

DISPUTE PREVENTION/RESOLUTION NEGOTIATION TECHNIQUES

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1. Introduction

Negotiation is 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. It is a back and forth communication, the purpose of which is to reach an agreement. It can be creatively employed for dispute prevention purposes as well as to defuse disputes that have already reared their ugly heads on a construction project.

This paper will refer to the psychology of negotiation and some general negotiation techniques which are necessary to the negotiation of construction contracts and the resolution of claims.

Negotiation exists in almost everything we do on a daily basis. It occurs between spouses, parents and children, managers and staff, employers and employees and between professionals and clients. Negotiation exists within and between organizations, government agencies, special interest groups and the public. Negotiation requires the participants to identify issues about which they differ, to inform each other about their needs and interests, to generate settlement options and to bargain over the terms of a final agreement, if one can be reached.

Successful negotiations usually result in some kind of exchange between the negotiators. It may be something tangible, such as money, a commitment of time or a particular behaviour, or something intangible, such as an agreement to change an attitude, expectation or even make an apology.

In negotiating contracts in the construction industry, we are engaged in preparing documents which are the quintessential embodiment of certainty in our legal system. While negotiation is the game of life, in the construction industry the “game” can be deadly if it is not pursued properly. In the construction context, as well as in the world of commerce, we are dealing with the negotiation of contracts and claims which may be worth hundreds of thousands or many millions of dollars. The negotiation of appropriate contracts at the outset of a contractual relationship between two parties to the construction process may appear to be a thankless task at the time, however, doing one’s homework and negotiating an appropriate, understandable and comprehensive contract which foresees and allocates risk in an appropriate manner, will result in a smoother, less adversarial construction process. This will lessen the likelihood that future disputes between the parties will require resolution by way of costly and time-consuming arbitration or litigation.

When we talk about the use of psychology in the construction industry to negotiate contracts and claims or in participating in a pre-construction partnering process, it is important to appreciate that contracts are the basis of all of the major relationships in the industry, and also represent the source of 95% of all claims arising out of construction-related situations. Other claims which do not fall under the umbrella of the construction or design contract typically consist of third party claims by non-signatories to these contracts who are affected by the activities of the parties to the

construction contract itself. Construction contracts constitute the rules of the game for the parties to the construction process, and the negotiation of those contracts is critical to the ultimate success of the relationship between the parties, to the project itself as well as to the ability of the parties to maintain a long-term future business relationship which may lead to other business opportunities. When contracts fail or lead to disputes between the parties to those relationships, the art of claim negotiation and, ultimately, negotiation strategies, will serve the parties in good stead. The proper use of negotiation techniques, both as a dispute prevention and dispute resolution method, is not well understood in the construction industry.

2. Construction Contract Negotiations

In the construction industry, contracts define the legal obligations of the parties to one another. Because it is essential that the parties avoid becoming slaves to standard forms of contract, they must constantly be aware of the particular requirements and sensitivities of the individual project on which they are engaged so that they can ensure that the contract that they are negotiating will be tailored to fit the needs of the project under consideration, rather than attempting to have the project meet the needs of a particular standard form of contract.

The negotiation of a construction contract is a complex give-and-take process between owners and contractors, owners and design professionals, contractors and subcontractors and others who are engaged in this high-stakes industry. In entering into such a daunting endeavour, it is important that the parties act proactively rather than reactively. The old adage that the “early bird gets the worm” was never more true than in this field. Parties negotiating contracts in the construction industry should not be lazy. They should take the real advantage which comes from preparing the first draft of the Agreement if they are in a position to do so. Preparing the first

draft tends to imbue that document with legitimacy in future negotiations. If the other party wishes to change the document, he feels psychologically obliged to ask the permission of the first party to make amendments to the “gospel” represented by the document prepared by the construction early bird. Even though the document has no real claim to legitimacy, other than the fact that it was the first document off the mark, it nevertheless now becomes the basis upon which the rest of the negotiations will be measured, thereby providing the proactive early bird with a distinct advantage in the negotiation of a final agreement, which, from the outset, represents his own risk assessment and risk allocation philosophy for the project.

