

Article

The Negotiation Element in Mediation

The Art of Concessions

Martin Brink*

1 Introduction

20 Mediation is a process during which conflicting parties will be invited by the mediator to come to an appreciation of each other's views and interests. A sincere expression by each party of a genuine understanding of the viewpoint of the counterpart – and also of the reasons causing that viewpoint – is something that a mediator hopes to see occur in a mediation. An expression of appreciation is not the same as saying that one agrees with what the other is saying. It is one of the aims of the mediation process that the parties will listen to each other not merely to reply but in order to understand what is being said. On the basis of a mutual understanding of each other's viewpoint, the parties may then become willing to consider making concessions in order to find a solution to their problem. In a number of cases, differences cannot be overcome without concessions of one kind or another. The question that may become relevant then is, how to make a concession in a responsible manner? Therefore, to manage the making of concessions consciously is important and may help to achieve goals better or to prevent loss. In other words, it may be helpful to be versed in the art of concessions.

2 Mediation without Concessions

Mediation is not necessarily about concessions. The idea that consenting to participate in a mediation process implicitly entails a willingness or necessity to make concessions is not correct. This false assumption has been known to make parties shy away from becoming engaged in a mediation process. Certainly, depending on the nature of a conflict at hand, negotiation may be required for the parties in order to reach an agreement. Not everything, however, is about money. Corporate mediation is about mediation within and between organisations. Many things can go wrong without a monetary aspect being involved. Cooperation within and between organisations can easily become hindered as a result of misunderstanding, miscommunication, different personalities or simply differing paradigms. Mediation is an instrument that, in a positive sense, may bring about a transformation of traditions, help to shape ideologies, change paradigms and practices, and touch the hearts of people in many ways. Even if there is no aim to negotiate or settle disputes, mediation may be helpful to sort out miscommunication, achieve mutual understanding or make it possible to verify assumptions that may have been leading a life of their own and have gotten in the way of good relations. However, if at one point a mediation process involves elements of commercial or other negotiation, it is good to be versed in the art of concessions.

'Solving the problem of the other is solving one's own problem' is a practical thought. However, the outcome will have to be balanced and accord with the definition of negotiation as formulated by Korobkin in his Intro-

* Martin Brink, PhD, is attorney at law, arbitrator and deputy judge at the The Hague Court of Appeals and an internationally certified mediator (MfN, IMI, CEDR Global Panel).

Figure 1 The 'Brink bar'

IDEAL	DEAL	BATNA	WATNA
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duction to the handbook *Negotiation Theory and Strategy*:¹

Negotiation is an interactive communication process by which two or more parties who lack identical interests attempt to find a way to coordinate their behaviour or allocate scarce resources in a way that will make them better off than they could be if they were to act alone.

The charm of this definition is that it does include the aspect of just being better off than one could be if one were to act alone, that is, able to relate or work together. The definition also refers to interactive communication where the issue of scarce resources is concerned, be it monetary or otherwise, which may invite the necessity of concessions. One could argue that the two or more parties who are negotiating need not necessarily lack identical interests. Their interests can well be identical but their views may differ in regard to the means of amalgamating those interests. Both with and without a monetary aspect to a dispute, a willingness to make a concession to help move things forward may be helpful and will sometimes be unavoidable. Whether it is advisable to be the first one to make a move (offer or demand) was the subject of an article in a previous issue of *Corporate Mediation Journal (CMJ)*.² A first offer or demand, however, is not a concession per se. The question is whether it is advisable to be the first one to make a concession. Much in this respect will depend on the quality of the relationship between the parties around the table.

