Brigham Young University International Law & Management Review

Volume 1 | Issue 1 Article 4

8-16-2005

Negotiating a Commercial "Most Favored Nation" Clause

Stirling Adams

NEGOTIATING A COMMERCIAL "MOST FAVORED NATION" CLAUSE

Stirling Adams[*]

The business lawyer's role in evaluating and negotiating a commercial "most favored nation" (MFN) commitment is to maximize its potential benefits to the client and to eliminate its potential pitfalls. This article discusses the specific business factors and forms of an MFN clause that can make the commitment either an unwise infringement on corporate decision making or an acceptable agreement that furthers a client's long-term objectives.

After summarizing events from the nineteenth century British "Opium War" with China to show the context in which MFN clauses were developed between nations, section A discusses the business justifications that may underlie a buyer's request for MFN status. Section B explores reasons an MFN clause may be impractical or inappropriate due to administrative difficulties, restrictions on corporate decision making, or antitrust issues. Section C is a summary, in checklist form, of the common negotiation points that should be considered when dealing with a commercial MFN clause, with drafting and negotiating tips. Most large clients are both suppliers in many commercial relationships and buyers in many others. Much of the discussion in this article focuses on the supplier's perspective, but the analyses can also inform a buyer's drafting and negotiating decisions.

[*]Stirling Adams is currently in-house counsel for a global software company, where he splits his time between negotiating technology transactions and advising his company's Latin America subsidiaries. Stirling received a B.S in Statistics and Computer Science from BYU and a J.D. from the Boston University School of Law, where he graduated cum laude and was named Edward F. Hennessey Distinguished Scholar of Law.

I. A LITTLE INTERNATIONAL MFN HISTORY

The first time a business lawyer comes across an MFN clause while reviewing a supply contract, she may understandably wonder if she is reading one of the treaties resulting from the nineteenth century Opium Wars fought by the British against China. In the early 1800s, due largely to British opium imports, China faced a serious epidemic of opium addiction. Though China had outlawed opium, Britain, in what historian John Fairbanks calls "the most long-continued and systematic international crime of modern times," encouraged British drug merchants to import it into China.[1] In 1839 China confiscated and destroyed over twenty thousand casks of illegal opium, required foreign importers to sign a commitment not to import opium, and threatened to arrest a prominent British smuggler. The British treated this as aggression against Britain and declared war. The British claimed the Chinese could only enforce anti-opium laws against domestic drug users and dealers: the property of foreign opium importers and traders should not be affected.[2]

The ensuing "First Opium War" almost ended in early 1842 after superior British war technology led to Chinese military defeat. However, when the Chinese refused to reimburse Britain $6,000,000 for the illegal opium that had been confiscated, Britain burned several more Chinese cities. The war concluded with ratification of the Treaty of Nanking in late 1842. Pursuant to the

[1] *See* 10 THE CAMBRIDGE HISTORY OF CHINA: VOLUME 11: LATE CH'ING, 1800–1911, PART I 114 (John K. Fairbanks ed., Cambridge University Press 1978).

[2] *Id.* at 187–88; JACK BEECHING, THE CHINESE OPIUM WARS 77–81 (Hutchinson & Co. 1977). A potential modern day equivalent to this would be for Colombia to claim that the United States could not interdict shipments of cocaine imported into the U.S.; instead, the U.S. could only exercise its police powers against domestic cocaine users and dealers.

terms of treaty China paid $21,000,000 to Britain, ceded the island of Hong Kong to British rule, and, importantly for our purposes, granted Britain "most favored nation" trading status.

On the last point, the treaty's MFN clause stated that if the Chinese were to grant any trading privileges or immunities to any subjects of non-British foreign countries, "the same privileges and immunities will be extended to and enjoyed by British Subjects . . . ."[3] In drafting this clause, the British drew on a feature of treaty negotiation they had utilized for at least four centuries.[4]

In 1844, under threat from a U.S. warship, the Chinese signed the Wangxia Treaty with the United States.[5] Weeks later the French extracted the Whampoa Treaty using leverage from the threat of eight French warships. These two treaties contained trade privileges similar to those gained by Britain in the Treaty of Nanking, including an MFN clause, and even a provision granting foreign nationals immunity from Chinese law.[6]

What does the First Opium War and the resulting MFN clauses forced on China have to do with a lawyer's review of a supply contract? More than one might initially think. The MFN clauses pushed on nineteenth century China had

---

[3] Supplementary Treaty of the Bogue, Oct. 8, 1843, P.R.C.-U.K., art. VIII. This "Supplementary Treaty" was an amendment to the Treaty of Nanking.

[4] *See* Akiko Yanai, *The Function of the MFN Clause in the Global Trading System* (IDE APEC Study Ctr., Working Paper Series 01/02 – No. 3, Mar. 2002) (describing an MFN clause in a treaty between England and Bourgogne in 1417) *avilable at* http://www.ide.go.jp/Japanese/Publish/Apec/pdf/apec13_wp3.pdf (last visited Jan. 28, 2005).

[5] Hongshan Li, *Managing Diplomatic Crisis with Educational Exchange: Government and U.S.-China Cultural Relations, 1905–1950*, Paper delivered at the 16th International Congress of Historical Sciences, Aug. 25–Sept. 1, 1985 at 3–7 (1985), *at* http://www.oslo2000.uio.no/program/papers/s16/s16-hongshanli.pdf (last visited Jan. 28, 2005).

[6] Sue Gronewold, *The Opium War and Foreign Encroachment* (1977), *at* http://afe.easia.columbia.edu/china/modern/opium.htm (last visited Jan. 28, 2005); *see also* BEECHING, *supra* note 2, at 172–74 (detailing the background to these treaties in greater depth).

much the same goal as today's commercial contract MFN clause: the party asking for MFN status demands that it be guaranteed pricing or other privileges at least as good as those the other party offers to any third party. Some historians refer to the treaties resulting from the First Opium War as the "Unequal Treaties,"[7] and the Chinese came to refer to the Treaty of Nanking as a "national humiliation."[8] The treaty severely diminished China's right of sovereign rule in its own territory; for example, China was limited in its ability to alter tariffs,[9] and it could not even control importation of illegal drugs. Similarly, without care in negotiation, a commercial MFN clause can become an "unequal contract," a "corporate humiliation," and can diminish a client's ability to control its own business operations.

