

Chapter 5

Moving beyond ‘Just’ a Deal, a Bad Deal or No Deal

How a Deal-Facilitator Engaged by the Parties as
a ‘Counsel to the Deal’ Can Help Them Improve
the Quality and Sustainability of the Outcome

Manon A. Schonewille and Kenneth H. Fox***

Intellectuals solve problems, geniuses prevent them.

Albert Einstein

* *Manon A. Schonewille* is President of the board of ACB Foundation, a conflict management research center and partner in Dispute Resolution and Deal Making training & resource center TOOLKIT Company. Besides training professionals in the advanced use of mediation and negotiation techniques all over the world, Manon lectures business mediation at Utrecht University, where she also conducts research for her PhD thesis on deal facilitation. She co-chairs the International Committee of the Dispute Resolution Section of the American Bar Association (ABA) and is member of the Independent Standards Commission of the International Mediation Institute (IMI). She is a mediator with Result ACB in The Netherlands. Manon publishes regularly and is among others the author of TOOLKIT GENERATING OUTCOMES. Her e-mail address is: manonschonewille@home.nl.

** *Kenneth Fox* is an associate professor and director of graduate and undergraduate conflict studies at Hamline University in the United States and a senior fellow of the Dispute Resolution Institute

1. INTRODUCTION¹

Mediation is commonly characterized as one of several core ‘ADR’ processes.² ADR generally refers to ‘Alternative’, ‘Amicable’ or ‘Appropriate’ Dispute Resolution,³ whereas some professionals prefer to speak about ADR as ‘Effective’ Dispute Resolution.⁴ Regardless of how it is named, there is overall agreement that ADR in general and commercial mediation in particular play a valuable role in business dispute settlement, particularly in the context of potential and pending litigation. Mediation is often defined as ‘assisted’ or ‘facilitated’ negotiation to resolve a dispute through improved communication, better understanding of perspectives and clarifying of issues.⁵ The vast majority of literature on mediation focuses on dispute settlement and resolution. However, relatively little attention is paid to the transactional potential of business mediation – ways in which this ADR process can assist parties to build better deals. Similarly, mediation education also takes this stance, as illustrated by role-plays that focus on solving existing disputes, just like negotiation courses rarely offer role-plays in which a neutral third party assists the parties.

at Hamline University School of Law. He teaches a range of conflict theory and theory-to-practice courses for law and business students and for working professionals. His e-mail address is kenfox@hamline.edu.

1. This contribution is a rewrite of: M.A. Schonewille (2010) *Kleine Toolkit Deal Facilitation, of Liever Deal Mediation*, in G. Frerks et al. (ed.) *Preventive Mediation* (Antwerpen. Apeldoorn, Maklu). As well as Part IV, Chs 4 and 5 of M.A. Schonewille (ed.) (2007) *Toolkit Mediation Advocacy. De kunst uw cliënt bij te staan in mediaton en bij andere vormen van conflictoplossing* (Den Haag, Bju).

We especially want to thank our colleagues *Michael Leathes* and *Joan Stearns Johnsen* for their availability to edit the first draft of this chapter and for their valuable insights and very useful comments on substance and language!

2. In the United States the three core processes are negotiation, mediation and arbitration. See, e.g., Menkel-Meadow, et al. In Europe arbitration is generally not seen as part of ADR. See, e.g., Schonewille (2007a).

3. See, e.g., the chapter ‘Appropriate Dispute Resolution (ADR): The Spectrum of Hybrid Techniques Available to the Parties’ of Jeremy Lack in this volume.

4. Schonewille (2007a). Yet other professionals, somewhat humorously, regard ADR as an ‘Alarming Drop in Revenues’

5. Menkel-Meadow, at 266. Depending on how one understands the nature of conflict, the role of the mediator changes and, as a result, so does one’s approach to the mediation process. In recent years, a variety of different mediation models have evolved that reflect new and different ways to work with conflict, thereby expanding upon or changing this general definition. These other models include transformative mediation (Bush and Folger), narrative mediation (Winslade and Monk), and mediation for understanding (Friedman and Himmelstein), among others. For purposes of this article, we refer specifically to the facilitative problem-solving model of mediation, which is the most commonly taught form of mediation.

Moving beyond 'Just' a Deal, a Bad Deal or No Deal

In 2008, the American Bar Association (ABA) Section of Dispute Resolution held a live webcast on deal-mediation, during which Michael Leathes (2008)⁶ observed as follows:

Mediation has consequently been pigeon-holed in the public consciousness as (a) an alternative process and (b) something to do with 'disputes' and practiced by attorneys. Changing such an established mindset at the superficial level of comprehension is extremely difficult. The perception of the neutral needs to turn itself away from being an 'alternative', or just a dispute process, and be recast in new terminology, using more non-lawyer practitioners and conspicuously extended to deals outside the conflict arena.

Mediation is unquestionably a valuable process to settle disputes. However, the untapped added value of a neutral also may lie in his or her abilities to help parties achieve a better and lasting business deal. This is where we will focus our attention.

In complex international negotiations, multifaceted issues and/or large financial interests are often at stake. Suboptimal results from such negotiations result, at the very least, in missed opportunities, and often in lost or inefficiently allocated time and money. A neutral negotiation professional – what we refer to as a *deal-mediator* or *deal-facilitator* – increases the chance of an optimal and sustainable deal for both parties.

In practice, commercial negotiations risk ending with suboptimal outcomes. This may be due to a variety of factors – substantive impediments between the parties, cognitive and strategic barriers between negotiators, lack of negotiation experience of those involved, lack of preparation, miscommunication, conflicting negotiation styles or adhering to positions instead of exploring interests, among others.⁷ Many parties work hard to divide value rather than creating more value to share. We believe that these potential problems can be overcome effectively in professional deal management by a deal-facilitator.

This chapter examines the opportunities and potential drawbacks of working with a neutral third-party deal-facilitator in complex commercial transactional or international negotiation processes and discusses the circumstances and negotiation situations in which neutrals can potentially add the most value. We also compare deal-facilitation principles and processes with dispute mediation.

6. A Director of the International Mediation Institute, IMI. During his career as General Manager and General Counsel of several multi-nationals he has been a party in numerous negotiation, ADR and litigation processes.

7. For a discussion of such impediments, see Bush (1996).

Manon A. Schonewille and Kenneth H. Fox

2. JUST ANY DEAL, BAD DEAL OR NO DEAL?
THAT'S THE QUESTION

2.1. THE INEVITABILITY OF SUBOPTIMAL DEALS
IN THE REAL WORLD

Both practice and research suggest that we have difficulty reaching optimal outcomes through direct negotiation. Although there is a substantial and growing literature to help negotiators improve their technique, not all business people have the time, talent or pre-disposition to develop this expertise. As a result, many business negotiations fall short of optimal outcomes.⁸ Our own professional experience (and that of other colleagues in the field) suggests that many commercial negotiations either unnecessarily arrive at impasse or reach agreements in which there were lost opportunities to create greater value for all parties. Anecdotal evidence seems to indicate that commercial negotiations often arrive at an impasse and end without reaching an agreement or overlook opportunities to improve upon and create optimal value.

**2.1.1. Negotiator, Professional Capacity:
Jack-of-All-Trades**

Much is expected of the typical negotiator. The person must clearly understand and manage complex facts, keep in mind the goals to achieve, interpret what the other side wants and needs, estimate when to put what information on the table, balance constantly changing variables and options and attempt to convince the other side to go along with his or her proposals. It is a constant balancing act between value creation and value claiming, while taking into account practicalities such as achievability, timeliness and the broader consequences of various options. Aspirations and emotions need to be managed. The negotiator's and the negotiator's counterpart's worldviews⁹ need to be understood and considered – all in real time at the negotiation table.

For much of the last century, the standard approach to conflict was adversarial. The primary way to address disputes was litigation or, in many commercial disputes, arbitration. Similarly, negotiations were based on 'competitive' or 'positional' bargaining principles. However, in the 1960s and 1970s, a number of

8. Such outcomes include what is often referred to as 'SMART' elements: Specific, Measurable, Achievable, Realistic, and with clear Timing.

