

SOFTWARE LICENSE CONTRACT NEGOTIATION THEORIES

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I. INTRODUCTION

Tackling a software contract, be it software as a service or traditional license, involves recourse to negotiation theory to examine how to approach achieving a workable result for the purchaser and contractor. Review of various negotiation theories may better prepare you to tackle the contract, secure appropriate terms, and expend satisfactory company resources. Deciding on an applicable theory requires comparison between some of the dominant modalities explaining negotiation in general. Hence, the goal of this short article is to present theoretical paradigms to assess which overarching approach to utilize in your particular software negotiations. This short article endeavors to discuss various negotiation theories, so you may evaluate their utility in software contract transactions. The method of approach and impact to a particular specific software contract and its distinct provisions are left to further discussion for another short article. Application of the methods discussed below to your software contract dialogues hope to produce negotiated agreement.

II. PRELIMINARY CONSIDERATIONS: SELECTING A NEGOTIATION THEORY

Tackling software contract negotiations involves recourse to negotiation theory to examine how best to bring debate to final agreement. In this way, application of theory may better prepare negotiators to tackle the circumstances. Deciding on an applicable theory requires comparison between some of the dominant modalities explaining negotiation in general. Hence, the goal of this article is to illustrate theoretical paradigms implemented to create awareness of these approaches utilized.

A. EFFECTIVE NEGOTIATION

Negotiation is the process and control of procedural elements. In essence, negotiation is “the process of orchestrating the exploitation and manipulation of situational opportunities with persuasiveness of presentation skills and personal characteristics to attain desired objectives in a dialogue.”¹ This is “think-negotiation” or the application of strategic considerations with a view to

¹ Bernard A. Ramundo, *Effective Negotiation A Dialogue Management and Control* 11 (1992).

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achieving one's desired goals, while comprehending the interests of all participants.² The process leads inevitably to the objective desired by the negotiator, not as a result of chance, but because of the implementation of negotiation tactics that lead the other participants to the negotiator's preconceived goal. Essential to think negotiation is the "careful analysis, preparation, and planning related to interest identification and pursuit."³ The think negotiator at the beginning of negotiation appears amenable to a mutually satisfactory resolution of the dispute. In reality, the think negotiator puts forth this mirage in order to change other disputants' own perception of the dispute.⁴ By changing the other disputants' perspective, the think negotiator achieves his desired result, while the disputants' leave the table with a sense that they too benefited from the consensus reached.

Think negotiation is four phased, requiring a negotiator to prepare, present, reach an agreement, and implement the agreement.⁵ Each phase carries equal weight and involves implementation of manipulation, orchestration, and exploitation.⁶ Through these tools the think negotiator maneuvers his way to his desired objective of consensus on his goal or resolution of the dispute.

Another author echoes the paradigm of the think negotiator by describing the negotiator's role in creation of doubts or uncertainties in disputants' espoused positions in order to change their negotiation positions.⁷ Negotiation is defined as a decision-making process that provides opportunities for participants to exchange commitments without procedural rules, other than those imposed by the parties upon themselves, to reach settlement.⁸

B. PRINCIPLED NEGOTIATION

This negotiation theory results in a mutually agreed result arrived at through reasoned open analysis identifying options for mutual gain.⁹ Principled negotiation begins with discarding the positions of the parties' and focuses on their interests and objectives.¹⁰ Positions may be defined loosely as "a negotiator's stated demands," whereas interests are a "person's underlying goals."¹¹ By discarding positions, which are likely in complete conflict between the parties, parties reach their

² Id.

³ Id. at 16.

⁴ Id.

⁵ Id. at 74-116.

⁶ Id. at 16.

⁷ Thomas R. Colosi, *On and Off The Record: Colosi On Negotiation* 2-5 (2ed 2001).

⁸ Id.

⁹ Roger Fisher and William Ury, ed. Bruce Patton, *Getting to Yes* 62-87 (1981).

¹⁰ Id. at 56-57.

¹¹ Leigh Thompson, *The Mind and Heart of the Negotiator* 55 (1998).

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interests that may be compatible.¹² Therefore, parties brainstorm collectively to achieve resolution of a dispute in which both sides benefit.¹³ Application of objective criteria permits candid discussion of parties' interests and leads to a conversation of principles affecting each party's interests.¹⁴ Negotiation is entered into to achieve a better result than a disputant may receive without negotiation.¹⁵

The authors of principled negotiation advocate development of a best alternative to a negotiated settlement (BATNA) to prepare a party to realize the importance of effective negotiation and provide a backdrop to propose and assess options while in the negotiation.¹⁶ Additionally, the BATNA provides power to the negotiator dependent on the estimated value of not reaching an agreement.¹⁷ Further, consideration of the other side's BATNA provides a negotiator a realistic assessment of the expected effectiveness of negotiation, while also providing an opportunity to identify mutually beneficial options not thought of by the other parties.¹⁸

C. PROBLEM-SOLVING NEGOTIATION CREATING VALUE

Other authors perceive negotiation as a process for creating value. When compared to other negotiated outcomes, a negotiation creating value arises when the value added outcome either benefits each party or "makes one party better off without making the other party worse off."¹⁹ Creation of value occurs through difference between parties, noncompetitive similarities, and economies of scale and scope.²⁰ Of these value creating occurrences, differences between the parties yield five sources of value described as dissimilarity in resources, relative valuations, forecasts, risk preferences, and time preferences.²¹ Noncompetitive similarities are those interests shared by parties in which one party's gain does not result in another party's loss.²² Economies of scale relate to a unity of resources to produce a good or service, while economies of scope result from the production of a good or service from identical resources.²³ Value may also be produced by reducing transaction cost and dampening strategic opportunism (or the use of tactics to mislead and shape the perception of another party).²⁴

¹² Id.