Of course, an MFN clause is not always a unilateral provision forced onto a weaker entity by a dominant party. As an example of this, the current standard in international trade agreements is that an MFN clause's obligations and benefits are reciprocal. An early instance of this is the 1654 treaty between Great Britain and Sweden, which stipulated that each country's citizens would enjoy the same privileges while in the other country "as any other foreigner at present doth, or hereafter shall enjoy there."[10] In the 1940s, as part of the General Agreement on Tariffs and Trade (GATT), dozens of countries agreed to grant MFN status regarding tariffs to signing countries; they simultaneously received

---

[7] *See, e.g.*, THE CAMBRIDGE HISTORY OF CHINA, *supra* note 1, at ch. 5.

[8] *See, e.g.*, PETER WARD FAY, THE OPIUM WAR, 1840–1842: BARBARIANS IN THE CELESTIAL EMPIRE IN THE EARLY PART OF THE NINETEENTH CENTURY AND THE WAR BY WHICH THEY FORCED HER GATES AJAR xiv (Univ. of N.C. Press, rev. ed. 1998).

[9] The treaty with the U.S. even stated that China could not raise its import duties without U.S. permission. *See* LI, *supra* note 5.

[10] *See* Yanai, *supra* note 4, at 3.

MFN status from the other signing countries. The GATT's successor is the World Trade Organization (WTO), and in 2001 China, once victimized by forced unilateral MFN clauses, willingly signed onto the WTO's mutual MFN obligations. As of Cambodia's joining in October 2004, 148 countries have joined the WTO, thereby signing up to reciprocal MFN commitments and benefits.[11]

II. Evaluating and Negotiating a Commercial MFN Clause

The following MFN clause was proffered by a large financial services company to a telecommunications hardware supplier. In it the buyer sought an MFN commitment that would apply broadly to any sales by the supplier to other customers, or even to distributors.

> Most Favored Customer. Supplier warrants that the prices offered to Buyer are no less favorable than any terms currently agreed to or that will be agreed to by Supplier with any other customer or distributor. If during the Agreement Supplier or any of its distributors enters into an agreement with any other customer that contains more favorable pricing than is provided hereunder, then this Agreement shall be deemed amended to provide Buyer such more favorable pricing on a retroactive basis. To ensure compliance, Buyer may bi-annually audit Supplier's records upon 7 days written notice. Supplier will reimburse Buyer retroactively for the savings Buyer should have received but for Buyer's failure to comply with this clause.[12]

[11] For details on the number of WTO members and the dates of China's and Nepal's membership, see http://www.wto.org/ (last visited Apr. 27, 2005). In 1998, U.S. government trade agencies began using the term "Normal Trade Relations" (NTR) status instead of "MFN status." The stated reason was that since a large majority of U.S. trading partners had MFN status, it was more accurate to use the NTR term. *See* U.S. Treasury, Normal Trade Relations, *at* http://www.itds.treas.gov/mfn.html (last visited Apr. 27, 2005). An unstated reason for the name change was that some U.S. legislators had difficulty granting "most favored nation" status to communist China; ironic, given that the U.S. pressured China into granting the U.S. MFN status 150 years earlier. *See supra* text accompanying note 5.

[12] These clauses are used with permission of the supplier, who requested that the companies' names be withheld.

For the business reasons explained below, this clause is *not* representative of the content of most MFN clauses found in commercial contracts today. In this particular situation, an MFN clause was agreed to by the parties, but the final text matched the following:

> Most Favored Customer. Supplier warrants that the prices under this agreement are equal to or less than standard prices offered by Supplier generally to similarly situated customers contracting for similar volumes under the same terms and conditions.[13]

The discussion below analyzes the business context and negotiation factors counsel should consider in either modifying or completely avoiding a proposed MFN clause, with the assumption that at the end of a negotiation the client's situation should more closely match that of WTO-member China in 2001 than the MFN-victimized China of 1842.

When negotiating an MFN or other relatively unfamiliar contract clause, it is helpful for the lawyer to collect some intelligence regarding the purpose, impact, and business context of the clause, particularly when she may not be completely familiar with business and contracting practices within the client's industry. This often means reviewing contracts in which the same or other companies have addressed similar issues. The discussion that follows uses text from actual commercial contracts. Several websites provide easy access to, and searching capability within, thousands of contracts that public companies have included as part of filings before the U.S. Securities and Exchange Commission,

[13] *Id.*

and thousands more contracts are available in other private and government contract archives.[14]

A. Examining the Potential Business Justifications for an MFN

Before negotiating specific elements of a buyer-proposed MFN clause, the supplier's lawyer should first ask whether *any* MFN clause would be appropriate given the proposed business relationship. In some situations, the answer may be obvious. For nineteenth century China, the objective in accepting the MFN-laden Unequal Treaties was to avoid ransacking and pillaging by the British, the Americans, and the French.[15] When reviewing an MFN clause today, the lawyer should at least understand the business context at hand; does the relationship between the parties justify an MFN commitment? In many circumstances, the best negotiation result is complete exclusion of an MFN clause.

---

[14] Contracts contained in SEC filings (redacted of those parts that a filing company designates as confidential) are available at http://www.sec.gov/cgi-bin/srch-edgar (last visited Apr. 27, 2005). It can be time consuming to locate a contract on this website without a specific company and filing date or document type. Findlaw.com is one of several web sites that has also published many filed contracts from the SEC database and organized them by industry and contract type, and these are available at http://contracts.corporate. findlaw.com/ (last visited Apr. 27, 2005). The University of Missouri's Contracting and Organizations Research Institute makes available over 22,000 contracts, mostly extracted from the SEC database, and these are available at http://cori.missouri.edu/ (last visited Apr. 27, 2005). Three government procurement sites that provide access to many contracts between state agencies and private suppliers are: http://www.ogs.state.ny.us/purchase (New York) (last visited Apr. 27, 2005), http://procure.ohio.gov/ proc/index.asp (Ohio) (last visited Apr. 27, 2005), and http://fcn.state.fl.us/st_contracts (Florida) (last visited Apr. 27, 2005).

[15] In 1840 the British publication the *India Gazette* described a British attack on the city of Chousan as follows:

> A more complete pillage could not be conceived than took place. Every house was broken open, every drawer and box ransacked, the streets strewn with fragments of furniture, pictures, tables, chairs, grain of all sorts — the whole set off by the dead or the living bodies of those who had been unable to leave the city from the wounds received from our merciless guns. . . . The plunder ceased only when there was nothing to take or destroy.

