

Chapter two

Negotiation

Outline

- Definition
- Types
- Elements
- Styles
- Negative effects
- Tricks

- Everyone negotiates everyday
- Lawyers (narrowing the scope, only legal perspective, narrow it to some legal category, just raise points they plan to use in litigation to negotiate ,.....)
- Corporate lawyers negotiate a business deal
- Government lawyers negotiate administrative agencies
- Trial lawyers negotiate to minimize cost of litigation
- Mediation/ conciliation/ mini trial/ summary jury trial ... all bases itself on negotiation

- Definition
- Consensual bargaining process which the parties attempt to reach settlement on disputed matter without 3rd party intervention.
- We all negotiate all day if our interests are different from others.
- E.g. crying child

Types

- Deal making Vs. Dispute
- Deal making – for future relationship
- It is contractual or transactional negotiation.
- The end goal is contractual agreement.
- E.g. M & A
- No actual dispute exists

- Dispute negotiation
- Negotiation to resolve existing dispute
- It might be over breach of contract, patent ..

Distributive Vs. integrative

- Distributive
- When parties believe that there is limited resource to be divided.
- Individual than joint gain is sought
- The process is influenced by information asymmetry and manipulation.
- more for you -less for him
- It is a zero- sum

- Integrative
- Mutual gain is possible and desirable
- There is much alternatives
- Possible agreements than can maximize gains for both parties.
- What is the interest behind.

Positional Vs. Principled

Structure of Negotiation

- One issue Vs. Multiple issues
- If it is about money only or price – mostly zero sum
- Most cases will have more than one issue
- E.g. sale of house Price, time, down payment, mortgage, repair cost,
- Not zero sum because there is a trade off between issues.

- Negotiated agreement is efficient if the parties gain all possible benefits from trade
- Efficiently referred to as win win/positive sum/joint gain/ value creating negotiation
- The parties have a possibility to expand the pie than just slice it up

I. Pareto optimality – the maximum the pie can be expanded.

- Solution is pareto optimal if it benefits one party without affecting the other (worse of other).

- Expanding the pie needs identifying values

II. Source of value

- shared interests/ preferences e.g. couples choose to live together ...cost minimized
- Differences between the parties.... There interests are different but not in conflict e.g. opening window ...one for fresh air other for avoiding winds.
- Things more important for one party may be less important for the other e.g. the seller needs the money now but buyer is not in problem to pay

- Sometimes it might be contingent ...
in such case having contingent
contract is important
- E.g. A company and city for
electricity agreement
- Company believe its oil input
increase price in the future City
otherwise
- Contigent contract if increases

- Risk aversion/ risk sharing
- If the negotiation is about uncertain future
- You can keep the interest of both parties through risk sharing
- E.g. A & B wanted to start a business
- A is single B has a family
- High salary for B and High profit for A
- Or high salary less guarantee / high salary less bonus

Negotiation strategy

- Positional hard competitive
- Positional soft compromise
- Problem solving

- Alternatives and litigation analysis
- Information is important to trade off
- BATNA (what will the court decides?)

Not easy to know

- 1. uncertainty of lawyers on the outcome (judge, law, fact)
- 2. strategic temptation by other party
- 3. miscommunication between lawyers and client about the outcome e.g. lawyer .. You have a strong case vs client winner ..