Commerce & Contract Management Institute

Most Negotiated Terms 2026

The conflicts and confusions of the modern negotiator

In collaboration with

SIRION

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Premise

The terms we fight over are not those that matter

For the last four years, and on the evidence of the past 25, negotiators have spent most effort on the same handful of risk-transfer terms, none of which is where disputes actually arise.

Our views of success are too limited

Most see success as closeness to a standard or approved position, protected margin or a negotiated price reduction.

AI is quietly cementing the problem

56% of negotiators now use Artificial intelligence (AI), yet the most negotiated terms have not moved, and more than three-quarters say AI has never even shown them which terms they most negotiate. Trained on the past, and without the right context, it is following the same habits faster.

The profession thinks it is changing – but its contracts say otherwise

Commerce & Contract Management Institute (CCM Institute)'s July 2026 report *Win-Win or Just Winning?* reveals that nearly half believe they are being more collaborative than they are, but the data shows the opposite has held steady. That report also tells us that only 16% are ever incentivized to measure those win-win outcomes.

The cost lands on the middle market

As we discovered in our *Most Negotiated Terms 2024* report, this constrains innovation so in the end, the whole market pays.

Respondents

This report is based on a survey which ran from March to August 2026, and drew inputs from 1,344 respondents.

Buy- and sell-side

51% Buy-side

49% Sell-side

Top sectors

14% Aerospace and defense

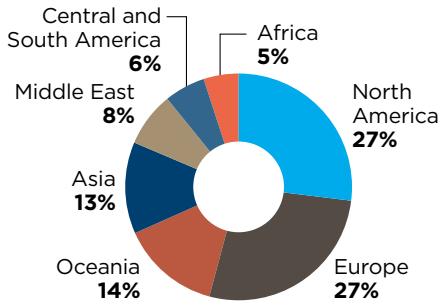
9% Business services and consulting

9% Government and public sector

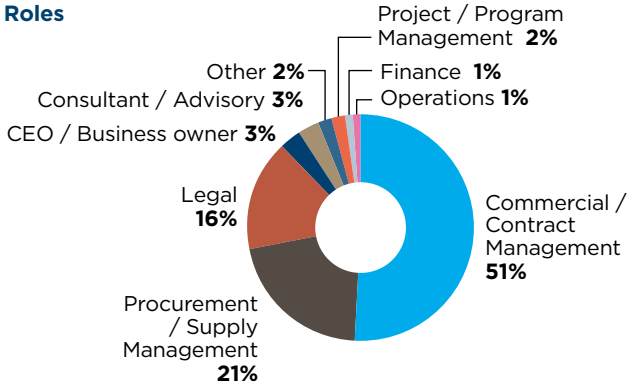
9% Engineering and construction

8% Technology and software

Regions



Roles



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Introduction

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We start this report with a reflection, with a call to think differently.

The purpose of negotiation is to achieve alignment, to reach a point of agreement or to establish that there is no mutually acceptable position. To the extent that it helps us make the right choice, to ensure shared understanding, to identify opportunities not previously considered, that is a good thing. Let's call this Type A negotiation.

But negotiation for its own sake, where it brings no meaningful value and could easily have been avoided, indicates a quality failure. This is Type B negotiation.

So the big question that every business, and every negotiator, should ask is how much time and effort is spent on Type A as opposed to Type B.

The 2026 data provokes an answer. The terms that consume the most negotiating effort are not the terms practitioners say matter most, nor the ones that cause the most trouble in performance. Effort concentrates, year after year, on a handful of risk-transfer terms that rarely decide whether a contract succeeds, while the terms that *do* decide it are comparatively neglected.

On their own testimony, most negotiators believe much of their effort goes on the wrong things. That is Type B and our research suggests that 60%-80% of negotiations are of this type. What follows is an attempt to measure it, to explain why it persists even though the profession believes it is changing, and to say what a shift toward Type A would take.

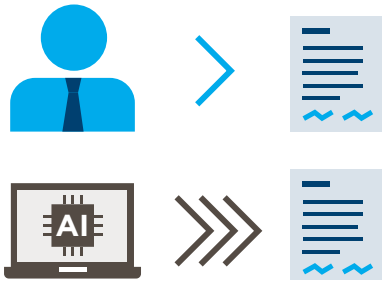
The question has become urgent because the people above the negotiator have started to ask it too. Executive pressure for speed is real and rising, and there are only three ways to answer it.

The first is to step aside, to let the deal through with less scrutiny and hope for the best. That is clearly not a great idea.

The second is to speed the existing process with technology, and with AI in particular. This is necessary, and much of it is welcome, but it carries a risk this report examines closely: applied to the process as it stands, these AI tools make the existing work faster without asking whether it is the right work, and because they are trained on the way deals have always been done, they can entrench the very pattern we should be trying to escape. Speed on a Type B agenda is faster Type B, not greater value. Grounded instead in a structured system of record that shows which terms are negotiated most, how they were agreed with similar suppliers, and how a supplier's stance has shifted over time, the same tools could help change the agenda itself.

The third way is the one that matters most, and it is the focus of this report. It is to use intelligence, our own and the market's, to remove avoidable friction, by opening from market-competitive terms rather than from defensive extremes. Knowing where the market actually settles, and starting there, is how a great deal of today's negotiation disappears, leaving the effort for the deals and the terms that genuinely warrant it.

That is the choice: step aside, go faster, or use AI to get smarter. This report argues for the third, and how it enables the second. Refuse to choose, and the first will be chosen for you.



AI is the great enabler but left to run on the past, the tool embeds the past, faster.

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The confusion

What assembles when we meet to make a deal. Consider who and what gathers at the table when two organizations sit down to negotiate. It is people, increasingly alongside machines, and it is also personalities, knowledge banks, belief systems and ideas.

Behind each person is a training that shapes how they view the whole exercise. One came up through engineering, another through law, a third through supply chain, finance, project management, the liberal arts, psychology, the sciences. The engineer, the lawyer, the scientist and the accountant each bring a way of thinking that is legitimate, useful, and potentially destructive. The difficulty lives in the space between them, because they may hold no common view of what the negotiation is for, how it ought to be conducted, or even what a good result would look like.

Their measurements pull them further apart. They may agree on the optimal outcome if they ever step back to identify it, but functional interests act as blinders and the shared objective may never emerge. For one the goal is to minimize cost, for another to minimize risk, for a third to minimize operational responsibility, each viewing the same terms through a different lens.

There is an irony to face at the outset. Negotiators are content with their own performance: they rate the quality of their negotiations comfortably above the middle of the scale, and they place a shortage of skill or training near the bottom of their list of barriers. Yet on their own testimony, 84% say much of their effort goes on the wrong things, and only 16% work to measures that reward collaboration or contract outcomes. A profession that believes it is competent, while its own evidence says it is misdirected, is the subject of this report.

Even where a shared upside is agreed, the what-ifs remain, the concerns over capability remain, the regulatory framing and the future unknowns remain. Senior people can rise above the functional squabbling, but not even they can step outside the regulatory frame or the geopolitical facts, so their freedom to commit is always smaller than their authority to commit. Collaborative intent, once established, is quickly compromised by the realities of the terms.

They meet, too, across cultures, jurisdictions and languages, against a political and regulatory backdrop that will not hold still, and under a wave of technological change that may alter what they want, what they can deliver, and whether they will go on working together at all. And despite all of it, contracts emerge: sometimes a narrow template, sometimes an enormous tome close to incomprehensible to any normal human being, occasionally a balanced framework that lays the ground for a genuine relationship.