BEECHING, *supra* note 2, at 116, citing the *India Gazette*. Jack Beeching, in THE CHINESE OPIUM WARS, refers to this incident and writes: "This was the occasion after which the Hindi word *lut* — previously used in an English form only hesitantly, and with inverted commas — became firmly established in the language, as *loot*." *Id.*

The following, roughly ordered by both frequency and importance, are the most common business justifications given for a buyer seeking an MFN clause:

1. Buyer's volume commitment

A buyer's commitment to purchase a large volume can lead to an accompanying request for an MFN commitment. A buyer might tell a supplier, essentially, "I will be your largest customer and buy more from you than any other customer. Therefore, I deserve to be guaranteed your best price." An example of how this concept can play out in an MFN clause comes from a 2001 Microsoft agreement to provide Expedia digital map services:

> Most Favored Nation. Microsoft will not charge Expedia a price for Services rendered under this Agreement . . . that is less favorable than the rates charged . . . to any third party unless such third party agrees to use MapPoint.Net Maps more frequently than Expedia's then current actual usage of MapPoint.Net Maps.[16]

The justification for the clause was Expedia's usage volume; consequently, the MFN obligation did not apply where Microsoft contracted with a customer that made a greater volume commitment. Similarly, in contracting with Hewlett Packard for computer systems, New York State obtained an MFN commitment that only applied when HP sold to a third party "substantially the same or a smaller quantity of a commodity."[17]

---

[16] AMENDED AND RESTATED MAP SERVER LICENSE AGREEMENT BETWEEN MICROSOFT CORPORATION AND EXPEDIA, INC., cl. 4.3 (Aug. 15, 2001), http://contracts.corporate.findlaw.com/agreements/expedia/msft.map.2001.08.15.html (last visited Jan. 28, 2005).

[17] HEWLETT PACKARD - SYSTEMS AND PERIPHERALS CONTRACT (July 20, 1994), http://www.ogs.state.ny.us/purchase/snt/awardnotes/75006533eprices.htm (last visited Jan. 28, 2005) (the contract was originally signed between the state of New York and Compaq).

2. Dominant bargaining position

A related justification is based partly in simple, brute economic force. A large buyer may have the economic clout to tell a supplier, "If you don't agree to give us your best prices, we won't buy from you." This negotiating stance is more likely to occur with large governments or companies with centralized purchasing organizations. As an example, the State of Ohio's purchasing office includes the following "Economic Price Adjustment" clause in its standard language for contracting directly with suppliers:

> The State will be entitled to a price decrease any time the Contractor or any of its distributors sells a product or a service to any similarly situated most favored customer for less than the price agreed to between the State and the Contractor under this Contract.[18]

Even if unstated, a usual assumption behind a large buyer's request for special pricing treatment is that the supplier will be significantly benefited by entering into a direct supply contract with the customer's purchasing office. Once the contract is in place, the assumption is that the supplier will have easier selling access to the hundreds of individual subsidiaries or office locations of a company or the many agencies or municipalities of a government. The supplier's attorney needs to understand this assumption: it may not be valid in many situations. To start with, much of the buyer's purchasing potential may be exhausted by the transaction at hand. In addition, even if the buying company is sufficiently large, with many potential purchasing locations, an MFN clause may be irrelevant to

[18] STATE OF OHIO DEPARTMENT OF ADMINISTRATIVE SERVICES, STATE TERM SCHEDULE – S&LG-BASED, Economic Price Adjustment cl. (June 1, 2003), http://procure.ohio.gov/pdf/slg06-01-03.pdf (last visited Jan. 28, 2005) [hereinafter STATE OF OHIO].

the supplier's ability to make sales across the enterprise if the locations do not share purchasing processes.

3. Preserve a competitive advantage

If the buyer is providing a manufacturer with intellectual property or other resources necessary for the manufacturing process, an MFN commitment may be sought to preserve the buyer's competitive advantage regarding those resources. A manufacturing agreement between Avanex, a provider of photonic processors to telecommunications companies, and manufacturer Concord Micro-Optics, Inc. (CMI) provides an example. Avanex provided CMI with the training, confidential information, and intellectual property to enable CMI to manufacture photonic components designed by Avanex. Avanex owned all of the intellectual property developed or resulting from the manufacturing process and could therefore have chosen to preclude CMI from selling the components to Avanex competitors. The agreement however, allowed sales to third parties (perhaps to create cost savings through large-scale production). Under the circumstances, to preserve a competitive price advantage for Avanex, the agreement included an unqualified MFN clause stating, "CMI shall guarantee Avanex a [percentage redacted] discount to the lowest prices at which it offers Products to third parties . . . in any other agreement that may hereafter be entered into by CMI."[19] Without this clause, Avanex would have effectively subsidized its competition by allowing CMI to sell to Avanex competitors—without price or other restrictions—components Avanex had designed and financed, and for which Avanex

[19] AVANEX CORPORATION, LICENSE AND SUPPLY AGREEMENT, EX. A (May 8, 1999), http://contracts.corporate.findlaw.com/agreements/avanex/licenseagt.html (last visited Jan. 28, 2005).

owned the intellectual property and other resources necessary for their manufacture.

4. Sole-source bidding

Many government entities and large corporations have a defined purchasing process that includes putting larger buys out for competitive bidding. If, instead, a purchase is made after soliciting a price from only a single, or "sole source" bidder, the customer may argue that it needs an MFN guarantee as an assurance that it has received a competitive price. The MFN clause in the Canadian government's standard language for a sole source software license purchase provides an example:

> The Offeror certifies that the price quoted is not in excess of the lowest price normally charged anyone else in Canada, including its most favored Canadian customer, for like quality and quantity of the Software Products and Related Services . . . .[20]

Though this clause does not guarantee that the bidder's price is *less* than that of any competitors, it provides the customer some assurance that the price is fair and comparable to similar sales to other buyers within the specified geographical location.