In the construction industry, there are some inherently unequal bargaining positions, including the situation that often pertains when contractors bid for construction projects. In this scenario, the contracting community is required to bid based upon the bid package of documents produced by the owner and his design professional, which usually includes the plans, specifications and other technical requirements for the project, as well as the form of Agreement and all Supplementary Conditions, which will define the legal relationship between the parties. In such situations, the opportunity for bidding contractors to engage in meaningful negotiations is minimal. The negotiation techniques referred to later in this paper will therefore pertain more to claim situations that typically arise between contractors and owners than to the negotiation of contracts.

The ability to set up a negotiation dynamic which will transform an atmosphere of poisonous acrimony between contractors and owners into one of tolerance, flexibility and openness to new and creative ideas toward a mutual accommodation of differences, will usually require the use and application of creative negotiation techniques.

The negotiation techniques referred to in this paper are equally applicable to the exercise of give-and-take negotiation of construction contracts or the parry and thrust interaction typical to the successful negotiation of construction disputes once they arise.

3. The Art Of Negotiation

Negotiation involves communication in one form or another. If we do not communicate effectively, we don't negotiate effectively. The physical law of rocket science is that every action results in an equal and opposite reaction. This is precisely what happens in our negotiated communications. If one party over-emphasises negative aspects in a negotiation session, more than likely he will be met with an equally negative opposite reaction, resulting in a "no-gain" and "no-win" situation for both parties. Negotiators should always consider the effect of the verbal and body language which they project to the other side in terms of the likely reaction that they will receive to the arguments which they are putting forward. There is no point expecting to achieve miracle results if a reasoned and considered effort is not made to elicit appropriate responses from the other side. In negotiations, miracles seldom happen. Negotiations that lead to settlements are usually based on hard work and proper attitudes to the negotiation process, as well as a thorough knowledge of the subject matter of the negotiations.

The negotiation process requires the participants to clearly and explicitly identify issues about which they differ and to inform each other about their needs and interests so as to generate settlement options which will allow them to bargain over the terms of a final agreement, if one can be reached.

The prospects for a successful negotiation will be greater if the issues in dispute and the most suitable way of addressing them are analyzed in advance. There is no substitute for having a thorough understanding of the facts surrounding a dispute. Once the facts are known, the law tends to take care of itself. Many issues of dispute between parties in the construction industry arise from a general misunderstanding as to the factual basis for the dispute.

The parties should be introspective to the extent that they critically analyze all aspects of their own position. This will allow them to devise an initial position to be presented in the negotiations as well as a fall-back position to employ as the negotiations unfold. It is essential that the parties understand the practical, legal and moral basis for their positions in a claim or contract situation. Another point for consideration is whether the negotiation has any precedential value in terms of an ongoing business relationship.

It is critical to the ultimate success of a negotiation process for each of the parties to be conversant with the position of the other party, insofar as this is possible, and to understand where the other party is coming from. A sincere effort should be made to understand the psychological basis of the other party's position, which should include all of the practical, legal, moral and business considerations that the other party is bringing to the negotiation table. In addition, thought should go into the emotional context from which the other side derives its position, which will, in no small measure, govern its attitudes and responses to positions you will put forward in the negotiation sessions.

It goes without saying, that if the parties are not 100% sure and confident in their own position, from a factual, legal, practical or moral point of view, then they can hardly expect to resolve their disputes by way of negotiation. Without such confidence, it is difficult to adopt fall-back

positions and flexibility in negotiations. The failure to actively pursue a complete picture of all of the issues is indicative of a lack of commitment to the negotiation process, and suggests that the party concerned is “using” the process for his own ulterior motives. Such insincerity is not atypical, and often manifests itself in a situation where one party or the other is using the negotiation process as a glorified examination for discovery exercise for the purpose of gearing up for future arbitration or litigation proceedings.