This is the confusion the most negotiated terms reveal. It's a reality which stands in the way of change, and still leads many to treat contracts as an elaborate mating game with limited bearing on how value is won or lost. It is why so many negotiations end in a compromise that is really an exercise in self-protection, guarding against the consequences of failure rather than building a foundation for success.

You hear it in the things practitioners say: "My contracts are for services, so they aren't really subject to market disruption" or "We want a partner, not a supplier" or "We'll take responsibility for the outcome, as long as they do their bit". Each speaks with conviction, and each contains the very confusion which sets the scene for today's most negotiated terms.

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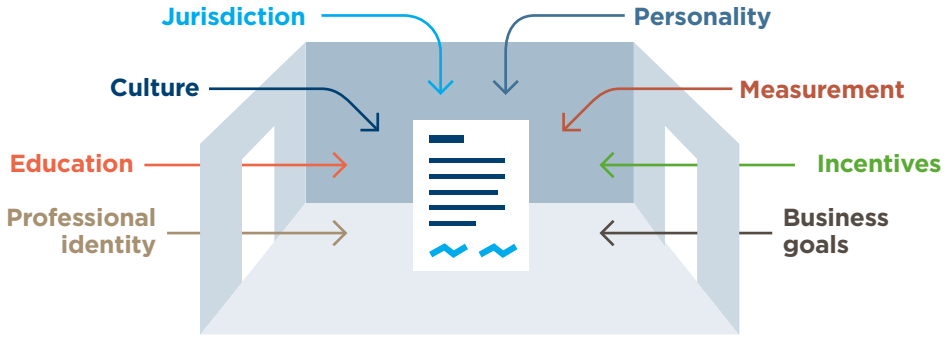

The forces in the negotiation room (from which agreement must emerge)

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The confusion *(continued)*

The fear underneath it

Measurement shapes how a negotiator thinks. So does fear – the fear of being caught out, of being let down, of being the one exposed as having given away the "family jewels". That phrase is used so often and it tells us so much. It casts the contract as protecting treasure already held and at risk of loss, rather than something that might be grown. It frames the job as guarding what exists rather than making anything new, and it erects defensive walls, often at the expense of any welcoming gates.

Set the two sides of the negotiator's position next to each other and no amount of balancing will make them fully symmetrical. Protection is expected – it is assumed that this is what a negotiator does, even if, most of the time, it is not needed in its most negotiated form. The data tells us that the liability cap or the indemnity are rarely called upon. But where it is tested and found wanting, the consequence is not a poor appraisal, it is your career. The negotiator is focusing on a low-probability event which has a severe consequence.

> "We don't teach win-win here."
>
> **Dean of major US law school**

Value-seeking sits on quite different ground and requires a very different mandate on both sides of the table. It shifts a negotiation's focus towards greater collaboration, openness and sharing of responsibility. To succeed, it may require movement by an entire supply ecosystem – the sort of move that is starting to become visible within the defense sector and increasingly discussed within energy and infrastructure. Yet even when the remedy is visible, the patient may be unwilling to consume it.

It is more than 30 years since major reports called for changes in the construction sector, an end to battles over risk-transfer and a claims-based culture. Today, in most cases, the model has not changed.

Value terms take longer to construct than protective ones, because protection has templates and precedent while value has to be invented or confirmed for each deal, so the negotiation slows. They also require early engagement – and we know that negotiators frequently complain "If only they had involved me earlier." To a degree, that lack of early engagement also pushes negotiations towards protection, because that is the only thing left to do.

And finally there is skepticism – the product of experience. Many practitioners carry the wounds of deals that did not perform as expected, where internal colleagues or external parties did not perform as promised, so they are nervous about contracting for outcomes they privately expect will never be realized.

The defensive instinct is understandable: exposure is real, and the person who lost the jewels through inattention deserved the blame they got. The objection is not to protection: it is to the dominance it has over value.

Where the pattern is set

There is a part of the negotiation that looks like order rather than confusion, and it is the lawyer-to-lawyer exchange. The two arrive with a shared training, work to similar rules, and share an understanding of what terms mean, and it is tempting to hold this up as the calm center of the room. It is not. What the lawyers share is a starting position, and that position opens from risk extremes: the limitation of liability at the head of the list, the indemnity, the warranty suite, the terms built to guard against the worst deal anyone could imagine. Because the template opens there, the negotiation opens there too, and the most negotiated terms are manufactured before either party has said what the deal is for. The consistency is real, and it is consistency in the wrong place. It also flatters itself on speed. The lawyer-to-lawyer route often means weeks can pass before the two sides so much as engage, and then the redlining dance begins, each side moving a position it drew from an extreme, toward a middle it could have started near. This common language between lawyers, in other words, has produced a consistent way of opening every negotiation from its most defensive corner, and it is the habit this report is challenging. It is not the model the rest of the room should copy, and enlightened, business-conscious lawyers are moving away from it.

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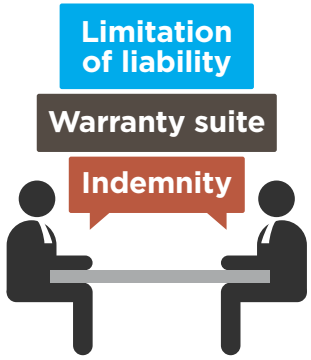

The lawyers' starting position opens from risk extremes, to guard against the worst deal.

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The confusion *(continued)*

A first example: the fire extinguisher and the fire

Take the term that sits at the top of what gets negotiated, Limitation of Liability. It heads every list of negotiated terms, it consumes more negotiating time than anything else, and it is often the first clause parties reach for when a deal turns sour. However, when the contract runs well it does nothing. It comes into play only once something has gone wrong and is no more the cause of late delivery or defective goods than an insurance policy can cause a fire.