5. Reward for risk: lock-in and switching costs

Where the buyer takes a significant business risk in making a major purchase, it may seek MFN status in compensation, particularly if the buyer's risk is in direct proportion to the supplier's gain. For example, in implementing

[20] SOFTWARE ACQUISITION REFERENCE CENTRE, REQUEST FOR STANDING OFFER (FOR A DEPARTMENTAL INDIVIDUAL STANDING OFFER (DISO) FOR THE SUPPLY OF CLASS I SOLE SOURCE REQUIREMENTS OR LIMITED TENDERING SOFTWARE SERVICES SOLUTIONS) cl. C.2.5.4, http://software.pwgsc.gc.ca/rfso/rfsosections/section2c-e.cfm (last modified Sept. 22, 2004).

the supplier's product or service, the buyer may experience significant "lock-in" due to high switching costs.[21] The buyer's switching costs can give the supplier an advantage in pricing negotiations in future years because of the high costs associated with switching suppliers. Thus, prior to allowing itself to be "locked-in," such buyers may seek an MFN clause as a protection against future price increases.

6. Network effects

Where a buyer's purchase of a product or service benefits the supplier by substantially increasing the network effect for the product or service,[22] the buyer may argue that its contribution to the supplier's success is deserving of an extra pricing benefit such as MFN status. For example, a manufacturer with a new data storage technology that competes with DVD's may make a significant sale to a movie distribution company. The manufacturer is benefited by the initial purchase, but it may receive a much greater benefit when the buyer makes movies available to consumers on the new technology. As the number of content providers and consumers that use the new technology (the "network") grows, the value of the new technology increases.

---

[21] "Lock-in" occurs when a buyer has to invest in assets in order to make use of a product or service, and would experience significant "switching costs" if it changed to a competing product or service. For example, a company might get "locked-in" to one supplier's voice-over IP telecommunications solution if in order to move to a competing solution the company would have significant switching costs of purchasing new telephones, adapters, switches, and other hardware, training personnel on using the new system, installing the new system, training users or support personnel on using the new system, and other logistical matters. For a detailed discussion of when lock-in and switching costs occur, and how to cause or avoid these phenomena, see CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 11–13, 103–72 (Harvard Bus. School Press 1998).

[22] A "network effect" exists when, as with many communications and consumer technology products, the value of a product to its users depends significantly on how many other people have it and use it. *See id.* at 13–15, 45–47, 173–225. For example, if you have and use email but few of your family members, friends, or business colleagues do, the value to you of the email program is extremely limited.

7. Ensure "fair" pricing

In multiyear contracts and in many industries where companies' products, business models, and pricing are subject to change, a buyer may seek an MFN clause to give it a level of confidence that the buyer's pricing and service level will continue to be competitive because it will be at least as good as the pricing other buyers receive. For example, in a ten-year contract for cable services, the town of Keyport, Connecticut, sought an MFN commitment from Cablevision to guarantee that over the contract life the town would receive service or pricing improvements or upgrades that were provided to neighboring towns.[23]

Most of the above justifications for seeking MFN status result simply from the buyer seeking to negotiate the best possible price for the contract. Ensuing negotiations frequently include discussions based in the specific context of the transaction regarding whether the agreement—without the MFN clause—already represents a favorable price. Section C below contains suggestions on negotiating points for both parties regarding potential justifications for an MFN clause.

B. Potential MFN Problems—Impracticality, Competitive Harm, Antitrust Risks

Within the context of a specific transaction, there may be a legitimate reason for a buyer to seek a price benefit such as an MFN clause. However, in order to determine whether an MFN clause should be negotiated or simply rejected, the supplier needs to consider whether granting MFN status may create

[23] Doug Mckenzie, *Keyport Ready to Fight Cable Giant*, THE INDEP., May 24, 2000, at 1, http://independent.gmnews.com/News/2000/0524/Front_Page/f04.html (last visited Jan. 28, 2005).

negative repercussions for the supplier. Three circumstances where this may occur are when the MFN commitment creates an administrative impracticality for the supplier, when it leaves the supplier open to competitive harm, and when it places the supplier at risk of violating antitrust laws.

1. Administrative impracticality or impossibility

Suppose the proposed MFN clause is similar to the following commitment found in the State of Ohio's boilerplate supply contract:

> Any time the Contractor or any of its distributors sells a product or provides a service to any customer or dealer for less than it is then available to the State under this Contract, the Contractor must notify the State of that event within thirty (30) calendar days of its occurrence and immediately reduce the price of the affected goods or services to the State under this Contract.[24]

For many companies, because of complexity in their pricing practices and the lack of control—or even awareness—of channel pricing, it would be impractical, if not commercially impossible, to avoid breaching this obligation. In various industries (such as food, pharmaceutical, and electronics) a sale to the end user is made after the product passes at least through one level of a distribution supply chain or channel. For example, a computer manufacturer's basic channel typically includes distributors, OEMs,[25] and various flavors of resellers (system integrators, value added resellers, online resellers, sales agents, etc.).

Often, each level of a distribution channel is offered pricing unique to that level. For example, a manufacturer's price for telephony software is likely to be different for each distributor (that may act mainly as a shipping and collection

[24] *See* STATE OF OHIO, *supra* note 18.

[25] An "OEM" is an original equipment manufacturer that bundles another company's product with its own. For example, an automobile manufacturer is an OEM of the airbag it includes in its vehicles.

agent), hardware OEMs that bundle the software with its equipment, system integrators that include the software as one of many parts of its business telecommunications solution, resellers that simply sell the software in an online store, and—most obviously—end user customers. For each of the potential parties, the supplier may establish a different price based in part upon matters such as how much of the storage, shipment, and collection burden the channel member assumes, and on how much purchase volume the buyer commits to.

All of this complexity results in a common factual circumstance where a supplier may not know the prices at which each member of its channel sells an item. In fact, once a company has sold a product to a distributor or other channel member, it *cannot* set or control the minimum price at which the product is resold—to do so would be illegal "price fixing."[26] Furthermore, even if no distribution channel is involved, the number of customer contracts a company develops over time can easily number in the thousands or tens of thousands. Unless its pricing processes are centralized with little variation, the supplier company simply may be unable to track the various prices at which it offers its products.

2. Freedom to compete The initial problem with the Ohio MFN clause example is simply that a supplier may not be able to comply with the clause due to the difficulty of administering the commitment. Another serious problem with the commitment is that even if the supplier could be *aware* of its pricing for all

[26] In antitrust parlance such action would be considered "vertical price fixing" or "resale price maintenance," an activity found to be inherently in violation of antitrust laws in an early U.S. Supreme Court price-fixing decision. *See* Dr. Miles Med. Co. v. John D. Park & Sons, 220 U.S. 373 (1911). This conclusion has been repeatedly upheld in subsequent decades. *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); Cal. Retail Liquor Dealers' Ass'n v. Midcal Aluminum, Inc., 45 U.S. 97 (1980).

transactions at various distribution points, in many—even most—situations the clause *should* not be accepted because it may handcuff the supplier in future business decisions that may be necessary to compete in the market on an ongoing basis.

