

Negotiating and Mediating

Overview

Negotiating is, or should be, a process designed to achieve a mutually acceptable outcome. Great negotiated outcomes are when both parties feel they have 'won'; acceptable outcomes are when the parties can 'live with' the results.

Negotiation usually occurs when there is a difference of disagreement between two parties¹ (people or organisations). As a general rule, negotiation is preferable to disputing an issue; *'You probably should negotiate more often than you feel like it'*.²

Pragmatic decisions to negotiate will often be more beneficial to you or your clients than principled decisions to fight based on intuition or moral claims, even if this conflicts with your personal honour and integrity. To get past the emotions driving you to fight you need to pragmatically focus on the real costs and likely outcomes for both parties; external advice helps validate your assessments of the cost of the negotiation and the likelihood of an implementable deal compared to the cost and returns from a fight (the likelihood of a deal after a fight is close to zero). Systematically comparing the expected costs and benefits for every fight can be forgotten when emotions cut in³. Presuming in favour of negotiation is a good starting point.

In circumstances where one-on-one discussions fail, mediation or conciliation employing an independent third party may help. The independent third party's role is to facilitate the negotiation which is quite different to an adjudicated settlement where an independent tribunal listens to evidence and then imposes a settlement on the parties. The decision on an acceptable outcome in Adjudication, Arbitration or Litigation (Magistrate or Judge) is made by the tribunal and enforced on the parties. The decision on an acceptable outcome in negotiations, mediations and conciliations are made by the parties jointly⁴.

The other important time negotiation occurs is at the start of a contract. In this circumstance it is important to remember sales and contract negotiations are the start of a working relationship not the end of the purchasing process, therefore ensuring a 'win-win' outcome⁵ is far more important but apart from this aspect, the negotiation is still a negotiation!

Normal Phases of a Negotiation

All negotiations should follow the same general pattern:

Preparation is the key to every successful negotiation. The more you know about your negotiating team, the matter under negotiation, plus the other side's negotiating team, their offer, their business and the general market the better the likely outcome. A successful negotiation owes 80% its success to planning, 20% to the strategy and tactics used during the process.

Introductions and establishing appropriate protocols sets the atmosphere and framework for the negotiation. Issues such as venue for the meetings can change the power structure within the negotiation and influence the negotiating tactics used.

¹ For more on contractual dispute management see:

http://www.mosaicprojects.com.au/WhitePapers/WP1049_Dispute_Management.pdf

² Robert Mnookin: *Bargaining with the Devil*. Simon & Schuster 2010.

³ Managing your emotions is a key element of Emotional Intelligence (EQ) see:

http://www.mosaicprojects.com.au/WhitePapers/WP1008_Emotional%20_Intelligence.pdf

⁴ For more on Alternative Dispute Resolution (ADR), see: http://www.mosaicprojects.com.au/Disputes.html#ADR_Processes

⁵ For more on Win-Win negotiating see:

http://www.mosaicprojects.com.au/WhitePapers/WP1032_Win-Win_Negotiating.pdf

Opening statements simply outline the starting position for each of the parties. All relevant documents should have been disclosed and copies provided to all of the negotiators.

Probing is when each of the parties seek to understand their position in relation to the other.

- What points are already agreed and what is the difference between the parties on each of the other points;
- What are your, and the other party's strengths and weaknesses;
- What is important to you (and the other side) and what can be traded to achieve an ultimate agreement?

Through building rapport and engaging in active listening⁶ it may be possible to understand the hidden thoughts and agendas of the other party. Body language can give important clues to attitudes and internal team power structures (the lead negotiator may not be the ultimate decision maker).

Bargaining is the process of trading concessions for benefits. Ideally to trade something of low value, but important to the other side, for some concession - *"If we agree to pay your progress claims in 7 days, can you increase your workforce and reduce the development time?".* All concessions are made *"subject to us reaching a final agreement then..."*. Most of the negotiating tactics and ploys are used during this stage of negotiating.