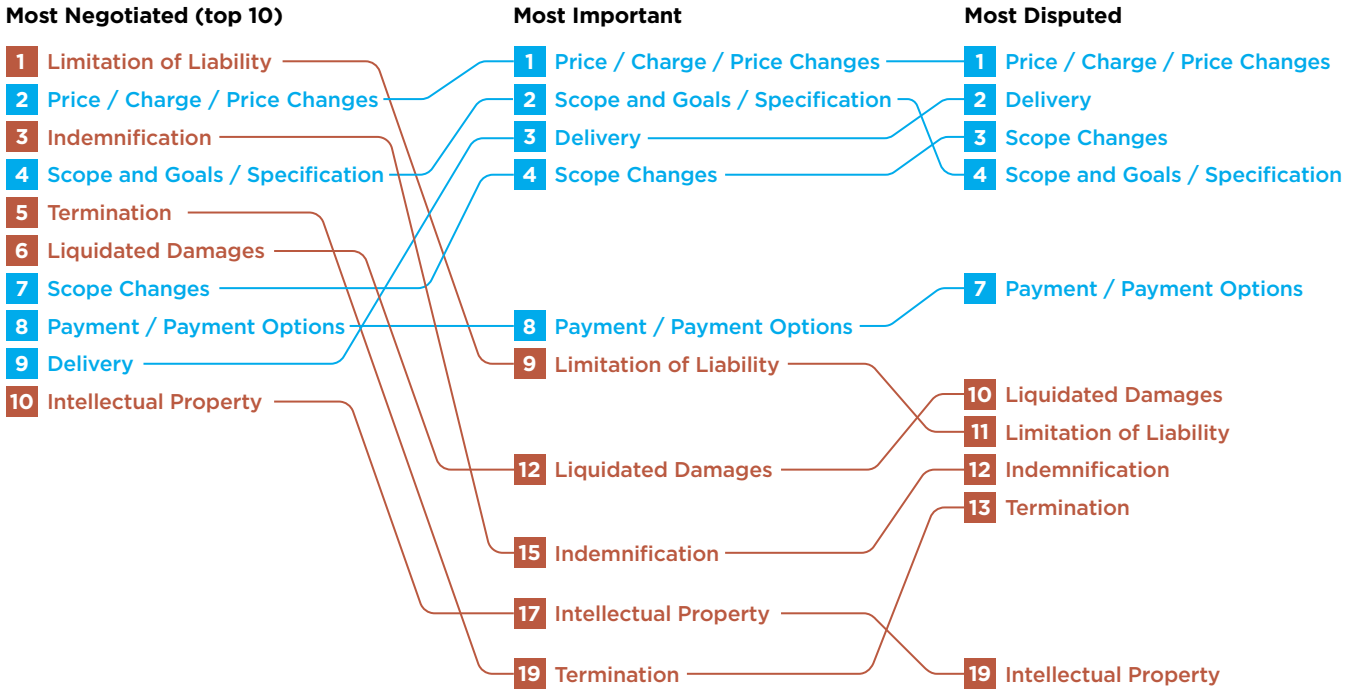
However, the terms that are most important and most disputed during performance are not Limitation of Liability, but rather Price, Scope and Delivery, i.e. the terms that set out what each party has to do.

Limitation of Liability sits at the top of what gets negotiated but outside the top 10 of what gets disputed. Limitation of Liability is what we call a 'passive term' because it mostly lies dormant. Figure 1 illustrates this point by comparing the passive (risk) terms with the active (performance) terms contained in the top 10 most negotiated terms.

The passive terms create friction within the negotiation. They cause negotiators to dwell on one another's failure before work has begun, and are widely viewed as a statement about trust. They divert attention from measures that could reduce the likelihood of a dispute arising in the first place – and generally the negotiated end point is relatively predictable.

This is where a lack of planning becomes obvious. The confusion this report identifies is exacerbated by the fact that very few organizations operate with a consistent frame or tools for negotiation planning, for setting an agenda and deciding in advance what this deal is for and what balance of terms would make success more likely. That is the prize this report is really after. Not a promise that every contract becomes collaborative, but a better-set agenda which improves the odds of success by design rather than by luck.

Figure 1: Passive (risk) terms versus active (performance) terms



Passive (risk) terms – fall away in Most Important and Most Disputed

Performance (active) terms – hold or increase their rank in Most Imporant and Most Disputed

Note: Termination and Intellectual Property can be considered 'performance' terms in some contexts

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Part two

The evidence

Four years, and no movement.[1] The pattern in the terms data is not new, and its stability is the point. Limitation of Liability, Price and Indemnification lead the most negotiated terms in 2026, on both the buy- and the sell-side.

They led in the same order, at almost identical scores, in 2024, and also in 2022, and in fact stretching back for more than 20 years.

Formal disputes, meanwhile, remain extremely rare, with 0.007% estimated to go to litigation. For most respondents fewer than 5% of contracts end in significant disagreement, and the picture is consistent across buy- and sell-sides and corroborated by the separate findings in our report *Beyond the Contract*.

A profession that has been told for the better part of two decades where its effort is misdirected, and yet has not moved, does not have an information problem. The facts have been available and repeated. Something else holds the pattern in place, and the rest of this report is an attempt to say what that is and how it can be changed.

The lists, and the gap between them

Readers of this series know the lists, and they read them closely, because they are a mirror of their own working life. Figure 2 shows the top of the most negotiated table for 2026, set out for each side of the deal. We have decided to show the top 12 because they act as reinforcement of our later conclusions.

The two columns are near-identical, and both are led by the same three terms that have led since this study began more than 20 years ago.

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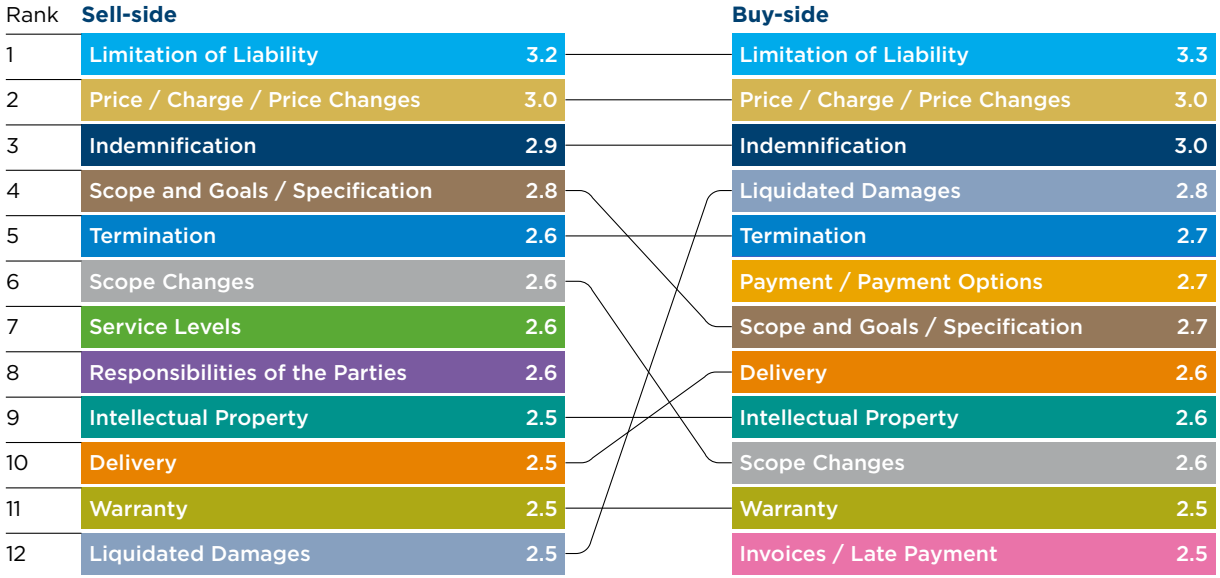
Figure 2: Top 12 Most Negotiated Terms for 2026, sell-side versus buy-side (mean score)



1. The top terms have held the same order in the last four years. *Most Negotiated Terms 2022*, WorldCC, and *Most Negotiated Terms 2024*, CCM Institute.

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The evidence *(continued)*

What the readers of this report have always compared, though, is not one list but three, because the terms that consume the most negotiation are not the terms practitioners say matter most, nor the terms that actually cause the most trouble during performance.

The three columns in Figure 3 barely overlap at the top. Limitation of Liability leads what is negotiated, is ninth on what matters, and does not appear at all among what is disputed. Indemnification, third on effort, is absent from both of the other columns.

The terms that fill the importance and dispute columns: Scope, Delivery, Acceptance, Service Levels, Amendments and Invoicing, sit lower on the effort column than their consequences appear to warrant. **This is the gap the whole report reveals and seeks to challenge,** since the most disputed and most important terms link us to the outcomes that are so heavily dependent on what is most negotiated.

