



Farmers' Organizations' Guide to

# CONTRACT NEGOTIATIONS



in Southern Africa

H. G. Lutz









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**SWEDISH COOPERATIVE CENTRE**

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## CONTRACT NEGOTIATIONS

# Introduction

No matter who we are, where we live or what we do, the importance of negotiation skills can not be ignored. In today's world, those who can negotiate are better able to optimize their true potential, and consequently succeed and even excel at that which others fail to accomplish.

The art of negotiation helps us to present our case to others in a manner that enables the counterpart to get a better understanding of our interests, and gives us sufficient control over situations to prevent us from being so vulnerable that we are victimized. When practiced correctly negotiation is one the most powerful tools in getting others to move in our direction.

A small-scale farmers' challenge is not limited to optimizing the yield on her land. It is equally important to ensure that she is able to optimize price, terms and conditions when she sells her produce or procure farming needs. Her aim should be to get prices, terms and conditions that will not only allow her to farm profitably, but also to expand her farming operations and to improve the quality of life of her family and employees. Small-scale farmers have for far too long been passive price takers, allowing buyers to be aggressive price makers. Negotiation skills combined with some knowledge of contract law and marketing are effective tools which can give the power to break free from this stranglehold.

The literature on negotiation abounds with models on how a negotiation should be approached and conducted. Generally, most of these models contain valuable insights, although few if any provide the ultimate answer. This has prompted the authors to distil more than 15 years of hands-on negotiation experience and study into the models on which this guide is based. The elements of the model are proven success factors, attested to by thousands of negotiators in all parts of the world.

The Guide to Contract Negotiations is part of SCC ROSA's support to Farmers'

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Organizations. The support encompasses a number of different components, including manuals and guides on Marketing, Organizational Structure, Business Development and many more, software developed specifically for Farmers' Organizations, workshops and courses. Further information on SCC ROSA's support to Farmer's Organizations is available on [www.sccrosa.org](http://www.sccrosa.org).

On behalf of SCC I would like to express the deepest felt gratitude to all those who have contributed to the production of this guide; Dr. David P. Venter, author of the lions' share of the guide; Victoria Dean, who wrote the Legal section; Janice Nadler, whose input was crucial in creating the Analogical Learning part; and countless others, whose names do not appear here but who nevertheless have been invaluable in the process. Thank you.

Please join this journey into the adventure of negotiating, remembering that negotiation is a skill available to any person with the necessary dedication.

H. G. Lutz

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# LEARNING TO NEGOTIATE

# Background

Since the early 1900's researchers have gathered a very large body of information on negotiation. From this information, they have deduced certain key determinants of successful negotiation, gradually moving the negotiation frame away from bazaar style distributive bargaining towards an integrative form of negotiation where the focus is not on claiming value, but on working together to explore and develop possibilities that will enable them to create value for each other. We say that positional, distributive bargaining, gradually, has given way to win-win or win more-win more negotiation approaches.

## **Case based learning**

The use of examples and specific cases in teaching new concepts and problem-solving strategies is a mainstay of educational methodology. Examples are important in all levels of instruction, from elementary to advanced education. For example, in case based instruction, a method widely used in business, law, and medicine, the principles of a domain are taught through discussions of rich concrete examples that embody key points. The idea is that people can readily learn specific examples, which then can serve as models or analogies for future situations. Because cases and examples are concrete, they are more engaging and more easily understood than abstract, domain-general principles. The understanding gained through these specific cases can then be transferred to novel situations. There is considerable evidence that familiar examples can serve as models or analogies to new situations. For example, it has been found that giving people examples to illustrate a probability principle facilitates the later use of the probability formula to solve new problems. If people notice a similarity between a new problem and one of their previously learned ex examples –that is, if the new problem reminds them of a prior example- they can use the prior example to inform the current problem.

However, the effectiveness of case-based training varies widely in practice. Prior cases can be highly useful when people bring them to bear on new problems.

Unfortunately, people often fail to recall relevant examples that they have been exposed to. This is particularly true when the two cases differ in surface features (i.e., most important objects and aspects of the context).

In short, our ability to take advantage of our prior experiences is highly limited. One explanation for the low degree of appropriate recall is that people often encode cases in a situation-specific manner, focusing mainly on their surface features. This is particularly true of novices, who may have no basis for understanding a situation other than the objects and contextual features. For example, physics students were asked to sort physics problems into categories. Novices in physics grouped the problems on the basis of common concrete features and objects (e.g., those about inclined planes, those about springs, etc.), whereas expert physicists grouped problems on the basis of common underlying principles (e.g., those about conservation of energy). If learners form highly concrete, context-specific representations of the situations they encounter, then it is not surprising that their later references to the initial examples occur only when the new example is highly similar in surface details to the earlier one.

### **Analogical Learning**

In analogical encoding, learners compare two examples and by doing so come to understand the underlying structure common to both. Surprisingly, comparing two cases can be extremely informative to learners, even when neither is well understood. The analogical encoding method differs from the standard use of analogy in learning, in which a learner acquires knowledge about a new target situation by invoking an analogy with a situation he or she already understands (e.g., a student may use her knowledge of water flow to understand an electric circuit). Although this technique can be highly effective for educational purposes, its applicability is limited to those cases for which the learner understands an appropriate base example or domain. In contrast, in analogical encoding, comparison is not being used to facilitate transfer of a well-learned piece of prior knowledge but rather to highlight and clarify a new concept. Working through the comparison of two cases that share a common underlying principle can be illuminating even if the common principle is only partially understood in either case. Analogical encoding fosters learning by taking advantage of a basic property of analogical reasoning: Analogies promote attention to commonalities, including

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common principles or schemas. According to Gentner's structure-mapping theory, drawing an analogy between two examples leads to a structural alignment—a set of correspondences between the elements of the two analogs in which their shared relational structure is highlighted. For example, comparing an office to a jail highlights their common constraining and regimented and institutional aspects, and minimizes focus on surface details that are not comparable, such as the color of the rug in the office. Thus, drawing a comparison can lead learners to focus on structural commonalities rather than on idiosyncratic surface features (assuming that the learners are provided cases with common underlying structure). Further, although in typical analogical learning, knowledge is being mapped from the well-understood example to the new example, in analogical encoding, the mapping can occur in both directions—whatever is understood about one example can serve to shed light on the other. Our claim is that analogical encoding both captures the value of using concrete cases and focuses learners on precisely those aspects that generalize across cases.

Recent research suggests that suggest that learners who compare cases will develop a more general problem-solving schema that primarily captures the common structure of the cases rather than the surface elements. Consequently, in contrast to cases studied individually, cases that are compared should be more easily retrieved when the learner encounters a new case with the same structure. This is because the abstracted schema will have fewer idiosyncratic details and therefore will conflict less with the surface features of the current case.

Thus, when solving problems in new contexts, people should be able to recall and apply schemas derived through analogical encoding better than prior individual examples. In short, analogical encoding promotes the abstraction of schemas, which in turn promotes recall and transfer. A further advantage of analogical encoding is that it does not require a prior well-learned situation; it can potentially be beneficial even for people who lack deep knowledge of the domain. Thus, analogical encoding may allow learners to develop knowledge using a bootstrapping process in which cases lead to the abstraction of principles, which are subsequently used to understand new cases and so on.

As it has proven to be of such crucial importance that a negotiator has not only surface knowledge of negotiations, but also a clear mental map and personal

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understanding of how a successful negotiation is carried out, the first part of this Guide to Contract Negotiations provides an opportunity for you to analyze a number of negotiations yourself. You will be presented with six cases. Each case is followed by a template in which to enter your own observations, guided by a very simple question. When you have read through all of the cases, you will be given the opportunity to analyze what defines a successful negotiation, and which principles determine whether a negotiation will be successful or unsuccessful.

# Cases

## The Maize Case

### *Background*

John is a small-scale maize farmer in a rural area approximately 50 km from the nearest city. This is his fourth season in farming.

Given his past experiences in marketing his crop, he is very unsure what to expect in terms of price. The purchasers seem to hold the upper hand when it comes to determining price.

Upon harvesting his crop, he needs to negotiate transport by road to the local miller where he normally sells his crop.

The maize crop this year has been average to slightly below average due to a dry spell at a critical time shortly after the seeds had germinated.

The man John is set to meet to negotiate the sale of his crop of five tons of white maize is the senior buyer of Future Milling, a division of a very large agri business with mills in a number of African countries. This man, Mr. Casey, has a reputation for being very difficult to deal with.

### *The negotiation*

#### *Mr. Casey*

Morning John, I hope you are ready to accept our price and deliver your crop as soon as possible. We are very busy and have a long line of people waiting to do their business with me.

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*John*

Good morning Mr. Casey, I am sure looking forward to negotiating a deal with you.

*Mr. Casey*

Clearly, you do not understand, we are not here to haggle about price my friend. We need to get it over and done with, or you must take your crop elsewhere. Let's get on with it!

*John*

Well that's not how I thought we would do business. But if that's the way you want it, then what are you willing to pay per ton for my crop?

*Mr. Casey*

My price, take it or leave it, is US\$ 180 per ton. It sure is the very best price you ever will get! What do you say?

*John*

No ways, that's plain robbery! You keep doing this every time!

*Mr. Casey*

Don't give me that, all I am doing is offering you the fairest price you will ever get. There's lots of maize available, I don't have to buy yours for a ridiculous price. You know that if you don't sell to me, you are going to be stuck with your crop. There are no other big buyers.

*John*

Well, at this time I don't have another buyer, but I could try to look for one that is willing to pay my price. I worked very hard to cultivate this crop; I cannot just give it away.

*Mr. Casey*

John, how soon do you need the money my friend?

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*John*

You know I need it practically immediately. Agricultural inputs are expensive, and I need to prepare for the new planting season.

*Mr. Casey*

With us you know you get immediate payment on delivery; none of the delays you will experience with other buyers.

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*John*

I don't know. I cannot give you my crop for that price, but I do need the money. You must give me at least US\$ 190 please.

*Mr. Casey*

I run a business, not a welfare institution. You have my price; now make up your mind quickly or else...

*John*

You're robbing me and making sure that I cannot pay the debts I had to incur in producing this crop. Seed, fertilizer, insecticides and fuel are very expensive. If I take your price I'm dead!

*Mr. Casey*

That's what they all say and then they are back here every year with the same old story. Come on, I don't have time to listen to this all over again. Yes or no?

*John*

Could you not just increase the price by a few US\$ please?

*Mr. Casey*

No! What I said is what I pay.

*John*

I don't know. It's not what I was hoping for.

*Mr. Casey*

Well, I'm not the fulfiller of wishes. I'm a businessman that needs to survive for the benefit of all the farmers such as you. Where would you go with your crop if my business failed? I need an answer, there are many others waiting eagerly to sell me their crop.

*John*

Will you pay me immediately if I sign?

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*Mr. Casey*

Yes, the moment your crop is in my storage and graded.

*John*

Well, I seem to have no other alternative, even if I don't like it. Let's get it over with.

*Mr. Casey*

Here is the contract. Please read it and then sign.

*John*

I don't have time to read all this stuff. Where do I sign?

The contract having been signed, the discussion continues.

*Mr. Casey*

John you are aware, it's in the contract we signed, that this price does not include transport costs to our storage and is based on your maize being A grade maize. If your maize is of a lower grade the price will decrease on the scale included in the contract. Our inspectors will check the grade when your crop is delivered.

*John*

That's not fair. If I knew that I would not have signed. You're a robber!

*Mr. Casey*

I told you to read the contract before signing it. If you had you would have known. We'll be visiting your farm on Tuesday next week to load your crop. Once it is delivered and graded and approved we will immediately pay you the amount owing to you.

*John*

Will that be in next week?

*Mr. Casey*

Well it depends on how soon the paperwork is signed off and whether the finance

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section can do the necessary to have your check printed. We'll keep you informed.

*John*

I thought I would be paid sooner, that why I signed. I need the money!

*Mr. Casey*

Now don't forget that if you fail to deliver when we come to collect your crop or are unable to deliver the contracted tonnage, you will be liable for a penalty of US\$ 50 per ton you fail to deliver.

*John*

Since when?

*Mr. Casey*

Read your contract, it's all in there.

