

Beyond Winning:
Negotiating to Create Value in Deals and Disputes.

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Preface and Introduction

problem solving approach to negotiation
legal system alters feasible outcomes

construct fair and durable commitments

opportunity costs
context of the negotiation: deal v. dispute

distributive issues = zero sum game
create value = not a zero sum game

Tensions inherent in all negotiations

creating value v. distributing value

empathy v. assertiveness

principals v. agents

Deals and disputes are negotiated in the shadow of the law.
lawyers have special opportunities to create value
misused, lawyers are wasteful and costly

SYSTEMS OF RELATIONSHIPS

client A to client B
client A to lawyer A
lawyer A to lawyer B
client B to lawyer B

any relationship can be a barrier or a bridge
information exchange
filtering
value creation requires accurate and nuanced info

fair and durable commitments
are more likely if
define and allocate **risks**
understand underlying **interests**
rather than mere positions
understand and address **legal opportunities** and risks
identify and accommodate **decision points**
design efficient **processes**
manage **expectations**

preparation for negotiation always is inadequate

expect ethical dilemmas

Part I: The Dynamics of Negotiation

tensions are inherent
can not eliminate, can only manage

distributive gain v. joint gains (create value)
asymmetric information fuels this tension
trust

empathize v. assert
an experiential tension
both, not either/or

principal v. agent
incentives and monitoring

Chapter 1: The Tension between Creating and Distribution Value

negotiation's central activity

search for

value creating trades (*not distribution*)

search in

divergent interests, resources, and capabilities

BATNA = **B**est **A**lternative **T**o a **N**egotiated **A**greement
voluntary

Sources of Value

differences between the parties

non-competitive similarities

economies of scale and scope

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Sources of Value: Differences between the Parties

resources

relative valuation

forecasts (belief and likelihood)

risk preferences

averse v. neutral v. taker

risk shifting towards efficient carrier

time preferences

event v. payment

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Non-Competitive Similarities

avoids zero sum game

shared objectives

Economies of Scale

production v. consumption

MES = **M**inimum **E**fficient **S**ize

absolute v. relative

Economies of Scope

joint v. concurrent = shared

network effects

positive *and* negative

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The search for value creation opportunities necessarily creates the **potential for exploitation** via asymmetric information.

Value distribution must occur.

Unpack the distributive issues.

Move away from positions and toward interests.

Alternatives

range of feasible options *without* agreement

BATNA

Reservation Value

minimum value *prior to* resort to BATNA

ZOPA = **Z**one **O**f **P**ossible **A**greement

Aspiration Value = high (reasonable?) estimate

Asymmetric information

material

would change the conclusion

see slides on Contracts

latent

a reasonable inspection will not discover

Strategic Opportunism

concealed: reservation value and BATNA

independent generation and confirmation of info

ZOPA v. range of BATNA to aspiration value

sculpting perceptions

Hard Bargaining Tactics

1. Extreme claims followed by small, slow concessions.
2. Commitment tactics.
3. Take-it-or-leave-it offers.
4. Inviting unreciprocated offers.
5. Flinch.
6. Personal insults and feather ruffling.
7. Bluffing, puffing, and lying.
8. Threats and warnings.
9. Belittling the other party's alternatives.
10. Good cop, bad cop.

Functional if [a] in a single transaction and/or [b] opponent is an aggressive negotiator.

Disastrous in sequential transactions with a reasonable negotiator.

Aggressive bargaining and information asymmetry increase the benefits from reducing transaction costs and dampening strategic opportunism.

Lemons = latent defects and adverse selection, but feedback loop to reputation

Moral hazard= after shifting the risk, the non-riskbearer may profit from induced losses due to lack of detection or consequence

Focus on value creation while minimizing exploitation risks.

Always prepare for a negotiation.
All preparations always are inadequate and misdirected.
Increase your preparation.
Evaluate, post-negotiation, your preparation.

