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Review Article

Practical Suggestions for Win-Win, Win-Lose, Lose-Win, and Lose-Lose Strategies in Mediation or Arbitration

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Abstract

This essay discusses the practical aspects of mediation and arbitration. The article outlines effective steps to implement win-win, win-lose, lose-win, and lose-lose negotiation strategies. It is posited that with a win-win strategy, the job of a mediator or arbitrator is to find a win-win scenario that is acceptable to both sides. The role of a mediator or arbitrator when the parties are engaging in win-lose, lose-win, and lose-lose strategies is different in that at least one of the parties is not seeking a win for all sides. In particular, when the parties are not involved in a win-win, and court is an option, the parties need to gain as much information about the opposing party as possible to use it to their advantage in court. This is unfortunate but, at times, a necessary result of not participating in a win-win outcome.

Keywords:
Win-Win Strategy; Win-Lose Strategy; Lose-Win Strategy; Lose-Lose Strategy; Mediation; Arbitration

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Introduction

This essay aims to discuss the dynamics of mediation or arbitration. In mediation or arbitration, it is presumed that each side wants to win and may or may not be concerned with whether the other side wins. Under a win-win perspective, the job of a mediator or an arbitrator is to find a win-win scenario that is acceptable to both sides, presuming that such a scenario exists. It should always be remembered that a win-win outcome may not exist, depending upon the ability of the parties to compromise or find areas of mutual agreement. The more issues that parties can agree on, the higher the likelihood of arriving at a win-win outcome. Also, a compromise can take on many forms, thereby ensuring that there are potentially many win-win scenarios. If the parties are unwilling to compromise or find an acceptable middle ground, the likelihood of mediation or arbitration coming to a successful conclusion where each party feels that it has won something is dim. Thus, getting to a win-win outcome may be fraught with danger, but hopefully, it is worth the risk in mediation or arbitration.

The Four Negotiating Strategies

In this section, the win-win, win-lose, lose-win, and lose-lose strategies will be discussed in turn. This essay will not cover a win-win-win strategy where a win-win-win occurs when three or more parties stand to gain from a negotiation [1]. The reason is that analyzing the negotiating positions of three or more parties tends to make the analysis overly complicated. Thus, only the negotiating strategies for the two parties will be considered for this paper.

Win-Win Strategy

There are many excellent and popular texts proclaiming the virtues of the win-win strategy, where one such text was written by Ury and Fischer entitled, *Getting to Yes* [2], [3], [4], [5], [6]. A win-win is a result that is good for all parties that are involved in a given negotiation [7]. There are problems with the win-win strategy that should be recognized [8]. First and foremost, a party that purports to promote a win-win strategy can change its mind during the negotiations and revert to a win-lose strategy [9]. Although a party may claim that it is adhering to a win-win strategy, the truth is that when faced with another party that has replaced their win-win strategy with a win-lose strategy, the other party has put the first party in an untenable position [10]. Suppose the first party maintains a win-win strategy in the face of an alternative strategy. There is a distinct probability that it will lose because the other party is no longer interested in, or perhaps never was interested in, a win-win mediation or arbitration [11]. This means that when two parties are involved in a negotiation and are seemingly dedicated to pursuing win-win strategies, it is imperative that both parties periodically query the other party regarding whether that other party is continuing in its quest for a win-win outcome [12]. Testing a party's current negotiating strategy will depend upon the details of the respective parties' positions [13]. Individual negotiations demand creative ways for verifying that a party is adhering to its declared win-win strategy [14]. Suppose a party fails to make this inquiry, and the other party changes its strategy. In that case, it is likely that one party will be caught unaware of the change, thereby giving the other party a tactical advantage, an advantage that a party may or may not be able to overcome as the negotiation proceeds to the finish line [15]. Thus, both parties must query the other party periodically to pursue a win-win outcome.

