

# 2012 Top Terms in Negotiation

By

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The International Association for Contract and Commercial Management (IACCM)'s Top Terms in Negotiation is an annual study, now in its 11th year. Collecting input from over 8000 negotiators, the study includes input from both buy and sell side practitioners, and from a wide range of industries including oil & gas, manufacturing, outsourcing, IT, among many others. The study is global, with respondents representing every trading nation.

## Executive Summary

Contracting and commercial capability have risen in importance on the Corporate agenda – and IACCM's 11th Annual Study of the Most Frequently Negotiated Terms explains why. Continued turmoil in global markets, coupled with a wave of regulation and shifting economic power, are creating an environment of increased complexity and risk, which is having a major impact on contract negotiations.

This year's study reveals changes that are far more dramatic than at any time since inception of the report. Among the highlights:

- Markets are fragmenting; major corporations are either choosing or being forced to shift the focus of their negotiation in international markets as local issues or concerns challenge standard templates.
- The buy-side / sell-side agenda has become more polarized, reflecting a growing divergence of concerns and increased focus by Legal and contracting specialists on supplier risk.
- The frequency of negotiation and of post-award claims and disputes has increased, driven by a combination of rapid power shifts within industries and between countries, and economic conditions that result in cost-cutting and adversarial behaviour.
- There are encouraging signs that negotiators are placing greater focus on terms that impact risk probability. However, there are also indications of diminished trust between buyers and suppliers, with collaboration occurring only between a select few.

These changes have significant implications for workload, skills, operational management and risk. They demand revised contract and commercial strategies and increase the urgency of steps toward 'intelligent contracting'.

## Top Thirty Terms

**While the top rated terms in this year's chart are unchanged, the overall rankings show greater volatility than in any year since our study began in 2002.**

There are four factors of particular note in this year's Top Thirty Terms:

1. The move towards services and solutions contracts (as opposed to traditional product sales / acquisitions) is at last reflected in growing focus on clauses such as Scope, Service Levels and Responsibilities of the Parties.
2. Regulatory impacts and new sources of risk are another cause of volatility. This is not in itself new – regulatory trends always generate a short-term impact around the time of their introduction. At present, data protection / security is the big issue from a regulatory perspective, with many countries taking action in this area. New sources of risk are sometimes generic concerns, or may be driven by particular industries or geographies. For example, Non-solicitation of employees has entered the chart, driven by specific skill shortages in particular countries.
3. There appears to be a growing focus on efficiency, resulting in efforts to streamline or eliminate low value negotiation, or to establish more balanced 'norms'. Key examples are shown in the significant decline in Confidential Information / non-disclosure terms, down 10 places over the last two years, where more stable provisions supported by the use of technology have resulted in significant streamlining. Service withdrawal or termination is another area in which there is steadily less contention. Especially interesting is the shift in Applicable Law (down 21 places) and rise in Dispute Resolution (up 5 places). This requires further investigation, but appears to reflect growing use of Alternative Dispute Resolution techniques, especially in cross-border contracts (which is of course where debates over Applicable Law / Jurisdiction arise).
4. International divergence is the final area for comment. The criticality of issues certainly varies between geographies and jurisdictions (for example, Entirety of Agreement debates, or the Solicitation of Employees noted above). But there are also signs that divergence is being generated by growing maturity around the use of contracts in markets where they previously had limited significance and were seen either as unnecessary, or as administrative pro-formas. The growth of international trade has awakened many to the overall risks and benefits of contracting and leads to more push-back on some of the Western legal concepts of risk allocation, as well as the rise of significance of local issues or areas of interest. This trend is raising questions over the best approach to 'global contracts' or Master Agreements, used today in many industries to drive consolidation of supply relationships and to exert central control over corporate policies and practices.

Overall, the results confirm the need for negotiators to remain alert and informed on the traditional negotiated terms, but also to develop increased awareness of the potential for more industry or geography specific issues, as well as keeping abreast of the business and regulatory issues that affect their contracts.

	TOP 30 TERMS in 2012	↑↓	2011	2010	2009	2008	2007
1	Limitation of Liability	-	1	1	1	1	1
2	Indemnification	-	2	2	2	2	2
3	Price / Charge / Price Changes	-	3	3	3	3	4
4	Scope and Goals	↑	16	12	14	-	-
5	Liquidated Damages	↑	6	9	9	11	10
6	Payment	↓	5	6	8	8	9
7	Data Protection / Security	↑	15	5	5	10	7
8	Intellectual Property	↓	4	4	4	4	3
9	Service Levels and Warranties	↑	11	7	6	7	11
10	Warranty	↑	12	10	11	13	14
11	Insurance	↑	13	11	15	12	12
12	Responsibilities of the Parties	↑	17	15	13	-	-
13	Delivery / Acceptance	↓	8	8	7	9	8
14	Rights of Use	↑	23	22	22	18	15
15	Confidential Information / Non disclosure	↓	10	5	5	10	7
16	Dispute Resolution	↑	21	19	16	16	17
17	Performance / Guarantees / Undertakings	↓	7	18	-	15	15
18	Invoices / Late Payment	↑	19	16	19	14	19
19	Change Management	↓	18	17	17	-	-
20	Service Withdrawal or Termination	↓	14	13	12	5	5
21	Non-Solicitation of Employees	NEW	-	-	-	-	-
22	Information Access and Management	↑	30	29	29	-	-
23	Entirety of Agreement	↑	29	25	25	23	23
24	Communications and Reporting	↑	28	26	24	-	-
25	Force Majeure	↓	24	24	26	22	27
26	Assignment / Transfer	↓	22	21	20	19	16
27	Product Substitution	NEW	-	-	-	-	-
28	Freight / Shipping	↓	25	28	23	21	21
29	Audits / Benchmarking	↓	20	20	18	17	18
30	Applicable law / Jurisdiction	↓	9	5	5	10	7

## Claims & Disputes

**This year's results show a significant increase in the frequency of claims and disputes, up almost 20% when compared with 2011. These are generally buyer-driven and reflect not only the continuation of tough economic conditions, but also continued erosion of traditional relationships and the complexities of dealing with increasingly rapid change.**

IACCM research into the source of claims and disputes results in somewhat variable data. However, this is largely due to inconsistent categorizations. For example, while 'Price, charge and price changes' has risen to the number one position, we know that disagreements in this area are frequently related to different perceptions of what is included within the Scope, which in turn also impacts the area of 'Change Management' and whether or not a requested change is chargeable.

Since the goal of those negotiating contracts is presumably to support achievement of a successful business outcome, their understanding of the main causes of claim and dispute is of real importance. Any competent risk manager is alert to the primary sources of risk – and in the world of contracts, the nature of claims and disputes is a key indicator. Yet IACCM's research shows that very few organizations monitor the underlying causes of claims and disputes and therefore these do not feature significantly in the development of negotiation plans or strategies. Indeed, it is often the case that those who designed the product (in this case, a contract) have no on-going responsibility for its performance.

