

NEGOTIATION AS AN EFFECTIVE METHOD OF DISPUTE RESOLUTION

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Introduction

Negotiation and discussion are the greatest weapons we have for promoting peace and development'

Nelson Mandela

Compared to the other primary processes, negotiation is the dominant process. Negotiation is inherent in the nature of humankind. Since time immemorial, humans have negotiated about every conceivable aspect of life and still do so today. Viewed in this context, negotiation is as varied as the persons involved and as complex as the related situations it serves.

Conflict is inevitable in a social order. Human beings have the ability to think rationally, hence resulting into having different ideas, beliefs, values, needs, goals etc. It is based on these differences that conflicts springs from. Ultimately, it is impossible for people from different background to work together, make decisions without having conflict. John Burton is of the view that conflict is a generic phenomenon that knows no system boundaries.²⁶⁸⁷ Whether we are dealing with interpersonal, community, ethnic, or international relations, we are dealing with the same ontological needs of people, requiring the same analytical processes of conflict resolution.

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²⁶⁸⁷ John W. Burton, Conflict resolution as a political theory
<http://cardata.gmu.edu/docs/teaching/TEACHING%20PLATFORM/course%20501/UNIT%203/Burton%20-%20Conflict%20Resolution%20as%20a%20Political%20Philosophy%20copy.pdf> accessed 21st Jan 2025

Indians are quite passionate about negotiation. From negotiating over disputes to negotiating over responsibilities, one participates in this mechanism of Alternative Disputes Resolution in one or the other way. Not every dispute is fit for the court. Some disputes can be resolved outside the court. To incorporate the idea of 'Talk it Out', the judiciary has started putting emphasis on Negotiation, in order to allow the individuals to talk to each other and come to an amicable resolution.

The terms Negotiation and Bargaining are interchangeable. However, the difference between these terms two lies in the fact that in bargaining one party ultimately compromises by agreeing to the terms of other parties whereas in negotiation both parties enjoy a win-win situation. The term 'Negotiation' has been derived from a Latin expression, 'Negotiari' which implies 'to carry on businesses.' Negotiation can be defined as a bargaining process done between two parties with the object of dispute settlement. The negotiating parties should consult an advocate before entering into negotiations as then the party will be fully aware of their rights. Also, professional expertise is required during the process of negotiation so as to ensure that the disputing parties put their emotions aside.

The parties certainly aim at reaching some sort of remedy by cooperating and collaborating among themselves on terms agreeable by both.²⁶⁸⁸ Negotiation is one of the most commonly used forms of alternative dispute resolution as it is preferred in non-profit organizations, businesses, government organizations, and legal proceedings for instance in matters of divorce, adoption, etc.²⁶⁸⁹

Negotiation: Meaning

As per Fisher, Ury and Patton (1991), negotiation is a 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. "Negotiation is a process through which parties move from their initially divergent positions to a point where agreement may be reached".²⁶⁹⁰ "To negotiate means to confer with others in order to reach a compromise in agreement".²⁶⁹¹ Shapiro (2013, p.1) defines it as a "problem-solving process in which two or more people voluntarily discuss their differences and attempt to reach a shared decision on their common concerns."

However, from the above stated definitions that are much similar in views it is evident that ultimate purpose of the process is reaching agreement acceptable to all parties through communications.

Negotiation is a dispute where parties come together and then try to resolve their disputes by means of mutual understanding and negotiations. The disputing parties have the choice to appoint a negotiator or not. In case, a negotiator is appointed, he has a very small role to play in getting the parties to a common understanding. Negotiation is not governed by law. All the decisions regarding such negotiation, for instance, the time, procedure and place where the negotiation will be conducted is totally up to the discretion of the parties. A vital element of negotiation is that it is a process.²⁶⁹² In this respect emphasis is placed on the continuity of negotiation. Negotiation is not some ad hoc event – negotiation has a starting point and it reaches a point of termination signified by either agreement or the failure to settle. Whether this is attained within a few hours or over a period of months or even years is irrelevant.

