THE ART OF NEGOTIATION

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Alternative dispute resolution (ADR) has become increasingly important given that courts are often unable to protect private interests in a satisfactory manner. This article is the first in a series on ADR and deals with negotiation.

Negotiation has been defined as a process of exchange of opinions, shifting of positions and mutual persuasion in order to reach an agreement that satisfies the interests of the parties involved. It is generally considered more natural, more accessible, less formal and less "professionalized" than the other ADR mechanisms, namely mediation, conciliation and arbitration. These characteristics can work both in its favour and against it. Furthermore, in some cases, negotiation can in fact trigger new problems for the party instigating the negotiations.

Before starting to negotiate, the dispute should be examined objectively to ascertain whether the two parties are actually motivated to reach an agreement. Two factors are essential: a party's dissatisfaction with its current situation and an incentive to reach a settlement. It obviously makes no sense to try and negotiate with a defaulting party who is perfectly prepared to face legal action. Nor is it sensible to try and negotiate with public institutions whose regulations prevent them from or

restrict their entering into a settlement, or if one is aware that the parties, because of their situation, have nothing to give.

Nevertheless, with the exception of emergency situations that justify interim remedies, it is always advisable to offer the defaulting party or the party that has caused the damage the opportunity to voluntarily compensate the non-defaulting or injured party, even if just to gain an advantage in court (eg to ensure an award of costs under Art. 395 of the Spanish Civil Procedure Act in the event that the claim is successful) rather than to actually trigger the negotiation process.

If negotiation is a realistic option, the next step is meticulous preparation. This involves making a accurate assessment as to the strength of the claim, identifying the parties' interests, identifying the alternatives to negotiation (and an assessment of their likely costs), ascertaining where the client is prepared to compromise and designing the negotiating strategy to be followed.

Antonio Hierro Hernández-Mora, director de la división de contencioso, litigios y arbitraje, y Antonio Pipó Malgosa, abogado procesal de Cuatrecasas, explican en este artículo que la negociación es un elemento fundamental en el uso de medios alternativos de resolución de conflictos (ADR). El concepto ADR es cada vez más importante ya que frecuentemente los juzgados no pueden proteger los intereses privados de manera satisfactoria. Los autores explican de qué forma se debería averiguar si utilizar el ADR es factible, qué aptitudes necesita el negociador, qué problemas pueden surgir con la confidencialidad, y la importancia de documentar minuciosamente el acuerdo de conciliación entre las partes.

The negotiating process will depend on the negotiator's skills, on the parties' flexibility and commitment to settle, and, of course, on the extent to which the above recommendations have been adopted by the other party. As an incidental point, we would highlight that, whilst e-mails, correspondence, documents and witness statements exchanged by the parties for the purpose of negotiations should remain confidential in the event that negotiations fail, there has been an increasing violation of this confidentiality. Thus, one should adopt suitable precautions in this regard.

Finally, it is vital to properly document the settlement agreement reached by the parties. The agreement should clearly specify the rights the parties have waived, the obligations they have undertaken, whether the preexisting relationship between them has been extinguished, any penalties for breach of the settlement agreement, and the submission to arbitration of any dispute arising over performance of the settlement agreement. If the settlement is reached during judicial proceedings, it may be advisable for the agreement to be approved by a judge to ensure its enforcement in the event of default. However, this will obviously depend on the confidentiality of the agreement and the nature of the obligations contained in it.

By way of summary, if a negotiation is to have any chance of success, thus avoiding the costs and stress of litigation, it is essential that both parties are, first, fully committed to the negotiation and, second, extremely well-prepared, having given careful thought with their lawyers as to what they are prepared to concede based on an accurate assessment of the strength and likely costs of the claim.

Antonio Hierro Hernández-Mora is a partner and Head of the Litigation and Arbitration at Cuatrecasas. He can be reached at antonio.hierro@cuatrecasas.com. Antonio Pipó Malgosa is a litigation partner at Cuatrecasas. He can be reached at antonio.pipo@cuatrecasas.com.