9. Definition in Wikipedia: 'A *world view* is the fundamental cognitive orientation of an individual or society encompassing natural philosophy, fundamental existential and normative postulates or themes, values, emotions, and ethics. (Gary B. Palmer, *Toward A Theory of Cultural Linguistics* (University of Texas Press: Austin, 1996), 114). It is a loan translation of German *Weltanschauung* composed of *Welt*, "world", and *Anschauung*, "view" or "outlook".... Additionally, it refers to the framework of ideas and beliefs through which an individual interprets the world and interacts with it.'

publications emerged reflecting new and important thinking about the negotiation process, especially in the field of industrial relations.¹⁰

In 1981, Fisher and Ury (and in later editions, Patton) published their groundbreaking book *Getting to Yes: Negotiating Agreement without Giving In*, marking a new approach toward negotiation and dispute resolution – principled negotiation, also known as problem-solving, interest-based, integrative, mutual gain, win-win or the Harvard approach to negotiation (referring to its intellectual roots in the Harvard Negotiation Project). Insights such as separating the ‘people from the problem’, focusing on both parties’ interests rather than positions, inventing options for mutual gain, insisting on objective criteria and employing new concepts, for example, BATNA (best alternative to a negotiated agreement) and WATNA (worst alternative to a negotiated agreement),¹¹ were the key to a more constructive approach to negotiation. It also stimulated the development and refinement of other methods for resolving disputes, such as mediation.

2.1.2. Efficient versus Suboptimal Outcomes

From the second part of the 1980s, other significant research and insights into the negotiation process were published. Several studies¹² suggested that even experienced negotiators very often fail to reach a deal for reasons having nothing to do with the merits of the deal itself. For example, negotiators may fail to discover the other side’s position in full, may not negotiate based on interests or may lack bargaining skills. Negotiation is a challenging task for negotiation professionals, lawyers and business-people alike.

In 1982, Howard Raiffa (1982) published *The Art and Science of Negotiation*. In addition to providing a conceptual framework for the negotiation process, he described a negotiation experiment involving experienced executives. The group was arranged into twenty-one pairings to negotiate a merger transaction. The parameters for the (fictitious) companies involved were such that it was possible to arrive at a deal. However, only nine of the twenty-one pairs actually struck deals, meaning that twelve of twenty-one, or 57%, did not. In 1985, Raiffa reported additional research into Pareto efficient versus suboptimal outcomes, by applying game theories and mathematical fair division approaches to negotiation

AQI

10. A groundbreaking book on negotiation in industrial relations was written by Walton & McKersie (1965), whose basic ideas have been applied to many fields outside of industrial relations. Their book was edited by Kochan & Lipsky (2003) into a book that takes in account recent developments in thinking about negotiation.

11. BATNA, is the acronym for Best Alternative to Negotiated Agreement. This is the most positive scenario that can be envisaged if the negotiators fail to reach an agreement. Exploration of the BATNA ensures that the negotiated outcome is better than the available alternatives. WATNA refers to ‘Worst Alternative to a Negotiated Agreement’ and instructs negotiators to also consider the worst consequences of not reaching agreement. Glossary in: Schonewille (2009).

12. For example, Raiffa (1985, 1996) and Bazerman et al. (1992).

processes.¹³ Research like Raiffa's, which demonstrates the difficulty of reaching negotiated agreements and, where they are reached, of achieving Pareto efficiency, raises important questions. Specifically, we are interested in knowing whether a deal-facilitator might help more negotiators reach deals and help those who do achieve deals to improve on their outcomes.¹⁴

The effect of direct negotiation (including through the use of agents) versus mediators (deal-facilitators) in a negotiation process was also studied by Bazerman et al. (2000), and the most important findings were – not unpredictably – that mediators in general help parties to avoid impasse and reach agreement, and that negotiators and their agents often hinder in these actions.¹⁵

2.2. DEALING WITH YOUR BRAIN¹⁶

2.2.1. Attribution Errors, Fixed Pies, Reactive Devaluation, Overconfidence and Other Inconveniences

Every negotiation implies dealing with psychological barriers and subconscious processes that influence the course and outcome of the negotiation. Negotiators are subject to psychological pitfalls, such as ego-defenses, self-serving biases and fundamental attribution errors, that is, the assumption that the negative behaviour of others is due to their personality and that the positive behaviour of the counterparty is due to the circumstances, whereas the reverse is true for them. There is evidence that even professional negotiators are duped by their own overconfidence through assessing their own alternatives more positively than they actually are and by overestimating the value of the things they offer to the other party.¹⁷ Recently, it was found that these effects become stronger if one party is in a position of power. De Dreu and van Kleef (2004) called this effect on the powerful party 'cognitive laziness'.

Conflict escalation accelerates when parties regard a negotiation in terms of a risk or loss instead of an opportunity or a (potential) gain.¹⁸ Fisher, Ury and Patton (1991) offered principled negotiators a clear guideline through the problem-solving adage to be 'unconditionally constructive' in order to reach the best solution. However, based on other research, this adage might be modified to

13. A negotiated outcome is Pareto efficient if no other outcome is possible that will make one party better off without making the other party worse off. The conclusion reached was that in most cases the negotiators do not end with a Pareto efficient result, consequently leaving value on the table.

14. In the same text, Raiffa discusses the option of engaging mediators in merger and acquisition processes.

15. See also Bush, who argues that mediators provide 'added value' to negotiations.

16. This title is inspired by a Toolkit training on neuroscience and decision making in negotiation processes <www.toolkitcompany.com>.

17. For example, De Dreu, Nauta & van de Vliert (1995).

18. Bazerman, Magliozzi & Neale (1985); De Dreu, Carnevale, Emans & van de Vliert (1994).

incorporate a combination of strategies such as a mixture of competing and cooperating (or tit-for-tat)¹⁹ negotiation moves that can yield better outcomes.²⁰ There apparently is no easy one-size-fits-all way to negotiate.

During a negotiation, other psychological factors such as the *fixed pie assumption* can kick in. Here, parties see the issues at stake as slices of a metaphorical pie that have to be divided during the negotiation. As a result, each negotiator is inclined to think 'The more the other party gets, the less that remains for me'. This leads to positional bargaining, makes it difficult to create value and can lead to *reactive devaluation*: the idea that 'a proposal from the other side will by definition be bad for me, so I am against it.'

2.2.2. Irrationality: We Cannot Help Ourselves, Can We?

Negotiation consumes a lot of mental energy. In order to save this energy and manage the complexity of negotiation, we use a variety of cognitive devices to simplify what we must process. Although these 'heuristic' devices work well for us most of the time, they can cause problems that complicate the negotiation process. Bazerman and Neale (1992) described such psychological barriers that negotiators encounter that make them behave irrationally (in the eyes of others) and more importantly for the topic of this chapter, prevent them from reaching an optimal outcome. For example, a known order of magnitude is a simple anchor for our brain. So once a number or negotiation proposal is put on the table, our brain uses it as a reference point, no matter how far off the number is to our own ideas of what is realistic or optimal. Turchin and McGuire (2005) describe an experiment that demonstrates the effect of such anchoring. Two groups of respondents were asked 'How long is the Mississippi River?' For group one, the researchers added 'longer or shorter than 800 km?' and for group two, they added 'longer or shorter than 5000 km? The average estimated length in group one was significantly lower than that in group two.²¹ So a specific proposal, or the introduction of a number during a negotiation (here, a suggested river length or anchor point), affects our ability to assess options and consequently impacts the course of a negotiation. A trained negotiator can try to take advantage of these mechanisms, but will nevertheless also be influenced by anchors set out by his or her counterpart.

19. A tit-for-tat approach is being cooperative, assuming integrative or principled negotiation, unless you are being provoked. If you are being provoked, you respond to the other party in the way they are behaving to you – you are, so to speak, copying the behavior of the other party. You forgive and forget quickly. This means you are not hitting back harder than necessary, and you do not want to be seen as scoring points. As soon as you reach your goal, i.e., the other party is adopting a more constructive attitude, you follow suit. Schonewille (2009) Glossary.

20. For example, van de Vliert, Euwema, Huisman (1995); van de Vliert, Nauta, Euwema & Janssen (1997).

21. For the curious or statisticians: the length of a river varies on account of the constant change in river bedding, so the Mississippi river is on average over 3,700 km long. Source: <www.nps.gov/miss/riverfacts.htm>.

Even if it is specifically stated that the anchor number has been chosen strictly at random, it influences the negotiator's estimation.