4. Basic Negotiation Techniques

A basic tenet of good negotiations is the critical importance of employing good negotiators. Some people are negotiation “naturals” and others are negotiators who have “learned” their trade. Either way, good communication requires good communicators. In order to optimize the likelihood of achieving a favourable result in negotiations, the parties should ensure that the negotiator who is put forward to represent the interest of a particular party has good communication skills, a diplomatic flare, the ability to think fast on his feet, is able to exhibit a degree of flexibility and, last but not least, has the ability to ascertain and keep his mind on the big picture, even while the minutia of a dispute are obfuscating the settlement goal for both parties.

A good negotiator does not assume that if he can hear, he is capable of listening. In other words, it is essential to be a good listener so as to pick up and understand both the verbal language and body language emanating from the other side. It is this intrinsic ability to pick up on subtle cues, many of which are inadvertently or subliminally provided by the other side during the negotiation sessions, that a good negotiator can use to ascertain the strengths, weaknesses and back-off points in the opposite party’s position.

In addition, good negotiators also do not assume that if they can speak they can communicate. There are various methods of “speaking” in a negotiation environment. As mentioned earlier, body language, tone of voice, words used and attitudes displayed speak volumes as to your position, your willingness to be flexible, your interest in a “win-win” result as well as your commitment to the negotiation process itself, which goes hand in hand with the commitment of your side in the process to actively work towards achieving a resolution acceptable to both sides.

It is helpful if the negotiators put forward by both sides have a basic understanding of human inter-personal dynamics. Sometimes this involves a study of psychology on the part of the negotiator, and sometimes it is simply something which a good negotiator inherently has in his personality makeup. Whatever it is, parties should understand that there is no point in putting forward a spokesperson to act as a lead negotiator if that person is not capable of exhibiting the traits of a good negotiator. Whether a settlement turns out to be an equitable settlement or a one-sided settlement, is beside the point. The issue is to ensure that the person who is doing the physical negotiating on the front lines is the best person with the requisite talent required to achieve the best result possible.

A thorough understanding of the respective positions by each of the parties to a negotiation process should be pursued prior to the beginning of a negotiation session. This will lead to a strategic plan prior to the onset of intense pressurized discussions, and will facilitate quick decision-making so as not to send ambiguous or conflicting messages to the other side. Mixed messages will suggest that you either do not understand your own position, that you lack commitment to the process, or even worse, that you are being less than candid in setting out your position on the matters in issue.

In order to have a clear understanding of your position prior to the inception of the negotiation process, certain questions require to be asked, including the following:

- (a) What do I want to achieve from this process?
- (b) What is the main point I wish to get across to the other side?
- (c) What mutual interests and needs do the two sides have in common that can motivate them both to work for a consensus?
- (d) What can I do for the other party to motivate him to give me what I want?
- (e) Why is the negotiation process important to me and to the other party?
- (f) What does the other person know about my position, and in the same vein, what does he not know that he needs to know in order to resolve the dispute between us?

All of these questions require to be asked and answered pre-negotiation, so as to have a proper negotiating plan in place which will increase the likelihood of a favourable result arising out of the negotiation process.

It is also essential that the negotiator ensure that the messages which are being sent to the other side are the messages that are intended to be sent, and as a corollary, the messages that are being received by the other side are received and understood as they are intended to be understood. So much in the way of human communication is lost in the translation as parties struggle to understand mixed messages, inconsistencies and ambiguities emanating from the other side of the negotiating table. A negotiation where factual, legal or business issues require resolution is difficult enough, without the parties' inability to say what they mean when trying to establish their basic positions. Say what you mean and mean what you say is a good model to follow in these situations, and, of course, be clear, concise and explicit in conveying your message.

It is also important for the good negotiator to be a good listener and to be comfortable with the sound of silence. Silence is indeed golden in the context of a negotiation proceeding. It is difficult to pick up on the messages coming from the other side and react to them when one is constantly speaking and sending out a constant stream of information, without leaving sufficient opportunity for the other side to make its own case.

