

Annexure - II

About Negotiation – A Write Up

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Introduction

The reading material is prepared with an object to provide an insight in to the concept of negotiation to the students. This is a bare minimum material, which can aid to prepare for the competition.

Negotiation

Jurist Mathews defines Negotiation as “a process of adjustment of existing difference, with a view to establish a mutually more desirable legal relation by means of barter and compromise of legal rights and duties and of economic, psychological, social and other interests”. The definition describes only one aspect of negotiation process. Negotiation is also involved at the stage of entering into contract. Therefore, the process is designed to enter into a legal relationship as well as maintain the existing legal relationship.

The Negotiator

As a negotiator, the first and foremost object should be, to protect the interest of the client by either entering or refusing to enter into an agreement. The entering into a settlement agreement alone may not protect the interest of the parties. What is required is a “wise agreement”. Wise agreement is the one, which is efficient in protecting the interest of both the parties and improves their legal relationship, or at least does not damage the existing relationship between parties.

At the same time as a true professional, the Negotiator is expected to provide all the options (best deals in different preferences) as well as alternatives other than negotiation, to solve the problems, and project their advantages and disadvantages.

Further, he should not heed to the pressure of the client in case of the prospects of his immediate benefit, which may in the end harm the interest of the client.

A Negotiator is expected to behave in an ethical manner and provide comprehensive solution to the dispute.

Pre-Negotiation Stage

The pre-negotiation stage is one of the important stages of the whole negotiation process. The majority of amateur negotiators commit mistakes at this stage. This is a brain storming session. The Negotiators are expected to find out best possible solution to the problem.

The session includes the drawing up of plan of action and the strategy to protect the interest of the client. In this session, the negotiator will understand the nature of problem, the issues involved and laws involved. The negotiator will agree upon the terms and conditions for the agreement settlement. Once the terms and conditions are finalized, the negotiator has to design the plan of action. The plan of action should relate to all the seven principles discussed below.

Position based or Hard Negotiation

The Negotiators commit the most common mistakes by choosing to take positions at the stage of brainstorming. It is rather always advisable to find the different conflicting interest of the client, and the other party and the common interest of both. Instead, the Negotiators take position of victim or sufferer or wounded, which results in a mind block.

For example, a case of breach of a contract, the party takes a position that he is a victim, and he needs redress. The negotiator is automatically prompted to bargain hard, thereby making it impossible for him to change and adapt. This consequently leads to an unwise agreement. During negotiation, when the client takes the position of a victim, almost instantly, ego gets attached to it and the rest of the bargain is directed towards the satisfaction of this ego, rather than finding a solution to the problem. Arguing over positions, thus endangers an ongoing relationship. The task of jointly devising an acceptable solution tends to become a battle. Therefore, during brainstorming session the Negotiators should consciously avoid taking a position and concentrate on providing solutions.

Soft Negotiation

On the other hand, the Negotiator may adopt more gentle style of negotiation. This depends on the needs of the parties and the object behind the negotiation. In this kind of negotiation, the parties instead of viewing the other side as an adversary prefer to view them as friends. The emphasis is not on the goal of victory but on the necessity of reaching an agreement. In soft negotiation, the standard moves are to make offers and concessions, which aim to win the trust of the other party. The soft negotiator tries to adopt the role of a friend and is willing to repose faith in the other party. His approach makes him yield to the demands of the other party, in order to avoid confrontation. If this type of a Negotiator meets a hard negotiator, it leads to exploitation, resulting into the feel of being cheated. Thereafter the party attempts to find ways to breach the settlement agreement. This type of a settlement agreement, though favors one party, ultimately leads to litigation wherein, relationship becomes a casualty.

Both above discussed approaches lead to an unwise agreement. The negotiator therefore needs to adopt a process which will yield a wise agreement and that achieved by adopting the method of Principled Negotiation.

Principled Negotiation

By keeping the above common mistakes in mind and avoiding them consciously, a plan of action has to be prepared, which the Negotiators will try to implement to their best capacity.

The plan of action of a best negotiator will contain flexibility, multiple solutions, and adaptability. This flexibility provides an opportunity to the negotiator to take ad hoc decisions. This helps in having a comprehensive approach and creates more control over the proceedings thus avoiding frequent re-consultation with the client, which may affect the level of trust between the negotiating parties.

During negotiation, the whole process can be subjected to self-analyses by posing three questions to yourself.

1. Whether it has produced a wise agreement?
2. Whether it has produced efficient agreement?
3. Whether it has any positive impact on the relationship with the other party?

Harvard Principles

The successful negotiation process can be conducted by considering the seven Harvard Principles on Negotiation. These principles propose to eliminate selfish bargain, replacing it with Principled Bargain.