Closure is when the overall position is summed up. At this stage there are often one or two outstanding issues that are not easily resolved by trading concessions. The negotiators need to be able to look at all that has been achieved and agree to compromise on the differences - to spread the pain equally. This is much easier to achieve if the negotiations have been used to build a common understanding between the two sides and a good rapport has been developed.

Agreement: As soon as the final gap has been closed, fully document the agreement immediately (and sign off on the document). A reaction known as buyers remorse often sets in after a negotiation: *"We should have done better / it was too easy."* The agreement can be lost if it is not clearly documented.

Preparation for a Negotiation

The approach to any serious negotiation requires the following preparation.

First define and write down your positions:

1. Define your opening position.
 - a. This is what you ask for or offer as the opening gambit.
 - b. The position should be defensible and justifiable.
 - c. It does not have to be reasonable – you expect to move.
 - d. The position should contain as many strands as is practical with a value or quantity attached to each. Some options include:
 - i. Money,
 - ii. Time,
 - iii. Materials to be supplied,
 - iv. Services to be supplied,
 - v. Things to be changed, replaced, improved.
 - e. You should prioritise which strand is critically important, which are less important and expect to trade the less important options during the negotiation.

⁶ For more on Active Listening see: http://www.mosaicprojects.com.au/WhitePapers/WP1012_Active_Listening.pdf

2. Define your optimum position.
 - a. This is the outcome you reasonably expect to achieve and will be happy to achieve, or can live with. This has to be framed in the context of what's feasible considering the other sides positioning.
 - b. The optimum position should be defined for each 'negotiating strand'.
 - c. If using an external negotiator such as a lawyer, as far as they are concerned, this should be the 'bottom line'. They are not informed of the next position (research suggest most negotiations/negotiators settle at around this point, regardless of where it is set).
 - d. You should aim to negotiate an outcome better than this position but be prepared for worse.

3. Define your 'walk away' position (BATNA). BATNA = Best Alternative To a Negotiated Agreement. If you cannot negotiate a position that is better than the alternative options (eg, no agreement or taking the matter to court) there is no point in continuing the negotiation.
 - a. Your BATNA position should be defined for each 'negotiating strand'.
 - b. For some critically important strands, the BATNA may be the same as the opening position particularly if the options are binary, ie yes or no.
 - c. Failing to agree a negotiated outcome is not a failure. Continuing to negotiate below the BATNA is a failure – you could have achieved a better outcome elsewhere.

Second assess and write down your 'opponents' positions. Whilst this is highly subjective it will help you understand where there is likely to be negotiating space. If you are participating in a facilitated negotiation (eg, mediation or conciliation) the mediator will be looking to find or create this space. The art of negotiating is to first create 'space' (eg, they will accept \$800, you are prepared to pay up to \$1000) and then see how close the outcome is to your preferred position.

Third look for negotiating points and hypothesise likely tactics.

1. Determine your 'game plan' for the negotiation (but expect to change – the other people will have one too and you don't know their objectives).
 - a. What are your objectives (see above plus others)
 - b. What is your overall strategic approach to this negotiation, the overall relationship and surrounding relationships
 - c. What sort of tactics will you use and what are the other side likely to use? Some game plans include:
 - i. Power plays: One party seeks to demonstrate its superior power and creates its position by undermining the other party. Real power is obvious and does not need to be demonstrated!
 - ii. Rights based argument: One party seeks to demonstrate its position is based on legitimate entitlements and is fair and reasonable – it is unreasonable for the other party to disagree.
 - iii. Interest based collaboration: Seek to understand **our** underlying interests by requesting information and knowledge to craft a solution that is good for both parties.