Parties also assume that the world is the way they perceive it. 'Reality' as we observe it, however, is constructed by the way the brain functions and by how it processes information combined with real or constructed input from the environment. Social psychologists speak about this as *naïve realism*.²² We believe that our own convictions are based on a rational interpretation of reality and that our actions are consistent with it. We assume others should have the same perceptions as we do, simply because, from our point of view, it is the right way to look at things. If others have a different way of looking at the world, most people believe that this is because the others are unable to observe certain events in the correct way.

During a negotiation, this naïve realism can lead to inaccurate interpretations of what is taking place at the table. For example, it might lead to any of the following thoughts:

The other party sees things differently than me. S/he apparently has false or insufficient information, so if I provide the right information and explain how it should be interpreted, and then s/he will realize I am right.

The other person is stupid, stubborn or dominant, so s/he is not capable of logical interpretation. S/He reaches the wrong conclusion or makes irrational decisions.

The other person is not able to see the world 'objectively.' S/He has certain prejudices, fixed opinions, self-interests.

Negotiators often assume the other side is prejudiced or has a false view of matters. However, we often forget that the same principle also applies to the way our negotiation counterpart views us.

2.3. RETHINKING NEGOTIATION 1.0

In 2008, Hamline University²³ initiated a four-year cross-disciplinary, global initiative to rethink contemporary negotiation theory and pedagogy. This 'rethinking negotiation teaching' initiative has brought together negotiation scholars and teachers from around the world to re-examine and advance the way negotiation is taught and practiced – moving the negotiation field from first- (negotiation 1.0) to second-generation (negotiation 2.0) thinking. Second-generation negotiation teaching does not abolish first-generation insights, but has a different focus and emphasis. Negotiation 2.0 does not regard negotiation as something for which a negotiator has a fixed set of tools and can plan a strategy while analysing the

22. Ross (1995) and Turchin (2005), as described in Schonewille (2009). Ross & Wand (1995).

23. Honeyman et al. (2009, 2010). Chapter from the landmark books that were produced as part of this project 'Rethinking Negotiation Teaching' (2009) and 'Venturing beyond the Classroom' (2010) are downloaded from the website of the Hamline Dispute Resolution Institute: <http://law.hamline.edu/dispute_resolution/second_generation_negotiation.html>.

Moving beyond 'Just' a Deal, a Bad Deal or No Deal

negotiation styles and gaming the interaction. Second-generation negotiation thinking challenges negotiators to develop a heightened awareness of themselves and others, focuses on the social worlds that negotiators inhabit and teaches negotiators how to act in the 'here and now' as the negotiation process unfolds.²⁴

These insights support the practical impression that negotiation is not a science but, instead, a highly contextual, dynamic and emergent process in which there is neither one best way nor any easy 'how-to' formula or advice.

Parties involved in complex negotiations usually do not disclose their real objectives, strategy, and impediments to their negotiating counterpart. Although this is understandable from human or strategic considerations – there often is a lot at stake and parties must work hard to establish trust – it can also be counterproductive. If you do not deal with the real interests and discuss potential problems during a negotiation process, it is unlikely that the outcome of the negotiation will achieve what you really need.

For parties in a negotiation it is often very difficult to negotiate about the substance and simultaneously manage all communications, psychological processes and interests of their own as well as those of the other side. There are a lot of things to manage simultaneously, and from neuroscience and anecdotal evidence we know that our brain is not well equipped to perform high-level multi-tasking. Those who claim to be good at multi-tasking can often simply switch faster in the brain.²⁵

As we have previously stated, many negotiations end without agreement or yield sub-optimal results with opportunities remaining unexplored and value left on the table. We have also noticed something more. At Result ACB,²⁶ we note that a large number of business disputes arise from incomplete, unclear or poorly tested transactional agreements. Such agreements can result in parties moving forward with deals based on differing expectations, divergent perceptions of information or facts and circumstances, vague or conflicting views as to 'who is in charge of what', among other sources of conflict. So every negotiation carries within it a very real potential for dispute. In general, negotiation results are not SMART and many issues remain vague. Moreover, most commercial negotiation processes do not end with the signatures on the contract. Finalizing the written contract is usually the starting signal for the real negotiation challenge – managing the various interpretations, expectations, constituencies and implementation tasks. Continuous updating, re-negotiating, and fine-tuning of expectations is required. Parties in direct negotiations may reach no deal, 'just a deal' or a bad deal as a result of their efforts. They also run the very real risk of subsequent disputes. So the question, then, is can third parties add value as facilitators of the negotiation process, helping parties improve on their negotiation outcomes?

24. Fox et al. (2010) in Honeyman et al. (2010).

25. <http://en.wikipedia.org/wiki/Human_multitasking>. What we mean by multi-tasking in this context is the ability to plan and device strategies to carry out all the complex tasks in the same time interval.

26. Dutch mediation provider, <www.resultacb.com> and conflict management research centre <www.acbfoundation.nl>.

3. DEAL-FACILITATION: MEDIATION WITHOUT A DISPUTE (OR NEGOTIATION WITH A MEDIATOR)

3.1. TERMINOLOGY

Deal-mediation, or deal-facilitation, is often described as a new application of an existing process. All mediation is facilitated negotiation.²⁷ Deal-mediation is facilitated negotiation, with the involvement of a neutral third party, of business transactions in which no dispute has arisen²⁸ – in other words, mediation without a dispute²⁹ or transactional negotiation with a mediator. Practice, however, is more complex, and to understand deal-facilitation as a credible, recognized, freestanding aid to negotiation, a proper definition is needed.

Deal-facilitation is an assisted negotiation process in which a third-party professional, whom the parties see as neutral and independent, is engaged jointly by all parties to a prospective deal to support them in their communication and negotiation process as they seek to reach the best possible outcome. The facilitator enables the parties to focus on the substance of the deal; however, the facilitator may, under certain circumstances, take on evaluative and other responsibilities where desired by the parties.³⁰ The objective is a speedy process, dealing optimally with substantive issues and achieving unambiguous, optimal and sustainable negotiation results. Because the deal-facilitator is the manager of the negotiation process, he or she is preferably appointed at the outset of the deal negotiation before potential problems arise. Said differently, a deal-facilitator is a neutral third party who is the organizer of deals, not a deal maker or conciliator.

Jeswald Salacuse (2002) describes a deal-facilitator as a ‘counsellor to the transaction’. In this sense, the deal is the client. Seeing a deal-facilitator as more than a shared and impartial resource to the parties is a thought-provoking idea. Looking at the transaction itself as the deal-facilitator’s true client – meaning that the deal-facilitator’s prime responsibility is to stand up for the interests and needs of the deal – makes the distinct and versatile role of the neutral deal-facilitator very clear. Seen in this light, the deal-facilitator is ‘counsel to the deal’. L. Michael Hager and Robert Pritchard introduced the concept of a deal-mediator–lawyer for large global deals as a role for commercial transaction lawyers in 2000.³¹ Hager, being active in both ADR and negotiation, asked himself, ‘If one can negotiate both to resolve disputes and reach agreements on fresh transactions and if mediation is merely “assisted negotiation”, why not bring in a lawyer neutral to help parties reach agreement on complicated or difficult contract negotiations?’³² After meeting Pritchard, who had actual experience in this field, the pair published an article

27. At least as the term is used in this chapter. See our fn. 5.

28. Stearns Johnsen (2008).

29. Wassenaer (2006).

30. Rework of Schonewille (2007).

31. Hager and Pritchard (2000).

32. Hager (2008), ABA webcast.

Moving beyond 'Just' a Deal, a Bad Deal or No Deal

describing two case studies and offering preliminary professional guidelines. As a result, the concept of deal-mediation was formalized.

As seen earlier, deal-facilitation is also referred to as deal-mediation,³³ *transactional* mediation and 'assisted deal-making',³⁴ which differentiates the process from dispute mediation, although it may cause misunderstandings because the deal-facilitator is not a deal-maker.³⁵ The term *mediation* is used in this context because the deal-facilitator is a neutral or impartial third party who applies mediation principles to help parties negotiate a deal. Mediation to resolve disputes is, in that context, referred to as dispute mediation.

Although we like the terminology *transactional mediation*, we prefer to use *deal-facilitation*³⁶ or *facilitated negotiation*³⁷ because the use of the word *mediation* in this context may cause confusion. There is no dispute that needs to be resolved and the often-found formalities of mediation are not applicable. Although a deal-facilitator uses techniques similar to those used by a mediator, his or her role is more pro-active and the order in which techniques are applied is different. Section 7 of this chapter provides a TOOLKIT with an overview of several techniques and interventions and the stages of a deal-facilitation process in which they are being used, as well as a comparison with mediation tools and techniques.