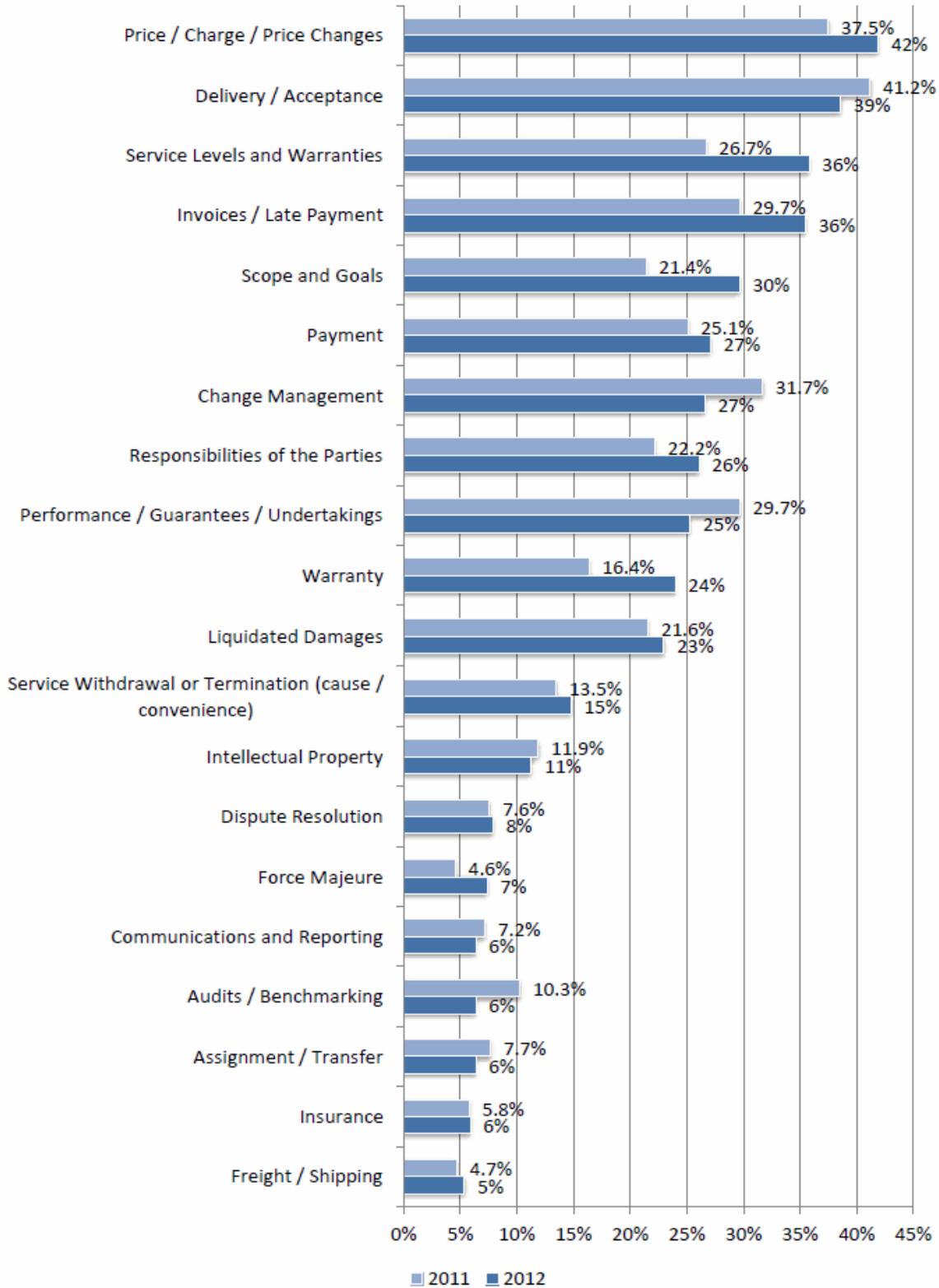
The factors mentioned in the introduction to this section (tough market conditions, eroding relationships and speed of change in market and business conditions) each require new approaches to contracting and negotiation. In many organizations, traditional models of contract and methods of negotiation are still being used, but business conditions have altered quite dramatically. These call for more agile forms of relationship and better-defined governance or administrative procedures<sup>1</sup>, which themselves are often hard to achieve within the structure of today's management and measurement systems. Once again, the inadequacies of contracts and contract terms are a symptom of more deep-seated weaknesses in business policy and practice.

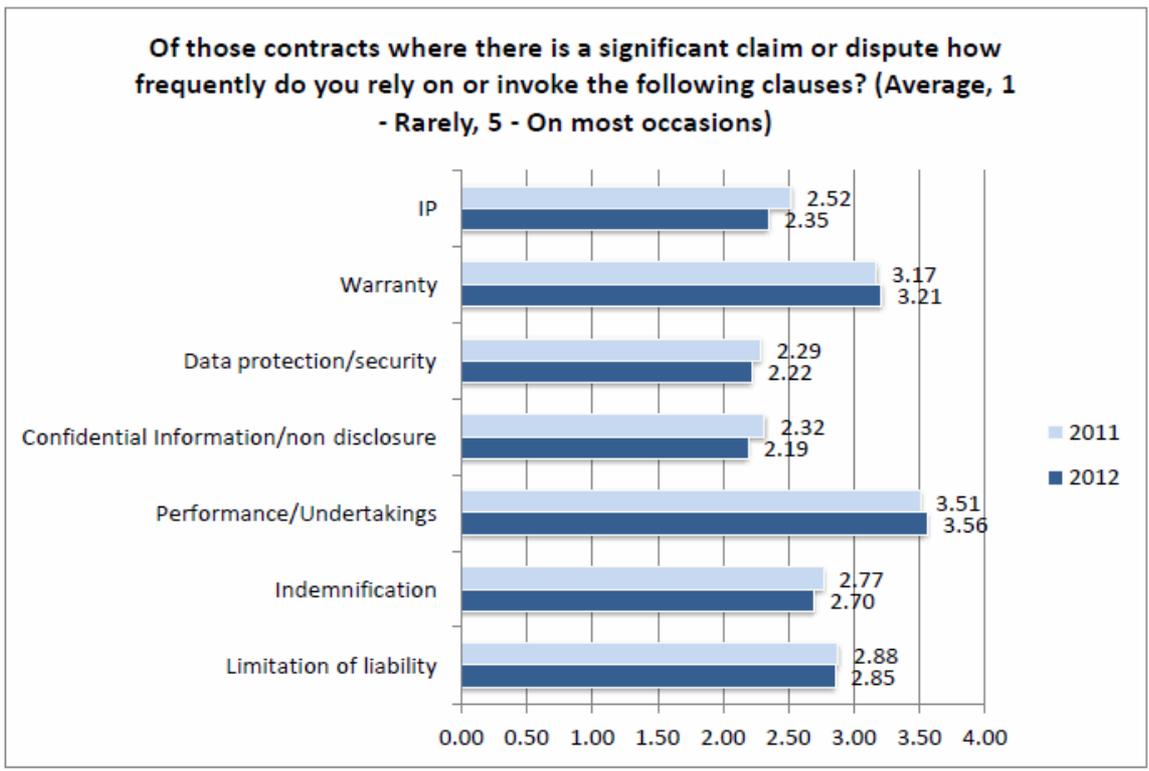
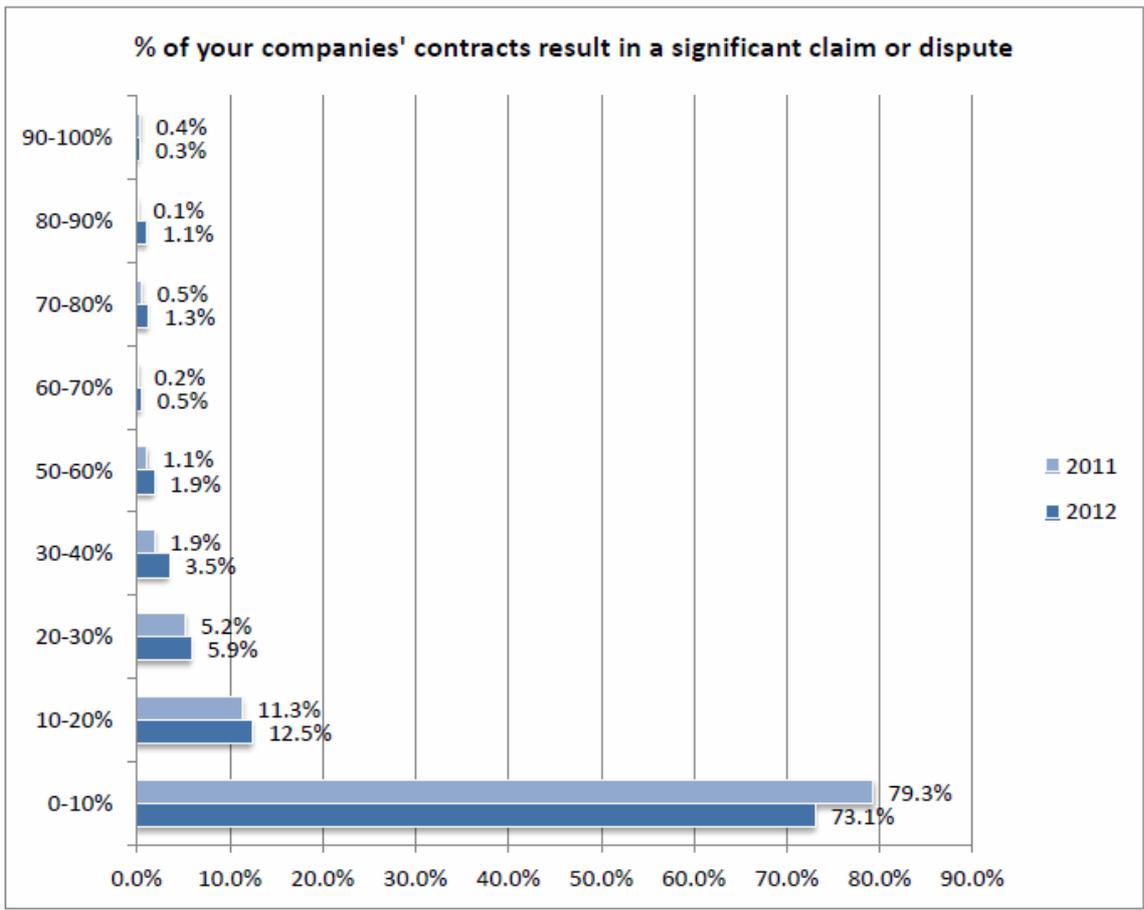
27% of the companies reporting in our survey identify that they experience a significant claim or dispute on 10% or more of their contracts. This represents a major economic cost for both the company and its trading partners. Of particular significance is the fact that the percentage showing this level of claim in 2011 was only 21% - so we have seen a 30% increase in just one year.