2. Negotiating points:
 - a. Things that support your position / argument / moral standing
 - b. Things that weaken the oppositions position / argument / moral standing

- c. How these are used depends on the nature of the negotiation but remember it is impossible to un-fire a bullet.
3. Negotiating tactics:
- a. How do you plan to establish your opening position and justify it?
 - b. How will you manage the trade offs towards your optimum outcome?
 - c. What do you expect the other party to do / say / behave?
 - d. How will you counter their behaviours and positions?
 - e. Negotiating tactics (a few)
 - i. Impose a deadline: Most concessions are made shortly before (or just after) the deadline. Set deadlines to create pressure: “If we don’t reach agreement by Friday, we will have to readvertise the tender in Saturday’s paper”. If you have internal deadlines, do not let the other side know, they will use it to put pressure on you in the negotiations.
 - ii. Surprise the other party with new information
 - iii. Attack the other side:
 - 1. Competence – you can’t really believe that.... / no competent xxxxx could reach that conclusion...
 - 2. Ideas – that is a totally unreasonable / unrealistic.....
 - 3. Style / behaviour – your are being really
 - iv. Use referred authority / negotiating limits: such as “I am only allowed to agree to \$10000, I can ring the boss and ask for the \$12000 you want, but only if we agree these other points....”.
 - v. Demonstrate fair and reasonable pricing
 - vi. Make a threat – this pulls power and can backfire if called.
 - vii. Appeal to sympathy – gains power by making the other side feel sorry for the negotiator (I will be fired if we don’t reach a settlement...)
 - viii. Use strategic delays: can take the heat out of a discussion. One useful technique is to break out for a private discussion, resuming only after everyone has cooled off. The tactic can also be used to push negotiations towards a deadline and increase the pressure.
 - ix. Remove sides (problem solving together): Solving problems together by asking technical experts for the two sides to develop a joint recommendation on an issue, can help resolve issues by turning them into problems for joint solution.
 - x. Fait accompli - Don’t renegotiate agreed points
 - f. Some things to avoid:
 - i. Don’t get personal!
 - ii. Avoid counter attacks – don’t reciprocate negative moves, reply with an interests based proposal
 - iii. Avoid the spiral into defensiveness – call the problem and reframe to a holistic approach
 - g. The best way to counter a negotiating tactic is to name it.... “That was one of the best ‘good cop / bad cop’ displays I have seen...” then correct the situation by offering a constructive alternative.

Using this framework.

Only you can define your positions (you may need advice on the BATNA). You need to understand the boundaries of the negotiation and know what is core to your needs and what can be traded for a settlement. Your 'walk-away' point (BATNA) needs to be clearly understood as well as your desired outcome.

You also need to establish as clearly as possible these values for the other side of the negotiation (but of course no one makes these public). The more research you do, the more likely you are to understand your opponent's positions. There is no substitute for preparation. If there is likely to be an overlap you have room to negotiate. If there is no overlap, then the first issue is to reframe the issues to create overlap and consequently negotiating space, this is the key skill of really effective mediators and independent negotiators.

All of the 'game plans' outlined above are appropriate in the right situation. It is often necessary to develop some power and rights based positions early in a negotiation simply to show the other side you are in the process for 'real'. These options are also needed at times to close out a negotiation particularly if you cannot reach a win-win outcome. The best chance of success is created by reframing the discussion to an interests based approach as soon as practical. To achieve this you need to be on the lookout for potential 'turning points' and use the opportunities when they arise.

Skilled negotiators are continually on the lookout for unproductive cycles both escalatory and defensive negative cycles, and where everyone is being too obliging an agreeable to actually review the situation and uncover hidden issues. As soon as one is identified, appropriate tactics are used to break the cycle.

In particular, you need to avoid the *move - countermove* trap. Simply responding to the other side's tactics with a 'bigger' response is a spiral to deadlock and failure. If when the other side plays hard, you play harder or when the other side makes a threat you make a bigger threat all you are doing is playing for power in a win-lose scenario. This is a very defensive posture that leads to escalating levels of contentiousness and combat. Transactional discussion based on move countermove at best lead to a compromise where everyone loses something, you need to look for circuit breakers to move them to your game plan and this usually requires some quick improvisation. Some circuit breakers include:

