



ADLS
WEBINAR



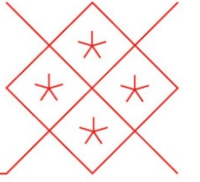
Don't Just Sit There - Negotiate

Lady Deborah Chambers QC
Mark Kelly

BANKSIDE CHAMBERS

24 FEBRUARY 2020

Being a good negotiator – a chance to reflect



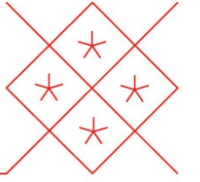
Negotiation suffuses what lawyers do:

- Vast majority of contracts, and disputes, are negotiated

We can always be better negotiators:

- A chance to reflect on how

Being a good negotiator – a chance to reflect



“Whenever I’m making a creative choice, I try to step back and remember my first shallow reaction. The day I realized it can be smart to be shallow was, for me, a deep experience.”

Donald Trump

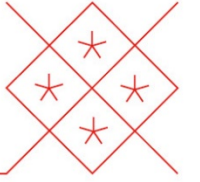
Think Like a Billionaire, 2004



RHONA WISE/GETTY IMAGES

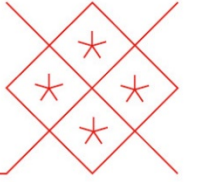
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Being a good negotiator - overview

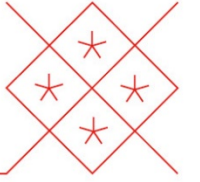


- **Preparation** – doing the mahi
 - *Be well-prepared, and make sure your client is too – facts, law, cost, risk, goals, strategy*
- **Personal factors** – understanding their effect
 - *The significance of relationship breakdown, bias, cultural issues, dealing with “difficult” people*
- **Problems** – how might they arise, and what to do
 - *Information asymmetries, deadlock*

Being a good negotiator - Preparation



Being a good negotiator - Preparation



Get a good understanding of **the facts** leading into any negotiation:

- The client's brief – dig deep
- The key correspondence/documents
- Other witnesses/relevant parties
- Expert input
- What are the “known unknowns” – Paul Wolfowitz

What is **the law**?

Being a good negotiator - Preparation

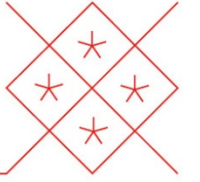
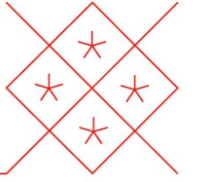


Figure out **the costs** of *not* doing a deal:

- Legal costs – actual and recoverable:
 - Lawyers often massively underestimate likely legal costs. Lawyer’s Global Litigation Top 50 survey 2013:
 - General counsel saw an average disparity between budget and final bill of +40%
 - 14% saw divergences as high as +80-100%
 - Recoverability a function of HCR, *and* ability to pay
- Business costs - management time, distraction, relationships/productivity/morale affected. Work with your client on these.
 - 2012 Victoria, Aus., survey of B2B litigation costs - 37% said the dispute had an adverse effect of the performance of their business, 40% of those said the impact was high
 - Survey of 500 US CEOs - lawsuits caused 36% of their companies to discontinue products, 15% to lay off workers and 8% to close plants

Being a good negotiator - Preparation

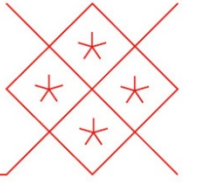


Synthesise the facts, law and costs into a **risk analysis**. Assess:

- BATNA
- WATNA
- PATNA

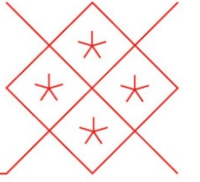
Keep an open mind, things can change. But this will give you a rational framework to work with.

