



SESSION 5: TOP TIPS FOR NEGOTIATIONS

WIN In-House Counsel Day Brisbane 2017

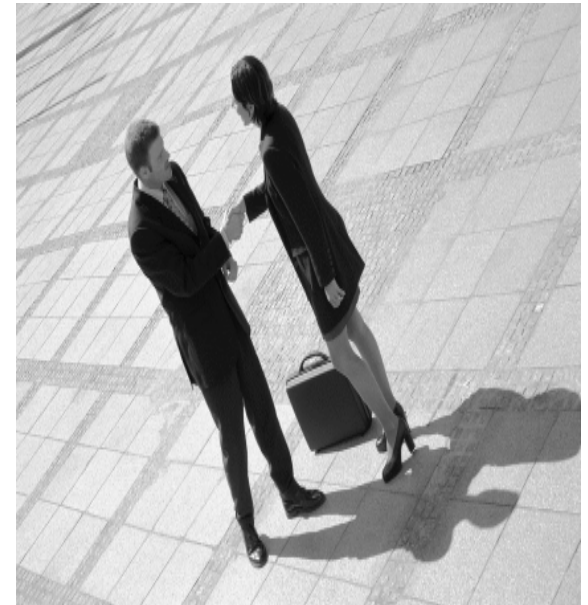
Tuesday, 21 February 2017

Agenda

- 1** Why negotiate?
- 2** Negotiation and risk management
- 3** Preparation Prevents Poor Performance
- 4** Maximising leverage
- 5** Tactics – yours and theirs
- 6** Key negotiation techniques
- 7** Typical customer/vendor sensitivities
- 8** Putting it into practice - a working example

Why negotiate?

- Why?
 - to set out agreed terms and conditions
- Why?
 - to ensure they are legally enforceable
- Why?
 - to obtain certainty
- Why?
 - because the terms and conditions allocate risks/benefits



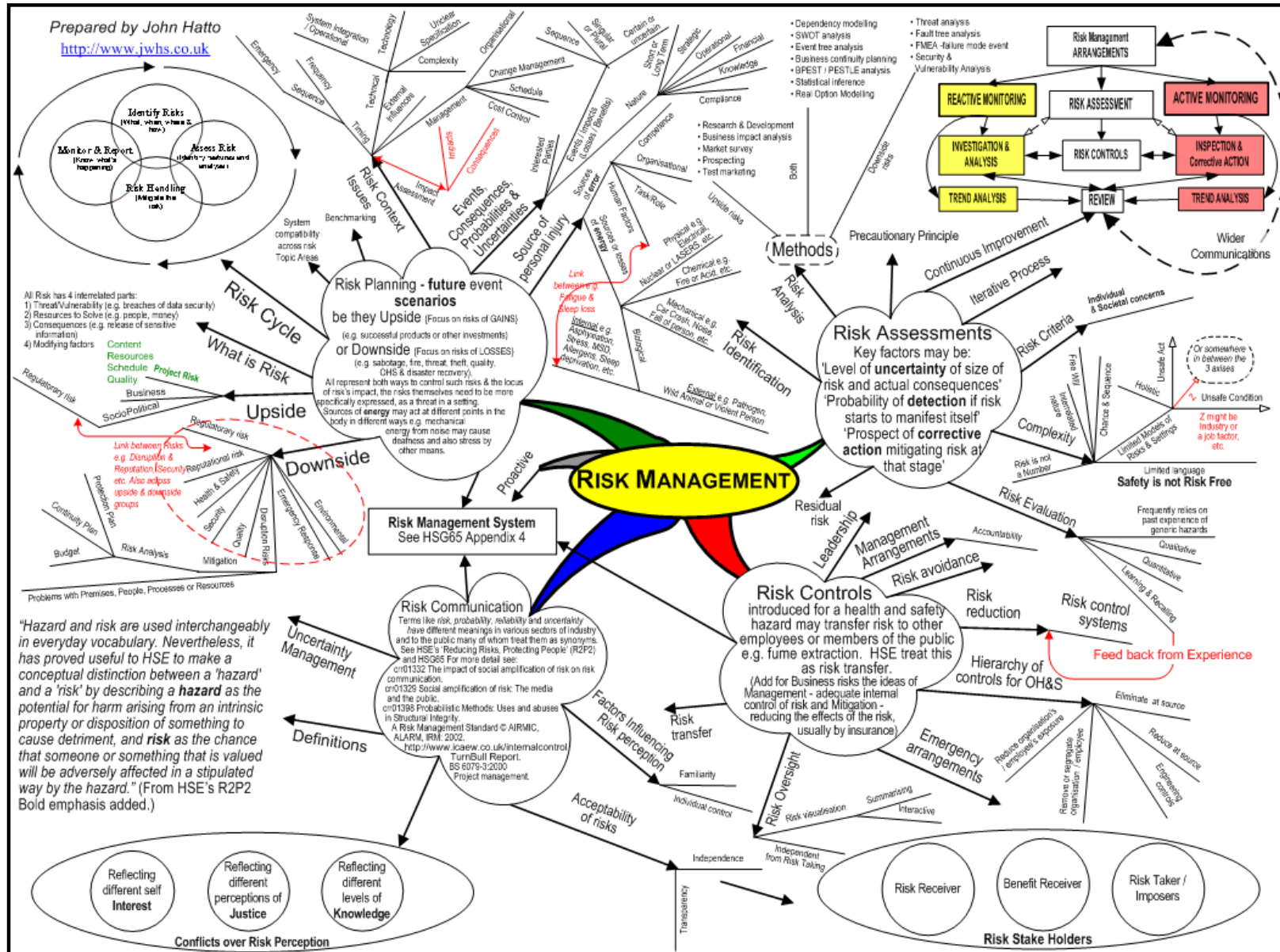
Role of legal contracts in risk management

