Alternatives

TO THE HIGH COST OF LITIGATION

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Deal ADR

Putting in a Good Word for Compromise

BY JAMES C. FREUND

Com–pro–mise (n)–
a. A settlement of differences in which each side makes concessions.
b. The result of such a settlement.

– *American Heritage Dictionary*

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So, picture this scene. Moses descends from the mountain, tablets in hand. The Israelites in the valley anxiously await the latest news from their leader. Moses surveys the bustling throng, lifts his right arm for silence, and speaks in magisterial tones.

"The good news is, I got him down to 10. The bad news is, adultery is still in."

I'll bet you didn't realize that this heretofore little-known Decalogue compromise sealed the deal. …

This article is about the importance of forging compromises. I'm a great believer in them and an active practitioner of the craft. I would have thought that put me on the side of the angels—but when you read the copious stream of fire-breathing vituperation in the daily press, when you watch those extremist yokels hijacking opinion shows on the tube, when you witness the legislative paralysis that results from our elected officials hewing to no-yield political positions—to say nothing of the abject failure to reach satisfactory resolutions of international disputes—the receptivity to compromise appears to be in short supply nowadays.

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I'm no expert in areas such as the press, talk shows, politics, and international relations, so I'll refrain from venturing any views as to the causes of, or remedies for, those situations. But there is one area in which compromise is paramount that I know pretty well—the business world. And here the breadth of my personal experiences over the years with commercial matters puts me in an advantageous place to offer some views on the subject.

Negotiating Deals v. Resolving Disputes

In the business world, the need for compromise arises both in making deals and in resolving disputes—a duality that's crucial to recognize in approaching the subject.

I have an advantage here, not shared by most lawyers, of having spent the first three decades of my professional life making deals on behalf of corporate clients, and the past two-plus decades as a mediator trying to resolve disputes. These are different constituencies, to be sure, but the deal experience gave me a lot of useful insights into navigating the dispute area.

As a practicing lawyer, my main task was negotiating corporate acquisitions and other

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kinds of business transactions. It was a world where—except in the case of defending against a hostile takeover—the words we consistently heard from the top executives of our clients were, "Let's get this deal done."

As a result, those of us in the trenches—the financial mavens, the investment bankers, the lawyers—were all imbued with a "can-do" mentality. For some folks, like the investment bankers, the message from on high was reinforced by the realization that they were only paid if the deal got done.

So, we all behaved constructively and looked for ways to resolve impasse—to find compromises to thorny issues, to formulate outcomes that both sides could live with. Here's what I had to say about the process in my book, *Anatomy of a Merger*:

> [T]o call off a deal is not trouble at all, but it requires some real ability to hold together the pieces of a difficult acquisition and accomplish it in a way that satisfies all parties. … [T]he adept negotiating lawyer does not allow a seeming impasse to sabotage an otherwise viable deal, but instead devises a workable compromise (which itself can possess aspects of creativity) fulfilling the needs of both sides without subjecting either to serious adverse consequences.

James C. Freund, Anatomy of a Merger: Strategies and Techniques for Negotiating Corporate Acquisitions (Law Journal Press 1975).

In addition to looking out for the interests of our own clients, this sometimes required us to help the other side solve its problems in order for the deal to get done. A sense of impending resolution pervaded the scene. Even when negotiations bogged down, we figured we could ultimately work things out. After all, the fact that the parties were there voluntarily and still talking was proof that they wanted to do a deal. And the top executives, although frustrated, weren't really irate at each other, and could still negotiate their differences in (mostly) civil terms.

Knowing why I'd been hired, I always felt a sense of responsibility to deliver a favorable outcome. Here's how I expressed that thought, as part of my personal credo:

> It goes against my grain to see deals muffed that should be made—whether because of intransigence, overtrading, miscalculation, erroneous assumptions, or whatever. I recognize that some deals simply don't make sense. But when one is itching to occur, I feel a sense of failure if I can't concoct and carry out a strategy to bring the two sides together."

James C. Freund, Smart Negotiating: How to Make Good Deals in the Real World at 29 (Simon & Schuster 1992).

Crucial Factor

The crucial factor in deal-making is that if the negotiations prove unsuccessful, the parties can simply walk away from the table, terminating the talks with no further responsibility. As a result, unless your leverage is commanding, you don't take extreme positions in a transaction that your client wants to consummate, and you can't "stick" with impunity on anything less than a real deal-breaker.

And so, we all embraced compromise—reckoning that most deals wouldn't get done

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unless we could find accommodative solutions to divisive issues. Oh, sure, occasionally you ran into a cynic—such as Ambrose Bierce, who defined "compromise" in his *Devil's Dictionary* as "such an adjustment of conflicting interests as gives each adversary the satisfaction of thinking he has got what he ought not to have, and is deprived of nothing except what was justly his due."

And sometimes you'd hear one of the players moan about "compromising his principles." But in my view, any negative connotation to the word in the business world is undeserved. A compromise—however messy and inelegant—that satisfies both parties sufficiently to do the deal is one hell of an accomplishment. (Although I'm not sure I'd go quite as far as Edmund Burke, who said, "All government—indeed, every human benefit and enjoyment, every virtue and every prudent act—is founded on compromise and barter.")