On delivery of John's crop, which is two tons short, the crop is found to be grade B, and John therefore receives the following settlement amount:

5 tons of grade B white maize @ US\$ 160 per ton	US\$	800
Minus:		
Transport costs of US\$ 5 per ton	US\$	25
Administration costs	US\$	15
Shortfall of 2 tons @ US\$ 50 per ton	US\$	100
AMOUNT DUE	US\$	660

**Quite obviously this was not a successful negotiation. Now, continue reading the other cases. When you are done, take time to think through the question following each case and writing down your observations.**

## **The old cows**

### *Background*

Peter is a small scale dairy farmer 50km from the city in an area that has been blessed with reasonable rainfall. This has enabled him to grow a very good crop of feed for his twenty milking cows. Milk production has however been disappointing, seriously eroding his cash flow. On a recent visit to his farm the agricultural extension officer recommended that he replace his current milking cows, as they are genetically so inferior that they are unable to provide a good yield. He suggested that Peter approach a registered breeder to negotiate the purchase of at least a good Jersey bull and four Jersey cows as the first phase in building up a new herd.

Although Peter agrees that he is in serious need of better cows, he has never tried to acquire thoroughbred cows, as he simply does not have the necessary funds and does not believe that he will ever be able to get such funds together. He has now, however, decided to try and negotiate a deal with a breeder.

Grant Mullins, a jersey breeder in the area, has a good reputation as a breeder of quality animals, but is said to be a very strict, principled person that is not easy to deal with.

Despite his misgivings concerning a possible deal, he has decided to be positive and aspire to purchase the recommended bull and cows from Mullins. Whereas his lack of money had previously prevented him from trying to acquire better cows, he is now motivated to negotiate a deal that will enable him to produce more milk and by so doing pay Mullins in installments over a period.

Peter is today scheduled to meet Mullins at the Mullins farm to negotiate the purchase of a Jersey bull and four Jersey cows.

### *The negotiation*

#### *Mullins*

Morning Peter, I understand you are in need of better cows to strengthen your production of milk.

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*Peter*

Good morning Mr. Mullins, that's right, I am eager to improve the milk production I currently realize on my limited piece of land. The cows I at present have are not able to produce more milk, despite the good crop of feed I harvested this year. I need your help.

*Mullins*

That's good. What do you have in mind?

*Peter*

On the advice of the agricultural extension officer, I wish to negotiate the purchase of one Jersey Bull and four Jersey cows.

*Mullins*

What you are asking for is going to be very expensive. My Jersey bulls are on average US\$ 5 000 and my Jersey cows about US\$ 3 500, thus creating an overall cost of almost 20,000 USD. If you are able to pay this amount we can do business. Are you?

*Peter*

No, I'm not. Although I do not have the money to pay you immediately, I do, however, wish to explore possible ways in which we could cooperate to make such a purchase possible and thereby benefit both of us.

*Mullins*

How do you suggest we do this in a way which will ensure that I get payment for my bull and cows?

*Peter*

As I see it, you are well within your rights to demand immediate payment or send me packing. Alternatively, we could work together to create value for each other, by your renting the bull and cows to me in return for my undertaking to deliver the full production of the four cows to your dairy for the duration of the time needed to fully pay for the bull and cows. You would then keep 70% of the money earned for my milk – 50% to be subtracted from the cost of the bull and cows and 20% for you as your profit on this deal. 30% will come to me to cover my costs. With the current

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shortage of milk and the very good prices being paid for milk, I should be able to pay the cost of the bull and cows in about 18 months. I will then undertake to buy another five cows on the same basis, continuing to provide all my milk from the seven cows to you.

*Mullins*

So are you offering payment plus 20% interest?

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*Peter*

Yes. I think we can both make good money if we work together as partners. I produce milk for you, you sell it, I pay for the bull and cows and you earn 20% interest. We both win! If you wish we could go even further, as I am willing to undertake to buy further cows every time I finish paying, and to also deliver all the milk from the cows I buy to you to sell. We could then agree the percentage of the income you will keep on the milk from the cows that I have finished paying. If you are interested we could also work out a deal for the other milk I produce from my other cows.

*Mullins*

Would you be willing to sign a contract with all this in it, and to offer some of your land as security?

*Peter*

Yes. I produce, you sell and we both make money.

*Mullins*

A deal! I'll get my lawyer to draw up a contract. If this works we could together build a strong partnership that will benefit us both.

***The Old Cows***

Which factors contributed to making this negotiation so successful? It could be any event or behavior that you feel significantly influenced the outcome. List your observations below

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## **The old tractor**

### *Background*

Jack and Solomon farm together on a five hectare farm fifty kilometers from Lusaka, where they cultivate Irish potatoes. Up until now they have had a very old and unreliable tractor which they have used to plough their own lands and those of other farmers in the vicinity. This tractor has, however, now reached a point where it requires a total overhaul. Having considered the cost of a major overhaul, they together decided to urgently seek a replacement. They intend to approach a tractor dealer in Lusaka to negotiate the purchase of a 'new' tractor. In order to meet the deposit requirement they hope to trade in their current tractor. They have investigated the market and are disgusted at the prices of new tractors. The market is however flooded with used tractors, creating a very large difference in prices between new and used tractors. This is a problem for the dealers. Jack and Solomon know they will probably need to go for a refurbished tractor, but intend to start out making as if they intend to buy a new tractor. Should the price of a refurbished tractor be totally out of their reach, they would be compelled to have the current tractor fully refitted at a cost of 8000 USD. This will not provide a long term solution.

The tractor dealer in Lusaka is the main dealer in Zambia, selling approximately ten new tractors per month. According to other farmers who have recently done business with this dealer, he is a tough but accommodating businessman.

### *The negotiation*

#### *Jack*

Good morning Mr. Lutz. Thank you for your willingness to see us at such short notice, to assist us in our desire to purchase a new tractor.

#### *Mr. Lutz*

Good morning Jack, good morning Solomon. Gentlemen, it's always a pleasure to deal with farmers who are serious about their business and have a good track record. What do you guys have in mind?

*Solomon*

Thank you for seeing us Mr. Lutz. As Jack has said, we are here to work out a way together with you to purchase a new tractor that will enable us to grow our business and make it more profitable. I trust that we will be able to work together in such a way that our future need for tractors will always be part of the business arrangement we conclude.

*Mr. Lutz*

Gentlemen, nothing would give me greater pleasure than to establish a business relationship that will continue long into the future and will benefit my business as well as yours. What we need to do, is to clearly establish what kind of tractor you need, and what the optimal engine size is.

*Jack*

Mr. Lutz, currently we plow our own land, which is approximately five hectares, and the land of ten neighboring farmers, which is approximately another thirty hectares. If we buy a new tractor, as we intend, we could expand the land we plow to approximately one hundred hectares, and also provide a transport service for our own goods and those of our neighboring farmers.

*Solomon*

The type and size of the tractor is something which we would like you to advise us on, as we know that you have many years of very valuable experience. The area where we farm is primarily potato land. The tractor we need would therefore have to be suited to this type of farming. We are eager to benefit from your expertise.

*Mr. Lutz*

Gentlemen, what we need to establish together, is whether a new or a refurbished tractor with a guarantee would best serve your purpose. As you know, our dealerships in other countries are constantly trading in tractors that are often still in very good shape. These tractors, after being refurbished by us, are often as good as new, giving our clients the opportunity of buying a very good tractor at a very reasonable price.

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*Jack*

Mr. Lutz, we have had it with second hand tractors! They are just problems! We cannot afford to continue donating our hard earned money for tractor repairs. I don't think we are even going to consider anything but a new tractor.

*Solomon*

Mr. Lutz, you will understand the need every person has to, at one time or another, own something new that he can take special care of to ensure that it is in a good state for many years. We have really suffered over the last number of years, trying to keep our old tractor running. It has cost us very dearly.

*Mr. Lutz*

My friends, I very much appreciate your need to have a tractor that is highly reliable and is something you can be proud of. What I am suggesting will not cause you the same trouble you have had for many years. I'm only trying to suggest a way in which I could possibly save you a considerable amount of money and at the same time give you a tractor that will fully meet your needs. As you know, new tractors have become extremely expensive. The type of tractor you would need would cost, depending on the quality, anything between 30,000 and 50,000 USD, whereas a refurbished tractor of the same size and high quality would only cost you between 10,000 and 15,000 USD.

*Jack*

Although the price for a new tractor is high, we believe that after the trade-in we would be able to pay the monthly installments required over a repayment period of five years. The important thing is that you give us the very best trade-in on our tractor. With your expertise, you will sort our old tractor out very quickly.

*Solomon*

We know that you have, over many years, helped many other farmers to acquire tractors and implements and that you have been very generous with the trade-in values that you have provided. We want to do long term business with you. All we need is a kick start.

*Mr. Lutz*

Friends, this is a difficult time in the second hand tractor market. The drought has seriously decreased the number of second hand tractors we are able to sell. Even when these tractors are in excellent shape, as those I am recommending to you, they are still difficult to sell. As for your tractor, it would seem that I am going to have to spend quite a bit of money to get it into shape again. Given its age and its current wear, I would be robbing my own business if I were to offer you anything more than 1,000 USD trade-in value. If you were to buy a new tractor, which I am not recommending, I could possibly increase this to between 1,300 and 1,500 USD, which would not even cover the first installment, given your need for a reliable high quality product. Roughly speaking, the up-front deposit on a new tractor would be between 3000 and 5000 USD, with sixty monthly installments of 550-900 USD. That's a lot of money!

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*Jack*

Do you want to tell us that this is all you are willing to offer? We would be giving away our tractor at that price! You will have to do much better than that if you want our business. There are other dealers.

*Solomon*

We want to do business with you, but you need to make it possible.

*Mr. Lutz*

Please don't get me wrong, I do want your business, and I do want to create a deal where we will all benefit. That is why I have suggested that we not go for a new tractor, but rather for a very good second hand tractor. It just doesn't make sense to pay 20,000 to 30,000 USD more for something that will do exactly the same job as a cheaper second hand tractor.

*Jack*

What second hand tractor do you have in mind?

*Mr. Lutz*

I have a perfectly refurbished Volvo tractor at a very reasonable price. It has only had a single owner and has been very well maintained. I'm willing to sell this tractor to you at 12,000 USD, and to give you a very good trade-in of 11,000 USD. This would largely cover the deposit of 10% on the purchase price. It would also require much smaller monthly installments.

*Solomon*

How would we know that this tractor is going to serve us for many years without regularly costing us large amounts of money to keep it running?

*Mr. Lutz*

Naturally, gentlemen, I would, as in all transactions that I do, provide you with a warranty.

*Jack*

I don't trust these warranties. You guys give me a one year warranty, and the first day

of the second year the tractor is no more.

*Solomon*

Come now, Jack, we know that Mr. Lutz is a reliable man who lives up to his promises. Our friends have told us so.

*Jack*

Well, if he's as trustworthy as you say he is, I'm sure he wouldn't mind giving us at least a three year warranty covering all parts and repairs!

*Mr. Lutz*

Thank you, Solomon. We are proud of the reputation we have built. We wouldn't do anything to tear that down. We would be happy to get legal advisers of your choice to check out this warranty. Three years is the normal warranty on a new product. At most, what I could offer is a warranty of one year covering all parts and repairs, as well as an extended warranty of a further year covering all parts.

*Jack*

That's just not enough. The least I'm willing to accept is a three year warranty on all parts and labor.

*Mr. Lutz*

Guys, let's not be unreasonable here. I'll tell you what; I'm willing to increase the extended warranty to two years on all parts, and to decrease the price of the tractor to 11000 USD. That would mean your trade-in covers your deposit. More, I cannot do.

*Solomon*

If we bought this tractor from you, can we honestly accept that you will always be there when we need you, and that it is your intent to continue doing business with us after this deal?

*Mr. Lutz*

Gentlemen, I would be honored to get your business. If you buy from me, I'm your partner. The success of your business is the success of my business.

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*Jack*

Ok. This looks fair to me. When can we sign this deal? We need this tractor as soon as possible.

*Mr. Lutz*

If you guys leave your tractor here, I will draft the new contract and have your new tractor checked out again, and you can then take it back to your farm later this afternoon.

*Solomon*

Mr. Lutz, I believe this is the beginning of a very good relationship. You can rest assured that we will do all our business with you if you treat us in the way that you have committed to do.

***The Old Tractor***

Which factors contributed to making this negotiation so successful? It could be any event or behavior that you feel significantly influenced the outcome. List your observations below

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## The Transporter

### *Background*

Sally is at a point where she needs to negotiate a transport contract to move her Sweetpotatos to market and bring the necessary inputs to her farm.

