

Chapter 2

Negotiating Drafting and Interpreting Sports Marketing Agreements: Some General Legal and Practical Points and Considerations

2.1 Introductory Remarks

It has been generally well said, that if a commercial deal makes business sense, it also makes legal sense and it is relatively easy, therefore, to draw up the corresponding legal agreement—and, where necessary, enforce it. And this is certainly true of Sports Marketing Agreements, which come in all shapes and sizes. All the commercial and financial arrangements that have been negotiated need to be covered by clearly drafted provisions to avoid any legal challenges to the validity of the Sports Marketing Agreement concerned on the grounds of its uncertainty. Otherwise, the parties may find themselves with a void Agreement, which they cannot rely on or legally enforce. Clarity is the name of the game!

Before dealing with the subjects of drafting and interpreting Sports Marketing Agreements, which, as will be seen, go hand in hand, a word or two on the general principles of negotiating contracts generally would not be inappropriate.

2.2 Negotiating Sports Marketing Agreements

When negotiating Commercial Agreements generally and Sports Marketing Agreements, in particular, especially those with an international dimension, attention should be paid to the following general principles of negotiating.

Negotiating is an art—not a science—and there are a number of useful guidelines to be followed in order to achieve a successful outcome.

In basic terms negotiating is ‘getting to yes’. Like any other form of advocacy—persuading another person to accept your point of view—a negotiation needs to be carefully *planned*. Before you start, you need to know clearly what your objectives are and how you are going to achieve them. Make sure, however, that your objectives are *realistic* and *reasonably achievable*.

An important part of the planning process is to gather as much *intelligence* about the other side in the negotiation as possible. You will need to know, amongst other things, the kind of people you are dealing with; their strengths and weaknesses; and their aims and objectives. Be prepared generally!

Again, as part of the planning process, the negotiation needs to be *structured* into distinct phases. The first phase should identify any points of agreement and get those out of the way; the next, any points of disagreement and the reasons for them. The following phases should be to evaluate, from your own point of view and that of the other side, the importance of these differences and the possibilities for any compromises. Try to identify the matters that are negotiable and the ones that are not negotiable. The points that can be conceded and ‘*given away*’ and the ones that cannot—the ones that are *deal breakers* if not agreed!

Watch out for and try to interpret any *body language*—that is, non-verbal communications and gestures. This is very important in multi-cultural negotiations.

Negotiation also needs *time* and *patience* and should not, therefore, be rushed to avoid bad deals.

Every negotiation should be conducted in a courteous and conciliatory manner. When tempers and blood pressures begin to rise, it is time to take a break!

The use of *role play*—the *hard* person and the *soft* one—should be handled carefully. You should decide, in advance, on the particular roles to be played by each of the members of your negotiating team. And, having done so, you should stick to them! In particular, you should appoint one of the members of the team to lead the negotiations and someone else to take notes and keep a record of everything that is said and ‘agreed’ during them. As to the composition of your negotiating team, if the issues raised involve technical, legal and/or financial matters, make sure that there is someone who is qualified and, therefore, can deal with them.

Likewise the imposition of any *deadlines*, which are designed to move the negotiation along and reach a conclusion more speedily, should also be carefully managed. As in litigation, so also in good negotiation, you should never issue a threat that you are not able and have no intention whatever of carrying out!

Timing is also very important. Choose your moment carefully to press home a particular point. Always know when and how to retreat.

In international negotiations, be aware of and allow for *cultural differences* and the need, where necessary, for the other side to *save face*. This is especially important in negotiations with the Chinese and Japanese and also with parties from the Middle East, where pride may be at the heart of the matter or dispute.

Always remember that negotiating is *getting to yes*, and so always try to make it easy for the other side to say *yes*.

You should be aware of all these negotiating techniques, not only to use them effectively in your own interests, but also be aware of any of them when they are being used against you!

In addition to all the other points that I have mentioned, there is one vital or *golden rule* that should always apply to any negotiations and it is this:

Do not insist on getting the last penny!

