Re: Negotiating Win-Win Contracts

Knowing how to go about negotiating contracts with your suppliers, customers, employees and alliance partners is important because it allows you to get a good deal while managing legal risks using a written agreement. This article highlights some of the goals and tactics involved in negotiating win-win contracts.

5 RESULTS OF A SUCCESSFUL NEGOTIATION

At the end of the negotiations, when the contract is signed, each individual involved in the negotiations:

1. Feels the other side listened, understood and cared about the interests underlying his/her position on the issues.

2. Feels the other side was reasonable and strived for win-win solutions.

3. Feels a sense of accomplishment in achieving a win-win result.

4. Enjoyed the experience and would deal again with the other side.

5. Feels the other side will respect the agreement that was reached.

NEGOTIATING TECHNIQUES

1. Express Understanding: Paraphrase the other person's important statements to ensure you understood the point and to let the other side know you are actively listening. (Be careful, however, not to talk too much and put words in their mouth).

2. Don't React to Attacks: Striking back leads to a vicious cycle of attack and counter-attack. It damages your relationships and does not advance your interests. Detach yourself: Evaluate the conflict as if you were a third party with the capacity to think objectively for both sides.

3. Focus on the Goal: Identify the interests underlying each side's position. By detaching yourself, it's often possible to think of ways of satisfying the interests of each side even though it may not be possible to satisfy each side's position.
4. Ask Questions: Open ended "why" questions are best for obtaining information on interests. "Dumb" questions keep the other side off guard and usually lead the other side to help you rather than compete with you in the negotiation. Questions can also be used as a non-confrontational way of making a point. A question may even lead the other side to adopt your unexpressed point of view as their own.

5. Don't Argue: Playing "lawyer", acting "smart", arguing or expressing outright disagreement creates confrontational negotiation. Never say "I disagree with you" - it's often perceived as insulting to the other person. Look for an aspect of the other's statement that you do agree with, state that you agree on that aspect, and expand on that aspect with additional facts that support your interests. "I agree on ... and here are some facts we should also consider..."

6. Feel, Felt, Found: Slowly turn the ship around by using phrases like, "I understand how you feel about this. "The other side may say "You do?!" (amazed that they have been finally understood). You reply "Yes, others have felt the same way, and we have always found that..."

7. Set-Aside: Put a contentious issue on hold, find agreement on other issues to create momentum and a positive negotiating climate, return to any major impasse issues.

8. Mediator: Bring in a third party to mediate, someone who can be perceived as neutral.

Examples
To bring this subject to life, it's useful to review actual experiences and to relate the experiences to applicable negotiating tactics. Here are some examples:

Higher Authority
Explain that although you will recommend whatever is agreed upon, there is a "higher authority" that needs to be checked with before certain decisions are made. This can be used in conjunction with the "good guy/bad guy" tactic as in the statement "I don't think the contract review committee will go for it, but let me see what I can do for you". It's also a way of putting pressure on the other side without confrontation. And it can be used as a means of bringing the negotiations to a close when faced with endless demands. Higher authority works best when the higher authority is in fact an entity like a contract review team, committee or a board of directors.
In one transaction we were faced with last minute legal requests for changes to a contract under negotiation. We knew that all the major business and legal terms had been agreed to and that the management team of my client’s corporation was satisfied with the contract. We therefore responded to the request by indicating that the contract review committee had approved the contract for signature after considerable "internal negotiating among the committee members". We said we would need to bring that particular request to the attention of the committee and in view of the prolonged negotiations and disagreement among the committee members, the committee will "not likely be happy" to revisit this contract. This quickly brought negotiations to a close.

The counter tactic to higher authority is to remove the other side's resort to higher authority before the negotiations start. It is like the salesperson that asks "if you like this car as much as I know you will, is there any reason why you cannot make a decision today?" Salespeople know that if they do not remove your resort to "higher authority" (in this case, perhaps your spouse), there is a risk that under pressure to make a decision, you will invent one as a delaying tactic.

Testing for Validity

If the other side presents you with a problem or a "hot potato", resist the tendency to accept it as your problem or a problem that you need to find a workaround for. Test it immediately for validity. In a negotiation with a supplier of certain services (this supplier was facing intense competition from other suppliers), the supplier asked for a three year term for the contract after our team had proposed a one year term. Instead of accepting this "hot potato", it proved worthwhile to test it immediately for validity. This was done when we asked: "Is the term of the contract a show stopper for your company?" And the supplier conceded that it was not. So we then quickly moved on to another issue - we got our one-year term and the supplier got the contract.