A question of some importance is what is the first party to do if the other party deviates from a win-win strategy. There are three possibilities. First, a party can maintain a win-win strategy regardless of the strategy used by the other party [16]. This option has an element of risk because it does not consider the other party's strategy [17]. Also, the other party may construe that the first party is weak because the first party is ignoring the other party's stance [18]. The other party may exploit this weakness to gain an

even greater advantage over the first party [19]. The first party can attempt to work with the other party to bring them back to a win-win [20]. However, as a mediator or an arbitrator, one should be keenly aware that once the other party has decided to pursue a strategy other than a win-win strategy, there is no guarantee that the other party will decide to abandon their new strategy in favor of a win-win strategy [21]. And even if the other party does decide to return to a win-win strategy, there is no assurance that the returning win-win strategy will be similar to the original win-win strategy [22]. The two win-win strategies can be dramatically different, sometimes as dissimilar as night is to the day [23]. The reason is that what constitutes a win under one win-win strategy may be structurally different than a win under a different win-win strategy [24]. The implication is that a win-win strategy is not unique [25].

Win-Lose Strategy

Second, when the first party realizes that the other party has changed its strategy from a win-win strategy to a win-lose strategy, there are three other options available to the first party. The first party could retain its win-win strategy or engage in a win-lose strategy, a lose-win strategy, or a lose-lose strategy [26]. The timeframe in which the first party decides to either remain with a win-win strategy or change its strategy to one of the three other possibilities depends on the negotiations' circumstances and the first party's commitment to its original win-win strategy [27].

A win-lose occurs when one party's gain results in the other party's loss [28]. Both parties are typically competing to take away or claim the most value from the mediation or arbitration [29]. A win-lose can be viewed as a "fixed-pie" situation where only a limited amount is distributed among the negotiating parties [30]. In game theory, a win-lose is also known as a zero-sum game [31].

In engaging in a win-lose strategy, the first party should recognize that the other party has betrayed its confidence by reverting to a win-lose strategy [32], [33]. This betrayal should notify the first party that even if the other party returns to a win-win strategy, there is little reason to believe that the other party will stay with its revised win-win strategy for the remainder of the negotiations [34]. In essence, by changing their negotiating strategy, the other party has breached the trust of the first party, and trust once breached is challenging to restore, if at all [35], [36].

One possible win-lose situation that needs to be discussed is when the other party espouses a win-win strategy, but in fact, desires an outcome that directly contradicts a win-win outcome [37]. In this instance, the first party may not know that the other party is intentionally or unintentionally engaging in a win-lose strategy [38]. For example, suppose that one party is an oil pipeline company attempting to construct a pipeline across Native American land. The Native Americans oppose the pipeline, citing that the land is sacred where the oil pipeline company is proposing to lay the pipe. One win-win solution to this conflict is for the pipeline company to inquire if there is any non-sacred land where the oil pipeline may be laid. If so, both parties would experience a win because the pipeline would not be laid on sacred land.

On the other hand, if all of the lands are sacred where the oil pipeline could be laid, and there is no non-sacred land, then the actual strategy held by the Native Americans is a win-lose strategy even though the Native American negotiators may be advocating a win-win strategy to the oil pipeline company. There is neither non-sacred land nor acceptable sacred land to the Native American negotiators where it would be economically feasible for the oil pipeline company to lay the pipeline. In this example, a win-win does not seem within the realm of possibility because of an inconsistency in the espoused negotiating strategy of one of the parties [39], [40], [41].

Thus, a party must question whether the other party is indeed acting in accordance with its purported win-win strategy [42]. If the other party is seemingly embracing a win-win strategy, but its actions and positions reveal an alternative negotiating strategy in play, the first party can either attempt to convince the other party to behave consistently with its advertised win-win strategy or acknowledge that a win-win outcome is not possible and then change its negotiating strategy accordingly [43]. The decision of the first party to alter its negotiating strategy is a difficult one and should probably not be made without exploring within the time constraints of the negotiation the possible avenues for a successful win-win outcome [44].

Lose-Win Strategy

Third, a lose-win strategy is the same as the win-lose strategy, but not the winner from the loser's perspective [45]. According to Warschaw, a party employing a lose-win strategy procures what they want by losing [46]. A party that uses a lose-win strategy is likely a passive negotiator who does not desire to dominate because the thought of finishing first or winning frightens them [47]. In mediation or arbitration, a party involved in a lose-win strategy may not necessarily be acting in their own best interest, but when negotiating from an inferior societal or business position, a lose-win strategy may be in the best interest of the other party [48]. In other words, from the perspective of an inferior-superior interaction, a lose-win strategy may be disguised as a win-win strategy [49].

