



# WHEN PARTIES GET...

☐☐☐ Stuck, Wedged, Fixed,  
Positional, Trapped, Jammed,  
Entrenched



# APPROACHING AN IMPASSE

- What do you understand from the word impasse?
- Why do we try to overcome them? Why not let parties carry on to adjudication if they anchor on a position?



# Review of “Pure” Interest-Based Mediation Process

- Power/Rights/Interests
- Facilitated interest-based negotiation
- Neutral third party
- Impartial process
- “Party-centric” and Voluntary
- Informed Consent



# Review of “Pure” Interest-Based Mediation Process

- Facilitated interest-based negotiation:
- Interests vs Positions
- Options vs Decisions
- Legitimacy vs Power
- BATNA vs Deal



# HOW TO HEAD THEM OFF AT THE IMPASSE

- What creates impasses?



# Process Impasses: Before

- Refusal to meet, participate
- Pre-conditions to meeting
- Failure to fulfill pre-mediation requirements such as exchanging documents



# Process Impasses: During

## Process design to avoid impasses:

- Explicit negotiation over process
- Interest based negotiation process: Commitment at the end, not the beginning
- Avoiding early commitments
- Relationship building
- Perspective management
- Structuring simultaneous proposal exchanges
- Limiting trading opportunities
- Caucus vs plenary sessions



# Process Impasses: Offer

- You commit, I decide
- Don't offer less than "X" or we're leaving
- We've moved a lot, they should move now
- This offer is fair, the other side should move
- I have to get approval, don't have the authority to decide





# GETTING PAST NO

1. Don't React:



# GETTING PAST NO

1. Don't React: Go to the Balcony



# GETTING PAST NO

- 1. Don't React: Go to the Balcony
- 2. Don't Argue:



# GETTING PAST NO

- 1. Don't React: Go to the Balcony
- 2. Don't Argue: Step to their Side



# GETTING PAST NO

- 1. Don't React: Go to the Balcony
- 2. Don't Argue: Step to their Side
- 3. Don't Reject:



# GETTING PAST NO

- 1. Don't React: Go to the Balcony
- 2. Don't Argue: Step to their Side
- 3. Don't Reject: Reframe



# GETTING PAST NO

- 1. Don't React: Go to the Balcony
- 2. Don't Argue: Step to their Side
- 3. Don't Reject: Reframe
- 4. Don't Push:



# GETTING PAST NO

- 1. Don't React: Go to the Balcony
- 2. Don't Argue: Step to their Side
- 3. Don't Reject: Reframe
- 4. Don't Push: Build a Golden Bridge





# GETTING PAST NO

- 1. Don't React: Go to the Balcony
- 2. Don't Argue: Step to their Side
- 3. Don't Reject: Reframe
- 4. Don't Push: Build a Golden Bridge
- 5. Don't Escalate:

- *Getting Past No: Moving From Conflict to Co-operation; William Ury, New York: Bantam, 1991.*



# GETTING PAST NO

- 1. Don't React: Go to the Balcony
- 2. Don't Argue: Step to their Side
- 3. Don't Reject: Reframe
- 4. Don't Push: Build a Golden Bridge
- 5. Don't Escalate: Use Power to Educate

- *Getting Past No: Moving From Conflict to Co-operation; William Ury, New York: Bantam, 1991.*



# Commitment impasses

- This is our bottom line . . . Almost
- I'd rather pay my lawyer \$50,000 than pay you one penny
- We can't go any lower/higher
- If they want to settle, they will have to move
- There's just one more thing . . .



# BREAKING THE “IMPASSE MINDSET”

- Not about fair or just.
- Also not about compromise.
- About clear decision making, based on two perspectives:
  - Acknowledgement of the other side’s reality
  - Conscious valuation of my side’s priorities



- Acknowledgment of--NOT agreement with-- the other side's perspective
- Forget about changing the other person's mind: instead, work to create opportunities for people to change their own minds
- Understand your own priorities to be able to assess proposals clearly and consistently



# “IMPASSE MINDSET” in Tribunal Operated or Sanctioned Mediations

- Tribunal or regulatory context, those perspectives are subject to an overriding power that the parties in dispute must accept:
  - The legislation, rules, guidelines that govern the mediation and outcome
  - The public interest mandated exercised by the tribunal, even in the mediation context



# □ The Impasse Breaker's Toolkit

## – Assessing offers

- Recognizing tendency for “Reactive Devaluation”
- Asking parties to sell the Agreement for the other side



# BATNA analysis for decision making

- Review of BATNA
- General problems regarding BATNA:
  - Overvaluation of strength by parties (Article)
  - Underestimation of weakness by parties (Let's not make a deal)
  - Failure to improve or make BATNA concrete
  - Use as threat rather than decision making tool
  - Assessment as outcome rather than as course of action
  - Catastrophization” of BATNA by mediator





# Effective Presentation of BATNA to parties

- Explicit review of decision making process
- Questioning with the other side's strengths:
  - The other side has raised this issue . . . How do you counter that point?
  - Seems to me that their argument will include the following . . . What will you say when that is raised? How would you respond to those questions?



# Effective Presentation of BATNA to parties

- Questioning their weaknesses:
  - You have said you are going to prove X: how will you do that when the other side says the opposite is true based on the recording of your conversation?
  - Do you have any precedent for this point; the other side seems to suggest that there is none?



# Effective Presentation of BATNA to parties

- Particular opportunity for Tribunal members who mediate:
  - Evaluative mediation style
    - Eg. Here are the points that will be of concern to the Tribunal that you will have to deal with
    - Here is how similar cases that I am aware of have turned out,
    - Here are the issues that have created challenges for parties before the Tribunal



# Effective Presentation of BATNA to parties

- Distinguish INFORMATION that allows parties to make informed choices from ADVICE on what to do:
  - Significant influencing power, must be used appropriately and in compliance with your obligations and duties both as Tribunal member and mediator: impartial, neutral.



# Deeper into the Toolkit

- There's just One Last Thing



# Deeper into the Toolkit

- High Value, Low Cost Trades
- “Rounding”
- Lump Sum instead of particular items
- Splitting the Difference
- Unrecoverable costs
- Conditional Agreements
- Range for Discussion
- Double Blind
- Opinions