Relationship

Relationship is an important aspect of the negotiation process. The main reason to adopt negotiation as an alternative process of dispute resolution is to protect the relationship between the parties. The regular judicial mechanism or Arbitration is an efficient process. However, the relationship is sacrificed due to the adversarial approach in the justice delivery system from day one itself. As two or more parties deal with one another in a negotiation, protecting relationship becomes the major object, even though it may be a one-time transaction and they may have no past or ongoing interaction.

A good businessperson looks at short-term gains and is ready to sacrifice relationship for it. However, a successful businessperson always invests in long-term gains. The negotiation is the best process for such a successful businessperson. The parties who establish the trust and faith in the market can have intergenerational survival instinct for ex: Tata, Reliance. Protecting relationship may appear to be least important at the time of negotiation, but the hostile business community may later harm the growth of the individual. So the first principle in the negotiation process is to protect the relationship between parties.

Communication

During negotiation people tends to get angry, depressed, fearful, hostile, frustrated, offended and confused to their perception as reality. When they confronted with this situation, the principle, which helps to overcome the situation, is Communication. Parties must talk to each other. The more they discuss the problem, more clarity is brought to the discussion table.

Miscommunication or vague communication may lead to a misunderstanding. This misunderstanding, affects the trust between the parties, which may lead to misinterpretation of the statements. This may prejudice the relationship, and further lead to deadlock in the negotiation process. If not, then it may lead to counter reactions, further damaging the relationship between the parties. This may lead to further misunderstandings. The lack of proper communication may lead to such vicious circle, which may be very difficult to break and will lead to two main casualties' vis., the negotiation process itself; and the relationship between the parties.

Interests

The parties involved in a negotiation always attempt to protect their own interests. However an expert negotiator tries to assess the concerns, objectives, needs, desires, or fears of the other party. The interests are of two types, vis., the conflicting interests, and the common interests. Enlisting conflicting interest provides a path for the negotiation and a fair outline of the approach of the opposite party can be drawn. However, most important factor is the common interest. Once common interests are enumerated and explained, the opposite party tends to understand the importance of the success of the negotiation. Common interest always binds the parties together and helps them understand and appreciate the needs and importance of each other.

The interests can be concerns. The parties' idea of profit varies depending on these concerns. For example, if the parties' concern depends on the cost, historical importance, antique value, then they will not value money during the negotiation. If the parties want to avoid the court, then will value the negotiation more and will make more concessions to reach an agreement. Once the concerns

are assessed, the negotiation becomes much easier. Showing empathy to the concerns of the other party always develops intimate relationship. This intimacy acts as a cushion during negotiation.

Fears are the main blocks in the negotiation process. The party under the fear does not open up and looks at the process with a doubt. The fear also creates bluffing, puffing etc, which are dangerous to the negotiation. A good negotiator always addresses the fears of the other party. Thereby building a rapport, this is essential for a successful negotiation.

If the interests are satisfied or at least included in the discussion, leads to satisfaction of the participants. This satisfied, wise agreement can potentially avoid disregard to the contract

Options

The negotiator proposes Options, which are the various possible ways by which the parties could work together, balancing their interests and more-or-less satisfies them in a negotiated agreement. The success of negotiation depends upon the number of options that parties propose. The exercise of enlisting 'options', includes the act of enumerating the various interests of the parties.

For e.g. Where the Municipality decides to increase the tax on the local factory, the interest of the municipality is to increase the revenue. This is the basic interest. If studied closely, the municipality is interested in investing the money collected, in the maintenance of municipal school, ground and garden in the city. However, the factory is hesitant to shell off more tax money. Therefore, the factory may come out with an option of volunteering to maintain the garden, as factory has already employed gardening staff to maintain the factory premises.

Further, the factory management may volunteer to publicize and invite more factories within the jurisdiction of the Municipality. With this Municipality will get more revenue than expected and factory will enjoy the business without increase in the tax rates.

This example as to options, sufficiently explains that negotiation is a process where the parties have no restriction for coming out with options. When parties concentrate on interests, their rights and liabilities take a backseat. With the different options available, the parties feel that they belong to the process, they feel recognized and they enjoy the new importance and credibility given to them for including the options aired by them during negotiation. All this helps in developing the first principle, 'relationship'.

Legitimacy

Negotiation being a voluntary process, the parties have complete control over it. It begins with the freedom to agree or disagree for the negotiation process, which continues during negotiation to the extent of agreeing or disagreeing to continue with the negotiation, and even includes the freedom to agree or disagree to a settlement agreement.

In this voluntary process, the negotiator has to strive to improve the faith of the parties in the negotiation process. The success of the negotiation depends upon the faith of the parties. The success in negotiation is not assessed on how much of profit the parties made, but measured on the aspect of whether both the parties respect the agreement? Whether both the parties willing to fulfill their respective obligations under the settlement agreement. In absence of both these, the negotiation is a half success. It is successful regarding the ability to achieve settlement agreement. However, in absence of loyalty, the settlement agreement may be breached and may result into an inevitable litigation.

The only method available to a negotiator to ensure loyalty of the parties towards settlement agreement is by providing legitimacy and objective standards, to the demands of the parties.

