

Interest Based Bargaining

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Introduction

People interact everyday in ways which can be seen as bargaining. Where are we going for lunch, what movie are we going to see, what car will we buy? These and many other similar issues are discussed between and among friends and family members, but they would probably not realize that they are in essence 'bargaining'. In coming to a mutual decision about what actions to take in any given circumstance, the individual interests of each participant plays a part in the discussion, and ideally, the final 'decision' is the one that meets, to the greatest extent possible, the individual interests of each of the participants. Normally in these 'friendly' interchanges, the interests of each of the participants is openly expressed and the final decision hopefully takes those interests into account. Many people would not identify these discussions as 'negotiations', but that is in essence, what they are.

On the other hand, the term 'negotiation' is more commonly associated with the purchase of a major asset such as a house or car. In these circumstances, the seller wants to achieve as much as possible, and the buyer wants to pay as little as possible, and the 'bargaining' is an attempt to see if the seller will accept what the buyer is prepared to pay. The buyer of course will attempt to 'keep secret' from the seller what he is ultimately prepared to pay. But even in these circumstances, sometimes other 'interests' can become involved. For example, the buyer might be prepared to close early to assist the seller, who has already purchased another home, thus eliminating the need for bridge financing, and therefore making a lower selling price acceptable to the seller. So even in a situation where the interests seem to be diametrically opposed, identifying an 'interest' can lead to a better deal for both parties.

The principles of interest based bargaining have been discussed for many years. Several books have been written outlining this approach. Notwithstanding the general availability of these texts and courses, relatively few practitioners involved in traditional 'bargaining', such as human resource professionals, union negotiators, or merger and acquisition professionals are fully aware of or use this approach in bargaining what are seen as traditionally 'adversarial' bargaining. By adversarial bargaining, I mean bargaining where one side sees their interests as fundamentally opposed to the other party(ies) with whom they are bargaining.

There is a great deal of misunderstanding and misinformation concerning interest based bargaining, perhaps in part because it has also been characterized as 'mutual gains bargaining'. In the traditionally adversarial union-management bargaining arena, it is often considered be a "leftist" or union-friendly approach to bargaining, not to be utilized in the tough negotiations that in many ways have characterized the last decade of union/management relations. Terms such as "single team bargaining" have been used to describe the process. Often these terms have given practitioners the impression that adopting this approach to bargaining puts the employer at a disadvantage, especially in tough times. This misconception of the principles underlying interest based bargaining has led many practitioners to avoid learning about it and using it. In my view, this result is unfortunate.

Interest based, or mutual gains bargaining at its foundation is based on the principle that a negotiated settlement of any issue is usually superior to other alternatives available. In fact, in order to determine whether or this approach to 'bargaining' can be of any advantage to you, you first must discover whether or not other alternatives will give you a better solution. If they will, the principles of interest based bargaining are probably inapplicable to your situation.

The Basic Premise

Mutual gains bargaining is based on the premise that both sides in a negotiation have *something to gain* from the negotiation. A settlement will be better than either party's best alternative. In collective bargaining, it is a very rare case indeed where no agreement is superior to a negotiated settlement. If both sides approach the bargaining table with the understanding that it is in their mutual interest to solve their disputes and to reach a negotiated settlement, the fundamental requirements for mutual gains bargaining to succeed are met. It only remains with the parties to decide whether or not this approach to bargaining will be more effective than the traditional, positional approach.

Types of Bargaining

Those of us who spend a great deal of our time bargaining collective agreements, or other traditionally adversarial negotiations are familiar with the usual drill. One side prepares a series of demands or 'proposals'. They prepare that series of demands by discussion with their constituents and after a period of internal machination, a "proposal" is prepared. In a unionized context, that proposal usually contains a number of actual contractual language proposals or changes that are put forward by the union, together with changes in wages and benefits. It is most common for unions to hold back on the "monetary" portion of a proposal until all or most of the "non-monetary" demands have been resolved. Often these 'proposals' are the result of sometimes vigorous debate amongst the various constituents of one side - in this case the union and its various members - often containing internal compromises made before the proposals are finalized.

