

On-Line Negotiation— “Lawyer-Approved”

One of the most important elements in on-line negotiation is the maintenance of a full and accurate audit trail of changes—with supporting notes—throughout the entire negotiation process.

BY ASHIF MAWJI

Negotiating contracts has not really advanced a great deal over time. In fact, most companies still negotiate using either the fax machine or sleek daredevil bike couriers. New contract management (CM) solutions, however, offer a robust means for negotiating contracts with an extensive audit trail capability. In this article, I will discuss the various facets of on-line negotiation, and what you should look for in a CM solution, to ensure your negotiations are handled effectively.

“Don’t Take MS Word Away!”

One of the biggest barriers to adopting on-line negotiation is this: users are

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familiar with MS Word and the “track changes” feature. Why learn something else? This is a good question.

Some CM solutions include software that actually manages the on-line negotiation through MS Word. One of the biggest issues with negotiating, using MS Word, is the control factor—what changes can and cannot be made by the affected party. For example, there may be an insurance section within a contract that your legal department says is “non-negotiable.” Now, when you e-mail that contract in MS Word to the other party, there is no way to easily lock that section. However, with recent advances in some CM software solutions, these sections and clauses can now be locked in MS Word, thereby keeping the other party from making any impermissible changes (according to your legal group).

The best thing about CM solutions that allow using MS Word to handle the on-line negotiation is that almost every organization out there uses MS Word. Now, let’s talk about how to ensure the integrity of the negotiation process, and how to keep your chief legal counsel and friendly audit department happy.

Essential Features

One of the most important elements in on-line negotiation is the maintenance of a full and accurate audit trail of changes—with supporting notes—throughout the entire negotiation process. This is equally as important, whether negotiating (or collaborating) with either internal and/or external stakeholders. If changes are made in MS Word or through a Web-based application interface within the CM solution, the red-lined history of changes should be maintained, as well as notes of what was changed, who made the change, when the change was made, and whether that change was approved (or rejected) by all required parties. Another important related feature is to ensure that the software will permit you to go back to a previous version (before a change). There are times when you negotiate back and forth, and one of the first changes made is, in fact, the most suitable. Therefore, you should have the opportunity to recall specific language and text sections from a previous version.

CM software offers a lot of control in regulating contract templates, enforcing the use of approved clauses,

managing alternatives (e.g., approved choices for specific contract sections, etc.), inserting mandatory language based on the type or jurisdiction of the contract, and so forth. With all the control available in the CM solution, it is imperative that this level of governance be extended into the MS Word document that is created from the CM solution, and then sent to the parties affected by the contract. If this level of document governance is not available, you will experience significant difficulty and frustration trying to enforce the document control—the CM solution will also lose all credibility for effective off-line negotiation. Legal review is minimized for language that is already approved by the legal group when there is document governance built into the MS Word document.

Finally, there is a technical requirement that is fundamental, when you are dealing with on-line negotiation. If the MS Word document contains any macros or embedded objects, this is sure to cause havoc with corporate firewalls, and result in a visit from your neighborhood information technology (IT) czar. Viruses are commonly spread through macros embedded in MS Word or MS Excel documents, and so many companies have set their firewalls to “super-paranoid” levels, which will raise all sorts of alarms at the very smell of a macro trying to enter. So, be sure that your CM software guarantees that the MS Word document generated by the solution is free of all macros, controls, or anything else that might cause firewall problems. Also, be sure not to compromise on any other features mentioned in this article.

Everyone on Board

If the CEO could simply send an e-mail, indicating “Thou must embrace this...,” then you are home free! But in reality, this type of situation is quite rare—so here is a realistic approach to get everyone on board. Assure them that they can use MS Word to handle the negotiation, as they always have. This will relieve any anxieties and allow the stakeholders to see the many additional benefits a CM software solu-

tion can offer (including the features that deal with on-line negotiation).

To get the legal group on board, too, you will need to demonstrate how the process will actually allow them to streamline their negotiation, while maintaining their control. By demonstrating the functionality that allows lawyers to govern contracts and eliminate maverick contract creation, you will get their attention and support. Frankly, maverick contracts and rogue (unapproved) contract language is a known nemesis for lawyers—and if you can show them how the CM solution can help eliminate this age-old problem, this will be highly helpful to your case.

Of course, CM software is going to cost your organization some money to purchase and then implement, so you must get the chief financial officer (CFO) on your side, too. The best way to do this is to demonstrate a clear return on investment (ROI)—this always is a magic word for the “bean counters.” By demonstrating that on-line negotiation will actually help reduce the number of hours billed by legal staff (internal and/or external), as well as improve contract governance and adherence to corporate governance standards, you will be the company hero (and the CFO

may even double your budget!).