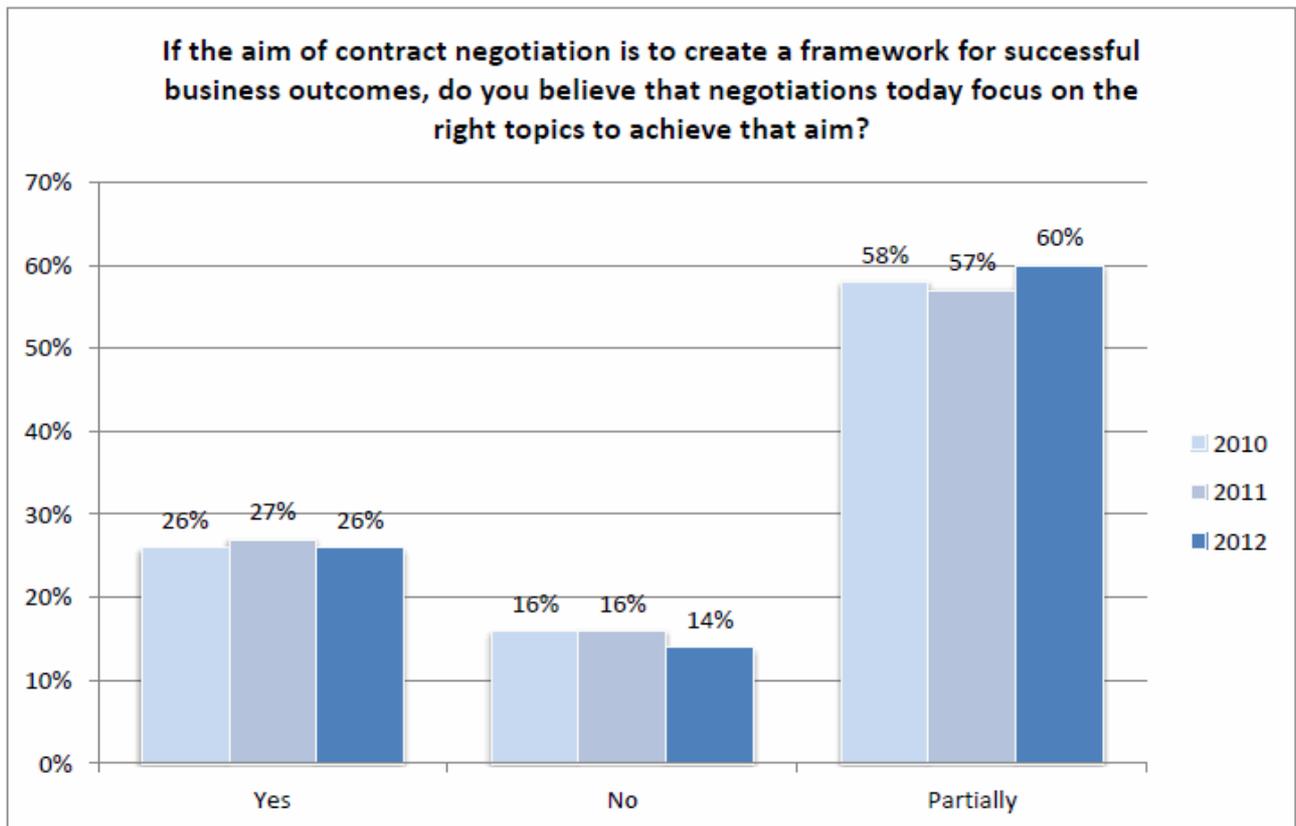
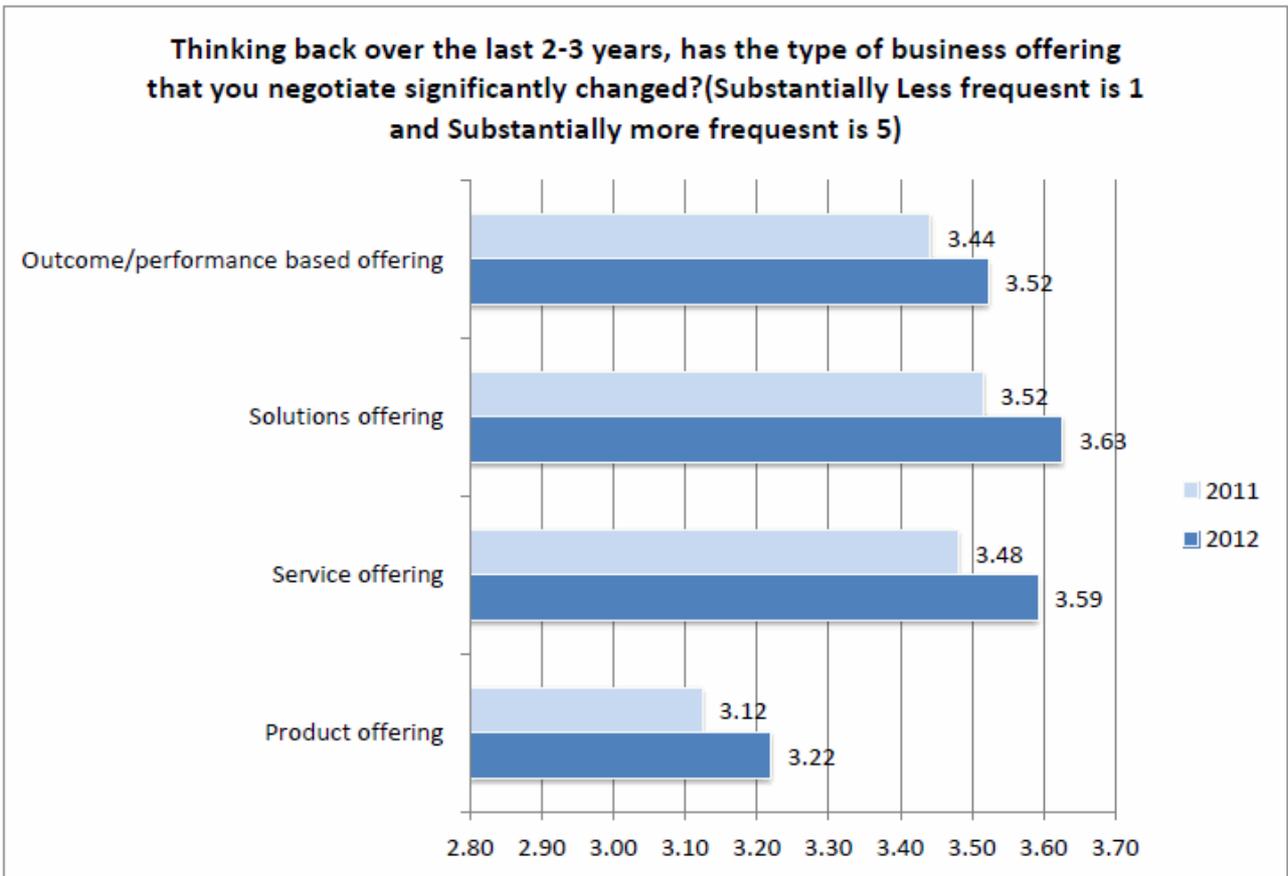
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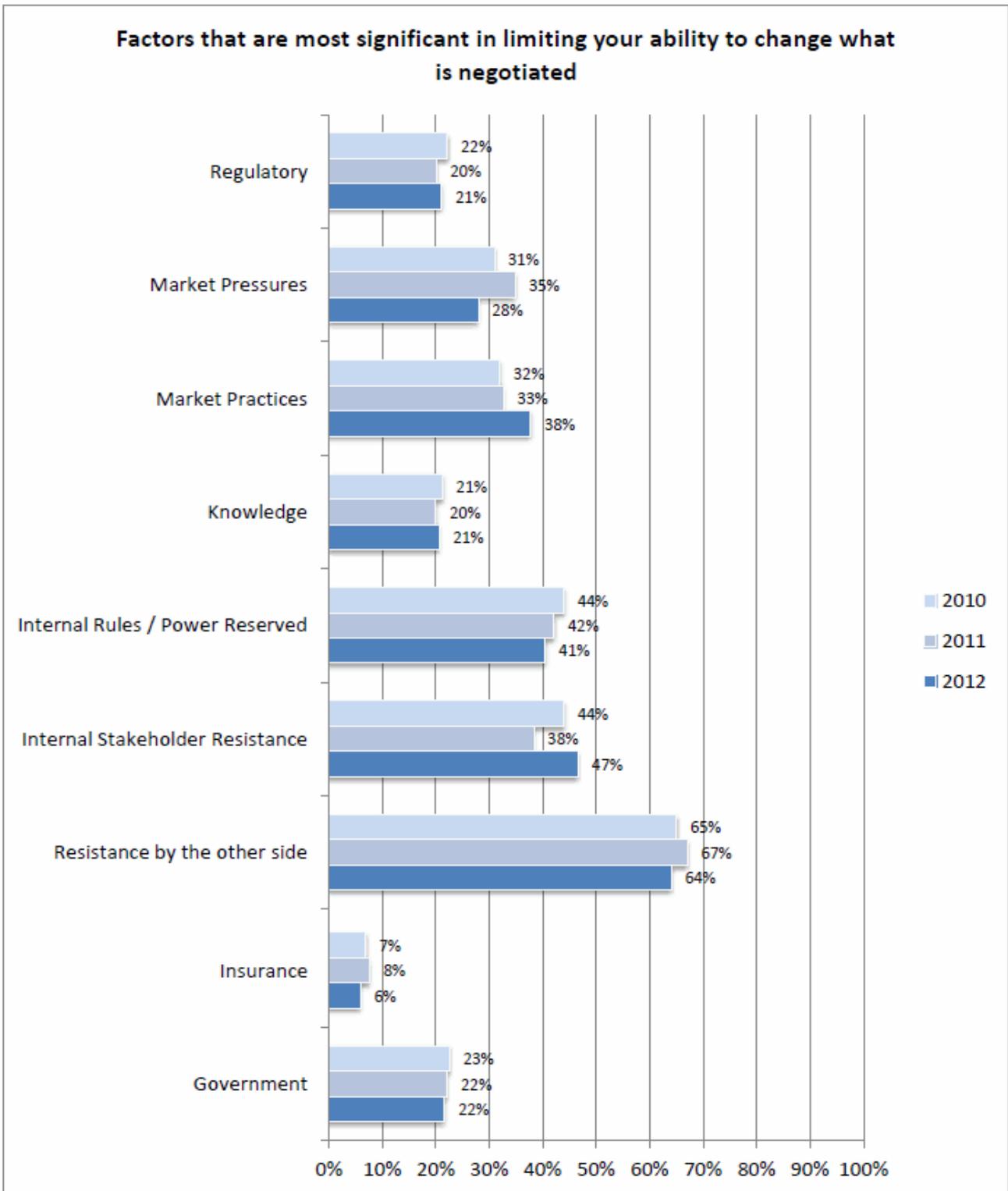
<sup>1</sup> See, for example, IACCM's work on 'Relational Contracting', or webinars / expert interviews on Agile Contracts. Ref: member library at [www.iaccm.com](http://www.iaccm.com)