Typically, a supplier needs to retain flexibility to modify its pricing and other elements of its business model in order to remain competitive over time. In line with this, when the town of Keyport, Connecticut, sought an MFN commitment from Cablevision in a ten-year contract for cable services, Cablevision's firm response was that "we can't accept the favored nation clause. . . . If we agree to the provision we'd have to do it everywhere. Eventually we would have one rate, and our competitors can set their rates, leaving us hamstrung."[27]

A supplier's need for pricing flexibility may be most obvious when considering its distribution model. As discussed above, the supplier will vary its pricing for different distribution channels, in part to reflect the different services the channel members provide to the supplier. If an MFN clause forces a supplier to price its product the same for its various types of channel members and end users, it can break the company's pricing model. As one example of this, a channel member is much less likely to aggressively promote, or to even carry or sell, a supplier's products if the end user can get the same products directly from the supplier at a price near, equal to, or better than what the channel member itself pays for the products.

Even if the text in the Ohio clause referring to distributors and dealers were removed and the term "customer" were clarified to exclude channel sales,

[27] *See* Mckenzie, *supra* note 23.

for some suppliers an acute problem with the MFN clause is that it applies to any sale to "any customer." A business reality is that in many companies sharp variations in pricing occur without even taking the channel into account. These might include temporary promotional prices to introduce a product (perhaps to break into a competitive market) or to reduce inventory, or special discounts negotiated to meet end-of-year company or individual sales quotas. If a supplier has made MFN commitments that could force it to pass special pricing to existing customers, the supplier may have foreclosed its ability to address specific market needs with custom pricing.

The following are some of the reasons a supplier may price its products/services differently for different customers.

a. International sales. Some suppliers price products and services differently in different countries. A common motivation for this is that consumer, business, and government purchasing power may vary significantly by country and region. For example, a pharmaceutical manufacturer might offer a drug in some countries for one-tenth of the price offered to U.S. buyers. Concern for international pricing variation is demonstrated in a manufacturing contract between SCI Systems and Apple Computer. There, Apple's volume purchase commitment was conditioned on SCI (the supplier) providing Apple favorable pricing as measured by comparable purchases made in the United States and sales in other countries would not be considered in determining Apple's pricing.[28]

b. Sales to government, school, or non-profit customers. In some industries it is common to offer special pricing to specific categories of

[28] FOUNTAIN MANUFACTURING AGREEMENT BETWEEN APPLE COMPUTER, INC. AND SCI SYSTEMS, INC., cl. 3.2(i) (May 31, 1996), http://contracts.corporate.findlaw.com/agreements/apple/scis.manu.1996.05.31.html (last visited Jan. 28, 2005).

customers. For example, if a supplier makes its latest digital service available to public schools at a ninety percent discount (presumably at a loss), and assuming that it intends to keep its employees on a salary continuation program, the supplier needs to preserve its ability to make a profit by charging corporate customers more that it might have otherwise.

c. Sales to intra-company or other corporate affiliates. Some companies offer steep discounts when selling to customers or employees within the company's corporate enterprise or when purchases are made by corporate affiliates.

d. Sales through different distribution channels. As described above, a supplier's price for the same product may vary markedly between the various types of channel members that purchase and distribute a product.

e. Sales based on volume or type of purchase. Even an extremely large buyer that makes no volume commitment and buys $10,000 worth of a product would not typically merit a commitment to receive the same pricing benefits as another buyer who has a multiyear, multimillion dollar purchase commitment. An agreement for Linuxcare to supply Linux-related support to Motorola addressed this issue in an MFN clause stating that Motorola "shall be entitled to the most favorable prices for services for *equivalent type and volume of services*."[29] Therefore, the low-price commitment did not apply to sales to other Linuxcare customers that vary in size from Motorola's.

[29] MASTER OUTSOURCING AGREEMENT, cl. 6 (Dec. 13, 1999), http://contracts.corporate.findlaw.com/agreements/linuxcare/motorola.serv.1999.12.13.html (last visited Jan. 28, 2005) (emphasis added) (the contract containing the exemplary clause was between Motorola, Inc. and Linuxcare, Inc.).

As most suppliers are likely to have business practices that include at least one of these justifications, in addition to other reasons for selling at different prices, a supplier should usually avoid promising one customer the best price offered to *any* other customer. With this in mind, a common supplier response to a request for such a commitment is to simply reject the clause, perhaps with an explanation of why an MFN commitment is not appropriate for the transaction. Alternatively, the parties may negotiate the clause to reflect the complexity of the supplier's business model, with the supplier tailoring the clause to meet its business circumstances. Typically, even the largest buyers will agree to either eliminate or narrow an MFN when faced with a reasoned explanation of how the clause may create problems for the supplier or is not justified by the business context. An instructive example of this is the Canadian government's standard MFN clause for sole source purchasing referred to above:

> The Offeror certifies that the price quoted is not in excess of the lowest price *normally* charged anyone else *in Canada*, including its most favored Canadian customer, *for like quality and quantity* of the Software Products and Related Services.[30]

When the government first started requesting that suppliers use this clause, it did not include the italicized qualifying phrases. In response to negotiations with suppliers, it adopted the above text, so that now the standard MFN commitment applies only to "normal" pricing (and therefore not to occasional promotions or other such conditions), only to sales in Canada, and only to sales of similar "quality and quantity."

[30] *See* SOFTWARE ACQUISITION REFERENCE CENTRE, *supra* note 20 (emphasis added).

