Damages
<b>22</b>	Rights of Use	Invoices / Late Payment
<b>23</b>	Freight / Shipping	Assignment / Transfer
<b>24</b>	Communications and Reporting	Service Withdrawal or Termination (cause / convenience)
<b>25</b>	Entirety of Agreement	Rights of Use
<b>26</b>	Force Majeure	Other
<b>27</b>	Most Favored Client	Insurance
<b>28</b>	Export / Import Regulations	Product Substitution
<b>29</b>	Information Access and Management	Enterprise Definition / Future Acquisitions / Divestiture
<b>30</b>	Security	Freight / Shipping

This second chart shows the views of negotiators worldwide regarding the areas that should receive greater focus in order to derive better business outcomes. This consolidated view disguises the variations between buyers and sellers, between functional groups, between jurisdictions and industries. It is those differences and their implications that we will describe in subsequent reports.