

Most Important Terms 2022/23

Negotiating for marriage or divorce?



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Introduction

This report provides generic guidance on the areas that are typically of greatest importance when negotiating a contract. It contrasts these with the terms that are currently the most negotiated and explains the benefits that a shift in focus can deliver. The call to action provides access to methods and resources that support you in moving from today's most 'negotiated' terms towards those that are most 'important' and thereby improve your success in delivering positive business outcomes.



Tim Cummins
President
World Commerce & Contracting

Data for this report came from



1,305 organizations



59 countries

And the participants were



52% buy-side and
48% sell-side



22% practising
in-house counsel

What are the Most Important Terms?

Since 2002, World Commerce & Contracting has undertaken research to establish which contract terms are most frequently negotiated. The data represents the experience of thousands of contract negotiators involved in establishing business-to-business and business-to-government agreements.

Over the years, there has been remarkably little change in which terms are most negotiated. Specific economic, geopolitical and regulatory events may have a temporary impact. There are also some long-lasting trends, such as the steady shift from products to services, that result in a sustained shift. Data protection, cybersecurity and service levels are examples of these.

[View the report Most Negotiated Terms 2022.](#)



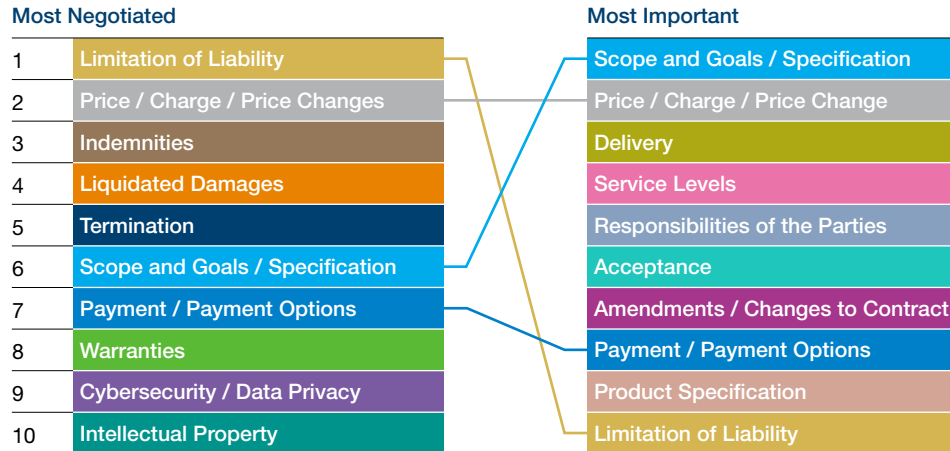
Many might assume that the Most *Negotiated* Terms would be identical to those that negotiators consider Most *Important*. But, as Figure 1 shows, they would be wrong. In fact, only four of the top ten Most Negotiated Terms feature in the top ten Most Important Terms. However, let's be clear, the fact that many of the Most Negotiated Terms do not feature high in the list of the Most Important, does not mean that they are unimportant.

This report explains why this discrepancy exists, why it matters, and what steps can be taken to achieve greater alignment.

Sally Guyer, WorldCC Global CEO, explains why the difference exists.



Figure 1 – Most Negotiated versus Most Important Terms (all participants)





Most Important Terms by sector

Figure 2 shows the variation of the Most Important Terms between sectors. There is a high level of consistency in which terms are in each sector’s top ten. However, the main variation is in the *ranking* of importance for each term.

This insight is especially valuable for cross-sector negotiators. Understanding what most matters to your counter-party prepares you for key discussion points, assists your planning and provides ideas for possible trade-offs.

Several obvious factors influence the lists – for example, the extent of regulation affecting the sector, or whether the typical negotiation relates to a product or a service, or whether there is significant likelihood of a change in requirements.

