

Business Contracts Handbook

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Planning More Complex Contracts

Introduction – planning the deal outlines – internal and external teams – planning the contract documentation – planning for change – the length and complexity of contracts – summary and checklist

Introduction

As circumstances become more complex, so more time and attention needs to be put into the earlier stages of planning both the framework of the contract and the involvement of others to try to ensure that the right issues are being addressed in the right way by the right people at the right time.

Planning the Deal Outlines

No one would deny that military campaigns may be won or lost in the planning, and, without taking the analogy too far, contract campaigns may also be badly compromised if those involved fail to think through all the issues in good time and organize their forces to best advantage. At a more logistical and less adversarial level it can be helpful to think of planning a business contract like a trip abroad – as a packing list.

A pro forma 'packing list' contract planner

- *The subject* – where are we going and how are we going to get there?
- *The object* – why are we going there and how will we know we have got there?
- *The benefits* – what are we aiming to get out of this trip longer term and how will we evaluate that, if at all?
- *The cost* – what will the whole thing cost and have we factored in all the incidental things, such as the equivalent of currency exchange, airport transfers and taxes, insurance and gratuities?
- *The risks* – what are the main risks, how are we going to keep these to a manageable minimum and what insurance should we have in place?
- *The effects* – what will be the result if this all works out? What are we likely to want to do next and should this be built in now?
- *Tolerance* – have we built in enough margin for delays or problems (or time out)?

An example of the planner

Here is an example of client use of the planner in the context of an IT project. This will then feed through to the rolling memorandum, as seen below, and the framework and content of the agreement, as shown in Chapter 15 on technology contracts.

Subject – New software system to handle order processing, designed externally to our requirements (schedule to be prepared and attached).

Object – Effective order processing measured by a) ability to handle current volumes of [...] customer orders with expansion up to [...] orders with b) average 24-hour maximum turnaround on average staff complement of three accounts staff and c) 99.9 per cent accuracy – initial measure after four weeks' operation and regular reassessment each quarter.

Benefits – Ability to process customer orders within three working days and invoice immediately, leading to greater customer satisfaction and average invoicing one week earlier than current levels, giving improved cash flow and ability to negotiate early payment discounts with suppliers.

Cost – Fixed cost (budget figure £x) to satisfactory implementation with annual support and maintenance contract with guaranteed 24-hour response (budget figure £y).

Main risks and suggested actions –

- *Choosing wrong supplier: carry out effective due diligence.*
- *System non-compliant: specify performance/acceptance tests.*
- *Delays caused in commissioning process: clear timescale with price adjustments.*
- *Failure after implementation: workable but not to specification – price adjustment.*
- *Failure after implementation: non-workable – need to terminate – build in parameters and termination right.*
- *System works but maintenance poor: need to find a new maintenance provider (will anyone else have the knowledge?) but not to lose system – due diligence and contract provision to permit change.*

Effects – If successful, we will want it long term and to have capacity for upgrades.

Tolerance – Ensure we have sensible timescale and fall-back position for possible downtime.

THE ROLLING MEMORANDUM

Keeping track

As negotiations continue, it can be difficult to keep track of where you are. The biggest danger is that one of the original objectives or concerns gets lost in the detail of particular points. To prevent this, the original planner – or packing list – can be usefully developed into a document that you can keep updated, incorporating an action list for the project team. This will be of great help when drafting or reviewing the contract and, as the chances are that the terms finally agreed will have moved some way from the original

planner, the rolling memo gives the chance to compare directly where you finish up against where you started – before you sign the contract! An example, following on from the IT contract planner above, is set out in Appendix C.

An aid to communication

The rolling memo could then trigger a separate note to the other party to the negotiations – the system supplier in the example – summarizing the agreed and outstanding issues. Their response would then be fed back into the memo until all everything is agreed, at which point the memo would become a guide to preparing or checking the contract itself. The memo could also be used to keep the rest of the implementation team updated.