3 Mediations with Concessions

In the event there is a negotiation element in mediation, a helpful tool for the mediator is what I refer to as 'my bar'.³ The mediator can ask the parties to work with this bar by reasoning through, as profoundly as they can, every option mentioned. This may be done by a party separately while it waits during a caucus⁴ between the mediator and the other party, but also in a plenary session with both parties when the negotiations have come to a halt. Experience shows that, in a vast number of cases, positions start to move again and things have

become less fixed than before. Posing the question to the parties to start working with the bar and to search one's values and beliefs profoundly following every option mentioned in the bar often works wonders. It initiates that a party will (re)organise its own thoughts and divert these away from the dynamics of the discussions with the adversary. Being oriented towards the discourse with the other party causes a limitation on the free flow of thought. It can be compared to looking around in one shop and seeing what is on offer there as opposed to being able to search the Internet at liberty and explore what else is available. To place this in the context not of the room left for solutions by the other party during a mediation – given the verbal responses or body language of the other – but one's own values and beliefs brings the focus back on what really matters in the end. This helps to make realistic choices. The focus shifts momentarily from the discussion with the adversary to one's own position and realistic considerations. The result is often that a party can also offer the other party more direction as to what might be a desired solution. The bar can also render good services in another respect. When attorneys are present in a mediation and riding the high horse of their conviction that legally they have a very strong case, it can be illuminating – in caucus and preferably in the presence of their own client – to ask them to also go over the four options mentioned in the bar. This may be of great help in bringing back the reality that nothing is certain in life, the future cannot be foretold and that it ultimately comes down to what the client wants in terms of priorities and risk taking. As said, the bar can also be used to invite parties in a joint meeting to together examine the various options in the bar in order to understand the situations they may find themselves in, if it would come to the actualisation of either of those options.

What the four options do entail is being discussed with a party. The mediator will explain the idea. This goes as follows:

IDEAL: It is a Sunday afternoon. You find yourself in your garden. The sun is shining. The birds sing their cheerful song, and there is a gentle breeze. On the table next to you is your favourite drink. It is a perfect world, and you may design the perfect solution for the problem you have with the other party. You dream up the exact way you would like the situation to be solved, everything completely according to your wishes. You can design the ideal solution.

There is but one problem: somewhere else someone is also in a garden with his or her favourite drink on a table while the sun is shining and the birds are singing their cheerful song. This person is also coming up with a perfect solution but that solution is almost certainly not the

1. Korobkin R. (2002). *Negotiation Theory and Strategy*. New York: Aspen Law & Business, p. 1.
2. Brink M. (2017). The Negotiation Element in Mediation, The Impact of Anchoring. *Corporate Mediation Journal*, (2), 55-61.
3. Brink M. (2016, January). The Brink Bar. *Mediate.com*. Retrieved from <http://mediate.com/pfriendly.cfm?id=11729>.
4. A caucus is a one-on-one conversation between a mediator and one of the parties that may during a mediation take place with the consent of both parties to be matched with a one-on-one conversation with the other party.

same as yours. The chance you may be able to achieve your perfect solution, therefore, is very slim.

DEAL: Then it is Monday again; it is raining, and you have to go back to the office. You return to the reality of everyday life, where positions, desires and the needs of others are to be taken into account. Compromises are unavoidable, and most of the time things are not exactly the way one would want them to be. It comes down to achieving as good a deal as one can, which normally does not consist of the perfect solution and does not meet all of one's objectives. Concessions are part of that reality.

BATNA: What if you are unsuccessful in coming to a deal? What is the best alternative to a negotiated agreement in that case? What price are you willing to pay when not reaching an agreement with the other party? What price can you afford? In what predicament will you find yourself or what predicament will you get yourself into in case no settlement comes about? At what cost are you willing not to reach an agreement?

WATNA: What if things get totally out of hand and the worst comes to worst? What is the worst alternative to a negotiated agreement? If such a situation did occur, what would your situation then be? It helps to keep this scenario in mind as long as there is still reluctance to come to an amicable settlement, even if it would not be reached in great friendship.

The bar can do exactly what is considered to be one of the objectives of mediation and that is to restore the autonomy of a party and help it to come to decisions based on considerations independent of one's own values, priorities and means. It may bring back the connection with the starting point when entering into negotiation. Preparation is key and to remain loyal to the scenario that was envisaged while preparing for a negotiation is not always easy due to the dynamics of the process and the attitude of the other party. As a result of the tension that will come with participation in a mediation process and the involvement therein of the other party and orientation of the other party, the bar may be of help in bringing back the paradigm to oneself and to get one's ducks in a row again. Yet concessions are likely to remain part of the negotiation, and with the bar in mind, concessions will have to be consciously and carefully managed.

