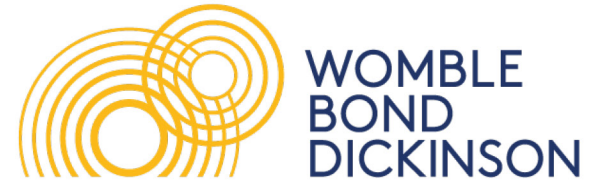


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ACGC In-House Legal Skills Institute

Negotiating skills for in-house teams

2 December 2021



Commercial contracts: risk and price

- A contract cannot alter the amount of risk in a deal
- A contract can:
 - Identify
 - Allocate, and
 - Price risk
- If risk is inaccurately identified or inappropriately allocated, the price must be wrong

Commercial contracts: risk and price

Price is what you pay: value is what you get

Warren Buffet

- What is the commercial lawyer's role in relation to:
 - Price
 - Risk
 - Value



Approaches to negotiation: what is your client's style?

Distributive?

- Win/lose
- Competitive
- Zero sum

Integrative?

- Win/win
- Collaborative
- Value creating/enhancing

I reread "*The Art Of The Deal*" today in anticipation of this discussion. And when you look even at his own book, in the pure real-estate environment, it did serve him well. But when the deals that he was seeking went beyond simple real estate purchase and sales, ownership of a professional football team or his casinos, where the deals were more complex and had a lot more involved than just buying and selling something of value, they did not ultimately work out well for him. Sometimes, you have to deal with people again. And if you've taken them, or they feel like they've been taken, they're not going to deal with you again. You can do that with a cabinet maker who put the cabinets in your hotel or casino because you can find another cabinet maker. But you can't find another Canada. You can't find another China.

David Honig, Attorney and Adjunct Professor, Indiana University



Key concepts in negotiation

- BATNA
 - Best alternative to negotiated agreement
- How does BATNA relate to (or differ from)
 - Bottom line
 - Red line/reservation?
- ZOPA
 - Zone of Possible Agreement

BATNA

- BATNA is your *best alternative to a negotiated agreement*—that is, what you'll do if you don't reach your goal in the current negotiation.
- A job seeker's BATNA might be another job or the decision to go to grad school, for example.
- You can try to improve your BATNA in distributive bargaining by researching the various alternatives available to you and perhaps pursuing several negotiations at the same time. For instance, a job seeker is likely to ask for more when they have two or three good offers when they just have one.
- (Professor Leigh L. Thompson, *The Mind and Heart of the Negotiator*)



Reservation point

- In a distributive negotiation, your reservation point is the figure that indicates you are indifferent between accepting the deal you've negotiated and instead turning to your BATNA.
- For example, you might decide you are willing to pay up to \$4,000 for a particular used car, but will walk away if the other party insists on more than \$4,000.
- It's important to determine your reservation point *before* you negotiate, as there's a good chance your counterpart will try to convince you to accept less than you should. When you know what your reservation point is in advance and keep it at the forefront of your mind, you will be less likely to cave in to unreasonable demands.



Assess the other party's BATNA and reservation point

- Before negotiating for a particular used car, you might research the availability of similar cars in your area and their market value, determine how long the car has been for sale, and so on. When you know how low (or high) they may be willing to go on price, you'll have a better sense of how high (or low) you can aim.

Assess ZOPA

- Armed with a sense of each party's reservation point and BATNA, you should be able to determine if a *zone of possible agreement*, or ZOPA, exists in your negotiation.
- ZOPA is the range of all possible deals that both parties would accept. Your reservation point will be at one end of the ZOPA, and the other party's reservation point will be at the other.
- For example, if you're willing to spend up to \$4,000 on the used car you're interested in and believe the seller might be willing to part with her car for \$3,700, the ZOPA ranges from \$3,700 to \$4,000.
- If there is no overlap between your reservation point and the other party's (for example, if you won't pay more than \$4,000 and they won't take less than \$4,100), then you should look for a better deal elsewhere.

