

Implementation Negotiation

The 2019 Annual AALS Conference on
Clinical Legal Education

Professor Tina L. Stark (retired)
Emory University School of Law

1

BATNA

Best
Alternative
To a
Negotiated
Agreement

2

Interests of the parties

Issues

Positions of the parties

Zone of agreement

3

Negotiators stake out **positions** on a range of **issues** in order to achieve their **interests**.

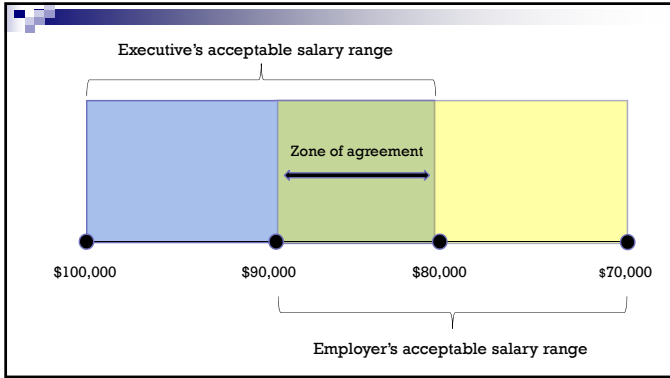
4

A prospective executive asks for \$100,000 (**position**) salary (**issue**) to achieve financial security (**interest**).

5

Zone of agreement represents potential resolutions of a particular issue

6



7

Framework for contract analysis

- What is the business purpose of the provision? Does the provision properly incorporate the agreed-on business deal?
- Can the provision better protect the client and reduce the risk?
- Can the provision further advance the client's goals?
- Are there legal issues?
- Are there drafting issues?

8

Categories of Implementation Negotiation

- Risk allocation.
- Expected zone of agreement.
- Problem-solving.
- Translation.
- Legal effect.
- Logistics.
- Contract language.

9

Loan Agreement Provision

6.7. Certain Fundamental Changes. The Borrower shall not directly or indirectly acquire all or substantially all of the assets and properties of any other Person or any discrete division or business of any other Person.

10

Risk Allocation Negotiation

Factual background:

- The Seller is selling all of the shares of one of its wholly owned subsidiaries (the Target).
- The Buyer's lawyer proposes the following representation and warranty:

No Litigation. No litigation is pending or threatened against the Target.

11

Risk Allocation Negotiation

No Litigation. Except as stated in Schedule 3.14, no litigation is pending or threatened against the Target.

12

Risk Allocation Negotiation

No Litigation. Except as stated in Schedule 3.14, no litigation is pending or, to the Seller's knowledge, threatened against the Target.

13

Risk Allocation Negotiation

No Litigation. Except as stated in Schedule 3.14, no litigation is pending or, to the knowledge of any of the Seller's three executive officers, threatened against the Target.

14

Risk Allocation Negotiation

For the purpose of this representation and warranty, "knowledge" means, cumulatively,

- each officer's actual knowledge; and
- the knowledge that that officer would have had after a diligent investigation.

15
