

# Contract Clauses & Contract Negotiation

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# OVERVIEW

- I. Contract negotiation
- II. Drafting a contract & boilerplate clauses
- III. Troublesome clauses

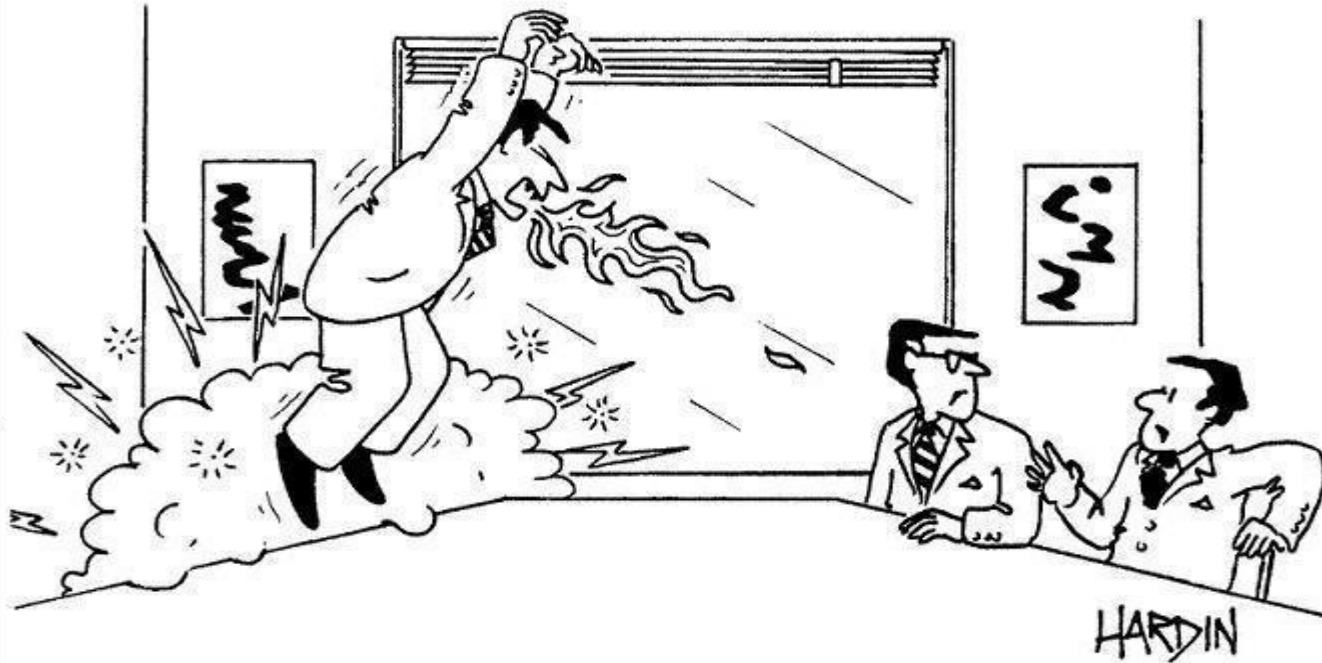
# I. Contract Negotiation



## The process of “Getting the Deal Done”

- Broad commercial understanding
- MoU (more precise terms)
- Assembling the negotiation team & schedule
- Preparing the draft Contract
- Negotiating the Contract (the “fine detail”)
- Finalising the Contract
- Executing the Contract

## Handling the Negotiation



"Don't let it throw you - It's just a negotiating tactic."