Once the proposals have been formulated, a meeting is set up between the union and management at which time the proposals are formally made. Sometimes counter-proposals by the company are made at the same meeting. More often, the company listens to the proposals

from the union, asks some questions and then retires to consider their response. The company then responds to those proposals and perhaps makes several proposals of its own. The practice of companies making proposals for changes in language of the collective agreement has only come to common usage in the last decade or two. Prior to that it was "union asks, company responds".

1. Positional Bargaining

Positional bargaining is based on the premise that there is a given pie to divide. A win for one side means a loss for the other. Human Resources people often say that the best collective agreement you will ever have is the first collective agreement you have. Changes to that collective agreement usually mean a diminution in the flexibility and/or authority of management. Thus, union demands equal company losses.

A great deal of time in positional bargaining is spent determining what the other side "really wants". In a union situation, management knows that the union does not expect to be successful on all of its demands. The union keeps secret those demands which it *really* wants as opposed to those which it has only put forward as bargaining chips in order to increase the "bargaining power" of any particular demand which later on in the process they agree to relinquish. By artificially increasing the perceived value of a particular demand, the thinking goes, the union can extract a bigger price when they withdraw that demand. In the new era of 'company demands' there is a tendency on management to adopt exactly the same technique.

In very large measure, the parties in positional bargaining enact a ritual set piece until they get to the stage where 'real' bargaining occurs. Too often, this happens in extended overnight sessions where the parties get down to "real bargaining". Only at this stage do people start to discuss in any meaningful way their actual interests. Often, at this stage, there are sidebar discussions between one side and the other where there is greater disclosure as to the bottom line and the real interests which need to be accommodated. Too often, too little time is spent by tired individuals whose flexibility has been greatly diminished and who are expected to come to a solution pending some threatened deadline established by one side or the other, or, in the case of labor disputes, by legislation. Not surprisingly, solutions devised in these circumstances are often less than satisfactory to either side. But more importantly, often the very process by which the final result has been achieved has negated any chance of a solution which would have much more effectively satisfied all parties.

2. Interest Based Bargaining

Interest based bargaining is premised on the understanding that all sides to the bargaining process (there are often more than two sides in multi-party discussions or disputes) have legitimate interests to be protected and advanced. Often the interests are not the same. Sometimes they are directly opposing. But it is usually in the interest of both sides that to the maximum extent possible, the interest of both sides be maximized in the final solution. The

more complex the problem, the more parties involved, the more difficult it is to 'solve' with positional bargaining.

In my view, good labour negotiators have always used the principles of mutual gains bargaining, but often they have done so unwittingly. The final negotiations which take place just before the settlement of a new collective agreement strike, or lock-out, almost always involve recognition on both sides that the other side has interests which must be taken into account. Too often this realization is only made when positions have hardened to the point where alternative and perhaps superior solutions are no longer on the table and where the politics simply do not allow for their examination. Traditional, positional bargaining can be inefficient. It produces agreements which are not as good as they could have been had the parties approached the problems in a different way.

The Role of Power

In most negotiations, one side or the other has greater negotiating power. In union/management relationships, management is usually perceived as having greater power, but in some cases, this perception is false. The party with the greater negotiating power can change from one set of negotiations to another. Thus, positional bargaining based on bargaining power often results in alternating bargaining situations. In one set, the company has the advantage. In the following set, the union has the advantage. If the goal in bargaining is to always get as much as possible, this shift in power balance can result in extremely adversarial, counter-productive labour relations. But the same problem can arise in other negotiations. Public pressure, legal impediments, logistics or other factors can shift 'power' from one party to another in any negotiation - sometimes in ways that are difficult to predict at the front end. Parties who 'depend' on their superior bargaining power at the front end of a discussion can find the tables turned on them by unforeseen events, and if they have been demonstrably exercising their superior 'bargaining power', can find an 'opponent' intent on exacting revenge. Interest based bargaining, because it starts from a different premise, does not create the adversarial atmosphere so often the main ingredient in positional bargaining.

If the parties approach the issues as problems requiring resolution, and instead of seeking a win on their side, seek the best solution for all parties concerned, this destructive cycle can be avoided.

Positional Bargaining: The Usual Approach

- Each side starts the process by putting forth the "solution".
- Each side is left to guess which problem the solution from the other side is intended to solve.
- Each side becomes wedded to the solution they have suggested before there is any discussion about what, if anything, needs fixing.
- "Positions" are traded and packaged.
- Occasionally, alternative positions are suggested.
- A great deal of time is spent discovering what is really important to the other side.
- Each party plays its cards close to the vest.
- Each party tries to maximize its "bargaining power".