But then, when you cross over from deal-making into the domain of resolving disputes, the road to compromise is a whole lot bumpier.

In part, it's emotional. Each side is often enraged at the other, which doesn't create an atmosphere conducive to compromise. Distrust is rampant. In contrast to the make-it-happen attitude pervading a deal, the parties to a dispute often display a noticeable ambivalence. One day, it's "Let's settle"; the next, it's "Let's go back to square one."

In the typical one-shot dollar dispute that sprouts in the aftermath of a sale or other completed deal, the disputing parties generally have little or no existing relationship and thus lack shared interests that might facilitate resolution of the conflict .

When, as is often the case, the dispute arises after one party has paid the other in full (as in a sale), the seller's possession of the money provides powerful leverage that often causes him to adopt a hardball posture. And there's little of the sense of resolve that marks the deal atmosphere—none of that stuff about helping the other guy solve his problems so as to make the deal happen. In a dispute, no one gives his adversary the time of day.

The typical deal contains dozens of issues to resolve, and no single issue other than price takes on disproportionate importance. You can make progress resolving individual issues one by one. But in a dispute—in which everything often depends on agreeing upon a single number—it's tough to make headway. Much more pressure is placed on the final breakthrough.

But here's what really distinguishes disputes from deals in the business world: In a deal, if the parties fail to strike a compromise resolution, they just go home. But if that stalemate occurs in a dispute, they go to court, with the ultimate prospect of an all-or-nothing result dictated by a judge or jury, or sometimes by an arbitrator.

Because of this, those who think they have a winning case are reluctant to accept a compromise that is less favorable to them than what they expect to achieve by prevailing in court.

As a result, the biggest hurdle in dispute resolution is the need to assess the litigation alternative against which any proposed settlement has to be measured. What's the most likely outcome in court, and how likely it is to occur? That's not an easy determination to make.

Unlike many kinds of deals, there's often a scarcity of models or benchmarks to rely on in business disputes, which typically have their own unique facts and dynamics. You might be able to make an educated guess, but you can never know for sure what the judge will decide, let alone an unpredictable jury. What's more, because the judge can't whack up the dollars at issue somewhere in the broad middle where a settlement has a chance of taking place, the negotiated resolution is bound to be at odds with an all-or-nothing litigation result.

Further complicating the matter is what might be termed the people element. The management of disputes generally falls into the hands of litigators—trial lawyers—who have some special interests and problems of their own in achieving a compromise settlement.

Please understand, in raising this issue, I am *not* subscribing to the accusation sometimes heard that the litigator's heart isn't into settlement because she or he is itching to try the case for the dollars and glory it'll bring. Rather, to mix a metaphor, it's a matter of some baggage that comes with the territory.

Psychological Adjustment

If, as is frequently the case, the lawsuit has started before the settlement talks begin, the litigators have been busy throwing their weight around—alleging fraud and depredation, seeking trebled damages, ridiculing their adversary's claims.

In the litigation papers, everything is larger than life and choking on adverbs: the opponent's argument is "patently absurd," and the simplest contractual phrase is "hopelessly ambiguous." And the litigators, who tend to be combative types, often reflect the indignation their clients feel.

To shift abruptly from all this bristling to a rational discussion of settlement possibilities requires a sizable psychological adjustment. And what further undermines the process is that the litigators can't tell whether a settlement ultimately will be reached—so the left hand is negotiating while the right hand prepares to resume the conflict.

This uncertainty can deter trial lawyers from making conciliatory gestures or from taking positions that imply vulnerability or convey weakness. They're often hesitant about initiating settlement talks and reluctant to swap meaningful concessions, for fear this will complicate their lives if they have to go back to the mat. But that sort of rigidity is antithetical to the search for a workable compromise.

The litigator may also have trouble, of a more subtle variety, in his or her own camp. Clients like their gladiators to be tough, forceful advocates. Many successful trial lawyers respond to this by cultivating a hawkish image.

It's hard for such a litigator—poised to defend the client's honor with gusto—to now prod the client in the direction of settlement. The litigator runs the risk of being deemed a "softie," who's afraid to try the case and is ready to capitulate. Yet that prodding may be just what's needed, particularly with irate clients who want their day in court although the outlook at trial isn't rosy.

Courtroom-savvy lawyers may not be equally comfortable handling negotiations at the conference table. Some of the qualities that make for a good litigator—the "winning" mentality, an instinct for the jugular—aren't conducive to compromise settlements.

Conversely, qualities honed in negotiation, such as knowing when to adjust your sights

or lower the temperature of the encounter, are unlikely to get sharpened in the skirmishes of a lawsuit. And even if the litigator on your side is well-equipped in this regard, you have to be concerned that the trial lawyer on the other side isn't up to the task.

In the Smart Negotiating book, I advocated a four-point "game-plan" approach to negotiating deals. The approach was designed to answer the negotiator's most pressing questions: What do I want? Where do I start? When (and by how much) do I move? How do I close?