Integrative negotiation

- Relationship building and trust
- Is there:
 - One deal?
 - A range of possible deals?
 - A menu of potential deals based on breaking the problem down into component parts?
- SaaS as an example?
- **Legal note:** offering price-adjusted alternatives during negotiation can help to validate the finally agreed clause:
Goodlife v Hall Fire Protection [2018] EWCA Civ 1371

Our role

- How far are we involved in setting (or adjusting) the commercial terms of a deal?
 - Term sheets or Heads of Terms?
 - Structure of the deal (eg asset or share sale)?
 - Price or price adjustment?
 - Timing of the deal (eg completion deadline)?



Our role

If we have no (or limited) involvement in setting the commercial terms of a deal, then what is our role in negotiation?



Factors affecting commercial negotiations



Factors affecting commercial negotiation

- What factors might determine the timescale or deadlines for a commercial transaction?
- Whose problem is a missed deadline?
- How might deadlines affect a party's negotiating position?
- How might a tight deadline affect the structure and terms of a commercial deal?

Factors affecting commercial negotiation

- Time?
- Cost?
- Extent of due diligence/materiality threshold
- Competitive pressures (eg speed to market, ICOs)



Factors affecting commercial negotiation

- How might you use the following contract terms to protect your client's commercial position?
 - Warranties and representations?
 - Service level agreements and/or Key performance indicators?
 - Retention from price?
 - Price adjustments?
 - Recitals and background clauses?

Factors affecting commercial negotiation

- Discussions with your client have identified as the most important point in the proposed contract with the Supplier of touchscreen components the delivery deadline of 31 March 2022.
- What contract clauses might you consider to incentivise the Supplier to meet that deadline, or to deter them from missing it?

