COMMERCIAL code of practice

OIL&GAS UK

Negotiations Best Practice

March 2017

Introduction and Context

Poor negotiation practice and undesirable behaviours by legal and commercial practitioners are often cited as a barrier to timely conclusion of agreements between parties.

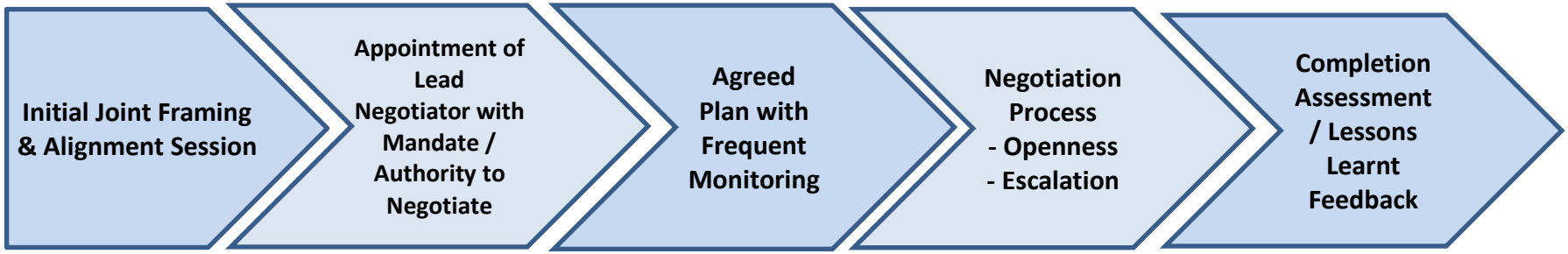
While there are many areas to consider, there are several basic elements that will support a timely and successful negotiation process.

Recognising that each negotiation may have unique elements, this guidance suggests a generic best practice for a negotiation and highlights some of the expected positive industry behaviours required to ensure a timely and successful negotiation process consistent with the recently updated Commercial Code of Practice (CCOP). This guidance should therefore be read in conjunction with the CCOP.

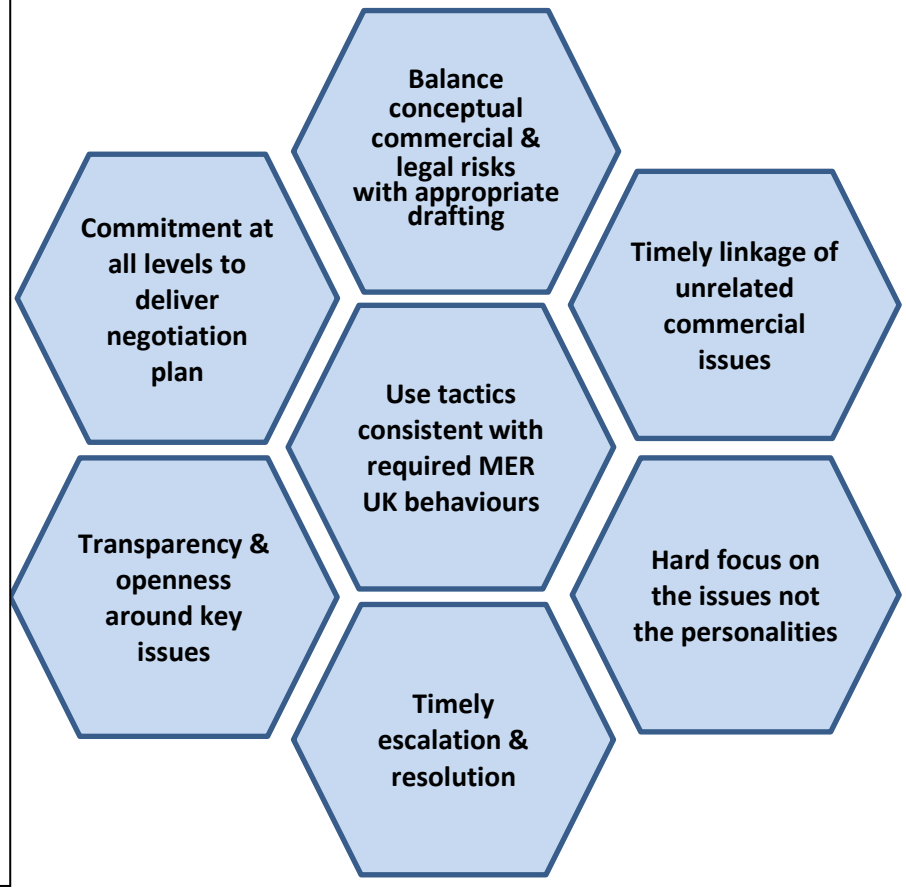
The scope of agreements covered by this guidance is intended to be the traditional suite of upstream agreements and is not intended to cover, for example, corporate acquisitions nor conflict with the established infrastructure processes.