And always remember: *in a successful negotiation, everybody wins something!*

Many Books and Articles have been written and many Seminars and Courses are offered on the subject of Successful Negotiating, particularly on Negotiating Strategies and Tactics. A general article on this important aspect of Negotiating, intended to whet the appetite of the reader of this Book to investigate the subject of Negotiating in more detail, is reproduced in the first appendix of this Chapter (2.5.1), for general information and interest purposes. Likewise, in the second appendix of this Chapter (2.5.2), the reader will find some general tips on How to Negotiate Successfully.

2.3 General Principles of Drafting and Interpreting Sports Marketing Agreements

As regards effective drafting, the following general principles should be borne in mind:

- Before starting to draft an agreement, the whole design of the document should be worked out (remember, the agreement will be looked at and interpreted as a whole);
- Nothing should be omitted or included at random;
- The order of the agreement should be strictly logical;
- The ordinary and usual technical language should be followed; and
- Legal language, should, as far as possible, be precise and accurate.

Sir Ernest Gowers of *Plain Words* fame¹ gave the following advice (in rather quaint terms) on making the meaning clear in a legal document:

“The inevitable peculiarities of the legal English are caused by the necessity of being unambiguous. That is by no means the same as being readily intelligible; on the contrary, the nearer you get to the one the further you are likely to get from the other..... it is accordingly the duty of the draftsman.... To try to imagine every possible combination of circumstances to which his words might apply and every conceivable misinterpretation that might be put on them, and to take precautions accordingly. He must avoid all graces, not be afraid of repetitions, or even of identifying them by aforesaid, he must limit by definition words with a penumbra dangerously large, and amplify with a string of near-synonyms words with a penumbra dangerously small; he must eschew all pronouns when their antecedents might possibly be open to dispute, and generally avoid every potential grammatical ambiguity..... All the time he must keep his eye on the rules of legal interpretation and the case-law on the meaning of particular words, and choose his phraseology to fit them.”

¹ ‘The Complete Plain Words’ by Sir Ernest Gowers, first published in 1954 and never out of print since!

To avoid ambiguities and, therefore, disputes on the meaning, interpretation, scope and application of legal documents, keep sentences short and avoid convoluted ones with lots of relative clauses. Also, use simple and clear language and make sure that the document follows a logical and chronological order and, is therefore, easy to read and follow.

For further practical guidance on the art of effective drafting of legal documents, see the very useful little handbook entitled, *The Elements of Drafting*.²

It should be added that, under the rules of interpretation (technical term: *construction*) according to English Law, the aim is to discover the intention of the parties from the language they have used in their written agreement, and, in that process, giving the words used their ordinary and natural meaning.³ Only on an exceptional basis, where there is ambiguity or contradiction on the face of the document, may the Court call upon *parol* evidence (that is, oral external evidence) in order to discover the real intention and meaning of the parties to the particular Agreement.⁴

In this connection, take care with the use of *Recitals* (the so-called *Whereas* clauses). These should be very carefully drafted, stating the background to and the reason(s) for the Agreement. For example, Recitals are important in the case of a Trademark Licence Agreement (which is what a Sports Merchandising Agreement essentially is), where there has been a previous dispute regarding the mark. If the *operative part* of the Agreement is ambiguous or in conflict with the Recitals, the Recitals will prevail when it comes to determining the meaning of the Agreement. Lord Esher, MR, well expressed the legal position in the English case of *Ex p Daves Re Moon* as follows:

“If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred.”⁵

So watch out and avoid such ambiguities inconsistencies!

Whilst on the subject of ambiguities, mention should be made of the *contra proferentem* rule of construction of contracts. This rule derives from the Latin maxim: *verba chartarum fortius accipiuntur contra proferentem*—the words of written documents are construed more forcibly against the party offering them.

This rule provides that any ambiguous term will be construed against the interests of the party that imposed it in the Agreement. Thus, the interpretation of

² E. L. Piesse & J. Gilchrist Smith, Stevens and Sons Ltd, London, 2nd edition 1954.

³ Often called the ‘objective’ method of interpretation.

⁴ See *Street v Mountfort* [1985] AC 809. On the contrary, under Civil Law in Continental Europe, it is much easier to introduce and rely on parol evidence to clarify and explain any ambiguity in an Agreement. This approach is often called the ‘subjective’ method of interpretation. In other words, what did the parties intend to say?