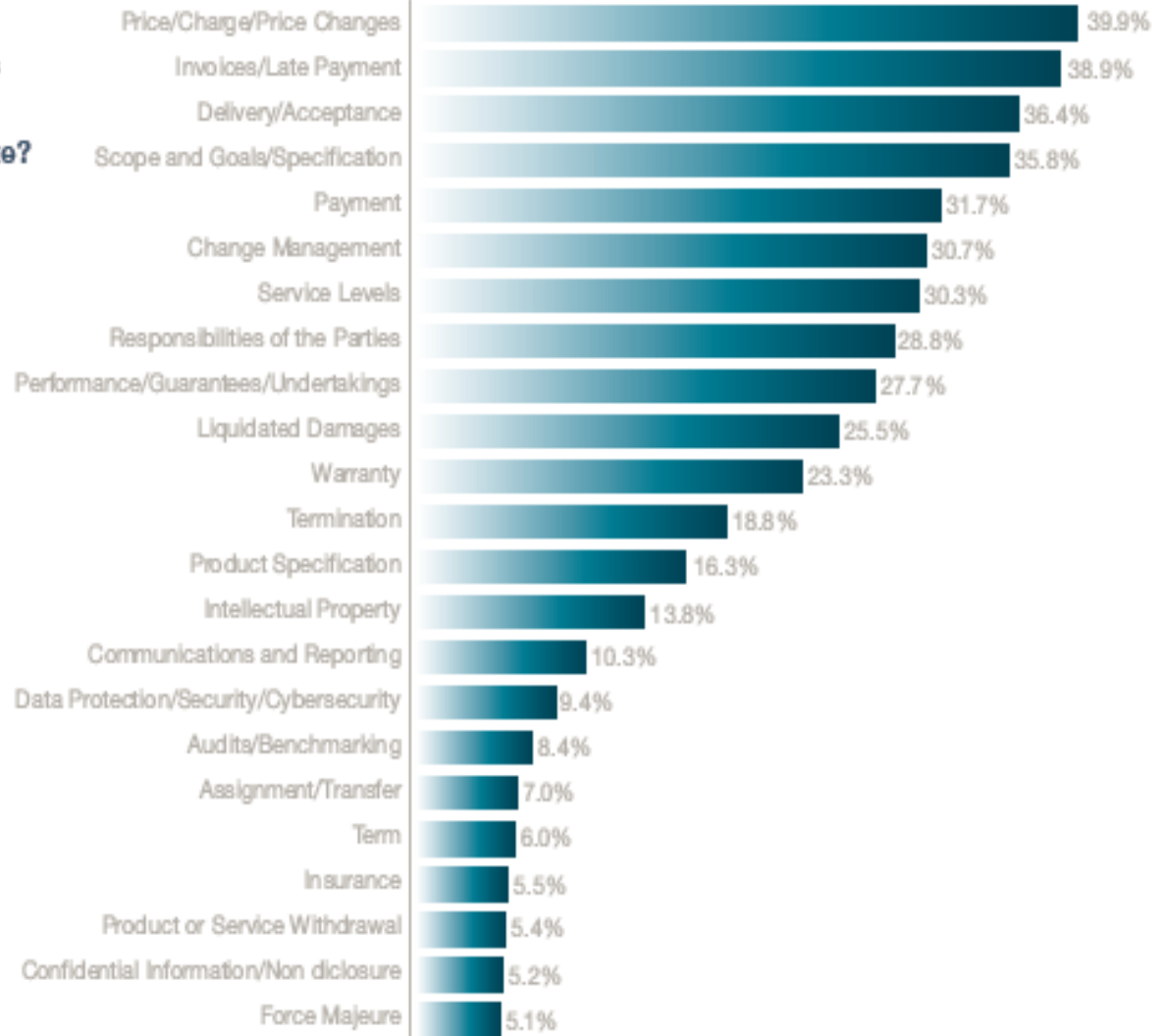
Most negotiated v most litigated



Chart 1: The top 30 'most negotiated terms' (based on surveys undertaken by IACCM during 2018, with replies representing more than 8,000 negotiators based in over 120 countries).

Year	2018	2015	2014/2013	2012	2011	2010	2009	2008	2007
1 Limitation of Liability	-	1	1	1	1	1	1	1	1
2 Indemnification	-	2	3	2	2	2	2	2	2
3 Price / Charge / Price Changes	-	3	2	3	3	3	3	3	4
4 Termination		9	4	8	11	7	6	7	11
5 Scope and Goals / Specification		11	5	6	5	6	8	8	9
6 Warranty		7	8	7	4	4	4	4	3
7 Performance / Guarantees / Undertakings		8	7	9	12	10	11	13	14
8 Payment		5	9	16	7	18	-	15	15
9 Data Protection / Security / Cybersecurity		18	17	18	15	5	5	10	7
10 Liquidated Damages		13	6	20	14	13	12	5	5
11 Delivery / Acceptance		10	10	12	8	8	7	9	8
12 Responsibilities of the Parties	-	12	12	4	16	12	14	-	-
13 Intellectual Property		6	13	11	17	15	13	-	-
14 Invoices / Late Payment		15	11	5	6	9	9	11	10
15 Service Levels		4	15	14	10	5	5	10	7

During the post-award phase of contract performance which terms are, in your experience, the most frequent cause of a claim or dispute?



How to lose by “winning”



Allocation of risk

- Public-Private Partnership (PPP or P3) contracts
- UK PFI report 2012:
 - PFI contracts failed because government/public sector passed to private sector risks more suitable borne by public sector, eg contaminated land costs.
 - Consequences: price increased along with risk of breach.
 - Increased risk of breach led to early renegotiation/waiver of key obligations
 - Altered balance between parties due to procurement risk.

Price adjustment

- Commercial lease rent reviews
- England and Wales, rent reviewed on “open market” basis
- Process assumes a “hypothetical lease” granted on the rent review date, based on the terms of the actual lease.
- “Onerous” terms likely to result in a discounted rent (because parties in the open market would be unlikely to accept onerous terms without a reduced rent).