²⁶⁸⁸ Alternative Dispute Resolution: Negotiation, LawShelf (Jan 20, 2023) <https://lawshelf.com/shortvideoscontentview/alternative-dispute-resolution-methods-negotiation>

²⁶⁸⁹ Drishti, Alternative Dispute Resolution (ADR) Mechanisms, (Jan 20 2023) <https://www.drishtias.com/to-the-points/Paper2/alternative-dispute-resolution-adr-mechanisms-paper-2>

²⁶⁹⁰ Steele and Beasor as cited in Kolmakova, 2011

²⁶⁹¹ concise oxford dictionary as cited in Pickavance, 2007, p. 440.

²⁶⁹² Pienaar and Spoelstra Negotiation 3 18-19; Mathews "Negotiation" 94; Gulliver Disputes and Negotiations 180-186

Features and Characteristics of Negotiation

Following are some of the characteristics of Negotiation:

- Two or more parties
- Negotiation contributes to better results
- Conflicts between needs and desires
- Equalizing process
- It contributes to attaining mutual satisfaction or agreement.

One of the distinguishing features of the process of negotiation is that it is based solely upon the bilateral interaction of the disputants. The term "bilateral" indicates that the process is dyadic in the sense that a neutral third party is not involved. The disputants themselves fill the role of advocate and decision maker: the disputants determine the rules that will govern the form of the proceedings, identify and argue the facts in issue, control the process and determine its outcome.²⁶⁹³ Unlike other mechanisms of Alternative Dispute Resolution, negotiations are concluded without the involvement of the third party and only through discussions between parties and their representatives. Thus, Negotiation is a non-binding process. The negotiating parties are struck between the fulfillment of their needs and desires. Although such parties have their pre-determined goals fixed, which they wish to achieve, still clashes arise during negotiation. Apart from the above-mentioned characteristics of negotiation, the parties undergoing this process are also willing to adjust themselves by being in a compromising position.

A popular legal maxim, "*Consilia omnia verbis prius experiri, quam armis sapientem decet*" which means that an intelligent man would prefer negotiation before using arms, rightfully justifies the purpose behind using

negotiation.²⁶⁹⁴ This process helps the conflicting parties by suggesting them better results and also aid them in concluding a mutual agreement and settlement. Overall, it is an equalization process whereby a solution is offered keeping in mind the interests of both parties. It is only when the parties at dispute doesn't consider themselves to be capable enough of resolving the dispute by themselves or by the consultation of independent individual, they might choose another popular mechanism of alternative dispute resolution, namely, Mediation.

Steps of Negotiation Process

Negotiation which is a process whereby two or more parties reach an agreement over conflict goes through certain phases before reaching the desired agreement. These phases include:

1. Preparation phase
2. Presentation or Opening phase
3. Bargaining phase
4. Closing or Agreement phase

Preparation phase

Ordinarily, preparation is the act of putting or setting things in order for a future purpose. Hence proper planning and preparation are keys to a successful negotiation. At this stage proper investigation and gathering of factual information concerning disputing parties interests, ideas, values, goals, aspirations etc. This phase simply involves setting out what you hope to achieve and how you hope to achieve it in negotiation. People tend to argue that preparation is not important in negotiating. However, experts have strongly argued that

²⁶⁹³ Astor and Chinkin Dispute Resolution 80; Leeson and Johnston Dispute Resolution America 103 107

²⁶⁹⁴ Saroj Murmu, Negotiation: Meaning, Scope, Advantage & Disadvantage, Legal Bites (Jan 27, 2023) <https://www.legalbites.in/negotiation-meaning-scope-adv-dis/>

careful and thorough preparation in negotiating is imperative.²⁶⁹⁵

Opening phase

The phase allows conflicting parties to state his or her case. They are both expected to use this opportunity to highlight what they consider to be the main issues for discussions in the negotiation. There is the need to clearly identify and understand issues for determination so as not to derail the negotiation process. By stating the issues clearly, parties are able to identify areas of agreement and separate them from the main issues to be negotiated. Summarily, the opening or presentation phase involves the presentations of offers and demands whether orally or written.