When is Positional Bargaining Appropriate?

One could argue that positional bargaining is never appropriate. However, in the real world, positional bargaining will continue to be used.

This positional bargaining is based on certain premises. Some of these are as follows:

- Limited Resources
- Each party strives to maximize its share of a fixed pie.
- The interests of the parties are not interdependent.
- The future relationship between the parties has low priority to them.
- A win for one side equals a loss for the other.
- Each party sees the other side as an opponent.
- The ultimate goal is to win as much as you can, recognizing that your win is the other side's loss.

Interest Based Bargaining: The Fundamental Principle

Mutual gains bargaining in contrast is based on the premise that each side has interests. Each side examines its own interests and also becomes educated as to the legitimate interests of the other parties. Together the issues are addressed, having in mind the interests of all of the parties and how they can be best accommodated.

Interest based bargaining often takes longer. Because it requires open discussion about real issues, more time is needed for each of the bargaining teams to achieve a level of mutual trust - a crucial element to the process. Only in an atmosphere of mutual trust can the parties honestly discuss their own interests. Neither side can view the process as merely a bargaining technique. If either side attempts to do so, the other side will sooner or later recognize that fact and the mutual trust essential for the process will be destroyed. Although the process is in some ways more time consuming, and in many ways more difficult, the results that can be achieved make the effort worth it, especially if the problems are complex.

An Example in Action

I acted for the Ontario Medical Association in its relationships with the Government of Ontario for many years. Anyone who has followed that relationship over the last twenty five years will recognize that for many of those years it was extremely fractious. The problems which both the Government and the OMA are forced to deal with are complex and involve large sums of money, a large measure of public interest, and a very large number of interested parties.

When the Harris Government was elected, it immediately made significant changes to the relationship between the doctors and the Government. The previous NDP regime had negotiated Framework Agreements with the Ontario Medical Association, governing the 20,000 doctors practicing in the Province of Ontario. Virtually all of their income is derived from insured medical services, which, because of the **Canada Health Act**, cannot be provided by doctors to patients except through a provincial medical scheme. For many years, both here and in other jurisdictions, the utilization of medical services by patients had been increasing at double digit rates. The then new Harris Government was convinced that this increased utilization was at

significantly driven by the doctor's themselves. Accordingly, early in their mandate the Government passed Bill 26, an omnibus piece of legislation which, among other things, nullified the agreements which had been reached with the OMA and the Government of Ontario. In addition, several arbitration decisions which had been rendered under that agreement, that had been 'won' by the OMA were also nullified.

The Government indicated to the OMA that it no longer wished to discuss these matters with them, but would be content to deal directly with various interested groups. The effect of this decision, perhaps surprisingly for the Government, was to intensify the animosity between doctors and the Government. The OMA had represented all of the doctors in Ontario. Now groups of doctors either on a specialty specific basis, or on an interest basis sought the right to negotiate directly with the Ministry. When the Ministry did not respond effectively or quickly enough, various of the newly established groups threatened to withdraw or reduce services being provided in order to force the Government to negotiate with them.

It was against this back-drop of suspicion, distrust, ripped up agreements and claw backs that the OMA and the Government sat down to attempt to negotiate a new agreement. Both sides recognized that it was in their individual interest to come to a mutually negotiated settlement. The situation was chaotic and rapidly deteriorating. The public was concerned about lack of medical services. The doctors were concerned that the Government had nullified previous obligations to them and was refusing to negotiate in any meaningful way with them. Doctors both individually and collectively were angry and distrustful. The Ministry officials had come to accept that physicians were driving utilization by a serious of what later proved to be somewhat erroneous and inadequate statistical analysis. What followed was a lengthy negotiation which lasted more than eight months. During that negotiation, the Government and the OMA consciously chose representatives who would be prepared to discuss issues on a rationale basis. After a series of meetings where positional bargaining took place, the parties quickly realized that the issues involved were far too complex to be amenable to positional approaches. Over a period of months of extensive discussions, the parties started to discuss the underlying issues which each of them had on a myriad of fronts.