- Integral part of the risk management processes
- Ensure projects are structured within the risk management matrix
- There is always a link between risk and cost of projects
- Direct and indirect methods of risk management through contracts

Getting the balance right



Risk management

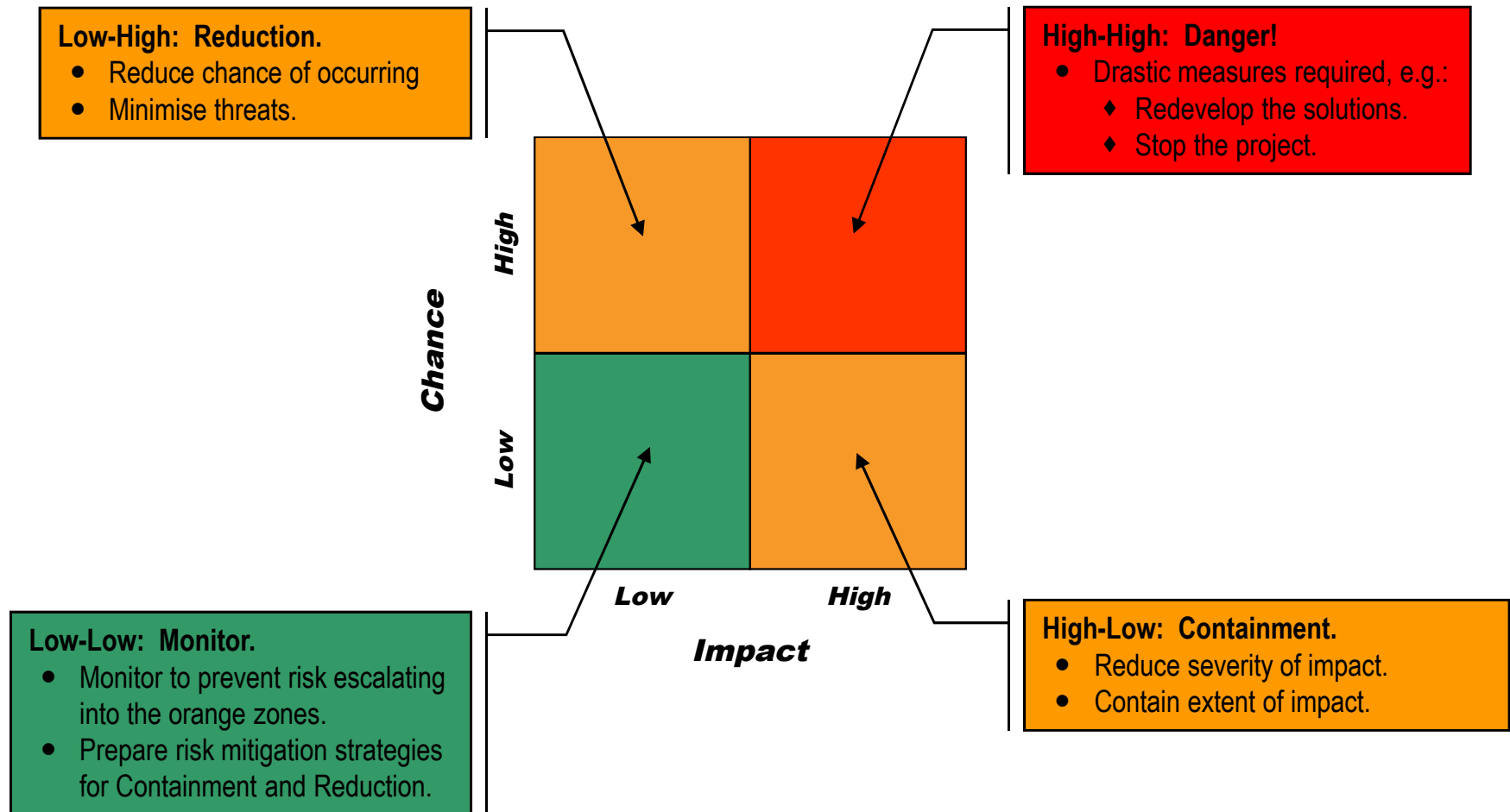


Risk profile

- Risk is a commercial/pricing issue
 - problem – price often finalised very early
- Risk cannot be eliminated
 - but it should be minimised to a level which allows the client a return
- Risk is time sensitive and changes as the transaction evolves
 - keep a watching brief over the transaction
- Risk is different for each transaction
 - “cookie cutter” contracting approach not often beneficial
- Strategies for dealing with risk can be packaged
 - ie interwoven and balanced against each other



Typical risk mitigation strategies



Preparing for Negotiations

The Golden Rule:

“Planning Prevents Poor Performance”

Preparation

- Know what you want/ need and anticipate what the other side wants/ needs
 - what performance level does customer require?
 - what performance level can supplier meet?
 - what areas does customer currently measure?
 - what is the level of confidence in the accuracy of reporting?
 - what service areas are important?
 - what flexibility is required? Key issue

Preparation

- For customers, avoid the risk of post-execution baselining
 - Internal due diligence: do not outsource a problem
- And if you don't prepare?
 - the other side's position may become the default