Bargaining phase

In this phase, the skills previously discussed in this paper i.e. distributive and integrative models, come into play. It may not be out of place to consider this phase as the focal point in the negotiation process. This is predicated on the fact that at this phase the negotiation can proceed to an agreement or to a deadlock. Where there is a deadlock at the bargaining phase, the negotiation can break down and when this happens, immediate action must be taken to prevent the situation from being irretrievable.²⁶⁹⁶

The bargaining phase offers the parties the opportunity to debate, rationalize, scrutinize and agree on the issues established at the opening phase. It is the stage where parties persuade the opponent to accept their offers and counter offers. In addition, at this stage communication skills must be utilized effectively. Facilitation of communication between the conflicting parties through the negotiator will yield good

negotiation results and limit the damage from a breakdown in negotiation.

Closing phase

Otherwise known as the agreement stage, brings to an end the negotiation process thereby putting the mutual agreement in a setting that is acceptable to both conflicting parties. At this stage parties are expected to fine tune the details of the agreement and ensure that all issues necessary for having an enforceable and feasible agreement have been tackled.

It can be succinctly put that there are generally four stages in a negotiation process (preparation, opening, bargaining and closing). It is a continuous process as a party can stop at any phase and demand for a negotiation *de novo* or upon reaching closing phase, negotiations over implementation of the agreement may continue.

How to negotiate conflict effectively

Before entering a conflict negotiation, consider these strategies to achieve the best outcome:

1. Clearly define goals

It's important to define your desired outcome ahead of time to ensure you stay focused. Think about the specific numbers, time frame and outcomes you want so you have something defined for your negotiation. Specific goals can also help you make stronger and clearer arguments.

2. Consider the other party's background

Negotiations can sometimes involve international businesses or individuals from different cultural backgrounds. A successful conflict negotiation strategy often involves being mindful of how different organizations and professionals conduct business. Focus on the individuals you are directly resolving a conflict with and how you both can mutually benefit from the process.

²⁶⁹⁵ Roger Fisher, William Ury and Patton B. (1991): *Getting to Yes: Negotiating Agreement Without Giving In*, 2nd Ed. New York: Penguin Books

²⁶⁹⁶ Robert Heller and Tim Hindle (1998): *Essential Managers Manual*, London, Dorling Kindersley Limited p. 614-615

3. Be proactive

Being proactive can deescalate or eliminate conflict and encourage a positive atmosphere. If you think you're close to a conflict with a coworker or witness a potential conflict among team members, proactively identifying the challenge and attempting to resolve it can show that your focus is on bettering your work relationships and environment.

4. Know your role

Depending on your position within a company, your role in conflict negotiation might be different. If you're in a leadership position, it's probably your responsibility to understand your company's guidelines for settling internal disputes and policies for entering negotiations with vendors or third parties. As a team member, you might have the following roles:

A mediator who suggests solutions to conflicts

A witness who provides input for others' negotiations

A teacher who shares conflict negotiation strategies

A negotiator for yourself, responsible for representing your own interests

5. Use established forums for negotiating conflicts

Regardless of your role, it can be helpful for your workplace to have a designated time to discuss issues that require negotiated solutions. Having a well-defined forum, such as a weekly meeting or shared document where colleagues can share their concerns, can help team members feel more comfortable expressing their opinions. For more private or sensitive conflict negotiations, you may want to approach the other party separately or ask a human resources representative act as a mediator.

6. Be flexible with time

How you use time in a negotiation often reflects what you wish to achieve. In some cases, being firm with a resolution deadline can encourage a more direct and productive conversation. Other conflict negotiations can take time to discuss various points and counterpoints. Being willing to meet on multiple occasions over a longer period of time might produce a better negotiated outcome.

7. Focus on creating value

Negotiations may begin because of conflicting positions, but a creative, value-oriented mindset can produce the win-win results that leave both parties satisfied. When considering the other party, know where your interests overlap and what your similarities are. Consider what trade-offs you might be willing to accept or propose to the other party that could benefit both sides of the deal.

Skills needed to negotiate conflicts

Conflict negotiation techniques involve various persuasive, analytical and interpersonal skills, such as:

Emotional intelligence

Emotional intelligence is the ability to control your own emotions and recognize others' feelings. Being conscious of the emotional dynamics during conflict negotiation can allow you to remain calm and focused on the core issues. If you're unsatisfied with the current negotiation, express the need for a break so you and the other party can return later with refreshed perspectives.