In this same regard, it is essential to focus on what the other party is saying along with the message that is being sent. In other words, what is the other party saying and what is their body language saying. Don't be oblivious to the hidden clues and subliminal messages being sent by the other party's communications, and above all, don't lose the opportunity to notice those clues by monopolizing the conversation.

It is also a function of human interpersonal dynamics that we tend to respond to people in the same way that we are spoken to. If one is confrontational and adopts an adversarial style, leading to a position-based negotiation stance, also referred to as a "win-lose", this will likely elicit a corresponding antagonistic approach from the other side which may or may not advance the purpose of the negotiations. In this same regard, remain watchful and sensitive to the other party's voice tone and body language as a method of effectively understanding not only the other side's position, but also its likely areas of flexibility and accommodation. Remember, we hear with our eyes as well as with our ears. What we "hear" from looking at the other side can be invaluable in assessing our own position and in making modifications and adjustments in our position to bridge the gap between the parties. Too often we look with our eyes but do not see because our vision is clouded by our own self-interest and self-absorption.

Asking questions is another valuable technique in picking up information and in displaying sincerity, commitment and an interest in the other side's position. In asking questions, be tactful and non-threatening. It is possible to seek information in a non-adversarial way, thereby projecting an aura of flexibility and commitment to an equitable resolution of the dispute. This will give the other side more confidence in proceeding with a negotiation process which is not predicated on a "win-lose" result. It is also a fact that asking questions relating to unknown factors associated with the other party's case is essential to a full understanding of where the other party is coming from and where it intends to go in moving along the winding path of negotiations.

In addition to asking questions, be prepared to answer questions posed by the other side. Be knowledgeable of the facts surrounding your case and the legal ramifications related to those facts so that you can answer questions effectively and confidently, thereby leaving the impression in the other party's mind that you are not only knowledgeable in your position but also confident in your position. All of this increases the credibility of the position you are putting forward at the negotiation. In answering questions, however, make sure that you do not offer more information than what is being asked. Too often, we provide too much information when simple answers will do. Providing too much information creates the impression that we are defensive about our case and therefore have the need to over-speak our position. In addition, do not offer additional information which is irrelevant to the issue, but which may provide a basis for the other side to go on a "fishing expedition" down "garden paths" which may, in fact, lead to embarrassing problems for your position in the negotiations.

Periodically paraphrase your position, particularly in the negotiation of complex construction disputes, so that complicated matters can be made understandable. Also, take the opportunity to summarize your opponent's position so that there are no misunderstandings as to where he is coming from, and so that opportunities to close the gap between the two conflicting positions will not be lost. This also has the benefit of allowing the parties to build on the factual, legal and practical issues previously discussed, using them as a foundation for future movement on both sides.

Conclude sections of your argument or presentation which form a part of the larger group of issues in dispute by summarizing and committing those sections to writing, being sure to include a reference to any interim agreements reached between the parties. Sometimes, even agreements as to small matters of seeming insignificance can operate as a stimulus to the negotiation process by fostering a feeling of trust and commitment to find a reasonable resolution to the issues in dispute. Also, a feeling of momentum can be created by a series of small agreements on minor issues which can be used as a foundation upon which to build an eventual consensus.

A good negotiator remains sensitive throughout the entire negotiation process to his opponent's positions as they are enunciated and delivered. As stated earlier, this sensitivity includes a negotiator's ability to discern "cracks in the armour" which suggest alternate methods of attacking the other party's position. Alternatively, information coming from the other party may also suggest other avenues of argument that might be used as alternatives to previous positions or theories of your case which have, until now, fallen on deaf ears.

