



FACULTY OF JURIDICAL SCIENCES

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Resolution

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Lecture-40



LECTURE 40: Objective and Preparing of Negotiation

Objective of a Negotiation

Negotiations allow the parties to agree to an outcome which is mutually satisfactory. The actual terms of the agreement must be concluded by the parties and can be as broad or as specific as the parties desire. A negotiated settlement can be recorded in the form of an agreement. Once signed, has the force of a contract between the parties. If the settlement is negotiated in the context of a litigious dispute, then the parties may wish to register the settlement with the court in conformity with the applicable rules of practice.

Negotiating Styles

Generally speaking, although the labels may vary from one commentator to the next, negotiating styles can be divided into two categories:

i. **Competitive/Positional-Based Negotiation**

In the competitive model, the parties try to maximize their returns at the expense of one another, will use a variety of methods to do so and view the interests of the opposing party or parties as not being relevant, except insofar as they advance one's own goal of maximizing returns. Competitive bargaining has been criticized for its focus on specific positions rather than attempting to discern the true interests of the parties. Among the criticisms which have been levelled at the competitive model are its tendency to promote brinkmanship and to discourage the mutual trust which is necessary for joint gain.

ii. **Cooperative/Interest-Based Negotiation**

Cooperative or problem-solving negotiation starts from the premise that the negotiations need not be seen as a “zero-sum” situation, i.e., the gains of one party in the negotiation are not necessarily at the expense of the other party. Common interests and values are stressed, as is the use of an objective approach, and the goal of the negotiations is a solution that is fair and mutually agreeable

In recent years, the form of cooperative negotiating style known as principled bargaining has won widespread acceptance. The proponents of principled bargaining believe that bargaining over fixed positions can lead to situations where parties will either be stubborn (“hard bargaining”) or accept unilateral losses (“soft bargaining”) in order to reach agreement. Principled bargaining, which attempts to reconcile the interests underlying these positions, helps the parties to reach agreement and

circumvent the problems of hard and soft bargaining. It is this form of negotiation which is seeing increasing use. See Part G “Steps of a Negotiation” for further discussion.

Preparing for a Negotiation

i. Initial Assessment

The negotiation process begins with a communication or signal from one party to the other indicating a willingness to bargain. Since negotiation is a voluntary process, the first and fundamental step to be taken is to confirm whether or not the other party or parties are interested in negotiations. In making such an assessment, it is important to take into account the following factors:

- the desire to resolve the dispute;
- whether a negotiated solution is in the interests of any or all of the parties in question;
- the credibility of the other party(ies);
- the willingness of the parties to establish or preserve a relationship;
- whether or not there is a disparity between the parties to the extent that it would be impossible to bargain equally, i.e., there is a marked contrast between the parties in terms of the level of education or the resources of the parties;
- the desirability of using another form of alternative dispute resolution, such as mediation or arbitration; and
- proper authority to enter into negotiations and to reach an agreement or settlement.

ii. Contacting the Other Party

Once it has been decided that negotiations are an appropriate course of action, arrangements that must be made with the other parties include:

- outlining the agenda and the scope of the negotiations;
- fixing the timetable, i.e., whether or not there will be a fixed period for the talks as well as the frequency and the duration of the negotiations;
- determining the identity of the participants, ensuring that all interested parties have been consulted;
- choosing the locale for the negotiations (preferably a neutral location) and arranging necessary support services;

- specifying the official language(s) to be used for the purposes of the negotiations, as well as the need for translation and interpretation services (please refer to the discussion of the *Official Languages Act*).
- deciding whether or not the negotiations and any resulting agreement will be confidential (please see the discussion of the *Access to Information and Privacy Acts*).

Consistency in these matters will not only assist in ensuring the negotiations are as effective as possible, they will also reinforce one's credibility and can thus contribute to establishing mutual confidence and trust.

iii. Preparation of a Strategy and Interest Assessment

A crucial factor in achieving one's goals in negotiation is thorough preparation. Therefore, it is suggested that the following steps should be taken prior to any bargaining session:

- Study the dispute in question before the negotiations. This means not only obtaining the facts surrounding the dispute, but also attempting to find out as much as possible about the other party or parties, their background and their negotiating interests.
- Harmonize and reconcile the varying and sometimes competing interests within one's negotiating side before negotiating with the other side. Failure to do so can undermine one's negotiating stance by making the other party aware of internal disagreements and thus raising doubts as to one's ability to implement any future agreement.
- When assessing one's interests as well as those of other parties, the Best Alternative To a Negotiated Agreement (BATNA) must be taken into account. The BATNA is “the standard against which any proposed agreement should be measured”. It is, in essence, the best of all the possible alternatives to negotiation should the latter fail. Assessing one's BATNA is indispensable and should be done carefully and well in advance of any bargaining session so as to avoid unpleasant surprises from the opposing party during the negotiations. Attempting to estimate the BATNA of the other party will also be worthwhile when planning one's negotiation strategy.
- Creativity is necessary when attempting to devise solutions when at first glance the dispute appears to be insoluble. An impasse will often result when the negotiating parties advance specific positions and refuse to change them. Each party should then canvass the various members of the negotiating team in order to obtain their views regarding possible solutions, i.e., determining the parties' underlying interests and how they may be satisfied. This should be done in an environment which encourages the

team members to express their ideas freely and without fear of criticism, e.g., a brainstorming session.

- Thought must be given as to how the negotiations will be handled. For example, it must be decided in advance whether there will be one spokesperson or whether each member of the negotiating team will be responsible for one or more particular areas or topics. Another consideration is fixing in advance when and how to call a private team caucus that will interrupt the negotiations. Resorting to a caucus of team members is helpful when a new issue emerges at the table or an issue on the table requires clarification or further analysis. Finally, all members of the negotiating team should be aware of the need to resolve any internal disputes away from the negotiating table and to avoid revealing any such disputes or doubts to the other parties, e.g., through the use of inappropriate body language.