3.2. CLASSIFICATIONS OF DEAL-FACILITATION PROCESSES

Salacuse (2002) describes an international deal as a continuing negotiation between parties in a constantly changing environment and sees negotiation as a tool to manage the deal. He identifies three stages in an international deal-making process in which parties need negotiation and conflict resolution techniques to be able to reach their goals and where a third party could support them in their efforts: a deal-making mediator (to get the deal done), a deal-managing mediator (conflict prevention after the deal has been signed) and a deal-mending mediator (to settle conflicts that may arise between parties). He includes several case studies to illustrate these approaches. This 'mediator' can be either an impartial third person, one of the advisers or one of the parties themselves, where agreed upon.

In practice, the role and tasks of the deal-facilitator touch on all three stages Salacuse mentions and often change in the course of the negotiation process. Moreover, although a deal-mending mediator may be seen as the 'classical' dispute mediator, in this context, he or she plays a different role. A deal-facilitator who may help the parties mend their deal also can be involved in establishing the deal, thereby changing the dynamics. Additionally, during the deal-making part of the

33. Hager and Pritchard (2000) <www.imi-mediation.org>, Salacuse (2002).

34. Middleton-Smith and Moore (2007).

35. Peppet (2004).

36. Schonewille (2007a).

37. Stearns Johnsen (2008).

negotiation, things such as conflict prevention and managing the deal are very important. Further, as discussed earlier, we suggest being careful using the word *deal-making* in relation to the neutral third party whose task it is to manage and organize the negotiation process. Therefore we prefer to divide deal-facilitation into two (rather than three) dimensions: deal-building facilitations and deal-ending facilitations.³⁸

3.2.1. Deal-Building Facilitation

A deal-facilitator can be engaged to establish an agreement or transaction and possibly to guide its implementation. Specific tasks of the deal-building facilitator include:

- Managing the negotiation process.
- Ensuring that the deal is realized and on terms to which all parties involved can agree.
- Preventing and, if necessary, resolving, disputes during the negotiation process and at a later stage during the implementation of the negotiated outcome.

A deal-building facilitator manages the negotiation with the objective to obtain a timely, substantive, efficient, sustainable and durable outcome.

The Negotiated Envelope: Case Study of a Hybrid³⁹ Deal-Building Facilitation

The background of the case: A straight-forward negotiation, bogged down on the price

PMEC⁴⁰ is a small, Dutch, independent, successful business selling up-market casual clothing and accessories for men originally themed on 1950s aviator gear. BAT is a British multinational tobacco company that for decades had owned a series of clothing trademarks that were licensed to PMECC. BAT had no interest in continuing to own the trademarks and was happy to sell them to PMECC, who preferred to own its own brand names rather than operate under a license agreement. It seemed an easy situation – a willing buyer, a willing seller, no other parties in the frame and a simple deal.

38. Schonewille (2007a).

39. See for an explanation of hybrid methods the chapter ‘Appropriate Dispute Resolution (ADR): The Spectrum of Hybrid Techniques Available to the Parties’ of Jeremy Lack in this volume.

40. This case study is based on an actual Result ACB case that was described in ‘Einstein’s Lessons in Mediation’ of Leathes et al. (2006). The article was co-written by both parties, the deal-facilitator and the ADR provider, therefore the names of the actual parties involved in this case may be used.

Moving beyond 'Just' a Deal, a Bad Deal or No Deal

Negotiations went well until the discussion, inevitably, turned to the price. Both companies had a clear idea about what they considered a fair price; however, the figures of the two companies were dramatically different. The parties did not have a dispute about anything. Both wanted to make the deal but could not agree on the key issue, money. In order to break the impasse, they agreed that each would instruct an independent professional expert in valuing brands to help them arrive at a mutually acceptable price. After exchange of their valuation reports the parties would meet again to finalize the deal.

Unfortunately the two prominent professional firms had arrived at very different valuation results based on the same facts.

The parties' initial positions

PMEC is prepared to pay something for the rights, but it has limits because owning the trademarks will only increase the uncomfortable feeling (but not the business) and they have capital and cash limits. Also, there are alternatives such re-branding over time, merging with another company and using their brand rights or putting up with the discomfort and continuing to license the rights from BAT. PMEC views the BAT valuation report as unrealistically high and unaffordable.

BAT had gradually sold off its non-core rights to focus on what it knew best – being a tobacco business. Owning and maintaining these clothing brands was a throw-back to the past. BAT wants to divest them, but not give them away. They had a longtime relationship with PMEC, which had built a business with these brands and it would have been irresponsible for a large company like BAT to threaten to sell the brand rights to a third party just to intimidate PMEC into paying more. On the other hand, the trademarks in question are certainly not worthless, and the company's shareholders had the right to expect a fair value. BAT viewed the PMEC valuation report as unrealistically low.

Choosing the method

Both parties wanted to close the deal, maintain their relationship and have a result quickly, but there was a large gap in valuation that had to be closed.

The parties discussed several methods:

Mediation or deal-facilitation would take care of the timing and relationship issues, but there was no guarantee that there would be an outcome at the end of the day.

Arbitration could spoil the relationship, and they would lose control of the outcome unless they chose final offer arbitration; however, because of the large gap, both parties were afraid to let their fate be sealed by the other or an arbitrator.

Mediation-arbitration was considered, but both parties wanted to have the opportunity to caucus and confidentially discuss underlying interests and explore options that could have drawbacks if the person being confided in might later be called on to make a binding decision.

A one-day hybrid arbitration-mediation procedure – in this case an informal arbitration in the morning, followed by deal-facilitation in the afternoon – was the best alternative. An outcome was guaranteed at the end of the day, but the parties had ample opportunity to control that outcome themselves by arriving at an amicable arrangement.

The deal-facilitation process

The neutral acted in the morning as an arbitrator and arrived at a fair and appropriate valuation over lunch that was placed in a sealed envelope. The amount was not disclosed to the parties. The afternoon was spent by trying to negotiate a deal under the guidance of the same neutral.

It was agreed that if by 4 p.m. the parties had not arrived at a mutually acceptable outcome, the envelope would be opened and the parties would accept the valuation figure that it contained.

The deal-facilitator began the afternoon session by emphasizing that he had done his evaluative job. He stressed that his role had now changed radically. The goal in the afternoon was to assist the parties in arriving at a negotiated agreement to avoid opening the envelope – an act that could have pleased one party but probably not both.

The deal-facilitator held several private sessions with each party, and after two hours had moved them both to common ground. The gap was closed by exchanging terms that represented value as well as by understanding what each needed to reach a mutual agreement. The pie was enlarged and the existence of the sealed envelope helped tremendously in an unspoken form of reality testing – it represented a tangible WATNA for both parties. By looking at the underlying issues, aspects other than just the financial interests could be brought into the negotiation. The heads of agreement were signed at 3.30 p.m.

The outcome

In spite of the curiosity of all involved the envelope was not opened to compare the negotiated outcome with the decision of the arbitrator. When asked whether the figure in the envelope was very different from the negotiated deal the deal-facilitator commented that this was the wrong question. The question instead should be: had parties arrived at the best outcome for them? And the answer, for them both, was yes. The envelope only contained a number, and parties had negotiated a multi-faceted deal that took in account the interests of both.

3.2.2. Deal-Ending Facilitation

A deal-ending facilitator can be engaged to guide the process of terminating a contract, joint venture or business partnership or to guide their completion. Tasks of a deal-ending facilitator include:

- Managing the process of cancellation and termination.
- Ensuring that the termination will be realized in a manner that is acceptable to all parties involved and with minimal negative impact on relationships and the business itself.
- Preventing, or preventing the escalation of, disputes and where necessary resolving conflicts.

A deal-ending facilitator guides the process of cancellation and termination and strives to ensure that the business relationship is not unduly spoiled and also that the parties' interests are not damaged. The objective is to try to find a termination mode and terms in which, as far as possible, the interests of all stakeholders are met. In practice, a well-conducted deal-ending facilitation may even, in appropriate occasions, turn into a deal-building facilitation.