The most important parties to get on board are your suppliers and/or customers (the parties you will be negotiating with). This is actually the easy part. Suppliers and/or customers want to get the contract executed quickly and get business rolling—so if you can offer an approach where they have more control (e.g., on-line negotiation) and can move through the feared contract negotiation process more quickly, then the response will overwhelmingly be “What took you so long to get negotiation online?” Everyone likes to have ownership and control. On-line negotiation affords all parties a full view of the process status, who has the contract for review/approval, the history of a given clause/section, and much more.

Expected Benefits

There are a few standard benefits you can expect from a robust CM software solution, which has on-line negotiation functionality. Due to variances in organizations and the numerous ways companies handle contract negotiation, some benefits will be more accentuated than others. Table 1 on page 39 shows some high-level benefits you could expect to receive.

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No train. No gain.

Digital Signatures

Legislation is catching up to technology, but not as fast as we would all like. There are many states in the United States (and some Canadian provinces), however, that consider digital signatures to be legally binding. The trend is definitely in the right direction to make on-line negotiation truly effective.

There are simple ways of accommodating digital signature within a CM solution, such as capturing signatures for authorizing parties and then inserting them into the contracts automatically, based on a maintained signature repository. Further security can be included at the time of approval, such as asking the user to enter a confidential personal identification number (PIN). This, however, can tend to be more of an annoyance for people who approve many contracts.

Another manner of incorporating digital signatures is to integrate to third-party software that provides the secure, electronic signature infrastructure—this can be done quite simply

with many of the available CM software solutions.

The best approach, I think, is to base it on an organization's requirements and desired level of sophistication. There are simple ways of implementing this that work quite well, as per the example above about maintaining authorized personnel signatures.

Exchange the Filing Cabinet

Now that we are negotiating online and agreeing to the contract electronically, it makes sense to completely do away with paper and store the contract electronically.

Digital records are getting to a point where they are a legally acceptable substitute for hard copies; there is no longer a need to maintain hard copy contracts. This does vary by jurisdiction and also depending on the type of agreement. Many organizations digitally scan, index, and then shred their paper-copy contracts.

To accommodate electronic records management, the document and all related appendices, including scanned

and attached documents, can be maintained exclusively within the CM software. Where more robust document management functionality is necessary, or where other corporate data is stored in an existing document management system, the CM software can be integrated with the document management system, so the signed contract then can be viewed by clicking on a link within the CM software. This, then, automatically opens the document in the document management system.

If digital signatures are incorporated in the CM system, organizations can avoid document scanning and indexing, and simply send all the information contained in the contract (including the electronic signatures) via an interface to a document management system.

Negotiating Online

If you have a budget approved, I am certain that the CM software providers out there, who have a decent solution to manage on-line negotiation, would

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welcome the opportunity to help you. Technology is at a point now where this is all possible in a streamlined, cost-effective manner.

You may need to ensure your organization is using a current release of MS Word (e.g., Office XP or higher) to deploy this functionality effectively. Be sure to do your “due diligence” and have the vendor prove his or her points during the demo time, using your process and documents as sample scenarios.

In terms of implementation timelines, some of the available CM software solutions can be implemented in as little as three days—although large enterprise deployments would obviously take a little longer. In terms of adoption by your internal and external stakeholders, selling on-line negotiation is actually quite easy, once all the benefits are demonstrated. In terms of your legal group’s acceptance, show them that CM software can improve their control over negotiations and contracts, and they will stand right behind you in your purchase. **CM**

Expected Benefit	% Savings Expected (Est. based on related expense cost)
Reduce legal review costs	50 – 75%
Minimize corporate risk (no more maverick contracts)	10 – 25%
Maintain complete audit trail (all changes are tracked and maintained in an audit log, so you know exactly why a section got changed, and who approved that change)	Intangible
Reduce courier and telecommunication costs	15 – 30%
Reduce overall time in contract execution with quicker reviews, modifications of allowable sections, faster approval process, and quicker turnaround time with suppliers/customers, etc.	20 – 45%
Reduce lost contract revisions (with electronic tracking and control)	Intangible

Table 1



Certificate in
Procurement & Contracts Management

Fall 2003 Online Courses

- PC 401W: Procurement and Contracting
- PC 402W: Contract Administration
- PC 403W: Cost and Price Analysis
- PC 404W: Government Contract Law
- PC 405W: Seminar in Procurement and Contracts Management
- PC 409W: Contracting for Information Systems
- PC 419W: Government Computer Law
- PC 510W: Contracting by Negotiation
- PC 511W: Construction Contracting
- PC 512W: Electronic Commerce in Federal Acquisition
- PC 513W: Advanced Services Contracting

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