**Negotiation strategy**

This element addresses some basic concepts in negotiation strategy

**Introduction**

Many books have been written in relation to negotiation strategy.

This element seeks to introduce at a basic level two important concepts:

Focusing on interests rather than positions.The best and worst alternatives to negotiated agreement (‘BATNA’ and ‘WATNA’)

**Interests and positions**

A basic approach to negotiation involves focusing solely on a party’s position in the proceedings. For example, a claimant’s position in relation to a breach of contract claim is likely to be articulated in the particulars of claim – the claimant considers that the defendant owes the claimant a sum of money as a result of the defendant’s breach of contract. A negotiator might simply pursue his client’s position irrespective of the broader underlying interests of the parties. This approach to negotiation is rarely adequate.

A more sophisticated approach to negotiation involves asking much broader questions. What does the client want to achieve and why? What does the other side want to achieve and why? By understanding the parties' underlying motivations and interests (whether commercial or personal, and whether already expressed in the dispute or not) you are most likely to achieve a satisfactory negotiated settlement.

Common advice given when preparing for a negotiation is to focus on interests, not on positions.

The example on following pages makes this distinction clearer.

**Example**

Let us now consider this by way of an example:

Company A is negotiating with Company B.

Company A needs to buy some widgets. From Company A’s perspective, it wants to pay as little as possible for the widgets since it wants to save money for a new IT project. Company A simply cannot afford to pay more than £27 per unit. If it does so, it will not have any resources available for its IT project. If the widgets are bought for less than £27 per unit, then every extra pound will be ploughed into the IT project. Having investigated the market, Company A considers that £23 per unit is a reasonable and sensible starting position. Company B’s widgets are, however, brand leaders and are the best quality on the market. Company A needs the widgets for a new product it is manufacturing and, if the contract with Company B goes well, would want to enter into a long-term agreement to buy widgets on a regular basis from Company B.

Company B sells widgets. Company B wants to secure a profit from this transaction in order to fund the construction of a new factory. The lowest price it could sell its widgets for is £22 per unit. If the widgets are sold for less, Company B will make no profit whatsoever. If the widgets are sold for more than this figure, then every extra pound will be ploughed into a new factory. Company B considers that £26 per unit is a reasonable and sensible starting position. Company A is an impressive new company and Company B would like to secure this contract/to supply widgets to Company A both now and in the future.

By focusing on a position (£23 per unit or £26 per unit), there is less scope for effective negotiation. If both parties can define their objectives and interests clearly (by identifying them during their preparations and maybe even articulating them during the negotiation), then a solution could be reached whereby Company A saves money (which can then count towards its IT project) but Company B still makes a profit (which can be used to fund a new factory). Some level of saving and some level of profit is preferable to none. Importantly, both companies have stated that one of their mutual interests is to potentially establish a long-term relationship and further orders for widgets. A small amount of give and take in the current negotiation is likely to lead to a better working relationship between the companies and the potential for future contracts.

**Buyer (Company A)**

Objective / outcome: To buy widgets from Company B.

Position: Maximum amount willing/able to pay: £27

Interests:

- Pay as little as possible in order to save money for a new IT project.

- Buy from Company B because its widgets are the best on the market.

- Possibly establish a long-term relationship with Company B and buy widgets from it regularly.

**Seller (Company B)**

Objective / outcome: To sell its widgets.

Position: Minimum price which will secure a profit: £22

Interests:

- Secure a high profit in order to finance the construction of a new factory.

- Sell to Company A because it is an impressive new company and there is the possibility of future business.

**BATNA and WATNA**

In dissecting the parties’ objectives, positions and interests, remember that the entire reason behind a negotiation is to enable the parties to obtain an outcome that is more favourable to them than an outcome they might achieve through other means (e.g. a form of binding dispute resolution). If there is definitely a better option available for either party, then there is little point in negotiating.

Rather than pinpoint a possibly arbitrary and most likely inflexible ‘bottom line’ position, it is better to focus on developing your BATNA (‘Best Alternative to a Negotiated Agreement’).

If a resolution cannot be negotiated, what is the best possible alternative? Conversely, what is the worst possible alternative if a negotiated settlement cannot be agreed? By focusing on these potential ‘extremes’ the parties are better able to make decisions on whether to settle/agree and, if so, on what terms.

