PART III — NEGOTIATION

1 AN INTRODUCTION TO NEGOTIATION

1.1 *Introduction*

Negotiation is a way to balance value between two or more parties. It is a fundamental mode of human interaction and occurs frequently in many social contexts. Implicit processes of negotiation are particularly prolific in non-legal contexts. Negotiation is important when it is not possible to achieve a goal without the assistance of another.

There are several types of negotiation, each differing in medium and formality. It can be a verbal or non-verbal, formal or informal process. Balancing can be distributive or corrective. The extent to which value is distributed depends on whether a soft or hard approach is adopted. Sometimes, cooperation produces better outcomes for both parties.

Several ethical issues also arise in the context of negotiation. To what extent is it permissible to lie about, misrepresent, or otherwise conceal pertinent facts or law? Must a party correct misapprehension of the other side? These issues are explored in greater detail below.

In general, there are three negotiations implicit in any process of bargaining. They concern:

- **Substance**
  Formal distributions of value;

- **Process**
  How value is distributed and negotiation proceeds; and

- **Relationship**
  Interactions between parties and others.

There are two competing tensions in negotiation:

- **Creating value**
  Producing a beneficial outcome overall; and

- **Claiming or distributing value**
  Taking a share of the benefits.

Each extreme (where one party creates/takes all the value) is unfeasible. To be successful, any negotiation must address these tensions and resolve the three primary negotiations.

There are many opportunities to improve your negotiation skills; observation and self-reflection are discussed below. The influence that the medium of communication has upon negotiation is also explored.

1.2 *Negotiation Approaches*

The Harvard Program on Negotiation outlines two conventional approaches to negotiation, and proposes a third, principled model.

1.2.1 *Hard Bargaining*

Hard bargaining is based on power and stubbornness. It uses force and threats to produce the desired outcome. Outcomes are conceived as either being 'win' or 'lose': negotiation is thus a zero sum game. The party who applies the most pressure wins.

> Example: "I beat him down to half his asking price."

Success is determined by the number of concessions able to be extracted from the other party. The problem, however, is that the concessions might not be real (the asking price might have been set artificially high so as to make it seem like a good deal was being garnered by the buyer). When two hard bargainers go up against one another, little progress is made.

1.2.2 *Soft Bargaining*

Soft bargaining is based on conflict avoidance. It focuses on maintaining the relationship at all costs. As such, soft bargainers are willing to trade relationship benefits for concessions on substance.

> Example: "I may have had to make concessions, but it will be better in the long run."

In prioritising harm avoidance, the soft bargaining approach is willing to make substantial concessions to maintain a relationship. The problem is that the value of a relationship is not always high. It also fares very poorly when going up *against* a hard bargaining negotiator (who will extract significant concessions).

1.2.3 *Principled Negotiation*

Principled negotiation emerges out of dissatisfaction with hard and soft bargaining, both of which suffer from reliance upon an unreliable success metric (concessions and relationship, respectively). Principled negotiation, by contrast, is based on meeting both parties' interests with practical solutions justified by reference to objective criteria.

The focus is on creating as well as distributing value – producing 'win/win' outcomes by using creative problem-solving. Using a formal analytical structure, it separates the relationship from the issues.

1.3 *The Principled Negotiation Framework*

Principled negotiation provides a useful conceptual framework for guiding and evaluating dispute resolution.

An agreement is *successful* if

- It improves the **relationship**
- It acceptably meets parties' **interests**
- It is better than the **alternatives**
- It is the best of the available **options**
- It meets objective **criteria** for fairness

- It uses effective **communication**
- It results in operational **commitments**

The seven elements framework emerges from these criteria. It posits seven headings of analysis in a negotiation:

- Relationship
- Interests
- Alternatives
- Options
- Criteria
- Communication
- Commitment

1.3.1 *Relationship*

Negotiation should improve the ability of the parties to manage their differences effectively.

A good relationship does not mean that parties always agree. Further, not all relationships are worth preserving.

At this stage, it is important to 'separate the people from the problem'.

Do not make concessions on relationship in exchange for substantive gains. Do not respond to unethical behaviour or threats.

Build a relationship that enables you to negotiate better in the future. Maintaining the relationship should confer mutual benefit, but need not amount to friendship.

> *Example: "How can we work together to solve this problem?"*

Classes of relationship:

- Professional
  - Long term or short-term?
  - Mutually beneficial?
  - Stable or going through turmoil?
- Personal
  - Maintain status quo?
  - Lacking in respect or acknowledgement?
  - Worth preserving?
- Third parties
  - How could negotiations affect others?
  - Product liability? Private wrongdoing? Public interest?
- Your own relationships
  - With your client
  - With the other client's lawyer
  - Among your colleagues
  - Could these be affected by the outcome of negotiation?

