



Martin Cukierman

# Model contracts

## ... a useful, if imperfect tool

**M**ODEL CONTRACTS ARE a useful tool, not the ultimate answer. For many years, various stakeholder groups have devised model contracts, which are particularly useful in the areas of international and multi-jurisdictional transactions. However, certain terms should still be analyzed carefully.

The primary goal of a model contract is to create a single standard of terms in order to deal with the varied laws of different countries and jurisdictions thereby improving trade. With the use of model contracts, some would argue that the playing field of unequal bargaining power has been somewhat leveled by creating more opportunities for international and multi-jurisdictional trade.

A model contract can save time and effort when used as a template – particularly for smaller companies without the means to afford protracted, high-priced legal negotiations. However, both large and small organizations should beware. The model contract should be viewed as a rudimentary tool rather than a sophisticated solution to international or multi-jurisdictional trade. Striking a balance between parties through the use of standardized terms has the potential of leaving neither party in the best possible circumstance.

Parties should also be wary of the origin of the model contract. Certain regions of the world using a model contract developed for that area might impose values and restrictions on the parties that may be foreign and contradictory to their own values. For example, the European Union and its member countries insist on certain restrictions regarding the privacy of information and the privacy of individuals. The United States, particularly since 9/11, has vastly different rules regarding privacy. Canada's view is closer to the European concept. Consequently, depending on the origin of the contract, certain privacy requirements may create serious issues. Furthermore, as various regions of the world vie for greater economic power, the use of model contracts may serve as a tool to impose their values on those that wish to do business with that region. Rather than improving trade, the model contract may inhibit trade with competing regions.

Although model contracts may serve a purpose, and certainly require considerable consideration in their formation and use, they should not be used or devised in a perfunctory manner. Attention should be given to the economic and social ramifications of imposing or altering the values of one's society simply to do business with a particular region of the world. For those entering into model contracts specific heed should be paid to clauses involving areas such as: privacy, limitations on liability, liquidated damages, governing law, letters of credit, dispute resolution, obligations regarding non-conformity of goods or services, disclosure of information, accountability and notice provisions. Each of these clauses may have profound effects on the contracting parties. Some venues may permit negotiation of these provisions while others may not. Regardless, parties should

seek competent legal advice regarding the terms and conditions of the model contract.

As stated previously, imposing standardized terms may leave neither party in the best possible circumstance. If one operates from the premise that model contracts are simply rudimentary tools to assist the parties, then it should be open for the parties to negotiate the most favourable terms. Using an interest-based approach to achieve solutions that are more beneficial to both sides, or at least arriving at a solution that benefits one side while not detrimentally affecting the other is a proven and useful methodology, designed to achieve better outcomes.

The interest-based approach involves: a thorough review of the model contract and any supporting documentation and legislation; determining the scope of negotiation within the context of competitive rules; devising a strategy and process for the negotiation; identifying interests; communication of interests in a full, open and truthful exchange; identifying gaps and divergent or opposing positions; exploring alternatives; analyzing and categorizing interests and gaps; and negotiating with a view to maximizing outcomes. The results should produce both better relationships and agreements.

Change is inevitable. Therefore in order for the model contract to be sustainable, it should contain provisions for flexible governance. Defined authorities, roles, accountabilities, performance measurement, and all issues pertaining to the realization of outcomes should be aligned on an ongoing basis with the objectives, priorities and interests of the stakeholders. Provisions should be incorporated into the contract to manage change.

Therefore, in addition to an interest-based negotiation process, an alignment, collaboration and relationship-based model procedure should be initiated from the outset, and incorporated into the model contract framework. Governance structures reflecting the interests, risks, rewards, control and responsibility requirements of the stakeholders should have flexibility over the duration of the contract in order to accommodate change. Additionally, strategic management provisions causing alignment through collaborative means should also be incorporated into the agreements. The functions, methodologies and processes to achieve alignment should be clear and well defined.

Where permitted, using an interest-based approach to negotiation, and by employing a collaborative, non-adversarial approach to contract formation, the parties should strive to establish lasting relationships based on mutual benefits. By incorporating dynamic governance systems and strategic management provisions within the contracts, stakeholders will improve the circumstances of all sides. *MC*

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*Martin Cukierman has over 20 years of legal and business experience specializing in public-private partnerships, negotiations and strategic planning.*