## Negotiating Techniques

### Break the negotiation into parts

- Avoid roadblocks by breaking negotiations into sections and reach an agreement on each part separately
- Reaching a series of solutions, rather than fighting one “big” war



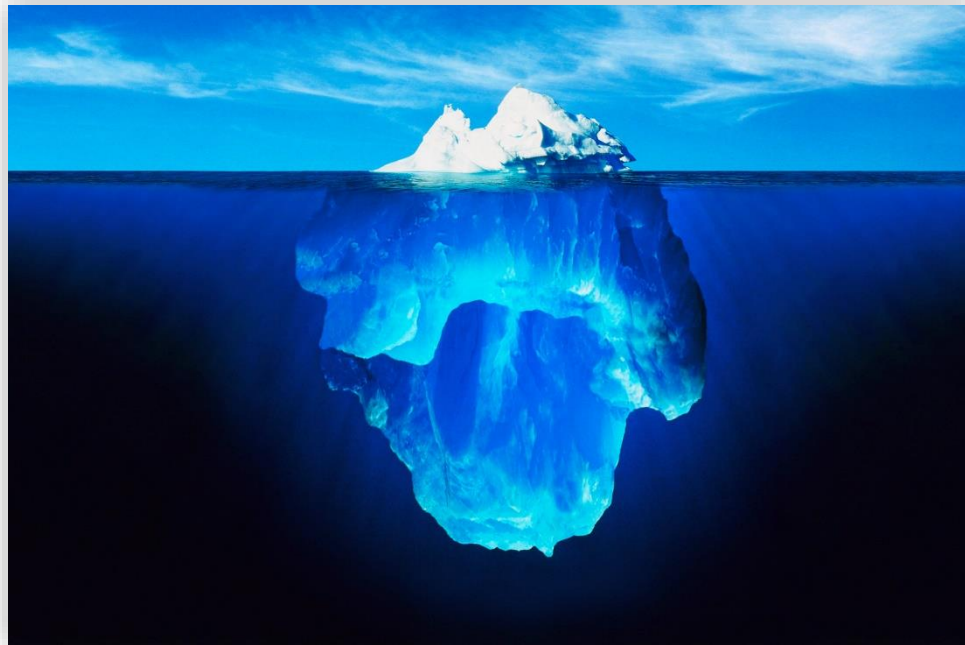
## The "I'm only asking for what's fair" approach

- Emphasizes that requests are simply in line with industry standards or current market prices
- Only for standard deal terms
  - Burden shifts to the other party to convince you that you should make an exception in this case



## The *Getting to Yes* approach

- Emphasizes that negotiating parties must separate the people from the issues & look beyond to see who/what is the real interest or influence each party, in order to create a problem-solving environment





## Take control

- Controlling the location, timing, topics, and pace of negotiation ("controlling the agenda") may create an advantage
  - Eg: Lawyers often believe that the attorney who first drafts the agreement is in the contractual driver's seat. Similarly, by controlling the negotiations, you get to decide the topics and their order



## Prioritise

- Know your top priorities (usually the business or money-making opportunity offered by the deal) and further ranking of important points
- Will help avoid getting bogged down in issues that are not as important



## The "offer-concession" strategy

- Make sure the other side leaves feeling they've made a good deal
- Your offers should always leave enough wiggle room to make acceptable concessions to the other side