### During the post-award phase of contract performance which terms are the most frequent source of a claim or dispute?









## Negotiating for Success

**Once again, professional negotiators understand the need to focus more on reducing risk probability through improved post-award governance and change management. They recognize the risks that are created by today's concentration on terms that deal with the consequence of failure.**

The percentage of respondents who recognize that today's negotiations often focus on the wrong topics has remained static, at 84%. They continue to see 'resistance by the other side' as the biggest obstacle to change. In particular, the limited authorities and narrowly focused measurement systems of the Sales and Procurement functions are seen as major barriers to more intelligent negotiations. Neither of these functions is seen as having any substantive interest in changing the agenda or understanding the significance of the contracting process, because both are driven by perceived success at the point of contract signature rather than the longer-term outcome.

As in previous years, the negotiations community is clear about the areas where more time should be spent. The chart of the Top 20 terms that would be more productive in supporting successful relationships includes seven that do not make the current list of 'greatest frequency'. The highest ranking terms in the 'more productive' list are predominantly focused on ensuring clarity of intent and establishing the mechanisms for on-going contract management. This is also the case with the terms that creep into the top 20, addressing the practical issues that arise or that allow effective monitoring of performance – audits, benchmarking, assignment, disaster recovery, business continuity, information access and management.

The interesting – and perhaps surprising – newcomer to the list is 'Entirety of Agreement'. This did not even feature in 2011, yet now is in second place and is of particular concern to the buyer community. It may be that the tendency of courts – and in particular regulatory authorities – to view any communication (including social media) as relevant to investigations has impacted sensitivity in this area. In addition, law firms appear to be investing heavily in off-shore resources to raise their ability to explore every aspect of a disputed agreement. The growing propensity to enter into buyer-driven claims and disputes (noted earlier) may surely be having some impact on concerns over successful prosecution and defense. And finally, the increased use of contracts in world regions where they were traditionally of low importance appears to have been accompanied by local concerns over what precisely constitutes part of the legal agreement.