Identify positions, issues, and **interests**.
both yours and theirs
Contemplate **value creation** opportunities
Know your **BATNA** and translate into a **reservation value**
if possible, increase your BATNA
Estimate their BATNA, reservation value, & aspiration
Estimate the **ZOPA**
Establish an ambitious, but good faith, **aspiration**
Know yourself, know your assumptions, AND verify.

Negotiator Styles
hard / aggressive / positional
v.
soft / reasonable / principled

Negotiation building blocks
good faith
reciprocity
brainstorming
without evaluation or commitment
side payments
dynamic, not static

Only a zero sum transaction is solely distributive.

Chapter 2: The Tension between Empathy and Assertiveness

empathy = understanding the other person and demonstrating that understanding
nonjudgmental not = agreement

assertiveness = express and advocate your own interests
not belligerent

emotionally charged
often grounded on assumptions (erroneous?)
shades the substance of the transaction

Negotiation focused on problem solving with **both empathy and assertiveness** is:
win - win if both sides do it
win for the one that does it
reduces transaction costs and strategic opportunism

If increase **perspective-taking abilities and behaviors,**
then increase
anticipation of strategic problems
correction of misperceptions
earning of trust
inspiration of openness

Assertiveness is beneficial in a zero sum transaction.

Unproductive Tendencies: suboptimal lack of nimbleness

Competitor (high assertion)
advantage with distribution

Accommodator (high empathy)
focused on sustaining a relationship
but, imbalanced and prone to exploitation

Avoider (low assertion and low empathy)
conflict unproductive, wait for it to go away

competitor - competitor
strategic dance to stalemate
competitor - avoider
annoyance and alienation
competitor - accommodator
unceasing exploitation

accommodator - accommodator
overlook value creation in rush to agreement
accommodator - avoider
both end up avoiding

avoider - avoider
neither aware of the other
page 55, Figure 3, nimble upper right corner

PREPARE
to minimize your (plural) most likely errors
to maximize your (plural) outcome

INTROSPECTION
know thyself

CURIOSITY
know thy opponent
verify assumptions
ask
demonstrate understanding
paraphrasing

SHARE
process for perspective-taking behaviors
key points in a story framed without blame

At the Table
reciprocal processes
empathy loop
inquire > respond > demonstrate > test > inquire
do not agree if you disagree
unambiguous understanding
unambiguous lack of agreement
transition from empathy to assertion
verify understandings
assert your story
verify they *heard* what you said
and that you said what they heard
dynamic process
focused on fair and durable commitments

Chapter 3: The Tension between Principals and Agents

an agent acts instead of and on behalf of the principal

an agent brings the principal advantages in

knowledge
resources
skills
strategic

advantages

absolute v. relative
competitive v. comparative
outweighed by agency costs?

Agency Costs

agent's interest will not necessarily align with the principal's

PREFERENCES

reputation as a repeat player

INCENTIVES

"success" reach with different outcomes

INFORMATION

availability
kinds
discovery

Management Mechanisms

none are cost free
none eliminate the tension
exploitation can cut both ways

Incentive Contracts

align definitions of "success"
competition with asymmetric information

Monitoring Systems

observe v. distinguish
creates another set of incentives

Bonding

reputation validated by another agent
most effective with repeat players *and* info flows
short term v. long term flexibility

Incentive Contracts

contingency fee
 champerty
 not for criminal
hourly fee
 time value of money
fixed fee
 total quality constrained
mixed fee
 off setting deficiencies?
salary
 no profit motive

Professional Norms

prior commitments with high claims

reputational aspect
 strength of peer group

express v. implied
statute v. judicial
mores v. norms
intent v. negligence

good faith

**Capturing the agency benefits
and
minimizing the agency costs.**

acknowledge "the agency problem"
do not avoid
problem is shared by the principal *and* the agent

focus on comparative advantage and strategy

scope of authority

only process? only deal? only dispute?
no single bottom line if multiple issues
dynamic during negotiation

candor between principal and agent
BATNA and reservation

principal can not distinguish and must trust agent
segments of the agreement v. the whole

your opponent also has the "agency problem"

misused, agents can destroy value