⁵ (1886) 17 QBD 275, at p. 286, CA.

the term concerned will be construed in favour of the party against whom it was unilaterally included. In other words, there was no negotiation—it was ‘a take it or leave it’ situation. Again, the rule only applies where a Court determines that the term is ambiguous. This often forms the basis of a contractual dispute.⁶

The *rationale* for the rule is to encourage the person who drafted the contract to be as clear and explicit as possible and to take into account as many foreseeable situations as possible.

Again, the rule reflects the Courts’ inherent dislike of standard form take-it-or-leave-it contracts, known as ‘contracts of adhesion’—in other words, these are terms and conditions of business, take them or leave them! The Courts take the view that such contracts are the result of unequal or unfair bargaining positions of the parties. To mitigate these effects, the doctrine of *contra proferentem* gives the benefit of any doubt to the party upon whom the contract was imposed.

This rule applies in numerous States of the US. For example, §1654 of the California Civil Code, enacted in 1872, provides as follows:

“In cases of uncertainty... the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.”

The rule particularly applies to clauses in Agreements that impose on one party restrictions that are not clearly drafted and are, therefore, ambiguous, where the party claiming the restrictions contends that they apply in a particular situation, which is not expressly covered by the wording of the clause, is met with the counter argument that such party could have made the position clear by expressly providing for that situation but has failed to do so.

Again, there is a need for clear and precise drafting of Agreements.

A further point in the interests of clarity: the draftsman should use a *definition/interpretation clause*, especially to define *terms of art*; and also use *Annexes/Appendices* for technical information, which is particularly useful in Sports Licensing and Merchandising Agreements (e.g. to define and calculate complex royalties arrangements).

Drafting and interpretation of Agreements should always go hand in hand; they are two sides of the same coin!

Also, it is advisable to include a *dispute resolution clause*, especially if the parties wish to refer any disputes arising under, out of, or in relation to their Sports Marketing Agreement to the Court of Arbitration for Sport (CAS), based in Lausanne, Switzerland, in relation to which there are standard clauses provided by the CAS for such purposes (see [Chap. 17](#)).

Another point: use so-called *boiler-plate* clauses carefully and only where, according to the particular circumstances of the case, they are appropriate and add something to the meaning and effect of the agreement.

⁶ See the English Court of Appeal case of *Peak Construction (Liverpool) Ltd v McKinney Foundation Ltd* [1970] 1 BLR 111 and, in particular, the following remarks of Lord Justice Salmon in his judgement at p. 121: “*The liquidated damages and extension of time clauses in printed forms of contract must be construed strictly contra proferentem.*”

For example, the so-called *Entire Agreement* clause, which expressly excludes from the agreement, *inter alia*, any and all representations or warranties (both oral and written) given before the agreement was signed and which may have induced one of the parties to enter into the agreement in the first place. In this connection, the High Court decision in the case of *White v. Bristol Rugby Club*⁷ is instructive. White, a professional rugby player, signed a three-year contract to move from his previous club to Bristol. The contract expressly stipulated that it was subject to an ‘entire agreement’ clause, so that no oral representations made in the course of negotiations applied in respect of its express terms and conditions. White subsequently decided not to join Bristol and asserted that he had been told during the pre-contract negotiations that he could opt out of the contract on the repayment of the advance made to him by Bristol. The Court held that the entire agreement clause precluded White from relying on an oral opt-out term.⁸

Furthermore, take care of express warranties and conditions—distinguishing between the two of them for legal purposes—especially when acting for the grantor of the rights being licensed. A warranty, if breached, gives rise to a claim in damages only, whereas a condition *goes to the root of the contract*—in other words, is a fundamental term of the contract—and, if breached, entitles the other party to terminate the contract and also claim damages.⁹ Expect to find in a Sports Licensing and Merchandising Agreement, the following mutual warranties:

- both parties are free to enter into the Agreement and have all the necessary rights and title to do so;
- neither party has entered into any conflicting/competing arrangements;
- neither party shall hold itself out as representing the other or binding the other;
- neither party will do or omit to do or allow anything to be done to impair the rights; and
- the use of the rights granted in accordance with the terms of the Agreement shall not cause the infringement of any intellectual property rights of any third party.

