



Paul Usoro & Co
LEGAL PRACTITIONERS

Negotiation of International Contracts

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Negotiation of International Contracts

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Negotiation Skills

- Meaning and Value of Negotiation
 - the process of communicating or bargaining with another party/parties aimed at reaching a mutual agreement on different needs or ideas.
 - involves persuasion rather than power.
 - intended to create a win-win situation.
- legal counsel's job is to resolve problems or to prevent their occurrence
 - enable the negotiator to replace intuition and guessing in decision making with a well structured and professional approach to negotiations.
 - lay foundation for future interaction.
- skills applicable to lawsuit settlements, contractual undertakings, real estate, recruitment, commercial transactions etc.



Negotiation Strategy

- Plan a negotiation
 - consider benefit of reaching an agreement.
 - identify and prioritize issues.
 - agree on issues for concession.
 - gather information about the other party.
 - select a team and lead negotiator.
- Adopt a Problem Solving Approach (Win-Win strategy)
 - Don't focus on positions or deal breakers but on interests.
 - Focus on ways to solve a problem.
 - Everyone feels they have helped each other.
- Use simple language
 - use plain, simple language and avoid colloquialisms.
 - avoid assumptions about people's language capabilities.



Negotiation Strategy

- Ask questions and listen
 - Effective in gathering information and assessing the other party.
 - Listen carefully to their responses.
 - Appreciate the power of silence.
- Build strong relationships
 - develop a personal relationship with your counterpart.
 - this is valued and aids agreeing on issues.
- Maintain personal integrity
 - trust is vital to conclude a deal.
 - difficult to build but even harder to rebuild when destroyed.
- Conserve concessions
 - must be carefully formulated and tactically made.
 - signals anxiety/loss of control when offered recklessly.
 - cooperative attitude, counteroffer.



Negotiation Strategy

- Be patient
 - politeness builds trusting relationship,
 - consider time zones and culture.
 - takes patience to obtain information from the other party.
- Be aware of cultural differences
 - greetings, manner of introduction/exchanging business cards,
 - physical distance between each other
 - attitudes towards overt power display.



Stages in Negotiation

- Preliminary Stage
 - Establish limits and goals, and
 - Establish negotiator identities and tone for interaction
- Client preparation
 - Determine the needs of the client,
 - Set and agree on expectations,
 - Agree on your limits.
- Assess your team's capacity
 - Knowledge of subject matter
 - Negotiation skills
 - Strengthen your team with foreign experts if required.



Stages in Negotiation

- Preliminary Stage
 - Counsel preparation contd
 - Knowledge of the subject-matter very critical
 - Understand the real-cost of non-settlement to client
 - Understand the real-cost of non-settlement to the other party
 - Accurate assessment of strength and weaknesses of own side and the other party
 - Understand and appreciate importance of foresight and flexibility
 - Importance of establishing good impression and reputation.
 - Coordinating strategy/inter-party communications
 - Appoint a spokesperson
 - Setting the stage
 - Whose office?- Own office; Opposing counsel; Office Facilities
 - Assessing negotiator personalities and authority to make decisions
 - Prior familiarity or unknown negotiator
 - Establish negotiation tone.



Stages in Negotiation

- Information Stage (Questions, Offers, Responses)
- Questions
 - obtain information about the skills, resources and experience of counsel regarding the type of transaction.
 - ascertain the other's needs and objectives.
 - do not allow opponent to use evasive tactics to avoid disclosure of pertinent information.
 - listen and be patient to absorb as much information as possible.
 - enables you to seize control of the bargaining process.
- Offer
 - Methods of presenting demands and message conveyed
 - Most or least important first?
 - Key Issues or ancillary Issues?



Stages in Negotiation

- **Competitive/Distributive Stage**

- articulate own side's specific demands, diligently advance the interests of own client and obtain as much as possible.
- focus is on outcome of negotiations
- Make principled concessions
 - articulate in the language of party's needs or interests not "positions" or "deal breakers".
 - amount and timing is crucial.
 - should be made in response to appropriate counteroffer.
 - planning flexibility and patience.



Stages in Negotiation

- **Competitive/Distributive Stage**
- Dealing with adversities or deadlock
 - change strategy, change negotiation focus or setting.
 - take a break.
 - when negotiations breakdown, immediate action should be taken to prevent the situation from becoming irretrievable.
 - avoid the temptation to respond an 'eye for an eye' when the meeting reconvenes.
 - do not insist on an apology when order is restored.
 - do not allow a breakdown to continue if the consequences of not reaching agreement are worse than the last deal on the table.



Stages in Negotiation

- **Closing Stage**

- combination of relief and anxiety, very competitive stage.
- very critical as majority of concessions tend to be made during the concluding portion of negotiations.
- overly anxious participants may forfeit much of what they obtained in the earlier stage if they are not vigilant.
- concessions decrease in size and must be reciprocated.
- avoid unreciprocated and excessive position changes.
- must be patient and maintain calculated silence.
- permit the final phase of the process to develop in a deliberate fashion.
- maintain momentum towards settlement
- suggest a face saving way out from stalemates



Stages in Negotiation

- **Cooperative/Integrative Stage**
- After agreement has been reached
 - review the terms agreed upon to ensure there are no misunderstanding.
 - this is the time to rectify any discrepancies.
 - take control of the drafting.
 - if the opponent drafts the final terms, review very carefully to ensure
 - language correctly reflects the agreed positions of parties,
 - nothing is omitted or
 - smuggled in.