Another important consideration and a key to influencing others lies in a negotiator's ability to present his own needs in terms of meeting the needs of his opponent. Almost imperceptibly, the

good negotiator picks up on the other party's positional rationale, and begins to understand the moral/ethical, legal and practical factors which affect and characterize the other party's position. It is important to realize that people do things for their own reasons, not yours. In the case of negotiations, it is important to move people off their psychological positions without appearing to do so. The ability to accomplish this takes a great deal of tact and diplomacy on the part of an adroit negotiator. One of the procedures for attempting to move the other side off its position in small increments is to come to agreements on small issues or to paraphrase the other side's position, changing it slightly each time, so that you begin to define your opponent's position for him. In doing that, you move forward by summarizing your position and his position in closer and closer proximity to one another, while at the same time, changing his position to suit yours in a manner which suggests that the coming together of the two positions is a natural progression of the negotiation process. This can also be accomplished by agreeing, with some fanfare, with issues raised by your opponent which were never matters of real disagreement, thereby demonstrating your flexibility and willingness to meet the other party half way. In doing so, you are giving up nothing to the other side, while at the same time, you continue to paraphrase his position and demonstrate to him how his needs and interests can be defined in such a way so that they also coincide and meet your needs and interests.

5. Win-Win Versus Win-Lose Negotiations

There are many theories as to how to conduct a successful negotiation, and whether the cooperative flexible approach is to be preferred to the hard line adversarial approach. In truth, there are no right or wrong answers to these questions, but only a number of issues to be considered, depending upon the nature of the dispute, its complexity, the legal and social issues

at stake, the amount of money at issue and the need and desire to preserve a future business relationship. With this in mind, there is no prescribed way to conduct a negotiation. The method for conducting the negotiation, and whether it is based upon a “win-win” or a “win-lose” methodology, depends upon various criteria which define the dispute being negotiated. The method also depends upon the nature and personality of the negotiator and his or her own favourite negotiating techniques.

In some cases, negotiators start out in a non-adversarial manner, but retain a flexibility to modify their negotiation behaviour to suit the situation, the environment and the person representing the other side. Should a negotiation go “sour” for one reason or another, it may suit the interests of the negotiator to adopt a Jekyll and Hyde negotiating stance, moving from cooperative flexibility to aggressive hard line discussions, or vice versa. One of the difficulties in switching to the Jekyll and Hyde approach, is that it tends to suggest a level of inconsistency in negotiating technique or style which may cause your opponent to feel that you are unsure of your case and the strength of your argument, with the result that you have changed tactics and personality. This will not strengthen your bargaining position in the negotiation process, and likely will have the opposite effect. One way to avoid this problem is to use the “team approach” as a negotiating tactic. That is, two or more members of your negotiating team work together in concert to present your negotiating counterpart with differing attitudes. This is also referred to as the “good cop” – “bad cop” approach. One member of the team plays the role of the flexible accommodator, while another adopts the adversarial more confrontational style. What you are telling the other side is, if you don’t like my easy-going “win-win” style, then you will get my “win-lose” colleague who will be much more difficult to deal with.

In deciding which tactics are best for a particular fact situation and to meet a particular adversary, certain general theories of negotiation are employed. These are categorized as interest-based negotiation strategies versus position-based negotiation strategies.

Interest-based negotiations typically refer to negotiations which are based upon meeting as many of the parties' mutual and complementary interests as possible. This is often referred to as a "win-win" negotiation process. In this type of a process, a flexible attitude is usually displayed in non-acrimonious negotiations, with an overall pervading atmosphere of cooperation between the parties. The parties work together to discover their mutual interests which may be used to serve the interests of both of them.

In position-based negotiations, bargaining between the parties takes place over a perceived ideal outcome for each of them. This is often referred to as a "win-lose" negotiating process, whereby each of the parties has in mind an optimum result of the negotiations. By definition, the position of the other party to the negotiation process must therefore be a "lose" position.

In employing the interest-based negotiation model, the negotiator tries to focus on a settlement that will meet as many of their mutual and complementary interests as possible. It is therefore necessary to conduct a relatively exhaustive exercise to discover the interests of the other party, so that these can be used to foster your own interests in a complementary way. Indeed, while the parties are likely to be aware of each others positions on the issues in dispute, they are not normally aware of each other's interests.