ATTITUDES TO RISK

Assessing the risk

Risk goes hand-in-hand with cost and benefit. If you don't get what you ordered, what are you likely to lose? A short-term computer failure could be a blow, but what about the effects of failure of the computer system altogether or – at an extreme – the collapse of a hydro-electric dam? One failure to mend a computer fault may have limited effects, but a full system crash or the failure of one vital component might make a complete system useless for its intended purpose. It could also cause major loss of data, enforced downtime and perhaps a resulting breach of the affected company's obligations to a customer. This becomes even clearer with a hydro-electric dam, whose construction is as strong as its weakest part. Here there will be massive power and property interests, and human life potentially at risk. In such cases, the risk factor may outweigh all others and will influence the entire process of selecting and agreeing terms with designers, engineers and contractors.

Limiting the risk

Contracts are not playing cards, and should not be a gamble. For the supplier or provider planning a commitment with a high potential downside, it pays to think at an early stage how that risk can be limited. This may include tighter contract terms, limitation and exclusion clauses and insurance. These are all increasingly important and complex issues, considered in more detail in Chapter 7, and they fundamentally affect the way in which the contract is planned and drafted.

Internal and External Teams

Armies need supply lines. Without the right equipment and ongoing supplies of ammunition, clothing and food, the army will be unable to continue in the field. Supplies require excellent lines of communication and support throughout the whole task force.

INVOLVING THE RIGHT PEOPLE INTERNALLY

In the same way, businesses need to ensure that all those likely to be involved in the supply or purchase chain or the implementation process know what is going on that affects their area and have the chance to feed into the process in good time. Any complex negotiation benefits from being run in parallel with an implementation group. A classic area is outsourcing – the contracting-out to an external specialist of a defined function or part of the business, considered in more detail in Chapter 13. A contract drawn up and signed without reference to those who will need to put it into effect is liable to create all sorts of problems including delay and frustration and, quite possibly, breach and termination. So the advice must be to consider at the outset who has the knowledge and experience to feed into the project and who will need to be fully briefed as to implementation. Without needing to swell the size of the actual negotiation team, this should help ensure that all others who will help formulate and make the project work are – and feel – involved from the outset.

INVOLVING LAWYERS

When to use a lawyer

Business people enter into contracts every day without feeling the need for a lawyer, and this book supports that proposition, but there will come a point when specialist support should be sought. It can be as critical to work out how and when to involve a lawyer as it is whether to involve one. The right planning process will help highlight the issues that will need professional support and when this is best obtained. As a private-practice lawyer, I always felt that clients often tended to leave it too late to instruct me, but, as my experience developed, the clients I had worked with increasingly gave me at least an initial brief at an early stage. This enabled issues such as potential competition law problems to be identified and addressed early on, these often being material in deciding not just what could be negotiated, but also the basic framework of the draft contract itself. As an in-house lawyer, my focus is somewhat different with the acid tests being to balance priorities of overall in-house workload and expertise against the cost and value of external advice. The in-house legal team will know its industry well, so external advice has to be in tune with, able to build on and add value to that knowledge.

The importance of a clear brief

Any lawyer will need a brief; the clearer the brief, the better the outcome is likely to be. The old computer adage ‘garbage in, garbage out’ applies to contracts too, and if the brief is muddled, the drafting is liable to reflect this. A good lawyer will, of course, know the most appropriate questions to ask and will add value in the formation process, not just to the drafting. If you are using a lawyer, allow adequate time and scope for this process. There is no substitute for spending some time in working through the issues at the outset.

Being realistic

Lawyers will be familiar with the ‘could you just?’ request, as in ‘Could you just give this the once over?’ Often this is requested without any background as to the deal, objectives or main risk areas. To best manage cost and the lawyer relationship, send your lawyer the key documents – and the draft contract if there is one – and then book a meeting to run through it. That meeting may be all you need in order to flush out the main issues and raise and address up-front any key questions not in the initial brief. It can also save time and cost, avoiding lengthy correspondence and unnecessary redrafting. Yet all too often this stage is missed, with the lawyer starting with limited information and an unrealistic timescale. Lawyers are professionally risk-averse and need to be told what level of risk clients will and don’t want to accept. Otherwise, they will try to cover them all!

The relationship with your lawyer

Working regularly with a lawyer who knows you and your business is an enormous advantage. Spending time at the outset of the relationship, with updates from time to time, pays dividends, allowing your lawyer to develop the quality, speed and relevance of their advice as their knowledge of your business increases. Most commercial lawyers will respond well to such opportunities and the prospect of building a lasting relationship with a valued client.