4 An Offer One Cannot Refuse

The opposite of having to manoeuvre a long time before obtaining a concession is receiving an offer one cannot refuse. What do you do when you receive 'an offer you cannot refuse'? The advice of experts is: 'Refuse it'. This advice is based on several considerations. One is that there is a chance that the other party knows something you do not know. You may have wrongly estimated their reservation value (their walk away point).

Maybe what you have to offer is more valuable than you thought. Maybe they are more desperate than you expected or have a lot more money than you thought.⁵ Instead of jumping at the occasion, first take a step back and consider all options before responding. Another reason to defer acceptance is that it will make the other party feel it has given away too much. So, if only for the form, it is advisable to stretch the negotiation and demand even more than the offer that was too good to refuse. The example given by Neale and Thomas⁶ is illustrative: They cite three experiences of a similar transaction involving buying the same horse. The prospective buyer liked the horse and, after inspection by a veterinarian, was convinced it was sound and in good health. The negotiation now was about the price. The buyer expected having to pay \$ 9,000. The seller asked for \$ 11,000. In the first scenario the seller accepts a counter-offer of \$ 9,000 straightaway; in the second scenario the seller, after four rounds of offers, finally agrees to a price of \$ 9,000; and in the third scenario the seller takes a hard line, does not give in after multiple rounds of offers and demands and only concedes to a price of \$ 9,000 because the buyer threatens to walk away. The appreciation of the horse on the part of the buyer may differ depending on which scenario applies. In all three scenarios the initial asking price is \$ 11,000, and the end result of the negotiation is \$ 9,000. In economic terms there is no difference between the outcome of the three scenarios, yet in the first scenario the buyer will feel that the horse was in fact worth less than the \$ 9,000 he had estimated, because the first offer was accepted so quickly. Maybe something was wrong with the horse or something else must have escaped his attention when making the first assessment of the value of the horse. In the second scenario the buyer will most likely have the satisfaction of having negotiated well and achieved the estimated price, and may also feel that the horse was worth at least \$ 9,000, and possibly even \$ 11,000. The satisfaction with the end result may have even been greater if the seller had motivated his concession towards the asking price, for example by saying that he needed the money or needed to close his books for the year. In the third scenario the appreciation of the transaction would probably be the same but not the appreciation of the seller. The manner in which the negotiation unfolded in this scenario will have created a more distant feeling towards the seller than in the second scenario.

The outcome of a negotiation is generally considered successful when both parties feel they have obtained what was in it for them, although it is not seldom that the buyer will feel that more was paid than what was desirable and the seller will feel that less was received than he or she desired.

5. See Malhotra D. & Bazerman M.H. (2007). *Negotiation Genius*. New York: Harvard Business School, Bantam Books, p. 48.

6. Neale M.A. & Lys Th. Z. (2016). *Getting (More of) What You Want*. London: Profile Books Ltd., p.

5 Tit for Tat

It is a familiar saying that ‘you teach others how to treat you and others teach you how to treat them’. It is helpful to keep this in mind when reading the spirit in which a counterpart is participating in the negotiation and also in determining – at least at first – how to approach the other party. Parties who take a strong stand and yield little will otherwise take benefit of the more compromising attitude of their counterpart. I like to think that the other party will have to ‘deserve my attitude’. Many things in the behaviour of the counterpart are of significance. Is it necessary to put up a fight before obtaining a concession? Does the other side manifest a desire to seek a solution or just the best result for themselves? How well motivated are demands and concessions? Is there transparency in their strengths and weaknesses? Negotiation works best when complete transparency prevails on both sides about what is desired and what is possible, but that is not always achieved, and certainly not in the early phase of a negotiation. Trust needs to be built up first, and that is the result of the behaviour experienced from the counterpart in the early stages of the negotiation.