	<b>The terms that are negotiated with greatest frequency</b>	<b>Terms which would be more productive in supporting successful relationships</b>
1	Limitation of Liability	Scope and Goals
2	Indemnification	Entirety of Agreement
3	Price / Charge / Price Changes	Responsibilities of the Parties
4	Scope and Goals	Change Management
5	Liquidated Damages	Communications and Reporting
6	Payment	Price / Charge / Price Changes
7	Data Protection / Security	Delivery / Acceptance
8	Intellectual Property	Performance / Guarantees / Undertakings
9	Service Levels and Warranties	Limitation of Liability
10	Warranty	Indemnification
11	Insurance	Payment
12	Responsibilities of the Parties	Service Levels and Warranties
13	Delivery / Acceptance	Audits / Benchmarking
14	Rights of Use	Liquidated Damages
15	Confidential Information / Non disclosure	Dispute Resolution
16	Dispute Resolution	Data Protection / Security
17	Performance / Guarantees / Undertakings	Assignment / Transfer
18	Invoices / Late Payment	Intellectual Property
19	Change Management	Business Continuity / Disaster Recovery
20	Service Withdrawal or Termination	Information Access and Management

	<b>Terms which would be more productive in supporting successful relationships 2012</b>	<b>Terms which would be more productive in supporting successful relationships 2011</b>
1	Scope and Goals	Change Management
2	Entirety of Agreement	Scope and Goals
3	Responsibilities of the Parties	Responsibilities of the Parties
4	Change Management	Communications and Reporting
5	Communications and Reporting	Performance / Guarantees / Undertakings
6	Price / Charge / Price Changes	Limitation of Liability
7	Delivery / Acceptance	Delivery / Acceptance
8	Performance / Guarantees / Undertakings	Dispute Resolution
9	Limitation of Liability	Service Levels and Warranties
10	Indemnification	Price / Charge / Price Changes
11	Payment	Audits / Benchmarking
12	Service Levels and Warranties	Indemnification
13	Audits / Benchmarking	Intellectual Property
14	Liquidated Damages	Payment
15	Dispute Resolution	Information Access and Management
16	Data Protection / Security	Business Continuity / Disaster Recovery
17	Assignment / Transfer	Applicable law / Jurisdiction
18	Intellectual Property	Confidential Information / Non disclosure
19	Business Continuity / Disaster Recovery	Warranty
20	Information Access and Management	Assignment / Transfer

## Buyers and Sellers: A World Apart?

**There are significant variations in the priorities of the buyer and the seller – and in their perceptions of where they spend most time today. This typically reflects a difference in relative values and indicates opportunities for trade-off during negotiations. But they also share a mutual desire for a new agenda – and this is being prevented by timing of engagement and their lack of influence over ‘the relationship’.**

Growing specialism frequently results in today’s negotiators going head-to-head on a list of issues; it reduces the opportunities to discuss trade-off based on the relative importance of those issues. To take a case in point, ‘data protection and security’ and ‘insurance’ are terms of high importance to buyers. Sellers, on the other hand, appear especially sensitive to ‘liquidated damages’ and ‘service levels’. Are there opportunities to reach compromises based on these different areas of concern? The list suggests a range of opportunities in this regard.

The ‘terms of the future’ point to a much closer common interest than the parties otherwise believe. As previously noted, each sees ‘the other side’ as the obstacle to changing the negotiations agenda, but it appears that the real obstacle may be more to do with custom and practice and a failure to open the door to new conversations. This may in part be a result of timing of engagement. The fact that those who are responsible for negotiation are rarely involved in early discussions or in establishing relationships makes it hard to shift the traditional agenda.

	Seller's terms today	Seller's terms future	Buyer's terms today	Buyer's terms future
1	Limitation of Liability	Responsibilities of the Parties	Limitation of Liability	Entirety of Agreement
2	Indemnification	Scope and Goals	Indemnification	Scope and Goals
3	Price / Charge / Price Changes	Delivery / Acceptance	Price / Charge / Price Changes	Responsibilities of the Parties
4	Liquidated Damages	Change Management	Data Protection / Security	Insurance
5	Scope and Goals	Electronic Contracts / EDI	Intellectual Property	Change Management
6	Payment	Escrow	Insurance	Price / Charge / Price Changes
7	Service Levels and Warranties	Freight / Shipping	Scope and Goals	Limitation of Liability
8	Intellectual Property	Business Continuity / Disaster Recovery	Payment	Indemnification
9	Information Access and Management	Data Protection / Security	Warranty	Most Favored Client
10	Warranty	Price / Charge / Price Changes	Liquidated Damages	Performance / Guarantees / Undertakings
11	Delivery / Acceptance	Limitation of Liability	Freight / Shipping	Communications and Reporting
12	Rights of Use	Entirety of Agreement	Service Levels and Warranties	Audits / Benchmarking
13	Change Management	Intellectual Property	Responsibilities of the Parties	Service Levels and Warranties
14	Service Withdrawal or Termination	Communications and Reporting	Rights of Use	Intellectual Property
15	Entirety of Agreement	Liquidated Damages	Confidential Information / Non disclosure	Invoices / Late Payment
16	Performance / Guarantees / Undertakings	Performance / Guarantees / Undertakings	Performance / Guarantees / Undertakings	Assignment / Transfer
17	Responsibilities of the Parties	Payment	Dispute Resolution	Dispute Resolution
18	Insurance	Indemnification	Service Withdrawal or Termination	Force Majeure
19	Confidential Information / Non disclosure	Assignment / Transfer	Invoices / Late Payment	Non-Solicitation of Employees
20	Non-Solicitation of Employees	Applicable law / Jurisdiction	Delivery / Acceptance	Information Access and Management
21	Data Protection / Security	Rights of Use	Entirety of Agreement	Delivery / Acceptance
22	Business Continuity	Dispute Resolution	Assignment / Transfer	Product Substitution
23	Dispute Resolution	Enterprise Definition	Change Management	Warranty
24	Force Majeure	Most Favored Client	Electronic Contracts / EDI	Rights of Use
25	Product Substitution	Service Levels and Warranties	Applicable law / Jurisdiction	Payment
26	Invoices / Late Payment	Responsibilities of the Parties	Force Majeure	Liquidated Damages
27	Assignment / Transfer	Scope and Goals	Audits / Benchmarking	Service Withdrawal or Termination
28	Export / Import Regulations	Delivery / Acceptance	Escrow	Business Continuity / Disaster Recovery
29	Communications and Reporting	Invoices / Late Payment	Enterprise Definition / Future Acquisitions	Confidential Information / Non disclosure
30	Enterprise Definition / Future Acquisitions / Divestiture	Export / Import Regulations	Non-Solicitation of Employees	Applicable law

## Does Geography Matter?

**There are substantial variations between the major geographies (and to some extent within them). These are in part due to differences in legal system, but also arise from cultural norms, local business practices and regulation, and the nature of the transactions that are occurring.**

For any organization doing business internationally, and especially for those doing business through Global Master Agreements, these differences are important to understand. The imposition of legal and cultural norms that are alien to the receiving party require explanation and sensitivity. Similarly, a failure to grasp the significance of the issues that are locally important may result in a variety of exposures.

There are few obvious patterns in this data and it is best reviewed in conjunction with the subsequent charts that show variations by major legal jurisdiction. In practical terms, the findings are probably of greatest use when planning for negotiations or in developing new standard contracts. They offer insights that may help in anticipating or understanding the issues of the counter-party – or indeed the reactions of internal colleagues located in other countries.