 - negotiations may become protracted
 - a suboptimal result may be cemented
 - personal reputation impacted
 - sow the seeds for future dispute
 - pay to amend/exit?

Negotiation and compliance template

Clause Number	Subject	Other side's position	Has drafting been proposed?	Code*	[Client] position	Fall back position (if applicable)	Current Status (as at [#] date)	Action

*Code	Description	Explanation
M	Mandatory Requirement	This signifies a mandatory requirement for Party A which must be included.
PP	Preferred Position	This signifies Party A's preferred position.
B	Bonus Requirement	This clause is beneficial to Party A, however it is not required
AR	Acceptable Request.	The relevant change can be accepted.
AC	Additional comment	Raised by the other side in response to updated Party A drafting or additional comments otherwise raised since the negotiations commenced.

But don't forget about requirements traceability either...

Risk Analysis

- What are the risks you want to address?
- What are the risks the other party will want to address?
- What other risk management techniques are available?
 - insurance
 - self insurance

Risk Analysis

- The Risk Analysis Outcome: Who can manage the risk most efficiently?
 - identify options: what type of contract provision best allocates the risk?
 - output:
 - basic outline of a contract which allocates risk in an efficient way
 - understanding of the risk and the rationale for their allocation
 - verification of facts

BATNAs

- What is a BATNA?