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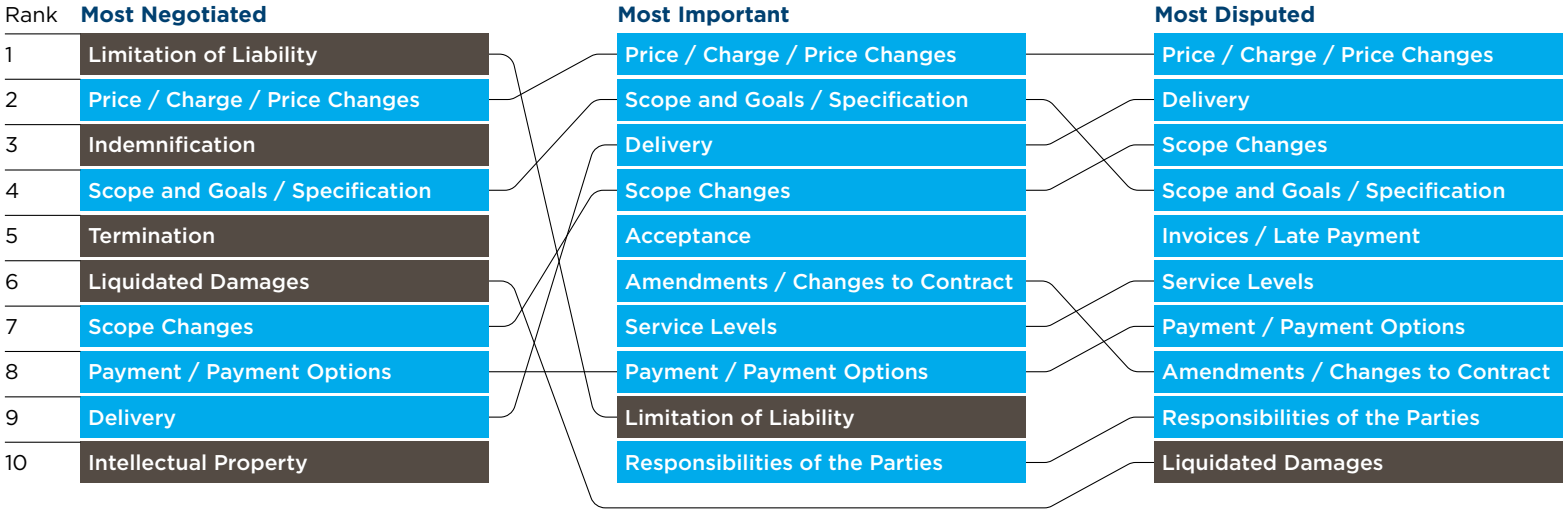
Figure 3: Most Negotiated, versus those ranked Most Important and Most Disputed



Most Negotiated Terms ranked lower or not at all in Most Important and Most Disputed

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The evidence *(continued)*

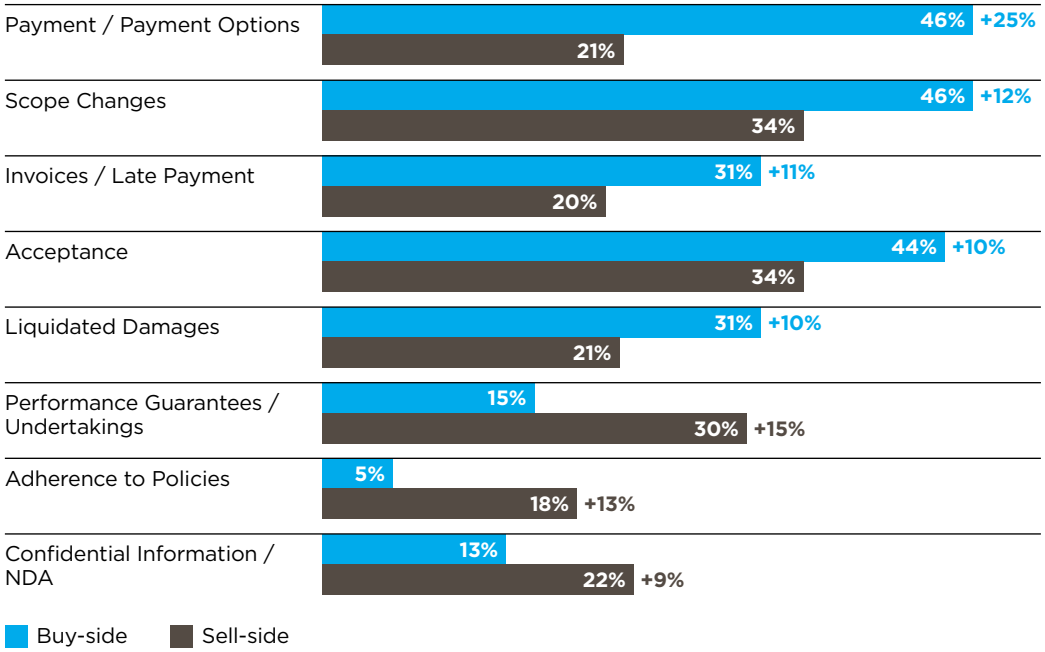
Buyers and sellers largely agree on what to negotiate, but they part company on what is important, and the divergence is revealing, see Figure 4.

Buyers prioritize the terms that give them financial control and a safety gate before money moves: Payment / Payment Options, Scope Changes, Invoicing / Late Payment, Acceptance, and Liquidated Damages. These priorities are a clear reflection of their close connection to Finance. It is not that those issues do not matter to sellers, but they are more focused than buyers on the terms that protect their delivery and exposure: Performance Guarantees / Undertaking, Adherence to Policies, and Confidentiality.

Each side works hardest on the terms that guard it from the other, and each rates as important the protections it would most fear living without.

It is the mirror-image defensiveness of the whole practice, the negotiation dance. Performance Guarantees are the sharpest case: the buyer asks for one as near-costless reassurance and reads any resistance as reluctance to stand behind the work, while for the supplier it commits banking capacity, the balance sheet and sometimes the group's tax position, so the two sides are not even arguing about the same thing.

Figure 4: Importance of terms – buy-side versus sell-side (in order of divergence)



Judging a term by the job it does

The confusion we described at the beginning of this report can reduce if everyone operates with a single rule: judge a term by the job it does. Contract terms are not one kind of thing. They do different work, they fail in different ways.

The simplest question to ask of any term is whether it needs an active process to make it work, a process that has to be defined, put in place and run through the life of the contract. If it does, the term is active. If it does not, sitting idle unless a failure calls on it, the term is passive. A Service Level is active: it needs measurement, reporting and review. Payment is active: it needs invoicing, approval and reconciliation, whatever event sets it off. A Limitation of Liability is passive: no one runs a process for it, it simply waits. The distinction matters because the active terms are where value is managed, made or lost as the contract runs, while the passive terms do nothing until something has already gone wrong, which is why the two cannot be judged by the same evidence.

The active terms divide into two families. One relates to the work itself, the performance obligations such as Scope, Delivery, Service Levels, Acceptance and Payment; and the other is the running of the relationship, the governance and relational terms such as Performance Reviews, Communications, Escalation, Forecasting, Site Rules and Transition. The passive terms form a class of their own, the consequence-allocation terms, Liability, Indemnity, and Insurance, which decide who carries the cost of a failure once it has happened. Standing outside all of these is the perimeter, the boundary and compliance terms, Regulation, Data, Cyber, Intellectual Property, Confidentiality and Applicable Law, the legal frame within which the rest operate. Some of these are managed and some are not, which is why they sit apart rather than inside the test.