In analyzing the effectiveness of the lose-win strategy used by the other party, it is presumed that the first party is engaged in a win-win. The issue with the lose-win strategy, when advocated by the other party, is that the other party wants to lose and the first party to win [50]. On its face, if this situation occurs, the first party can make the mistake of thinking that the other party is giving the first party manna from heaven [51]. After all, the other party is seeking a loss. Why not take advantage of the situation where the first party eagerly embraces its win?[52] This situation could be construed to be a mistake that could adversely affect the negotiation outcome for the first party. [53]

Suppose the other party selects a lose-win strategy. In this case, it is probably better for the first party not to express too much enthusiasm, if only because such behavior could be perceived at best as gloating, or at worst, stomping on an underdog [54]. The preferred course of action for the first party is to inquire from the other party why they are engaging in a lose-win strategy or accept the third party's decision as an acknowledgment of the first party's superior position in society or in business [55]. Suppose the other party is unable or unwilling to reveal the reasons for selecting the lose-win strategy. In that case, the first party should probably accept a win gracefully while reluctantly accepting the other party's decision [56]. In this manner, the other party can save face and keep its dignity intact [57].

Lose-Lose Strategy

Finally, there is the lose-lose strategy. A lose-lose is a result that is bad for all parties that are involved in a given negotiation [58]. A lose-lose is also known as a no-win strategy [59]. A lose-lose strategy is similar to a win-win strategy because just as there are multiple win-win strategies, there are also many distinct lose-lose strategies [60]. A lose-lose strategy is the hardest negotiating strategy because most people detest losing [61]. The vast majority of individuals will not even consider a lose-lose strategy because it is repulsive and anathema [62]. The classic example of a lose-lose strategy is the "prisoner's dilemma," where two prisoners decide whether to confess to a crime [63]. Neither prisoner knows what the other prisoner will do in the prisoner's dilemma [64]. The optimal outcome for the first prisoner is to confess while the other prisoner remains quiet [65]. In this case, the prisoner that confesses and implicates the other prisoner is set free, while the other prisoner, the one who remained quiet, goes to prison, receiving the maximum sentence [66]. The same scenario holds for the other prisoner [67]. However, if both prisoners confess to the crime, both prisoners are given the maximum sentence [68]. This is a lose-lose scenario [69]. If both prisoners choose not to confess, they are given a reduced sentence, which could be a win-win because the reduced sentence is less than the maximum sentence [70].

For a lose-lose strategy to be effective against a party dedicated to employing a win-lose strategy, a first-party must have nerves of steel and be willing to lose, not only something but everything [71]. The first party must impress the other party with the knowledge that if the first party is willing to lose something or everything, the other party will lose more than the first party, if not everything [72]. The success of the lose-lose strategy rests on the premise that the other party may be unwilling to lose everything or at least more than what will be lost by the first party [73]. One way to employ a lose-lose strategy is to force the other party to seriously consider the potential of losing everything or at least more than the other party is reasonably willing to lose [74]. Then, the first party may bring the other party back to its senses, returning the other party to a win-win strategy [75]. A lose-lose can also occur when both parties offer significant concessions early in the negotiation and then subordinate the bargaining positions of one of the parties, or the consequence of a miscommunication or misunderstanding [76].

When the first party engages in a lose-lose strategy, there is no guarantee that the other party will return to a win-win strategy [77]. Because of this fact, a first-party employing a lose-lose strategy must possess

nerves of steel [78]. The first party must be willing to lose a great deal, if not everything [79]. Essentially, a lose-lose strategy can be likened to a balance of terror strategy during the Cold War, where the threat of nuclear war was sufficient to prevent mutually assured destruction [80].

One possibility of particular interest in a lose-lose scenario is when both parties lose something, but not everything. In this instance, a lose-lose scenario may be the best alternative to a negotiated agreement (BATNA) [81]. A BATNA refers to the optimal alternative course of action that a party can take if an agreement cannot be reached and the negotiations fail [82]. The opposite of a BATNA is the worst alternative to a negotiated agreement (WATNA) [83]. A BATNA may consist of diverse situations, including the suspension of negotiations, a transition to another negotiating party, an appeal to a court's ruling, conducting labor strikes, or forming alliances outside the negotiating process [84].