Ending a business relationship in a non-damaging way can often be an even greater challenge than negotiating and closing a new transaction. Also, in a corporate setting a termination – especially of cooperation – can be an emotionally charged affair. Usually a termination does not come out of the blue and there is typically a history behind it such as unfulfilled expectations, miscommunication or distrust. The 'terminator' usually wants to terminate the contractual obligation or end the cooperation with the least possible cost incurred and as soon as possible. The terminator has often developed the termination strategy over a period of time and perhaps has prepared several legal actions. However, the 'terminee' is often caught by surprise by the termination notice and may try to resist the termination, buy time to develop a response strategy or seek an exit strategy at least cost or maximum possible compensation.

Starting Over Again: Case Study a Multi-Party Deal-Ending Facilitation⁴¹

The background of the case: Starting over again. Four parties (subsequently five) are involved in a deal-ending facilitation regarding the financing of a company

A bank wanted to terminate an outstanding loan of EUR 100,000 to an agricultural company. At the time the loan was granted there were two guarantors involved. A fast outcome is vital because company assets

41. This case study is based on an actual Result ACB negotiation. To preserve confidentiality some details have been changed. The case was published earlier in Dutch (Schonewille (2007a)).

(e.g., livestock) could perish. Moreover the company was facing potential bankruptcy. The complicating factor in this case was the involvement of the two guarantors and the fact that the guarantors were both customers and users of the company's agricultural products as well as suppliers to the company. Previous negotiations about the termination of the loan had bogged down because the bank and the guarantors could not reach an agreement.

The parties' initial positions

Bank: The loan is not repaid, so under the terms of our agreement we can terminate the loan. Our relationship ends here.

Company: The bankruptcy must be prevented at all costs, and therefore the loan is vital.

Guarantor 1: Wants a bailout in order to reduce damages.

Guarantor 2: Wants to terminate the relationship with the company immediately.

The deal-facilitation process and the outcome

The deal-facilitator started with a private meeting of approximately two and a half hours with each of the parties. Next a joint session was scheduled that took an entire day. During the individual meetings the parties' interests were explored:

Bank's interests: Needs to limit loss and risk; a feasible solution with maximum security; if there would be more collateral, continuation of the loan could be discussed.

Company's interests: A solution is needed quickly because they want to have a new start; the company has found an additional source (a new financier) willing to contribute if a substantial part of the loan can be continued.

Guarantor 1's interests: Wants to continue the relationship with the company and is therefore motivated to support a bailout.

Guarantor 2's interests: Wants to limit its own loss and risk.

During the joint session the deal-facilitator worked on restoring trust and focused on establishing the mutual interest: All parties wanted to find a solution that would limit the loss and risk of all involved. Once the parties had re-established sufficient confidence in each other, the additional financier was introduced. Because the company was able to contribute a substantial amount for refinancing the loan with the help of the new financier, the other parties were motivated to find a solution. This helped to bridge their differences of opinion. The guarantors are willing to contribute to the solution by continuing their relationship with the company. Because the new financier is sharing part of the risk, and due to the positive attitude of the guarantors, the bank is willing to make a positive contribution and continues a substantial part of the loan. This deal enables the company to make a restart and over time repay the entire loan.

3.2.3. Combination

A deal-ending facilitation can sometimes evolve into a deal-building facilitation. In more complex and multi-party situations, both activities might be combined in one and the same process.

The Russian Solution: Case Study of a Multi-party, Multi-cultural Simultaneous Deal-Ending and Deal-Building Facilitation

The background of the case: Getting the parties together to simultaneously negotiate a deal-ending between parties A and B and a deal-building between parties A and C

- (1) USCo⁴² is a US manufacturer who wants to negotiate cooperation with RusCo, a Russian manufacturer. USCo is a worldwide market leader and has mainly premium brands. They want to enter the Russian market. RusCo has high-volume lower price point brands and is the largest manufacturer and distributor in this market segment in Russia. They do not trust USCo as they see them as their competitor.
- (2) AusCo, an Australian manufacturer internationally distributes products of RusCo. Although AusCo has invested considerable effort sales still have been slow for several years. They want to terminate their cooperation with RusCo as soon as possible and concentrate their efforts on the Pacific area. RusCo wants to maintain the status quo with AusCo and continue their cooperation.

Complicating factors

Cooperation between USCo and RusCo would in principle be advantageous for all parties. However, there are complicating factors that need to be overcome.

- Multi-cultural parties with incompatible cultural and personality-based negotiating styles.
- RusCo views USCo mainly as its largest competitor.
- RusCo mistrusts USCo.
- RusCo and AusCo have been cooperating for many years; RusCo trusts them and wants to continue cooperation.
- AusCo loses money rapidly especially on the RusCo cooperation and urgently needs to terminate the cooperation.

42. This case study is based on an actual negotiation. To preserve confidentiality some details have been changed. The case was published earlier in Dutch (Schonewille (2007a)).

- RusCo has a large and vague constituency without any formal structures or processes for decision making and tuning in. Part of the constituency consists of ten factories whose businesses need to be protected. In fact, the total constituency involves sixty-four sets of communication streams, different interests, positions, commitments and so forth. These factors indicate complex negotiation process.
- RusCo is an important player in the Russian market and is afraid of losing face through the termination of AusCo or if a cooperation with USCo would turn out to be unreliable.
- Through the involvement of the government, RusCo's dealings have potential political implications; therefore a deal may not be perceived as a 'foreign initiative'.

Choosing the deal-facilitator

USCo and AusCo wanted to arrive at a deal and engaged a deal-facilitator, whose first task it was to get all parties and especially RusCo willing to negotiate. A highly respected Dutch mediator was engaged to take on the role of deal-facilitator.

The deal-facilitation process and outcome

The neutral began by initiating several private meetings with all three manufacturers, especially RusCo's factories and management, as well as the government. The objective of these preliminary meetings was to establish trust and create mutual respect so that the parties were willing to engage in a negotiation.

Next, joint sessions were initiated in which the deal-facilitator focused on exploring underlying interests, reality testing and exploring BATNAs and WATNAs.

The final deal was framed and communicated to the constituencies as a 'Russian solution'.

The deal-facilitator was available as sounding board and for troubleshooting during the implementation of the termination between AusCo and RusCo and the sealing of the cooperation between RusCo and USCo.

The result was a long-lasting joint venture between USCo and RusCo that remained functioning long after the individuals that were involved had moved on to other organizations.

3.3. THE ROLE AND TASKS OF A DEAL-FACILITATOR

Although a deal-facilitator may have evaluative tasks, he or she is not responsible for the substance; as in any mediation this is the domain of the parties. The deal-facilitator is the process manager, the organizer of deals or counsel to the deal, who

Moving beyond 'Just' a Deal, a Bad Deal or No Deal

can primarily focus on the process and communication dimensions of the negotiation. This allows the parties and their advisers to fully concentrate on the substance and on each other. The neutral can also add value by focusing on relationship building. In direct negotiations, this is a delicate dance. Trying to negotiate the best deal for yourself can conflict with maintaining a good relationship, particularly where economic or other apparently distributive factors are present. In the case of a job negotiation the chance to get the best terms is before someone is hired, but building a long-term relationship is equally important from the outset. Therefore high earners often employ an agent. The agent can take the tough position, allowing the employee to preserve his or her relationship with the future employer. A deal-facilitator can serve the same role for both parties to a complex deal, especially if seen as the counselor to the deal.

In addition to improving communication, providing attention to relational issues and helping manage process complexity, a deal-facilitator also adds value by providing structure to the process, fixing a timetable and assigning tasks. Moreover, the deal-facilitator can maintain an interest-oriented focus to the negotiation, increasing the level of trust between the parties and therefore adding greater flexibility and creativity to the negotiation process. Finally, the deal-facilitator can table proposals the parties are unwilling or unable to bring up themselves, support negotiators as they explore more extreme positions, help the parties engage in reality testing as well as managing the potential negative effects that an extreme position may have on the other side. In contrast, in direct negotiations, these activities pose the risk of derailing the negotiation process, even if a party is merely engaging in a sort of 'price discovery' exercise.

The deal-facilitator is available for the long term, including after the deal is signed. Thus, when new developments arise, or if continued implementation of the deal is at risk, the parties can again engage the deal-facilitator.

3.3.1. Overview Role and Tasks of a Deal Facilitator, the User's Perspective

According to Michael Leathes, what companies want from a negotiation 'are these things: We want outcomes, not process. We want speed. We want cost efficiency. We want removal of blockages. We want longer-term relationships. We want to avoid disputes and we want to maintain reputations. And we want them all at the same time.'⁴³

Professional deal management can help parties fulfil those needs. A deal-facilitator can take the burden of being responsible for the negotiation process away from the parties and can improve its quality and the outcome of the deal by producing durable interest-based results. Moreover, a good deal-facilitator keeps all involved parties on track, improves communications and clarifies misunderstandings, thereby minimizing disputes arising during the negotiation

43. Leathes (2008), ABA webcast.

process and maximizing the achievement of SMART deals right through the implementation phase of a business transaction. A deal-facilitator can also help address face saving, face making and confidentiality issues.