Developing your own and, if possible, your counterparty’s best and worst alternatives to a negotiated settlement provides a context and framework for the negotiation discussions. It gives you a measure by which you can test any proposed agreement.

**BATNA**

The person with the most power in the negotiation is usually the person who is willing (or able) to ‘walk away’ from the deal. Your BATNA essentially defines your ‘Plan B’. It tells you exactly when you should (and when you should not) be walking away from a negotiation.

Furthermore: If you know or can anticipate your counterparty’s BATNA, then you will know how far you can push them before they are prepared to walk away from the negotiation.

A BATNA is not necessarily unchanging, nor is it something to be merely observed - part of a negotiation strategy (in the broad sense) might be to take steps to improve the BATNA. So, to consider our example above (in relation to positions and interests), having investigated the market, Company A considered that £23 per unit was the market price. That might suggest that the BATNA as regards purchasing the units is paying £23 per unit. But if Company A can put in place an in-principle arrangement with Company C to purchase widgets for £22 per unit, then Company A has improved its BATNA, and strengthened its negotiating position with Company B.

**WATNA**

WATNA stands for ‘Worst Alternative to a Negotiated Agreement’. Your WATNA gives you an idea as to how important it might be to reach a negotiated outcome with your counterparty. If an agreement is not reached in the negotiation, then how bad might the alternative be?

**Task**

The claimant and defendant are both high profile companies in the construction business. You act for the claimant who is suing the defendant for breach of contract. The claim is worth £300,000.

You estimate that your client’s costs to trial will be £100,000. The defendant estimates that its costs to trial will be £100,000. Even if your client is successful at trial, you estimate that it will be unlikely to recover more than £60,000 (60%) of its costs. If your client is unsuccessful at trial, you estimate that it will be liable for approximately £60,000 (60%) in respect of the defendant’s costs.

Assume the claim has 50% prospects of success.

Answer the following questions?

On the basis of an initial rough estimate /intuition, what is a fair settlement?

What are your client’s WATNA and BATNA?

Does this change your view about what a fair settlement might be?

**Your client’s BATNA will be:**

Going to court/full trial; Winning; Being awarded the full amount claimed (£300,000); andBeing awarded its costs of the action (estimated at £60,000).Total: receiving £360,000.Total: paying: £100,000 (solicitors’ charges).Net total **received** : £260,000No adverse publicity

**Your client’s WATNA will be:**

Going to trial and losing, being awarded no damages;Having to pay all of its own costs (£100,000); andBeing ordered to pay the defendant’s costs (estimated at £60,000).Total receiving: £0Total **paying**: £160,000Adverse publicity

What does this tell you?

Firstly, that the claimant should probably accept any offer over £260,000 – it would be better than the best outcome at trial.

Secondly, that taking into account the litigation risk, the claimant should probably accept significantly less than this.

If the claimant were to run this litigation an infinite number of times, the claimant would expect to win £260,000 half of the time and to pay £160,000 the other half – this actually makes the average recovery following trial just £50,000.

Does that mean that £50,000 is a fair settlement? Not necessarily, if you carried out the same analysis as set out above from the defendant’s perspective, you would see that the Defendant’s BATNA is paying £40,000 (the irrecoverable proportion of its own solicitors’ costs) and the WATNA is paying £460,000 (£300,000 to the opponent for damages, plus £60,000 costs, plus its own solicitors’ charges of £100,000). The average outcome for the Defendant is paying £250,000. So perhaps a fair settlement is somewhere between £50,000 and £250,000?

**Summary**

• An integrative approach to negotiation will start with the question of what the parties’ objectives are but will then look behind these to get to the root of the interests of the parties.

• There could be one or a number of different interests behind any one objective. Your client’s interests might be business-orientated or personal.

• Focusing on interests, rather than positions, broadens the potential discussion between the parties and therefore increases the likelihood of the parties reaching an agreement.

• Analysing the best and worst alternatives to negotiated agreement:

- Allows a party to better understand when to accept an offer and when to ‘walk away’ from a negotiation;

- May reveal ways to improve the BATNA (or indeed the WATNA), thereby strengthening a negotiating position;

- May guide the parties to a justifiable settlement figure.