

INTERVIEW: Innovative Concepts are a Gamechanger in Commercial Transaction Negotiations

Article By:

Corporate Practice

The tidal wave of loan maturities expected in 2024 will put pressure on lenders and borrowers, which will spill over to the transactional sphere, putting pressure on buyers and sellers to come to weighed and balanced solutions. Without a true understanding of the interests of the other party and a willingness to find a weighed and balanced solution, this will lead to scenarios where no amicable solution can be found. Innovative negotiation concepts are essential to facilitate that process, says David van Dijk, Head of Greenberg Traurig's Dutch Real Estate Group.

‘There are many similarities between commercial disputes and commercial transaction negotiations’, Van Dijk explains. Van Dijk is a RICS accredited mediator and is ranked by Chambers and Partners as the most prominent real estate lawyer in the Netherlands. ‘Commercial disputes and commercial transaction negotiations both involve opposing interests. In disputes, both parties want to be right and to win, which in a commercial setting usually involves financial compensation. In transactions it is no different. Similarly, parties to both disputes and transactions usually have opposing interests, such as the amount of the purchase price or the allocation of certain risks.’

Van Dijk: ‘In disputes, there is always a choice between going to court or to arbitration. But in transaction negotiations, this is not the case. If parties do not come to an agreement, the negotiation process usually stops.’

In the legal industry, mediation is a tried and tested means of resolving *disputes*. But less well known is the application of the same concepts to a *transactional* setting. This is remarkable, given the many similarities between commercial disputes and commercial transaction negotiations. This is all the more surprising considering the fact that unlike in disputes, alternative legal proceedings do not exist. This would make the case for mediation for transactional negotiations even stronger.

‘Mediation is first and foremost about understanding and evaluating the other party’s interests and having the willingness to seek a weighted balance between one’s own interests and those of the other party’, explains Van Dijk. ‘That seems simple, but the way to get there is not always so. Parties and negotiators are often reluctant to share insights into their underlying interests. This may be understandable from a strategic point of view, but it is often also a missed opportunity. Greater openness can actually provide the other party with the means of finding the possible weighted balance in a solution. If this is reciprocal, a collaborative dialogue can exist, enabling the parties to

jointly find a compromise in stalled negotiations. But creating a setting in which the parties' negotiators feel comfortable offering that openness is often difficult. Mediation skills can provide a solution, even without an independent mediator. If the parties' lead negotiators have knowledge of mediation concepts (or are trained as mediators themselves), the negotiation process could be greatly improved. Such a collaborative dialogue usually requires a certain level of sophistication on the part of the negotiators involved, combined with experience in the specific industry (not just the legal aspects) and a level of professional trust between the negotiators.'

Van Dijk adds: 'Another option is to bring in an independent transaction mediator, as one would do in the classic dispute mediation setting. The mediator's independence makes it easier for the parties' negotiators to provide insight into the underlying interests. That insight is given confidentially to the mediator (the "caucus" in mediation practice), who shares information with the other party only with the consent of the first party. But even if the information is not shared with the other party, this provides the mediator with an understanding of the underlying interests, and thus the opportunity to help the parties explore whether a weighted and balanced solution is possible. If so, the mediator can consider sharing the confidential information abstractly with both parties, opening up a potential new phase in the negotiation, which allows the parties to home in further on a weighted and balanced solution.'

With the increase in the use of mediation and the number of real estate specialists trained as mediators, the application of mediation in transaction negotiations in the market is increasing. Many negotiations are already proceeding along the collaborative dialogue route rather than the classic "cold" negotiation.

'The tidal wave of loan maturities expected in 2024 will put pressure on lenders and borrowers, which will spill over to the transactional sphere, putting pressure on buyers and sellers to come to weighed and balanced solutions', explains Van Dijk. 'Banks will resort to foreclosure and execution of the property. This outcome will generally result in further devaluation of the property, adding to the downward spiral created by the tidal wave of loan maturities. Collaborative dialogue fostered by a mediator can contribute to easing the stress and reducing or avoiding further impact on values.'

This article was authored by Vera van der Heijde.

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