The Smart Negotiating technique works quite well in the deal context, but it encounters some real problems where a dispute is involved. For instance:

- Assessing your realistic expectation for the negotiations—"*What do I want?*"—runs smack into the difficulty of predicting what is likely to happen in the litigation. It also faces the added hurdle that your adversary—whose presumed views must be factored into the assessment, in order to make your expectation realistic—is likely to have a different slant on the probable judicial outcome than your own.
- Determining an appropriate opening proposal—"*Where do I start?*"—which neither appears to overreach, nor manages to underachieve, is a crucial step toward launching the parties on the right path to a deal. In most disputes, however, each side is determined to put its best foot forward, so that the initial bid-and-asked disparity can be enormous. As a result, the negotiators are often discouraged from taking what seem like futile steps to try to close the gap.
- Engaging in a constructive concession pattern—"*When—and by how much—do I move?*"—designed to deliver both parties into the vicinity of their realistic expectations, is difficult enough in a deal context. But in a dispute—where there's no premium on momentum, and reciprocity can be viewed as a sign of weakness—it's very tough indeed.
- And arranging the ultimate compromise—"*How do I close?*"—where all the focus is on a single finite number with few opportunities to be creative or expand the pie, is no picnic—especially when the settlement calls for more "give" from one of the parties than previously anticipated.

As a consequence of these and other factors, many disputes remain deeply enmeshed in litigation, with only half-hearted forays in the direction of a negotiated settlement. And these forays generally fail, at least until that moment, on the steps of the courthouse, and after a lot of time, energy and expense, when the parties finally face up to reality.

The Case for Agreement

As stated at the outset, I'm a great believer in the virtues of compromise solutions to rip-roaring disputes.

A Good Word for Compromise

The commonplace goal: Producing a viable and satisfying agreement.

The commonplace obstructions: 'Intransigence, overtrading, miscalculation, erroneous assumptions, or whatever.'

The commonplace (but rarely acknowledged) ending: Compromise, 'however messy and inelegant ... that satisfies both parties sufficiently to do the deal is one hell of an accomplishment.'

In the great bulk of commercial cases involving dollars, it makes real sense to settle rather than go to trial. Litigation is prohibitively expensive; it takes a long, long time to obtain a final judgment and then get through the appeal process; lawsuits are a continual source of aggravation and negative energy; they can disrupt business operations and create adverse publicity—to name just a few factors.

But one reason stands apart from all the others, especially (but not exclusively) when viewed from the perspective of a corporate defendant: Assuming there's a substantial sum of money or something else of significance at stake in the dispute, it's simply too great a risk for a company to entrust its fate to the inscrutability of a judge or the vagaries of a jury or the uncertainty of an arbitrator.

For business people, litigation is not a logical way to resolve a dispute. It isn't the way good executives run their companies—making rational risk-reward decisions, basing their business judgments on an assessment of the probabilities. By contrast, a judge or jury generally goes all the way for one side or the other, even when the probabilities are more nearly balanced.

When I was representing clients in these matters, I focused on devising a negotiating strategy to achieve an acceptable compromise deal. I conceded to my clients that this didn't represent a perfect solution, but I reminded them that untidy situations don't lend themselves to ideal outcomes.

With a client who relished his adversary's unconditional surrender—unattainable through negotiations but possible in court—I empathized with the passion, but then refocused the client on settlement as a way of controlling the client's own fate, rather than rolling the dice and facing the possibility of a devastating judicial decision.

Operating in today's world, I might borrow the apt phrase of a younger colleague and tell the client, "The outcome of this dispute is just too important to your company to outsource."

I realize that other bolder advisers—particularly those representing plaintiffs—may commonly counsel the client to go for broke, and some less risk-averse executives may well be amenable to such advice. But the great bulk of the business people I have encountered impressed me as more concerned with the possibility of a serious adverse result than enthralled with the prospect of a complete victory.

Any negative connotation (from those whose pretentious mantra is "standing on principle") is undeserved. In my book, a compromise—however messy or inelegant—that satisfies both parties sufficiently to do a business deal or resolve a commercial dispute, is one hell of an accomplishment.

By the way, when I talk about compromise, I don't mean to suggest an invariable 50-50 split. Just where the compromise takes place

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will depend on a lot of factors that can tilt toward or away from one side or the other. But it's still a compromise—defined in the dictionary, and as I remind the parties frequently—as "a settlement of differences in which each side makes concessions."

* * *

So that's the case for, and the problem attendant to, achieving compromise resolutions of disputes. The question then becomes: How to get the job done? Every compromise has two key elements. The first is finding the precise number or formulation that does the trick for both sides. The second is how and when it should be introduced, so that it's viewed as a resolution to the problem and not just another position that becomes the subject of further negotiating.

And because this is not a simple matter, that's where it can be helpful if the parties engage a mediator to assist in the process. But that's a topic for another day (or another article or, if you prefer, there's my book on the subject: James C. Freund, Anatomy of a Mediation: A Dealmaker's Distinctive Approach to Resolving Dollar Disputes and Other Commercial Conflicts (Practicing Law Institute 2012) (details on PLI's website at https://bit.ly/3jLPZH1)).

My purpose here has been simply to put in a good word for compromise.