Confidence and confidentiality

Confidence in your lawyer is vital in the longer term. If you don’t feel that confidence, think about a change. Try to find someone that you respect personally and can get on with, as well as instruct, as they are more likely to go the extra mile for you at critical times. If, however, you are consistently disappointed after using several different lawyers, it may be worth thinking about your own expectations and approach to the relationship! Some businesspeople are actually reluctant to recommend their lawyers to anyone else because they don’t want their adviser distracted by potentially competing clients. Others will happily recommend their lawyers, but consider confidentiality. If your lawyer acts for many of your friends or competitors, how confidential will they really be able to keep your own plans?

Challenge

It’s also worth encouraging your adviser to challenge you occasionally. There will be times when you are intent on doing a deal that is fundamentally flawed or exposes you to a major degree of risk with limited upside. This is when you need someone working with you who will question you before it’s too late. It is a delicate task, but can sometimes make the difference between success and failure at a critical time. But it is not the lawyer’s job to make your decisions, and the external professional who seeks to run your business probably either needs to be brought on board or replaced. Independence is important, and both lawyer and client must have the ability to walk away from a relationship in which trust and confidence has been lost.

Managing legal costs

However you choose a lawyer the issue of hourly rates soon comes up. Comparing hourly rates is a factor, but can be misleading, as it is the rate for the job that will often matter. The approach mentioned in this section can help keep fees down. It's always worth asking for a fixed fee, or at least an estimate based on assumptions which the lawyer can spell out. Good lawyers will work to that because they know that managing client expectations is vital. But clients need to be realistic too, and, if the deal becomes more protracted than expected, should not expect their lawyer to put in the extra time for no extra reward. Most lawyers do work under pressure and don't rack up extra hours unnecessarily (though there are exceptions). The greater risk is to pretend that the issues are simple, leading to work being passed to junior lawyer with the technical legal knowledge but without the experience to see the wood for the trees and separate out the possible from the probable. You then pay for their work and the partner supervision time to sort it out.

Specialization

Sometimes you will choose a lawyer who has broad experience, even if not necessarily detailed knowledge of your own business. This can involve a learning process, the cost of which the chosen lawyer may be prepared to share with you for building a longer-term relationship, but does give you the added benefit of the lawyer's experience from other kinds of business. Although there are a few exceptions, your conveyancing or matrimonial lawyer is – these days – unlikely also to have the legal expertise you need for business contracts. Even with a general commercial lawyer, there may be times when a specialist in a particular subject needs to be brought in. Your lawyer should suggest when this might apply, but occasionally lawyers do take themselves beyond their own area of expertise, fearing to disclose the limits of their knowledge in case they risk losing you as a client. Ideally, this is the point at which you should encourage your lawyer to be up-front and accept that there is more to be gained from honesty than from trying to sort out unnecessary mistakes afterwards.

Planning the Contract Documentation

It is easy to leap from agreement on the outlines of a deal straight into detailed contract drafting. Once the framework of the written contract is set, it can assume a life and resilience independent of its original creators. The aim must be to draft business contracts designed to give the best chance of the contract serving its intended purpose and the minimum risk of its becoming an agent of destruction. In extreme cases, the contract draft becomes Frankenstein's monster, threatening to destroy the original basis of agreement.

SOME INITIAL CONSIDERATIONS

Type of transaction

The first step is to consider what kind of transaction is proposed and what sort of document would be appropriate for that transaction. An agreement covering a period of time and/or

a mix of goods and services will require much more thought and planning than one for a single transaction.

Precedents are useful but should be used with caution. Contracts are often prepared against tight time deadlines; there is a tendency just to grab a familiar format or the last similar agreement, change the names of the parties and make any other obvious amendments. But the new deal may be significantly different or the last precedent may have been specifically adapted, with some normally vital clauses omitted, so it pays to start from the right point. Shoehorning a deal into the wrong template ultimately serves no one.

SATISFYING CONDITIONS OR REQUIREMENTS

Conditions

Some agreements set out conditions, either ‘conditions precedent’ to the rest of the contract coming into force or ‘conditions subsequent’, to be complied with during the contract. In other cases there may just be a requirement to do something to a given level, such as acceptance testing in technology contracts. These conditions or requirements then need to be ‘satisfied’, either in order to engage the rest of the contract or to establish that the relevant party has complied with its specific obligations. If so, it is essential that the conditions or requirements are clearly expressed so that whether they have taken place can be objectively verified. Where there is the need for the consent of a third party, such as licensor consent, this can most clearly be demonstrated by a signed form or letter. Where there is unlikely to be such a clear-cut position, the contract should, if possible, specify how it will be established that the condition has been met.