HOW TO FIND SOME  
*wiggle room*

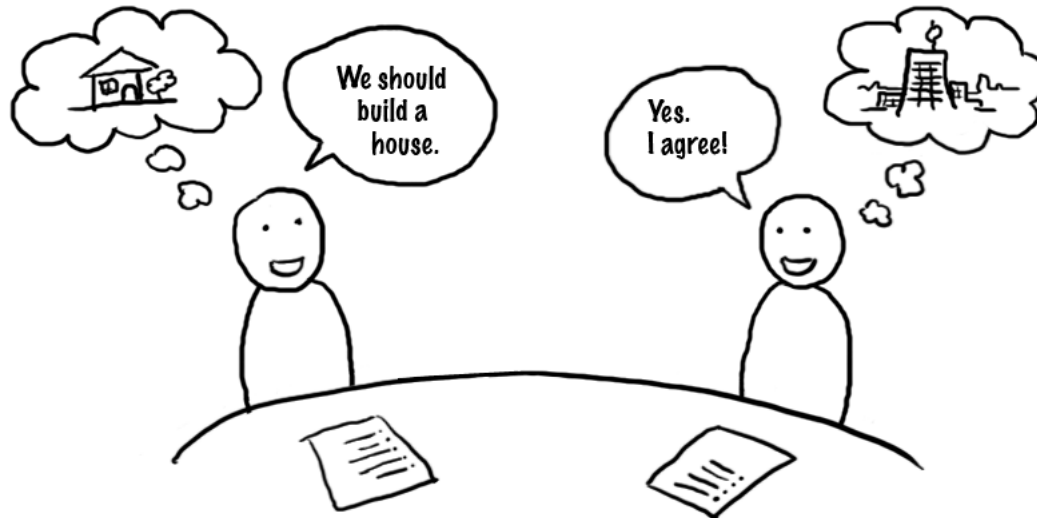
## Question, don't demand

- If the other party is taking a hard line on certain issues, ask why
  - Questions open up discussion
  - Arguments close communication down



## Find points of agreement and end on a positive note

- This upbeat approach requires that you find opportunities to say, "You're right about that," or "I agree."
- However small these points of agreement may be, they help set a collaborative tone



## Do your research

- The party with more information usually has more leverage



## Dealing with burn-outs and ultimata

- If the other party resorts to threats ("*Agree to these terms or there's no deal*") or wages a war of attrition by dragging out the negotiations, you'll have to decide what the underlying deal is really worth to you:
  - So important that you're willing to accept the other party's ultimatum endless haggling?
  - Does other party simply have all the bargaining power?
  - Otherwise, sometimes better to walk away
- If the other party really needs you, it may re-evaluate its tactics and return to the table

## Use facts, not feelings

- Successful negotiators separate business from personal
  - Facts  $\neq$  feelings
  - Avoid letting an unpleasant personality or style drag down the negotiations





## II. Drafting Contracts & boilerplate clauses



Can you do another draft of this? There's still a couple of sentences people might actually understand...

## Drafting an Agreement

- Starts with a detailed explanation of the service and how it will be operated and delivered
- Clauses move from:

(1) Very specific about the service



(2) More general: how service will fit into the airlines' operations

## Contract content

- Names of the Parties
- Date
- Introduction/Recitals
  - Setting the scene
- Operative Clauses
  - Focus on the particulars of the transaction
  - What the parties will have to do
- Clauses of importance, but not necessary directly relevant to the operative clauses
  - Liability / Indemnity
  - Term and termination
- Boilerplate clauses
  - Relevant but standard for most contracts

## Categories of Boilerplate clauses

- Clauses which vary the common law position to one or both parties' benefit and for clarity
  - Termination, force majeure, set off, confidentiality, waiver, no agency, assignment/subcontracting, severance clauses
- Clauses which try to ensure that agreement means what is states
  - Entire agreement clause
- Clauses which deal with interpretation & grant additional rights
  - Remedies cumulative, notices, 3<sup>rd</sup> party rights clauses
- Clauses which assist parties in performing the contract
  - Further assurance clauses

## Danger of Boilerplate clauses

- Included in most commercial contracts
- Can be overlooked when drafting & negotiating agreement
- Failure to give them the attention they deserve can lead to serious consequences
  - Party may find itself in breach of contract when unforeseen event occurs, even being unable to overcome the event

## Examples of Boilerplate clauses

### Confidentiality

*“Each party agrees to treat the following information as confidential and not to divulge, use or exploit the same except as expressly permitted under this Agreement: (a) the existence and terms of this Agreement and (b) all information received from the other party under or in connection with this Agreement. The foregoing restrictions shall not apply to the extent the information: (a) ceases to be confidential and enters into the public domain other than due to a breach of this Agreement by the receiving party; (b) is acquired by the receiving party from a third party free of any obligation of confidence, or (c) is required by law to be disclosed.”*