- Ask questions 'is this really helpful would we be better off focusing on options or solutions?' – remind the others of the purpose of the negotiation
- Reframe the situation – bring in new options
- Call the tactic and suggest different approaches
- Use silence effectively – take a break / go to the balcony – especially if you feel yourself descending into a shouting match and trying to talk over the top of the other party. Silence breaks the cycle and allows more productive negotiations. Learn to recognise your physical symptoms (eg, a hot flush) indicating you are about to 'jump in' over the top of someone annoying you (this is a physiological reaction) and resist the urge to speak until the symptoms pass.
- Don't be afraid to say NO!
- Appear perplexed by the other sides attitude/tactics. Ask questions such as "help me to understand you?"
- Interrupt the other parties move – just pause and don't respond, use silence to create pressure, take a physical break. Most tactics and power plays work best if run to the planned script

Using negotiating points and tactics such as these are where the skilled / professional negotiators come into play. You should develop as many as possible but the lead negotiator is the only person who can decide when or if to use them. You cannot un-fire a bullet!

The negotiating team can be an asset or a liability; understand the personalities and skills of each team member. Allocate roles, such as, who should lead the negotiation, who should watch the body language of the other side. Ensure that the team members taking specific roles only enter the negotiations when the leader invites them. Every team member must know what to do in each given situation. It may be necessary to rehearse beforehand.

During the negotiations it may be necessary to change tactics and strategies as the discussions unfold and opportunities appear. At the end of the day some compromise may be necessary, the art is not to compromise too much. However, in all but the most extreme situations it is unethical and bad business, to seek to drive the other side into capitulation.

For the agreement to stick, at the end of the negotiation both sides need to feel that each has had a win, or at least an outcome they can live with. Therefore, be pragmatic, anyone can 'crash' a negotiation by making 'large initial demands' or 'refusing to make the first concession'. The trouble with these unethical positions if you are facing a really skilled negotiator who knows almost as much about your position as you do is you will either have no negotiation (in which case why bother) or you will 'lose'.

Ethical and transformational negotiations seek to reframe issues and offer concessions to the other party that have low value to you but high value to them and expect similar 'trades' in return to achieve an acceptable outcome all round. The art is to make the whole 'cake' being negotiated 'bigger' so everyone wins. The skill is to see who wins how much⁷.

Transactional -v- Transformational negotiations

In most negotiations everyone knows exactly what they're talking about. The defining elements of the situation are relatively stable and the discussions are relatively predictable. These tend to be transactional, negotiations that follow rules and trade compromises; our culture's default setting.

This type of negotiation is referred to as 'transactional' because they're essentially about trading or exchanging ideas, positions or things of value. Beneficial transactional negotiations provide a context in which participants can exchange ideas and perspectives that expand the stable common ground on which they can work together. However, whilst transactional negotiations are good for maintaining the status quo, they can easily become dysfunctional as the parties trade compromises and eventually work to the common lowest denominator, with both parties focusing on making sure the other does not 'win'.

Transformational negotiations, on the other hand, are about creating something new. At the point the parties enter a transformational negotiation they don't know what the outcome will be. The outcome will be created by jointly melding and building on ideas to create new possibilities that were unthinkable at the start. This is both an exciting and a frightening place to go, everyone needs to actively let go of preconceptions and open up to the possibilities created by 'not knowing' and 'not controlling'.

As a group, the parties need to accept that:

We don't know what solution we're going to get here: Once our co-creativity gets rolling, new third-way solutions are virtually inevitable. We can create together more choices in our approach to the problem (new options).

We don't actually know what topic we're talking about or what problem we're trying to solve: The stated topic or problem will probably shift during the conversation as the decks get cleared for more basic topics or problems to emerge. New choices become available because we've deepened our understanding of the situation we're addressing (reframing the problem).

⁷ For more on win-win negotiating see:

http://www.mosaicprojects.com.au/WhitePapers/WP1032_Win-Win_Negotiating.pdf

We don't know who we will be at the end of the negotiation: All of us may change, not only individually, but in our relationships to each other and to our situation and its context (choice creating).

To allow these open-ended questions, there needs to be a high level of mutual trust and respect. The trust allows a better outcome to be developed by reframing the problems and building a combined future together.