‘Satisfactory’

Sometimes the contract will require that something is done to the satisfaction of the other party. Whereas ‘satisfactory quality’ can be objectively judged in sale of goods issues (see Chapter 9) and ‘reasonable satisfaction’ can ultimately be judged on the principles of reasonableness already mentioned, the requirement to do something to the ‘satisfaction’ of the other party is normally best avoided. If confirmation is given, well and good but, if not, it is difficult to imply and, if someone is not satisfied, there is no objective standard against which to judge their view (see *Stabilad v. Stephens & Carter* (1999)).

MAKING ASSUMPTIONS (SEE ALSO ‘WARRANTIES’, P. 62 IN CHAPTER 4)

‘Don’t assume anything’ is a useful golden rule in negotiations. This is not meant as a negative, but as a reminder to check every assumption. Experience shows that many problems could have been avoided by sensible checks at the outset. Many of the potential problems outlined in this book could be identified by a thorough checking process. Of course there are leaps of faith to be made, but better an informed leap than a blind leap into the unknown.

Due diligence (both ways)

Whilst there is always a practical, as well as a theoretical, limit to the extent of 'due diligence' that can be undertaken on any project, there is much that can be done quickly and easily (see the comments in the previous chapter). If you find you are making assumptions that have not been tested, then it's worth going back and making the checks. In addition to the fundamental questions below, 'who' and 'why' are always worth extra thought. Part of that process might usefully include revisiting your own attitude to the other parties. Sometimes their motives may not be what they appear. Equally, on reflection, you might find that your own attitude and performance could be giving the other parties real doubts as to your integrity and commitment. So it pays to try to look both ways.

THE ST ALBANS CASE – RISK, LOSS AND LIABILITY

The leading case of *St Albans City and District Council v. International Computers Ltd* (1996) is worth referring to here as it highlights many issues of contract planning. In brief, ICL provided software which failed to do what the contract said it would do. As a direct result, a substantial loss was incurred by the council which successfully sued ICL. The case is referred to several times in this book. In planning terms, two points are especially worth noting here:

- *Specification/whose terms?* – In *St Albans* the specification requirements were set out in the council's invitation to tender (ITT) and ICL agreed to produce 'a system to cope with all statutory requirements for ... the community charge'. It therefore undertook not only to supply the goods, but also in effect to ensure the result, directly increasing its own risk as provider and reducing risk for St Albans as buyer. If the specification had been based on technical performance and not on actual functionality, the outcome might have been different.
- *Limitations on liability* are really key commercial terms. The contract, although including St Albans' specification, incorporated ICL's standard terms of supply. These limited ICL's liability to £100,000 or the amount of the contract price, whichever was the less. The £100,000 bore no relation either to the contract price (c. £1.3 million) or the council's possible loss. As explained in Chapter 7, this limitation was held to be unreasonable and ineffective, exposing ICL to the full amount of the claim.

Planning for Change

TOLERANCE FACTOR

In engineering, even main supporting structures are designed to move. If they did not, the tension in their construction would break them apart, either slowly or dramatically, when the stresses of their environment proved too strong for the rigidity of their framework. This is even more critical where the risks are high. Buildings in known earthquake zones are now constructed to withstand minor tremors and to cause less destruction if they collapse. Yet businesses often seek to contract on strict terms and time limits with no tolerance built in for inevitable commercial strains.

PEOPLE AND EVENTS

Both circumstances and people may change. The person with whom you negotiated and worked well may suddenly leave and be replaced by someone else with no understanding of the background. Worse still, the new agenda may be completely different. You may have trusted those with whom you were dealing (and their ability to remember all those unwritten promises!), but they may suddenly not be there when the chips are down.

CHANGE CONTROL CLAUSES

Many business contracts (outsourcing being a prime example) now build in clauses dealing specifically with the management of changes to the contract. (The reference to 'change control' is somewhat misleading and not to be confused with 'change of control'.) These typically involve a summary of the likely provisions that may be changed, the procedure and timetable for discussion, a resolution mechanism in the absence of agreement on the change and a process for documenting the change.