In the past, Sally made separate deals every time she required transport. She now realizes that this has probably not been to her benefit, as she has not used the fact that she regularly needs transport as a means to negotiating a better price. Another factor which she has come to realize that could improve her position to negotiate a good price is the possibility of agreeing with her neighbors to jointly enter into a transport negotiation. In their discussions they have agreed that she should try to negotiate to achieve the best possible transport price on their behalf, as this is very likely to be better than the price they could individually negotiate. Indications are that she and her four neighbors will together require a minimum transport capacity of five tons per week. Currently, they are on average paying 10 USD per ton to market, each using a variety of transport solutions.

In thinking about the concessions they could make to secure a mutually beneficial deal, they agree that they would offer all their business to a transporter offering a price of 8 USD per ton to market. They would furthermore be willing to guarantee a minimum volume of five tons per week to a transporter offering a price of 6 USD per ton to market, although they are not absolutely sure of achieving this volume.

The transporters generally have never had to negotiate prices. Clients have tended to largely accept whatever quotations they were given. This, however, is changing.

### *Negotiation*

#### *Sally*

Good morning Mr. Ndebele. I trust that you are well and that business is good. I am here this morning to talk new business to you; business that I believe will benefit both you and me.

## CONTRACT NEGOTIATIONS

*Mr. Ndebele*

Morning Sally. It's always good to see you and do business with you. Times are tough, fuel is very costly and spares and repairs are also very expensive. Our clients do not seem to recognize this when they demand prices that are so low that we would be subsidizing them. This is a tough old business. How can I help you?

*Sally*

Mr. Ndebele, my neighboring farmers and I recently sat down and together agreed that in the future we would buy transport together. I have been appointed by them to approach you with a deal that will serve both your and our interests very well. On considering possible transporters we unanimously agreed that you are the man with the best track record, not having tried to cheat your clients as so often happens in your industry. We are sick and tired of people without integrity.

*Mr. Ndebele*

Thank you Sally. It's tough being an honest man in these times. Working with you folks will be an honor. What is it that you exactly have in mind?

*Sally*

As you know, we all primarily produce Sweetpotatos, requiring us to regularly transport our crops to market. Together we on average require transport for at least five tons of Sweetpotatos per week. What we are looking for, is a long term contract with a single transporter to move our entire crop to market. Mr. Ndebele, what could you offer?

*Mr. Ndebele*

That sounds very interesting. What we need to find out before we can talk price, is how long this delivery season will be, how often I would be required to collect your Sweetpotatos and where such collection will take place? Are you intent on bringing all the produce together on one farm, thereby requiring me to collect from a single point, or would I need to visit all your farms individually?

*Sally*

Our intent is to bulk up our crop every week at one of our farms and to have you make one collection per week on behalf of all of us. Furthermore we have agreed

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## CONTRACT NEGOTIATIONS

that when we need inputs we would ask you to transport those on our behalf. All in all, this could mean one trip per week to market all year round.

*Mr. Ndebele*

I'm interested, provided that you have not set your mind on a ridiculous price. I cannot do business at the price some of your colleagues demand. At that price I will be out of business in a very short time. My suggestion is that we draw up a contract which provides for a transport cost of 8 USD per ton to market. That truly is the best that I can do.

*Sally*

You will have to sharpen your pencil. 8 USD is what you charge those who use your transport infrequently, jumping from one transporter to another. What we are offering is a long term contract where you can better plan your business. Our price requirement is 5 USD per ton to market. We cannot go over that, as it would then make no sense to incur the trouble and cost of bulking up our produce and working with a single transporter. If you are flexible on the price, we could possibly consider giving you a guarantee of a certain tonnage per week. That would, however, require you to accept our price.

*Mr. Ndebele*

5 USD per ton! That is totally outside my reach! If you offer me a guarantee that you will pay me for a minimum of five tons per week, I could drop my price to 7 USD per ton. At that price you would be getting an excellent deal.

*Sally*

I have gotten information on your business costs. Seeing that you demand 7 USD per ton, five tons per week every week of the year, this would give you an income of 1820 USD per year. Based on the fact that you might not even be required to make all those trips, the quality of the roads leading to the pick up point and your running costs, you would be making a very heavy profit.

*Mr. Ndebele*

I haven't sat down to calculate this yet. You must however remember that I am in business to make money.

LEARNINING TO NEGOTIATE

*Sally*

So what you are saying Mr. Ndebele is that you don't really care what effect your price has on us, and whether it prevents us growing our business, thereby giving you more business.

*Mr. Ndebele*

Sally, I want your business, but not if it is going to destroy me. The best I can do is to offer you a contract at 6 USD per ton, providing you then give me a guarantee that you will pay me for five tons per week, every week of the year, irrespective of whether I in fact transport five tons per week. You also undertake to channel all future business to my company.

*Sally*

Thank you Mr. Ndebele. I suggest we together approach a legal person to draw up a contract.

***The Transporter***

Which factors contributed to making this negotiation so successful? It could be any event or behavior that you feel significantly influenced the outcome. List your observations below

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## The Outgrower

### *Background*

Mrs. Whyte, a large scale producer of fresh produce, has secured markets in excess of her ability to produce and has subsequently approached a group of small scale farmers to grow green beans and Brussels sprouts on her behalf, which she will then market.

As she as a large scale producer is subject to very strict regulations laid down by the EU for products exported into the EU, she needs to demand that all her contracted producers meet these requirements as she would otherwise run the risk of loosing very lucrative contracts.

She has approached a group of thirty small scale farmers, who have all been trained by an NGO in meeting the requirements laid down by the EU, but have unfortunately not been able to utilize these skills as they have not had access to foreign markets.

The small scale farmers have agreed that they should make use of this opportunity, provided that it secures a better income than their current cabbage production. Currently, the cabbage is sold on the local market, and is not subject to all the costly and time consuming requirements they need to meet under the suggested scheme. The farmers have decided that Mrs. Makeba and Mr. Zuma will negotiate on their behalf.

The large scale producer, Mrs. Whyte, is intent on securing the production of the thirty farmers at the lowest possible cost. She intends to provide the necessary chemicals and seed needed on credit at 50% interest, payable on a fixed date at the end of the season. If the farmers prove to be very sticky on price, she will (very reluctantly) offer them the necessary inputs on credit, free of interest payable on delivery. Given that she would need to revert to an untrained group of farmers if this negotiation were not to succeed, she will as a “last ditch offer” consider advancing twenty percent of the expected income to these farmers, to facilitate the purchase of the necessary implements.

### *Negotiation*

*Mrs. Makeba*

Good morning Mrs. Whyte. Thank you for inviting us to come and discuss the possibility of us working together and creating value for each other. I have Mr. Zuma with me. He is a very knowledgeable person on EUROPEGAP regulations.

*Mrs. Whyte*

Welcome. As you know, I'm a busy person and I don't have much time for anything but my real business. So, let's get to the point. I want your group of thirty farmers to grow green beans and Brussels sprouts for me, which I will then export to Europe. For this I will naturally pay you a fair price. Let's talk.

*Mrs. Makeba*

Mrs. Whyte, we as a group are interested in entering into a business agreement that will serve our interests and yours equally well. We believe that by combining our skills with yours, we can create a strong market advantage. We need each other.

*Mr. Zuma*

Mrs. Whyte, what you need to understand is that we are not here to simply be informed about how things are going to happen. We are experienced farmers with a very good knowledge of the requirements regarding the export of produce to the EU. There is no other group in this area that has our knowledge and expertise. We are aware that in the past you have constructed deals that have clearly been to the disadvantage of the contracted farmers. This we will not allow.

*Mrs. Whyte*

Mr. Zuma, I just do not have time argue the past. Let's look to the future and see what kind of deal we can make. Without me, you will continue to grow cabbages and remain struggling small scale farmers.

*Mrs. Makeba*

Let's not get all emotional about this. We are not here to tear each other down, but rather to create some value for each other. What do you have in mind Mrs. Whyte?



*Mrs. Whyte*

Mrs. Makeba, I'm happy that you adopt this sensible approach. What I have in mind is a deal where you produce and I market. You will earn an income considerably better than that which your cabbages give you. I currently have a secure market in the European Union for green beans and Brussels sprouts. This market is way in excess of what I can produce. Naturally, I could simply inform my clients that I'm not able to satisfy this demand. Alternatively I could use it to help people like you. That is what I'm offering.

*Mr. Zuma*

Mrs. Whyte, you are very vague. You would have to tell us what volumes you require, what prices you intend to pay and whether you are willing to contribute the inputs and whether you will make certain up front payments. After all, this is the standard practice in deals of this nature.

*Mrs. Makeba*

Mrs. Whyte, as I have said, we want this to be a long term deal, which serves both parties equally well. Therefore it is necessary that you ensure that we as farmers make the kind of profit that will keep us motivated to honor this deal.

*Mrs. Whyte*

What you need to bear in mind is that I am offering you security of income and the opportunity of earning the kind of money that will enable you to improve your farms and your standard of living. Between the thirty of you, I require 50 tons of grade A green beans and 50 tons of grade A Brussels sprouts grown in strict accordance with EU regulations. For that I will pay you 500 USD per ton of green beans and 1000 USD per ton of Brussels sprouts.

*Mr. Zuma*

Why are you ignoring me? I asked you specific questions to which I have received only partial answers. What about the input costs and upfront payments? What you are asking of us will force us to make new investments. This is a risk, which we need to balance.

*Mrs. Whyte*

Naturally, I want you to remain with me for the duration of my contract. I wouldn't want to exploit you. All I'm looking for is a fair deal. If you are willing to provide me with the volumes of produce that I have indicated, at the price that I have indicated, I am willing to provide you with the necessary inputs on credit, at no interest, payable on delivery of the produce. This would, as I am sure you will agree, guarantee you a very fair margin.

*Mr. Zuma*

You still don't answer the question of a loan. You need to remember that we have to buy certain capital goods to produce the volumes you require. Without a loan many of us will not be able to do this.

*Mrs. Whyte*

Once we have agreed to enter into a long term relationship I am willing to sit down with you and look at your capital requirements so that we can together work out the

## CONTRACT NEGOTIATIONS

best way of dealing with them. It makes no sense to talk about an amount without knowing exactly what is required.

*Mrs. Makeba*

Mrs. Whyte, although I understand where you are coming from, you need to appreciate that your approach will not build the trust needed to cement a long term relationship. You should please think again. Everything must be in the contract that we sign if we are not to experience serious conflicts very soon after signing it. We need to trust each other.

*Mrs. Whyte*

I appreciate what you are saying, but I still do not know how we are to determine what your needs are before we have had an opportunity to carefully study these needs. If I were to, for example, offer you a loan of 20% of the anticipated income you stand to derive from the products you deliver to me, this may prove to be totally inadequate.

*Mr. Zuma*

Mrs. Whyte, I think we should, as you have recommended, calculate the capital need before we enter into any contract. You are right; we shouldn't just jump at an amount or a percentage.

*Mrs. Whyte*

To summarize, what you are therefore requesting, is that I, in addition to what I have offered, after this meeting sit down with you and determine your capital needs. I'm willing to do this on condition that we immediately sign a letter of intent, as I need to have that surety before I invest further time in this matter.

*Mr. Zuma*

This is a good starting point, but we then also as a matter of great urgency, must determine what our rate of return on this investment will be. Our present cabbage business is reliable, involves low risk and generates a good return. Because the business you are suggesting inevitably involves a higher risk, it would have to generate a substantially better return. This we need to establish as soon as possible.

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*Mrs. Makeba*

Mrs. Whyte, if you prove to us that you really care for our interests and are willing to share the return on this investment equitably, you will find in us a very reliable long term partner.

*Mrs. Whyte*

I wish to thank you as my prospective partners for the positive way in which you have approached this negotiation. Although there may be tough roads ahead, I believe we can together work out ways of dealing with each other in a manner that will benefit us all.

*The Outgrower*

Which factors contributed to making this negotiation so successful? It could be any event or behavior that you feel significantly influenced the outcome. List your observations below

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## The Cooperators

### *Background*

There are three small cooperatives, whereof one is strictly informal, who's members are situated around a mid-sized rural town. The two formal cooperatives were started with help from an international aid organization. One of these is focused on production cooperation, having structures for joint purchases of inputs, a tractor and storage facilities. It also has a dam and some irrigation implements that, due to excessive wear and lack of spare parts, are no longer in use. The other formal cooperative is involved in processing, producing dried fruits and sunflower oil. It uses simple sun dryers and an old oil press with inadequate filtering facilities. The informal cooperative consists of a large number of farmers who, without obligations, find markets, bulk their produce, find transporters and sell together. Although they have been successful in securing markets, the informal structure has not sufficed to ensure reliable access to products, and it has made planning for the future impossible.

At a strategic planning session these cooperatives came to the conclusion that they would become far more effective if they were to join forces.