It is generally recognized that mediators can help parties settle commercial disputes and that they add value in these negotiations, particularly in the context of potential litigation. The same principle should apply to business transactions. In business transactions, companies spend significant resources to create deals, conduct due diligence and retain lawyers, accountants and other professionals, all of which is justifiable because substantial financial and other interests are at stake. It follows that businesses would similarly retain professionals to help avoid sub-optimal agreements and to make the best deal possible.

3.3.2. Checklist Preparation for Deal Facilitation⁴⁴

At the outset, the deal-facilitator should reach agreement with the parties (and their legal counsel) about the role and the scope of the deal-facilitator's assignment as well as any conditions and rules that apply to the negotiation. This can be either done in a pre-meeting process consultation or at the beginning of the first meeting.

Process Consultation with (Legal) Counsellors and/or the Parties

Confidentiality and privacy

- The deal-facilitator does not provide any information to third parties about the parties, the substance of the negotiation or even the fact that the deal-facilitation is taking place, unless parties have explicitly granted permission or have requested disclosure (*in writing*).⁴⁵
- To what extent do the parties appreciate confidentiality among themselves? In regard to third parties, decisions on confidentiality must be made, for example, on whether third parties should know the negotiation takes place, information arising from or related to the deal information or any information obtained from a caucus toward the other party.
- Are there other parties that should be consulted? If so, should they also sign a confidentiality undertaking?
- Is there a risk of publicity? If so, how should the press be handled?

Impartiality and neutral attitude of the deal-facilitator

- Should the deal-facilitator be totally independent? If not, to what extent could he or she be acceptable to act as a neutral? Facts or circumstances

44. This checklist can be downloaded from <www.toolkitcompany.com>.

45. A request of the parties to making something public does *not* imply the obligation for the deal-facilitator to do so.

that might interfere with the neutral's impartiality that should be revealed in advance to the parties are, for example:

- Having a personal or business relationship with one of the parties.
- The deal-facilitator (or his firm) acted previously on behalf of one of the parties.
- Any substantial interest or stake (directly or indirectly) that might be gained from the negotiations.
- Insider trading implications.⁴⁶
- Having prior access to confidential information with regard to one of the parties or the subject of the negotiation.

□ **Managing expectations**

- Finding out from all parties their objectives in the negotiation.
- Explore BATNA, RATNA,⁴⁷ WATNA and ZOPA (zone of possible agreements) early on to get an idea of the potential settlement range. Exploration of the BATNA ensures that the negotiated deal is better than the alternatives at hand. The worst alternative, WATNA, can support reality testing, just like exploring RATNA. The RATNA is what will most likely happen. ZOPA shows the likely range for a possible deal.⁴⁸

□ **The tasks and assignment of the deal-facilitator during the deal-facilitation**

- The deal-facilitator tries to manage the negotiation process and organize the deal to arrive at a favorable outcome for all parties involved. Check what this implies; do parties expect that the deal-facilitator is:
 - Responsible only for process management and organizing the deal.
 - Making an assessment of the substantive aspects of the deal, helping to find a solution or evaluating the business aspects or merits and drawbacks?
 - Advising only if all parties explicitly request it? To what extent or under which circumstances is his or her judgment binding to the parties?⁴⁹ Can/will the deal-facilitator hold separate private sessions with the parties in a caucus?
 - Manage time.
 - Explore and list the various interests, get underlying needs on the table, try to uncover hidden agendas.
 - Guide and stimulate brainstorming and generate options.
 - Identify objective criteria.
 - Prevent misunderstandings and ensure good communication.

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46. For example, should the deal-facilitator be formally considered an 'Insider' from a share trading standpoint and governed by the same restrictions as the party representatives?

47. Realistic Alternative To Negotiated Agreement, This is the most realistic scenario that can be expected if the negotiators do not arrive at an outcome. Schonewille (2009).

48. Remember to expand the pie. Do not lock yourself or the negotiators onto ZOPA. It's to get a first idea what is realistically possible.

49. For instance, when this assignment has been confirmed in writing beforehand.

- Clarify differing perceptions.
- Equalize power imbalances or undesired leverage effects.
- Establish or reinforce existing relationships.
- **Concluding stage**
 - Ensure a SMART settlement and unambiguous interpretation and understanding of the agreements.
 - Serve as a sounding board for parties and their advisors while they are drafting the agreement.
- **The role and mandate of the parties**
 - Which representatives from what organizational level and background are taking part in the negotiations? How many representatives of each party are required?
 - Are parties represented by legal or other counselors? Powers of attorney?
 - To what extent should the mandate of the representatives include their range of authority?
 - Who is the constituency, what are the procedures for agreeing/getting endorsement or approval with or from the constituency?
- **The assignment of the deal-facilitator after the conclusion of the deal**
 - Prevent miscommunication and therefore misunderstanding, generating clarity regarding the meaning of the agreement during the implementation phase.
 - Do the parties expect the deal-facilitator to remain available as an advisor, implementation manager or contract broker after the conclusion of the deal? If so, will the deal-facilitator help parties to solve any problems arising during the implementation phase?
 - Should the deal-facilitator be allowed to undertake future assignments for a party, for example, regarding something with the same or similar underlying subject matter, and if so, under what strict conditions?⁵⁰
- **Formal and administrative aspects**
 - **Cost-aspects**
 - The fee, which activities will be charged, allowance for travel expenses and travel time, writing reports or agreements and preparation.
 - How are the costs divided among parties?
 - Indication of the expected time/costs.
 - **Process management aspects**
 - Agenda (issues that need to be covered).
 - Venue.
 - Time planning: Required time for negotiation and the individual consultations? Is there a deadline for the parties that needs to be considered?

50. For instance, never, under pre-determined circumstances, or only with an explicit written consent of all parties.

- **Observing agreements** Do parties work with package deals?⁵¹
- **Governing law, language and dispute management.**
- Which law applies to the negotiation and the resulting agreement?
- How to handle possible disputes that might arise during or after the negotiation?
- What is the official language being used during the negotiation? Is an interpreter needed?

Note for deal-facilitators Transparency and clarity are very important, especially regarding potential conflict of interests or a lack of impartiality. Manage expectations and clarify your way of working and your role in the process. What will you do, what can parties not expect you to do and in what capacity are you acting and for whom (are you a deal-maker for one of the parties or an impartial deal-facilitator)? What is your approach to the negotiating process? Are you prepared to give advice or offer an evaluation? If so, under what circumstances and what is the status of your advice? Due to potential civil liability issues it is advisable to request the parties to sign a written deal-facilitation agreement.

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4. IN WHAT TYPES OF NEGOTIATION CAN A DEAL-FACILITATOR ADD MOST VALUE?

4.1. CHARACTERISTICS OF A COMPLEX NEGOTIATION PROCESS

A deal-facilitator can add tremendous value to a complex negotiation process, for example, in situations involving multiple parties, complex issues, or cross-cultural dynamics. Deal-facilitation can be particularly helpful where significant power imbalances or substantial unequal leverage exist. Leverage is any potential opportunity (power, chances, time, ascendancy, and so forth) that a party may exploit to shape the outcome of a negotiation in such a way that an agreement is reached the party's terms. Whether on a commercial or personal level, the party with the greater need to reach a deal often has the least leverage.

Generally speaking, considering the engagement of a deal-facilitator is appropriate for every negotiation process that is sufficiently important, large and complicated to warrant the extra costs.

Characteristics of a complex negotiation process:

- Multiplicity of parties or more than two representatives from each party.
- Cross-border/multi-cultural negotiations, especially when there is contrast in culturally based negotiating styles or difficulty in achieving mutual trust.

51. Package deal: In mediation, parties only commit themselves to a proposal or to an agreement if all issues have been recorded and signed in a settlement agreement or have been specifically agreed upon in a package. Until that moment all consensus is conditional.