A PRACTICAL EXAMPLE OF CHANGE

The background and intention

These last two points can be illustrated by an actual case in which I was involved when in private practice. My then clients were selling their bakery production business, basically getting out of production to concentrate on the business of selling bakery and other food products. To secure the ongoing value of the production business, they were, at the same time, agreeing an exclusive distribution agreement with the buyer of the production business to distribute their products into specialist markets. Quality, consistency, freshness and speed of delivery of the products were all vital to compete effectively in this market. To secure the sale of the production business, the sellers had to undertake that, for a specified period after completion of the sale, not only would they not compete in producing the same type of bakery products, but also that they would not buy those products from anyone else. We argued on behalf of the clients that they needed the right to buy bakery products elsewhere if the new owners of the production business were unable to supply on time or to quality standards. The prospective new owners insisted in negotiations that the exclusivity in the agreements was absolute in the restriction period, even if they themselves were unable to produce and deliver the right quality products on time. The sellers, whilst having misgivings, considered the importance of selling the business to be paramount and went ahead on this basis.

What actually happened

The buyers may have started with good intentions but, first, the bakery production manager had not been enrolled into the agreement and, second, the new owner's sales team brought in much more business from other sources than had been expected. There was then a change of personnel, with the new team having no allegiance to the original deal. The quality and reliability of the deliveries started to suffer, but the bakery, now run

by the new owner, refused to let our clients go elsewhere for supplies or, even temporarily, to produce the food itself. When customers started pulling out, something had to give. In the end both parties suffered through customer loss and legal costs because, however apparently justifiable, there was no tolerance allowed in the contract for this outcome, even though the outcome had been predicted at the outset.

PRICE CHANGES

Price changes in long-term contracts

Another area that is largely predictable, and where many longer-term contracts come under strain, is price. The ideal for providers of goods or services is a price that they can change (normally increase) at will; the ideal for buyers of those goods or services is a price that is fixed, or even one that will reduce if costs go down. Contracts need to find a viable route between these extremes.

Legal implications

As seen earlier, except for rare cases where an obligation is implied to make a contract work at all, the courts will not fill in the blanks where the parties have simply left open – or agreed to agree – a crucial issue, such as the price (or the quantity or the delivery date). The exception here is where the parties have set up in advance a clear procedure or machinery to resolve the issue. This may be by means of reference to an agreed price index or a third-party arbitrator or expert.

Planning ahead; the short-term approach

The temptation to put the issue off should be stoutly resisted, unless both parties accept that, if they don't agree, the contract can be terminated at short notice and without penalty. This is often the best approach but, clearly, would not work in the bakery example above, since a long-term supply agreement underpinned the whole value of the business. A short-term deal will, however, help keep both parties on their commercial toes and enable quality and service issues to be dealt with quickly if they wish to keep the relationship alive.

Planning ahead: the longer-term approach to price changes

Where there is material up-front investment (or a discounted up-front price) and where a long-term support commitment is required for that investment to pay off, a different approach is required, and sustainable pricing is likely to go to the root of the deal. The following questions are then worth considering:

- *Acceptance tests* – Where payment depends on a satisfactory working installation, as with computers or software, is there an adequate acceptance test process? (For example, see Chapter 15, 'Technology Contracts'.)

- *Market price* – With raw material or product prices, is there an active market which can be used to establish market value at any time? Ensure you have the right details and a fall-back position if that market ceases to be viable.
- *Raw materials* – In a manufacturing agreement should there be price adjustments in line with changes in raw materials costs and, if so,
 - how are these costs to be assessed?
 - how much advance notice of a price change should be given?
 - will increases be permitted at any time or only at certain times of the year?
 - should there be a maximum increase or a maximum number of increases in any year?
 - are retrospective rebates appropriate, based on the volume of business conducted in the period?
 - what about *reductions* in raw material costs, especially if these are at an historic high at the time the deal is negotiated?
- *Labour and overheads* – What about these – do the same principles apply?
- *Maximum change* – Should the parties be able to terminate the contract if price changes go beyond agreed levels?
- *Inflation* – Is the rate of inflation relevant and, if so, which index should be specified in the contract? How far is it safe to predict inflation in view of past volatility, and should there be a cap or maximum on the amount of any increase? The wide disparity in recent years between retail and consumer price increases, let alone raw material costs, shows that a simple inflation measure is insufficient. Indeed, such indices have shown some retail prices falling sharply as others have increased, so that prices of imported consumer goods, for example, might bear no relation and might actually be moving in the opposite direction to prices for fuel and power or wages or home-produced goods directly affected as a result.
- *Termination* – If there were to be a spectacular change in circumstances, producing a fundamental shift in the economics of the contract, might there be an exceptional right for either party to terminate? Such a change might be difficult to define, but the financial disasters of 2008–09 suggest that the collapse of a major international bank ('the Lehman's effect', as some have called it) or the plunging in value of specified stock markets or currencies might be indicators of such circumstances.