Each of the cooperatives have mandated the chairpersons of their boards to enter into negotiations to explore the possibility of amalgamation, as this would create a far more powerful and influential single cooperative.

Given the history of the three cooperatives, the negotiation is likely to be difficult, as each of the cooperatives is likely to hold out for ultimate power within the new structure.

Mr. Radebe represents the Agricultural Production Cooperative

Mr. Banda represents the Agricultural Processing Cooperative

Mrs. Temba represents the Informal Cooperative

The Agricultural Production Cooperative is hosting the negotiation at its offices.

*Negotiation*

*Mr. Radebe*

It gives me great pleasure to welcome you, Mr. Banda and Mrs. Temba. This meeting is long overdue, and I therefore trust that we will be able to work together in a manner that will allow us to create a better organization by bringing together all the good qualities of our organizations. We all have much that we can rightfully be proud of.

*Mrs. Temba*

Thank you. In our informal grouping we have long felt the need to be part of a bigger organization that is better able to do the things that are important to us.

*Mr. Banda*

Thank you for inviting us. There can be no doubt that together we will have much more muscle to utilize our processing abilities. Up to now, one of our main problems has been the fragmentation in our industry. Marketing and selling are the areas where we have often not succeeded.

*Mr. Radebe*

Friends, what I suggest is that we today work towards reaching an agreement that we wish to merge our organizations. The details we could work out at a future meeting. Does that make sense?

*Mr. Banda*

I don't think it will serve much purpose to agree on any merger before we have put our minds to how this should be structured. After all, as we sit here, our contributions to this new organization will be quite different, and therefore should be recognized in the structure. It doesn't help to try and stick something together without knowing what the organization would need to do. As an example, we are the cooperative that has by far the most knowledge, skills and experience when it comes to processing, which is the key value adding function in any marketing chain.

*Mrs. Temba*

We shouldn't be arguing about positions at this point. It is far more important that

## CONTRACT NEGOTIATIONS

we create an organization that will have the necessary marketing expertise to ensure that our produce, whether it be processed or not, is sold at the best possible prices.

*Mr. Banda*

It's easy for you to say, when you do not cover all the areas we are responsible for. I cannot sacrifice the position of my organization if I'm not able to ensure that it play a leading role in the new organization. My members simply would not accept this.

*Mr. Radebe*

Let us not argue about positions before we know what the nature of the new organization is going to be. Only then will it be meaningful to talk about positions.

*Mrs. Temba*

I think we need an organization that has a number of clear divisions that specialize in certain areas that are important to all of us. I'm going to have a go at identifying the areas we should cover. I think we need a division that assists our members in optimizing their production with respect to market demand. This would to my mind involve improving the technical knowledge of our members, negotiating better input costs and securing more cost effective transport. Most importantly, this division will need to be in constant contact with the second division I visualize, namely marketing. Mr. Banda is right in emphasizing processing as a means to add value to our products, but should always remember that processing cannot be treated in isolation. We need to process what the market demands. We all agree that value adding is a key area. In summary, I'm calling for Production, Processing and Marketing divisions.

*Mr. Banda*

Do we then really need to be one organization?

*Mr. Radebe*

Definitely. As we would then be pooling our resources and making a far greater impact in each of the areas concerned. Currently, there is duplication and a lack of specialist skills due to the fact that we are each trying to be everything to everyone. We live in a world of specialization; there is no sense in ignoring it. Together we will have much more clout with government, business, and donors.



*Mr. Banda*

I wouldn't be here if I didn't think there was merit in developing a new organization. Let me see if I'm getting you correctly? Are we in effect saying that there should be a production division managed by Mrs. Temba, a processing division managed by myself, and a marketing division managed by Mrs. Temba, and that we would all work very closely together?

*Mrs. Temba*

That's exactly what I'm trying to say. Once we agree this, we can sit down and work out the details. Such a deal would clearly be in the interest of all our stakeholders.

*Mr. Radebe*

I'm all for it. I suggest, as I was initially trying to say, that we today agree that we are going to set up an organization with these three divisions, and that we at our next meeting start to work out the details.

*Mr. Radebe*

I think we need to congratulate ourselves on being as flexible as we have been.

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Believe me, this idea has been around for many decades but has never been realized. Maybe it's just a case of the time now being ripe. Are we agreed?

*Mrs. Temba*

Undoubtedly. This idea has my full support.

*Mr. Banda*

Let's move.

### *The Cooperators*

Which factors contributed to making this negotiation so successful? It could be any event or behavior that you feel significantly influenced the outcome. List your observations below:

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## **Analysis**

1. Compare the “factors contributing to a successful negotiation” that you identified after analyzing the separate cases. You will probably find that you have written down the same, or very similar, factors several times. This is exactly the way it should be. Your task now is to compare these factors and to combine similar factors or statements to form new, more relevant or “all encompassing” “factors that contribute to a successful negotiation”. Finally you are to enter these factors in column 1 of this table. Please note that the table contains only ten rows, which means that you will be required to make a genuine effort to reduce the number of “factors” you identify to ten, omitting those factors that are of lesser importance.

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Column 1	Column 2						
Factors contributing to a successful negotiation:	How well are the factors employed in each case?						
	Case 1	Case 2	Case 3	Case 4	Case 5	Case 6	Sum
	1	1	1	1	1	1	
	2	2	2	2	2	2	
	3	3	3	3	3	3	
	1	1	1	1	1	1	
	2	2	2	2	2	2	
	3	3	3	3	3	3	
	1	1	1	1	1	1	
	2	2	2	2	2	2	
	3	3	3	3	3	3	
	1	1	1	1	1	1	
	2	2	2	2	2	2	
	3	3	3	3	3	3	
	1	1	1	1	1	1	
	2	2	2	2	2	2	
	3	3	3	3	3	3	
	1	1	1	1	1	1	
	2	2	2	2	2	2	
	3	3	3	3	3	3	
	1	1	1	1	1	1	
	2	2	2	2	2	2	
	3	3	3	3	3	3	
	1	1	1	1	1	1	
	2	2	2	2	2	2	
	3	3	3	3	3	3	
	1	1	1	1	1	1	
	2	2	2	2	2	2	
	3	3	3	3	3	3	
	1	1	1	1	1	1	
	2	2	2	2	2	2	
	3	3	3	3	3	3	

## CONTRACT NEGOTIATIONS

2. Grade the “factors contributing to a successful negotiation” according to how well they are employed in each case. Use the three level grading matrix in column 2, giving the “factors” a grade for each case.
3. Sum up the grades in the sum column (for example, if you have given one factor the grades 1,3,2,3,3,2, you would enter the sum  $1+3+2+3+3+2=14$  in the sum column on the corresponding row)
4. Prioritize the “factors” according to the total grade sums awarded to each factor. The higher the total sum, the higher the importance of the factor.

## LEARNINING TO NEGOTIATE

## CONTRACT NEGOTIATIONS

# WHAT IS NEGOTIATION?

# A common quest

Although many an author has described negotiation as the art of the possible, it is an increasingly well-researched and well-documented business discipline. Negotiation and conflict dispute resolution are today increasingly regarded as prerequisites for business and personal success. Politicians, managers, professionals, consultants, agents, parents and children are becoming increasingly aware of negotiation as a generic skill that is present in all facets of vocational and personal life. With our world slowly edging towards a greater degree of democracy in political, social and economic interactions, negotiation is increasingly seen as a skill essential to life, society and business.

As with all things in life, there are a myriad of definitions of negotiation. The following is the definition the author has developed and refined over many years: Negotiation, which is both an art and a science, is the interactive process whereby parties together create and explore alternatives in their common quest to reach a value-enhancing agreement that is mutually acceptable and honored by both parties, despite widely differing initial positions.

- Interactive process – Negotiation is an advanced form of communication in which two or more parties through their interaction with each other strive towards achieving a mutually beneficial solution. In essence negotiation is both an art and a science.
- Creating and exploring alternatives together – For negotiation to succeed in creating sustainable agreements it is essential that all the parties involved in a negotiation are willing to move beyond their initial positions and to understand and acknowledge the interests that underpin these positions. This is the key to establishing value-enhancing, sustainable agreements. Only when positions are set aside is it possible to broaden the negotiation frame from a competitive I vs. I frame to a co-operative WE frame that enables the parties to explore all the opportunities posed by the negotiation. This prevents the premature thought

## WHAT IS NEGOTIATION

closure inherently related to a positional approach, thereby creating the mental, attitudinal and behavioral flexibility needed to elevate the negotiation above a mere value-claiming tug-of-war.

- Common quest – In principled negotiation, the focus shifts from I vs. I to WE, thus creating a negotiation environment within which the parties are able to ask themselves “what they can become together”. The parties, despite arriving at the negotiation table with divergent views, are then willing to shift their focus from what sets them apart to the common interests they inevitably share. This elevates the negotiation from what is all too often a bruising, competitive encounter to a co-operative partnership where both parties consciously work towards achieving an outcome that is optimally beneficial and mutually acceptable.
- A value-enhancing agreement that is mutually acceptable – True negotiation goes beyond the mere claiming of value by the parties. It aspires to create an environment within which the parties feel sufficiently secure to work together for an outcome that does not merely involve a decision as to how “the cake should be cut”, but aspires to develop choices as to how to “grow the cake”. In principled negotiation, the parties are future-orientated, creatively using the negotiation as an opportunity to work together for a mutually acceptable, value-enhancing outcome. Instead of merely employing distributive bargaining to “divide the cake”, they deliberately choose to jointly explore the most productive ways of creating value for each other. By resisting the temptation to divide the cake, opting rather to explore its value-enhancing possibilities, they use the cake “to build a bakery”. They deliberately shift the emphasis from claiming value to creating value.
- Mutually acceptable and honored by both parties – The litmus test for any negotiation is whether all the parties will honor and uphold the agreement. In essence, this precludes any process whereby one party victimizes the other party/parties by deliberately stripping out as much value as possible for itself and leaving the other party/parties with what remains. Understandably, the party/parties that are stripped bare consequently have no allegiance to the outcome. True to the dictum that victims become aggressors, they then feel compelled to undo or undermine what they perceive as an unjust outcome.

## CONTRACT NEGOTIATIONS

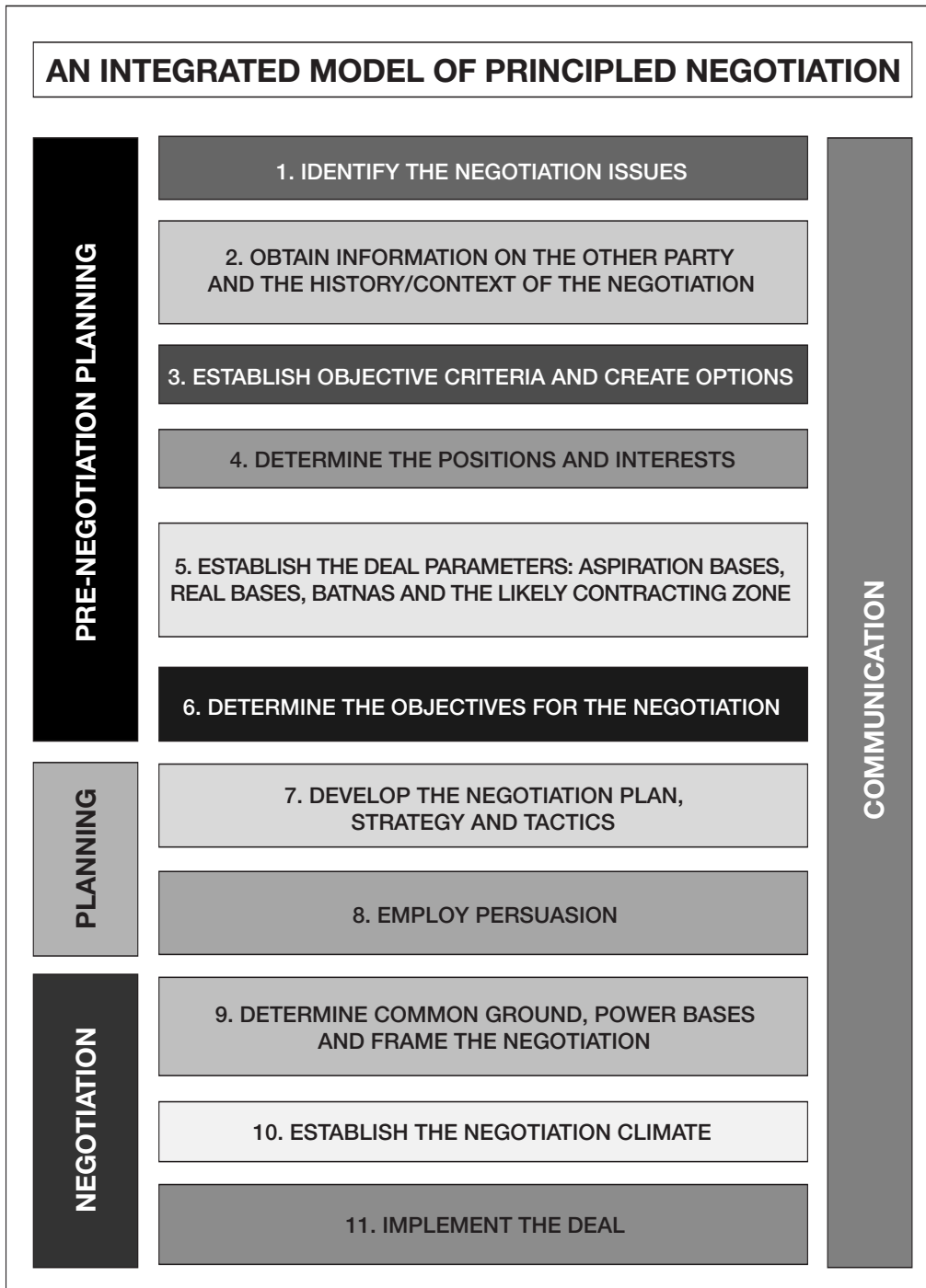
- Despite widely differing initial positions – Negotiation is a creative tool that enables parties to bridge the divides that exist between them on any issues of concern or importance to them. Although there is a strong correlation between the extent of the divide between the parties and the difficulty of securing an agreement, negotiation is a resilient tool, capable of resolving even the most intractable problems and securing sustainable agreements across wide divides.
- With the possible exception of a once-off property transaction, negotiation is not a once-off event. In the business environment, negotiation is predominantly a process whereby the parties negotiate to negotiate again in future. Most definitions take cognizance of negotiation as a process, for example:
- “A series of things that are done in order to achieve a particular result.” - Oxford Learners Dictionary
- “A series of actions or operations conducing to an end.” - Merriam-Webster Dictionary
- Given the nature of most negotiations, it is essential that well-defined processes and methodologies that optimize the outcomes and ensure repeatable results underpin them. When conducted within the context of a flexible framework, based on best practice negotiation principles as set out in fig. 1, negotiation is a powerful tool that creates a distinct advantage for those who understand how to use this tool.