Legitimacy is an attempt made by the negotiator to provide an explanation to the demand made by his party. The major difference between a negotiation by the professionals and by the parties is that the professionals not only reach an agreement but also ensure loyalty to the agreement. The discussion between professionals will not be emotion based, but objective based. Thus legitimacy brings in moral force to the demand made by the parties.

Legitimacy can be explained by providing objective standards relied upon for making such demand e.g., In case of demand of compensation for the breach of a contract, the negotiator will assess the total loss suffered and it is liquidated by referring to the market value.

In case of ambiguity in the contract as to transportation charges, the negotiator will rely on the precedents followed in such trade or business.

In case of problem with demand made by the trade unions and refusal by the management, the negotiator relies on industry standards maintained in the different factories of the industry. These will be the concrete basis for the negotiation.

The objective standards also includes the negotiator's effort to convince the other party regarding his honest objective and to convince them that even the Court of law will follow these objective standards and therefore the outcome of the litigation would be largely similar.

The success of negotiation and the respect to the settlement agreement depends on the feeling of belonging, fair treatment and the feeling of following of fair procedures. Fair procedure is a slippery slope. Being fair is not enough, but fairness has to be rather manifested in the negotiators approach and dealing.

Usually the negotiators act fair and expect the other party to believe them and have faith in their honest intention. This is an unfair expectation while negotiating with the fresh party or a stranger. This is equally unfair, even while dealing with known parties, as they are already in dispute, and may obviously have doubts regarding the intention of the negotiator to exploit.

The establishment of a fair procedure is a necessary task. In a partition between two brothers, if the eldest brother does the splitting of share to his best capacity, impartially and then selects his share, the younger will have objection. The younger may have a doubt in his mind, even though the elder has acted fairly. Therefore, this cannot be a fair procedure. The better way to deal with this is to give options to one to split the shares and the other to select.

To establish fairness in the proceedings, periodical appraisals of the proceedings by narrating back the facts discussed or making list of interests play a very important role. To establish fair chance to both parties bidding is also a one of the better way to establish fairness. These fair procedures can be used to evaluate the options given to the parties.

Alternatives

As a lawyer does not depend on single argument or issue, similarly the negotiator also should not depend on one process. His endeavor should always be to find the Alternatives. The negotiators' attempt to settle the dispute depends on the BATNA (Best Alternative to a Negotiated Agreement). This principle is usually discussed in the pre-negotiation stage). This helps in making decision as to whether to agree to the proposal or not to agree.

As mentioned above, negotiation is one of the processes of resolution of dispute. During negotiation, the parties will be aware of consequences of failure of negotiation, i.e. if parties fail to achieve settlement agreement. This knowledge of the alternatives helps parties during negotiation. If the alternatives to negotiation are explored and the success of other process assessed then the

parties to the negotiation will accordingly act more aggressively and concessions will be hard to come by.

In case of an accident, the offender offers to compensate for the loss suffered due to damage to the vehicle.

Before agreeing to his proposal, negotiator has to check BATNA. Alternatives available are, to file a case and claim damages from the M V Tribunal or forego the litigation and claim from the insurer of the vehicle (Insurance Co).

Out of the three alternatives, litigation causes delay, includes lawyers expenses and if contributory negligence plea is accepted then the amount of compensation gets reduced. Litigation is a risk, but is it worth taking? Does litigation offer much more compensation compared to the offer made by the other party? So litigation can be BATNA, only if, the offer of other party is much less than the loss suffered.

Applying for the insurer (insurance Co) and claim for compensation directly cannot be BATNA, as the Insurance Co will pay for the loss according to the agreement. Most of the spare parts are not included in the Insurance coverage. In addition, the party will lose the 'non-claim bonus' for the next insurance coverage. So litigation will be the BATNA if the negotiators offer is much lower than the prescription of law.

Commitment

The success of negotiation depends on the Commitment of both the parties. The negotiator has to include pre-conditions if any, to ensure their commitment to the negotiation. These pre-conditions help in assessing the attitude of the opposite party. If the party is interested in negotiation or believes in negotiation then the parties' involvement will be of higher level and chances of agreement will be high. Even if the party is new to negotiation and has formed no opinion, even then these pre-conditions help in understanding the inclination of the other party. These pre-conditions also help in assessing the parties' ability to assent to a final agreement

Conclusion

Thus, the Negotiation process is a fair process to avoid or resolve commercial dispute. The role of Lawyer as a negotiator is more appreciable than as a friend of Court. Resolving of a dispute can lead to unlimited benefits, but litigation always lead to loss, hostile environment and enmity.

This competition has been designed with an objective of introducing the concept of Negotiation to budding lawyers. The young lawyer with flexibility in mind and approach can bring a change in the outlook of the profession. This is a small attempt of the college to appraise and sensitize the student community about the importance of Negotiation

B e s t o f L u c k

