Getting past the impasse

Nigel Dunlop discusses strategies to deal with impasses in mediation

Some negotiators and mediators have a morbid of fear of impasses. Impasses occur when negotiations hit a veritable brick wall. Failure to settle looms.

Such fear is understandable, because, after all, the objective of mediation is to achieve settlement. Impasses can be the unwanted harbinger of difficult and tiring negotiations to come.

Fear of impasses is, however, unnecessary for the following reasons. First, there are ways of *avoiding* impasses from occurring. Second, if they do occur, impasses may be *welcomed* as the first clear indication of what separates the parties. Third, having occurred, there are ways of *overcoming* impasses. Fourth, if an impasse cannot be overcome, that may helpfully confirm that settlement is *undesirable* or *impossible*.

Avoiding the impasse

Impasses can be likened to traffic gridlock. Once within the gridlock, extrication is difficult and progress slow.

Therefore, the trick is to anticipate the gridlock and steer clear of it. A problem-solving approach is called for.

Under this approach, the parties avoid rushing into a process of confrontational argument, followed by hostile offer and counter-offer, which will inevitably result in them becoming stuck. Rather, they acknowledge at the outset that they have different understandings of the facts and law which most likely will not be amenable to significant change. Instead of focusing on *what* the ultimate settlement will be, they first reflect on *how* to go about reaching agreement. Therefore, they discuss the *basis* or *process* by which agreement might be reached assuming ongoing disagreement on legal and factual matters.

And so, for example, in an alleged breach of contract case, the parties, realising they will never resolve the issue of whether or not there was a breach, agree to resolve the dispute by determining the financial consequences of the dispute to each party and how these losses might be equitably addressed with a view to preserving goodwill between the parties. Following this approach, they are likely to negotiate inexorably to agreement, without confronting a gulf between their positions, which is the hallmark of impasses.

Welcoming the impasse

Sometimes in mediation, parties are coy about revealing how they might be prepared to settle. They dance about in an avoidant manner, not committing to clear positions. When they are forced into a process of offer and counter-offer, their positions are finally revealed, and typically an impasse quickly results.

In such cases, an impasse may be nothing more than the first genuine indication of how far apart the parties really are. The impasse marks the point when the bargaining can *really* begin. For that reason, in these circumstances, the impasse is helpful and to be welcomed.

Overcoming the impasse

Let us assume the parties have genuinely and appropriately engaged in the process of offer and counter-offer, but have reached deadlock. What might be done?

The key message is to persevere. The following three broad approaches may be utilised in applying that 'don't give up' attitude.

1. *Take stock*

- Summarise what appears to have been agreed to, as well as not agreed to. This serves many purposes. Often parties have not fully or accurately understood the detail of proposals, or have even been talking at cross purposes. Parties may have become lost in the detail of the case, and so a summary serves to reorientate them and provide clear direction to the discussions. The summary may serve to objectify the difficulties and

Parallel-Track Bargaining

Party A (plaintiff) is at $1.3 million and party B (defendant) $400,000, a gap of $900,000. A tells the mediator that B should now be at $800,000, and if B was prepared to move to that point, A would move to $1.1 million. B tells the mediator that A should now be at $750,000, and if it were, B would move to $600,000. The mediator now knows that A might theoretically be prepared to settle for $1.1 million and B for $600,000, a gap of $500,000 in contrast to the stated gap of $900,000. The mediator also knows the parties' expectations of each other. This confidential questioning process continues until say A discloses it might be prepared to move to $950,000 and B $875,000, at which point, at the mediator's suggestion, the parties consent to the disclosure of these figures to each other. The last gap of $75,000 should be reasonably easy to bridge (see baseball-type bargaining box for one technique that might be used).

depersonalise them. And a summary may bring about the realisation that despite the ongoing differences, there are many points of agreement, and much progress has been made.
- Remind the parties of the consequences of not settling. Collectively, revisit the parties' respective BATNAs and WATNAs. In other words, evaluate the respective settlement proposals against the possible best and worst-case scenarios which might unfold were the case not to settle, having regard to needs and interests and the likelihood of those scenarios occurring. On calm reflection, the uncertainty and undesirability of the outcome were the case to not settle might well justify continuing the effort to settle.

2. Identify the obstacles and formulate a response

Ask the question: "What is getting in the way of settlement?" Avoid the temptation to answer the question along the lines of "The opposition is too stupid to understand our arguments and what's good for them". Rather, dig down and identify the underlying reasons the negotiations have stalled.