	South/Central America	Europe	Middle East	Africa	Asia	Australasia	North America	India
1	Entirety of Agreement	Limitation of Liability	Confidential Information / Non disclosure	Non-Solicitation of Employees	Scope and Goals	Limitation of Liability	Limitation of Liability	Limitation of Liability
2	Non-Solicitation of Employees	Price / Charge / Price Changes	Escrow	Responsibilities of the Parties	Dispute Resolution	Non-Solicitation of Employees	Indemnification	Force Majeure
3	Indemnification	Indemnification	Indemnification	Product Substitution	Communications and Reporting	Indemnification	Price / Charge / Price Changes	Freight / Shipping
4	Force Majeure	Liquidated Damages	Limitation of Liability	Limitation of Liability	Limitation of Liability	Insurance	Intellectual Property	Invoices / Late Payment
5	Intellectual Property	Service Levels and Warranties	Audits / Benchmarking	Audits / Benchmarking	Intellectual Property	Scope and Goals	Liquidated Damages	Indemnification
6	Assignment / Transfer	Scope and Goals	Scope and Goals	Data Protection / Security	Liquidated Damages	Audits / Benchmarking	Payment	Price / Charge / Price Changes
7	Insurance	Payment	Product Substitution	Change Management	Change Management	Intellectual Property	Scope and Goals	Service Levels and Warranties
8	Payment	Warranty	Data Protection / Security	Entirety of Agreement	Price / Charge / Price Changes	Business Continuity	Warranty	Change Management
9	Data Protection / Security	Information Access and Management	Payment	Export / Import Regulations	Confidential Information / Non disclosure	Export / Import Regulations	Rights of Use	Data Protection / Security
10	Liquidated Damages	Data Protection / Security	Price / Charge / Price Changes	Service Levels and Warranties	Applicable law / Jurisdiction	Price / Charge / Price Changes	Service Levels and Warranties	Delivery / Acceptance
11	Information Access and Management	Responsibilities of the Parties	Service Withdrawal or Termination	Payment	Indemnification	Rights of Use	Invoices / Late Payment	Responsibilities of the Parties
12	Scope and Goals	Rights of Use	Entirety of Agreement	Communications and Reporting	Warranty	Liquidated Damages	Data Protection / Security	Warranty
13	Limitation of Liability	Delivery / Acceptance	Force Majeure	Insurance	Payment	Entirety of Agreement	Confidential Information	Escrow
14	Delivery / Acceptance	Service Withdrawal or Termination	Rights of Use	Liquidated Damages	Service Levels and Warranties	Data Protection / Security	Insurance	Intellectual Property
15	Dispute Resolution	Dispute Resolution	Responsibilities of the Parties	Scope and Goals	Responsibilities of the Parties	Performance / Guarantees	Electronic Contracts / EDI	Liquidated Damages
16	Price / Charge / Price Changes	Intellectual Property	Liquidated Damages	Delivery / Acceptance	Assignment / Transfer	Service Withdrawal or Termination	Delivery / Acceptance	Rights of Use
17	Change Management	Performance / Guarantees / Undertakings	Performance / Guarantees / Undertakings	Assignment / Transfer	Business Continuity / Disaster Recovery	Warranty	Change Management	Payment
18	Audits / Benchmarking	Invoices / Late Payment	Warranty	Freight / Shipping	Escrow	Service Levels and Warranties	Performance / Guarantees	Dispute Resolution
19	Freight / Shipping	Non-Solicitation of Employees	Invoices / Late Payment	Performance / Guarantees	Insurance	Delivery / Acceptance	Dispute Resolution	Insurance
20	Invoices / Late Payment	Confidential Information / Non disclosure	Delivery / Acceptance	Invoices / Late Payment	Performance / Guarantees / Undertakings	Confidential Information / Non disclosure	Enterprise Definition / Future Acquisitions	Performance / Guarantees
21	Service Levels and Warranties	Insurance	Non-Solicitation of Employees	Confidential Information	Non-Solicitation of Employees	Payment	Information Access and Management	Scope and Goals
22	Communications and Reporting	Change Management	Service Levels and Warranties	Price / Charge / Price Changes	Freight / Shipping	Invoices / Late Payment	Service Withdrawal or Termination	Confidential Information
23	Product Substitution	Assignment / Transfer	Intellectual Property	Warranty	Delivery / Acceptance	Change Management	Responsibilities of the Parties	Export / Import Regulations
24	Business Continuity / Disaster Recovery	Communications and Reporting	Change Management	Dispute Resolution	Force Majeure	Force Majeure	Applicable law / Jurisdiction	Product Substitution
25	Applicable law / Jurisdiction	Audits / Benchmarking	Insurance	Indemnification	Data Protection / Security	Responsibilities of the Parties	Non-Solicitation of Employees	Audits / Benchmarking
26	Performance / Guarantees	Entirety of Agreement	Applicable law / Jurisdiction	Force Majeure	Entirety of Agreement	Product Substitution	Communications and Reporting	Service Withdrawal or Termination
27	Service Withdrawal or Termination	Business Continuity / Disaster Recovery	Communications and Reporting	Most Favored Client	Service Withdrawal	Information Access and Management	Assignment / Transfer	Most Favored Client
28	Responsibilities of the Parties	Most Favored Client	Dispute Resolution	Service Withdrawal	Invoices / Late Payment	Assignment / Transfer	Product Substitution	Assignment / Transfer
29	Escrow	Export / Import Regulations	Assignment / Transfer	Applicable law / Jurisdiction	Electronic Contracts / EDI	Communications and Reporting	Force Majeure	Enterprise Definition
30	Warranty	Freight / Shipping	Business Continuity / Disaster Recovery	Intellectual Property	Most Favored Client	Dispute Resolution	Audits / Benchmarking	Business Continuity / Disaster Recovery