The so-called *severance* clause is particularly useful in the case of a Sports Merchandising Agreement containing territorial restrictions on the exploitation of the rights granted (especially when part of a wider geographical licensing programme), in order to avoid the whole of the Agreement being held to be void on National or European Competition Law grounds. The standard *severance* clause runs as follows:

“If any provision or term of this Agreement shall be become or be declared in conflict with Law or Public Policy or otherwise illegal invalid or unenforceable for any reason

⁷ [2002] IRLR 204.

⁸ For further comment on this case, see Blackshaw, Ian (2002) 5(1) Sports Law Bulletin, p. 3.

⁹ See, respectively, the English cases of *Bettini v Gye* (1876) 1 QBD 183 and *Poussard v Spiers* (1876) 1 QBD 410.

whatsoever such term or provision shall be divisible from this Agreement and shall be deemed to be deleted from this Agreement provide always that if such deletion substantially affects or alters the commercial basis of this Agreement the parties shall negotiate in good faith to amend and modify the provisions and terms of this Agreement as may be necessary or desirable in the circumstances and the validity of the remainder shall not in any event be affected by any severance taking effect pursuant to the terms of this clause.”

Likewise, the so-called *waiver* clause, which usually runs as follows:

“No failure or delay by either party to enforce at any time any one or more of the terms of this Agreement shall be a waiver by the said party of the term or right therein or prevent that party at any time subsequently from enforcing all the terms of this Agreement.”

A general point: be careful of using the phrase *best endeavours* in relation to obligations undertaken in the agreement. This phrase has been interpreted by the Courts quite onerously as: *leaving no stone unturned!* This, according to the particular circumstances, could turn out to be quite a heavy financial burden to discharge. In view of its importance and also the variations on theme—‘best endeavours’, ‘reasonable endeavours’ and ‘all reasonable endeavours’—and the need to avoid sloppy and traditional drafting, the legal meaning of these expressions are summarised in [Chap. 18](#) of this Book.

Another important and sport-specific provision to be included in Sports Licensing and Merchandising Agreements—and, indeed, in all events-related Sports Marketing Agreements (for example, Sports Sponsorship Agreements)—is the one making the Agreement subject to the general and commercial/marketing rules and regulations of the Sports Governing Body concerned.

For example, in the case of the Olympics, the Olympic Charter (the latest version of which dates from July 2007) includes a number of articles dealing with the question of the marketing of the Games. See, for example, the provisions of Rule 7 of the Charter, which deals with the rights over the Olympic Games and the so-called ‘Olympic Properties’ and their commercialisation. Paragraphs 1 & 2 of this Rule provide as follows:

- “ 1. The Olympic Games are the exclusive property of the IOC which owns all rights and data relating thereto, in particular, and without limitation, all rights relating to their organisation, exploitation, broadcasting, recording, representation, reproduction, access and dissemination in any form and by any means or mechanism whatsoever, whether now existing or developed in the future. The IOC shall determine the conditions of access to and the conditions of any use of data relating to the Olympic Games and to the competitions and sports performances of the Olympic Games.
2. The Olympic symbol, flag, motto, anthem, identifications (including but not limited to “Olympic Games” and “Games of the Olympiad”), designations, emblems, flame and torches, as defined in Rules 8–14 below, shall be collectively or individually referred to as “Olympic properties”. All rights to any and all Olympic properties, as well as all rights to the use thereof, belong exclusively to the IOC, including but not limited to the use for any profit-making, commercial or advertising purposes. The IOC may license all or part of its rights on terms and conditions set forth by the IOC Executive Board.”

Note, in particular, the inclusion of data rights in paragraph 1 of Rule 7.

A standard Sports Governing Body compliance clause runs as follows:

“This Agreement is expressly subject to the rules and regulations of [the Governing Body] wherever relevant and for the avoidance of doubt in the event that any of the said rules and regulations in any way conflicts with any obligation arising pursuant to this Agreement that rule and/or regulation shall prevail over the conflicting obligation arising pursuant to this Agreement and such obligation shall be suspended during any period such conflict exists.”

Two other ‘boiler-plate’ clauses that may usefully be included in a Sports Marketing Agreement are the following:

‘Good Faith’ Clause

“The Parties hereto hereby mutually agree and declare that both during and after the termination of this Agreement for whatever cause they will act at all times and for all purposes towards one another in the utmost good faith with a view to giving full legal and practical effect to the terms and conditions whether express or implied of this Agreement and any amendment or amendments thereto.”