¹³ Id. At 63.

¹⁴ Id. at 91.

¹⁵ Id. 104.

¹⁶ Id.

¹⁷ Id.at 106.

¹⁸ Id. at 110-111 (describing use of the BATNA against a perceived more powerful disputant).

¹⁹ Robert H. Mnookin, Scott R. Peppet, Andrew S. Tulumello, *Beyond Winning Negotiating to Create Value in Deals and Disputes* 12 (2000).

²⁰ Id. at 13.

²¹ Id. at 15.

²² Id. at 16.

²³ Id.

²⁴ Id. at 22-23.

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This theory of negotiation reacts to effective negotiation and principled negotiation by illustrating the pitfalls of both systems. Negotiation is joint problem-solving to create value that may be traded by all parties to reach an agreement.²⁵

A more apt name for this style of negotiation is integrative negotiation. By moving past principled negotiation, the parties expand the possible scope of settlement. With an expanded scope or resources available for settlement, all parties receive a better result than with the limited settlement conceived of by principled negotiation. Hence, integrative negotiation is “a negotiated outcome that leaves no resources unutilized.”²⁶ Key to this theory of negotiation is that parties need not have a “strong intrinsic interest in the other party’s welfare.”²⁷ But, parties must identify common interests or create desirable values lest each side lose a possible agreement.²⁸

D. RATIONAL NEGOTIATION

Yet another theory of negotiation posits use of rational decisions to maximize a party’s interest, while achieving the best agreement possible.²⁹ By discarding irrational decision-making biases, parties rationally negotiate to enlarge the value of possible settlement and each party’s share in such settlement.³⁰ Here examination of individual choice permits selection of an appropriate strategy by a party to maximize a party’s gain, while strategically assessing “how to maximize its own gain in the context of potential interference from the other party.”³¹ The structure of negotiation affects the rational choices of each participant. These choices are governed by a mixed strategy of competition and cooperation because negotiators “have reason to cooperate with one another, to reach an agreement and avoid the costs of conflict or impasse, but they also have reason to compete with one another for the scarce commodities at stake.”³²

This theory is based upon the assumptions that all parties are rational actors who make reasoned decisions in an attempt to “maximize their own gain or utility” based upon “complete information on the utility of alternatives to settlements to themselves and their opponent.”³³ Further, parties will not settle for an agreement unless “no other feasible agreement exists that would improve

²⁵ Id. at 43.

²⁶ Leigh Thompson, *The Mind and Heart of the Negotiator* 47 (1998).

²⁷ Id. at 49.

²⁸ See Id (lose-lose agreement occurs upon the failure of the parties to capitalize on compatible interests).

²⁹ Max H. Bazerman and Margaret A. Neale, *Negotiating Rationally* 1 (1993).

³⁰ Id. at 75.

³¹ Samuel B. Bacharach and Edward J. Lawler, *Bargaining Power Tactics, and Outcomes* 7 (1984) (describing Jon Nash’s bargaining theory based upon game theory).

³² Id.

³³ Id. at 8.

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the other party's outcome while simultaneously not hurting the other party's outcome."³⁴ Parties shall bargain in good faith assuring that an agreement accepted and entered into is enforceable.³⁵ The theory disregards initial offers and concessions as impacting the outcome of the negotiation.³⁶ Additionally, differences between the parties are considered only in that such disparities reflect a party's preference for a different outcome.³⁷ Hence, selection of negotiation strategies will not be affected by a party's "knowledge that it values a particular agreement or fears nonagreement either more or less than its opponent."³⁸ Based upon this model, negotiators may predict (or at least possess a concomitant response to) the other party's optimal threat—and thereby achieve an optimal resolution to the dispute acceptable to all parties.³⁹

Rational negotiation differs from the previously discussed theories in that it is possible to predict the outcome of negotiation. A party utilizing rational negotiation may plan tactics and strategy with the knowledge of the most likely achievable outcome.

III. CONCLUSION

Selection of an appropriate negotiation theory occurs based upon the type and object of the particular contract provisions under discussion in the software contract. Commingling of the theories may prove ineffective, while decision on a solitary theory will prove helpful in structuring the negotiation. Employment of promises, tacit threats, and concessions accounting for the nuances of the negotiating parties may lead to a negotiated result agreeable to all. Maintenance of business relationships through concessions in future work may prove useful. Viewing software contract negotiations, particularly in the cloud-based Software as a Service or data storage marketplace, as a lasting relationship may induce negotiation participants to view the negotiation as a friendship building relationship and not a one-time transaction.

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³⁴ Leigh Thompson, *The Mind and Heart of the Negotiator* 48 (1998); Samuel B. Bacharach and Edward J. Lawler, *Bargaining Power Tactics, and Outcomes* 9 (1984).

³⁵ Samuel B. Bacharach and Edward J. Lawler, *Bargaining Power Tactics, and Outcomes* 9 (1984).

³⁶ *Id.*

³⁷ *Id.* at 10.

³⁸ *Id.* at 11.

³⁹ *Id.* at 12-13.

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