- Technically, factually or substantively complex case.
- Negotiations involving competitors.
- Psychologically or emotionally complicated, potential underlying conflicts of important interest, great distrust between the parties involved.
- The negotiators are ‘entrenched’ in their own positions/views.
- Constituency problems, for example, a large or vague constituency or a constituency that is divided among themselves.
- Third parties or stakeholders play a role.
- One or more of the parties applies tough tactics or is an extreme positional bargainer.
- Power imbalance such as size, knowledge, sophistication, negotiation experience or resources.
- Lack of relevant and objective information with one of the negotiators or all involved start with different information.
- One of the parties has much more negotiating experience or is a much better negotiator.
- Media attention or high risk factors.
- The substantive issues can (potentially) affect others (e.g., personal living environment, the potential for large financial gain or loss, prestige); there are large interests at stake, such as financial.
- Lack of transparency and clarity about the (negotiation) process. For example, it is unclear what steps must be taken by whom, the status of documents or commitments, there is no agreed timeline.
- Time pressure can make a negotiation complex. Time is an important leverage factor that can make arriving at agreement more difficult, but it can also lead to reaching a quick(er) agreement.

A deal-facilitator may also re-energize a negotiation if parties have attempted direct negotiations and have arrived at a deadlock or impasse. If a deal is important to complete, this option should remain available. Thus, a deal-facilitator can add value for a variety of reasons and in a variety of ways.

4.2. MONOPOLISTIC MARKETS VERSUS COMPETITIVE BUSINESS MARKETS

In his article on using mediators to make deals, Peppet (2004) describes the bargaining dynamics in one-on-one situations in which transaction cost, information asymmetries and strategic behaviour such as posturing often lead to impasse or imperfect deals. Negotiating with the help of a lawyer does not overcome these dynamics because the lawyer who represents one of the parties can also fall prey to the same pitfalls as their clients. These issues and dynamics occur not only while settling disputes, but also during transactional negotiations. Peppet argues that, in theory, a deal-facilitator adds more value in ‘bilateral monopoly’-type markets (in which parties hardly have an alternative and therefore – comparable to dispute resolution between litigants – need to find a solution among themselves) than in competitive business markets (in which parties have more walk-away alternatives).

Moving beyond 'Just' a Deal, a Bad Deal or No Deal

In bilateral monopolistic circumstances, parties will often try to discipline themselves to make the negotiation less adversarial or more attractive to all involved. Peppet conducted a survey of 122 practicing mediators and found that 39% had mediated at least one transaction, and most of these cases had bilateral monopoly characteristics. The study supports the suggestion that third parties add value when assisting in making deals and sustaining them. This article also describes the opportunities in which a deal-facilitator can add value in various stages of a deal's life cycle.

5. DEAL FACILITATION, WHY WOULD YOU (NOT)?

5.1. POTENTIAL BENEFITS OF EMPLOYING A DEAL-FACILITATOR

A deal-facilitator adds value by:

- Structuring an orderly negotiation process, providing a clear negotiation framework through professional negotiation management and ensures a good preparation.
- Promoting transparency and availability of objective information.
- Increasing the chances of reaching an interest-based outcome within a pre-defined time frame.
- Identifying and managing imbalances and neutralizing the effects of negative leverage.
- Preventing breakdown of negotiation caused by deadlocks, high emotions and communication and interpretation problems.
- Supporting parties to maintain relationship building while claiming value.
- Neutralizing difficult negotiation tactics of (one of) the negotiators and managing conflicting personalities and clashing styles or differing objectives.
- Directing and managing the party advisors and preventing them from losing themselves in 'specialist topics' or wasting time exploring irrelevant or tangential issues
- Enabling parties to explore new options and discuss underlying interests in confidence, for example, in a caucus; helping parties to explore more extreme positions without derailing the negotiation process.
- Supporting parties in framing or reframing issues and generating clarity by reality testing.
- Promoting understanding and communications in cross-border or multi-cultural negotiations, especially if incompatible values or cultures or different languages are involved.
- Assisting parties in dealing with constituency issues and being available after the deal is signed as a source of continuity. A deal-facilitator can assist parties who are engaged in an ongoing relationship to deal with potential 'people' problems, tensions or unexpected issues that may arise during implementation.

5.2. POTENTIAL DISADVANTAGES OF EMPLOYING A DEAL-FACILITATOR

A deal-facilitator can:

- Bring additional costs.
- Add another individual to the negotiating table, meaning one more person to match schedules and dates with and to communicate with and an additional person who receives confidential information.
- Require agreement on the deal-facilitation process or the person who should be appointed the deal-facilitator. This can spark an additional negotiation process of its own. This can be simplified by asking an ADR provider to prepare a shortlist. In our experience at Result ACB it is usually easier for parties to agree on a general profile of the neutral first and then on a specific person. Another hint for non-administered deal-facilitation is to always discuss and agree on at least two potential neutrals to avoid having to start again when the intended neutral turns out to be unavailable. Another option is to engage a deal-facilitator in another capacity, for example, as a negotiation coach that works for one party.
- Create the potential for over-reliance on the deal-facilitator, which can lead to a position of undesirable power. Especially in situations in which a party or party advisor takes on the role of deal-facilitator during a negotiation process, this may be an important consideration. Working through an ADR provider can relieve this problem because parties can always turn back to the provider for feedback or request substitution of the neutral.
- Introduce new potentially conflicting interests. When the deal-facilitator works for a success fee or on a no cure/no pay basis he or she may have a stake in the outcome and be tempted to try to reflect their own interests. Clear agreements beforehand on the role of the deal-facilitator can take care of these aspects.

6. DEAL-MAKER, DEAL-FACILITATOR AND DISPUTE MEDIATOR: WHAT'S THE DIFFERENCE?

6.1. THE GENERAL DIFFERENCE BETWEEN DISPUTE MEDIATION AND DEAL FACILITATION

We have previously discussed some of the differences among deal-makers, deal-facilitators and dispute mediators. However, we believe it is useful to more clearly articulate these distinctions. Parties in a dispute are usually hostile and emotional; there is poor or even non-existent communication. Disputants generally focus on wants instead of needs and have fixed ideas of how the other party should move in order to accommodate them and can be obsessed with revenge or recrimination. It is very difficult for them to be creative and think about options to expand the pie,

Moving beyond 'Just' a Deal, a Bad Deal or No Deal

let alone see options for mutual gain. The parties have descended Glasl's escalation stairs⁵² and it is clear that they are in conflict.

By contrast, parties involved in deal-making are generally on friendly terms, at least superficially, and the communications seem open and positive. They appear to be willing to consider options, including those for mutual gain, and to search for opportunities. Negotiators seem positive and focused. However, mistrust and suspicion lurk below the surface. The potential deal is often seen as a fixed pie, of which each wants to win the biggest slice and in spite of over thirty years of *Getting to Yes*, most negotiations remain highly positional.

6.2. DEAL-MAKER, NEGOTIATION CONSULTANT,
DEAL-FACILITATOR AND MEDIATOR

Characteristics, advantages and disadvantages compared.

Deal maker

<i>Characteristics</i>	<i>Advantages</i>	<i>Disadvantages</i>
<ul style="list-style-type: none"> – Appointed by and appearing for one party as this party's representative in a negotiation – Objective is to arrive at a concrete negotiation outcome (often pre-defined) which is beneficial to the client. – In principle no formal structure or regulation, although some rules or code of conduct may be applicable depending on the occupational background and formal capacity of the deal maker. 	<ul style="list-style-type: none"> – Efficient method to pursue own interests to the end with the help of a representative with professional negotiation skills and experience, whose most important aim is to arrive at the client's desired outcome. – Especially if the client has limited negotiation skills or lacks substantive knowledge that is important for the negotiation, such as a legal or financial background. 	<ul style="list-style-type: none"> – Depending on the style and experience of the deal-maker, the negotiation can become competitive or positional. – On one hand the deal-maker must be briefed in advance and prepared sufficiently on the substance, background and expected outcome by the client, yet at the same time this harbours the risk of inflexibility and missed opportunities to create value based on new information or unknown interests of the opposite party.

52. See chapter 17.

<i>Characteristics</i>	<i>Advantages</i>	<i>Disadvantages</i>
		<ul style="list-style-type: none"> – In principle the other party must give his or her consent to involving the deal-maker. In practice this is usually not a big issue because both parties usually engage a deal maker (e.g., a lawyer in settlement negotiations or a real estate agent). – Additional costs, which can be substantial for a complex negotiation process, have to be borne by one party solely. Also a negotiation process set in motion may be difficult to stop, so the party may need the deal-maker (with all costs attached) to the end.