Historically the negotiation approach suggested in this manual has developed from the bartering and bazaar style bargaining which was previously an important way of doing business. Although both bargaining and negotiation require that the parties to reach an agreement or compromise through a process of give-and-take, negotiation goes beyond what often is a mere price war, by requiring both parties to co-operate in a spirit of compromise that enables a mutually beneficial and sustainable agreement to be reached. Whereas bargaining may be applicable in a very limited number of environments, it seldom creates the sustainable, profitable agreements to which we all aspire.

## WHAT IS NEGOTIATION

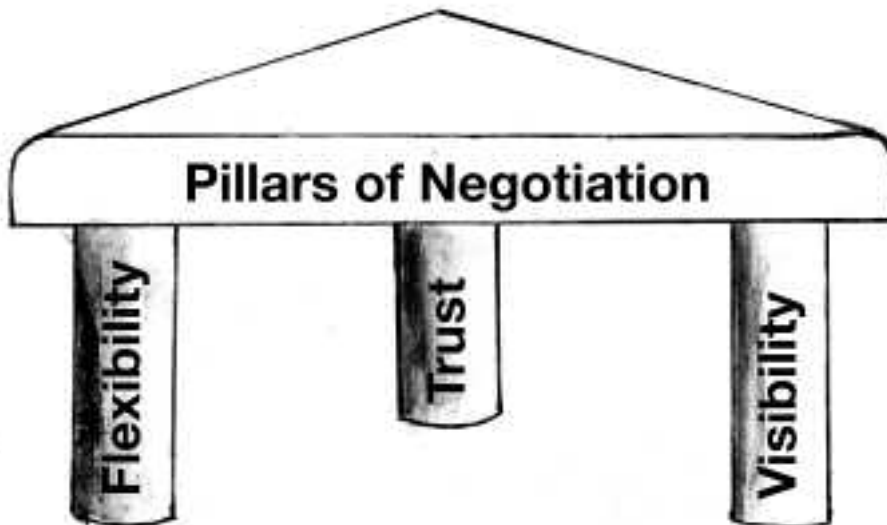
<b>Distributive positional negotiation</b>	<b>Integrative principled negotiation</b>
<ul style="list-style-type: none"> <li>• Parties treat each other as adversaries, I vs. I</li> <li>• Hard bargaining</li> <li>• Commits to position early</li> <li>• Competitive, antagonistic, confrontational</li> <li>• Egocentric, self-interest, self needs</li> <li>• Distributive – seek “win-lose” victory in which more is won than the other party wins</li> <li>• Defensive</li> <li>• Assertive – only one solution, mine</li> <li>• Past/present focused</li> <li>• Relationship insensitive</li> <li>• Applies pressure</li> <li>• Misleads and employs tricks</li> <li>• Claims value</li> </ul>	<ul style="list-style-type: none"> <li>• Parties work together to explore opportunities</li> <li>• Seeks an outcome based on the needs of all the parties</li> <li>• Co-operative</li> <li>• Assertive</li> <li>• Not bottom line fixated</li> <li>• Uses objective criteria as basis for decisions</li> <li>• Orientated towards common interests</li> <li>• Future focused</li> <li>• Integrative – seek “win-win” agreement that is mutually beneficial</li> <li>• Relationship sensitive</li> <li>• Open and employs fair principles</li> <li>• Relies on reason and yields to principle</li> <li>• Negotiates hard based on interests</li> <li>• Creates value</li> </ul>

Bargaining has serious limitations, as it typically employs a positional, competitive, self-interest mode of interaction that fails to provide for any meaningful accommodation of the other parties’ interests. Furthermore, it proceeds from the assumption that every negotiation is a once-off encounter and that it is therefore highly unlikely that the parties will do business with each other ever again. Bargaining is akin to a zero sum game where there are distinct winners and losers.



# The three pillars of principled negotiation

Principled negotiation rests on the three pillars, trust, flexibility and visibility. Negotiation that is not built on these pillars, invariably delivers suboptimal outcomes with one of the parties feeling sufficiently victimized to not commit to an agreement. Building durable relationships that underpin agreements requires parties to pursue their objectives in such a manner that healthy party-to-party relations are established. Such relationships reduce the need for compliance monitoring, decrease transaction costs, and create greater value through the improved use of assets and capabilities. They enable low-cost high-value trade-offs, cause fewer costly surprises, facilitate early problem recognition and stimulate innovation. Trust, flexibility and visibility allow parties to feel sufficiently secure to share their interests with each other, and promote the understanding required to create mutually beneficial, value-enhancing deals.



## Trust

Negotiation is a highly sophisticated form of communication. Without trust, successful negotiation is not possible. Although manipulation could masquerade as negotiation, it would ultimately fail the acid test, an agreement that holds.

Good negotiators are trustworthy. They honor their commitments, tell the truth and respect confidences.

Although trust tends to develop naturally over time, negotiators seldom have the luxury of letting nature take its course. This being the case, many negotiators simply choose to limit their risk by only embarking on deals that involve few tradeoffs, few concessions, and require the minimal sharing of information between parties. Uncertainty as to the trustworthiness of a party often results in that party being excluded from significant opportunities.

With regard to the ability to foster trust in the course of a negotiation, Deepak Malhotra, writing in *Negotiation* (Edition of 5 April 2004), recommends that negotiators employ the following seven strategies to influence the perceptions of their trustworthiness at the negotiating table:

- Speak the language of the other party

It is important that negotiators speak one another's language. Not only should they be able to understand technical terms and jargon, but also be sensitive to the nuances and cultural implications underpinning what is being said. They must be aware of how the other party uses words and non-verbal language to convey ideas. By displaying an understanding of other party's history, culture, and perspectives, negotiators are able to convey a message of commitment to the negotiation and to securing the good relationship. Such sensitivity signals an eagerness and readiness to follow through on the negotiated agreement.

Negotiators can increase the impact of their pre-negotiation preparation by informing the other party of what they have done to understand the needs and interests of that party, and by recognizing the fact that further learning will take place as the negotiation moves forward and the relationship develops. This ensures that when misunderstandings occur, as often happens, the parties will not overreact,

but rather see such misunderstanding as part of a learning process and an indication that they should increase their efforts to understand each other's points of view and the underlying rationale.

- **Manage your reputation**

A negotiator is preceded by his reputation. Whereas a bad reputation can be a non-starter, a strong reputation can assist in overcoming very tough obstacles.

Successful negotiators appreciate that their reputation is not merely a backdrop to a negotiation, but is potentially a very important tool. They consequently employ their reputation by providing the other party with references from mutually trusted third parties that are willing to provide character and competence references. Where appropriate, they may even at times arrange that a third party communicate directly with the other party prior to the negotiation. Media or other references of past successes in similar negotiations often are very helpful.

- **Make dependence a factor**

The more dependent a person is on another person, the more likely that person is to trust the other person. This is borne out to the extreme by the so-called Stockholm syndrome, where hostages become so psychologically dependent on their captors that they begin to trust their captors' statements and demands more than what the officials say who are attempting to negotiate their release.

In a negotiation where both parties understand and believe that they need each other to achieve their respective goals within an environment of limited options, trust between the parties increases. Skilful negotiators are able to trigger this trust-building process by emphasizing the unique benefits they can provide to each other, and by stressing the damage that could be incurred because of a standoff or deadlock. This dependence can become so strong that when a stalemate looms large and the alternatives to an agreement seem very limited, painful or costly, negotiators still tend to trust their "enemy."

- **Make unilateral concessions**

Negotiating with strangers and adversaries tends to be extremely measured and careful, with both parties cautiously weighing what is to be gained from each concession made

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to and by the other party. This stands in stark contrast to negotiations where a long-term relationship exists, as in such negotiations the focus is usually far less on keeping score of gains and losses. Experience teaches that a carefully structured unilateral concession often leads to the development of trust, as it communicates to the other party that its counterpart in the negotiation deems the relationship to be a cooperative one, with the potential for mutual gains and trust over time.

Although a true unilateral concession should not require commitment or a concession from the other side, it should, however, not entail substantial cost or risk to the provider. What is important is that it must involve a meaningful benefit for the recipient. Carefully crafted unilateral concessions not only increase the likelihood of a trusting relationship, but also demonstrate sensitivity and an understanding of the interests and values of the other party.

- Label your concessions

Although it is generally true that actions may speak louder than words, this is not necessarily the case in a negotiation. Concessions, whether unilateral or not, are often not influential in building trust or encouraging reciprocity, as the recipient does not appreciate them as such. In an effort to circumvent the obligation of reciprocating, negotiators often devalue each other's concessions and contributions, causing many concessions to go unnoticed or unacknowledged. Understandably, this may lead to confusion, resentment, an escalation of negative tactics and unwillingness to cooperate or offer further concessions.

In negotiation, it is important not to simply accept that actions speak for themselves. When a significant concession is made, the party making the concession must ensure that it communicates to the other party exactly how much it has conceded, together with the value it attaches to the concession. By emphasizing the magnitude of the concessions it has made, a party ensures that it is able to use the concession to influence the perceptions, attitude and behavior of the other party, increases the level of mutual trust, and encourage the other party to reciprocate.

- Explain your demands

Unfortunately, at the outset of a negotiation the other party is often inclined to assume the worst about the motives and intentions of its counterpart. When a party holds out

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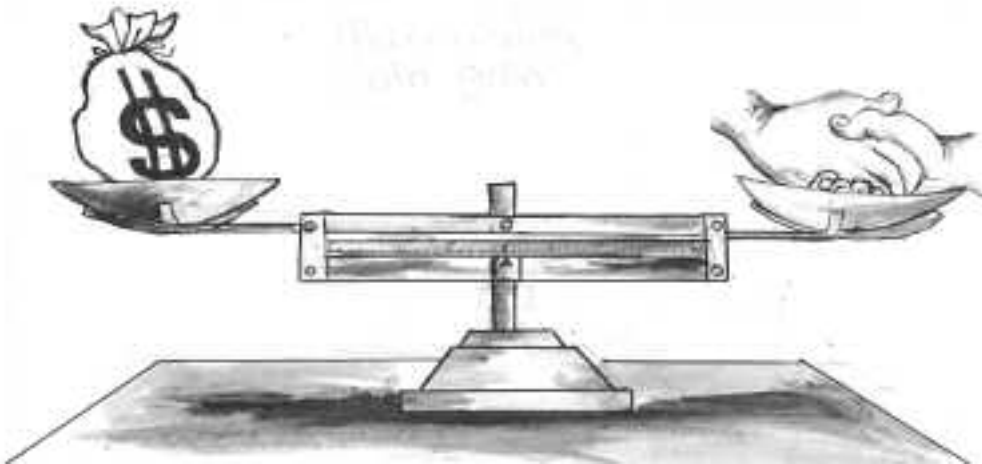
for a better deal, it is seen as being greedy, wishing to see the other party suffer, or simply being unfair. The reality could be that the party making such assumptions may not be discounting the fact that its counterpart is representing a constituency that will not accept the deal on the table, or has serious budgetary constraints.