1.3.2 *Interests*

Identify parties' interests and seek an agreement that

- Meets your interests well;
- Meets the other party's interests acceptably; and
- Meets others' interests tolerably

Listen for underlying interests. Interests are not the same as positions. Whereas positions are what parties are demanding, interests are their underlying needs, concerns, goals, hopes and fears. For example:

> *Position: "I want your pen"*
> *Interest: "I need to write something down" or "I lent you my pen last time"*

Interests may be tangible or intangible. Thus, in the above example, the second interest is equality of treatment. A negotiator should focus on interests, not positions.

- ❑ Your own interests
  - Happy client
  - Reputation among colleagues

- ❑ Your client's interests
  - Reputation
  - Expediency
  - Expansion
  - Financial viability
  - Respect from the other party
  - Costs incurred
  - Liability

- ❑ The other client's interests
  - Quality of result
  - Viability of business
  - Feels defensive
  - No adverse publicity
  - Outstanding payment
  - Costs incurred

- ❑ Third parties' interests
  - Other clients
  - Retailers or distributors
  - Customers of either party
  - Victims
  - ACCC/Consumer affairs

- ❑ Identify shared interests
  - Protecting business reputation
  - Avoiding adverse publicity

- ❑ Broader interests
  - Maintaining a relationship
  - Acknowledgement or recognition
  - Obtaining trust and confidence of others
  - Allaying concerns

Example: "What is really important to our clients?" or "What interests do they have in common?"

1.3.3 *Alternatives*

Any agreement reached should be better than the alternatives. Alternatives are outcomes that parties could obtain *outside* of the negotiation, whether by themselves or with the aid of a third party. For example:

"I could walk next door and buy a pen for $0.50"

Be aware of your alternatives. Identify the best alternative to negotiated agreement ('BATNA'). A BATNA is the best outcome a party could reasonably obtain outside the negotiation (assuming the negotiation broke down immediately). Do not accept an agreement that is worse than your BATNA. Thus, in the above example, it would make little sense to pay more than $0.50 (plus any additional transaction costs associated with venturing next door) for the loan of a pen.

The BATNA is not the same as a 'bottom line' (which is the minimum threshold of value a party is willing to accept).

You can strengthen your negotiating position by improving your alternatives or limiting the other party's (eg, by noting that the store is all out of pens, or closed, or by pointing out the unique advantages of this particular pen).

It is usually unwise to mention your alternatives during negotiation.

- ❑ Walk away and sever the relationship?
- ❑ How important is A's business to B?
- ❑ Find a person to replace A's role?
- ❑ Continue regardless of problems?
- ❑ Partially recover outstanding costs creatively?
- ❑ Seek outside investment?
- ❑ Join in a class action against B? (publicity?)
- ❑ Reverse a defect or problem?
- ❑ Has the limitation date for proceedings passed?
- ❑ Can what the other party is offering be obtained elsewhere?
- ❑ Find work elsewhere or leave the industry?

Do not lose sight of the client's interests.

Test legal assumptions about the viability of alternatives based on what is revealed in the negotiation by the other party.

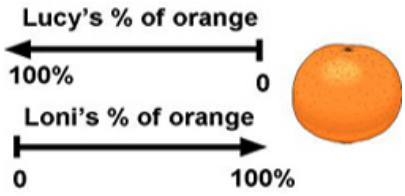
1.3.4 *Options*

Seek the best of the available options. Options are the outcomes that can be achieved *through* the negotiation — all the ways in which the parties might agree.

Identify options that maximise value. Put them on the table in a non-commital way. Use creativity to sole problems.

Example: "How else could we both meet our objectives?"

It is quite possible to satisfy both parties' needs without reducing the value of either outcome. For example, where both parties demand rights over an orange (but one wants to make orange juice and the other wants to grind the peel to make icing), an optimal outcome would be to separate the desired components of the orange such that both parties achieve their ideal outcome.



Pareto optimality occurs where neither party can be better off without making the other worse off. This is normally the result of making both parties as happy as possible.

When both parties have the components of the orange they need, the outcome is said to be Pareto optimal. Principled negotiation requires parties to aim for Pareto optimality.

- ❑ Options contingent upon another outcome
  - Eg, independent testing or appraisal of blame
- ❑ Keep the party's interests in mind when devising strategies to meet them
  - Integration between different parts of the plan
- ❑ Sharing cost or burden
- ❑ Suing the party at fault
- ❑ Is the preserving a relationship important to the party?
  - If so, what is the best option to preserve it?
- ❑ Doing what the other party wants for a certain amount of time
- ❑ Trading a financial interest for another benefit
- ❑ Partially implementing the other party's wishes
  - Eg, base salary, minimum standard, further investigation
- ❑ Public apology or promotion
- ❑ Confidentiality agreement

1.3.5 *Criteria*

Use standards and objective criteria to persuade using principle and not pressure. It is particularly important to seek out external sources of legitimacy. That is, sources of criteria must be independent from either party.