PLAN FOR SUCCESS (AS WELL AS FOR RISK AND FAILURE)

What will happen if you succeed?

With all the risk analysis and fear of adversity, it is easy to forget that success can be as great a problem as failure. In a way, the example of the bakery business ('A practical example of change' – see above) shows what can happen when a business is too successful. As another example, imagine that you run a house-building company and are looking for appealing new house designs. Market research indicates that converted railway stations have great appeal as homes, so you engage designers to prepare plans of new houses that look like converted railway stations. The houses are popular, and your competitors want to get in on the act. What could be easier than for them to go to the same designers and ask for the same design? There will normally be no breach of copyright because the

copyright belongs to the designers and not the client (see Chapter 14), so the designers are free to reproduce the design, with or without amendments, for your competitors.

The Cala Homes case

This is not a fanciful scenario, but substantially what led to litigation in *Cala Homes v. Alfred McAlpine (No. 1)* (1995), with the added factor that the managing director of Cala left to join its competitor, Alfred McAlpine, complete with the house design idea. Cala took McAlpine to court but had the difficulty that, although the McAlpine design was effectively a copy of the Cala house design, the architect's copyright in the actual design had not been assigned to Cala. Although the whole point of the design was to obtain business advantage for Cala, there was nothing in the contract with the designers to protect the design. In the event, the court took a practical approach to the situation and held that Cala had effective editorial control over the drawings and such an input into the design through their employees that the copyright was owned jointly between themselves and the designers. Cala, as joint copyright owner, had not consented to the licence to McAlpine and could therefore prevent McAlpine from copying the plans. So Cala finally succeeded, but this result necessitated court action and – to some extent – a creative legal interpretation to achieve. The moral is that the effect of success, and not merely the effect of failure, needs to be considered in advance.

Success and exclusivity

Basic economics tells us that the fulfilment of any demand may stimulate more demand, and this can often be anticipated from the outset. That success can, in turn, lead to suppliers or main customers attempting to tie in the successful party. If the baker finds a magic new product or ingredient which starts to sell superbly, its main distributor may seek exclusivity for that product, particularly if the distributor had originally established the product by its effective marketing. For its part, the baker will want to protect the recipe and prevent the distributor from setting up its own bakery or obtaining equivalent, but cheaper, supplies from someone else who has not made the same investment. Exclusivity in contracts, looked at in more detail in Chapter 8, is a particular problem in relation to competition law and needs careful planning. It might best even be avoided unless a clear business case can be made out, which could not adequately be achieved in another way. Where exclusivity is appropriate, it could be conditional on satisfactory ongoing performance by the party benefiting from the restrictions. In the bakery example, the seller who became the customer could have been allowed to buy elsewhere, without detriment to the new owner, only if the latter was unable to produce on time and to quality standards.

The Length and Complexity of Contracts

Having set out many aspects of what to plan for, it is important not to lose sight of practicalities. Every business transaction carries a risk, and a key reason to have a written contract is to set out who is responsible for what, and what the consequences would be if those responsibilities were not followed through. In a simple sale and purchase of goods, the major risks can be fairly quickly identified. But if the transaction is more complex, how many more issues might arise, and how far should the contract cover all these risks? This is

where those negotiating the deal need to decide how far the contract should concentrate on probabilities, rather than distant possibilities, and just how complex the contract should be. Every different possibility can create several new pages of drafting if care is not taken.