Each party loses something but potentially gains a much closer or more profound understanding of the other party [85]. According to the PON Staff, this is akin to the events in O. Henry's classic short story entitled "The Gift of the Magi. [86], [87]" In the short story, a loving husband and wife are poor, but they both want to give each other the perfect Christmas gift [88]. The wife, Della, sells her beautiful long hair to buy her husband, Jim, a platinum watch chain for his gold watch, while Jim sells his gold watch to purchase a set of tortoiseshell hair combs for Della's beautiful long hair [89]. On its face, in a negotiation, the actions of both the husband and wife constitute a lose-lose outcome [90]. According to the PON Staff, in O. Henry's story, although both parties lost something, in the end, their love for each other increased [91]. A similar thing can happen in a negotiation. Although both parties may lose in a negotiated outcome, the act of losing may bring both parties together so that in future negotiations, a win-win is virtually assured [92].

What Is a First Party to Do When the Other Party Changes Its Negotiating Strategy?

Suppose a party using a win-win strategy correctly concludes that the other party has altered its negotiating strategy from a win-win strategy to one of the three different strategies described above. In that case, the first party can select various options, including ending the negotiation and pursuing legal action in a court of law [93]. This is a BATNA [94] situation where the two parties may be asked by a court to engage in mediation before laying their case before a court of law [95].

Negotiation Outside Mediation or Arbitration

Two possibilities need to be considered. First, the negotiation may occur in a context outside mediation or arbitration [96]. In this instance, the parties are negotiating with each other, not needing the services of a mediator or an arbitrator [97]. The parties are sufficiently mature to be able to negotiate without a third party acting as a referee or umpire [98]. This type of negotiation may be between sovereigns or in a business setting, where the parties understand the terms, conditions, and dynamics of a negotiation [99]. Although there may be some emotional attachment by the parties to the outcome of the negotiation, the parties are sufficiently experienced and responsible so that the presence of a mediator or an arbitrator may be unnecessary [100].

When separate sovereigns negotiate, the negotiations can be quite complex, depending on the issues being discussed. When sovereigns are involved in a negotiation, the negotiators for each sovereign are likely highly sophisticated individuals, well versed in negotiating strategy and tactics [101]. The timeline for such negotiations can be quite extended, sometimes taking decades to come to a successful conclusion [102]. For example, consider the negotiations between the United States and its allies and Iran that led to the signing of the Joint Comprehensive Plan of Action (JCPOA), commonly referred to as the "Iran nuclear deal [103]." During the negotiations, both sides possessed negotiators that were well-versed in the art of negotiation [104]. Due to the complexity of the issues involved and the desire to negotiate minute differences of opinion, the negotiation had the potential of becoming hopelessly mired due to potentially unforeseen consequences [105].

Negotiation Inside Mediation or Arbitration

In this instance, the first party should probably exploit the mediation to learn as much as possible about the other party's overt and hidden agendas [106]. The idea is that by seeking such knowledge, the first party can exploit that knowledge if and when the two parties go to court or binding arbitration. If the

two parties are destined for a court date, the party that did not change their negotiating strategy should be intimately aware that there are winners in court or binding arbitration, and there are losers [107]. The non-changing negotiating strategy party should impress the other party that "the worst decision out of court is always better than the best decision in court [108]." The reason is that in court or binding arbitration, both parties lose control of the negotiation outcome. The court or the arbitrators determine the outcome rather than the parties.

Unfortunately, most people believe in the righteousness of their cause or position and fail to recognize that they can lose in court or binding arbitration [109]. This outcome is drilled into the heads of attorneys and aspiring attorneys from the moment they enter law school and is constantly being reinforced in their law practice [110]. In other words, a mediator, and more consciously an arbitrator, must be far more aware of this fact. Both parties will likely come out of the proceedings in court or arbitration firmly believing that they have lost something near and dear to their heart [111].