Being a good negotiator - Preparation



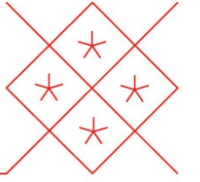
- It is sensible to set **goals** in negotiation. But:
 - They need to be realistic given **risk analysis**
 - Avoid being absolute
 - A goal range is a good idea
 - Recognise that things may come up which will necessitate a change in the goals
 - Clients will want you to validate their hopes - beware
- Then think about – what is the **strategy** for getting there:
 - When to negotiate, how to negotiate, who will do the negotiating?
 - What is the fall-back?

Being a good negotiator - Personal factors



"Don't let it throw you - It's just a negotiating tactic."

Being a good negotiator - Personal factors



The significance of relationship breakdown

Most contracts, and disputes, a function of/affected by human relationships.

When relationships break down, people can behave irrationally.

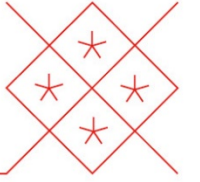
In a 2015 speech, Lord Neuberger, then President of the UKSC, cited a 2007 UK survey,

“which reported that 47% of respondents involved in commercial litigation admitted that a personal dislike of the other side had been responsible for driving them into costly and lengthy litigation”.

Check for this. If present, acknowledge, manage. Reach for objective criteria.

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Being a good negotiator - Personal factors



Bias

Hostile attribution bias – the tendency to wrongly perceive hostility as the other party's driving force

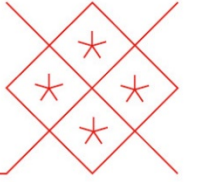
Confirmation bias - the tendency to search for, interpret, focus on and remember information in a way that confirms your preconceptions

Optimism bias - overestimating the prospect of favourable outcomes -wishful thinking

Egocentric bias in memory - recalling the past in a self-aggrandising way

Check for this. Reach for objective criteria.

Being a good negotiator - Personal factors



Cultural issues

Can be many and varied

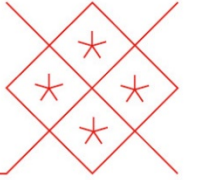
Always be open-minded, and courteous

Don't make assumptions

Don't be afraid to ask polite questions

Don't be afraid to ask for help

Being a good negotiator - Personal factors



Dealing with “difficult” people

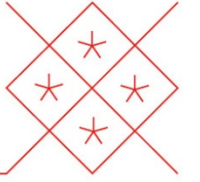
Often, when people being “difficult” (rude, shouting, personal, snide, otherwise aggressive), a sign they are not coping/stressed. Some people need to vent. Some under misapprehension being difficult will get them what they want.

Within the bounds of safety (incl. emotional):

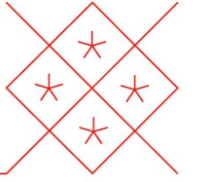
- Stay calm
- Acknowledge the pain
- Note that the aggro will not change things
- Reframe the conversation back towards the problem
- Focus on objective criteria

But you can always push PAUSE. Chances are, if invested enough to act that way, they *need* to re-engage.

Being a good negotiator - Problems



Being a good negotiator - Problems



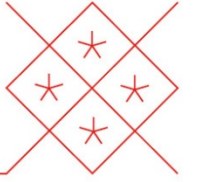
Information asymmetries

A major cause of disputes not settling, and/or people doing bad deals.

Minimise by:

- Taking additional steps to get better informed about your client's position - input from an expert, targeted discovery/interrogatories, document requests. Feed the further information into your risk assessment
- Taking steps to ensure that the other side appreciates the strengths of your client's position
- Encouraging the other side to tell you what they think is important/relevant

Being a good negotiator - Problems



Deadlock

- As Don Draper famously said in Mad Men, *“if you don’t like what’s being said, change the conversation”*
- Look at other settlement options – “growing the pie”. Is there something else that can go into the mix, or another way of settling?
- Change who is talking. Get the lawyers, or the parties, together separately
- “Call a friend”
- Change the format – mediate/JSC/a determinative process/combinations
- Blind bidding/chance options/split the difference

Questions and Answers



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