	UCC	English/Comm on Law	French	German	Scandinavian	Middle East/Islamic	Chinese	Spanish	Indian	Brazilian	Russian
1	Indemnificati on	Limitation of Liability	Applicable law / Jurisdiction	Communicati ons and Reporting	Data Protection / Security	Confidential Information / Non disclosure	Limitation of Liability	Limitation of Liability	Dispute Resolution	Applicable law / Jurisdiction	Payment
2	Limitation of Liability	Indemnificati on	Delivery / Acceptance	Limitation of Liability	Invoices / Late Payment	Force Majeure	Liquidated Damages	Change Management	Intellectual Property	Non-Solicitation of Employees	Service Levels and Warranties
3	Price / Charge / Price Changes	Price / Charge / Price Changes	Business Continuity / Disaster Recovery	Price / Charge / Price Changes	Audits / Benchmarking	Scope and Goals	Confidential Information / Non disclosure	Indemnificati on	Service Levels and Warranties	Limitation of Liability	Warranty
4	Enterprise Definition / Future Acquisitions / Divestiture	Scope and Goals	Data Protection / Security	Indemnificati on	Payment	Limitation of Liability	Non-Solicitation of Employees	Freight / Shipping	Invoices / Late Payment	Scope and Goals	Price / Charge / Price Changes
5	Information Access and Management	Liquidated Damages	Liquidated Damages	Warranty	Dispute Resolution	Indemnificati on	Applicable law / Jurisdiction	Intellectual Property	Change Management	Indemnificati on	Service Withdrawal or Termination
6	Invoices / Late Payment	Intellectual Property	Entirety of Agreement	Intellectual Property	Liquidated Damages	Audits / Benchmarking	Intellectual Property	Dispute Resolution	Data Protection / Security	Intellectual Property	Export / Import Regulations
7	Warranty	Payment	Communicati ons and Reporting	Liquidated Damages	Delivery / Acceptance	Payment	Payment	Assignment / Transfer	Delivery / Acceptance	Insurance	Business Continuity / Disaster Recovery
8	Intellectual Property	Rights of Use	Change Management	Service Levels and Warranties	Service Levels and Warranties	Performance / Guarantees / Undertakings	Insurance	Invoices / Late Payment	Indemnificati on	Responsibiliti es of the Parties	Force Majeure
9	Insurance	Warranty	Intellectual Property	Payment	Confidential Information / Non disclosure	Product Substitution	Price / Charge / Price Changes	Service Levels and Warranties	Non-Solicitation of Employees	Payment	Product Substitution
10	Service Levels and Warranties	Service Levels and Warranties	Assignment / Transfer	Performance / Guarantees / Undertakings	Price / Charge / Price Changes	Service Withdrawal or Termination	Data Protection / Security	Delivery / Acceptance	Price / Charge / Price Changes	Price / Charge / Price Changes	Freight / Shipping
11	Rights of Use	Data Protection / Security	Information Access and Management	Scope and Goals	Responsibiliti es of the Parties	Responsibiliti es of the Parties	Dispute Resolution	Scope and Goals	Scope and Goals	Liquidated Damages	Performance / Guarantees / Undertakings
12	Liquidated Damages	Responsibiliti es of the Parties	Invoices / Late Payment	Applicable law / Jurisdiction	Limitation of Liability	Delivery / Acceptance	Freight / Shipping	Payment	Responsibiliti es of the Parties	Product Substitution	Scope and Goals
13	Non-Solicitation of Employees	Confidential Information / Non disclosure	Limitation of Liability	Rights of Use	Intellectual Property	Dispute Resolution	Indemnificati on	Price / Charge / Price Changes	Escrow	Rights of Use	Escrow
14	Payment	Insurance	Most Favored Client	Insurance	Performance / Guarantees / Undertakings	Price / Charge	Responsibiliti es of the Parties	Force Majeure	Limitation of Liability	Invoices / Late Payment	Limitation of Liability
15	Performance / Guarantees	Delivery / Acceptance	Non-Solicitation of Employees	Service Withdrawal or Termination	Service Withdrawal or Termination	Liquidated Damages	Invoices / Late Payment	Non-Solicitation of Employees	Payment	Dispute Resolution	Liquidated Damages
16	Delivery / Acceptance	Performance / Guarantees / Undertakings	Responsibiliti es of the Parties	Assignment / Transfer	Rights of Use	Applicable law / Jurisdiction	Warranty	Insurance	Freight / Shipping	Warranty	Intellectual Property
17	Confidential Information / Non disclosure	Change Management	Service Withdrawal or Termination	Confidential Information / Non disclosure	Most Favored Client	Insurance	Change Management	Confidential Information / Non disclosure	Force Majeure	Change Management	Invoices / Late Payment
18	Service Withdrawal or Termination	Service Withdrawal or Termination	Payment	Product Substitution	Warranty	Invoices / Late Payment	Performance / Guarantees / Undertakings	Warranty	Export / Import Regulations	Service Levels and Warranties	Indemnificati on
19	Assignment / Transfer	Invoices / Late Payment	Confidential Information / Non disclosure	Business Continuity / Disaster Recovery	Communicati ons and Reporting	Assignment / Transfer	Delivery / Acceptance	Data Protection / Security	Insurance	Performance / Guarantees	Insurance
20	Scope and Goals	Dispute Resolution	Service Levels and Warranties	Responsibiliti es of the Parties	Freight / Shipping	Service Levels and Warranties	Audits / Benchmarking	Communicati ons and Reporting	Warranty	Export / Import Regulations	Most Favored Client

	Engineering / Construction / Real Estate	Oil / Gas / Minerals / Utilities	Services / Outsourcing / Consulting	Technology / Software	Telecommunications
1	Information Access and Management	Limitation of Liability	Limitation of Liability	Limitation of Liability	Limitation of Liability
2	Limitation of Liability	Indemnification	Price / Charge / Price Changes	Scope and Goals	Indemnification
3	Product Substitution	Insurance	Indemnification	Indemnification	Non-Solicitation of Employees
4	Indemnification	Scope and Goals	Scope and Goals	Intellectual Property	Payment
5	Price / Charge / Price Changes	Price / Charge / Price Changes	Delivery / Acceptance	Warranty	Change Management
6	Responsibilities of the Parties	Escrow	Service Levels and Warranties	Liquidated Damages	Dispute Resolution
7	Payment	Intellectual Property	Payment	Price / Charge / Price Changes	Confidential Information / Non disclosure
8	Entirety of Agreement	Liquidated Damages	Service Withdrawal or Termination	Rights of Use	Price / Charge / Price Changes
9	Service Levels and Warranties	Payment	Liquidated Damages	Product Substitution	Liquidated Damages
10	Scope and Goals	Performance / Guarantees / Undertakings	Data Protection / Security	Service Levels and Warranties	Intellectual Property
11	Communications and Reporting	Audits / Benchmarking	Business Continuity / Disaster Recovery	Payment	Service Levels and Warranties
12	Data Protection / Security	Dispute Resolution	Responsibilities of the Parties	Insurance	Communications
13	Delivery / Acceptance	Warranty	Intellectual Property	Invoices / Late Payment	Data Protection / Security
14	Liquidated Damages	Service Withdrawal	Force Majeure	Data Protection / Security	Invoices / Late Payment
15	Change Management	Responsibilities of the Parties	Information Access and Management	Assignment / Transfer	Delivery / Acceptance
16	Invoices / Late Payment	Service Levels and Warranties	Assignment / Transfer	Non-Solicitation of Employees	Warranty
17	Warranty	Communications and Reporting	Communications and Reporting	Communications and Reporting	Audits / Benchmarking
18	Performance / Guarantees	Confidential Information / Non disclosure	Export / Import Regulations	Confidential Information / Non disclosure	Export / Import Regulations
19	Freight / Shipping	Delivery / Acceptance	Confidential Information / Non disclosure	Delivery / Acceptance	Rights of Use
20	Non-Solicitation of Employees	Change Management	Non-Solicitation of Employees	Freight / Shipping	Assignment / Transfer

	<b>Lawyers</b>	<b>Non-Lawyers</b>
1	Limitation of Liability	Limitation of Liability
2	Indemnification	Indemnification
3	Warranty	Price / Charge / Price Changes
4	Price / Charge / Price Changes	Liquidated Damages
5	Scope and Goals	Scope and Goals
6	Intellectual Property	Payment
7	Service Levels and Warranties	Intellectual Property
8	Data Protection / Security	Responsibilities of the Parties
9	Payment	Service Levels and Warranties
10	Liquidated Damages	Rights of Use
11	Insurance	Data Protection / Security
12	Dispute Resolution	Non-Solicitation of Employees
13	Confidential Information / Non disclosure	Delivery / Acceptance
14	Invoices / Late Payment	Insurance
15	Performance / Guarantees / Undertakings	Change Management
16	Delivery / Acceptance	Confidential Information / Non disclosure
17	Information Access and Management	Service Withdrawal or
18	Responsibilities of the Parties	Warranty
19	Rights of Use	Invoices / Late Payment
20	Applicable law / Jurisdiction	Performance / Guarantees / Undertakings
21	Service Withdrawal or Termination	Dispute Resolution
22	Change Management	Entirety of Agreement
23	Audits / Benchmarking	Product Substitution
24	Communications and Reporting	Information Access and Management
25	Assignment / Transfer	Assignment / Transfer
26	Non-Solicitation of Employees	Communications and Reporting
27	Business Continuity / Disaster Recovery	Force Majeure
28	Freight / Shipping	Freight / Shipping
29	Escrow	Enterprise Definition / Future Acquisitions / Divestiture
30	Force Majeure	Audits / Benchmarking

