

Problem questions on alternative dispute resolution (adr)



Scenario:

The Herbert City Council owns a Olympic Pool and Training Centre which is managed by a Mr Samuel Phlipper. Until February 18, 2011 the facility had been used by both the Under Water Hockey Federation of Australia and the National Synchronized Swimmers' Association. This has been possible because, up to now, the national teams of the respective associations have not made heavy use of the only available time in which the pool is closed to the public, that is, from 6: 00am to 8: 00am. Both groups have now decided to use Herbert as the base for their Games training programmes and, as a consequence, they are claiming the right to the full two hour session every day. Both parties assert that priority usage agreements have been signed with the Herbert City Council. Mr Phlipper is not willing to extend the hours at which the pool is open because this would incur excessive . overtime costs and any variation of hours would not only inconvenience him but would impact on the use of the pool by the general public. In addition to the dispute over the use of the pool itself, the two groups have become increasingly antagonistic. The all male Under Water Hockey Squad objects to the 'bee-bop' music played by the synchronized swimmers and claim that discarded hair pins and dislodged nose pegs left on the floor of the pool have caused the hockey players to sustain minor injuries during practice. For their part the women swimmers have taken offence to pictures of scantily clad females which have been placed in communal areas by the Hockey Squad and at the frequent remarks with sexual innuendo made by the Hockey Squad members. The men also have a record of leaving equipment around the pool and expecting the women to clean up at the end of the training sessions.

Question 1

Identify the parties' issues and interests. The two teams nominate a representative to attempt a resolution of the issues through direct negotiation. The President of UWHF, Chuck Fitzpatrick, is concerned not to appear sexist, and is very keen to appease the women's team. The representative of the non-hierarchical swimming squad, Ms Georgia Douglas, has been democratically elected because she is a person who can be relied on to hold firm to an agreed position. She does not intend to move from her bottom line. Her team must be guaranteed priority usage and all the offensive material must be removed from the pool complex.

This factual matrix revolves around a dispute between the key parties, the Under Water Hockey Federation of Australia, the National Synchronized Swimmers' Association and the Herbert City Council and its manager Mr Samuel Phlipper. It arises over the two teams' assertion to use the pool in the two hour time slot that it is closed to the public, each claiming a contractual priority right to the pool at this time.

Additionally, just as with most disputes, alongside the major issue there are secondary issues arising either directly out of the major issue or as a result of the antagonism between parties. These include having the pool closed for more than two hours in the morning [Mr Phlipper's concern]; the 'bee-bop' music and discarded hairpins and dislodged nose pegs [The Hockey Squad's concerns]; the pictures of scantily clad women placed in communal areas, the sexual innuendo and leaving pool equipment to be put away by the ladies [concerns by the Swimming team about the men's behaviour] and last but not least the antagonism between the teams and the attitude of the

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Swimming team and their representative to the Dispute Resolution process. The pool's public clientele are also a party, albeit minor. Though they do not have an 'issue' as such, they none the less have an interest which should not be completely ignored.

The aim here as with any form of negotiation, is to reach a solution as satisfactory as possible for all, within the attendant resource boundaries. Quintessentially, "[N]egotiating is a basic means of getting what you want from others. It is back and forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed." ¹ Note that the operative word here is 'interests'. That is, not what the parties want, but why they want it.

Aside from a concern for the public interest noted already, Mr Phlipper's personal interest is in avoiding excessive overtime fees and the inconvenience of having the pool open for longer. The Under Water hockey Squad's interests are impliedly, a desire to maintain an attitude and behaviour of male superiority and /or the area as totally their own, avoid minor injuries and it would seem common sense that Chuck [as the team's President] would have an interest in maintaining the Squad's reputation and/or want damage control on behalf of the Squad. The Synchronised Swimmers interests are not to have to deal with the Hockey Squad's sexist attitude and behaviour and expectations.