This voluntary best practice guidance has been developed by a cross section of industry legal and commercial practitioners and is supported by the Oil and Gas Authority (OGA).

Negotiations Best Practice Process Cycle



Good Negotiation Behaviours



UNACCEPTABLE

Behaviour that shows lack of respect

Reneging on previously agreed point(s)

Significant deviation from industry standard terms where available

Hiding behind standard corporate terms without the ability to justify the position

Delay tactics to block progress and/or to simply "run down the clock" to force acceptance

Open-ended spending commitments or unjustified financial / liability thresholds

UNNECESSARY

Stylistic drafting edits

Protecting individual self-interests vs shareholder interest

Premature escalation to MD or OGA

Non-sequential mark-ups intended to confuse the counterparty / revising a draft without tracking changes

Late engagement of key participants creating the need to recycle

Unclear corporate process and approvals

Unnecessary / inappropriate use of agreements where a simpler option exists

Companies being unwilling to compromise on "non-commercial" internal corporate wording

1) Initial Joint Framing/Alignment Session

All negotiations should start with a joint framing session, the purpose of which will include:

- alignment on specific objective(s), deliverables and realistic timeline(s) – all parties should be clear about their desire and requirements for a successful negotiation outcome;
- "open" discussion of respective corporate perspectives and drivers;
- where applicable, legitimate linking (packaging) of issues should be established at the outset so that negotiation scope is clear. Bringing in unrelated issues at a very late stage is not acceptable;
- the "design" of optimal commercial framework(s) / contractual structure;
- determination of key information and technical expertise required;
- identification of key risks and concerns;
- agreement of legal/commercial/other resource requirements; and
- setting out appropriate "route map" regarding stakeholder engagement (e.g. OGA, Co-ventures' etc.) and, importantly, key requirements for each party's corporate approval process.

This session will be cognisant of the respective cultures, corporate processes, business drivers, context (regional plans) and the strategic fit of the parties.

The key aspect and outcome of this framing is confirming alignment (or not) between the parties such that there is a recognised and accepted desire or requirement for a deal to be done. Without such alignment delivering a collaborative solution may be challenging. It is acceptable for the parties to conclude at this early stage that no deal is possible.

2) Appointment of a Lead Negotiator for Each Party with a Mandate to Negotiate

Each party (being either a single party or group of related parties) should nominate a Lead Negotiator or sole representative, which, in the case of joint venture, may be the Operator (assuming no conflict of interest exists). Lead Negotiators should be the single point of contact for a party and will, collectively, be accountable for delivery of the overall negotiation plan including all functional input (e.g. technical, operational, legal etc.) and respective task delivery. Lead negotiators are expected to have the appropriate level of competency, experience and/or support appropriate for the negotiation in question.

Each party should ideally have in place ahead of commencement, their internal Authority to Negotiate (AtN)/mandate. Good practice is to develop a process/document that sets out the business case, the risks, and, critically, provides the corporate mandate with clear boundaries for the negotiation.