In interest-based negotiations, problem-solving negotiations require each party to assert his interests and, at the same time, seek to discuss what is important to the other party. It is this

“win-win” interest-based negotiation strategy which tends to prevail in most negotiating contexts. However, in certain other situations, including mediations, the adversarial position-based negotiation model is often employed as a threatening or scare tactic, with the idea being that the negativity displayed by the use of the tactic is more than off-set by the likelihood of the other party moving its position as a direct response to the threat of future legal action, particularly arbitration or litigation.

6. Basic Principles For Achieving A Successful Negotiation

Endeavour to separate the people from the problem. Do not become emotional over problems or the people who are discussing them with you. Know the person or persons with whom you are negotiating, their idiosyncrasies and personality traits which may provide you with a clue to their bottom-line agenda.

Do not get personal in your debating or negotiating on particular issues. Keep everything on a business level of mutual respect and basic understanding that each party to the negotiation process has a point of view which is worthy of expression and consideration by the other participant.

Do not lose sight of your overall goal of where you wish to end up in the negotiations. Before entering the negotiation room, have a flexible fall-back position that you will be willing to retreat to in order to resolve the dispute. Remain flexible to the point of considering other fall-back or move forward positions should the factual basis of your previous opinions change during the course of the negotiation process.

Manage your emotions. Allowing one's emotions to betray a hidden agenda or worse, betray one's strategic intent in the negotiations, can only lead to adverse results. If you have decided to adopt the "win-win" interest-based negotiation model, focus on interests, not positions.

Before negotiations begin, explore your own needs and motivations which underlie your position and use them as your starting point. Attempt to ascertain what motivations underlie the other party's position. If you are unsure as to those motivations, ask questions to ascertain what they are.

When one party states its "bottom line", try to ascertain what is behind it. When the other party makes a "final offer", acknowledge their readiness to conclude a settlement, and explore their rationale, rather than walking away from the table.

Attempt to jointly develop standards for fairness with the other side that all parties to the negotiation can rely on. When the parties put forward differing standards or procedures, put forward an objective rationale to choose between them.

Do not give in to pressure, but make it clear to the other side that you are open to being persuaded by reason. Try to invent multiple options for mutual gain. Look for solutions only after the issues and the parties' interests underlying them have been fully explored. Always try to avoid working with only one option, because if it is lost, then the negotiation process may be at an end. Try to generate as many options as possible in order to develop a more creative solution to the issues in dispute. Look for areas of commonality and mutuality of interest. Generate ideas for a solution together, and then evaluate them against the interests that must be accommodated on both sides.

Before beginning formal negotiations with your opponent, make an effort to ascertain your best alternative to a negotiated agreement as well as your worst alternative to a negotiated agreement. This will give you some necessary motivation to arrive at a negotiated agreement, depending upon the relative differential between your best alternative and worst alternative. In addition, if possible, try to ascertain the other party's best alternative and worst alternative so as to, as best you can, derive a picture of the other party's strategic considerations leading to a potential settlement and as to how these interface with your own best and worst alternatives.

In addition, it is often useful to consider your most likely alternative to a negotiated agreement. This is also helpful in many cases, where a party remains objective about its own likely alternative to a negotiated agreement which may have economic, practical or legal consequences. The most likely alternative is often the most realistic view of a party's options away from the negotiating table, and may be a motivator for a party to become more realistic about its expectations. The most likely alternative may also act as a warning signal to conclude the negotiations on one side or the other.

It is helpful if the parties to a negotiation process have realistic objectives, and have not raised their expectations unrealistically to a level that can never be satisfied. Such a one-sided subjective position can consign an otherwise settleable case to the slag heap of festering ongoing arbitration or litigation.

Try to foster an atmosphere of trust in the negotiation process. While this is difficult in the context of many business disputes, it should be possible to maintain the idea that parties can disagree on substantive legal, factual or other issues, while at the same time affording to one another mutual respect. This is particularly the case in the construction industry which

necessarily involves a continuing, trusting give and take relationship between the parties. This is also true in the initial negotiation of a construction contract.