Choosing a style to be adopted in a particular negotiation is based on a friendly approach insofar as the relationship is concerned but on a neutral attitude in regard to content. ‘Soft on people, hard on content’ should be the guiding principle until the counterpart gains sufficient goodwill to ‘deserve’ an attitude of being soft on people and transparent about the hoped for result of the negotiation and possible concessions. Preferably, each of the parties will seek to determine how to best meet its own end while meeting that of its counterpart. The most fruitful negotiations are those where both parties disclose their interests and try to find optimal solutions to combine them in a result that will bring most of what is available to both parties. A hard and fast rule in negotiation, however, is *tit for tat*. At one point someone will have to begin making concessions for a negotiation to lead somewhere. Normally, the first concession serves as a good test to get to know the counterpart. This first, often minor, concession ought to be met by a concession from the counterpart. In that sense it is *tit for tat*. This applies to concessions not only about monetary things but also about (the exchange of) information. If the counterpart offers nothing in return, then the situation is put on hold until there is a change in attitude or something is offered in return after all. As a rule, concessions are made in return for concessions – *tit for tat*. The philosophy that negotiation is all about disclosing the interests of the parties and combining them entails a danger. This win-win idea is based on what is referred to as the Harvard Negotiation Theory.⁷ The world does not consist of negotiators who think in terms of win-win and some play a tough game of what is called zero sum

negotiation. They constantly reckon one dollar yielded to the other is one dollar less for them. Their sole purpose is to defeat what they consider weak negotiators. In order not to be or become a sitting duck for these types, it is especially important not to negotiate according to a theory or philosophy that does not take into account the attitude of the other party, but to protect oneself by the rule of *tit for tat* and the resolve to walk away from a transaction if need be.

In an ongoing negotiation where many different aspects are tabled, it may be advisable not to consent to any of the possibilities that are discussed as potential concessions. First try to agree with the other party to collect all the issues that appear to be important in order to agree, and consequently engage in what is referred to as *log rolling*. This will make it possible to negotiate multiple things at the same time and to find out what is most important for the other party. Something that appears to be of value to the other party may have less value to yourself, so it may be exchanged for even more value. It comes down to seeing the entire picture and getting to a package that contains what is most important for yourself. When making a concession it is important to identify this as a concession and preferably explain why this is so. Also explain why a certain concession is demanded from the other party, as this may help to put your demand in perspective when asking for that concession. Sharing information may help to build trust.

When making concessions it is advisable to spread them out rather than to give them all away in one ‘grand gesture’. The counterpart receives a good message – for example that a requested concession has been granted – rather than a refusal or denial. Spreading the good news is therefore better. It provides more gestures of goodwill and also affords more opportunities to ask for something in return. Bad news can better be communicated in one message to avoid a repetition of moments of disappointment. It all comes down to the manner in which a message is conveyed. Empathy is fine as long as it does not distract from the content.

6 A Vital Difference

As said, making a small concession may be a good way to test the temperature of the water at the other end of the table, as there is not much harm done if the counterpart does not respond constructively with a concession in return. With more significant concessions, however, the risk of giving away something and not receiving anything of equal value in return is greater. In the case of both small and significant concessions there is a way to protect oneself against a negative reaction from the other party. It makes all the difference whether something is factually already given away by means of a concession or not. The question in this respect is how to make a concession without giving something away. Can that be done? The answer is yes. Negotiation cannot be abstracted from power, whether it is the power of granting or

7. See Fisher R. & Ury W. (1982). *Getting to Yes, Negotiating Agreements Without Giving In*. London: Arrow Books Ltd..

denying something or power as the result of scarcity on the part of the one and availability of what is wanted or needed by the other.⁸ To retain power and remain in charge when making a concession, it is important to choose the exact wording of a concession carefully. Do not say, 'I am willing to give you A and B if you are willing to give me C and D in return,' because that will allow the other party to say no to your proposal, at the same registering that you are willing to give up A and B. A simple change in the phraseology of the same proposal will avoid that position: 'If you are willing to give me C and D, I am willing (to consider) to give you A and B.' This leaves the counterpart with the choice to say yes or no to the proposal, although not knowing whether you are willing to give up A and B without having received C and D first. The sequence of receiving and accepting a concession instead of granting a concession in the hope of receiving one in return will help to retain ownership over the decision whether or not to surrender value.

