SQUIRE PATTON BOGGS

Effective Negotiation Advocacy – Prepare for Dialogue, Not Battle!

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There is an often quoted, albeit anonymous, saying: "You must always be willing fully to consider evidence that contradicts your beliefs, and admit the possibility that you may be wrong. Intelligence isn't knowing everything, it's the ability to challenge everything you know."

In the context of negotiation, one could change or paraphrase the last sentence: "Negotiation realistically cannot be based on knowing everything but does involve the ability to challenge everything you do know, let alone what you don't." There is truth behind former US Defence Secretary Donald Rumsfeld's claim that there are facts you know you do not know in contrast to those you do not realise you do not know.

In many disputes, each side spends hours of negotiation preparation building their respective positions, negotiation strategies and understanding of their own cases, all of which is vitally important. However, often too little focus is expended either on challenging one's own position and its premises, let alone on seeking to develop a real understanding of the other side's. An ability to challenge beliefs, rather than only seeking to confirm/affirm them, is a key part of negotiation preparation, the objective being to innovate and expand options and ideas for a resolution with the opposing side.

Closely allied to this is the importance of (i) avoiding entrenched positions and focusing too much on the who is right and who is wrong principle; (ii) commercial and legal preparatory work for the talks that follow; and where applicable (iii) acknowledging the objective of safeguarding commercial relations and seeking to avoid arbitration/litigation (if possible).

The belief and conviction in your own case can lead any party to forget that the other side hold an equal conviction in the merits and worth of their own case. Understanding the other side's viewpoint of their case will assist in concentrating on the real issues at stake, and not simply each party's position.

In order to fully and properly to prepare for any negotiation, whether taking place directly with the other side, or in a more structured process, such as a contractual negotiation exercise or a mediation, this is the frame of mind clients and lawyers need to develop. It is really about preparation for dialogue, not adversarial battle. In either court litigation or arbitration, developing a strong partisan opinion is vital if one is to prevail, where there is going to be a definitive determination in respect of each side's arguments. By contrast, in any negotiation, including mediation, there is not at any point going to be any such decision made on the issues by anyone.

Accordingly, there comes a point in negotiation when each side needs to put the factual and legal merits to one side in the interests of focusing on what is required to resolve and settle the dispute.

Ultimately, there is the prize of the resolution of the dispute in a timely and efficient manner, which can benefit all parties involved. It is difficult to find any party who does not prefer a dispute to be ended at the time of their choosing, rather than continuing to trial or an arbitration hearing in accordance with a timetable set by others. Negotiation places the power to make the crucial decisions in the hands of the decision-makers rather than the court or arbitral tribunal. The fundamental point is that negotiators are in control and manage their risks themselves, even when they appoint a mediator or third party neutral to assist them with their endeavours.

A key point to keep in mind, particularly for lawyers, is that the factual and legal merits of the case are merely one aspect of wider issues that could be at play, and which come into focus during any negotiations. Other parts of the overall picture include each side's appetite for risk, the financial ability to pursue or defend the claim, the wider commercial relationship and key commercial priorities or pressures that may be lurking beneath the surface. These can change to become more acute during any dispute. In some cases, acknowledging the objective of safeguarding long-term relations and seeking to avoid litigation or arbitration (if possible) is important. The starting point here is to recognise that commencing commercial and/or contractual negotiations is standard practice in the commercial world. It can, and indeed should, be done in a way that ideally maintains good relationships between contracting parties. Maintaining good relations may itself be an important factor in the development of a strategy and present a point of leverage in certain circumstances.

It is unfortunate that the word compromise has developed negative association with perceived weakness and/or with not standing up for one's principles/values, etc. Compromise is an entirely worthy objective developed as part of an overall negotiation strategy. It was US President Barack Obama who once explained: "There are times where compromise is necessary, even whilst holding on to what you believe. That's part of wisdom …" Compromise can often mean agreeing to disagree in relation to key components of the dispute, whilst nevertheless managing to conclude a settlement agreement.

It must be recognised that emotions can be an obstacle to settlement, but, equally, it is important for all parties to have the space to express their underlying feelings, which can be of anger, disappointment or frustration. There is a real need for patience and listening during negotiations so that ultimately each side can then move on to more constructive and rational thought.

Heading into any negotiation, including mediation, involves the parties and their lawyers looking beyond merely the legal position. Successful advocacy involves different skills from those required in court or even arbitrations. In our experience, true leverage only arises where the threat to the other party is clear, well-articulated and immediate.

Trying to build leverage from a position of weakness (such as advancing commercial or legal arguments that – if tested in court or in arbitration – would have low prospects of success, or which are otherwise speculative, or weak) can not only have minimal impact, but also, in fact, have the opposite effect. For example, if arguments are weak, unclear and poorly presented, the counterparty may consider that approach to be factually and/or legally lacking, as well as poorly executed, and may likely reject it immediately. In that case, all of one's leverage can fall away and the opportunity to push for a settlement or a valuable deal may be lost. It follows that developing a robust legal and commercial strategy, considering the merits and weaknesses of one's position, at the very outset is critical to success. The stronger the party's position, the more the counterparty will have to engage in discussions. A party that builds leverage from a robust and well-thought-through legal and factual position, presenting it in an organised and evidenced fashion, will more likely control the narrative from the start, be on the front foot and realise its objectives in talks.

Depending on the circumstances of the given process – be it contractual discussions, commercial settlement talks or mediation – parties may consider protecting the substance of the dialogue of the talks. This may help promote and encourage a level of meaningful discussion. There may be value in ensuring that any discussions with a counterparty are confidential and made on a without prejudice basis. The cloak of without prejudice privilege may help to (i) protect positions taken in negotiations from being used in any subsequent dispute; and importantly (ii) provide room to manoeuvre in response to the counterparty's position as discussions develop over time, thereby heightening the chances of securing a negotiated outcome.

During mediations, parties too often seem to treat mediators with suspicion, or at least fail to make use of them to full effect. They are there to enable each side to achieve its objectives. Even if a win-win outcome is not possible, the least-worst conclusion should always be achievable. Taking mediators into your confidence and regarding them as an extension of your own negotiation tactics and strategy is far more likely to result in a better outturn.

Importantly, there is no "one approach" that applies to all negotiations or mediations. The profile of relevant parties, markets, industries, geopolitical and financial risks, negotiation styles and commercial motivations will always differ. These observations, accordingly, represent an overview of what each party should aim to be a thorough and carefully considered commercial, analytical and legal process applied on a case-by-case basis.

Contacts

Peter Crossley
Partner, London
T +44 20 7655 1299
E peter.crossley@squirepb.com

Max Rockall
Partner, London
T +44 20 7655 1354
E max.rockall@squirepb.com

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squirepattonboggs.com

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