- Care needs to be taken as how confidential information is defined

– In case the parties wish to keep the agreement itself confidential, this should be explicitly drafted

## Force Majeure

- “ 1. For the purpose of the Contract the term Force Majeure shall mean:*
- a. war and other hostilities (whether war be declared or not) invasion, terrorist activity, act of foreign enemies, mobilisation, requisition or embargo*
  - b. ....*
- 2. If either party considers that any circumstance of Force Majeure has occurred which may affect materially the performance of its obligations then he shall forthwith notify the other in writing to that effect giving full details of the circumstances giving rise to the Force Majeure event.*
- 3. Neither party shall be considered to be in default of its obligations under the Contract to the extent that it can establish that the performance of such obligations is prevented by any circumstance of Force Majeure which arises after the date of the Contract and which was not foreseeable at the date of the Contract.*
- 4. ...”*

## Notices

*“Any notices given under this Agreement must be in writing and delivered to the registered office of the party to whom they are addressed or their principal place of business as set out at the front of this Agreement (or such alternative address notified to the other party under this clause). They shall be deemed given when delivered to such address in accordance with this clause. This clause does not apply to the service of proceedings or other documents in any legal action, including any arbitration.”*

- Desirable clause, as statutory provisions on notices are limited

–Must be very clear and strictly followed. As Lord Hoffmann put it:

*“If the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper, however clear it might have been that the tenant wanted to terminate the lease.”*



## Time of the essence

*“Time is of the essence under this Agreement”*

- Where time is of essence, breach of any obligations relating to performance by a certain time result in a termination right
- However, even where such a clause is not included, Courts can find certain clauses where time is of the essence



## Airline Contracts generally confirm to a customary shape

- In effect: standard form procurement contracts
- Rationale: Given the nature of aviation
  - Chicago system: airlines tended to operate to and from each other's home base on a very equal basis
  - Equality & cooperation > competition
  - IATA as airlines' strong central industry body



## III. Troublesome Clauses



## **4 Categories**

A. Financial

B. Management

C. Academic

D. Legal

## A. Financial clauses

- Payment Provisions
- Documentation and Reporting
- Ownership of Equipment
- Audit



## Eg. From IATA SGHA

[www.swgh.az/uploads/filemanager/AHM810\\_2013\\_SGHA-GHC.pdf](http://www.swgh.az/uploads/filemanager/AHM810_2013_SGHA-GHC.pdf)

### **ARTICLE 6. REMUNERATION**

**6.1** In consideration of the Handling Company providing the services, the Carrier agrees to pay to the Handling Company the charges set out in the respective Annex(es) B, within the terms specified. The Carrier further agrees to pay the proper charges of the Handling Company and to discharge all additional expenditure incurred for providing the services referred to in Sub-Articles 1.4, 1.6, 1.7 and 1.8.

**6.2** The charges set out in Annex(es) B do not include:

- any charges, fees or taxes imposed or levied by the Airport, Customs or other authorities against the Carrier or the Handling Company in connection with the provision of services herein by the Handling Company or in connection with the Carrier's flights.
- expenses incurred in connection with stopover and transfer passengers and with the handling of passengers for interrupted, delayed or cancelled flights.

Such charges, fees, taxes or other expenses as outlined above shall be borne ultimately by the Carrier.

### **ARTICLE 7. ACCOUNTING AND PAYMENT**

**7.1** The Handling Company shall invoice the Carrier monthly, unless otherwise agreed in Annex(es) B, with the charges arising from the provision of the handling services of Annex A as listed in Annex(es) B at the rates of charges set out in Annex(es) B.

**7.2** Payment shall be effected through the IATA Clearing House unless otherwise agreed in Annex(es) B.

**7.3** The Parties shall reach agreement on the payment terms at each location. Such payment terms will form part of the applicable Annex(es) B.