Tactics in Negotiation

- **Tactics (deceptive/manipulative/to gain advantage)**
 - There is a time to listen, a time to talk, a time to think, a time to decide, and a time to act. Take them in their turn.
 - While listening, suspend critical judgment.
 - Do not try to change the views of the other side; focus on the benefits of your own.
 - Sometimes a hostile audience needs to blow off steam. Let them; they will be less hostile afterwards.
 - Always draw out thinking when an audience is objecting.
 - Ask questions concerning their underlying thinking, on the premise that you want to better understand their position. What you really want is for them to more carefully examine their own thinking.



Tactics in Negotiation

- **Tactics**

- Questioning someone's judgment requires great tact. Preface such questions by acknowledging that something is true; ask the question; then give a reason for asking.
- Better to understate than overstate. Overstatement may give the other party a feeling of being manipulated.
- Back away from blunders quickly and completely. Have a strong place to go i.e. your next argument. If a fact was inaccurate, substitute an accurate one. If an analogy was faulty, find another that is not.
- Choose the venue for negotiation where you have the opportunity to do so.



Negotiating International Contracts

- **Characteristics of International Contracts**
 - Cross border, multi-jurisdictional, different legal systems, sometimes parties with uneven bargaining powers etc.
- Adopt International Terms/Rules/Standard Forms to govern contract
 - INCOTERMS, UCP 600, FIDIC, BALTIME, NYPE, BARECON
 - Provides for rights, obligations, liabilities of parties including clauses on foreign laws, export/import and currency exchange controls, treaties, transit issues, inspection of goods, insurance, tariffs, dispute resolution and jurisdiction.
- Peculiarities
 - a variety of internationally negotiated clauses which aid, smooth negotiation and execution of contract.
 - meaning, obligations and liabilities of parties specified and widely accepted
- Risks involved
 - Reliance on major variations of standard terms.
 - Clauses raise certain legal issues which if not well negotiated upon, may lead to harsh consequences.



Negotiating International Contracts

- **Boiler plate clauses**

- dangerous practice to use precedents without editing and negotiating
- give greater certainty to the parties as to how their carefully negotiated contracts will be interpreted.

- **Representations and Warranties**

- a statement of fact (a statement of intention, opinion or law) which is relied upon by the recipient and forms part of the inducement to contract which gives rise to legal liability if untrue.
- warranty is a contractual promise for which the remedy for breach is damages and not repudiation of the contract.
- note that a clause may be a condition even though called a warranty in the contract.



Negotiating International Contracts

- **Indemnity Clause**

- Shifts the obligation to pay damages from one person to another when facts of a particular case make it unfair to hold one party completely or partially responsible for the loss to a third party.
- Issues to consider when negotiating an indemnity clause:
 - The determination of the extent of loss or breach of the contract obligations which will necessitate some indemnity;
 - What occurrences will be fair to provide for reciprocal indemnities?
 - Determining the limits of the indemnity available; and
 - Criteria for arriving at reasonably incurred costs for which a party is entitled to indemnity.



Negotiating International Contracts

- **Force Majeure Clause**

- frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, such as war, strike, riot or “act of God”, prevents one or both parties from fulfilling their obligations under the contract.
- Not intended to excuse negligence or other malfeasance of a party.
- Issues to consider during negotiations:
 - Extent,
 - Notice to the other party,
 - Effect on agreement (delay or termination?)
 - Obligation to mitigate effect,
 - Events that constitute force majeure



Negotiating International Contracts

- **Change of Control**

- gives protection to a party if the controlling shareholding of the other party is transferred.
- breach triggers right to terminate the agreement.
- issues to consider during negotiations:
 - definition of what constitutes “change of control”
 - are there are rights or obligations which can adversely be affected by any “change of control”.

- **Dispute Resolution Clause**

- **Litigation**

- Governing laws, courts with jurisdiction

- **ADR**

- Arbitration
- Governing law, Arbitration rules, venue, appointment, binding/final



Negotiating International Contracts

- **Dispute Resolution Clause**
 - A combination of ADR and Litigation
- **Market disruption clause,**
- **Tax gross-up Clause;**
- **Business Day/Calendar Days etc**



Conclusion

- Advance Preparation
- Have a list of foreign firms to engage where necessary,
- Do not be afraid to participate in negotiations,
- Learn from your seniors and opposing counsel,
- Always be calm and polite,
- Be flexible,
- Remember always that we are advocates for our clients and do not become personally involved,
- Your job is to advise not to take positions or make decisions for the client,
- Make friends with the library and absorb as much knowledge as you can about the transaction.



References

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Thank You for Listening

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