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The distinction is what lets the report measure impact. An active term can be judged on how often it causes disagreement in performance, whether it reduces value erosion or generates added-value. A passive term cannot be judged this way, because it does nothing during performance. It is judged instead on how hard it is fought at formation against how frequently it is ever called upon, and on whether the general law already supplies adequate cover.

The test helps us think through situations where a term looks like one thing and behaves like another. Warranty is one such case, because it is two terms under one name. The commitment to a level of quality or performance is active: it needs a quality process behind it, and it carries a direct, largely fixed cost, which is performance economics, not risk-allocation. The remedy, the clause that decides whether the cover responds and to what limit, needs no standing process and waits like any passive term until a failure calls on it. The commitment belongs on the performance side; the remedy behaves like consequence allocation. Liquidated Damages and Service Credits look like risk terms, but they are active, their trigger a measured performance number, reported and applied period by period, so they are managed like a Service Level. Termination also divides, since Termination for cause is an active argument about whether performance justified exit, while Termination for convenience is passive and commercial, owing nothing to delivery. Performance Guarantees stay on the performance side, and suppliers fight them harder than their dispute rate suggests. The reason is not reluctance to carry the risk, though that is how buyers usually read it, but the cost and contingent implications of standing up bonds and parent or cross-enterprise guarantees, which the buyer often does not see.

Where the effort actually goes

When we look at the most negotiated terms through a slightly different lens, they fall into three groups, see Figure 5:

- **Rights and obligations** that say what is owed and what follows from failure
- **Collaboration** that builds shared value through data, planning and joint improvement
- **Relational** terms that run the relationship and let the parties accommodate the unexpected.

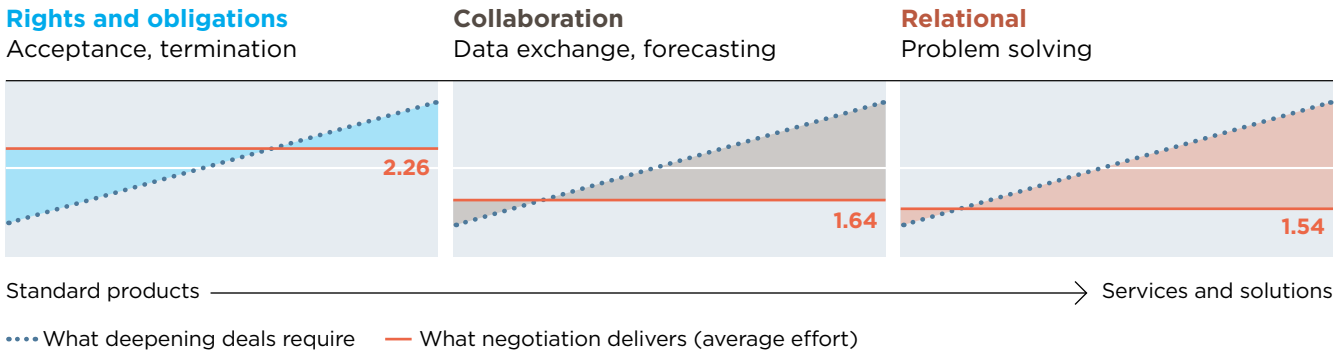
As previously observed, on both sides of the table, all 10 of the 10 most negotiated terms are rights and obligations.

The averages within each group reflect this focus. Measured on the 0-4 effort scale and averaged across both sides, rights and obligations attract an effort of 2.3, collaboration 1.6, and relational 1.5. The gap understates the concentration, because the score for the rights and obligations group is reduced by a long tail of minor or contract-specific terms that are rarely negotiated – for example, Escrow, Severability, Health and Safety. Figure 5 illustrates how heavily this reflects negotiations still oriented towards standard products, rather than meeting the needs of services and solutions.

Even within the collaboration and relational groups, it is the procedural or protective terms that receive focus. In collaboration, the terms that get negotiated are amendments, the mechanism for controlling change, and information access. The terms that create shared value, Gainshare, Forecasting and Benchmarking, sit at the bottom. In relational, the term that gets attention is Dispute Resolution and Escalation, while terms such as Communication, Step-in and Product Substitution are barely touched.

Finally, a term's group describes its purpose, but its handling can invert that purpose. A scope-change clause exists to let a contract flex, yet in the mind of a buyer who writes it, it is the right to make "any reasonable addition", with "reasonable" left undefined. It becomes a lever to extract unpaid work, and it belongs with the fighting rather than the flexing. *Force majeure* is a recognition that events may prevent performance, yet it is commonly negotiated as an attempt to shrink the other side's relief. Distinctions such as these, between what a term could be for, versus how it is actually used, are close to the heart of the matter.

Figure 5: What deepening deals require, against what negotiation delivers (scale 0-4)



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Part three

The negotiator's dilemma

The pattern we have described often shows itself before the negotiation even begins, in the way each side prepares. It's the point at which they either start to think inside-out or outside-in.

What follows is a constructed scenario, built on the real gradient of control and obligation that runs from a product, to a service, to a solution. Two teams plan for the same negotiation. The offering is one that has been sold as a product and is now being taken toward an outcome-based service, so it sits astride the two, which is exactly where the modern dilemma increasingly stands.

As an offering moves from product, to service, to solution, obligations should expand for both parties, and success comes to rest on three things rather than one: how obligation is distributed, how well the parties collaborate, and how much they invest in the relationship.

The supplier's planning works down its own gradient. Selling a product, it holds command over use, design and delivery method, the supply chain, and the terms of exit. Moving toward a service loosens each of those in turn, and the closer the offering comes to a solution, the more the supplier is asked to own an outcome it cannot fully control. Its planning keeps returning to a single conclusion: it can accept responsibility for the outcome only to the degree it can bind the buyer's behavior. The buyer's planning mirrors this. The buyer wants the outcome to be owned by the supplier, the partner on the hook for whether the thing works, and then discovers this comes with a cost, placing constraints on its own freedom of action and conditions on its own behavior. So, there are two negotiating rooms for one deal, see Figure 6.

A medical equipment manufacturer who used to sell machines is now committing and being paid based on the quality of patient outcomes. The buyer wants accountability without constraint on itself; the supplier will accept the accountability only in exchange for that constraint. The negotiation settles on the distribution of obligation, and the collaboration and relational investment a real 'partnership' would need are left unbuilt. Without them, either the negotiation or the ensuing relationship fails.

Figure 6: One deal, but two negotiation rooms

	→ The supplier's (seller's) room	← The buyer's room
What are we really selling and buying?	We have sold engines. Now we want to sell the power they produce, hours flown and availability, and be paid for that rather than the hardware.	Not an engine to maintain ourselves. Reliable thrust when we need it, with someone else accountable for keeping it flying.
Who holds control of maintenance, parts and overhaul?	If we sell availability, we must control servicing, parts and overhaul ourselves.	If we buy availability, we hand control over maintenance and servicing, and some of our scheduling, to the maker.
Where should the outcome sit?	We will guarantee availability, but only as far as we control how the engines are flown and maintained.	The maker carries availability. That is what paying by the hour is meant to buy.
What will we be bound to?	We can promise the hours only if the fleet is flown and maintained as agreed, so we must set conditions on how the airline operates.	We want the availability without new limits on how we run our operation, yet the guarantee holds only if we fly and service the maker's way.
What worries us most?	Guaranteeing an outcome that depends on how someone else flies, and being blamed for hours lost we could not control.	Paying for a partner, getting a supplier; accepting constraints on how we operate and still not getting the availability.