International contracts



Mapping key factors in international deals

- Governing law and jurisdiction
- A jurisdiction clause refers to the parties' choice of court in the event that a dispute arises. The choice of jurisdiction is important because:
 - it allows parties to avoid certain courts if they wish
 - it can save the time and cost of debating jurisdiction in the event of a dispute
 - it can increase the possibility of enforcement of a court judgment
 - in the absence of an effective jurisdiction clause, jurisdiction will be determined either by the appropriate rules or regulations

Governing law and jurisdiction

- Governing law and jurisdiction are separate concepts
 - Singapore International Commercial Court
 - Dubai International Financial Centre
 - London commercial court financial list
- *Conductive Inkjet v Unipixel* [2013] EWHC 2968 (Ch)
 - Parties could not agree on a jurisdiction clause, so left it out
 - Where was the contract formed?
 - Contract formed by (eg) email can in principle be made in two places at once
- Restricted choice depending on place of incorporation?



Good faith in negotiation

- Is there a duty to negotiate commercial contracts in good faith?
- If so, what does it mean in practice?

England and Wales
Walford v Miles [1992] 2 AC
128

- No duty to negotiate in good faith
- Agreements to agree are unenforceable

Singapore
*HSBC Institutional Trust
Services v Toshin* [2012]
SGCA 48

- an express agreement to “negotiate in good faith” could be enforceable



Good faith in negotiation

French civil code, Article 1104 (in force 1 October 2016 states:

“Les contrats doivent être négociés, formés et exécutés de bonne foi. Cette disposition est d’ordre public.”

US Uniform Commercial Code in the United States, says (in §1-304):

“Every contract ... imposes an obligation of good faith in its performance or enforcement.”

US Restatement (Second) of Contracts says (in §205):

“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”

Closer to England and Wales position



Good faith in negotiation

- Delaware Supreme Court's decision in *SIGA Technologies Inc. v. PharmAthene Inc.* (Dec. 23, 2015) has increased the risk associated with entering into a “preliminary agreement”— i.e., an agreement to negotiate in good faith a definitive agreement based on, for example, a term sheet or letter of intent, where some material terms have been set forth and others remain to be negotiated.
- expectation damages based on lost profits may be awarded for breach of a preliminary agreement based on a lower standard of proof with respect to the amount of damages than would generally apply.



Good faith in negotiation

- The Court held that, so long as the court finds that, but for the breaching party's bad faith negotiations, the parties would have reached a definitive agreement, "less certainty is required of the proof establishing the amount of damages" than would apply in the case of breach of a fully negotiated and executed agreement.
 - (Philip Richter, Fried, Frank, Harris, Shriver & Jacobson LLP, Harvard Law School Forum on Corporate Governance and Financial Regulation, Wednesday, January 27, 2016)

Good faith in negotiation: Delaware practice points

- Parties to an agreement to negotiate in good faith should consider whether to seek to negotiate the type of damages that would apply in the case of a breach –eg expressly exclude the possibility of expectation damages, or provide for reliance damages or a specified amount of liquidated damages, in the event of a breach.
- "Potential for expectation damages likely will change the game theory involved in breach of an obligation to negotiate an agreement in good faith... The real potential in Delaware for expectation damages for breach of an obligation to negotiate an agreement in good faith should change the calculus for a party considering whether to breach this type of obligation".
- Delaware's approach to expectation damages differs from (eg) New York or California



Good faith in negotiation: Delaware practice points

- A term sheet should be explicit as to the extent to which it is or is not intended to be binding.
- In SIGA, the fact that the footer of the LATs stated “Non-binding terms” was not sufficient to make the express obligation in the merger agreement to negotiate an agreement based on the term sheet non-binding.



Same language, different understanding

- Liquidated or ascertained damages
- Penalty?
 - **England and Wales:**
 - *Cavendish v Makdessi* [2015] UKSC 67. "Out of all proportion"
 - **India:**
 - Indian Contract Law Act 1872, s 74 as interpreted by the Supreme Court in *Kailash Nath v DDA* (2015) 4 SCC 136
 - **Malaysia:**
 - Contracts Act 1950, s 75
 - **Singapore:**
 - genuine pre-estimate of loss?



Same language, different understanding

What is the difference between:

Indemnify

Defend and indemnify

Hold harmless

Make good

Beyond negotiation



Figure 1

The good practice contract management framework





Technology



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