Given that psychologists have established that people tend to view themselves in the best possible light and to view others in a much less positive light, especially those with whom they are in conflict, it is important that negotiators make a strong case for their actions in a negotiation and provide the other party with explanations of their demands. This is why an opening offer, when viewed by the other side as extreme, can diminish and even destroy trust, whereas an offer explained and justified is unlikely to destroy trust, and may even enhance trust.

- Maximize joint gain

Only negotiators that believe that the other party is competent and of good character take the risks that are necessary to achieve value-enhancing negotiated outcomes, and to implement these agreements in ever-changing social, economic, and political environments.

Trust is essential when profit, security or peace depend upon the motives and actions of another party. Negotiators can build the trust that is necessary for a negotiation to yield optimal joint gain.



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Negotiation is a fine balance between pursuing the substance of the negotiation and ensuring that the relationship is protected. If a negotiator places a too heavy emphasis on the substance of a negotiation, neglecting the relationship, this could result in a deal not being achieved or may lead to whatever deal is achieved not being honored by the parties.

### **Flexibility**

In creativity terminology, positional negotiators suffer from what is termed premature thought closure. Their intent is to use negotiation as a battleground where they gradually wear down the other party and slowly drag it towards their inflexible position. They are oblivious to the destructive implications this has for the relationship with the other party, as they are fixated on the substance of the negotiation. The concept of working together to develop creative options that could enhance mutual value falls outside their frame of reference.

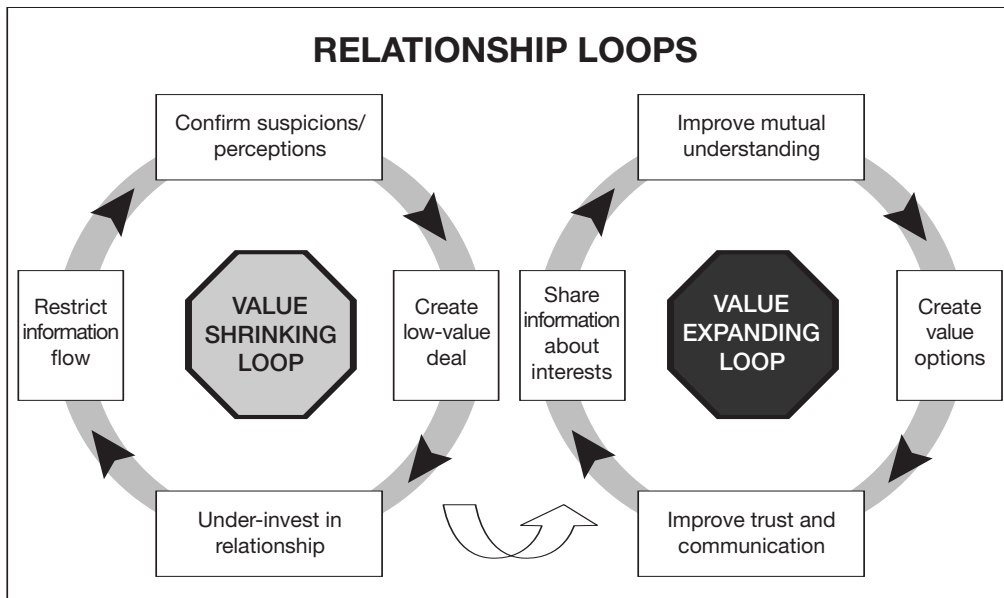
Positional negotiators tend to be convergent thinkers that merely focus on the issue at hand. They see only one beneficial outcome, securing their position. They have a restrictive past/present focus that is orientated towards securing as much as possible of the pie for their party. Building and maintaining a relationship is not part of their frame of reference.



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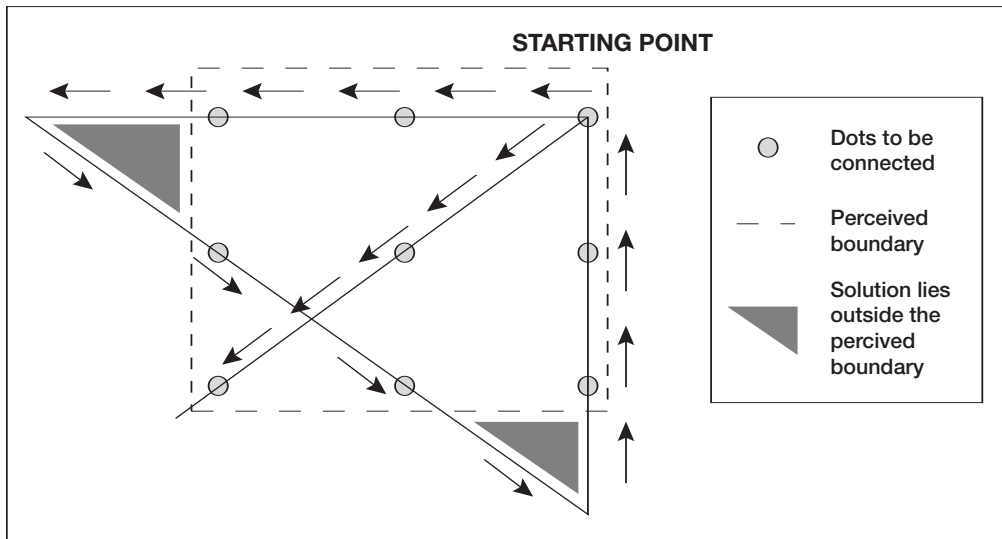


Principled negotiators are divergent thinkers that see every negotiation as an opportunity to work together with the other party in ways that unlock optimal value for all and establish a sound basis for a mutually beneficial future relationship. Whereas positional negotiators are past/present orientated, merely focusing on the problem, trying to remove the problem from the negotiation table by 'fixing' it,



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principled negotiators are future orientated, seeing the problem as the opportunity to explore better future ways of working together for the benefit of both parties. Negotiation is not primarily about the past or present, but is concerned with where the parties will be living tomorrow.



The well-known nine-dot problem, which poses the challenge of connecting all nine dots with four straight lines, without lifting the pencil and without backtracking over any of the lines, probably best illustrates the importance of flexibility. Interestingly, most people find this problem extremely difficult, as they are naturally inclined to see the nine dots within a frame defined by the outer rows of dots. Because of this self-imposed limitation, they try to work within the perceived frame and consequently fail to discover a way of successfully connecting the nine dots according to the instructions given. Only when the perceived boundary is drawn to their attention, do they discover the flexibility required to solve this problem. Once the parties have identified the interests that underlie their positions, it becomes possible for them to work together to brainstorm the best possible options for meeting their interests. To find these options they need to think outside the mental boundaries that normally constrain their thinking, and to list all possible options without criticizing or dismissing any option until their creative energies are

exhausted. Their goal is to generate the most creative new ideas that will ensure a “win more”/”win more” outcome that accommodates most if not all of their interests. Both parties must gain rather than lose.

### **Visibility**

When negotiators do not trust each other, their natural tendency is to reveal as little as possible to each other and to play their cards as close as possible to their chests. This approach understandably exacerbates the distrust, creates a climate of secrecy and unpredictability, and prevents either party from opening itself to the other party and together exploring options that may exceed their initial expectation. Unless one of the parties is willing to run the risk of revealing its interests and visibly showing its good intentions, the negotiation is likely either to fail or to deliver a sub-optimal outcome that in all probability will rapidly unravel.

Good negotiators understand that the only way of encouraging the other party to open itself to the possibility of jointly creating a mutually beneficial solution, requires a willingness on their part to take the first step towards visibility. The advantage of encouraging the other party to drop its defenses, rates far higher than the potential danger of the other party exploiting this self-imposed vulnerability.

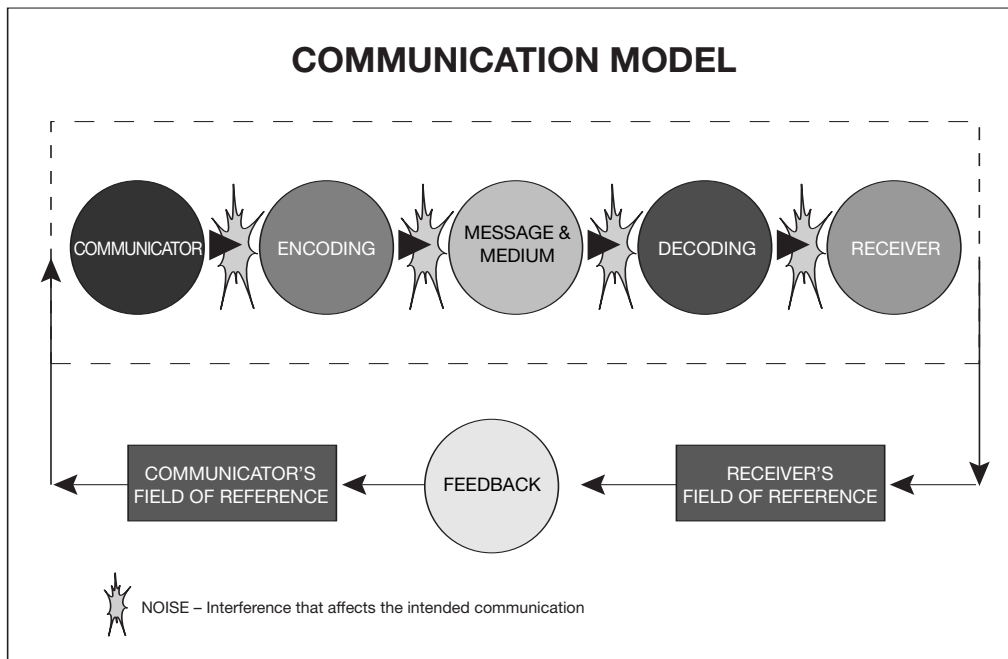
The law of reciprocity, probably the strongest law of human behavior, postulates that negotiators who are willing to act first in exposing their interests and the reasoning that underlies these interests, stand to benefit in most cases, as their willingness to act first creates an obligation for the other party to respond accordingly.

Within a climate of trust, negotiators are nigh powerless to respond positively to a party that deliberately shows its willingness to make itself vulnerable.

# Communication, perceptions & assumptions

## Basic communication considerations

Communication is a multi-faceted complex process involving various steps between the communicator and the receiver. Between these steps there is always the danger of some or other form of interference (noise) that can distort the communication and the understanding thereof. Negotiators therefore need to be aware of this process and sensitive to the feedback from other parties in the negotiation.



## **Managing first impression**

90% of the opinion that people form of one another is established within the first four minutes of their meeting. Thereafter there is only a 10% chance of changing this impression.

Five rules for the effective management of the first four minutes of any communication are:

- Know what you wish to project
- Look what you wish to project
- Act what you wish to project
- Take control
- Be what you wish to be.

### *Knowing what you wish to project*

What impression do you wish to make? You do not know? Would you start out on a journey without a plan? No? Why then communicate without due consideration of the impression you wish to make?

Start with the end in mind. Always write down what opinion the receiver should have after your communication. You may want different people to retain different opinions at different times:

Seller: Professional, reliable, accurate, well-informed etc.

Buyer: Dynamic, fair, trustworthy, honest etc.

Each communication may require that you enhance different aspects of your personality. To decide on the impression you need to create, you must know:

- As much as possible about the person(s) you will be interacting with;

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- What image you and your company wish to project;
- The Unique Selling Points of your product etc.
- Key client information:
  - Name
  - Position
  - Company
  - Type of person
  - Likes and dislikes
  - Have you met him/her before?
  - What will the client be looking for in you?
  - Reasons for communicating – business, social, selling, buying etc.
  - Where will the communication take place?
  - What amount of time will be available?

When deciding on the impression you wish to make, you must always remember that the client will see you as being the company. You reflect the quality of the service and/or product.