3. Antitrust

Commercial MFN clauses have been the focus of significant antitrust enforcement activity under federal and state antitrust laws and in litigation between private parties.[31] An MFN commitment can create antitrust concerns in both horizontal relationships (such as among members of a healthcare or other supplier network) and vertical markets (such as between an insurance company and participating physicians).[32] One example of a federal enforcement action comes from the pharmaceutical industry. The Federal Trade Commission (FTC) issued a complaint against RxCare and the Tennessee Pharmacists Association, alleging that an MFN clause in RxCare's contracts with the pharmacies was illegally anticompetitive.[33] RxCare, a pharmacy billing and management services company, filled prescriptions for patients covered by third-party health insurance plans. Participating pharmacies were reimbursed for the prescriptions at rates negotiated directly with RxCare. The MFN clause stated that if the participating pharmacy accepted a third-party reimbursement rate from any other entity that was lower than the RxCare rate, the pharmacy must accept that lower rate for all of its RxCare prescriptions. The FTC alleged this had a negative impact on

---

[31] *See, e.g.*, United States v. Med. Mut., No. 1:98CV 2172, 1998 U.S. Dist. LEXIS 21508 (N.D. Ohio E. Div. Sept. 30, 1998) (Department of Justice (DOJ) settlement that enjoined insurance company from agreeing to or enforcing MFN provisions with participating hospitals); United States v. Vision Serv. Plan, No. 1:94CV02693 TPJ, 1996 U.S. Dist. LEXIS 20930 (D.D.C. Apr. 12, 1996) (in a settlement agreement VSP was enjoined from using MFN clauses in contracts with member optometrists).

[32] MFN clauses can raise antitrust concerns of a horizontal conspiracy among participating providers in a health care network "which may foster collusive pricing by creating an effective floor on prices charged by the providers to all payors . . . ." COMMENTS REGARDING HEARINGS ON HEALTH CARE AND COMPETITION LAW AND POLICY, 2003 A.B.A. SEC. ANTITRUST L. 24 (DEC. 18, 2003), http://www.ftc.gov/os/comments/healthcarecomments2/aba.pdf (last visited Jan. 28, 2005) [Hereinafter HEARINGS ON HEALTH CARE AND COMPETITION LAW]. In a vertical relationship where a third party payor "imposes MFN requirements on its participating providers," one enforcement concern may be that "in some market circumstances prices to other payors may be kept up and barriers to entry raised." *Id.*

[33] *Id.*

consumer prices because the RxCare pharmacies were discouraged from agreeing to fill prescriptions at a rate lower than that offered by RxCare. In 1996, the parties signed a consent decree that prohibited RxCare and the pharmacists from agreeing to or enforcing MFN obligations, and RxCare agreed to remove the clause from its existing contracts.[34]

In *United States v. Delta Dental*, a First Circuit court rejected insurer Delta's argument that most MFN clauses have legitimate business justifications and are *per se* legal.[35] The court decided that in order to determine if the MFN clause was anticompetitive, a fact-specific "rule of reason" analysis must be conducted to establish whether "the anticompetitive effects of [the MFN clause] outweigh legitimate business justifications."[36] The court conducted its own rule of reason analysis and, relying largely on factors such as Delta's significant market power and the lack of any price savings to Delta from the MFN clause, it dismissed Delta's Rule 12(b)(6) motion to dismiss. The government and Delta subsequently agreed to a consent decree under which Delta was enjoined from "maintaining, adopting, or enforcing any Most Favored Nation Clause or similar provision in any Participating Dentist's Agreement, or by any other means or methods."[37] The MFN prohibition applied broadly to "any contractual provision,

[34] In re RxCare, Inc., 121 F.T.C. 762 (1996) (consent order); *see also* Press Release, Federal Trade Commission, FTC Challenges "Most Favored Nation" Clause In Tennessee Pharmacy Network Contract (Jan. 19, 1996), *at* http://www.ftc.gov/opa/1996/01/rxcare.htm (last visited Jan. 28, 2005).

[35] Delta Dental I, 943 F. Supp. at 182 (denial of motion to dismiss); United States v. Delta Dental, 1997-2 Trade Cas. (CCH) ¶71,860 (D.R.I. July 2, 1997) (consent decree) [Delta Dental II], www.usdoj.gov/atr/cases/f1100/1183.htm (last visited Jan. 28, 2005).

[36] *See* Delta Dental I, 943 F. Supp. at 178.

[37] *Id.*

policy, or practice which requires a dentist to charge Delta no more than the lowest fee charged by that dentist to any non-Delta plan or patient."[38]

One antitrust commentator notes that in the healthcare industry "virtually all of the MFN challenges instituted by either the DOJ or state antitrust authorities have ended in consent decrees that expressly prohibited the use of MFN clauses."[39] He opines that "[I]f your antitrust client is realizing no meaningful cost savings from its MFN clause, you can safely assume it will not survive judicial, or DOJ scrutiny."[40] This conclusion may be extreme, because it ignores the need for a fact-specific "rule of reason" analysis that would also examine issues such as the market power of the party with the MFN status, how the clause affects end-user pricing, and whether the clause creates a barrier to entry for competitors. A case in point was the Justice Department's antitrust enforcement probe of online travel consortium Orbitz in 2003. An aspect of the investigation was Orbitz's MFN clause, which prevented the participating airlines from offering lower fares to other travel sites. The DOJ ultimately determined that it could not show that the MFN clause led to higher travel fares and violated antitrust laws.[41]

---

38 *See* Delta Dental II, 1997-2 Trade Cas. (CCH) ¶71,860. According to the consent decree, the text of Delta's MFN clause read, "Delta Dental reserves the right to limit reimbursements to dentists to such levels as such dentists have agreed to accept as reimbursement from other non-governmental dental benefits reimbursement programs." *Id.*

39 Joseph A. Martin, *Antitrust Analysis of "Most Favored Nation" Clauses In Health Care Contracts*, PRIVATE ANTITRUST LITIGATION NEWS, Fall 2000 A.B.A. SEC. ANTITRUST L., http://www.archerlaw.com/articles/martin antitrust.pdf (last visited Jan. 28, 2005).

40 *Id.*

41 Statement from the Assistant Attorney General R. Hewitt Pate Regarding the Closing of the Orbitz Investigation, Department of Justice (July 31, 2003), *at* www.usdoj.gov/atr/public/press_releases/2003/201208.htm (last visited Jan. 28, 2005); *see also* Mark Berniker, *Justice Clears Orbitz in Anti-Trust Probe*, EARTHWEBNEWS.COM (Aug. 1, 2003), *at* http://news.earthweb.com/bus-news/article.php/2243491 (last visited Jan. 28, 2005).