“Best Alternative To a Negotiated Agreement”

- research and identify BATNAs
- Why?
 - Establish the parameters of the negotiation
 - prepare rationales and verification
- BATNAs depend on the circumstances

Negotiation phase – all about leverage

- Leverage = the ability to influence
- The result of a successful negotiation is not one party “winning” at the expense of the other
 - suppliers often seek to take no commercial/legal risk in the provision of services
 - customers often seek to engage a supplier as an “insurance policy” as well as a supplier



Negotiation Ground Rules

- Establish negotiation “rules”
 - each party must have the appropriate resources in the negotiations to make binding decisions
 - who will amend and control the documents
 - time frames
- Be aware of your alternatives
 - threatening to walk away can create leverage
 - strategically-placed call to senior management
 - adopting deliberately irrational positions to trade for important points

Be aware of alternatives conc.

- But there are boundaries on what you can do...



Key Negotiation Techniques

- The winning negotiating strategy
 - “address the concerns not the positions”
- What is negotiation about?
 - compromising positions?
 - solving problems?
- There are two types of negotiators:
 - positional negotiators
 - problem solving negotiators



Key negotiation techniques: preparation

- The key techniques are:
 - ascertain/explain the concern which the position addresses
 - ascertain/explain reasons for the concern
 - explore/understand the real concern which is rationalised
 - keep an open mind as to how concern can be accommodated
 - promote/consider alternative positions which meet the real concerns
- Based on ‘game theory’, ie rational behaviour
 - sometimes irrational positions cannot be avoided

The Key Tactics

- The key tactics are:
 - be prepared (undertake the risk analysis and research and identify the BATNAs)
 - don't under-estimate the other side
 - be disciplined, persistent and patient
 - be positive
 - focus on the winning strategy
 - address difficulties as they arise

Manipulative Tactics

- Examples (aggressive/manipulative tactics)
 - high opening bids
 - aggression/anger
 - “take it or leave it”
 - threats
 - sarcasm
 - refusal to provide information
 - diversionary tactics – e.g. wrong name
 - personal abuse e.g. “a jerk, a stooge and a lackey of imperialism



Other Tactics

- Other tactics include:
 - concessions: dos and don'ts
 - limited authority
 - “this is all I've got”
 - breaking an impasse
 - deadlines
 - splitting the difference



Counters to Manipulative Tactics

- Address manipulative/aggressive tactics as follows:
 - recognise the tactic
 - register your own feelings
 - remain calm
 - stay focused
 - explore the real interests
 - respond



Typical vendor / customer sensitivities

Key vendor sensitivities

- *Due diligence regarding the customer's systems / technical validation and reflection of assumptions*
- *Credits and liquidated damages as sole remedies*
- *Remedy caps (credits and liquidated damages)*
- *Restraints on supplier personnel and flexibility*
- *Change management*
- *Liability, indemnities and risk allocation*
- *Ownership of IP*
- *Limited 'defend and settle' IP claim protection*
- *Exclusivity of supply*
- *Customer step-in rights*
- *MFN/global best product/no 'product stranding' provisions*
- *Benchmarking and price reviews*
- *Performance bond or financial security*
- *Parent guarantee*
- *Costs of third party co-operation*

Key customer sensitivities

- *Alignment with customer objectives and business case*
- *Full integration, migration and compatibility; i.e. 'solution' delivery*
- *Organic/inorganic growth capacity*
- *Innovation delivery and interconnected cooperation*
- *Seamless user experience*
- *Cost management; efficient and workable change control*
- *Price stringency and ease of market review*
- *Acute project and delay management*
- *Single accountability for multi-vendor arrangements*
- *Comprehensive IP rights (ownership / use)*
- *Ease of transition and swap-out*

IACCM Survey

The terms that are negotiated with greatest frequency		Terms which would be more productive in supporting successful relationships
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/Warranties	Limitation of Liability
10	Warranty	Indemnification