## **B. Management clauses:**

- Key Personnel/Approval of Staff
- Technical Direction & Changes
- Deliverables



## Eg. From IATA SGHA

[www.swgh.az/uploads/filemanager/AHM810\\_2013\\_SGHA-GHC.pdf](http://www.swgh.az/uploads/filemanager/AHM810_2013_SGHA-GHC.pdf)

### SECTION 1. MANAGEMENT FUNCTIONS

#### 1.1 Representation

##### 1.1.1

- (a) provide
- (b) arrange for
  - 1. guarantee
  - 2. bond

to facilitate the Carrier's activities.

1.1.2 Liaise with local authorities.

1.1.3 Indicate that the Handling Company is acting as handling agent for the Carrier.

1.1.4 Inform all interested Parties concerning schedules of the Carrier's aircraft.

#### 1.2 Administrative Functions

1.2.1 Establish and maintain local procedures.

1.2.2 Take action on communications addressed to the Carrier.

1.2.3 Prepare, forward, file and retain for a period specified in the Annex B, messages/reports/statistics/documents and perform other administrative duties in the following areas.

- (a) station administration
- (b) passenger services
- (c) ramp services
- (d) load control
- (e) flight operations
- (f) cargo services



## C. Academic clauses:

- Confidentiality and Non-Disclosure
- Publicity
- Rights in Data
- Intellectual Property



Eg. From IATA SGHA

[www.swgh.az/uploads/filemanager/AHM810\\_2013\\_SGHA-GHC.pdf](http://www.swgh.az/uploads/filemanager/AHM810_2013_SGHA-GHC.pdf)

## ARTICLE 2. FAIR PRACTICES

**2.1** The Handling Company shall use its best efforts to protect the Carrier's confidential information and make it available for the purposes of the Carrier only.

**2.2** Neither Party to this Agreement shall disclose any information contained in Annex(es) B to outside parties without the prior consent of the other Party, unless such information is specifically required by applicable law or by governmental or authorities' regulations, in which case the other Party will be notified accordingly.

## D. Legal clauses:

- Indemnification
- Choice of Law
- Arbitration
- Termination



Eg. From IATA SGHA

[www.swgh.az/uploads/filemanager/AHM810\\_2013\\_SGHA-GHC.pdf](http://www.swgh.az/uploads/filemanager/AHM810_2013_SGHA-GHC.pdf)

## **ARTICLE 9. ARBITRATION**

In the event of any dispute or claim concerning the scope, meaning, construction or effect of this Agreement, the parties shall make all reasonable efforts to resolve disputes amongst themselves. Failing mutual resolution of the dispute, the parties may elect to resolve the dispute through arbitration (either by a single arbitrator or a panel of arbitrators). In the event that the parties fail to agree to an arbitration process, the dispute shall be settled in accordance with the laws of the state or jurisdiction set out in Annex(es) B, by the courts set out in Annex(es) B without regard to principles of conflict of laws.

## **ARTICLE 11. DURATION, MODIFICATION AND TERMINATION**

**11.1** This Agreement shall be effective from the date specified in the respective Annex(es) B. It shall supersede any previous arrangements between the Parties governing the provision of services at locations for which there are valid Annex(es) B to this Agreement.

**11.2** Modification of, or additions to this Agreement shall be recorded in Annex(es) B.

**11.3** Any notice referred to under this Article 11 given by one Party under this Agreement shall be deemed properly given if sent by registered letter, or by other means where proof of receipt or acknowledgement is obtained, to the respective office of the other Party as recorded in the Annex(es) B. In the case of a registered letter notice shall be considered to be served on the date of receipt.

**11.4** This Main Agreement shall continue in force until terminated by either Party giving sixty days prior notice to the other Party.

**11.5** Termination by either Party of any Annex(es) B to this Agreement of all or any part of the services provided at a specific location requires sixty days prior notice to the other Party. In the event of part termination of services, consideration shall be given to an adjustment of charges.

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**A contract is a *binding* agreement that your institution has a legal obligation to perform**

# Aviation Advocacy

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