Looking what you wish to project

Before seeing a person for the first time we tend to rely on telephonic impressions and/or impressions which we infer from information gleaned from others and from correspondence to develop a mental picture of the person. When we meet that person for the first time, we relate our mental picture to what we see. Should we see

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something different to what we had anticipated, we tend to have difficulty in breaking away from our first impression. It is therefore very important for negotiators to make a strong, vivid first physical impression

In the process of convincing ourselves about something:

- Our eyes account for 87% of the impression we form
- Only 9% relates to auditory stimuli and
- A mere 4% to other sensory information.

In order to convince somebody that we meet, we therefore need to LOOK the part we wish to communicate.

Life conditions us to relate the people that we meet to certain established stereotypes, which are closely related to outward appearances. If a person for example wishes to be seen as a professional, he/she must LOOK professional. Despite the more relaxed environment we live in, most people still continue to see others in terms of what they wear. When dressing, we need to ask ourselves what statement our clothes make and whether this statement corresponds to the overall statement we wish to make.

### *Acting what you wish to project*

What most influences the feelings and attitudes we communicate?

- 7% verbal (words)
- 38% vocal (tone of voice)
- 55% visual (body language).

A good example of the aforementioned is how we best communicate love. Doing it in a monotone without changing our face or body stance would probably not elicit the desired response. Doing it using the correct tone of voice and body language is, however, likely to result in a far more desirable response.

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Merely using body language without saying anything is often the most effective way of getting a message across.

How important is body language? The answer lies in considering the following:

- Do you trust people who do not look at you when they speak?
- Do you feel comfortable when a person points at you while talking to you?

### *Space*

“Spatial changes give a tone to communication, accentuate it, and at times even override the spoken word.” ET Hall.

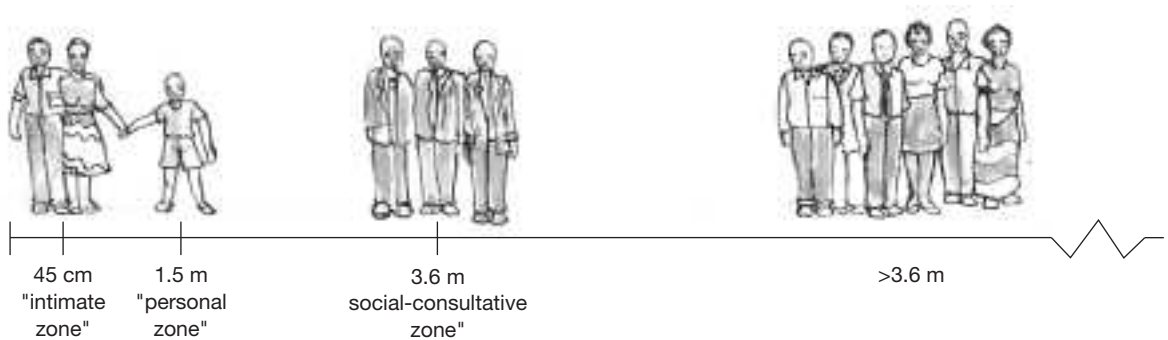
In our daily lives, we are often confronted with space as an important variable. Notice how space frequently appears in our attention frame – “Keep out”, “No entry”, “Reserved for . . .” etc.

As humans, we are territorially conscious and tend to relate power to space. Dominant and powerful persons undoubtedly tend to control a bigger territory than less dominant and less powerful persons. We need only think of the president of a country, the CEO of a company, the general in the military, etc.

The spatial zones that apply to humans can be summarized as follows:

- The intimate zone (45cm) the sole domain of the owner that is generally reserved for lovemaking or war:
- The personal zone (45cm-1,5m) reserved for family or close acquaintances;
- The social-consultative zone (1,5m-3,6m) area where initial business contacts take place before moving to the personal zone: and
- The public zone (3,6m+).

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- Small movements inside the intimate and personal zone, especially if they are repetitive, are intellectually destructive for both parties. Bigger or molar movements that stretch into unoccupied zones, create the perception of confidence and increasingly result in a positive and creative frame of mind.
- When negotiating in an office it is preferable not to interact across a desk or sit in an oppositional position across a table. Stay away from any barriers. If it is necessary to communicate across a table, rather sit diagonally across the corner or next to the other party on the same side of the table.
- If a table is an essential component during a negotiation, the parties should preferably be seated around a round table where no position is superior to any other position and space can easily be equalized.
- When a person, who is not welcome in a particular spatial zone, violates, invades or contaminates that zone, the response will depend on the person involved, the reason(s) why the encroachment took place and the nature of the encroachment. The response could involve the protection of a particular territory, e.g. by placing a personal possession on a seat at a negotiation table to reserve that seat, or, depending on whether the encroachment is of a positive or negative nature; the response could involve a reciprocal gesture or corrective action to restore the desired distance.
- Researchers have found that females interact more closely with others than males do, providing the interaction is cordial. Female/female interaction is closer than male/male interaction, while mixed pairs tend to maintain an intermediate

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distance. This possibly relates to the role as mother that women have traditionally fulfilled in society.

- Elderly persons tend to interact at a closer distance than younger people do.
- Culture also influences the preferred communication distance. Arabs, Latin-Americans and people from Southern Europe tend to face one another more closely, touch each other more often, and more frequently look each other in the eye and speak louder. Asians, Indians, Pakistani's, Americans and persons from Northern Europe respond in opposite ways.
- During the discussion of a negative subject, the communication distance generally tends to be bigger than when a positive subject is discussed.
- The social setting in which persons find themselves also influences the communication distance. At a cocktail party, the guests tend to interact at a closer distance than in an office environment.
- Lighting, noise, temperature, the available space and the formal or informal nature of a communication often determines whether the communication distance is large or small.
- When short persons interact with tall persons, they often adjust the communication distance to create a better angle or to prevent a feeling of domination.
- When interacting with obese, stigmatized, unhealthy and disabled persons the communication distance is often greater than with other persons.
- When persons feel depressed and tired they maintain a greater communication distance than they otherwise would.
- Persons who choose to maintain a close communication distance are perceived as warmer, more empathic and more understanding than those who prefer a greater distance.

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- When persons seek approval, they tend to close the distance between themselves and their communication partners. They are, however, cautious not to enter the intimate zone of the other person.
- Strangers, introverts and anxious persons maintain a greater communication distance than persons with a positive self-image and openness to affiliation.

### *Face & eyes*

Our faces and eyes are very strong non-verbal communication assets. The pupils in our eyes enlarge up to four times when we look positively at other persons or things, or when we feel very positive or excited. The opposite is, however, equally true.

- To make a positive impression in certain cultures we need to meet the other person's gaze for about two thirds of the communication time, thereby ensuring that our pupils are larger than normal.
- Persons receiving positive facial messages will reciprocate.
- There are three types of gazes:
  - The business gaze – focusing on the triangle from the top of forehead to the eyes.
  - The social gaze – focusing on the triangle between the eyes and mouth.
  - The intimate gaze – focusing on the triangle between the eyes and the chest or a lower point.
- Staring should strictly be reserved to emphasize strong feelings of love or displeasure, as this causes the pupils to be small.
- Rubbing an eye or wearing dark glasses when communicating creates an impression of dishonesty and leaves the other party feeling that something is being concealed.

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- Lying is deduced from hand-to-head gestures, e.g. rubbing the side of the nose or under the nose, rubbing the side of the ear, rubbing over the hair or tugging at a collar.
- Scratching the nose may indicate disagreement, while pulling an ear lobe may indicate disinterest and a desire to stop listening.
- An honest smile conveys pleasure, while an artificial smile conveys insincerity, thus distracting the other person from what is being said. A smile as a mask fails to convince, since it is seen as being a way of hiding true feelings. It often results in the communicator not being trusted.
- A true smile originates deep inside and then flows onto the face. As it unfolds, the eyes tend to get bigger and glisten slightly, the cheeks rise and the corners of the lips move upward to meet the lines that form around the eyes.
- To ensure a non-threatening impression persons should smile from the moment they meet each other. This clears the way for emotions to receive due recognition.

### *Hands*

- Open palms facing upward indicate subservience, whilst palms facing down indicate dominance. The orientation of the palms is often a good indicator of the 'temperature' of a communication.
- Showing the palms when meeting a person conveys a message of friendship.
- All the variations of shaking hands denote gestures of friendship. The palms should normally be wide open, the grip firm and the handshake a straight up-and-down movement. When the grip is too firm, aggression or competitiveness is perceived, while a limp grip is seen as weakness. When a hand is placed on top of the other person's hand, with the palm facing down, the handshake is seen as a desire to dominate. When the hand is placed below the other person's hand, with the palm facing upward, it is perceived as acceptance of domination.

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- A dominant handshake should not be forcefully twisted back to the vertical position, as this would be an aggressive response. The better response would be to move closer to the other person, thereby causing this person to step back and in so doing straighten his/her hand. An alternative response would be to place the hand on top of the other person's hand and firmly shake it or merely grasp the fingers and shake them.
- The best way to prevent a dominant handshake is to extend your hand first, offering a firm vertical handshake that the other person is likely to copy.
- Holding your hands in your pockets is seen as a desire to conceal something and therefore erodes trust.

### *Arms*

- A posture in which the arms are open, communicates that a person has nothing to hide and does not feel threatened.
- Keeping the arms with the elbows adjacent to the sides of the body, with the forearms at right angles to the upper arms and with the palms open is seen as an expression of openness and warmth.
- Folded or grasped arms indicate defensiveness or a need to protect or hide something. Even when a person merely plays with something in front of him/her this could be perceived as defensiveness and therefore could become a barrier to his/her true feelings being understood.

### *Crossing legs*

- The crossing of arms and legs often occurs simultaneously. When women cross their legs, it is perceived as politeness, whereas in men this is seen as a sign of not being receptive.
- Persons sitting side by side with their legs crossed towards each other displays interest in each other. When they cross their legs away from each other, the opposite impression is often created.

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### *Posture*

- Slumping in a chair indicates a low self-opinion, while an upright position indicates confidence and strong self-worth.
- Sitting back in a chair indicates confidence, whilst sitting forward indicates eagerness.
- Restlessness and repetitive movements indicate disinterest and an eagerness to speak.

### *Mimicking*

- When a general feeling of warmth exists, there is a tendency for persons to mimic the leader, e.g. in business meetings.
- Mimicking indicates acceptance and support for a point of view. When used during the first four minutes of a communication it indicates acceptance, warmth and agreement with a point of view.

### *Voice*

- When the plosives (d, t, c, k, p and b) are overemphasized this could indicate varying levels of aggression.
- Whilst, when the vowels (a, e, i, o and u) are emphasized it indicates flexibility, complacency and accommodating behavior.
- Emphasis on the s-sound indicates social sensitivity.
- High pitch and high volume normally indicate a low level of intellectual functioning. The lower the pitch and volume, the greater the ability of both parties to concentrate on the underlying intellectual processes. "I understand the fury in your words but not the words." Shakespeare.

Vocal emphasis is often used to influence interpretation, as is evident from the following example:

**He's** giving this car to John.

**HE** and nobody else is giving the car.

He's **giving** this car to John.

He is **GIVING NOT LENDING** the car to John.

He's giving **this** car to John.

It is, **THIS PARTICULAR CAR**, not any other car.

He's giving this **car** to John.

The gift is a **CAR** not any other item.

He's giving this car to **John**.

The person receiving the gift is **JOHN**, not any other person.

When we speak, we manipulate the pitch of our voices. We deliberately lower the pitch to indicate the end of a declarative sentence or raise the pitch to indicate a question. When we wish to be sarcastic, we deliberately manipulate the tone to make the vocal message contradict the verbal message, e.g. saying, "I'm having a great time" in a way that means, "I'm having a terrible time".

- In a comparative study of facial and vocal cues, researchers found that facial cues are more influential. Vocal cues (speed and loudness) were strong conveyors of dominance and potency, while facial cues (smiling) were better at conveying pleasantness or positivism.
- Voices that are not extremely high or low, or extremely flat or variable in terms of the pitch, generally are perceived more favorably.
- Persons who speak 'above' the class they are known to belong to, are perceived more positively than those who are expected to speak at a particular level and then deliberately speak 'down'.
- Our voices communicate emotional meanings that range from anxiety, sadness, discomfort, stress, uncertainty and rigidity to empathy and understanding.
- The way we deliver what we have to say, influences retention, comprehension, attitudinal change and our credibility. Variations in volume, rate, pitch and articulation are therefore important.