These guidelines are not hard and fast; negotiations can be more or less transactional, however, it is the openness generated by people intentionally not-knowing that increases their transformative power. Any assumptions, circumstances, processes or facilitation methods that restrict these open-ended questions, will restrict the capacity of the negotiation to be transformational.

Facilitated⁸ Negotiations

Mediation and Conciliation are facilitated negotiation processes. The independent third party assists the parties to the dispute to determine an agreement they voluntarily choose to enter into.

Expert Determination may be binding or advisory; an expert makes a determination based on information provided and depending on the contract the determination may be binding on the parties or merely informative. Expert determination is usually used to decide quality issues and valuations where a single answer is all that is required⁶.

These processes are distinctly different from Adjudication⁹, Arbitration¹⁰ and the Courts where an independent tribunal makes binding decisions that the parties to a dispute have to comply with.

All of the processes apart from court proceedings are private; only in the most exceptional circumstances will a court prevent public scrutiny of the proceedings.

The key difference between Mediation and Conciliation is the level of involvement of the neutral third party in formulating any agreement reached by the parties. In both processes, the neutral third party will, through their facilitation and technical skills, assist the parties explore the issues in depth and reach the best possible joint decisions that the circumstances allow. This is achieved by identifying the disputed issues, developing options, considering alternatives and endeavouring to reach an agreement.

In Mediation, the mediator will not offer suggestions or recommend solutions; the agreement is developed entirely by the parties and as a consequence is completely 'owned' by them at the end of a successful mediation. The mediator's role is focused on facilitating an efficient and effective mediation process.

In Conciliation, the conciliator is more actively involved in the search for a resolution. The conciliator may advise on, or determine the process of conciliation and may make suggestions for terms of settlement, give expert advice on likely settlement outcomes, and may actively encourage the participants to reach an agreement.

As with any other negotiation process, at the conclusion of the Mediation or Conciliation the parties need to document and sign their agreement and then honour their undertakings.

Skilled Mediators have the ability to unlock fixed positions and help the parties move forward to a settlement they can 'live with'. Conciliators can make more positive suggestions but in doing so risk losing the confidence of one of the parties. The challenge faced by the Mediator/Conciliator is first to remove the emotions and anger present in most disputes, then to create sufficient overlap between the demands of both

⁸ For more on facilitation see: http://www.mosaicprojects.com.au/WhitePapers/WP1067_Facilitation.pdf

⁹ For more on Adjudication see: <http://www.mosaicprojects.com.au/Disputes.html#Adjudication>

¹⁰ For more on Arbitration and Expert Determination see: <http://www.mosaicprojects.com.au/Disputes.html#arb111>

of the disputing parties to allow a settlement to be reached, then finally to lock in the agreement. This is a skilled role that needs training and experience. Within Australia there is now a national accreditation scheme for mediators and a number of national bodies including IAMA¹¹ and LEADER¹² that train and accredit mediators under the national scheme.

Insider-Partial or Outsider-Neutral Mediation

Whilst Western cultures emphasise the importance of an independent third party mediator this a cultural factor. Certainly in more individualistic cultures such as many countries in North America, Australia, South Africa and Western Europe, where trustworthiness to resolve a conflict stems from neutrality, an outsider would be chosen to mediate between the two parties.

However, more collectivist, relationship-based cultures, such as those in Latin America, Asia and the Middle East, may choose to use an insider who has a trusted relationship established with both parties, and is therefore credible.

When parties from individualistic and collectivist cultures come into conflict, the best person to mediate needs to be carefully considered. The ultimate selection of one of these techniques will depend on a range of factors including personality, management style, communication style (including language levels), and the degree to which one party or another is willing to yield in the process. It is important to keep in mind the range of choices at your disposal.

For more on mediating and negotiating see Mosaic's Disputes Management page:
<http://www.mosaicprojects.com.au/Disputes.html>

¹¹ IAMA - <http://www.iama.org.au/>

¹² LEADER - <http://www.leadr.com.au/>