



# HARD BARGAINING TACTICS

## ... and how to deal with them

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Leading negotiation experts have asked lawyers and business people to describe the most common tactics they have encountered in negotiation (see Mnookin, Peppet, and Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes*, Harvard University Press, 2000 at 24).

The following is their top 10 list:

### 1. Incremental bargaining

This may be the most common of all bargaining tactics. An initial offer is made far short of what the other party might possibly find acceptable, followed by a succession of further offers, each not much more generous than the previous one. A defendant, for example, offers to settle a \$500,000 claim for \$30,000, knowing this figure to be well outside the range of a possible settlement. When this offer is inevitably rejected by the plaintiff, it is increased by the defendant to \$45,000, still far short of a figure the plaintiff would even contemplate settling for. It is only after many further such slightly improved offers that a figure is reached which falls within the range that might be acceptable to the plaintiff.

An advantage of making an initial extreme offer is that the user begins by conceding little and

hence is better able, if required, to make significant concessions later. A second advantage is anchoring. Research suggests that an initial extreme offer limits the other party's perception of the bargaining range. This is despite knowing full well that the offer is probably a disingenuous self-serving opening gambit.

Incremental bargaining has the added value that it may grind the opposition down, with the result that they agree to a more generous settlement than they might otherwise.

However, a disadvantage of initial extreme offers is that they may inject unhelpful negativity and despondency into the negotiations. The targeted party might say, "Your offer is insulting; we can see that there is no realistic prospect of settlement; we are therefore leaving." Offers carry messages. Care has to be taken that an extreme initial offer does not carry the unintended message that the offeror does not intend to engage in realistic negotiations.

Another possible disadvantage of initial extreme offers is the subsequent loss of credibility. If a party contends at the commencement of negotiations that the extreme offer is reasonable, it is more difficult for them to later contend that a much improved offer is likewise reasonable. A further disadvantage of incremental bargaining is that it may serve to exhaust the opposition and cause them to lose patience, or lose the capacity

to make decisions. This may result in a premature end to the negotiation.

### 2. Commitment tactics

This involves a party adopting a course of action which ties their own hands, thus forcing the other side to accommodate them. To be effective, such a course must be seen by the targeted party to be binding, credible, visible, and irreversible.

Thus, a company in negotiation with a union about manning levels may proceed to sell the plant, thereby limiting the negotiations to redundancy talks. A leaky home owner may engage third parties to repair the damage and preclude the option of the defendants undertaking the repairs; this forces the defendants into a money-only negotiation. A development company may modify its plans, thereby compelling the objectors to argue their case on more limited grounds.

### 3. Take-it-or-leave-it offers

This tactic involves making a non-negotiable offer. "Either you settle for \$365,000 or we are leaving." A degree of bluff may be involved. It may succeed and induce the targeted party to settle accordingly. But the user of the tactic must also accept the prospect of the tactic bringing the negotiations to a sudden and possibly unwanted end.

#### 4. Try again

Instead of an offer being responded to by a counter-offer, the recipient of the offer invites the offeror to submit a revised offer. This process of reconsidering and revising an offer in the absence of a counter-offer is commonly referred to as bargaining against oneself. Although it may seem reasonable from the recipient's point of view, it is often considered to be objectionable by the offeror, because they are in effect being asked to do the work of the recipient party by second-guessing what might be acceptable to the recipient party. The offeror considers that in the event of their offer not being accepted, it is for the recipient, not them, to identify what different level of settlement might be acceptable, and that the recipient should do this by counter-offering accordingly.

#### 5. Flinch

One demand is piled upon another until the other side makes a visible sign that the demands have reached the other party's breaking point. The user of this tactic has the advantage of not only calling the shots, but exposing the other party's true bargaining limit. An example is a separated spouse making a rolling succession of demands for items of relationship property.

#### 6. Personal insults

The other party is flustered and thrown off balance by attacks directed at their insecurities. "This mess you've got yourself into shows once again that when it comes to business, you are a complete loser."

#### 7. Exaggeration and lying

The aim is to influence the other side's perception of what would be an acceptable settlement by overstating or misrepresenting facts. "There is no point in your returning to the workplace, because every employee is in utter contempt of what you did and does not want you back."

#### 8. Threats

Drastic consequences are promised if demands are not met: "We will go to the media." "We will go on strike."

#### 9. BATNA bashing

A party's BATNA (best alternative to a negotiated agreement) is their best case scenario should the negotiations not settle. Having regard to their BATNA, each party should have calculated the point at which it is no more advantageous to settle than to walk away. It is the tipping point between settling and not settling. If a party's BATNA is successfully impugned, then the tipping point will alter accordingly. Thus, plaintiffs, who might have been confident that it was not in their interests to settle for anything less than \$500,000, might lower that assessment to \$400,000 when their BATNA is found wanting.

#### 10. Hot and cold

This might involve the traditional bad cop, good cop routine. Negotiator one: "There's no way we're going to reinstate you." Negotiator two: "This is a wonderful opportunity for you to make a career change." Or it might involve a negotiator at one moment being aggressive in approach and in the next moment conciliatory.