Figure 2 – Most Important Terms by sector

	All sectors	Government and public sector	Banking, insurance and financial	Services, outsourcing and consulting
1	Scope and Goals / Specification	Service Levels	Service Levels	Price / Charge / Price Change
2	Price / Charge / Price Change	Governance, Comms. and Reporting	Scope and Goals / Specification	Scope and Goals / Specification
3	Delivery	Scope and Goals / Specification	Price / Charge / Price Change	Delivery
4	Service Levels	Delivery	Acceptance	Service Levels
5	Responsibilities of the Parties	Price / Charge / Price Change	Cybersecurity / Data Privacy	Amendments / Changes to Contract
6	Acceptance	Product Specification	Responsibilities of the Parties	Responsibilities of the Parties
7	Amendments / Changes to Contract	Responsibilities of the Parties	Termination	Governance, Comms. and Reporting
8	Payment / Payment Options	Amendments / Changes to Contract	Delivery	Acceptance
9	Product Specification	Information Access	Governance, Comms. and Reporting	Intellectual Property
10	Limitation of Liability	Acceptance	Payment / Payment Options	Payment / Payment Options
	Engineering, construction, real estate	Oil, gas and energy	Technology and software	Telecommunications
1	Scope and Goals / Specification	Price / Charge / Price Change	Service Levels	Scope and Goals / Specification
2	Price / Charge / Price Change	Scope and Goals / Specification	Acceptance	Acceptance
3	Amendments / Changes to Contract	Amendments / Changes to Contract	Price / Charge / Price Change	Service Levels
4	Delivery	Payment / Payment Options	Scope and Goals / Specification	Responsibilities of the Parties
5	Payment / Payment Options	Delivery	Delivery	Delivery
6	Responsibilities of the Parties	Product Specification	Limitation of Liability	Price / Charge / Price Change
7	Liquidated Damages	Responsibilities of the Parties	Cybersecurity / Data Privacy	Amendments / Changes to Contract
8	Limitation of Liability	Acceptance	Termination	Payment / Payment Options
9	Product Specification	Warranties	Product Specification	Governance, Comms. and Reporting
10	Performance Guarantees	Limitation of Liability	Indemnities	Termination

Why is there a difference?

The previous page illustrates how priorities vary between sectors and suggests reasons for the variations. Cultural and jurisdictional factors also play a role. For example, in countries operating under Statute Law, certain terms may be considered non-negotiable. In others, contracts themselves may be viewed as having limited relevance and ‘the relationship’ is seen as the critical mechanism for managing performance and resolving disagreements.

More broadly, even in environments where contracts are deemed important, negotiation is often a team sport and different stakeholders have different views about which terms matter.

[John Dieffenbach](#), leader in Ernst & Young’s Strategic Deal Management team, explains.



The list of the Most Negotiated versus the list of Most Important Terms illustrates a conflict between the need to protect the business – its core assets – potentially competing with the need to achieve value and growth. To succeed, contracts and their negotiation have a need for balance, but organizations do not always get it right. If stakeholders fail to work together, or if there is an imbalance in their power and authority, this often becomes evident in the contracts they produce.

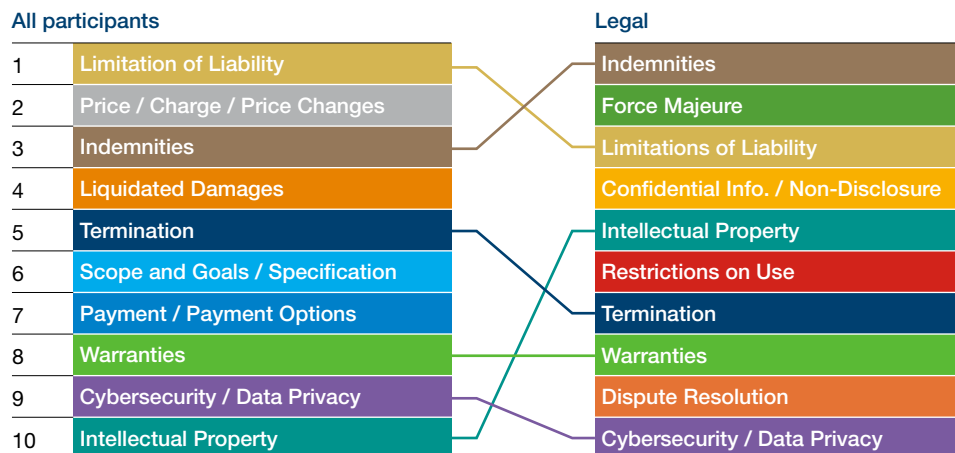
As an example, Figure 3 shows a typical legal view of the terms that are most important and contrasts with the more business-oriented view of overall survey participants. The legal perspective is shaped by a concern over asset protection and a classical view of risk transfer. To quote one source: *“Your contracts govern your relationships between your business and employees, suppliers and clients; it is important that they are designed to protect your business and mitigate risk”*.