Real estate agents use this tactic in a different context when a buyer says, for example, that only $40,000 is available for a down payment. The agent replies: "Well that's fine, maybe we can work with that. But let me ask you this. If I find the right property for you in the right location at the right price and terms, etc., and it takes a $50,000 down payment, is there any point in showing it to you or should I just show it to my other buyers?" The real estate agent has cleverly tested the buyer's problem for validity instead of accepting a "hot potato".
Legal Issues

Some of the more challenging legal issues in any contract are the terms and conditions dealing with: Warranties, Limitations of Liability, Indemnities, Dispute Resolution and Jurisdiction. These issues need to be carefully considered depending on whether you are representing the buyer or the seller, licensor or licensee, independent contractor or customer etc. There is no “one size fits” all solution because in any negotiation, there will be some give and take depending on all the surrounding circumstances and the underlying interests of each party.

For each clause in a contract, you must always keep in mind the default at law and whether you need the contract to change that default to favour your company. For example, if you are representing a buyer or a licensee of a software product, you do not need a strong “entire agreement” clause that says “this Agreement is the entire agreement between the parties on its subject matter and supersedes all prior and contemporaneous promises, statements, advertisements, representations and agreements, whether written or oral and in any media”.

The reason why a buyer or a licensee does not need a strong clause for this issue is that the buyer or licensee is better off with the default at law. The default at law makes a seller or a licensor bound by any oral or written representations that were made to induce a buyer or a licensee to enter into the agreement. Therefore if you are representing a buyer or a licensee in a transaction, you should try and make the clause as weak as possible. On the other hand, if you are representing a seller or a licensor, you should make sure that the clause also refers to “contemporaneous” representations. These are representations that someone from your company may have made to the buyer or the licensee contemporaneously or at the same time that the contract was signed. In some jurisdictions, the default is that contemporaneous representations amount to oral “collateral” contracts. Collateral contracts give rise to a cause of action against a seller or a licensee even though the representations were not included in the signed agreement and even though the signed agreement had an entire agreement clause.

Many inexperienced lawyers make the mistake of using the wording of detailed clauses that they have seen in case law or in other agreements that they have worked on, and using these detailed clauses inappropriately as precedents. For each legal issue that must be addressed in a contract, it is always necessary to think about the context. Think about which party is most likely to benefit from a given clause. And which party is most likely to benefit from the default at law. Which
party is most likely to breach the contract, and which party is most likely to suffer damages. Think about the underlying interests of each party and how risk should be allocated among the parties.

**User Friendly Contracts**

Contracts are complicated enough without legalese. And in today's fast-paced world, you need to conclude transactions quickly and effectively, while managing your legal and business risks. That's why I use plain language as much as possible. I draft contracts that make it easier for you to do business efficiently and effectively. However, these contracts are carefully thought through to protect your interests. Incomplete or ambiguous contacts can lead to costly litigation and irreparable damage to your business. The contracts meet the following standards:

1. Easy to Understand: In plain English without minimal legal jargon. So each party clearly understands its rights and obligations.

2. Concise: Concise and not visually overwhelming. Like most software programs, the law has its own "defaults" that apply when a contract is silent on an issue. If the default adequately covers the subject and benefits the party that is drafting the contract, it is not necessary to change the default. You need to know what the default is. And you need to be sure that it favours you and not the other party to the agreement.

3. Comprehensive: The purpose of a contract is to protect your interests. All the business and legal issues need to be spelled out clearly so each party understands its rights and obligations. I start by thoroughly understanding the business context of the transaction. This helps me anticipate what may go wrong. By anticipating what disputes may arise, I am able to draft a comprehensive agreement that thoroughly protects your interests.

*Chris Koressis is the founder of Koressis Legal Professional Corporation. Before going into private practice, he was Corporate Counsel at Geac Computer Corporation and a member of the company's worldwide mergers and acquisitions team. Prior to Geac, Chris Koressis led CIBC's technology law department as Senior Counsel and he also served as Director, Strategic Sourcing, managing the bank's worldwide procurement of information technology, corporate services and products. He also led a task force on the legal and business issues associated with electronic commerce and Internet business strategies. Before CIBC, he was Corporate Counsel for Royal Bank of Canada. Chris Koressis drafts and negotiates contracts using an approach that balances the need for detailed terms with the strategic significance of the project, appropriate allocation of risk, and the need to improve cycle time and preserve business relationships.*