#### Counter tactics

Here are some possible responses to the above tactics. They are not mutually exclusive. Many are

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best used in combination. Not all may be wise. Their use is fact dependent.

- **Naming:** Calling a tactic for what it is can disarm the user. "We know you are attempting to anchor a low bargaining range, but we're not buying into that."
- **Reciprocation:** Two can play the game. "Yes, we've heard your threat. Here's ours..."
- **Advance preclusion:** If a tactic is anticipated, an attempt may be made to rule it out of order in advance. "If you're thinking of making a non-negotiable offer, tell us now, because if you are, we're not interested in carrying on."
- **Pre-emptive intervention:** Jump in before the tactic is fully employed. "I'd just like to stop you there. I suspect you're about to ask us to reconsider our offer and bargain against ourselves. If that is what you are about to say, don't bother."
- **Parking:** An offer can be left for consideration later. "We'll come back to that offer later."
- **Adding complexity or variation:** A weakness of non-negotiable offers is that inevitably a small variant will be acceptable to the offeror. Raising that possibility keeps the offeror at the table and blunts their absolutist approach. For example, responses to a non-negotiable demand by a plaintiff for payment of \$500,000 in 28 days might be: "Despite what you say, how about being paid a smaller sum sooner, or a larger sum later?"
- **Wilful deafness:** Unhelpful or unacceptable tactics can be ignored in two ways. The targeted party can say: "We'll just pretend we didn't hear that." Another approach is not to say anything, but simply to act as if the words concerned had never been spoken; the tactic is not dignified by any response whatsoever.
- **Challenge:** Tactics can be challenged as either improper, unhelpful, or unrealistic. The first type of challenge involves a clear statement that the tactic breaches the negotiation rules. "I'm sorry, but we're not prepared to negotiate if you use personal insults." The second type involves reference to the value of the negotiation process and the threat posed to it by the tactic. "Is that really helping getting this settled?" The third type is usually directed at the offeror's litigation risk and BATNA. "It is completely unrealistic to suggest that you pay us \$500,000, because the Court will order you to pay a minimum of \$575,000".
- **Seeking explanation:** No matter what tactic is employed, explanation can be sought as to the reason the tactic was employed, or the basis upon which a statement or offer has been made. This may serve to expose the disingenuousness of the tactic or statement, or the unreasonableness of the offer. "Please provide us with the evidence which supports your statement."
- **Invitation to reconsider:** Where a tactic has been employed which is unhelpful, the targeted party may ask the user to reconsider. "How about reflecting on what you have just said and coming

back with something different?"

- **Demand a withdrawal:** "We will give you 15 minutes to decide whether or not to withdraw what you have just said. If you don't, we're leaving."
- **Appeal to the mediator:** If the negotiation involves a mediator, he or she can be asked for assistance to counter the tactic. Such a request can be made either in joint session or privately. Hopefully, the mediator will have already taken steps to deal with unacceptable or unhelpful tactics.
- **Reacting angrily:** A targeted party need not respond to a tactic with equanimity. They can react with controlled anger. The user of the tactic is unlikely to persevere with the tactic in the face of such a reaction. The reaction is only likely to be effective if it is sincere.
- **Taking a break/creating a disruption:** The sting can be taken out of the tactic by the targeted party temporarily withdrawing from the negotiation as soon as the tactic is employed. This may serve to demonstrate that the party is not panicked by the tactic. During the break, the user might mull apprehensively over the tactic, and reconsider it. "Sure, we heard what you have to say, but quite frankly, we're more interested in having lunch right now."
- **Scorn:** "In all my 30 years in this job, I've never seen such a ridiculous tactic used." "You're kidding aren't you?"
- **Demanding an apology:** Hard bargaining tactics can backfire if the other side won't play ball. "Unless you apologise for what you've just said, we're out of here." A forced apology shifts the moral and psychological high ground.
- **Issue proliferation:** Commitment tactics may provide an opportunity for the targeted party to widen the dispute by introducing further elements to the negotiations. For example, the union facing the plant close down might respond with a breach of good faith bargaining claim, or the leaky home respondents might argue loss of opportunity to mitigate the owner's loss, or the development objectors might raise new objections.
- **Walking out:** This is the ultimate sanction in any negotiation. It may be *necessary* because the party leaving cannot tolerate the tactics being employed against them. It may be *appropriate* because nothing further can be gained by remaining, or alternatively, something might be gained by leaving. The other party might want to resume negotiations later in a more concessionary spirit.
- **Acceding:** The other side may be hard bargainers and not particularly nice, but, in some circumstances, it may be wise to accede to their demands.

#### Conclusion

All of the above tactics and counter tactics have their place. They should be part of each negotiator's tool kit, ready to be used as the occasion demands. Knowledge of them also allows the negotiator to identify and hence respond when they're used by the other side.

The challenge is to know whether, when, and how to use these tactics and counter tactics and the many others which exist.

Negotiation is not easy. It will not always result in settlement. One sure way of improving the chances of a successful outcome is to engage the services of a mediator with a proven track record.