‘Covenant for Further Assurance’ Clause

“The Parties hereto hereby mutually agree and declare that both during and after the termination of this Agreement for whatever cause they will at their own expense and in a timely manner sign and execute any and all such further documents and deeds and do any and all such further acts and things as may be required to give full legal and practical effect to the terms and conditions whether express or implied of this Agreement and any amendment or amendments thereto.”

These two clauses are discussed in more detail in [Chap. 19](#) on ‘Boiler Plate’ Clauses.

Also, having drafted your Agreement, do not forget to read it through as a whole to make sure that it makes sense and there are no contradictions, inconsistencies or conflicts in the document. In other words, that it all hangs together and makes sense. Self-editing of legal documents is absolutely essential in all cases. In any case, the basic canon of interpretation of contracts is that “the contract must be read and construed as a whole”.¹⁰

The other canons of construction, which should always be borne in mind when drafting Agreements, are as follows:

“Secondly, a contract must be construed objectively, according to the standards of a reasonable third party who is aware of the commercial context in which the contract occurs. Thirdly, a commercial contract must be given a commercially sensible construction; a construction which produces a sensible result should be preferred over one which does not. This means that when a court is faced with competing constructions, it should consider

¹⁰ Per Lord Drummond Young in *Emcor Drake and Scull v Edinburgh Royal Joint Venture* 2005 SLT 1233, who set out seven canons of construction as follows:

“[13] First, a contractual provision must be construed in the context of the contract in which it is found. The contract is construed as a whole and, if possible, all the provisions of the contract should be given effect.”

which meaning is more likely to have been intended by reasonable businessmen. Fourthly, ... in construing a formal commercial contract, which lawyers have drafted on behalf of each of the parties, the court would normally expect the parties to have chosen their words with care and to have intended to convey the meaning which the words they chose would convey to a reasonable person. Fifthly, ... the Court must be alive to the position of both parties and to the possibilities (a) that the provision may represent a compromise and (b) that one party may have made a bad bargain. ... Sixthly ... the parties must give effect to the parties bargain and must not substitute a different bargain from that which the parties have made. Seventhly, it is permissible ... to have regard to the circumstances in which the contract came to be concluded for the purpose of discovering the facts to which the contract refers and its commercial purposes, objectively considered...".¹¹

One final point: be careful when, as is often the case, of including a general clause in Sports Marketing Agreements, usually insisted upon by Sports Governing Bodies, especially in Sports Sponsorship and Sports Licensing and Merchandising Agreements, making the Agreement subject to the general prohibition of not doing anything which *may bring the Sport of..... into disrepute*. This is a difficult provision to interpret and apply, in practice, as it is essentially subjective in nature. It is rather like including a general provision on 'public policy', which has been described by one English Judge, namely Mr. Justice Burrough, as: "a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."¹²

2.4 Concluding Remarks

Included throughout the Book are a number of Precedents—general/standard forms—for a wide range of Sports Marketing Agreements that will need to be negotiated and drafted.

But beware! Precedents should be used only as a general guide or checklist and should not be blindly and slavishly followed.

All Sports Marketing Agreements are the result of a particular commercial deal that has been negotiated between the parties to them and need, therefore, to be individually tailored and customised to fit and reflect the particular facts and circumstances of each case. In other words, when drafting Sports Marketing Agreements it is not a case of *one size fits all*. Drafting, to be legally and practically effective, needs to be contextual in all cases and should never be carried out in a vacuum. Furthermore, drafting and interpretation go hand in hand and should always be considered as two sides of the same coin.

You have been warned!

¹¹ Para [13] Ibid.

¹² *Richardson v Mellish* (1824), 2 Bing. 229, 252, 130 Eng. Rep. 294, at p. 303.

2.5 Appendices

2.5.1 Appendix 1

Best Practice Negotiation Skills: How to Determine the Best Negotiation Strategy

By Jan Potgieter^{*}

One of the most overlooked negotiation skills is the skill of selecting the most appropriate negotiation strategy for your negotiation.

Are you approaching all your commercial negotiations with a standard approach?
Should you only use a win/win approach to negotiations?

