



# **FACULTY OF JURIDICAL SCIENCES**

**COURSE: B.B.A.LL.B.**

**Semester: VIII**

**SUBJECT: Alternative Dispute**

**Resolution**

**SUBJECT CODE: BBL803**

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# Lecture-39



## LECTURE 39: Negotiation

Negotiation has been defined as any form of direct or indirect communication whereby parties who have opposing interests discuss the form of any joint action which they might take to manage and ultimately resolve the dispute between them. Negotiations may be used to resolve an already-existing problem or to lay the groundwork for a future relationship between two or more parties.

Negotiation has also been characterized as the “preeminent mode of dispute resolution, which is hardly surprising given its presence in virtually all aspects of everyday life, whether at the individual, institutional, national or global levels. Each negotiation is unique, differing from one another in terms of subject matter, the number of participants and the process used.

- **Characteristics of a negotiation**

Negotiation is:

- **Voluntary:** No party is forced to participate in a negotiation. The parties are free to accept or reject the outcome of negotiations and can withdraw at any point during the process. Parties may participate directly in the negotiations or they may choose to be represented by someone else, such as a family member, friend, a lawyer or other professional.
- **Bilateral/Multilateral:** Negotiations can involve two, three or dozens of parties. They can range from two individuals seeking to agree on the sale of a house to negotiations involving diplomats from dozens of States (e.g., World Trade Organization (WTO)).
- **Non-adjudicative:** Negotiation involves only the parties. The outcome of a negotiation is reached by the parties together without recourse to a third-party neutral.
- **Informal:** There are no prescribed rules in negotiation. The parties are free to adopt whatever rules they choose, if any. Generally they will agree on issues such as the subject matter, timing and location of negotiations. Further matters such as confidentiality, the number of negotiating sessions the parties commit to, and which documents may be used, can also be addressed.
- **Confidential:** The parties have the option of negotiating publicly or privately. In the government context, negotiations would be subject to the criteria governing disclosure as specified in the Access to Information Act and the Privacy Act. For general information on the privileged nature of communications between solicitor and client during the course of negotiations, please refer to the Department of Justice Civil Litigation Deskbook.

- **Flexible:** The scope of a negotiation depends on the choice of the parties. The parties can determine not only the topic or the topics that will be the subject of the negotiations, but also whether they will adopt a positional-based bargaining approach or an interest-based approach.
- **Advantages of negotiation**
  - In procedural terms, negotiation is probably the most flexible form of dispute resolution as it involves only those parties with an interest in the matter and their representatives, if any. The parties are free to shape the negotiations in accordance with their own needs, for example, setting the agenda, selecting the forum (public or private) and identifying the participants. By ensuring that all those who have an interest in the dispute have been consulted regarding their willingness to participate and that adequate safeguards exist to prevent inequities in the bargaining process (i.e., an imbalance in power between the parties), the chances of reaching an agreement satisfactory to all are enhanced.
  - Like any method of dispute resolution, negotiation cannot guarantee that a party will be successful. However, many commentators feel that negotiations have a greater possibility of a successful outcome when the parties adopt an interest-based approach as opposed to a positional-based approach. By focusing on their mutual needs and interests and the use of mechanisms such as objective standards, there is a greater chance of reaching an agreement that meets the needs of the parties. This is sometimes referred to as a “win-win” approach.
  - Negotiation is a voluntary process. No one is required to participate in negotiations should they not wish to do so.
  - There is no need for recourse to a third-party neutral. This is important when none of the parties wants to involve outside parties in the process, e.g., the matter to be discussed or the dispute to be resolved may be highly sensitive in nature.
  - Unlike the outcomes of certain adjudicative processes, e.g., the courts, the outcome of a negotiation only binds those parties who were involved in the negotiation. The agreement must not, of course, be contrary to Canadian law (e.g., an agreement to commit a crime would be illegal and thus void for public policy reasons).
  - Assuming that the parties are negotiating in good faith, negotiation will provide the parties with the opportunity to design an agreement which reflects their interests.
  - Negotiations may preserve and in some cases even enhance the relationship between the parties once an agreement has been reached between them.

- Opting for negotiation instead of litigation may be less expensive for the parties and may reduce delays.

- **Disadvantages of negotiation**

- A particular negotiation may have a successful outcome. However, parties may be of unequal power and the weaker party(ies) may be placed at a disadvantage. Where a party with an interest in the matter in dispute is excluded or inadequately represented in the negotiations, the agreement's value is diminished, thereby making it subject to future challenge. In the absence of safeguards in the negotiating process, the agreement could be viewed by a participant or others outside the process as being inequitable, even though the substance of the agreement may be beyond reproach.
- A successful negotiation requires each party to have a clear understanding of its negotiating mandate. If uncertainty exists regarding the limits of a party's negotiating authority, the party will not be able to participate effectively in the bargaining process.
- The absence of a neutral third party can result in parties being unable to reach agreement as they may be incapable of defining the issues at stake, let alone making any progress towards a solution.
- The absence of a neutral third party may encourage one party to attempt to take advantage of the other.
- No party can be compelled to continue negotiating. Anyone who chooses to terminate negotiations may do so at any time in the process, notwithstanding the time, effort and money that may have been invested by the other party or parties.
- Some issues or questions are simply not amenable to negotiation. There will be virtually no chance of an agreement where the parties are divided by opposing ideologies or beliefs which leave little or no room for mutual concessions and there is no willingness to make any such concessions.
- The negotiation process cannot guarantee the good faith or trustworthiness of any of the parties.
- Negotiation may be used as a stalling tactic to prevent another party from asserting its rights (e.g., through litigation or arbitration).