

An Analytical Approach to Business and Personal Realities

Draft as of: Sunday, June 09, 2002

The search for possible resolutions can be assisted by the use of analytical tools. Can we create a "settlement template" that shows the various ways of resolving this dispute?

Proviso. The use of analytical tools assumes that the parties have agreed upon and committed to a mediation process in which the parties will communicate effectively. Without that foundation, analytics do not assist.

Using the Template to assess settlement "value."

Settlement negotiations sometime fail because parties do not give sufficient attention to ranking Issues and, therefore, treat all issues as though they were equally important. To prepare for your negotiations, I suggest the counsel review the template with their clients, and consider the following:

1. Does the Template include all Issues and sub-issues that are important to the resolution of this dispute? Should Issues be removed or new Issues added? Can issues or sub-issues be combined, separated or amended to "improve" the template?
2. How important is each Issue to your client? If your client had 100 points to apply to the Issues and sub-issues, how would they rank the issues? I.e., if there are six issues on the template, how would your client allocate those 100 points? E.g., one party to this mediation could decide to allot 20 points each to Issues 1 through 4, and 10 points each to Issues 5 and 6. That allocation shows, for example, that the party thinks that Issue 1 (20 points) is twice as important as Issue 5 (10 points).
3. How important is each sub-issue? If a party allocated 20 points to an Issue (for example, if Issue 1 had 6 possible resolutions) how would they allocate those 20 points among the sub-issues 1.1 through 1.6? What is the relative importance of the sub-issues of Issue 1 to you? See attached examples.

Without a template it is terribly difficult to explore the 'feasible region' of possible settlements. An analytically minded mediator can persuade parties to a reasonably efficient and reasonably equitable solution. However, the parties must dampen "claiming" tactics in this phase and share enough information to jointly create a template for negotiations.

"Pre-Negotiations"

This can be done in a "pre-negotiation" between parties in the following overarching steps:

1. Reach agreement about the process ("Contracting" to form a process)
2. Share information, interests, vision, etc.
3. Brainstorm ideas for resolution, devise possible outcomes, and create value without claiming it.
4. Then create a "template" of issues and the possible resolutions thereof.

Step by step creation of the template

The template is an initial listing, based on a collaborative brainstorming session, of:

1. All issues that should be included in a comprehensive resolution of the dispute. To create value, this will likely include matters beyond the scope of the pleadings.
2. Having identified all issues, can we brainstorm and list all feasible resolutions of those issues in a template. The benefit of this comprehensive list (in the template) is that all parties can view the domain of possible resolutions.
3. Can the template of issues and resolutions be improved? Amended? Supplemented?
4. After time to consider the template of potential resolutions and assess the values, can the parties (with the aid of the mediator) exchange offers and counters to find settlement packages that increase value for all parties?

Moving to private meeting

After the parties have jointly worked on the template and its refinement:

5. Private sessions in which parties assess their negotiation preferences and issue importance.

Jointly using the Templates to exchange offers and counters

6. Exchanges of preference information.
7. Construction of packages that provide for resolution of all issues.
8. Efforts to improve the parties' packages to obtain settlement efficiency.

Sample templates are on the following pages.

These concepts are from Lectures on Negotiation Analysis, Howard Raiffa, Harvard Program on Negotiation, 1997.

Template #1**Sale of Contaminated Property-Buyer and Seller Negotiations**

Rev: 8/16/99

#	Negotiation Issues	#	Possible Resolutions [List all possible resolutions either qualitatively or quantitatively]	Preferred outcome	
				Seller	Buyer
1	Sale Price	1	Dollar amount		
2	Seller Indemnity	2.1	Pre-existing contamination		
		2.3	Future harm		
		2,3	Offsite harm & migration		
			Toxic tort defense & indemnity		
3	Seller's on-site responsibility	3.1	None		
		3.1	O&M		
		3.3	Retained full responsibility		
4	Restrictions on Buyer's future property use	4.1	None		
		4.2	Limited commercial Residential with outside water		
		4.3			
5	Warranty on disclosed information	5.1	Level 1 - high level warranty		
		5.2	Level 2 - moderate		
		5.3	Level 3 - minimal		
6	Perspective purchaser responsibility with the EPA/State	6.1	None		
		6.2	Limited		
		6.3	Not limited		

Template #2**CERCLA Remedial Design/Remedial Action Negotiation - EPA v Mining Company**

Rev: 10/15/99

#	Negotiation Issues	#	Possible Resolutions [List all possible resolutions either qualitatively or quantitatively]	Preferred outcome	
				Mining Company	EPA/State
1	Who performs the clean-up	1.1	Mining company	X	
		1.2	Contractor/EPA		X
2	PRP Performance	2.1	Technical limit #1	X	
		2.2	Technical limit #2		
		2.3	Legal limit #1		
		2.4	Legal limit #2		X
3	Stipulated penalty	3	Amount	\$500/day	\$10K/day

4	Additional work requirement in 5 year review plan	4.1	Broad review by EPA/State Broad review with Mining Company input	X
		4.2	Moderate review by EPA /State	
		4.3	Moderate review with Mining Company input	
		4.4	Limited review	X
		4.5		

