

# 5 tips to negotiating a settlement in commercial mediations

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Mediation is an alternative mechanism for dispute resolution and is, in essence, a facilitated negotiation, with the appointed mediator playing the role of the facilitator. The ultimate aim of mediation is for the parties to reach a settlement of their dispute that is mutually beneficial to them, without the need for the party to proceed with litigation or arbitration in respect of their dispute.



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There are a number of techniques that a mediator will employ in facilitating the settlement of a dispute. But what can the parties themselves do to prepare for the mediation and increase the prospects of a settlement being reached?

## **Make sure it is not a box-ticking exercise**

Mediation is increasing in popularity and has been shown to be an extremely effective way for parties to resolve their disputes without resorting to arbitration or litigation.

As a result, it is becoming increasingly common for commercial contracts to include a provision in terms of which the parties are required, before proceeding to arbitration or litigation, to refer their dispute to mediation.

However, mediation is only effective when the parties to the mediation are committed to the process and come together with a real intention of finding a resolution to their dispute. In this sense, parties to a mediation should ensure that they are there for the right reasons, and not simply to tick the mediation box before proceeding to arbitration and litigation.

## **Ensure that you are the right person to attend the mediation and have the necessary mandate to settle**

During your preparation for the mediation, you should interrogate whether you are the correct person, as the company's representative, to attend the mediation or whether there is someone more suitable or who has more knowledge in relation to

the dispute. Once you have established that you are the right person to attend, be sure to sit down with those with the necessary authority in order to establish your mandate in relation to any potential settlement.

There is nothing more frustrating for a willing party to a mediation, and indeed the mediator herself, than when the opposing party is not fully up to speed regarding the history between the parties or the nature of the dispute. Even worse is where the party that attends the mediation has not established up front what his/her company is prepared to settle on or where they, in fact, have no mandate at all to settle the dispute.

## **Understand the strengths and weaknesses of the case**

One of the benefits of mediation is that there is almost no preparation required beforehand, in the sense that there is no formal exchange of pleadings and the like, although parties are free to provide the arbitrator with any document they feel might assist her. That being said, it is imperative that, prior to the mediation, you properly understand the strengths and weaknesses of your case. It is often helpful to prepare a position statement with your legal representative, for your own personal use, which will set out the necessary facts and highlight the areas of your case where you are particularly weak or strong. This can go a long way in assisting a party with determining whether a settlement proposal is, in fact, beneficial in the circumstances.

## **Determine the other party's interest**

While it is important to safeguard your needs and interests in a negotiation, it is equally important to identify the actual interests of the other party rather than simply focusing on the position they have adopted. A party's position may, at first, seem to indicate what they want, but there are always hidden interests underlying these positions and identifying these actual interests can provide more leverage in a negotiation. This is because, once we better understand what a person actually wants, rather than the position they have adopted, we are much better placed to propose an acceptable solution to the dispute.

## **Do not be defensive or aggressive - listen!**

Disputes can lead to heightened emotions, especially when you have a financial interest in the matter or have been personally affected by the actions of the other party. However, being able to effectively control your emotions and act with emotional intelligence are the key to a successful mediation.

Adopting an aggressive stance will almost always lead to a breakdown in communication between the parties and will completely undermine the potential effectiveness of a mediation.

All humans have an innate need to be understood, accepted, appreciated and heard. Consequently, one of the most effective tools in a mediation is to actively listen to what the other party is saying. Listening denotes empathy and, when a person feels they are being heard, they are more likely to listen more carefully to what you are expressing and are in a better position to evaluate their own thoughts and feelings and identify when these might be irrational. They, in turn, become

less defensive and oppositional.

There are a few ways to become a better and more active listener. Asking open-ended questions is an effective tool as it gives the other party a feeling of control over the situation. Similarly, summarising what a person has said is a good way to make them feel understood and listened to and, importantly, it gives the other person an opportunity to rectify anything that you might have misunderstood. Recognising and acknowledging the way the other party is feeling can also be effective.

It is important to bear in mind that a mediation should not be viewed as a battle that is won when the other party accedes to your demands or accepts your position. It should be a process of discovering as much information about the other party as possible in order to find a solution beneficial to both parties.

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