



VAN STEENDEREN MAINPORTLAWYERS



Settlement and Mediation

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Stumbling blocks?

- Is it to evaluate information, arguments, assumptions and concepts?
- Is it to frame the appropriate questions to identify your parties' problems and objectives, and to obtain relevant information, or
- Is it the inability to identify the merits and risks of solutions?

Answer:

- Bringing to light the real interests of parties.
- Sometimes hidden under standpoints.

Individual decision making

- Elements that prejudice a clear view on our interests are the following:

Cognitive analysis of individual decision making

- **Optimistic overconfidence***
The common tendency of people to overestimate their ability to predict and control future outcomes.
- **The certainty effect***
The common tendency to overweight outcomes that are certain relative to outcomes that are merely probable
- **Loss/risk aversion***
The asymmetry in the evaluation of positive and negative outcomes, in which losses/risks loom larger than corresponding gains

* See following slides

Optimistic Overconfidence

- Undervaluation of those aspects of a situation of which the person making the assessment is relatively ignorant
- Overestimation of one's chances of success, one's ability to impose a solution on the other side, or one's ability to prevent such an attempt by the other side
- Tendency to think that particular features of the case at hand take the case out of the statistics for similar cases – "it won't happen to me"

Implications of “Overconfidence”

- Unrealistic optimism favours excessive risk-taking and irrational escalation of commitment to conflict
- Possible benefits of overconfidence:
 - Greater persistence and commitment during the implementation of plans
 - Complete confidence may intimidate opponents

Certainty

- Types of agreement outcomes:
 - Certain – immediately executed or unambiguous, unconditional and enforceable
 - Contingently certain outcomes – certain when a specified condition is met
 - Uncertain – consequence that are more likely in the presence of agreement, e.g. goodwill – tend to be systematically underweighted, reducing the perceived value of an agreement

The Certainty Effect

- Difference between probabilities of 0.99 and 1.00 looms larger than the difference between, say, 0.10 and 0.11
 - People will pay more to reduce uncertainty from, say, .01 to 0, than larger increments, e.g. from .2 to .15
 - People will pay disproportionately more for insurance that is contingently certain than for insurance that is probabilistic

Implications of “the Certainty Effect”

- What will be valued disproportionately is the complete elimination of risks, e.g. that the other party will not comply
- Military strategists will put greater value on holding a strategic asset, e.g. the Golan Heights, which provides contingently certain benefit in the event of war, even though the retention of the asset increases the likelihood of war and giving it up would probabilistically reduce that likelihood

Loss/Risk Aversion

- The reluctance to accept even-chance gambles unless the payoffs are very favourable, because the disadvantages/risks of any alternative to the status quo are weighted more heavily than its advantages
- There is therefore a strong bias in favour of the status quo
- Differences between disadvantages/risks will have greater weight than corresponding differences between advantages

Implications of “Loss Aversion”

- Fewer trades are made than is normally predicted (applicable to goods held for *use*, not for those held as means of exchange)
- Concession aversion – one values one's concessions more highly than equivalent gains
 - The most effective concessions you can make are those that reduce or eliminate your opponent's losses, risks or costs; least effective add gains where there are already gains

Two aspects of negotiating situations

- "Distributive" – zero sum
- "Integrative" – non-zero sum
- Both aspects are almost always present

Each suggests a different strategy:

- Competitive (bargaining)
or
- Collaborative (problem solving)

Barrier #1: Assumption of a “fixed pie”

Principle:

- Ask questions and share information to reveal the hidden potential for mutual gains

Barrier #2: The Negotiator's Dilemma

- Sharing information is necessary to find hidden solutions, but it renders you vulnerable to exploitation; so a reluctance to share information and trust is reasonable
- **Principles:**
 - Share information incrementally, based on continued reciprocation
 - Address contentious behaviour by raising process issues and posing choices:
 - "What are we trying to do here – take every advantage over each other that we can?"
 - "What kind of process will allow us to find creative solutions?"
 - "What kind of relationship do we want?"

Barrier #3: Taking and debating position

Positions ...

- are inflexible and ignore trade-off possibilities
- tend to focus on preconceived means rather than ends
- tend to lead to stalemates and then to either sub-optimal compromises or conflict escalation

Principles:

- Talk about interests and concerns that underlie positions
- Break the problem down – fractionating
- Generate and record options without critiquing them – brainstorming
- Evaluate the options
- Create a comprehensive solution either by solving each problem in turn or by "packaging" trades

“Firm flexibility”

"Firm" about your interests and needs, "flexible" about the means of achieving them

Optimal results are achieved by figuring out how to get your interests and concerns met in the least costly ways for the other side, and vice versa

Respond to unappealing positions by linking that issue to other issues: "**yes if ...**" rather than "no"

Demonstrate "firm flexibility" by stating your willingness to address other's interests and to change your proposals if ways to bridge your respective interests can be found

Sources of Power

Power to influence:

- Skill and knowledge
- Good relationship
- Elegant solution
- Legitimacy

Strategic Power:

- Strength of your BATNA (Best Alternative to a Negotiated Agreement)
- Your ability to weaken other's BATNA

Laying a Foundation for Effective Negotiation

Providing a Supportive Context

- Presence of higher authority from all sides to kick the process off
- Convening by credible, prestigious, disinterested individuals
- Relationship building – social activity, joint negotiation training

Establishing Common Ground

- Articulate possibilities arising from working collaboratively
 - Vision, goals, opportunities, obvious synergies
 - Recognizing the possibility that unseen solutions may exist
 - Ability to face common enemies
- Facing consequences of not working collaboratively
- Shared principles or values
- Acknowledgment of obstacles to working collaboratively
- Previous difficulties, history of mistrust, sensitivity of information

Achieving Small Wins

- Logistics and ground rules

Exploring Issues/Identifying Interests

Nature of interests: substantive and personal/relational

Tools:

- Ask questions
 - to probe for underlying interests, feelings, concerns
 - to check others' reactions
 - to insure that you or others have been understood
- Listen carefully and paraphrase ("So your concern is that ...")
- Make a comprehensive list – the attributes of a good outcome, from all parties' perspectives
- Redefine interests – so they can be stated as ends rather than means
- Do joint fact-finding – identify assumptions and opinions, and agree on how to get beyond them

Inventing Options

Brainstorming – free-wheeling generation of ideas

Question assumptions – to see if constraints can be relaxed ("What if ...?") and to engender new thinking ("So you believe that ...?")

Suspend judgment – be open to new possibilities

Fractionate – break issues down into smaller pieces

Seek principles/objective criteria to resolve issues fairly

Ascertain priorities – revisit the list of interests and probe to determine how tradeoffs could be made

Avoid selecting from the options prematurely

Slides: Content of slides: derived from
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Thank you for your attention

