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Some reflections on negotiation strategies and dispute settlement

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Resolving conflicts is expensive. At the outset, clients incur costs internally due to staff and managers spending time and energy on documenting and resolving disputes. Later on, expenses may arise in the form of attorney's fees and court costs.

This newsletter explores how the cost of conflict can be contained by agreeing a settlement of the dispute.

Conflicts result in substantial costs both for the individuals involved and the economy

- ! In most cases, the parties are best served if they are able to reach an agreement with the other side, preferably by way of a formal settlement.
- ! A "settlement" is a contract under which the parties agree to settle a dispute or unresolved matter pertaining to a legal relationship, with each side making concessions.

Some reflections on negotiation strategies and dispute settlement



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Conflicts cannot always be prevented. But conflicts can escalate and the parties then find themselves embroiled in litigation, either in the role of plaintiff or defendant. Precisely because conflicts are unavoidable, it is important to consider strategies and approaches that are most likely to resolve such disputes.

Pressure to settle

Litigation has become more expensive since the Swiss Code of Civil Procedure was introduced in 2011. Proceedings are often laborious and time-consuming. The plaintiff bears the brunt of this and faces a strategic disadvantage, since the court costs must be advanced by the party bringing the action. In addition, both litigants also have to pay lawyers' fees until an uncertain point in time when they obtain a judgment on a case. Sometimes, an appeal procedure may also follow.

Even in international disputes, where the parties often opt for arbitration, rather than litigate through national courts, the high costs involved are a major point of concern.

In view of these developments, it has become all the more important for lawyers to be skilled negotiators, with the ability to explore options for settling a dispute. Lawyers are also required to facilitate settlement under the Rules of Professional Conduct. Even though it is not always possible to reach a settlement, it is worthwhile making some observations on the best timing, the best negotiation format and the right ambience for settlement discussions.

The perfect time

There is no perfect time to engage in settlement discussions. Negotiations take time and sometimes occur unexpectedly. Anyone who believes or hopes that he or she can demolish the other party by making a few powerful, convincing arguments at an initial meeting may be in for a nasty surprise. Finding solutions is a process and, in many cases, dealing with the disagreeable aspects of one's own position is inevitably part of that process.

Even if there is no perfect time to talk about settling, certain times are better than others. In many cases, it is best to broach the subject of settlement prior to filing an action. At this stage, only limited internal costs (management effort) and legal costs will have been incurred.

If pre-litigation talks break down and legal proceedings are initiated, the court will generally be minded to summon the parties to a settlement hearing. This will be held either after the first exchange of written submissions (i.e. statement of claim and statement of defence), or following the second submissions of the parties. The Zurich Commercial Court prides itself on disposing of 70%-80% of cases brought before it through settlement. There might well be further opportunities to discuss settlement, for example at the stage of taking evidence, e.g. during a judicial inspection of the object of the dispute or on the occasion of a witness hearing.

Special rules applying to court settlement hearings

Note: In Switzerland, as in many other civil law jurisdictions, it is customary for the judge to summon the parties to a settlement hearing, where he or she will give them his/her preliminary and without prejudice view on the matter before adopting an active role as settlement facilitator.

1. The “bazaar”: the term conjures up images of bargaining in a Middle Eastern market. The parties try to agree a price for an item, such as a carpet or pretty shawl, by making small concessions. This can be very similar to the situation in court, where the parties grant each other small concessions with a view to establishing a workable position. Some clients and attorneys find the bazaar model arbitrary, but it is a valid approach. It can be used once all the arguments are exhausted and the parties are looking to narrow the gap by making final concessions.
2. Strike while the iron is hot: if the opportunity arises, constructive dialogue should be exploited to nail down a settlement. The attorney needs to ensure that the settlement covers all unresolved issues and that nothing is forgotten in the heat of the moment.
3. Court settlement hearings are conducted in accordance with specific, unwritten rules. It is therefore vital that attorneys prepare clients for the hearing in detail and address all the issues involved (participants, sequence of events, positions, rules).
4. Preparation: attorneys need to have an in-depth knowledge of the case. In preparing a settlement hearing, it is also sensible to consider alternatives and the possibility of the settlement failing.