Just as with the President of the UWHF, the representative of the Swimming Squad also has an interest however her interest is in being positional. That is, she is focused on making sure that a certain outcome is achieved rather

than in fulfilling the interests of the team. This is clear since it is stated that " Ms Georgia Douglas, has been democratically elected because she is a person who can be relied on to hold firm to an agreed position. She does not intend to move from her bottom line." ² As mentioned above, this creates a tangential issue, *interalia*, because of the difference in power that can be created by the differing approaches to the negotiation.

As noted earlier, a vital, almost inherent component to any successful negotiation is a concentration on the parties' interests. Mackie in his book reviewing different negotiation strategies notes clearly that although there are different personality types resulting in different negotiating strategies and some more productive than others, position bargaining really has no place in negotiation. ³ "*Ineffective competitiveness*", however were described as irritating, headstrong, unreasonable, arrogant and obstructive, lacking the perceptiveness and realism of the effective competitiveness - 'The problem of the ineffective/competitive is relatively easy to define: he is obnoxious'. ⁴

Question 2

Advise Chuck on negotiation strategy and how he might deal with Georgia. The negotiators make little progress, so the two representatives decide to request a meeting with Samuel Phillipper. The sticking point appears to be that both teams must have 1 ½ hours each in order to prepare, train and shower afterwards.

A brief discussion of the different types of negotiation techniques available to Chuck in the circumstances, with their possible outcomes and

recommendations, will be undertaken, in order to more thoroughly advise Chuck on the strategy he might use to deal with Georgia.

There is no 'one and only way' to negotiate. Since personalities differ, negotiation styles and their adjunct strategies will also differ. Whether shy, competitive, demanding, accommodating, compromising, bullying or retiring, all of these will affect the way in which we deal with others and so too the way we negotiate. In essence however, these can be boiled down to two main approaches as very briefly alluded to earlier, the competitive adversary and the co-operative problem solver.⁵

Following the style of the problem solver, the Principled Negotiation concept and its accordant strategies, which arguably changed the landscape in the area of Alternative Dispute Resolution, was introduced by Fisher and Ury in the 1980's.⁶ This system has been tested and found to have a higher success rate with 59% of negotiators using this manner being effective whilst effectiveness with the adversarial model was only 25%.⁷ Furthermore, a follow up study found time the effectiveness of adversarial bargaining continuing to decline, being only 9% at the time the later study was conducted a decade later.⁸

There are five founding principles to this approach. The first step is to deal with the problem, not the people. The parties should direct any frustrations at the problem not each other and work together rather than being distracted by misdirected emotions and communication. The problem should be 'the bad guy' not the other party. The second and arguably most

important point is, as was already explained, looking at the parties' interests – what is behind what they ask for? Concentrating on this allows step three to almost flow naturally, that is, brainstorming to arrive at win/win situations instead of demanding certain outcomes. The fourth element is important to ensure that all parties are confident that the outcome was fair and this can be achieved through solutions based on objective standards. Lastly but by no means least is the BATNA – 'Best Alternative To a Negotiated Outcome'. This simply means doing the requisite preparation and knowing exactly what your bottom line is before you go in. As opposed to a positional stance, this is not what is brought in at the start and demanded but rather something each party is aware that beyond this point any agreement would be unworkable.

Given the success rate of the problem solving approach to negotiation, Chuck should normally be advised to take this approach. However, despite its success rate and as mentioned previously, sometimes there are obstacles, and in this case it is Georgia's adversarial approach. Numerous authors who commend the work of Fisher and Ury none the less state that different strategies need to be employed when a co-operative negotiator must deal with an adversarial party, making the playing field uneven.⁹

It is the opinion of this author that Principled Negotiation should still form the foundational strategy of Chuck's approach since ultimately this technique also aims to ensure satisfaction as much as is possible for both sides, and as such is most likely to mean a more enduring solution.

However rarely are negotiations purely co-operative and to do so here is, paradoxically, likely to be naïve and counter-productive.¹⁰ Therefore it is <https://assignbuster.com/problem-questions-on-alternative-dispute-resolution-adr/>

recommended that some further strategies also be employed. Wade points out in his article on strategies for difficult negotiations that the party making the first offer and the content of that offer are two very vital considerations.