3) Agreed Negotiation Plan/Timetable with Frequent Monitoring

A basic but important aspect is to have an agreed negotiation plan at the outset – one that contains sufficient detail to ensure there is an acceptable timetable and road map to delivery of the plan's major milestones. The timetable should ensure the negotiation starts at the optimum time to align with the

technical or operational milestones. While deadlines should be neither arbitrary nor artificial, it is considered prudent to establish a rhythm to meetings and interaction – for example, no gap of longer than a month without a meeting, agreed draft turnaround timings, and acceptable time period within which to respond to questions.

The timeline must take account of approval timescales of each party and relevant stakeholders and the negotiation plan should be approved by the Commercial Manager (or equivalent). The timeline should consider typical negotiation timings where the agreements are expected to be based on industry standard. Where bespoke agreements are required due to the unique nature of the negotiation or the complexity of the joint venture, it is important that this is recognised and sufficient time is built into the plan.

Delivery against the negotiation plan should be monitored on a frequent and timely basis. Areas falling behind or deviating from the plan will be identified and any appropriate intervention(s) should be also be made on a timely basis.

4) The Negotiation Process

Successful negotiations are usually achieved when conducted face to face by empowered, suitably experienced and knowledgeable practitioners. Depending on scale and complexity, it is generally recognised that successful negotiations may be conducted by a team rather than on a one-to-one basis.

Participants are encouraged to adopt a common philosophy of principled negotiation. Separate relationship issues from substance and deal with the latter by focusing on interests, not positions; invent options for mutual gain; and use independent standards of fairness to avoid a bitter contest of will. A drafted agreement should be the product of a successful negotiation not the basis for discussion.

It is recommended that conducting negotiations via exchange of marked up agreements should, ideally, be undertaken only once key commercial principles (e.g. term sheet) have been agreed – i.e. the mark up process should ideally be limited to legal drafting clarifications. Negotiation via lengthy email chains should be avoided with best practice to encourage discussion.

Use industry standard agreement forms and precedents wherever practicable to reduce complexity and improve efficiency.

- ### Openness and Transparency

Parties to a negotiation are encouraged to establish a common view of the issues – for example, this may be achieved by sharing economic output in some cases (assuming this does not breach Competition Law), or the use of joint working sessions to try to solve issues collaboratively. Where parties take a position, argue for it and then make concessions to reach a compromise, a practice referred to as Positional Bargaining, the engagement commonly fails to produce the best overall result and almost certainly not one consistent with MER UK.

Where appropriate, parties should adopt a preference for preparing/sharing/reviewing open book analysis (e.g. cost, risk, economics, etc.) to achieve a common understanding of substantive matters.

- Agreed Escalation Route for Disputes/Blockages

Each party should identify a named individual for initial escalation of key issues if it transpires that the parties fail to reach agreement between them. Parties should adopt a strong bias in the negotiating process for items to be parked (for future escalation or review) rather than delaying discussion on other aspects of the negotiation.

Escalation to an external party (e.g. OGA) should only occur once all internal means to resolve matters between the parties have been exhausted. Any agreed actions and/or decisions should be documented.

- End of Process Review and Self-Assessment

A simple post completion review should occur within 1 month, covering the self-assessment of each other's performance against this guidance or other agreed process. This assessment will be shared and used for a formal feedback or a lessons learnt review and will be shared with the OGA if requested. In addition, a survey tool has been developed to capture and track factual elements of the negotiation which will facilitate measurement of industry performance. Oil & Gas UK will host, administer and collate the survey results – the live survey link to use is:

https://www.surveymonkey.co.uk/r/CMF-CCOP

Using this output, the OGA will be able to maintain an anonymised watching brief on industry practice and behaviour without the need to become involved in all processes. The results will form part of the CCOP annual commercial activities review.

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ISBN: 1 903 004 91 8