While it is not easy, an effort should be made to avoid an adversarial relationship in negotiations, and to try to foster a spirit of mutual cooperation and communication. In order to do this, both parties must come into the negotiation process with both the intent and the ability to disagree amicably, and to negotiate their differences with respect towards one another and with a sufficient degree of flexibility that a positive result is possible.

A positive, objective attitude tends to achieve better results than one that puts the other side immediately on the defensive. In this regard, avoid unflattering and unprofessional emotionalism or attempts to embarrass the other side or cause them to lose face. The success of a negotiation may depend on how tensions and conflicts are handled by the negotiators, and that often depends on the parties' relationship to one another and the experience they bring to the negotiation process.

Even though it may go against the grain, be sensitive to the other side's position and needs and have some empathy with them. Remember that it is easier to reach common ground once each of the parties' "must-have" interests have been established. The negotiation process can then be used to meet the needs of both parties to the process.

Another method of moving the negotiation process along and inspiring a feeling of cooperation and trust is to select issues on which the parties can agree, leaving the difficult issues until last. The parties can also agree to points not in dispute. This leaves fewer issues to be settled in the negotiations.

It is always better to open the negotiation process by asking questions instead of confronting the other party with declaratory statements. Never ask the other party what he will settle for. This tends to paralyze the positions and makes both parties unduly defensive.

It is often a good idea to set a time deadline for the settlement of claims. In the construction industry, the owner and the consultant often establish a procedure for handling changes, establishing negotiation sessions and setting realistic deadlines.

In construction, the owner, based upon the advice and recommendations of the consultant, must know when to make a concession and when to reach a settlement of a given issue. In this regard, it is often a good idea to avoid making concessions without receiving meaningful concessions or offers from the other side.

If negotiations go on for the some time without any real movement to resolution, at some point in the process, one of the parties may consider arbitration or litigation, whichever is provided for in the contract. Sometimes the threat of power can be more powerful than wielding actual power. The threat of arbitration or litigation may act as a motivator to bring the other party towards a settlement or at least to a more reasonable position in the negotiation process.

7. The Benefits Of Negotiation

The majority of construction or commercial claims can be settled through the negotiation process. Sometimes, this process takes the guise of informal without prejudice discussions between the parties and/or their legal counsel. In other cases, the negotiations take place in the context of a formal mediation proceeding, which in fact is an assisted form of negotiation, where

the mediator acts as a facilitator attempting to bring the parties together on the issues that separate them.

If one of the parties is out of touch with factual or contractual reality, or is acting in bad faith, or has not been adequately informed, a dispute may require to go further to arbitration or litigation. Otherwise, the negotiation or mediation process should, in most cases, result in a resolution of the dispute between the parties. In practice, most formal mediation proceedings result in settlements.

Typically, negotiation is the first point of resolution of disputes, followed by mediation, arbitration or litigation. Some of the benefits of negotiations and mediation proceedings include the fact that they are cheaper and quicker than the alternatives. Often, in the business world, long term survival means avoiding arbitration or litigation, if possible. Negotiations avoid costly and disruptive delays in construction. They enable the contractor to restore cash flow and provide reimbursement for the costs of performing disputed changes.

The negotiation process avoids the adversarial relationship that is so damaging to future business relationships. It preserves reputations and the adverse notoriety of disputes is often kept from public scrutiny. Even if negotiations or a mediation fail, they provide a good opportunity for each side to have a look at the other party's position and strategy for a potential future arbitration or litigation proceeding.

8. Negotiation Chemistry

In construction negotiations, the negotiation process is an exercise in basic engineering. The dynamics of the interaction between the negotiators is just as important as the issues they are

negotiating on. If the “chemistry” between the negotiators is right, a resolution will likely be achieved. The goal for each party must be to make the other party want to settle. That goal can only be achieved by satisfying some of the needs of both parties. In an ideal interest-based negotiation scenario, there are no “winners” or “losers”. Both parties should come away from the negotiation or mediation process thinking that a fair deal was achieved. A good rule to remember is that a good negotiated settlement is always better than a good lawsuit.