Out of this discussion grew an Agreement which was far more about process than about specific contractual obligations. The parties set in place a committee, known as the Physician Services Committee. That committee had, equal representation from both the Government on the one hand and from the OMA on the other. The committee was originally chaired by the Honourable George Adams who acted as the initial neutral facilitator. Those of you who know something about alternative dispute resolution will recognize this name. This approach prevents either side from high-jacking the agenda of the meeting.

The Physicians Services Committee has a number of sub-committees that report to it. These sub-committees are divided on particular issues which are complex or which require significant technical knowledge.

The agreement which established the PSC and its sub-committees also created an obligation for all of the members from both the Government and the OMA to be given a course on conflict resolution. That course was given with all members from both sides attending together. The intention was to attempt to establish a format and atmosphere in which issues could be discussed openly and honestly and where alternative solutions could be proposed by anyone without attribution. Further it was understood that agreement on everything would be unlikely. That doesn't mean that the relationship necessarily needs to end or that there necessarily needed to be sanctions of any sort.

This Committee has now been meeting for more than fifteen years. A number of very creative and unique approaches to the problems of our health care system have been developed by the PSC or its sub-committees and recommended to both the OMA and the Government of Ontario. The situation is far from perfect, and there have been some remarkable successes - and some failures, but I maintain this approach produced agreements and solutions to problems which would have been impossible using traditional positional bargaining. As in any situation, maintaining a viable dispute resolution process which is acceptable to the parties and their principles over a long period of time is extremely difficult. Often groups within one side or another will come to view their representatives as 'being in bed with' the other side(s). To be successful, each side must continuously work hard to insure those they represent understand how the process works and why it is in their interest to continue to use it.

Interest Based Bargaining: The Process

The BATNA Concept

In order to properly commence a process of interest bargaining, it is necessary for both sides to carefully examine the interests they need to protect. They also have to speculate about the interest which the other side needs to protect.

Each side then needs to inquire as to whether negotiations are necessary at all. This requires an examination of what is commonly referred to as the Best Alternative to a Negotiated Agreement (or BATNA). The BATNA is a solution to the issues which confront your side which can be solved without agreement of the other side or sides. If your BATNA is better than a negotiated settlement, you have no need to negotiate at all. On the other hand, if your BATNA is not as good as a possible solution achieved through negotiation, then there is a reason for you to negotiate.

The other sides go through essentially the same exercise. If both or all sides come to the conclusion that their BATNA is not as good as a possible negotiated solution, then the fundamentals exist for interest based or mutual gains bargaining.

Sometimes it will not be clear at the onset whether or not the BATNA is inferior to a negotiated solution. In such case, either side can enter discussions, always keeping in mind its BATNA. When it becomes clear that the BATNA is superior to any negotiated solution, that side has the option to implement their BATNA. Identifying your BATNA not only provides you with an

alternative to negotiation, it also provides you with a touch stone to which you can refer during the negotiating process.

It is important that you not only identify your own BATNA, but that you also learn as much as you can about the other sides' BATNA.

When both sides recognize that their BATNA, as well as the BATNA of the opposite number is not as good as a negotiated settlement, the opportunity exists for both sides to build on this recognition.

How To Build the Process

In positional bargaining, each side attacks the other's proposal and attempts to convince them that their proposal is the right one. In interest based bargaining, both (or all) sides attack the problem and attempt to discover the solution which best deals with the interests of both (or all) sides. The challenge for bargainers is to assist not only your own side but also the other side to approach the problem in this manner.

In this paper, I have broken down the process into a number of stages.

Step One: Identifying the Interests

The first thing you need to do before getting started with negotiations is to identify those interests which both you and the other side have in the process. This is true whatever approach to bargaining you intend to take.

There are three types of interests that both sides need to consider:

1. Substantive Issues

Substantive issues are those issues which are usually put on the table in positional bargaining as "positions". They deal with money, resources, benefits, or other actual issues that need to be solved during the negotiating process. Often some of these issues will involve fixed resources. Fixed resources issues can easily degenerate into win/lose situations and that realization needs to be foremost in the minds of the negotiators on both sides if the process is to be successful.

