

Chapter Two: Negotiation

Settlement is the primary way people adjust dispute, alter ownership, and rearrange their relationships. Because we reach settlements by negotiating, bargaining pervades personal, commercial, social and political life.

But what is negotiation?

Is there any difference between negotiation and bargaining?

Even though some writers try to distinguish negotiation from bargaining, in popular usage the terms are interchangeable. Hence, the terms are used interchangeably in this material and as defined here, negotiating or 'bargaining', as to Chorniki, means —the method by which two or more parties communicate in an effort to agree to change or refrain from changing: their relationship with each other; their relationship with others; their relationship with respect to an object or object. —

Negotiation can also be defined as: a non-binding procedure involving direct interaction of the disputing parties where in a party approaches the other with the offer of a negotiated settlement based on an objective assessment of each others position.

2.3.1 Primary Consideration of Negotiation

Selection is at the heart of ADR use. Whether your client or yourself are making an ad-hoc decision to use ADR for current controversy or are designing a systematic ADR program, it is vital to make appropriate choice for appropriate case. It is blunt fact that the one who makes the choice has to know the features of each ADR mechanisms. Here under are some primary concepts of negotiation.

2.3.1.1 when is negotiation appropriate Dispute resolution?

Selection is a challenging in ADR. Confusion about what choice to make is one reason that ADR sometimes generates resistance. According to Chorniki, there are criteria either to use one type of ADR or not. As to him negotiation remedy is appropriate when:

- 1) Collaboration among parties is probable with respect to subject –matter of the dispute.
- 2) Collaboration among parties is probable with respect to the process ;
- 3) There is no desire or need to resolve contested evidence ;
- 4) There is no desire or need to resolve contested legal issues;

- 5) There are some concerns about the cost and negative consequences of failing to achieve out come –cost may relate to relationships , reputation ,probable damage awards , transaction or opportunity costs;
- 6) The parties are able to and willing to make responsibility for the out come (since negotiation is highly participatory)
- 7) There is no need for involvement from an outsider because the necessary skills and wisdom (to manage the discussion to analyze the conflict etc.) reside with the parties ; and
8. There are no public interest concerns that would demand public attention and scrutiny.

The above measurements are best ways of identifying the situations when negotiation would be preferred dispute resolution mechanism.

2.3.1.2 Nature of bargaining power

The other crucial factor in negotiation and the negotiator need to know is the nature of bargaining power as no negotiation with out bargaining power.

How can you explain bargaining power?

Is /are there any condition(s) which affect(s) bargaining powers of parties?

In general terms, power is the capacity to exert influence .It is the ability of a person or a group to cause change,|| to over come resistance in achieving desired objectives or results. It is also defined as the probability that one actor within a social relationship will be in a position to impose his will despite resistance. Implemented in negotiating relation ship , bargaining power is party's capacity in influencing the out- comes of negotiation towards its own goals. Chamberlain explained, therefore, that bargaining power is the ability to secure another agreement on one's own terms.

Bargaining power must exist for there be bargaining. If one party has no power over the other, there is no bargaining relationship. Rather, either it is relationship involving a different type of power such as hierarchical power or a relationship equal with common goals seeking to discover through discussion the means for maximum achievement of those goals. Essential elements of bargaining are lacking in situations in which one party has total control over the other. For instance, master-slaves, or lord serf relationships are not bargaining relationships if the slave or serf is totally devoid of power to affect the interest of the lord or master. In contrast, where the parties have some thing to exchange and have alternative to submitting to the other's will, they have bargaining power.

When we speak of ‘Bargaining power’, we must also remember that, as others have noted, it is not an attribute that exists by itself. It is not a quantity that an individual can own, hoard or stockpile for future use against any other party. Bargaining power does not exist independently of bargaining relationship with a particular party or parties and with respect to particular or potential transaction.

The cost benefit model helps to understand the nature of bargaining power that analyzes the elements of bargaining power shows the relationship among those elements and reveals the dynamics of their transactions.

2.3.1.2.1 Element affecting of bargaining power;

Perception (P), offers to meet the other’s needs (OMON) ,Best Alternative to proposed agreement (BAPA) , Accrued cost (AC) , cost of impending negotiation (COIN), probability of performance , and Predictive accuracy (PA) , among other things are factors which affects bargaining power as illustrated by Goldman and Rojot in their book. Here are the excerpts taken from their book to show these elements.