Template #3**Partnership dissolution: A negotiating with B to split up medical practice**

Rev: 01/15/01

#	Negotiation Issues	#	Possible Resolutions [List all possible resolutions either qualitatively or quantitatively]	Preferred outcome	
				Partner A	Partner B
1	Division of existing clients/patients	1.1	All to A		
		1.2	50% split		
		1.3	All to B		
2	Division of referral sources	2.1	All to A		
		2.2	75% to A		
		2.3	50% split		
		2.4	All to B		
3	Payment to Senior partner	3	Amount		
4	Division of equipment	4.1	All to A		
		4.2	All to B		
5	Notice to clients/patients	5.1	A's notice		
		5.2	B's notice		
		5.3	Neutral agency decides		

Template #4**Energy Sale - Negotiations between Seller and buyer**

Rev: 01/16/01

#	Negotiation Issues	#	Possible Resolutions [List all possible resolutions either qualitatively or quantitatively]	Preferred outcome	
				Energy Company	Energy Purchaser
1	New contract term	1.1	5 yrs		
		1.2	10 yrs		
		1.3	15 yrs		
2	Price of energy	2.1	x/btu		
		2.2	y/btu		

		2.3	z/btu
3	Environmental Responsibility	3.1	0%
		3.2	20%
		3.3	40%

Template #5**DEH v. Riverside: Settlement Negotiations with Department of Health
Rev: 1/19/01**

#	Negotiation Issues	#	Possible Resolutions [List all possible resolutions either qualitatively or quantitatively]	Preferred outcome	
				DEH	Riverside
1	Scrubber installation-type of scrubber	1.1	None		
		1.2	Rotoblu		
		1.3	Technoclean		
2	If on Issue #1, Techno scrubber is chosen, what is DEH guarantee?	2.1	None		
		2.2	Full		
3	DEH \$ Subsidy of Technoclean	3	Amount		
4	Liability assist from DEH (Max)	4	Amount		
5	DEH ordered plant closure	5.1	None		
		5.2	2 month		
		5.3	6 month		
		5.4	permanent		
6	If any scrubber, DEH \$ for publicity	6	Amount		

Template #6**Credit Workout Negotiation Template- Bank and borrower
Rev: 8/14/99**

#	Negotiation Issues	#	Possible Resolutions [List all possible resolutions, either quantitatively or qualitatively]	Preferred outcome	
				Bank	Borrower
1	Amount of maximum revolving credit (in USD)	1.1	\$x		
		1.2	\$y		
		1.3	\$z		

2	Replacement Matrix for Applicable Margin	2.1	Matrix A
		2.2	Matrix B
		2.3	Matrix C
		2.4	Matrix D
		2.5	None
3	Borrower's Minimum Net Worth Requirement	3.1	\$A
		3.2	\$B
		3.3	\$C
4	New Borrower Covenants	4.1	Covenant group A
		4.2	Covenant group B
		4.3	Covenant group C
5	Conditions Precedent to Bank's Obligations under this Amendment	5.1	Conditions Set 1
		5.2	Conditions Set 2
		5.3	Conditions Set 3
		5.4	Conditions Set 4
6	Representations and Warranties made by Borrower	6.1	Reps set 1
		6.2	Reps set 2
		6.3	Reps set 3
7	Use of lockbox	7.1	High
		7.2	Moderate
		7.3	Limited
		7.4	None

Template #7**Settlement negotiations in royalty dispute: Lessor v Lessee**

Rev: 04/19/00

#	Negotiation Issues	#	Possible Resolutions [List all possible resolutions either qualitatively or quantitatively]	Preferred outcome	
				Lessor	Lessee
1	Adjustment to base royalty	1.1	None		
		1.2	Amount		
2	Mine or drilling plan	2.1	Plan #1		
		2.2	Plan #2		
		2.3	Plan #3		
		2.4	Plant #4		
3	Adjustment to bonus royalty	3	Amount		
4	Commitment to future exploration	4.1	Level 1		
		4.2	Level 2		
		4.3	Level 3		
		4.4	Level 4		
		4.5	Level 5		

Template #8**Licensing Negotiation Template-Preferred Outcomes**

Rev: 8/10/99

#	Issues	#	Resolutions	Preferred outcome	
				Party A	Party B
1	Definition of licensed technology	1	Very broad		X
		2	Very broad with carve outs		
		3	Narrow	X	
2	Scope of license	1	Use		
		2	Make		
		3	Copy		
		4	Sell	X	X
		5	Distribute		
3	Duration of license	1	Perpetual		X
		2	Life of patent		
		3	Limited	X	
4	Territory	1	World-wide		X
		2	Moderate definition	X	
		3	Narrow definition		
5	License payments	1	Paid-up		
		2	Fixed plus production	X	
		3	Production royalty only		X
		4	No production royalty		
6	License rights	1	None	X	
		2	Transferable		
		3	Sublicenseable		X
7	Warranties/disclaimers	1	"As-is"	X	
		2	Fitness		
		3	Fitness and merchantability		
		4	Non infringement		
		5	Complete		X