Traditionally, negotiated outcomes can be classified into one of the following categories:

- Lose/Lose (all parties lose)
- Win/Lose (I win and you lose)
- Lose/Win (I lose and you win)
- Win/Win (we both win—could also be described as compromise)
- Win More/Win More (we unlock synergies—could also be described as being collaborative)

Whilst I agree with the notion that a win/win approach is the only sustainable way to gain competitive advantage, it is well worth considering how you would practically apply this approach in today's global marketplace.

It would be short sighted to conclude that all negotiations are made equally and should therefore be approached in the same way. It would be similar to say that one nation's culture & beliefs are the appropriate culture and therefore the standards that apply to that culture should be applied in interacting with people across the world, irrespective of their background.

There is another dimension within the context of commercial negotiations that should be considered—the old economic dilemma of 'guns or butter'.

The 'guns or butter' story illustrates that with limited resources, organisations and individuals are forced to make choices. In order to have more butter, one must sacrifice guns and vice versa. In a practical sense this means that resources can only be allocated in relation to the relative strategic importance of the activity at issue.

In the case of negotiations that are considered strategic in importance to the organisation, we are more likely to pursue a collaborative or compromising approach. Conversely, when we deem the outcome of certain negotiations to have a limited impact or no impact at all on the achievement of strategic organisational

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objectives we could decide to be competitive in our approach or even to avoid negotiation completely.

We would not be responsible stewards of corporate resources if we were to approach all negotiations in a similar fashion. There is also a philosophical dimension to the approach to negotiation pursued by many organisations. Some organisations are renowned for their collaborative approach to doing business whilst others have a reputation for a mercenary approach to conducting business.

Some players in the retail sector have reputations of dealing ruthlessly with suppliers—they rationalise their approach by arguing that it is in the interest of the consumer. Whilst I agree that this approach is short sighted and probably not sustainable in the long run, it would be naïve not to recognise the fact that, at least commercially speaking, a lot of organisations have little interest in collaborative or compromising type negotiations within certain departments.

It is interesting to note that whilst most organisations pride themselves on providing ‘solutions’ to the issues confronting their clients, a significant proportion of their so called negotiations actually revolve around haggling about price.

I have no doubt that there is a sincere intention to engage on a solution based principle it just seems that this is much easier said than done where the rubber hits the road. A lot of the time companies’ stated intentions to engage on a win/win based principle is similar to the new year’s resolutions so many of us make every year. There is scant chance of us achieving our resolutions without putting in place a supporting plan and taking action to achieve our goals.

Many organisations lack a clear organisational negotiation strategy & process which exposes them to the risks associated with a huge variance in the results of their negotiated agreements.

Organisations and individuals should recognise that collaborative negotiation demands the investment of significant resources. In order for us to be truly collaborative, we have to spend much time getting to know each other. In a commercial context, this plainly does not make sense in some cases. Consider the purchase of a pure commodity such as paper for a small or medium sized organisation—if there are no value added services presented or required, it would be sub optimal to pursue a collaborative relationship with the provider of such a commodity.

It would make more sense to pursue a competitive approach to the procurement of paper than a collaborative or even compromising approach. In practise, many organisations would approach the purchase of paper or stationery in a way where they would request multiple quotations and award the business to the lowest bidder. As a matter of fact, in some cases no negotiation at all would take place.

An interesting note here is that this does not mean that the paper supplier has lost as a result of this transaction—they have won the order, but the telling thing is that we were not really interested in their interests at all; we were only focused on our desired objectives.

So pursuing a win/lose strategy in this example has not really resulted in a loss for the supplier, but it does mean that we were not really interested in their desired outcomes.

The flip side of this example is that if you are selling commodity type products, you have to realise that before you will be in a position to negotiate, you must create for yourself a base to do this from—hence the move towards providing solutions.

How then do we decide which negotiation strategy to follow? Within a commercial context, the following negotiation strategy options are available to us:

1. Avoiding negotiation altogether.
2. Engaging in a competitive negotiation where we seek to achieve our goals aggressively.
3. Engaging in an accommodating negotiation where we seek to satisfy only the needs of our counterparty to the exclusion of our own needs.
4. Using a compromising approach where we seek to satisfy some of our needs and interests and some of the needs and interests of our counterparty.
5. Deploying a collaborative negotiation approach where we seek to satisfy all our needs and interests in addition to satisfying all the needs and interests of our counterparty.