Use standards for deciding process as well as substantive issues. Use standards as a defence to unfair or unreasonable proposals.

Examples:

> *"What would be a fair solution?"*
> *"I'm open to options that you suggest. Can you persuade me that your proposal is fair?"*
> *"On what standards is that proposal based?"*

Look for objectively fair criteria:

- Substance criteria (objective standards by which to propose a fair solution)
  - Market prices
    - Eg, wholesale costs
  - Law
    - Tort law (negligence)
    - Contract law (the parties' agreement)
    - If clear, use precedent and formulate fair criteria from the law
      - Example: "What would be fair and reasonable in light of the legal rules?"
    - If unclear, it may be more appropriate to formulate a general standard of conduct
      - Certainly, it would be to the advantage of both parties to avoid litigating on the basis of uncertain law, which is likely to be costly and drawn out
  - Regulations
    - Codes of conduct
  - Standards
    - Comparison to previous circumstances
    - ISO 9000 standard
  - Industry practices

- Process criteria (objective processes to fairly solve a problem)
  - Expert opinion
    - Eg, identifying the cause of a problem (scientific analysis)
  - Independent valuation
  - Coin toss

The agreement will be more successful if it is supported by objectively fair criteria.

1.3.6 *Communication*

Seek effective and efficient communication. Communication can be by speech, writing, body language or other signals.

Concentrate on:

- Listening
- Ensuring the message you want to send is the message received
- Balancing advocacy and inquiry

Agreements will be more successful where they are effectively communicated. This occurs on two levels: listening (and enquiring about their interests, goals and fears) and sending messages (using advocacy techniques to get the other party to hear the message you want them to hear).

The content of any agreement reached must be clear and precise; both parties must know to what it is that they are agreeing.

- ❑ Enquiry
  - Is the other party aware of the problem?
  - How long has he known?
  - Can he fix it?
  - How much will it cost him?
  - Is either party hiding some prior action?
  - How strong or resolute is his position?

- ❑ Advocacy
  - Should we show compassion and understanding?
  - Should we demonstrate strength ('we can hurt you')?
  - Should we discuss the client's private concerns?
  - Do you want to maintain a strong relationship?

Example: "What am I listening for? What do I want them to hear?"

1.3.7 *Commitment*

Any agreement reached must be realistic, sufficient and operational. The authority of the parties to reach agreement should be clear.

Example: "Do we have the authority to resolve this today?"

The result of any agreement reached should be clearly evident to both parties. Agreements are more successful if they result in operational commitments.

- ❑ Is the agreement realistic?
- ❑ Will it be operational?
  - Authority to settle?
  - Within the client's parameters?
  - Settle only after conferring with the client?

1.3.8 *Applying the Seven Elements*

The principled negotiation framework can be used in several ways:

- Preparing for a negotiation;
- Guidelines for conducting negotiations;
- Assessing the success of a negotiation; and
- As a structure for observation and reflection.

Be aware of the seven elements and how they apply to a specific factual scenario before commencing negotiation. Don't leave a party with only unacceptable choices; this will make them more likely to abandon negotiations and try to obtain their best alternative.

Common problems:

- Which party will pay?
- Who is at fault?
    - Lack of evidence
- Where the client is not present, lack of exact instructions
- Lack of detailed knowledge of the facts

1.4 *Practice and Improvement*

Negotiation is a skill which can be learned and improved. There are opportunities to develop your skills every day. What follow are some suggestions about how best to practice and improve your negotiation skills:

- Take notes of your own performance
- Ask for feedback from others
- Observe other negotiators
    - Identify strategies and tactics used
    - Which worked?
    - Which did not work?
    - Why?
    - Which strategies and tactics would you feel comfortable using in your negotiations?
- Try new techniques and assess the results
- Use the seven elements as a preparatory framework
- Use the seven elements to guide the course of negotiations
- Use the seven elements to assess the outcome of negotiations

1.5 *Negotiating Online*

The internet presents a new environment for negotiation.

Advantages:

- Bridges distance
- Allows data transfer, retrieval and storage
- Enables delayed or real time communication
    - Improves access for some groups
    - Potentially useful in most disputes
    - Secure and recorded

Disadvantages:

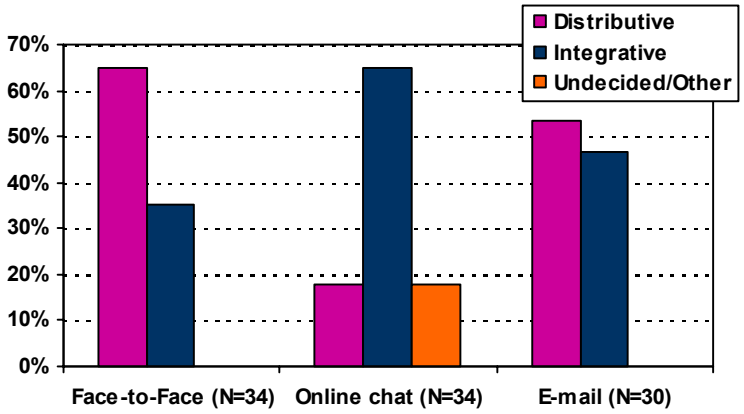
- Reduced non-verbal communication cues
- Negative interpersonal bias (formal)
- Synchrony bias (time delay)
- Skill barriers (typing, jargon, technological knowledge)

In short, people behave differently online and aren't always able to communicate effectively or immediately.

There are ways to address several of the disadvantages:

- Using text formatting and voice or audio streams
- Agreeing upon communication timetables/schedules, or using instant messaging utilities
- Adopting a user-friendly negotiation tool and using informal language
- Using asynchronous methods when typing speed is a problem for one party

Tan, Bretherton and Kennedy published a study in 2003, which investigated outcomes in online negotiations. It showed significant differences between face-to-face, delayed electronic and synchronous online forms of communication.



As the above diagram illustrates, in person negotiation tends to result in more distributive (win/lose) outcomes (probably because social norms dictate a positional approach), whereas synchronous online negotiation promotes an integrative (win/win) solution. E-mail appears to lie somewhere between (probably because it replicates the formality of face-to-face negotiations).

1.6 *The Role of Lawyers in Negotiations*

Typically, parties will be present at a negotiation but lawyers will lead the proceedings. The extent to which parties are involved depends upon several factors: their preferred strategy, level of comfort, and personality, among others.

Sometimes parties negotiate independently of lawyers. Whether this occurs depends on whether lawyers have been instructed and the preferences of the individual client.

Lawyers can play a positive role in negotiations. In some situations it may be better if the clients negotiate alone, but often clients want lawyers there for protection and support (particularly where a party feels at a disadvantage, or where the other side is represented).

Lawyers are able to separate relevant from irrelevant issues, keep parties focused on the process, defuse (to some extent) escalating tensions, understand the relevant legal principles and be aware of any legal consequences arising out of possible options. Although some lawyers

have a tendency to promote adversarial hard bargaining, many lawyers know how to negotiate effectively and may enable parties to see past unrealistic demands or obstinate positions.

1.7 *Appropriateness of Negotiation*

Negotiation is not always an appropriate mechanism for dispute resolution.

- Where the primary motive of one party is to punish or take revenge upon the other, 'the starting point of problem-solving negotiation is swept away'[1]
- Where there is a power imbalance between the parties, principled negotiation fails to recognise that the waker party may be unable to use problem-solving techniques to work with the stronger party
    - Economic
    - Legal
    - Physical
    - Mental
    - Psychological
    - Practical
    - Age
    - Gender

In these circumstances, the stronger party is unlikely to cede their power advantage. The weaker party may have insufficient leverage to engage in principled negotiation because the stronger party is likely to know that they can achieve success using a hard bargaining approach. The influence of power is difficult to determine; it may be used to enhance a party's interests or persuade the other side. However, while sensible negotiators can, using the principled framework, increase their persuasive power using the seven elements framework, it is not always possible to induce the more powerful party to reciprocate.

Several further criticisms have been made of principled negotiation:

- A 'win/win' outcome is not always possible – interests may be in direct and irreconcilable conflict
- Parties are often not interested in the needs of others and wish only to devise the best solution for their own interests

However, principled negotiation can be effective when there is a genuinely shared problem. Of course, to be effective there must be a mutual need to find a solution. Nevertheless:

- Most negotiations concern the distribution of finite resources such that a gain by one party necessarily entails a loss for the other – most bargaining is distributional
- Principled negotiation ignores the fact that most negotiation is hard bargaining; it is naïve to proceed on another basis

Certainly, there are situations in which positional negotiation may be necessary (eg, where it is unfeasibly expensive to explore the interests of the other party). As Fisher, Ury and Patton suggest, 'if the discussion starts to bog down, be prepared to change gears'.[2]

- As a matter of empirical fact, principled negotiation is not often used

[1] Hilary Astor and Christine Chinkin, 'Chapter 4: Alternative Processes in Australia: Negotiation' in *Dispute Resolution in Australia* (2nd ed, 2002) 126.
[2] Fisher, Ury and Patton, *Getting to Yes* (2nd ed, 1991) 153.

- Negotiation between lawyers is often 'low intensity bargaining' that fails to address the parties' issues and interests[3]
- A polarised approach to dispute resolution is ingrained in the culture of the legal institution
- According to Menkel-Meadow, many legal personalities naturally prefer positional negotiation

[3] Astor and Chinkin, above n 1, 127.