While few would dispute this statement, most non-lawyers see risk in a far more balanced way. In other words, they are equally concerned about achieving success and want to focus on terms that help achieve a positive outcome.

[Hal Bretan](#), former Chief Counsel at BT Americas, explains the importance of good stakeholder management.



Figure 3 – Most Important Terms (overall versus legal)



Source: Ironclad, Important Contract Clauses to Include in Business Contracts.

Why does this matter?

Contract terms have a role in both underpinning success and dealing with the consequences of poor performance or failure. This contrast is evident in the comparison between:

- **Most Negotiated Terms** which are strongly focused on consequences of failure; and
- **Most Important Terms** which are more strongly focused on factors that support success.

Therefore, achieving the right balance clearly matters.

Classical legal theory, which also influences financial thinking, tends to focus on risk mitigation and transfer. This is reflected in many of the Most Negotiated Terms which, by their nature, represent a ‘win-lose’ rather than ‘win-win’ proposition. This inevitably introduces a level of contention, rather than collaboration. In contrast, many business people are more focused on ensuring clarity and building consensus; their goal is to avoid disputes and to achieve this, they appreciate the need to focus on the sources of disagreement, rather than their consequences.

In principle, organizations should be able to achieve a balance between the ‘Most Important’ and the ‘Most Negotiated’. But time and resources are often limited and choices must be made. Negotiations are frequently driven by competing standards – the famous ‘battle of the forms’ – where each side starts from a position of self-interest and slowly moves to a position of consensus.

Hence, this discrepancy between the ‘Most Negotiated’ and the ‘Most Important’ matters because it:

- creates delay
- absorbs resources and generates avoidable operational workload
- distracts from creating contracts that provide a framework for success
- increases the likelihood of subsequent performance issues and disagreements.

[Tim Cummins describes the impacts of the wrong focus.](#)



Negotiators appreciate the value of greater collaboration and believe in the merits of a ‘win-win’ approach. The state of collaboration data from the report [Most Negotiated Terms 2022](#) (see Figure 4) showed signs of optimism though this increased sense of growing collaboration has yet to reflect in the terms that are most frequently negotiated.

Figure 4
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%

Call to action: how to improve

Making the shift in focus from the current Most Negotiated Terms to the Most Important Terms has the potential to deliver tangible business benefits:

<p>Speed to contract Organizations have reported up to 50% reduction in negotiation cycle time</p>	
<p>Productivity Functions responsible for negotiation can achieve up to 12% reduction in workload</p>	
<p>Reduction in value erosion Greater clarity, less ambiguity result in fewer post-award claims and disagreements</p>	

The obvious question is how these benefits can be achieved. Working with its members, WorldCC has identified four major initiatives that contribute to effective change. These are:

1. Contract simplification and design
2. Proactive legal thinking
3. Establishing a balanced position on contract terms
4. Improved planning.

1. Contract simplification and design

Traditional forms of contract are difficult to navigate and to understand. This is easily demonstrated by simple tools such as the easily accessed and free to use Flesch-Kincaid readability test. You will find multiple websites offering access. [Find out more about Flesch-Kincaid at: wikipedia.org](https://en.wikipedia.org/wiki/Flesch-Kincaid_readability_test)

There is no legal requirement to draft or structure contracts in a way that makes them hard to read and use. By taking this approach, organizations often ensure that contract documents are rapidly passed to experts for review, resulting in inevitable delay and increasing the chance of negotiation. A global telecoms company achieved a 60% reduction in negotiation when it shifted from traditional agreements to an easily understood brochure. WorldCC provides an open access contract design library that provides ideas and approaches. [To find out more about contract design visit: contract-design.worldcc.com](https://contract-design.worldcc.com)

By making contracts more integrated and easier to use, business people start to view them in a more positive way and appreciate that they are not solely, or even primarily, legal instruments, but can be used as operational guides. This increases attention and focus on ancillary areas, such as the quality of the Statement of Work or clarity over the responsibilities of the parties – both areas that are fundamental to performance and the avoidance of disputes.