7 Three Trading Questions

The art of concessions, as we have seen, has much to do with tit for tat, in terms of both attitude and goodwill and the exchange of value. According to the three trading questions rule, before making a concession it is best to answer three (trading) questions (3TQ):

- What is the cost/value of a concession?
- What is the cost/value to the other party?
- If I can answer the previous two questions, what do I want in return?

I remember a mediation, which lasted two full days, about corporate governance in a company. One shareholder ('A') who held positions of both majority shareholder and managing director, after lengthy negotiations with three minority shareholders ('B', 'C', and 'D'), finally agreed to give up his controlling interest. The controlling interest was constituted by owning 49% of the shares in the capital of the company and being the single member on the board of an ESOP (employee stock ownership plan foundation), which was entitled to 5% of the shares in the capital of the company. Combined A could exercise voting rights on 54% of the shares. During the negotiations he succeeded in obtaining many concessions from the trio B, C and D in return for a willingness to give up the seat on the board of the ESOP and a willingness to stand down as managing director of the company. When everything seemed to be settled and done in the late hours of the second day of

8. A helpful thought in negotiation is proffered by Jim Camp, author of *Start with NO*, who explains that a negotiator should not be needy. If you have the basic essentials for physical survival (such as food, fresh air, clothing and shelter) and intellectual and emotional well-being (such as love, family, work, hobbies) you do not need anything from negotiations; you may want it, but that is something else. Camp J. (2002). *Start with No, The Negotiating Tools That the Pros Don't Want You to Know*. New York: Crown Business Books, p. 21–24.

negotiations and B, C and D were believed to have finally reached a solution for their predicament, A played the 'Colombo move'. He confirmed having agreed to all that was negotiated but said that his willingness to stand down as managing director – which B, C and D had believed to have been included in everything that was discussed and negotiated – 'of course would only stand when he received a severance payment of € 150,000, which he believed to be only fair and reasonable'. B, C and D exploded but, instead of walking away, retreated to a break-out room and applied the three trading questions. The concession A still demanded from them had a value of € 150,000. They had been surrendering a lot of things in the past two days in order to come this far, so they started to make an inventory of how much value they could try to get back by asking things in return for accepting what they considered this very unjust and unreasonable demand on the part of A. They came up with a list of things that in their view represented a value of at least € 150,000 and went back to A, : saying that 'if he would be willing to consent to granting them these things, they would be willing to accept paying the severance payment. A accepted and this settled the case. B, C and D kept their eye on the entire picture and wisely applied both the three trading questions and the framing of their counter-offer. Working out and demonstrating the value of a concession is an important aspect of negotiation.

8 Do Not Negotiate with Yourself

A famous concession is 'to split the difference'. Even if splitting the difference would be something to contemplate under the circumstances, take care to partake in this exercise only once. Otherwise, half of half becomes one quarter, and one quarter becomes one eighth. The same awareness is needed for 'the salami-effect'. In a negotiation where multiple elements matter, it is best not to agree to anything before the entire picture is clear. A clear example from the perspective of a seller is the sale of a carpet. The seller will know the various costs involved, for example carpet, underlay, fixtures and fittings and labour, but the purchaser does not. Until he or she is sufficiently informed about those details, it is difficult to determine the price of the carpet and to compare this with the prices of other offerors of such carpets.

9 Conclusion

When using the tool of mediation, negotiation may or may not be involved. If it is, parties are well advised to be aware of the mechanics that may be involved in nego-

tiation, such as anchoring⁹ and how to deploy the art of making concessions.

9. Brink M. (2017). The Negotiation Element in Mediation, The Impact of Anchoring. Corporate Mediation Journal, (2), 55-61.