The 90:10 rule

In this context my version of the 90 per cent rule is as follows:

Rule 1: In an average contract, 90 per cent of the substance of the transaction will be covered by 10 per cent of the content of the document. The remaining 90 per cent of the document content will deal with things that require clarification, are unlikely to happen or are just irrelevant. So, in an average 20-page document, two pages will cover 90 per cent of the substance.

Rule 2: If you start with a two-page document covering 90 per cent of the substance, each 1 per cent increase above 90 per cent will double the length of the document from what it was before. So 91 per cent will involve four pages, 92 per cent eight pages, 93 per cent 16 pages, 94 per cent 32 pages and so on, so that a 20-page document will probably only reach about 93 per cent cover.

Rule 3: You will never actually achieve 100 per cent. There is no such thing as an infallible document.

The packing list principle

So, if you want a short document, think of it as a matter of choice as to what to put in and what to leave out, like having a limited amount of space in your suitcase. What are you most likely to be doing on your journey and what is the weather likely to be? You may want one sweater, but there's no point in packing several for a warm climate. Likewise there is no reason to have extensive default provisions if the business arrangement can be cancelled at short notice without fault on either side. Will there be laundry facilities? The equivalent might be regular meetings built into the agenda to assess how the project is developing and to give an early opportunity to deal with any problems that arise. Or is this a long-term multi-continent expedition where you really have to provide for a full range of possibilities? Even so, you might be going somewhere where local supplies are cheap and plentiful. The analogy has its weaknesses of course, but the danger lies in thinking that the contract is an ever-expandable suitcase, with the result that it becomes harder to choose (and can cause friction) as to what to put in it and much harder to carry from place to place once you have finally finished packing. Sometimes the tendency to want to forget the over-heavy contract is as great as the tendency to leave the over-heavy suitcase behind and travel light.

Summary and Checklist

Planning can be half the battle. A packing list approach and/or a rolling memorandum can help focus attention and negotiations; it may also prompt involving the right colleagues at an early stage.

Lawyers can add clarity, independence, experience and drafting skills to the mix. The project team needs to do the initial planning and appraisal first, but should know who to bring in to support them and when. The process can be planned so as to maximize added value and manage cost effectively.

Achieving the right contract may, at this stage, begin to look daunting! But the right contract is the right contract for the occasion, not the definitive draft for all occasions. The comprehensive document designed to cover all eventualities and fiercely protect its own corner is rarely agreed, more rarely signed and, if signed, hardly ever observed. The negotiation process itself can become like an emotional tug-of-war. Similarly, no two sets of circumstances are the same, and time does not stand still, so templates need regular updating. You would not take the same precautions for a walk in space as for a walk in the park. They are both excursions, but are utterly different in objective, technical difficulty, cost, overall importance and risk. Despite this, there is tendency to prepare similar contracts to cover entirely dissimilar situations.

A sense of proportion and relevance goes to the route of contract planning. If you asked a lawyer for an infallible contract for your spacecraft you would never take off, as no contract can cover everything that might go wrong. A balance needs to be achieved between action and protection and it is primarily up to you, as the person who knows the business, to decide what sort of document you want. The 90:10 rule applies: more comprehensive documents are longer – longer in length, longer to prepare and longer to negotiate. The decision needs to be made at the outset as to what is appropriate, since the mould is set by the first draft.

The emphasis should therefore be on what is important to make the contract reflect the *essential obligations* of the parties, what is needed to make it work and what should happen if it does not. When that foundation and load-bearing structure has been established, the detail can then safely be added. The process of identifying subject, object, benefit of the contract, cost, risks and the tolerance factor should all help in planning that foundation and structure for the relevant terrain.

Key planning points to consider include:

- What is the subject of the contract and is it clearly covered – for example, by a detailed specification?
- What are the objectives of the agreement? Are they measurable and what are the conditions of achievement?
- What will be the benefits of the contract being carried out and what new pressures might this produce?
- Have you worked out all the cost implications and covered these in the contract as far as possible?
- Have all assumptions been checked and recorded in the contract?
- What are the risks and how are these dealt with? Are there exclusion or limitation clauses to be negotiated? Is suitable insurance cover in place?
- Has some tolerance been built in to the equation?
- Will the deal work in practice and have you done all that is required to integrate the necessary processes to make it work as effectively as possible?
- What areas of uncertainty still exist and how far can these sensibly be covered?