A) Perception (p). One of the elements of bargaining power is perception. Much of what we believe is based on inadequate or inaccurate data. Yet, those short comings rarely detract from our confidence in those beliefs. Every skilled negotiator understands that what counts in bargaining is not the reality; what counts are the parties’ perceptions of

reality. The element of bargaining power exists only to the extent that they are perceived as existing in the minds of the transaction participants. The situation, the environment and the context may contain abundant resources and formidable opportunities to build up the bargaining power of one or both parties. However, if parties are not aware of these opportunities or neglect them, they are unlikely to affect the bargaining outcome.

Thus , a significant factor in developing bargaining power requires:

1. Bring your perception in line with the reality;
2. Ascertaining the other side’s perceptions of the proposed transaction and available alternatives and
3. Finding ways to favourably alter the other side’s perception.

Perception, therefore, is an element that has direct impact upon all other elements of bargaining power.

When negotiating, each party’s bargaining power is based on his opponent’s perception of the cost of agreeing and the cost of disagreeing with other’s proposals. Therefore, in large measure

our bargaining power is a function of the way the bargaining situation is perceived by our opponent not by ourselves. Accordingly parties aiming at increasing their own bargaining power must influence the other side's perception.

B) Offer to Meet the others needs (OMON)

People enter negotiation to achieve particular objectives. Bargaining objectives can be analyzed as a range between two salient points which constitute the limits of the parties' objectives; an ideal goal and a resistance point. That is the most preferred result (the goal) and the least acceptable result (the resistant point.) In negotiation each party is looking to obtain something from the other side that he does not think he can obtain more easily in some other manner.

A party will stay in negotiating relationship given what the other party expects of him and settle on the other's terms if he wants badly enough what other party has to offer. more one side depends on other to satisfy his needs, the more he will be inclined to settle on the terms proposed by the other side. Thus, a core element of bargaining power is the offer to meet the other's needs. The perceived needs of negotiating parties are related to each other in one of four ways. They may be perceived to be: common, compatible, conflicting or incompatible. Common needs exist when opposing parties stand to mutually benefit from a particular resolution or facet of the resolution of the conflict. Compatible needs are found when one side , though not gaining any particular benefit for itself , can accommodate the other's special need with out scarifying any thing that it needs. Needs conflict when one side's gain is the other side's loss , with respect to particular need. A negotiated resolution represents only a partial accommodation of this aspect of each side's needs. Incompatible needs are involved in a transaction if one side's needs could be met only at the expense of not meeting some need of the other side. For example , if A's packing machines are designed to package parts in sets of 10 but B's manufacturing process uses 12 of these parts at a time , then the contractual terms respecting the packaging of shipments involves incompatible needs.

When a negotiation involves only common or compatible needs it can be called an integrative or problem solving transaction. In many negotiating situations the parties' needs are wholly conflicting or incompatible. If this is the case, the bargaining is distributive. In purely distributive situation, sometimes called an exchange transaction, each side has the ability to accommodate some or all of the other's needs but only by failing to meet part or all of its own needs.

C) Best Alternative to the proposed Agreement(BAPA)

Sound guidance for effective negotiating of integrative (problem solving) transaction is identifying the best alternative to searching a settlement agreement known as best alternative to negotiating agreement(BATNA). The Authors of the book entitled _Negotiation: theory and practice' uses another phrase, Best Alternative to Proposed Agreement (BAPA). According to

these author's the phrase, Best Alternative to negotiated Agreement is misleading to the extent that it indicates that the negotiator's bargaining power depends only on available alternative form of conflict resolution (that is, some thing other than a negotiated agreement). Often, however, the best alternative for a negotiator is to reach a negotiated agreement with some other party –for example, one

who perceives his or her needs in a way that more compatible with the moving party's to satisfy those needs. Otherwise, the best alternative may be to seek other conflict resolution methods for accomplishing one's goals. As to the scholars on negotiation, a skilled negotiator should be innovative as well as rigorous in exploring what is best alternative as to the proposed agreement.