Negotiation consultant or coach

<i>Characteristics</i>	<i>Advantages</i>	<i>Disadvantages</i>
<ul style="list-style-type: none"> – Appointed by and working for one party as this party's coach, sparring partner or consultant in a negotiation – The objective is to enable the client to arrive at the desired negotiation outcome. 	<ul style="list-style-type: none"> – No consent of the other party is necessary to engage a negotiation consultant or coach – A negotiation coach or consultant can add value to a party who is an experienced negotiator, especially 	<ul style="list-style-type: none"> – The client needs sufficient sophistication and negotiation skills to carry out the negotiation. – The negotiation should be sufficiently important to justify the additional costs.

Moving beyond 'Just' a Deal, a Bad Deal or No Deal

<i>Characteristics</i>	<i>Advantages</i>	<i>Disadvantages</i>
<ul style="list-style-type: none"> – A negotiation consultant usually acts in the background and not directly or primarily at the negotiation table. The client does the negotiation. 	<ul style="list-style-type: none"> for a negotiation process in which important interests are at stake or if it is a complex negotiation (see paragraph 4.1). – The all-important preparation for the negotiation will be done properly. – Next to negotiation advice – depending on the professional background of the negotiation consultant – he or she can also add substantive know-how. – The additional costs are usually limited and can be restricted or capped by the party. 	

Deal-facilitator or transactional mediator

<i>Characteristics</i>	<i>Advantages</i>	<i>Disadvantages</i>
<ul style="list-style-type: none"> – Appointed by and working for all parties involved as the manager of the negotiation process. – The objective is to enable all parties to arrive at an interest-based negotiation outcome to which all parties can agree. Another objective is 	<ul style="list-style-type: none"> – Dramatically increases the probability of arriving at an efficient and optimal negotiated outcome. – Keeps the negotiations interest based. – The parties and their counsellors can fully concentrate on the 	<ul style="list-style-type: none"> – Consent of all parties is necessary both on engaging in deal-facilitation and on the choice of the deal-facilitator. – Another party is added to the negotiation dynamics. – The parties must be willing and able to negotiate themselves.

<i>Characteristics</i>	<i>Advantages</i>	<i>Disadvantages</i>
<ul style="list-style-type: none"> to prevent problems or disputes at a later stage and to monitor the implementation. – Guides the entire negotiation process. – In principle, no rules or formal regulations, the parties decide the conditions under which they want to negotiate. – Very flexible. 	<ul style="list-style-type: none"> substantive aspects because the deal-facilitator is responsible for the process aspects. – The additional costs will be shared by all parties. 	<ul style="list-style-type: none"> – The negotiation should be sufficiently important to justify the additional costs.

Dispute mediator

<i>Characteristics</i>	<i>Advantages</i>	<i>Disadvantages</i>
<ul style="list-style-type: none"> – Appointed by and working for all parties involved as the conciliator and assisting the parties in their negotiation to settle a dispute. – The objective is to settle a dispute and/or to improve understanding and communication. – Flexible but structured process (mediation rules and regulations are usually applicable). 	<ul style="list-style-type: none"> – Good method to arrive fast at an interest-based settlement for a dispute. – The additional costs will be shared by all parties. 	<ul style="list-style-type: none"> – Consent of all parties is necessary both on engaging in mediation and on the choice of the mediator. – Another party is added to the negotiation dynamics. – One shot ad-hoc process, curative after a dispute has arisen, not preventive. – No support during the implementation.

7. TOOLKIT MAKING AND SUSTAINING A DEAL vs. DISPUTE RESOLUTION

Although a deal-facilitation involves largely the same principles as a facilitative mediation in a dispute setting, the ways in which the interventions play out are often different. The parties to a deal are often focused on the possibilities of their

Moving beyond 'Just' a Deal, a Bad Deal or No Deal

future working relationship and what they can achieve together. This may mean that communication patterns will be different than in dispute mediation, and the parties may be more open to exploring shared interests. However, this may also mean that the parties have not critically examined the deal they are about to make. For the deal-facilitator, this means paying close attention to creative possibilities for agreement. It also means paying close attention to unrealistic hopes and expectations. It is therefore advisable early on for the deal-facilitator to check for the real possibility for agreement (the ZOPA) and to work with the parties to clarify their over-arching objectives.

	<i>Deal-Facilitation</i>	<i>(Dispute) Mediation</i>
	<i>Making and sustaining a deal</i>	<i>Dispute settlement</i>
Techniques, style and approach of the process by the neutral	<p>Deal-facilitation basically employs the same techniques as dispute mediation but generally involves a more pro-active role on the part of the facilitator, and the order of the employment of skills can be different:</p> <ul style="list-style-type: none"> – ZOPA discussions as well as – development of objective criteria and – exploring BATNA, WATNA and RATNA are important in an early stage of the negotiation. <p>In deal-facilitation, even if the parties are negotiating positional, this tends to be more consciously tactical than in disputes, because the positions are usually not so entrenched. Parties in deals are usually more open to discussing options earlier on in the process (at least in confidence).</p>	<p>ZOPA-exploration, and so forth, are usually done at a late stage in a dispute mediation. It is important to thoroughly explore interests and to deal with emotions before asking the parties to focus on settlement ranges or talking about options for a solution. This is because in disputes, the parties usually have much more entrenched positional convictions, which all too often have obliterated the interests. Moreover emotions usually play a more prominent role and need to be dealt with before focusing on the content.</p>

	<i>Deal-Facilitation</i>	<i>(Dispute) Mediation</i>
	<i>Making and sustaining a deal</i>	<i>Dispute settlement</i>
	Emotions during a negotiation generally run on a lower level than is typical when resolving disputes.	
Uncovering hidden agendas and getting the real issues on the table	No dispute, therefore no open hostility; parties appear to be more friendly than they really are. Actually each wants part of what the other has got. In a deal context, differences are often re-interpreted and re-positioned. There is generally more posturing, pretense, hidden agendas and false assertions than in disputes.	A dispute has occurred. Therefore distrust and hostility are crystallized and more or less obvious. In a dispute setting, parties are more open about their differences.
Options and alternatives	Parties to a deal usually have a broader range of options and alternatives than those in a dispute. Parties to a deal can often either not do the deal at all or do it with someone else.	In a dispute the choice is often limited to: litigate, capitulate or settle. Therefore, the options and alternatives are limited. In a dispute mediation 'the deal' does not take place in a 'competitive market'.
Reactive devaluation	Reactive devaluation can be over-emphasized; in a negotiation it is often much more obvious and easier to deal with than in a dispute.	Reactive devaluation plays a more important role (i.e., one party is more likely to reject a proposal from the counterparty merely because it was the counterparty who proposed it).
Overconfidence, ego-defence and anchoring	People tend to overvalue what they are selling or offering and undervalue what they are buying or receiving. Deal-facilitators	In a dispute, anchors are quite often already placed; moreover, people under stress are usually more sensitive to the effect of

Moving beyond 'Just' a Deal, a Bad Deal or No Deal

	<i>Deal-Facilitation</i>	<i>(Dispute) Mediation</i>
	<i>Making and sustaining a deal</i>	<i>Dispute settlement</i>
	need to see through this, and reality testing and BATNA/WATNA analysis is as important as in dispute settlement. Moreover, careful placing of anchors is very important. ⁵³	anchoring (and other psychological processes).
Process and structure	The deal-facilitator is a third party that is regarded by the parties as being sufficiently neutral and impartial for their purposes. There is no regulation, total freedom and flexibility for the parties to shape their own process. The objective of the process is to pre-empt problems and reach a lasting mutual gain deal based on interests.	A mediator is a neutral and impartial third party who is generally bound by a code of conduct, mediation rules and often disciplinary rules or a complaint scheme. The purpose of the process is to solve a dispute and to find a mutual gain solution based on interests.

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(Source: Michael Leathes and Manon Schonewille © 2007)

8. READY, SET . . . AND WHERE DO WE GO NEXT?

Deal-mediation is still in its infancy, but it is gradually attracting attention, and rightly so. The theoretical foundations of deal-facilitation steadily take form; the next step will be a wider application in practice. The international business world will increasingly pick up this opportunity to go beyond just a deal, a bad deal or no deal to arrive at better, professionally managed deals. One of the routes is to provide a valuable deal with a counselor of its own.

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Manon A. Schonewille and Kenneth H. Fox

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