2. Procedural Interests

These are interests with respect to how the process is to be carried out and how disputes will be resolved. In addition, parties need to deal with how the process of negotiations will be communicated to the principals and how the settlement will be implemented. Very often, procedural interests are not properly considered and as a result, the process breaks down. It is usually appropriate for these issues to be discussed at the front end of the negotiating process. Issues such as communication with principals, communications with the press, and statements as to the issues being dealt with are important because miscommunication on these issues can destroy trust and break down the bargaining. In complex negotiations, a negotiation protocol is

often the first thing discussed. It certainly needs to be raised early in the process, especially if the issues are of interest to the press or the public.

3. Psychological Interests

Negotiations are conducted by individuals, often with their own peculiarities, strengths and weaknesses. In the negotiating process, 'psychological' interests can often be the most important. They involve how the opposite side is treated, the respect that is given to their positions and the way in which you respond to the proposals put forward by them. It is crucial to the process that you attack the problem, not the people. Negotiators often confuse positions with the people advocating them. This is true both for the advocator and for the person to whom they are advocating. Although people are not always constructive in their approach to a problem, they almost always expect the response to be. Throughout the process work hard to treat the individuals on all sides with respect.

Choosing The Team

It is important that you chose people on the team who actually have the ability to make decisions, or to make effective recommendations. It is also important that you choose individuals who have credibility with people on the other side. They need to have the right mental approach to the problem. They need to realize that the endeavour in which they are engaged is not a power struggle, but is instead an attempt to reach mutually acceptable solutions, keeping in mind the interests of both sides to the bargaining table.

The Use of Third Parties and Objective Criteria

Much of the literature discussing mutual gains bargaining describes the importance of using third parties or objective criteria as a methodology to evaluate options that are created during the negotiating process. Although it is sometimes very difficult to do so, parties should agree upon objective principles with which they will evaluate the proposed solutions to any problem put forward by either side. The concept that both sides need to adopt at some stage in the negotiating process is that they are jointly seeking the right solution as opposed to the solution proposed by either side. The use of third party criteria, ie. standards elsewhere in the community, public opinion, the advice of third party mediators, or other similar inputs can be extremely useful in assisting the parties to view problems in this light. Mediators can be expensive. Therefore in many cases agreed upon 'goals' that would be necessary for a 'good settlement' - such as mutual acceptability, and perhaps, in appropriate cases, acceptability of third party participants or users may be a useful place to start. In the OMA - MOHLTC case for example, part of the reduction in utilization was achieved by delisting certain procedures seen as medically unnecessary. A panel of experts was created to review the mutual recommendations and only after they agreed that the procedures were medically unnecessary, were recommendations forwarded to the Government and the OMA.

Step 1A: Changing The Game

It may be that one side of the bargaining table has decided to attempt to use an interest based bargaining approach to the set of bargaining in which they are about to become engaged. What

steps can this side of the bargaining table take to move the bargaining in that direction, when the other side of the table has no experience with mutual gains bargaining and is using positional tactics? This is a difficult problem and one that requires patience and a real understanding of where you and your team want to go.

Firstly, it is crucial to defuse the initial antagonism and anger which often accompany positional bargaining, especially in tough times. The key to defusing this anger is listening.

1. The Art of Active Listening

- i. "Active Listening" is one of the most important arrows in any negotiator's quiver. Contrary to popular opinion, an negotiator who can listen well is more important than one who can speak well. By listening to the other side, and by actually hearing what they say, it is possible to gain credibility. You need to demonstrate, not only that they have been given an opportunity to express their position, but that you have actually heard what they said.

One of the most important skills that you can learn in this regard, is to "replay the tape". Having given them an opportunity to give their position, you then in your own words, and without the hyperbole, tell them what you have just heard. It is not necessary for you to agree with what they have said, it is only necessary that you establish that you have heard what they said.

- ii. When they put forward a position, it is important that you do not respond with a counter position. Instead, attempt to understand what the position is and more importantly the interests behind the position. Ask questions to elucidate information about their position and more particularly, the reasons for that position. Where it is possible for you to agree with any of the statements they have made, you should agree. In some cases, it may be advisable for you to say something like this.

"I understand that you feel the following . . . If I was in your position, I would probably feel the same way."

You will note from the above statement that you have not said you agree with them, but you have said that their position has some validity. By saying to them that "If I were in your position" you are making it clear that you are not in their position. This opens the door for them to ask you further information concerning your position. This ability to open the door to rational discussion is a crucial skill for any negotiator, especially one who is interested in using the interest based

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