"We'll take responsibility for the outcome, as long as they do their bit."

"We want a partner, not a supplier."

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Why it persists, and whether it matters

The amplifiers

Three forces are working against change. The first is inheritance. Contracting descends from legal and financial risk-mitigation, so transfer is the classical response and value creation the afterthought. It takes an effort of will to challenge that thinking.

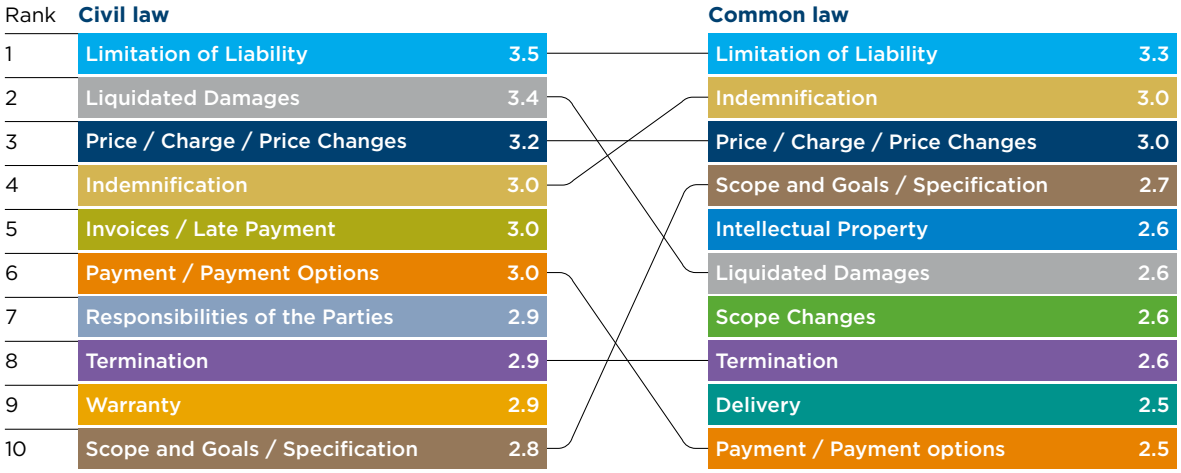
The second is regulation. In the heavily-regulated sectors, banking and financial services chief among them, the risk-laden agenda is now driven by instruction. Prudential regimes, operational-resilience and third-party-risk rules, outsourcing regulation and audit expectation all threaten to punish the firm that fails to load its contracts with control and liability. For those firms, finding the right balance is important, but more challenging.

The third is jurisdiction. The findings here are important – and perhaps counter-intuitive, see Figure 7.

Civil law negotiates every comparable term at least as hard, often harder When we line up the shared terms, civil law is never lower: Limitation of Liability 3.5 versus 3.3; Price 3.2 versus 3.0; Termination 2.9 versus 2.6; Scope / Specification 2.8 versus 2.7; Indemnification level at 3.0.

The two big gaps are Liquidated Damages 3.4 versus 2.6; and Payment 3.0 versus 2.5. Even the terms unique to the civil law top 10 (Invoices / Late Payment 3.0; Responsibilities 2.9; Warranty 2.9) sit above the terms unique to common law (Intellectual Property and Scope Changes, both 2.6; and Delivery 2.5). The whole civil law distribution is shifted up and denser at the top: six terms at 3.0+ versus three in common law. So what we might expect from a codified system – "the code does the work, so there's less to fight over" – is inverted here.

Figure 7: Most Negotiated Terms, common law versus civil law (mean score)



The most legally interesting line is Liquidated Damages, and it tells a story Liquidated Damages jump from sixth (2.6) in common law to second (3.4) in civil law, while Indemnification runs the other way – second in common law, fourth in civil. This is likely to be a substitution driven by enforceability. In civil systems the penalty / *clause pénale* is a legitimate, codified instrument that courts can *adjust* rather than strike (Article 1231-5 Code civil, BGB §343), so it becomes a primary risk-allocation tool and gets negotiated as one. In common law the penalty doctrine makes it fragile so parties lean more heavily on the indemnity.[2] Two systems using a different weapon: both are shifting blame and seeking to cap the downside, but the legal system dictates which clause carries the load.

Mandatory rules don't remove the fight; they make it more technical and raise the cost of getting the drafting wrong. Common law's broader freedom of contract on liability makes the outcome more predictable, so there's less marginal ground to contest.

A final factor to consider One reading of this data may not be "civil law increases negotiation" but that the impact of cross-border trade has a disproportionate impact on the nature and extent of negotiations. When a deal straddles jurisdictional boundaries, neither side's defaults can be assumed, so everything gets written down more explicitly, widening and intensifying the negotiation. A common law party brings belt-and-braces drafting; the civil-law party negotiates to preserve its code protections; the collision inflates both sides. The Payment / Invoices / Late Payment prominence on the civil side (statutory late payment regimes, currency, withholding, invoicing formalities) points that way, suggesting cross-border friction. This Part four of the report, is where the case for system over individuals is actually made. No single negotiator is failing. The system produces what its incentives ask of it.

Continued over >

2. UK Supreme Court's 2015 ruling in Cavendish v Makdessi, overhauled the traditional common law rule on contractual penalty clauses.

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Why it persists, and whether it matters *(continued)*

Does it matter?

The data quite clearly shows the preventive / defensive nature of many negotiations, but in the end, does it really matter? Many might argue that contracts are primarily about risk-allocation and that the data shows they are fulfilling their purpose. They might suggest that the contract is actually just one component of negotiations and that there are frequently adjacent conversations which create governance and establish the relationship. In reality, they say, the contract vanishes once it is signed and only re-emerges if or when things go badly wrong. It is, in their view, fulfilling its only real purpose. The most negotiated terms are exactly the terms you would want settled before a failure, and the rarity of disputes suggests the guarding works.

Much of this is true, and the report does not dispute that a contract is one component among several, nor that a great many are signed and never reopened. But the argument proves its conclusion by assuming it. "The contract vanishes until something breaks" is not a description; it is a decision about what a contract is for, and once the document is defined as the failure instrument, it naturally follows that the failure terms are the ones that matter and that its silence in between is no loss.

The report's evidence points the other way, starting with where disputes actually arise. They cluster on Price, Scope, Delivery, Service Levels and Acceptance, the terms that describe the work, which means the document is being consulted, relied upon and argued over while the contract runs, not only when it ends. A term that generates disagreement during performance has not in fact "disappeared quietly into a drawer".

Then consider governance and the relationship. When it is not incorporated or negotiated at the same time as the contract, governance is not being built. It remains undocumented or imposed by the more powerful party rather than agreed, or under time pressure the detail is deliberately deferred to after signature and then never settled at all. The most negotiated terms precisely reflect this: the governance and relational terms sit at the bottom of the list, assumed or ignored, and it is through governance that performance is overseen. Their absence represents the mechanism for later failure.