Expectation management

Just as you should enter a conflict negotiation with a clear goal, the other party also likely has its own defined expectations. If you believe you might not be able to agree to each other's terms, you could try adjusting your own expectations. Skilled expectation management

involves maintaining a balance between being a firm negotiator and a collaborative one.

Research

Performing research can help support your claims and start a foundation for your negotiation. By beginning a negotiation with a fact-driven and open-minded assessment of the issues and sharing useful insights, you and the other party may better understand how the conflict originated and how to solve it.

Empathy

Empathy allows you to understand the other party's perspective and negotiate toward a win-win approach. This skill is useful for maintaining positive and productive conflict negotiations that produce lasting connections.

Pros and Cons of Negotiation

There are numerous advantages to a negotiation process.

1. Negotiation is a party-based dispute resolution that only involves the stakeholders and no additional third party which makes it a private affair.
2. Negotiations safeguard the freedom of the parties. The parties are free to set plans of their choice which helps in the attainment of the purpose of the negotiation.
3. The consent of both parties is regarded. Also, it is made sure that there is no play of powers and both parties are given equal footing to speak.
4. The negotiations have a possibility of a more successful result as it is eventually grounded on the party's interest and is completely run by the party's consent to dissolve the dispute.
5. Negotiation is a voluntary process and there is no intrusion of any third party in the proceedings which results in the protection of the confidential information.

Some of the disadvantages of the negotiation process are:

1. The parties may not always be equal in status and power, which leads to a situation where the party in power uses the scope to dominate the other party's consent. The consequence may be an unfair agreement which acts as a big disadvantage to the process.
2. The disagreement between the parties occasionally leads to an impasse. An impasse is a situation when the disputant parties come to a halt in their discussion and they are not ready to proceed further. This happens when one of the parties is stubborn over its goals and no middle ground is achieved.
3. The walkout situation occurs when an impasse frustrates the parties to such an extent that no productive discussion can take place.
4. An ineffective negotiation results in unpleasantness between the parties. This leads to strained relations.

Conclusion

Negotiation is not always a harmful process. In fact, it has the capacity to be a remedial process which helps the disputing parties to converse and reflect upon their differences and settle their disagreements. The cooperative bargaining style can be adopted in the field of negotiation so that the dispute can be resolved amicably. A skilled negotiator should be an expert in varying between the distinct approaches to negotiation to accommodate the specific issues that may arise during the process.²⁶⁹⁷

Negotiation can be invoked by the parties at any time, even if the matter is pending in the court. Likewise, it can be terminated at the discretion of the parties. It is the choice of the parties to decide their fate and reach an amicable settlement.²⁶⁹⁸

²⁶⁹⁷ Non-Adjudicatory Modes of ADR: Conciliation, Mediation and Negotiation, Shodhganga (Feb 10, 2023) https://shodhganga.inflibnet.ac.in/bitstream/10603/41488/11/11_chapter%204.pdf

²⁶⁹⁸ V.G.Ranganath, Negotiation-Mode Of Alternative Dispute Resolution, Legal Service India (Feb 11, 2023) <http://www.legalservicesindia.com/article/245/Negotiation-Mode-Of-Alternative-Dispute-Resolution.html>

The basic purpose of negotiation is to reconcile interests or to settle a dispute by joint decision making. The notion of joint decision making is generally alien to common notions about negotiation. This attitude, which is often shared by lawyers, may be attributed to the adversarial culture instilled by the process of litigation. The general approach to negotiation is distributive, based on a competitive style. Yet, there is another approach which promotes co-operative or integrative negotiation which in turn is matched by a collaborative style. In this respect, it is possible to achieve the ideal objective of joint decision making founded on the understanding that negotiation is essentially a problem-solving process.²⁶⁹⁹

Negotiation therefore has many facets: it is a bilateral and consensual process directed at rule making or dispute resolution which is ideally achieved through problem solving by means of joint decision making.

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²⁶⁹⁹ "lawyer skills in negotiation" 138-139; Menkel-Meadow "Legal negotiation" 755-757.



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