Negotiation

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Useful links

- GAR – Global Arbitration Review

https://globalarbitrationreview.com/Magazine

Sign up for Daily email alert

https://globalarbitrationreview.com/account/register

- PON – Harvard Program on Negotiation

https://www.pon.harvard.edu/

https://www.pon.harvard.edu/free-reports/

Negotiation Journal

https://www.pon.harvard.edu/publications/

Useful convention/law, etc.

- New York convention, 1958
- UNCITRAL rules, 1976
- UNCITRAL Model Law, 1985
- ICC rules, 1998
- Indian Arbitration and Conciliation Act, 1996

International Business and Disputes

- More business --- more disputes
- More international business --- more international disputes
- Disputes are negative in connotation
- Wastage of resources – time, effort, money
- Ideal situation is to have no disputes in business
- All resources are channelised in a positive direction

Realistic Situation

- Disputes will occur
- May try to avoid them, Or
- Resolve them speedily
- How
- Legal manner or Extra-legal manner
- Dealing with only legal methods
- What is the law?
- Law --- applicable to all
- Law --- applicable to parties which agreed

International Law

- No global sovereign
- Agreement between sovereign nations
- *Pacta sund servanda* – pacts or treaties must be honoured
- No authority to impose punishment
- So, a gentleman's promise
- 'Vanishing point of jurisprudence' - Holland

Basic Concepts

Sovereign Nations

- No global sovereign

Different priorities of nations

- Political, Economic, Social, Cultural, Technology, etc.

Global and Regional

- UN, WTO; NAFTA, ASEAN, etc

Specific Businesses

- Oil, Steel, Software, Agriculture, etc

Equality

- All are equal; some are more equal than others

Players

- Sovereign nations
- Business organisations – national and international
- Global and regional organisations
- Companies
- Individuals

What is Law?

- A set of rules to be followed
- To be on the right side of law
- Instrument to bring positive change
- A potent tool to be used properly
- A weapon to be used against the competitor
- Friend Philosopher and Guide

Where to get dispute resolved?

- Forum Shopping
- Wise man
- But what is his authority?
- Court
- Which court, which country?
- Or some other means
- Wise man with authority of law

Law of Contract

- **Own sweet will - No one forces**
- **Between two or more parties**
- **Privity of contract - *jus in personam* as distinguished from *jus in rem***

Essentials of a contract

- Identity of mind - *consensus ad idem*
- Mutual communication
- Intention to create a contractual relationship

Contract

An agreement enforceable by law

Agreement

Every promise(s) forming the consideration for each other.

Consideration

- Offer
- Acceptance
- Something done in return is consideration

Contract cannot be against public policy

A contract without a consideration is void

Object or consideration is illegal if:

- it is forbidden by law
- if permitted, it would defeat the provision of any law
- it is fraudulent
- implies injury to any person or property
- it is immoral
- opposed to public policy

Contract creates liabilities

- Parties limit themselves – put themselves in a boundary
- And, they do it on their own. No one forces them.
- In case they cross the limits put on themselves
- – they should be asked to remain within limits imposed
- – or they should be penalised

Arbitration

- **Wise man's court**
- **Chosen by parties**
- **Binding on parties**
- **Lawful**
- **Recognised by sovereign nations**
- **Private Court, Private Judge**
- **As private --- all benefits of 'private' *per se*, like a private jet (but regulatory authorities)**

Negotiation: Art or Science

- Negotiation as a dialogue between two or more persons happens naturally and it is not at all a prerequisite that the parties must have gone through a course on negotiation.
- Is it possible to learn how to negotiate? If it is true, then, it must be possible to teach how to negotiate. Are there 'born negotiators' or negotiation skills can be acquired by training, observation and practise?

BATNA

- Harvard Law School’s Program on Negotiation (PON) is quite well-established to train negotiators. Roger Fisher and William Ury at PON developed BATNA in their book series on principled negotiation. BATNA means the ‘Best Alternative To a Negotiated Agreement’ and the parties going for negotiation decide about it as the best alternative if the negotiations fail.

- As the name suggests, it is the second best option for the parties which they decide on their own before going for negotiation. One can say, it is like thinking and finalising ‘plan B’, whereas the most optimistic plan they would like the other party to agree to is ‘plan A’. In negotiation, it is not always possible to get the other party to agree to what one wants, and in such a case, it is better if the parties have already made up their minds as to what is acceptable to them as the next best.

WATNA

- The opposite of BATNA is WATNA which obviously means 'Worst Alternative To a Negotiated Agreement'. The parties pre-decide consciously or sub-consciously the range within which they would like to agree in a negotiation and the two ends of that range are BATNA and WATNA

- Being sure about BATNA is necessary for both the parties to get to the negotiating table with confidence. It provides the much needed clarity of thought, which is essential for effective dialogue. Anticipating the other party's BATNA is the key to success in negotiation. When two parties A and B go for a negotiation exercise, A's BATNA and B's WATNA – and vice-versa – are closely related. The effort by both the parties is to stick to their BATNA and in no condition to agree to anything less than that, however, if both the parties have realistically anticipated the BATNA of the other party, it will never be possible. The simple reason is that when A pushes to its BATNA, B is pushed to its WATNA and B will be most reluctant to accept it. The other scenario is when B pushes the dialogue to its BATNA, A is pushed to its WATNA.

- Fisher’s and Ury’s BATNA appears to be quite close to ‘Nash Equilibrium’, a game theory concept developed by John Forbes Nash, the Nobel Laureate. Simply said, Nash Equilibrium is a situation when a player cannot benefit by changing strategy if other players continue with their strategy and don’t make any change. Thus, a person’s benefit is dependent on the actions taken by others. So, in a negotiation, if both the parties are making the best decision keeping in mind the decision made by the other party, nothing will change, and it is a situation of Nash Equilibrium. Things will change only if any of the parties budge from its position, and makes some concession – the more the concession made by one party, the better it is for the other party. Hence, it is like swinging between BATNA and WATNA of either of the parties.

- It all depends on what type of methods and techniques are used by the parties for negotiation. Sticking to one’s point and aggressively pushing it is a hard style, whereas trying to understand the position of the other party and making the effort to let the other party also gain something from the negotiation is a technique which is useful in the long run. Whatever the technique used in negotiation, one should not forget that the purpose of a negotiation is to arrive at an agreement and it is better if both the parties to a negotiation are happy with it.

- In case only one party is satisfied and the other has agreed under some compulsion, then there is a strong feeling of being wronged and somewhere deep inside the heart of the party feeling that is discontentment. This feeling results into conflict sooner or later, as the issue between the two parties was not settled once and for all in a just manner as perceived by both the parties. Conflict resolution, in such cases, is only at the surface level and for a short period of time.

Negotiating a Business Dispute

- BATNA: Best Alternative to a Negotiated Agreement
- Parties must know their Batna
- Bringing and creating options at the bargaining table
- Collaborative vs. Competitive
- How desperately you want something? What? Why?
- Mending relationships: *Wabi Sabi* and *Kintsugi*
- 6 steps: preparing; developing a strategy; getting started; building understanding; bargaining; closing
- Bargaining: for two parties (in reverse) – Bottom line, target point, top line.
- Styles: aggressive, defensive, moderate or middle path; and shades in between

- BATNA: What will the respective parties do if they don’t come to an agreement?
- Parties: Who are the real parties in the negotiation?
- Interests: What are their fundamental needs and priorities?
- Value: How can value be created and who is likely to get it?