¹¹ It is suggested here that Chuck's desire to appease the women's team, well intentioned as it is, not be allowed to result in Chuck's premature agreement. This is pivotal; a certain amount of delay may be necessary to allow room for thought.

Given that they are both in training, it seems likely that a competition of some sort is approaching for both teams and therefore possibly suggesting to Georgia that her unwillingness to even discuss 'her position' could cost them both a great deal of time, may also help. McLean when discussing difficult people posits that "[A] helpful strategy is to agree with the superficial complaint but then direct attention to the matter of costs and that perhaps there is something to be gained by compromise". ¹²

McLean also notes that it might also be important for Chuck to consider a way of allowing Georgia 'to save face' without letting go of anything that falls below the teams bottom line. ¹³ Since the sticking point is the actual time required to use the pool it seems that the Under Water Squad may be willing to amend the 'offensive' behaviour and this could be used by Chuck as a sign of compromise and allows Georgia the opportunity to show she has still managed to at least secure part of the girls 'demands'. ¹⁴

Question 3

Samuel is faced with a number of impasses and at least one difficult person. Identify them and suggest strategies he might use at the meeting.

The Impasses and People

The impasses seem to ultimately be that both parties need use of the pool for at least an hour and a half but it is only open for 2 hours each morning. A change in the behaviour of the men's team and the nose pegs, hairpins and bee-bop music of the women's team were an issue but these seem to be negotiable since we have been told that the 'sticking point' is the time for use of the pool so it seems these are no longer impasses. Opening the pool for longer will affect Samuel and the public interest and incur excessive overtime costs and though this is not a major impasse, it none the less still needs consideration and last but not least as pointed out earlier, Georgia is demanding that her team have priority use of the pool making her a more difficult person to deal with.

The Strategy

Samuel is brought in for a meeting with the two teams. His strategy will be largely determined by his role. If we are to take this scenario at face value, then Samuel would not be considered a neutral party since he does have an interest in and to a great extent, power over, the outcome of the dispute.

Therefore the most obvious role of just mediator is highly unlikely. NADRAC,¹⁵ the main governmental body overseeing Alternative Dispute Resolution in Australia explains that Mediation is a process in which [T]he mediator has no advisory or determinative role in regard to the content of the dispute or the

outcome of its resolution , but may advise on or determine the process of mediation whereby resolution is attempted. ¹⁶

Therefore Samuel is most likely to be acting in a hybrid process described by NADRAC as follows,

Combined or hybrid dispute resolution processes are processes in which the dispute resolution practitioner plays multiple roles. For example, in conciliation and in conferencing, the dispute resolution practitioner may facilitate discussions, as well as provide advice on the merits of the dispute. In hybrid processes, > such as med-arb, the practitioner first uses one process (mediation) and then a different one (arbitration).

The strategy therefore is likely to be one of combined mediation, negotiation and quazi adjudication, the last role arising out of the power he has to determine the other two parties' contractual rights giving him the power essentially to 'adjudicate' the matter. In *Capolingua v Phylum*, costs were not awarded to the winning party despite the rule that costs follow the event because of the winning party's unnecessary protraction of the matter. ¹⁷ One important factor about the inclusion of Samuel and his adjunct authority is his ability to control the outcome by taking Georgie's power to insist on her position out of her hand whilst simultaneously helping her 'save face'.

Samuel's best plan considering the interest of both parties could be to try to negotiate separately with each party first to see if they are willing to do alternate days, which would avoid Samuel having to keep the pool open for longer with its consequent problems. Should this fail, he could suggest the

option that the pool be open for an extra hour at the end of every day for the public, in place of keeping it open for the extra hour required in the morning to accommodate both parties. This would be on the basis that both parties are willing to share the extra cost and inconvenience of having the pool open and possibly opening it themselves. As noted earlier, if no agreement could be reached, Samuel is in opposition to make a final determinative decision.

References

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