Recognizing the complexity of this type of analysis, in late 2003, the ABA Antitrust Law Section asked the FTC to issue formal guidance statements to clarify the characteristics of an MFN clause and the specific market variables that affect whether an MFN clause would be construed as anticompetitive.[42]

From the various court decisions addressing whether an MFN clause illegally violates state or federal antitrust laws, the clearest conclusion to be drawn is that an MFN clause by itself is neither *per se* legally permissive nor *per se* illegally anticompetitive.[43] The Antitrust Division of the U.S. Justice Department (DOJ) similarly advises that:

> While not all MFNs violate the antitrust laws, they can, under certain market conditions, discourage provider discounting, deter innovation, and reduce meaningful consumer choices in health plans, either by facilitating collusive pricing among competing providers or by discouraging providers from offering lower rates or more cost-effective care to rival plans.[44]

Particularly within the context of a transaction where one of the parties possesses significant market power, or within an industry that has received antitrust enforcement attention, a lawyer evaluating a proposed MFN commitment may need to master, or seek advice regarding, applicable state and federal antitrust laws and enforcement actions. Subsequently, a rule of reason analysis

---

42 HEARINGS ON HEALTH CARE AND COMPETITION LAW, *supra* note 32, at 25. As of the date this article was written, the FTC had not provided any further guidance.

43 *See, e.g.*, Willamette Dental Group, PC v. Or. Dental Serv. Corp., 882 P.2d 637 (Or. App. 1994). "[C]ourts should not adopt a per se rule regarding MFN clauses, but should carefully examine the alleged anticompetitive effects of each challenged clause." U.S. v. Delta Dental, 943 F. Supp. 172, 182 (D.R.I. 1996) [Delta Dental I]; *see also* Blue Cross & Blue Shield Utd. v. Marshfield Clinic, 65 F.3d 1406 (7th Cir. 1995) (emphasizing legitimate business reason for MFN clause at issue); Ocean State Physicians Health Plan v. Blue Cross and Blue Shield, 883 F.2d 1101 (1st Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990) (finding that the insurer had legitimate business reason for MFN clause in contracts with participating physicians).

44 U.S DOJ, ANTITRUST DIVISION, HEALTH CARE TASK FORCE RECENT ENFORCEMENT ACTIONS, *at* www.usdoj.gov/atr/public/health_care/2044.htm (last visited Jan. 28, 2005) (see MFN Clauses section).

may be engaged in to determine what type of MFN clause, if any, would be legally permissible in the client's context. However, it may be a more efficient use of time to simply explain to the client that an MFN commitment creates on one hand the concern of a material risk of antitrust violation, and on the other, a significant time necessary to research and analyze the scope of that risk. These two concerns alone can discourage some parties from making MFN commitments altogether.

C. A Checklist for Negotiating an MFN Clause

Drawing on the discussion above, the following is a summary of the common negotiation points that should be considered in dealing with a commercial MFN clause. Part 1 lists factors that may be relevant in communicating rejection of a request for an MFN commitment. Part 2 lists elements to consider when negotiating the content of a specific MFN clause. Finally, an example is listed of an MFN clause that contains clarifications commonly negotiated that can make an MFN commitment mutually palatable in certain circumstances.

1. Rejecting a buyer's request for MFN status

A buyer usually has business reasons for seeking MFN status from a supplier. Where a supplier finds an MFN clause unacceptable and an initial polite but unexplained rejection of the clause is insufficient, it can be effective to address the business objective underlying the buyer's request. While the specific content of the supplier's arguments will come from the details of the transaction at hand, the following key concepts may be useful for attorneys in rejecting a buyer's request for an MFN commitment.

a. Justify the price. Explain why the pricing for the proposed transaction (which may have already been the subject of vigorous negotiation) is fair and advantageous to the buyer--without an MFN commitment. This may involve providing price comparisons with competitors or pointing out that the supplier has won a competitive bid, thus providing market validation of the supplier's price and quality. If applicable, it may be useful to remind a buyer that the volume of its purchases does not justify additional special pricing treatment.

b. Explain the total package. Price is just one element of the transaction. Remind the buyer of the supplier's other advantages (such as superior quality, faster service, or delivery commitments) in comparison to the buyer's alternatives.

c. Isolating the business objective. Especially if negotiation over an MFN clause has stalled, it is necessary to identify the main reason a party is seeking MFN status. Once the attorney understands the impetus for the MFN request, details from the specific context of the transaction can be used to address the concern.

d. Inability to comply. It may be impractical or virtually impossible for the supplier to comply because of the difficulty of administering an MFN commitment (i.e., variations in a supplier's pricing to channel members or end users).

e. Competitive restrictions. An MFN commitment may restrict a company's ability to effectively compete in its market. Also, in some situations, a supplier may be unwilling to, or contractually prohibited from, disclosing to one buyer information regarding the prices at which other buyers purchase the supplier's products/services.

f. Antitrust risks. An MFN clause may violate state or federal antitrust laws. At the very least, it may concern a supplier enough to feel that it needs to expend significant resources evaluating the antitrust risks associated with the proposed MFN clause. Antitrust risk is of more concern where one of the parties has a large market share, where the MFN clause has an identifiable effect on end user pricing, or where it creates a barrier to entry for the supplier's competitors.

g. Corporate policy. For the reasons discussed in this article, many companies have established firm corporate policies against granting buyers MFN status. An interesting stand-off may occur when a supplier with a corporate policy against granting MFN status attempts to contract with a buyer whose purchasing organization has a policy of demanding MFN status. That is where the creative lawyer who understands both parties' business objectives and concerns earns her money.[45]

---

45 *See, e.g.*, STRATEGIC ALLIANCE AND MASTER SERVICES AGREEMENT (Apr. 1, 1999), http://contracts.corporate.findlaw.com/agreements/akamai/apple.msa.1999.04.01.html (last visited Jan. 28, 2005) (contract between Akamai Technologies Inc. and Apple Computer Inc.). This agreement may provide an example of a company simply telling another that as a matter of corporate policy it does not agree to MFN clauses. The agreement contained no MFN clause, but stated:

> In the event that Akamai grants to any other party "low price assurance" or similar type arrangement with respect to the FreeFlow Services . . . then Akamai shall immediately disclose and offer such more favorable terms or pricing to Apple, provided however, in order to receive more favorable prices or terms, Apple must accept all of the same material aspects of the terms and conditions offered to such third party (monetary and non-monetary).