Role of a Mediator or Arbitrator in a Negotiation

The role of a mediator or an arbitrator is a delicate balance, intently searching the positions of both parties for a win-win if it exists at all [112]. A mediator or an arbitrator is obliged to guide both parties towards a win-win outcome, where each party feels but may not necessarily firmly believe that they have come out ahead, far better than they would if they had opted for adjudication in court or binding arbitration [113].

A mediator or an arbitrator should and ought not to take sides in a negotiation [114]. If a mediator or an arbitrator consciously or otherwise takes sides in a negotiation, one of the parties might catch wind of this fact. Then, the negotiation dynamics change entirely from one where the mediator or arbitrator is disinterested to one where the mediator or arbitrator is a de facto advocate for one of the parties [115]. If this occurs, the response of the other party, the party that is not reaping the benefits of the mediator's or arbitrator's encouragement, is critical [116]. When a party realizes that a mediator or arbitrator is no longer disinterested, the party should probably either terminate the mediation if possible or seek new arbitrators when engaged in binding arbitration.

There is usually only one mediator in charge of the mediation process. If a mediator becomes biased regarding the mediation outcome, it is the responsibility of the adverse party to have the mediator removed or have the mediator resign [117]. Suppose the parties cannot agree on whether the mediator remains disinterested. In that case, the parties may have the option of going to court and letting a judge decide the fate of the mediator, presuming that the parties are in mediation by court order [118]. As previously stated, in court, there are winners, and there are losers, and the worst decision out of court is always better than the best decision in court [119]. Under certain circumstances, there is a distinct possibility that the court will not hold that the mediator is biased [120]. In this case, the moving party, or adverse party, should prepare for a contest in a court of law. The moving party should make every effort to gather as much information about the non-moving party's position as possible. The non-moving party will also likely be collecting valuable information about the moving party's position. In this instance, combat has already begun, where the outcome may not be to anyone's liking.

In binding arbitration, there are usually three arbitrators, where each party selects one of the arbitrators, and the two arbitrators select a hopefully neutral third arbitrator. It is this third arbitrator that is critical to a negotiation. Suppose that the third arbitrator decides to advocate for one party rather than as a neutral arbitrator. In this case, the adverse party might lose because of the arbitrator's decision [121]. In this instance, the adverse party should probably seek to remove the third arbitrator from the proceeding [122]. In fact, in the initial arbitration agreement, an expressed mechanism should be available to a party to remove an arbitrator if that arbitrator decides to take sides in the negotiation rather than seek a just outcome [123].

There are some risks associated with attempting to have an arbitrator removed. One of the parties could use the process to merely remove an arbitrator because the party does not like the likely final decision of the arbitration [124]. The initial arbitration agreement should probably expressly state that all arbitrators must agree that the third arbitrator is no longer neutral to avoid this negative possibility [125]. This

result is doubtful to occur. This author's opinion is that the parties in binding arbitration should be able to nullify the arbitration process only for a good cause.

Conclusion

In conclusion, the parties must ensure that two possibilities do not occur in a negotiation. The first possibility is that a party changes its negotiation strategy from a win-win to a win-lose, lose-win, or lose-lose. This article highlights that if one party alters its negotiation strategy in midstream from a win-win strategy to a win-lose, lose-win, or lose-lose strategy, the other party is well advised to also change its strategy to a win-lose or a lose-lose strategy with the intent of forcing the other party back into a win-win strategy, hopefully, the same as the original win-win strategy. A party should not move from a win-win strategy to a lose-win strategy when the other party changes its negotiation strategy unless the other party goes to a win-lose strategy, and the first party is content with losing. The second possibility is that a mediator or a third arbitrator may become an apparent advocate for one of the two parties. In this instance, it is advised that the party that is not the recipient of this change of position immediately attempt to either end the negotiation and immediately go to court, use the negotiation to extract valuable information from the other party to be used in court, or have the mediator or third arbitrator replaced with a neutral mediator or arbitrator. There are seemingly no other options available.

Miscellaneous Considerations

Author Contributions

The author has read and agreed to the published version of the manuscript.

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Abbreviations

BATNA-Best Alternative to a Negotiated Agreement

JCPOA-Joint Comprehensive Plan of Action

WATNA-Worst Alternative to a Negotiated Agreement

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