The relationship is more complicated and tends to be used in a generic form. When it comes to contracts, relationships operate at two levels. There are the person-to-person relationships, which may be good or bad, and shift with the individuals involved. And there is the organization-to-organization relationship, the interactions across the life of the contract that reveal reliability, honesty and care. Those interactions are driven by the contract. It hums along in the background, and when it is not acted upon, not understood, or compromised by ambiguity, the relationship is what absorbs the damage. So it is true that a good relationship is a core determinant of value, and that is precisely why the quality of the contract matters, since the contract exerts a major influence on the quality of the relationship. To concede the relationship's importance and then wave the document away is to sever a cause from its effect.

This is also why the "one component among several" framing understates the reach of a contract's terms. Our benchmark data[3] shows that, on average, around 30% of an organization's workforce is touched in some way by its contracts: the lawyer who reviewed it, the operations team implementing it, the accounts manager raising the invoices, the sales team that won the work and wants to extend it, the delivery crews bound by its health-and-safety terms. A contract is not a document that surfaces at failure; it is a live instruction set that a third of the organization is acting on, most of them unaware that it is controlling their actions.

Seen at that scale, and not one contract but the network of them, the portfolio, the ecosystem, the conclusion turns around. Contracts are not the failure instrument the risk-allocation view takes them for. They are among the principal determinants of an organization's performance and of how it behaves toward its market, consciously or unconsciously framing what its people do. A contract is an expression of culture, an indication of the behavior you can expect. The risk-allocation account is not wrong about what contracts currently do; it is wrong to mistake that for the limit of what they can and arguably should be.

Continued over >

Some argue that contracts 'vanish' when signed and only re-appear if something goes wrong, but the evidence points the other way.

3. *Benchmark report 2025 – The race is on: navigating uncertainty through CCM resilience*, CCM Institute.

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Why it persists, and whether it matters *(continued)*

So, does it matter? For a large class of deals, honestly, not much. A simple, low-value, transactional purchase is well served by a risk-allocation instrument, and it rarely merits time being expended on substantive negotiation. It matters in situations where the value comes from performance and can therefore be lost or open to debate: the more complicated, often long-lived, outcome-dependent arrangements, where a contract should specify that performance and frame that debate. The question is not whether the risk-allocation view is ever right. It is whether it is right here. And the answer to that returns us to who carries the cost.

On one side, the cost we are discussing is real. During the initial negotiation, opportunities missed, costs escalated, deals delayed, trust undermined. And after signature, as a result of unbalanced or incomplete negotiations, value eroded, disagreements mounting, relationships turning sour. But taking a different view, risk discipline can be read as maturity, a reflection of realism rather than the optimism which often turns into dispute. Onerous terms force parties to confront how things might fail and to price that honestly, and in the complex, highly-regulated sectors where the risks are greatest it may be part of what keeps the next failure small.

However, the answer should surely be that this does not have to be a trade between providing protection or enabling opportunity. A balanced and well-structured negotiation should produce a contract that does both – and the evidence tells us that often this is not happening. So yes, it matters.

Who pays?

The impacts of the risk-transfer agenda are uneven. The large and powerful suppliers negotiate the onerous terms away, cap their exposure and impose their own paper, so the negotiation agenda barely touches the players most capable of causing serious harm. The small business, the innovative start-up, broadly accepts whatever is put in front of them, because they need the business, may lack negotiating skills and know that many of the consequences are theoretical. The onerous liabilities and indemnities could never be collected.

It is the middle that absorbs the terms. Their business is substantial enough to be worth suing and not powerful enough to resist, so they price for the risk where they can and accept it where they cannot. This means that the drag on creativity and innovation concentrates in the middle of the market, in part because being creative or innovative is itself more risky, but also because the contract has often failed to include a meaningful incentive or reward. Ultimately, the powerful shed the risk and the smallest are judgment-proof against it; the middle pays it, and because so much innovation lives there, in the end the market pays too.

The tools exist; the practice does not move

The point holds on every axis we can measure. Face-to-face (57%) and video (12%) are rated above email (2%) as negotiation methods, and the research on non-verbal communication explains why: the channels that carry relational signal are the ones capable of building the value terms, while email, stripped of tone and read more harshly than the same words spoken, erodes them. The capacity to change is present on every axis we can measure. Practice is the constant, and the newest tool of all, taken up in the belief that it will finally break the pattern, may be the one most likely to fix it in place.

Face-to-face and video are rated above email as negotiation methods.

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Artificial intelligence: acceleration or entrenchment

What AI is doing now

Artificial intelligence has arrived in the negotiation, and the survey shows 56% are using it to support some aspect of negotiation. There is currently greater deployment in procurement teams (58% of those who are users) than sales contracting (42%).

Where it is used, the impact it is having, is variable – as indicated in Figures 8 and 9. Effort concentrates on the backward-looking, document-processing tasks and reduces as the work turns forward and integrative.

The survey also sought write-in comments, and these – there are several hundred of them – explain the shape of that first figure. When we asked people to describe how AI helps them, the word "compare" came up time and again, and the thing compared against is always what the organization already does. They use it to:

"Identify deviations from standard positions."

"Compare supplier positions against playbooks."

"Run a first line of review using our playbook."

"Extract previous positions to ensure consistency."

Many are explicit that the intelligence is drawn from the past:

"It highlights risk elements based on past experiences."

"Retrieves relevant language and precedents from our contract repository."

"Interrogates against the standard template."

Almost every account describes taking what came before and applying it to what they are doing now, faster, more consistently and without questioning. Consistency with the existing playbook and practices is named as the goal, not examined as a risk.

Figure 9 confirms the data in Figure 8. The comments tell us that the tool is being pointed at the existing work to make it quicker:

"First pass review is always done through AI."

"It cuts planning time and reduces the number of cycles."

"It shortens the time required to turn documents."

Those who cite better outcomes generally see that in terms of speed – for example faster time to signature – and no one indicates that the deal comes out better in terms of value. The machine is making people faster at the thing they already did.

Continued over >

Figure 8: Where AI is used

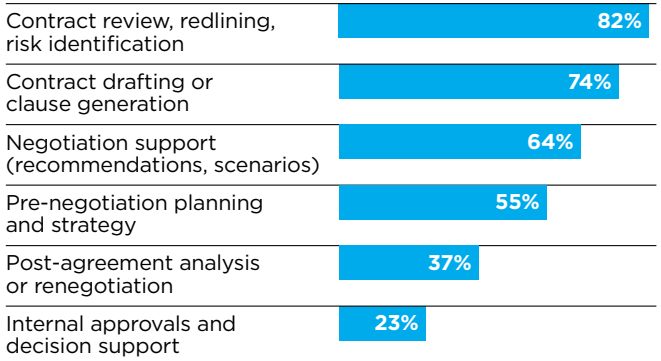
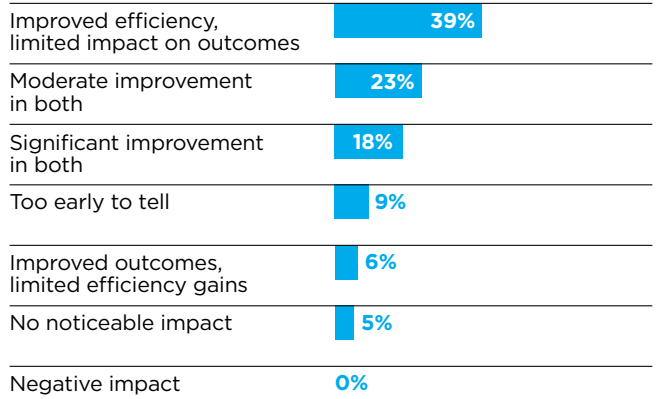


Figure 9: Impact of AI on outcomes and efficiency



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Artificial intelligence: acceleration or entrenchment *(continued)*

The consequence of this is that, for now at least, AI trained on the organization's own past, simply executes at speed and at scale. It does not alter what is negotiated – and the evidence for this is that whilst 56% of negotiators are using AI, the most negotiated terms remain unchanged.