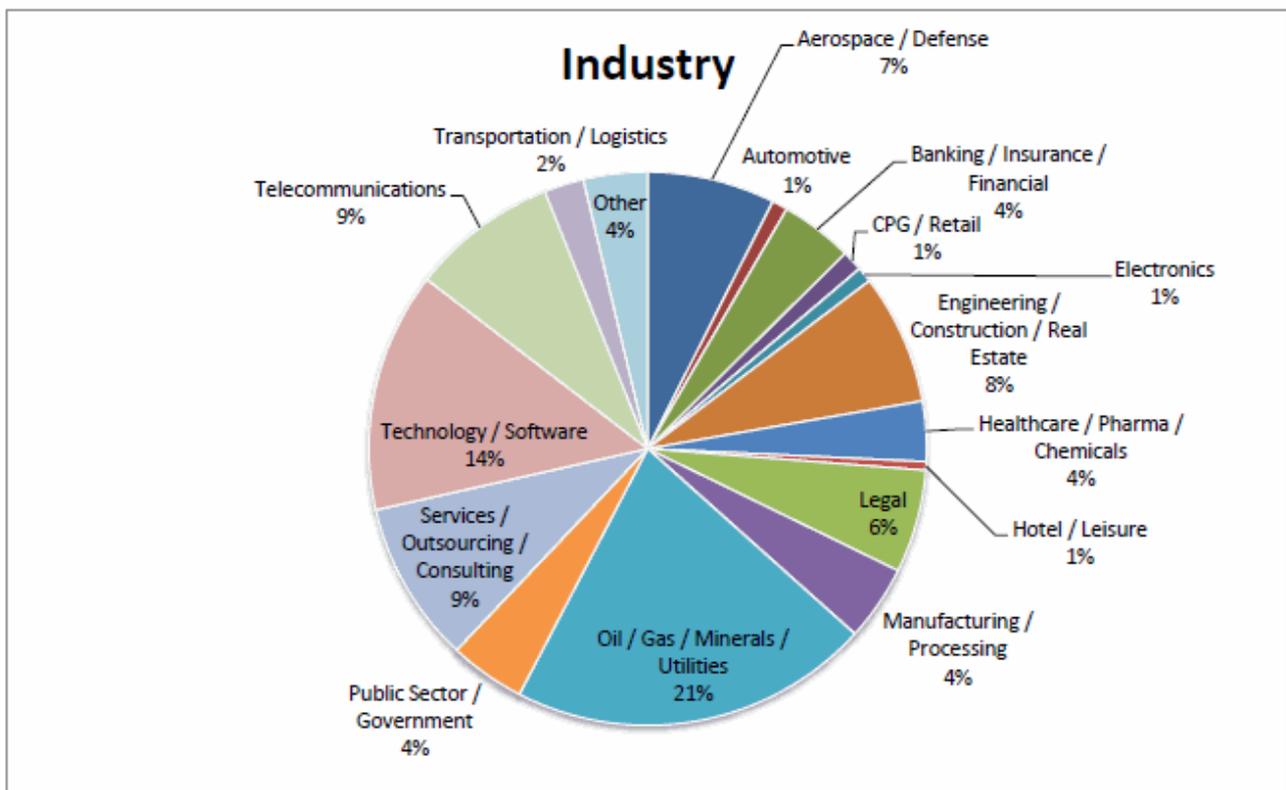
## Conclusion

The 2012 Top Negotiated Terms continue to point to opportunities for change. They confirm that the volume of negotiation is increasing and that contention arising from contracts is growing. These factors give increased urgency to a new approach. Many are calling for 'greater collaboration', but this appears to be a naïve aspiration given the volatility of markets and relationships. Intrinsically, contract negotiators are well aware of the changes that are needed; they are to focus more strongly on the principles of governance and contract administration - to make the contract a framework for business management.

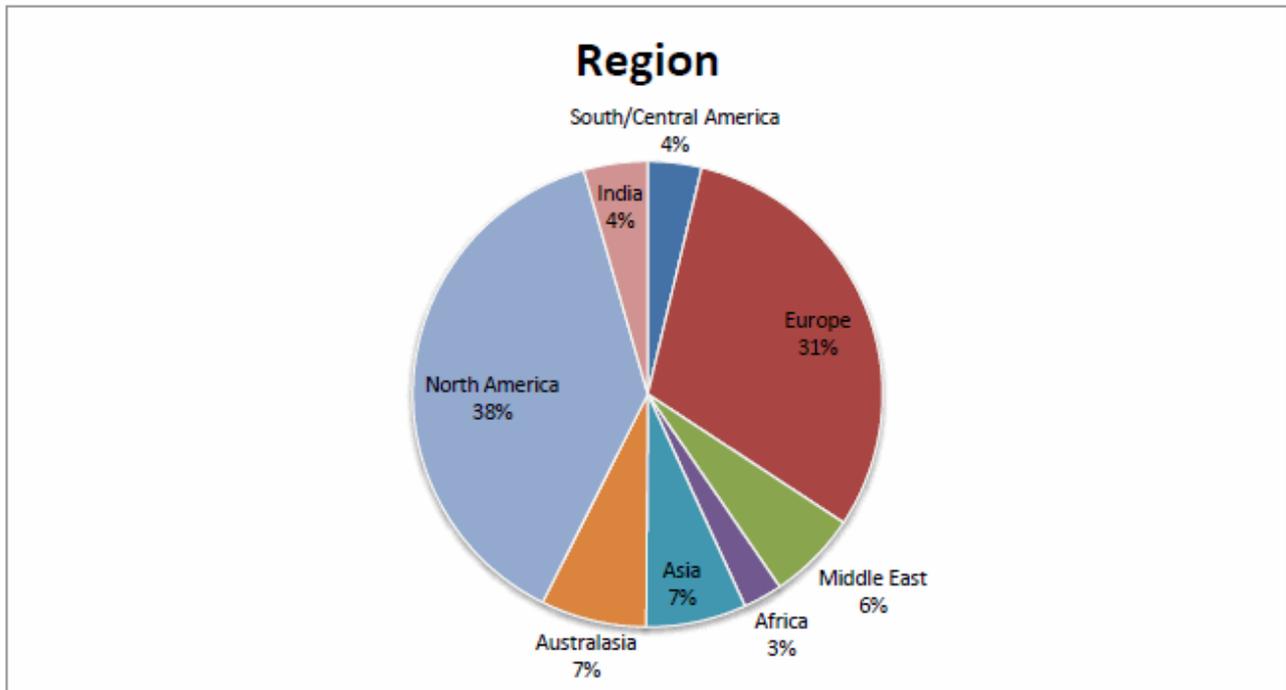
This message was also apparent in IACCM's recent study, 'The Future of Contracting'. However, its realization is frustrated by the tactical nature of contract and negotiation support in today's business organization. The contracting models reflect the priorities of a management and measurement system that rewards nominal savings or revenues, increasingly at the expense of eventual outcomes. The Top Negotiated Terms study offers valuable insights to the contracts and negotiations community, but more importantly it calls for a more radical approach by senior management to re-think the way that key trading relationships are formed and managed.

## Appendix 1; Survey's geographic

### Respondents by Industry



## Respondents by Region



In his role as President/CEO of the International Association for Contract and Commercial Management (IACCM), Tim Cummins works with leading corporations, public and academic bodies, supporting executive awareness and understanding of the role that procurement, contracting and relationship management increasingly play in 21<sup>st</sup> century business performance and public policy.

Prior to IACCM, Tim's business career included executive roles at IBM and a period on the Chairman's staff, leading studies on the impacts of globalization and the reengineering of IBM's global contracting processes. His earlier career involved the banking, automotive and aerospace industries, initially in Corporate Finance and later in commercial and business development. He led negotiations up to \$1.5bn in value and his work has taken him to over 40 countries.

Tim's writing is extensively published and he has acted in an advisory capacity to government bodies in countries that include the US, UK, Australia, Canada and Japan, as well as regular briefings to senior managers at many of the world's largest companies. Tim Cummins can be reached by e-mail at [slewy@iaccm.com](mailto:slewy@iaccm.com).