Negotiation As An Alternative Means To Dispute Resolution (In Mexico)

It's pitiful that in Mexico the culture of solving disputes through alternative means, is still very underdeveloped. Arbitration seems to be the most sophisticated alternative to litigation in Mexico. There are good arbiters and rules that regulate the arbitral process, however no other alternative methods have been appropriately encouraged. The judicial powers have been promoting mediation centers, as an alternative to judicial disputes. Despite the efforts, not a single mediator has been known to have become one as a result of taking that course in law school. Few are the mediators or attorneys who have attended seminars or workshops given by persons, who in many cases have not studied the fine points of the mediation process beyond simply attending a course. The point is that negotiation, as an alternative means for solving disputes in Mexico has not been duly exploited. The reasons could be many. The culture is undoubtedly a very important factor in the lack of an effective practice of a negotiation process prior to initiating litigation or during its process. The most common negotiation is the one in which the contending parties undergo after a judgment has been entered against one of them. I believe this phenomenon is due to the hope that attorneys have in obtaining a favorable sentence in a higher court. Then, he who has been deemed the loser of the litigation, threatens to hinder the enforcement process with actions which are borderline fraudulent. Sometimes they are. Then the victor knows that the enforcement of the judgment will be complicated and the defeated knows that he owes. As a result, it is not until then and not always, that the parties negotiate when it could have done so prior to the litigation and arrive to the same agreement.

But what happens when the parties wait until then to begin negotiating? It is clear that litigation make the parties incur in expenses. In addition and depending on the case, they have paid in full or partially the litigating attorney's fees. They risked to lose everything they could get because, lets face it, bringing justice in courts is a breed of its own. I have seen medical, physical and emotional problems

deriving from the stress of bearing a conflict that could last years. In a nutshell, the cost of litigation is not limited to only expenses and attorney fees.

Our personality as Mexicans many times does not benefit the interests in conflict. These can be our client's or that of the attorneys. There are those who would rather not give alternatives to their clients because the fees charged would be lower or the agreed contingent compensation would be determined from a probably lower base amount. No attorney wishes to portray and even more in a case that he put together, by suggesting the possibility of a negotiation, even when there is no such weakness. These are some of the reasons for which, in my experience, negotiation processes have been interrupted.

These problems, which make negotiations a not frequent alternate solution or prevention of disputes can be lessened by a few factors. First of all, we have the education of law students in college. For those of us that did not take this course in law school, there are courses, workshops and post-grad certificates in Mexico and abroad. Negotiation as a means to solve or prevent disputes is not the same as a business negotiation, although both share some traits.

A person who knows about negotiation to prevent or to solve disputes and prevent them from reaching the courts, knows how to give value of things that can be useful to the counterparty and at no expense to he who offers it. Not everything is solved with cash. There is value in actions, goods and services that can be valuable for some people and inexpensive for others.

Negotiation is not only about persuading, but also about giving value to things that can be used for negotiation. It requires patience, study, analysis and sacrifice.

The Harvard Law School in Cambridge, Massachusetts has a Negotiation Program within its law student program. In 2006, when I attended the workshops there, the basic program taught us to create value in deals and disputes. It is surprising how much you can negatively affect a client by not exploiting, to his or her benefit, the opportunity of having a negotiated agreement. Few are those who take the time to estimate the cost of a two or three year litigation process and determine whether this cost is greater or less than what could be settled as the result of a negotiated agreement or a sentence. Neither do they bother to consider which would be their best alternative to a negotiated agreement, in other words, evaluate whether if the negotiation fails to provide the minimum required compensation to avoid the conflict, which is the alternative and what will the cost be?

In Mexico City (Federal District) we have "conciliators" in the courthouses. In my experience, I have found their intervention to be very minor and they are an absurd expense for tax payers. Who has walked in a hearing in which the conciliator has not limited his participation to asking if the parties have reached an agreement? In the best scenario, like robots, they recite "We invite you to reach an agreement"; however I have never seen them explain to the parties the process by which they can determine whether the possibility of an agreement even exists before the trial is over.

In Mexico, I have seen two negotiation trends. The first one is where one party or its attorney gives the counterparty an ultimatum and often with ridiculous conditions. The most common is "Pay me what I am suing you for or there will be no agreement." As if granting all the wishes of a single party was any type of agreement or negotiation. The other trend I often see is the one in which one of the parties makes a ridiculous offer and expects to receive a counter-offer close to the first one. This is typical: "I owe you one hundred, but I offer you twenty five and expect you to counteroffer fifty."

I personally find this offensive. Not offensive to the counterparty, but offensive to the client since this immediately closes the door for the chance of avoiding the dispute and going home with a good settlement instead of withstanding a long period of conflict-ridden environment. We the litigators are used to this, but not our clients and for all those who have something to lose, this causes them stress, which is quite normal. On the other hand, it is immoral to forget that our job is to help our client, not to give him or her a heart attack.

I applaud the government's interest in promoting alternative means for solving disputes. I do so not because of the reason they do it, to avoid a greater workload, but the fact that they promote it is great. I believe that this issue should be analyzed with greater detail and the universities should create academic programs that include all the alternative means for solving disputes and not limit them to arbitration.

In commercial relations, more and more arbitral clauses are being added. This practice may not be the best choice for all cases because eventually the time to enforce an award before a judge will come. Let's imagine a dispute between two merchants in which one is a supplier of a given good or service of the other and an exclusivity clause has been agreed to between them. If the supplier is not paid for the goods or services, is he obliged to keep supplying the other? If an exclusivity agreement exists between them, the supplier cannot sell goods or services to third parties until the trial or arbitration has ended? However, these merchants could agree to a clause in their contract stating a negotiation period that must be fulfilled before having to go before a judge or mediator. The attorneys would have to be compliant with the clause, because otherwise a condition needed to begin the litigation would be missing.

The disadvantage I see to the pact of a negotiation process is the additional delay for the duration agreed upon and the remuneration of the negotiators. Aside from these slight disadvantages, which can be minimized through establishing a very short negotiation period and the remuneration agreement that each person has with their representative, I see many advantages.

The first is to increase the probability of ending disputes without having to recur to judicial or arbitral controversy. Continuing to do business with the counterparty is more feasible than after a dispute. The time and money saved from avoiding the controversy. The professional fees can be less for ten days of work rather than for two years. The parties would have, in the very short term, answers to certain aspects over which dissidence existed, because despite not reaching agreements to each and every one of the matters subject to negotiation, there is a chance that some of them could be left out of litigation. In the previous example, one could negotiate that the supplier be released from the exclusivity with its customer and in return frees the client from liability from the damage caused. Anyhow, this is only a possibility.

In conclusion, we should nurture the culture of negotiation as a means to prevent disputes, without the stigmas or formulas in which we have all taken part of, in other words, leave behind all the ultimatums and proposal of ridiculously large sums of money to arrive at the midpoint. Each individual acting in self capacity or representing a corporation should have an open mind, stop being visceral and be prepared for a negotiated agreement which could bring large savings of time, money and stress, even in the case of resulting the winner in a controversy.

Esteban Maqueo Barnetche

Maqueo Abogados, S.C.