Id. at cl. 7.1. This provision seems to provide a window to a negotiation in which Apple pushed hard for an MFN clause, but was successfully rebuffed by Akamai's firm stand and assertion that it never agrees to MFN clauses with anyone (at least regarding the services at issue). In the end Apple settled for the above clause which basically says, "if some day down the road you do give an MFN clause to someone, you'll offer us the same concession." *See id.*

If the parties reach a negotiating impasse at this point, the most effective way to break through can often be a frank business conversation between the parties' decision makers that lays bare the business motivations and concerns behind their positions. At the same time, it can help to buttress the negotiating position if the supplier's attorney has knowledge of past purchasing contracts that the buyer has agreed to, or, failing that, similar contracts entered into by entities within the buyer's industry.

2. Negotiating an MFN commitment

In most transactions where the supplier is willing to grant some form of an MFN guarantee to a buyer, the lawyer needs to ensure that the MFN clause is tailored to the business justification for the clause and applies only to sales that are reasonably comparable to the buyer's situation. In line with these objectives, the following are common issues that should be considered in reviewing or drafting the text of an MFN commitment.

a. Ensure the right comparisons. The scope of an MFN commitment should reflect the complexities of the buyer's business model. To accomplish this, many MFN clauses apply only to similarly situated customers contracting for similar volumes under the same terms and conditions. Some specific comparisons to be aware of are as follows.

1. International sales. To illustrate, the cost of a service in Eastern Europe may be half of its U.S. cost because of lower labor costs, and the price of a discretionary pharmaceutical drug or device may vary by country in relation to the average per capita income.

2. *Sales through different distribution channels.* The prices for OEM's, distributors, resellers, and end users are usually different. If the buyer claims not to understand or care about this, a lawyer can provide a quick primer on product distribution through a channel.

3. *Volume discounts.* It is easy to explain to the buyer making a small purchase that it should not be granted a unique pricing condition. A lawyer also needs to negotiate with a large buyer making a significant volume commitment, as the supplier will still want to preserve flexibility to make future decisions.

4. *Special promotions.* One-time and special temporary promotions should be excluded from any MFN commitment. This can be accomplished with a reference in the clause to "normal" or "standard" pricing.

5. *Government, school, and non-profit sales.* As an extreme example, a company give-away to benefit inner-city schools should not force the supplier to offer the same prices to the Walt Disney Company.

b. Reward performance. Granting an MFN commitment can be as real a pricing concession as reducing a buyer's price by a certain percentage. Ask for a buyer commitment that justifies the concession: i.e., "If you [make an initial purchase of $100 million, standardize throughout your enterprise on our system, etc.], we'll offer this type of an MFN commitment."

c. Reciprocity. Take a lesson from the World Trade Organization with its reciprocal international treaties. Where it would be advantageous to the supplier, seek to broaden the MFN commitment to provide a reciprocal benefit to the supplier. This can help a buyer to think more broadly about its demand for an MFN commitment.

d. Audit. It is best to avoid a buyer's ability to audit the pricing granted to a supplier's purchasers. At a minimum, any audit clause should prevent a buyer from accessing confidential or proprietary information of the supplier's customers. This can be accomplished by allowing only a third-party accounting firm to conduct the audit and narrowly defining the scope of information the auditor can disclose to the buyer.

e. Minimize administrative hassles. To ensure the supplier can comply with an MFN clause, limit the price commitment to the supplier's standard price list or some other metric that requires little or no extra processes to ensure continued compliance. This is a common feature in negotiated MFN clauses through references to a supplier's "standard" pricing.

f. Minimize antitrust risks. The means for accomplishing this depends on the context of the specific transaction. The safest path is no MFN commitment at all , but most antitrust risk can normally be avoided if an MFN clause is merely a representation regarding how the buyer's price compares to its standard prices or to prices given other suppliers up to that date, and does not apply to individual customer pricing made in future contracts.

g. The present beats past and future. If an MFN commitment is appropriate, it is often easiest to administer and comply with if it applies to the pricing that has been agreed to in current contracts. If it is extended to past or future deals, the antitrust risks from the commitment increase.

h. Reasonable time limits. If an MFN clause does need to apply to future sales to other buyers, the time period should be reasonably limited. If a supply contract's initial term is renewable, for example, it is best to limit the MFN commitment to the first term only. IBM's restrictive approach as the supplier in a contract with Uniphase was to limit the MFN commitment to sales made "during the preceding twelve (12) months to any other non-IBM customer purchasing equivalent quantities . . . ."[46]

i. Corporate policy. Explain to the buyer the reason for the supplier's policy against agreeing to MFN clauses, or at least to MFN clauses with certain objectionable elements. If the supplier has not developed a consistent corporate policy, see Sections A and B above.

III. CONCLUSION

The business lawyer can best assist a client in negotiating an MFN clause by paying attention to business justifications for, and potential problems resulting from, such a commitment. The above discussion argues that an MFN commitment is not appropriate in many sophisticated commercial transactions. Where both parties agree that an MFN clause is appropriate, the commitment should be tailored to meet agreed-to objectives and avoid unnecessary business risks. The following sample provision shows the type of qualifiers often agreed to in MFN clauses and illustrates the factors discussed in this article:

---

[46] TECHNOLOGY LICENSE AGREEMENT, cl. 2.12 (Mar. 10, 1997), http://contracts.corporate.findlaw.com/agreements/uniphase/ibm.techlic.1997.03.10.html (last visited Jan. 28, 2005) (the contract was entered into by IBM Corporation and Uniphase Corporation).

> Supplier warrants that the prices under this agreement are equal to or less than standard prices offered by Supplier generally to similarly situated customers contracting for similar volumes under the same terms and conditions.

Of course, as illustrated by this article, this clause cannot cover many, nor perhaps, even most situations. Many suppliers simply need the freedom to treat differently even similarly situated customers purchasing like quantities. Furthermore, some circumstances will justify an MFN provision with fewer qualifications.

This article began with a little history of the use of MFN agreements between nations. The criminal imperialism of the West in nineteenth century China was an atrocity so monstrous that there is no real analogue between forcing China to grant unilateral MFN status and contemporary commercial transactions. Instead, the lesson to extrapolate from the international treaties discussed may be simply that a supplier should take care to avoid unilateral commitments that constrict its ability to make decisions in a dynamic business environment. For the situation where both supplier and buyer agree to negotiate an MFN commitment, by considering the concepts discussed above, the attorney can negotiate so as to maximize the client's ability to compete and minimize the risks of administrative burden, contract breach, or illegal behavior.