As Figure 10 shows, more than three-quarters say AI has not shown them which terms they most negotiate, and only 31% currently seek AI's help in creating new contract language.

Figure 10: Specific uses of AI

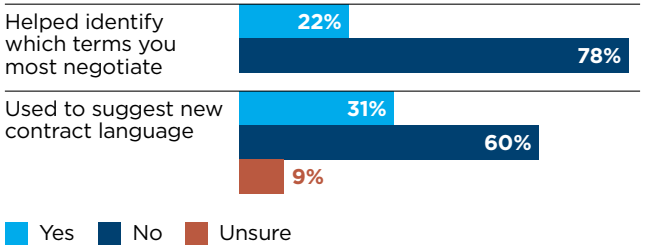
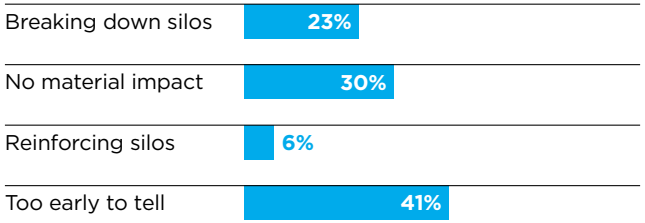


Figure 11: Effect of AI on cross-functional silos



However, remaining hostage to our legacy contracts is not inevitable, and a minority in the write-ins are already using the tool to create, rather than replicate. A few point it outward, rather than inward against their own past:

> "Generating live negotiating positions based on industry norms."

A few use it to challenge, rather than confirm:

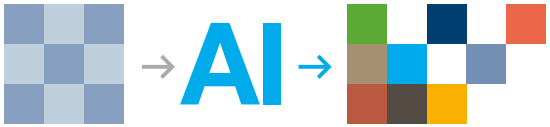
> "Asking it to argue the counterparty's position."

> "Simulate how a provision would behave under adverse scenarios such as insolvency, delay or regulatory change."

One describes it as:

> "An all-round thought-partner on legal, business, interpersonal, relationship, commercial and strategic issues, complete with practice negotiations."

That is what AI aimed against the legacy, rather than trained on it, looks like. For now it is the exception, but the hope is that it represents the future.



AI represents an opportunity to break the pattern and do things differently, to generate different outcomes.

Recognizing the limits

Even for its users the efficiency gains come at a price. The comments warn that:

> "Developing insightful prompts can soak up time."

> "The tool can cause delays given numerous iterations."

Trust is provisional, since it:

> "Still is not accurate and needs validating before trusting."

What the practitioners are describing is a capable assistant, and they say as much:

> "AI is a co-pilot rather than a decision-maker."

> "Valued precisely because what AI does not do is negotiate; judgment on risk appetite, relationship dynamics and timing remains entirely human."

That last point is one to consider and question. Left to run on the past, the tool embeds the past, faster. That is judgment imposed. But AI could do the opposite. Its use in supporting contract negotiation is established: the precise nature of that use depends on what we train it with and what we then ask it to do.

For AI to do more than repeat the past, it needs a system of record where contract data is structured and organized around the right ontology, plus feedback so it learns from each negotiation. This would also explain Figure 10: AI can only show which terms are negotiated most if the data is organized to show that.

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Part six

What could be different, and how

For those negotiators wedded to classical legal theory, this report is good news. Despite years of calls for change, it isn't happening. For everyone else, the message of Part four holds: the primary issue is the system, not the skills.

Our recent research confirms that very few negotiators are measured or incentivized to focus on business outcomes; most see success as closeness to a standard or approved position, protected margin or a negotiated price reduction. Add pressure for speed, and the natural response is to reach for the standard template or the established playbook. It is fast, it is safe, and it is the path of least resistance. And if the result erodes value, that erosion is rarely visible; if the business outcome disappoints, it is rarely tracked back to the contract.

The one measure that matters

The introduction to this report, asked how much of your negotiation is Type A versus Type B. The proportion of your negotiating time spent on friction that added nothing, that could have been settled by a market-competitive opening position, is the prize. It is a number only you can put in front of your own organization. Go and estimate it.

Remember the comment from our buyer:

"We want a partner, not a supplier."

And the comment from our seller:

"We'll take responsibility for the outcome, as long as they do their bit."

Each described the partnership they wanted, and each then negotiated its opposite. The distance between what they said and what they signed is the whole of the opportunity this report has tried to describe. Today's market will not wait while we close it – and in many cases, nor will your management. Increasingly we observe a view that AI tools can replace negotiators – and to a significant degree that is a valid view. However, faster is not necessarily better and it eliminates opportunities for judgment, the potential to add value. Speed eliminates judgment when AI only repeats past positions. With the right context, such as how a supplier's stance has shifted over the last 10-15 years and a view across the whole contract portfolio, AI can give negotiators more room for judgment, so they spend it on the terms that add value.

Our 2026 report *Win-Win or Just Winning?* confirms that few negotiators are incentivized to focus on business outcomes.

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Part seven

Actions for change

Change can happen through you and your organization, with two different sets of actions.

What you can do now

Three things are within any negotiator's reach:

1. Assess your own most negotiated terms

The simplest and clearest indicator of what needs to change. If you do not have a system that provides that insight (and, as we saw, most do not), collect the data by asking colleagues to share their experience.

2. Benchmark against the market

This is classic outside-in thinking. Terms and condition norms are increasingly published and available, WorldCC's among them, so a template or playbook can be reviewed and refreshed regularly to strip out friction on terms you were always going to negotiate anyway.

3. When negotiating, challenge each other to achieve better outcomes

Without challenge, the status quo will prevail and we will continue to have sub-optimal performance from our contracts.

What your organization must do

The rest cannot be fixed by an individual, because it is the system that produces the pattern:

1. Change how negotiation is planned

Don't start with the most negotiated terms – you know those will be addressed, and you know how – but with the question of what type and depth of relationship a successful outcome will need, and then which terms will build it: Gainshare, Problem-solving, Frequency of Reviews, Change Procedures. The full list is available from WorldCC.

2. Build consensus for that agenda

Do this internally and with the counterparty, so that both sides share an understanding of which terms create the greatest value for each.

3. Put the infrastructure underneath it

Use playbooks and decision trees to sort deals by their actual risk, routing the genuinely high-risk deal to careful evaluation – which is what the extreme template was always for – and the ordinary majority to a fitted template and a fast resolution. And the data and systems that let "which template, which position?" be answered by the organizations in seconds rather than rediscovered deal-by- deal, by whoever holds the pen. Risk appetite still has to be set, but set once, deliberately, and built into the tools.

4. Feed contract performance data

Feed the data back into playbooks and negotiating positions, so AI learns from how contracts perform and not only from past redlines.

> This is also how the commercial layer finally gets the shared language the legal layer already has. The classification in Part two of this report is an attempt to build it, a way to say what each term is for, and to check that the balance points at the value the deal is meant to create.

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About Sirion

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