The negotiation strategy that is appropriate will be determined by your answers to the following three questions:

1. How strong are my alternatives to this particular negotiation?
2. How important is a long term relationship in the context of this negotiation?
3. How much time do you have available for negotiation?

It follows that in many cases, buyers would be pursuing an approach where they are avoiding negotiation or being competitive and sellers would like to be compromising or collaborative.

How then to deal with this situation?

A key part of the negotiation preparation process should be focused on trying to understand your counterparties needs, interests and objectives. This will assist you in identifying the likely negotiation strategy that they will be pursuing.

If your counterparty is avoiding a negotiation, you can be sure that your organisation is not being viewed as a contributor of competitive advantage to your counterparty's organisation. Your challenge would in the first instance be to reconsider the way that your products and services are packaged.

The aim should be to add to the achievement of the strategic business objectives of your counterparty by identifying the components of your offering that matches their strategic needs. If you find yourself at the wrong end of a competitive negotiation, it would serve you well to be familiar with the most often used negotiation tactics as you will most certainly be confronted with a tactical approach.

Unless you are well versed in negotiation tactics, it will be difficult for you to maximise the value that you will be able to extract from the negotiation as there is no sincere interest on the part of your counterparty to satisfy any of your needs or interests.

2.5.2 Appendix 2

Fifteen Rules Every Negotiator Should Know*

1. ***Remember, everything is negotiable.*** Don't narrow a negotiation down to just one issue. Develop as many issues or negotiable deal points as you can and then juggle in additional deal points if you and the other party lock onto one issue.
2. ***Crystallize your vision of the outcome.*** The counterpart who can visualize the end result will most likely be the one who guides the negotiation.
3. ***Prepare in advance.*** Information is power. Obtain as much information as possible beforehand to make sure you understand the value of what you are negotiating. Remember, very few negotiations begin when the counterparts arrive at the table.
4. ***Ask questions.*** Clarify information you do not understand. Determine both the implicit and explicit needs of your counterpart.
5. ***Listen.*** When you do a good job listening, you not only gain new ideas for creating win/win outcomes but also make your counterpart feel cared for and valued. This also allows you to find out what the other party wants. If you assume that his or her wants and needs are the same as yours, you will have the attitude that only one of you can "win" the negotiation.
6. ***Set a goal for each deal point.*** Define your minimum level of acceptance for each goal. If you aren't clear on your goals, you will end up reacting to the propositions of your counterpart.
7. ***Aim your aspirations high.*** Your aspirations will likely be the single most important factor in determining the outcome of the negotiation. You can aim high just as easily as you can aim low.
8. ***Develop options and strategies.*** Successful people are those who have the greatest number of viable alternatives. Similarly, successful negotiators are those who have the most strategies they can use to turn their options into reality.
9. ***Think like a dolphin.*** The dolphin is the only mammal who can swim in a sea of sharks or in a sea of carp. Dolphins are able to adapt their strategies and behaviors to their counterparts. Remember, even when negotiating with a shark, you have an option—you can walk away!
10. ***Be honest and fair.*** In life, what goes around comes around. The goal in creating win/win outcomes is to have both counterparts feel that their needs and goals have been met, so that they will be willing to come back to the table and negotiate again. An atmosphere of trust reduces the time required to create win/win outcomes.

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11. ***Never accept the first offer.*** Often, the other party will make an offer that he or she thinks you will refuse just to see how firm you are on key issues. Chances are, if you don't have to fight a little for what you want, you won't get the best deal.
12. ***Deal from strength if you can.*** If that's not possible, at least create the appearance of strength. If the other party thinks you have no reason to compromise in your demands, he or she is less likely to ask you to.
13. ***Find out what the other party wants. Concede slowly, and call a concession a concession.*** Giving in too easily tells the other party that you will probably be open to accepting even more concessions.
14. ***Be cooperative and friendly.*** Avoid being abrasive or combative, which often breaks down negotiations.
15. ***Use the power of competition.*** Someone who thinks it's necessary to compete for your business may be willing to give away more than he or she originally intended. Sometimes just the threat of competition is enough to encourage concessions.



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