D) Accrued cost

Whether successful or not, bargaining has its costs. These costs always include time and effort, and often include out of pocket expenditure for research, personal, consultants, presentation materials, telecommunications, and the like. Research shows that typically the more people invest in project, the more willing to put their money on it. It follows that the more that is invested in a conflict resolution transaction, the greater will be the desire to resolve the conflict through that transactions rather than incur a whole new set of transaction costs in different efforts that might not produce a more favourable result. Indeed, at some point the budget resources available for the transaction might preclude opening negotiating with others.

E) Costs of impending negotiation(COIN)

The greater the cost a negotiator expects will be required to continue the negotiations, the greater is the bargainer's motivation to abandons that transaction and seeks the best alternative to the proposed agreement (BAPA).

F) Probability of performance (POP)

Another element affecting negotiating power is each side's perception of the likelihood that the opponents will in fact do what it promises. That is, each side's perception of other's offer to meet its needs is discounted by the extent to which it anticipates that in fact the other may fail to do what it promises. Another way to put this is that the perceived probability of other's performance alters the net value placed in the other side's offer to meet one's needs (OMON).

g) Predictive Accuracy

One lesson taught by the concept of bounded rationality is that one can rarely assess with 100 percent reliability the true net either of what is proposed or the alternatives to that proposal. Unforeseeable events, lapses in logical analysis, and gaps and mistaken information, all detract from the predictive Accuracy (PA) of the BAPA or COIN. Therefore, in weighing whether to turn to the alternative to the proposed agreement, a negotiation should discount the attractiveness of that alternative to the extent that he or she has a high or low level of confidence in the accuracy with which that alternative has been assessed. And, not surprisingly, research confirms that greater the uncertainty respecting the value of the alternatives to the proposed bargaining proposal, the greater is the prospect that a negotiator will accept a proposed settlement.

2.3.2 Perceived advantages of negotiation

One special attribute of negotiation as a method of resolving difference is flexibility, both with regard to the manner in which the parties proceed and with respect to the ultimate accommodation reached. It allows difference to be adjusted in a way that either maximum mutual gains or meets at least some needs of all parties to settlement. A third attribute is that it implicitly recognizes the dignity and worth of all participants since negotiated resolution requires the parties assent. Finally, unlike some other methods of resolving difference, negotiation takes in to account unofficial as well as official values – that is, it can reflect values that are important to the parties even though these values not have legal status.

2.3.3 Perceived disadvantages of negotiations

The following points might be taken as the disadvantages of negotiation. Firstly, as negotiation is all about bargaining, the parties have no assurance that they will reach a settlement. Nevertheless, the process requires an investment of time, effort, and often other expenses. Secondly, the soundness of the resolution may be impaired if the parties miss present their goal or the back ground information or if, after agreement is reached, circumstances change from what one or more parties anticipated during bargaining. Thirdly, some times negotiated settlement does not satisfy community mores or relevant and lawful interest of third parties and thus, may be unenforceable or subject to one or more participants to criminal penalties. Accordingly, it is not always the most desirable means of resolving conflict.

2.3.4 Legal effects of negotiation agreement.

What do you think the effect of a duly concluded negotiation?

Negotiation settlement is a daily practice in any society. After back and forth communication between disputing parties on their disagreement, they will reach an agreement and their agreement also has legal effect provided that parties respect what the law prescribed as requirements. The law not only imposes limits that shape both the procedure and substance of negotiation, but also its effects among the negotiating parties. In some situations the law

prohibits negotiated settlement. The most obvious example is where the agreement requires one or more parties to engage in unlawful conduct such as a non complete agreement or other agreement which might constitute a restraint of trade.

If the parties conclude negotiation in line with the law, this agreement will have effect on the agreed parties. Currently, the general policy of the law favours negotiated settlement of current and future disputes for the obvious benefit that which settlement brings- less litigation and cost in terms of time and money for the parties and the courts. Settlement agreement is, therefore, considered as contracts between negotiating parties.

In general, terms of agreement lawfully concluded by the negotiating parties shall be binding on them as though they were law. This is to mean that though the requirements for valid negotiation agreement differ from country to country, an agreement which is established with the free consent of the parties in dispute and as to the specific requirement specified by the law at hand , the agreement will be binding upon the parties. In the next chapter you will look at legal effect of negotiating agreement in Ethiopia.