Typical obstacles to settlement include:
- Experts are doing too much of the talking.
- Lawyers aren't letting their clients talk.
- Ongoing confusion on a crucial point.
- Incorrect assumptions being made.
- No proper risk analysis having been undertaken.
- Risk being understated.
- The real decision maker is not at the table.
- Participants are too hungry or tired to think clearly.
- There is unstated or unfinished emotional business yet to be worked through.
- Someone doesn't want to lose face.
- The opposition's negotiation style is unhelpful.
- There are too few settlement options on the table.

Having identified the obstacles, an appropriate response must then be devised. Usually, that response will be obvious, being a direct counter to the obstacle identified. Should the response not be obvious, the mediator will be able to assist.

3. Mid and end-game techniques

Most impasses are able to be overcome when the above two approaches are utilised, especially when the bargaining phase of the mediation has been comparatively short-lived.

But when the bargaining has already been prolonged, various techniques may need to be utilised to keep the negotiations alive. Some techniques are suitable when it is anticipated that the bargaining may yet have some way to run, and others are suitable only for last-gasp situations.

The range of techniques which might be utilised are only confined by the limits of human ingenuity. Just a few are covered in this article.

It is most likely that a 'linked move' approach will be helpful to overcome a mid to late-phase impasse. This approach is premised on the basis that parties are often more willing to make concessions if they know they will get one in return. There are at least three types of linked-move bargaining.

- **What if:** The mediator explores the parties' preparedness to compromise if the other party were hypothetically to compromise. For example, "What if the other party were to reduce its claim by $50,000? What would you be prepared to concede in response?"
- **Range bargaining:** The parties agree to henceforth bargain between an agreed range. If their positions are $200,000 and $600,000, they might agree to the mediator's suggestion to bargain from now on between $350,000 and $450,000, that being the most likely settlement range.
- **Parallel-track bargaining:** This technique can be utilised where the parties disclose to the mediator that they are willing to compromise, but not prepared to declare that to their opponent. (See box for example). It involves the parties confidentially disclosing to the mediator how much they are prepared to concede if the other party makes the concession that they would expect of them. When this questioning process continues, the positions of the parties progressively move together until the mediator, with the consent of the parties, discloses their respective positions, which are by now close. If such consent is not provided, the mediator can nonetheless use that knowledge to advantage in some other way, for example, utilising baseball-type bargaining (see box) or proposing a settlement figure.

When faced with make-or-break-it endgame situations, parties may resort to such techniques as splitting the difference, drawing lots, referring the gap to a third party to rule on and agreeing on the rest, and baseball-type bargaining.

The impasse cannot be overcome

The fourth reason earlier mentioned not to fear impasses is that they may helpfully demonstrate that settlement is neither possible nor desirable.

An impasse may reflect the fact that it is impossible for the parties to reach settlement, however reasonable and well intentioned they may be. For example, a crucial prospective party may be absent, or a decision maker such as a higher-level manager with authority to break the impasse is unavailable.

Or an impasse may reflect the fact that one or more of the parties is incapable or unwilling to enter into any sort of sensible and reasonable settlement. This will typically be apparent if the parties' positions are far apart and the parties fail to give any indication of wanting to move towards agreement. There are, in other words, some parties for whom it is not worth persevering, and so the impasse may be a welcome opportunity to end the negotiations.

Conclusion

It does not help either mediators or negotiators to be unduly anxious about confronting impasses because anxiety is unconducive to the calm and clear thinking which successful mediation requires.

Arguably, the less that mediators and negotiators worry about impasses, the less those impasses will be a problem.

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Baseball-Type Bargaining

The parties agree they will each make one last concession and that the party who makes the greater concession will prevail. Therefore, there is an incentive on the parties to make as big a concession as possible. For example, take the final $75,000 gap identified in the parallel-track bargaining example in the other box. A (plaintiff) is prepared to accept $950,000. B (defendant) is prepared to pay $875,000. A's final concession is to accept $20,000 less ($930,000) and B's final concession is to pay $25,000 more ($900,000). Therefore, B prevails and settlement is fixed at $900,000. B's 'generosity' has been rewarded with its proposal being accepted. A's lack of 'generosity' has been penalised, because A must now accept $30,000 less than A had conceded. If A had been more 'generous' and conceded say $30,000, the settlement would have been $920,000, still a better deal for A than the $900,000 settlement figure.