Contract design expert Stefania Passera explains the benefits of contract simplification and design.



PLAY VIDEO



2. Proactive legal thinking

Traditionally, the steps in providing legal care have resembled those of medical care – diagnosis, referral and treatment. This is a reactive model, waiting for a problem to occur and then fixing it. It is this model that drives today's Most Negotiated Terms, which in large part prepare for failure and dealing with its consequences.

Proactive law is a future-oriented approach where securing a successful business outcome is the primary goal. It puts users in the center, viewing achievement of their objectives as the primary purpose of commercial contracts. The focus shifts from one-sided safeguarding and liability limitation to ensuring clear expectations regarding the important terms such as scope and goals, price and delivery. This approach requires legal skills and knowledge to be used not only to prevent harm, but also to promote desirable agreements to better prevent or resolve disputes. This is in part achieved by better understanding the causes of claims and disputes, thereby reducing the frequency of problems.

Proactive law requires internal collaboration and analysis, creating increased alignment between the legal team and other business functions. It also promotes contracts that are easy to translate into action - making contract simplification and design a critical step in bringing proactive legal thinking into practice.

Helena Haapio, a pioneer of proactive legal thinking, tells us more about this topic.



PLAY VIDEO



See more content on this topic at: lexpert.com

Call to action: how to improve (continued)

3. Establishing a balanced position on contract terms

A WorldCC member in the manufacturing and technology sector recently commissioned a benchmark study of its contracting process. This revealed that contract negotiation occurred with approximately 45% greater frequency compared with others in their sector. The reason for this was that their terms were out of line with market norms.

This finding contrasts with the experience of a large business services company which typically negotiates more than 30% less frequently than its competitors. Their success has been enabled by the adoption and use of the WorldCC Contracting Principles. [Find out more about our Contracting Principles at: worldcc.com](#)

The Contracting Principles are not model contract terms; they are guidelines to assist organizations in better understanding what is 'market', with particular focus on the terms that are most frequently negotiated. Based on collaborative review by lawyers representing both buy-side and sell-side perspectives, the Principles reflect a balanced position – the place where most negotiations are concluded. As such, they can assist in avoiding or reducing the time taken to negotiate.

[Watch Hal Bretan again, lead developer of the WorldCC Contracting Principles.](#)



Artificial Intelligence also has the potential to transform contract negotiation. Using technologies such as Natural Language Processing, it is possible to undertake large scale analysis of contract norms and standards. As a result, an organization can easily test and compare its standard terms against those of others in its sector, or the market more generally. Such insights can be used to support update or rework on a much more frequent basis than in the past. For example, one major IT services and software company undertakes quarterly reviews in order to stay ahead of its competitors and has seen steady improvements in customer ratings of 'ease of doing business'. Indeed, top management views this as a source of competitive advantage.

WorldCC members have the opportunity to test these analytical tools through free access to TermScout and its Scout Plan. [Find out more at: term scout.com](#)

4. Improved planning

To make the transition, we must understand what terms are most important and this requires effective methods of analysis and planning. As several of our experts have emphasized, good planning is an inclusive team activity – we must engage the right stakeholders and take their views into account in determining the priority areas and setting targets.

[Negotiation guru Keld Jensen outlines an approach to improve planning and set up your negotiations for success.](#)



Conclusion

The Most Negotiated Terms are a consequence of traditional business and legal practice, reflecting a reactive model of protection based on risk allocation. Today, through a combination of greater insight supported by modern technology, we have the opportunity to move towards a more collaborative approach which offers significant benefits, in particular with regard to speed, efficiency and improved performance.

[Ecovadis' Head of Sales outlines the benefits they achieved from reimagining contracts.](#)



As explained in the introduction, this report provides generic guidance on the areas that are typically of greatest importance when negotiating. It should be used to encourage internal conversations, such that negotiators establish consensus over what terms are most important in any specific situation and that they develop an approach that ensures this is where focus is placed. The report explains the benefits that a shift in focus can deliver and outlines methods and resources to make a shift from today's 'Most Negotiated Terms' towards those that are 'Most Important' in delivering successful business outcomes.



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.



Tim Cummins, President
tcummins@worldcc.com

Sally Guyer, Global CEO
sguyer@worldcc.com

General or media enquiries
info@worldcc.com

www.worldcc.com