Form of negotiation

Negotiations may be conducted verbally or in writing. Both approaches have their benefits and drawbacks.

Anyone conducting verbal negotiations must be able to cope with human responses and, at times, ill feeling, anger or frustration. In verbal negotiations, it pays to be able to think on your feet and confident speakers will feel more at ease in situations like this. Verbal negotiations generally have a unifying effect. When people are sitting face-to-face, they are more inclined to be diplomatic out of simple courtesy. When meeting in person, it is also possible to pick up on nuances and observe physical reactions: exasperation, a smile of satisfaction, perspiration, evasiveness. Such pointers can be informative.

Written negotiations are significantly more time-consuming and may drag on for weeks or even months. It is important to be aware that written negotiations tend to polarise positions and that the parties often adopt a tougher stance. People will use more aggressive language and adopt black and white positions, which tend to accentuate negative feelings and divisions between the parties. In addition, it is usually more difficult to make concessions in writing than in face-to-face interactions.

Possible strategies and approaches

There are a number of different negotiation strategies and everyone, whether consciously or not, has a preferred method both in routine and non-routine negotiations. One theory that is often used is “anchoring”. Scientific studies have shown that specifying a benchmark (e.g. a settlement offer quantified at 70% of the claim) will fix people’s attention and have an “anchoring” effect. In simplistic

terms, this means that it is generally advantageous in negotiations to name an initial figure instead of letting the other party take this first step. The “25% rule” is another rule which states that where there is a gap of more than 25% between the offers put forward at the start of negotiations, the parties are unlikely to reach a settlement. Although there is some truth to these theories, they do not adequately reflect reality and only represent a starting point. They are also unsuitable for non-financial disputes, e.g. disputes involving performance in relation to the supply of goods or services.

Ambience for negotiation

The issue of what is the right ambience for negotiations also provides interesting food for thought. Delegation, i.e. allocating “good guy, bad guy” roles to the client and attorney may yield results. In this scenario, the “bad guy” rants, acts tough and threatens, while the “good guy” responds constructively and shows a willingness to negotiate. Either role may be required, depending on how the negotiations progress. The seniority and rank of the parties’ representatives are sometimes beneficial in negotiations, but ought not to be overestimated. Clearly, it is much more important to be familiar with the case and - first and foremost - have a thorough understanding of the client’s negotiating position. There are also issues to consider in terms of the venue for negotiation: the younger party goes to the older party, the plaintiff hosts the meeting, the parties meet in a neutral conference room or at the location where the dispute is situated. Because Switzerland has four official languages, negotiations can be conducted in German, French or Italian or, alternatively (and increasingly), in English to create a level playing field where representatives with a different linguistic background are involved.

We aim to solve problems for our clients. We define the negotiating objective, together with clients, prior to the negotiation.

Settlement or judgment

Article 9 of the Swiss Bar Association Rules of Professional Conduct requires attorneys to facilitate a mutually acceptable settlement where this is in the client's interests. It is therefore part of a lawyer's remit to explore options for reaching an amicable settlement and to keep settlement options on the table. To be acceptable, any proposed settlement must, of course, properly reflect the risks inherent in the specific litigation and fit the overall strategy. If this is not the case, it will be necessary to forego settlement in favour of obtaining a court judgment.

We are happy to assist clients with all aspects of litigation and dispute resolution.

Conclusion: blessing or curse?

Of course, settlements sometimes prove to be a curse. In most cases, a settlement will not give the client everything he or she wants and will involve concessions. Compromise thus always means letting go of a top-line objective.

Is it therefore misguided to describe settlements as a blessing? No. Settlements save clients time, money and management effort,

reduce risk and usually avoid any enforcement difficulties, as the majority of settlements are complied with voluntarily. Clients achieve legal certainty and, in some cases, can even save a business relationship that would have been lost otherwise. In a best-case scenario, the client will feel that they have obtained redress. And that is what the rule of law ultimately seeks to achieve.