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- The persuasiveness of a communicator is related primarily to his/her perceived credibility, fluency, rate of delivery and ability to vary volume and pitch.
- Verbal cues are often used to indicate to the other party his/her turn to speak, e.g. asking a question requiring an answer, dropping the pitch at the end of a sentence or maintaining a period of silence. A turn to speak is often requested by interrupting, speaking simultaneously, nodding vigorously, using vocalizations such as “uh-huh” or “mm-hmm” repetitively, or by moving.
- When a party wishes to retain the opportunity to speak he/she increases the volume, pauses less frequently and decreases the frequency and duration of silences. Passing up a turn to speak is best achieved by simply remaining silent.
- Silence is generally used to accentuate, to draw attention, to provide the other side with an opportunity to evaluate, to agree or disagree, to prevent having to reveal something, to express disgust, sadness, fear, anger or love, or to show thoughtfulness and reflection.

### *Reversing body language*

- Although a person may feel insecure and defensive when first meeting a stranger, he/she can counteract that feeling by employing positive thinking to ensure that his/her body language does not convey inner insecurity and defensiveness.
- Displaying a positive attitude towards another person generates a reciprocal response.

### *Feigned indifference*

- Some people use the trick of feigning total disinterest to gain control. For example, a manager may continue writing when a person enters a room and deliberately resist looking up. The best response to such behavior would be to wait patiently, knowing that the silence will eventually have to be broken. It would also not be inappropriate to ask a question, thereby compelling the other person to respond and shift his/her attention.

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### *Culture*

- Body language varies from country to country and culture to culture. In Africa for example, signs by way of body language may have entirely different meanings to what these signs have in European countries.
- Responding to single gestures is dangerous. Groups of gestures that convey the same messages are normally reliable.

### *Taking control*

How can one take control of a situation?

- Smile.
- Make eye contact.
- Put your hand out in advance.
- Greet the other person using his/her name.
- Make sure the other person is aware that you are eager to meet him/her.
- Do not use hackneyed expressions such as 'How are you?' to greet the other person, but rather say something that accentuates your uniqueness and displays interest in the other person.
- Use a firm vertical handshake or a form of greeting that fits a particular culture and is gender sensitive.
- Remember that the aim of your communication is to establish an equal balance between the parties in the first four minutes of the meeting.

When invited by a person sitting behind a desk to take a seat across the desk do not immediately accept. Rather look for an alternative by suggesting the possibility of sitting at the round conference table or by moving your chair to a position that is at right angles to the person behind the desk. Alternatively, suggest that the person

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considers joining you on the other side of the desk as a way of making it easier to share information. Should these strategies fail, the last resort would be to move your chair to the side of the desk and by so doing balance the territorial advantage.

After finding the most positive seating position, break the ice by referring to something the other person is keen on and about which you are knowledgeable. The office normally offers many clues. Never refer to politics or religion.

Always stay aware of your body language and your choice of words, remembering to use your hands to emphasize important points. Beware of pointing, clenching your fists, touching your face etc. Do not cross your arms and legs, and remember to mimic the body language of the other person.

Allow the other person the major share of the conversation during the ice-breaking period, but limit the duration of this period, before introducing the reason for your visit in a way that will capture the attention of the other person and make him/her look forward to what you have to say. Remember to elaborate on how the other person will benefit from what you have to say. Close with a summary and a request for a commitment.

### *Being what you wish to be*

Think for a moment who you would most like to be?

Why not be yourself? Do as Nike says: "Just do it".

You must decide to be a good communicator, always remembering what Thomas Edison said: "I am not discouraged because every wrong attempt discarded is another step forward."

## **Managing nervousness**

### *Posture, breathing & positive psyching*

What would your reactions be if you hit the jackpot at a casino?

- Sweaty palms

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- Trembling
- Talking in a high pitch voice
- Suffering a loss of memory
- Crying
- Experiencing a tightness in the chest and stomach
- Feeling a dryness in the mouth
- Experiencing an increased pulse and a pounding heart

How do your reactions to excitement correspond to the times when you are nervous due to negative reasons? Is the physiological reaction the same? The only difference lies in how we interpret the event that gave rise to the physiological reaction. If we experience it as a positive event, we interpret the reaction as positive and vice versa.

How should you positively direct the energy released by an event?

### *Physical posture*

Our brain and our body continuously communicate. As easily as we can talk ourselves into a depression, we can talk ourselves into being happy and relaxed.

By ensuring a positive physical posture we prevent our bodies from sending negative messages to our brain – biofeedback.

We need to ensure that we sit, stand and move in a way that is entirely comfortable. The biofeedback will then create a feeling of mental relaxation.

### *Breathing rhythm*

We need to practice rhythmic, whole-chest breathing by imagining a balloon in our bellies at the bottom tip of the breastbone where the ribs begin to part. By filling the imaginary balloon with air so that our stomachs expand and then exhaling so that

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our stomachs contract, we relax. The shoulders should not lift. Lying on the floor with a heavy book on your stomach is an excellent way of practicing.

Concentrating on equalizing incoming and outgoing air to the lungs can be achieved by mentally breathing in to a 2 - 3 - 4 rhythm and out again to the same 2 - 3 - 4 rhythm.

When angry, upset, tense or emotional, the equilibrium can consciously be restored by breathing in a mentally regulated rhythm.

### *Positive imaging, visualization or picturing*

When you need to participate in an important negotiation, it is essential that you visualize yourself in the negotiation, HEAR (auditory) the sounds from the other party (questions, statements) and FEEL (kinesthetic) the positive emotions that accompany a successful negotiation. The aim being to ensure that when you get into the real negotiation, your brain communicates to you that it has already successfully been 'there'.

Re-direct and focus the energy flow to work for and not against you.

Always remember what Eleanor Roosevelt said: "No one can make you feel inferior without your consent."

## **Empathic listening**

*"The heart has its reasons that the reason knows not of." Pascal*

For most negotiators it is second nature to offer a quick fix for a problem, without taking enough time to understand the problem fully before diagnosing the cause and prescribing a solution. They often forget the most important principle in interpersonal communication and negotiation: Seek first to understand, then to be understood.

Reading, writing, speaking and listening are the four basic types of communication. The first three receive a great deal of attention, but the latter is often totally neglected. The ability to influence others is heavily dependent on whether they are convinced of the desire of a negotiator to understand them and to be influenced by their uniqueness. This creates the trust needed for the other party to open themselves to the possibility of a mutually beneficial agreement.

## WHAT IS NEGOTIATION

Do you as a negotiator listen with the intention of understanding or merely to respond? Are you always speaking or preparing to speak? Do you filter everything through your own frame of reference without even realizing that you are doing so?

In our quest to be understood, we practice selective listening and often merely pretend to understand while we are in fact ignoring the other person.

Empathic listening involves getting into the other party's frame of reference and seeing the world from their perspective. It is not an act of agreement, but a full and deep understanding of the other party and his/her views and feelings at an emotional and intellectual level.

Empathic listening requires negotiators to use their ears, eyes and heart to distinguish and understand the feelings and meanings of the other party. They must sense, feel and be sensitive to their intuition.

Because empathic listening literally places a negotiator in the head and the heart of the other party, it ensures accurate information.

Next to physical survival, the greatest need of any person is psychological survival – to be understood, appreciated and accepted.

### **Understanding & perception**

The way negotiators perceive the same situations can differ drastically. One negotiator may look at the world from a person-centered perspective, while another may look at the same world from a task- and money-centered perspective. One may look from an abundance mentality, while another may look from a scarcity mentality.

To communicate effectively we need to be aware of our paradigms and be willing to challenge and transcend them.

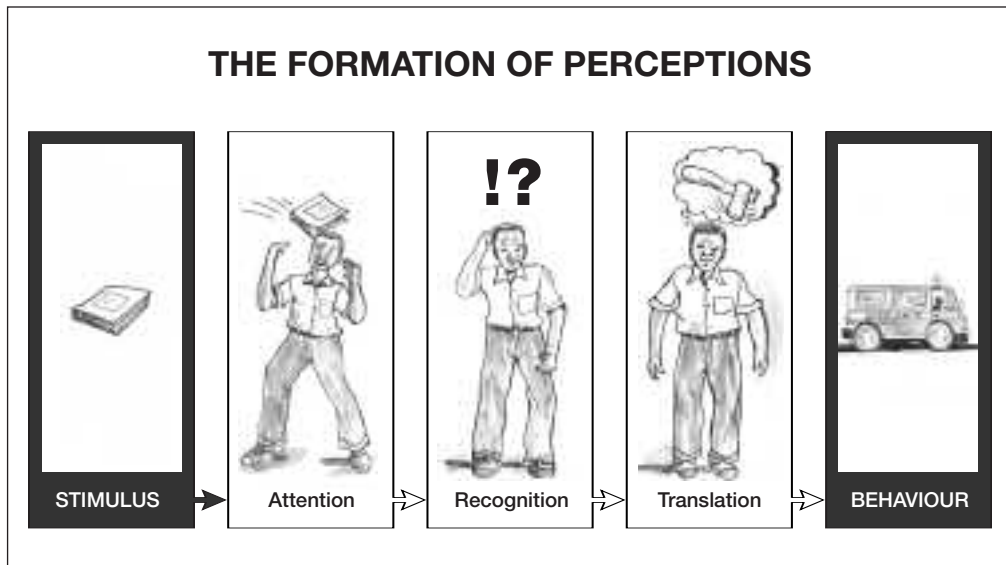
Effective communication/negotiation is built on three sequentially arranged words: Ethos, Pathos and Logos.

- Ethos (Character) – The negotiator's personal credibility – the faith people have in his/her integrity and competency.

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- Pathos (Relationship) - The degree to which a negotiator is able to demonstrate an alignment to the emotional thrust of the other negotiator's communication.
- Logos (Logic) - The degree to which a negotiator is perceived to understand the reasoning of the other party.

When negotiators express their ideas clearly, vividly, visually and in the context of a deep understanding of the other party's paradigms and interests, they greatly increase the credibility of their options and establish the kind of relationship needed to explore a mutually beneficial agreement together.



In negotiation perceptions relate to the stimulus, the attention paid to the stimulus, the recognition of the stimulus, the translation of the stimulus in the mind of the receiver, and the behavior which flows from this process. Although stimuli may be the same for two parties, it does not follow that each of these parties will attend to the stimulus in the same way, recognize the same meaning, draw the same conclusion (translation) and then respond in the same way (behavior). This depends on their background, culture, how they experience the setting, knowledge related to the stimulus etc. Typical factors that influence perceptions include:

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<b>Factors that influence perceptions</b>	
<ul style="list-style-type: none"><li>• Stereotyping</li><li>• Halo effect</li><li>• Selectivity</li><li>• Projection</li><li>• First impressions</li><li>• Defensiveness</li><li>• Space &amp; territory</li><li>• Party size</li><li>• Risky shift</li><li>• Location</li><li>• Furnishings &amp; décor</li><li>• Roles</li><li>• Groupthink<ul style="list-style-type: none"><li>• Invulnerability</li><li>• Moralization</li><li>• Unanimity</li><li>• Conformity</li><li>• Dismissal of opposing ideas</li></ul></li><li>• Politeness<ul style="list-style-type: none"><li>• Uncluttered tables</li></ul></li></ul>	<ul style="list-style-type: none"><li>• Communication<ul style="list-style-type: none"><li>• Verbal</li><li>• Pace</li><li>• Pitch</li><li>• Volume</li><li>• Silence</li><li>• Vowels</li><li>• Plosives</li><li>• S-sound</li></ul></li><li>• Non-verbal<ul style="list-style-type: none"><li>• Space</li><li>• Eyes</li><li>• Face</li><li>• Arms</li><li>• Hands</li><li>• Legs</li><li>• Posture</li><li>• Attentiveness</li></ul></li></ul>

Many negotiations fail because of the incorrect assumptions negotiators make about the other party, not checking their assumptions before entering the negotiation. Sadly, these incorrect assumptions all too often then become self-fulfilling prophecies.

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Some of the assumptions to which negotiators are particularly prone include accepting that:

- The other party is necessarily difficult and inflexible;
- The contracting zone is far narrower than it actually is;
- The other party has a very strong or very weak case;
- Flexibility leads to victimization;
- The only form of power lies in escalating power;
- Principled negotiation cannot deliver a better solution than his/her position;
- Concessions are a form of weakness;
- The outcome of a negotiation is limited to the size of the resource on the table;
- The size of a negotiation team is related to its power;
- The other party will only agree to a deal if elbowed into the deal;
- One style of negotiation fits all cultural sizes;
- The other side is out to get them and therefore needs to be got first;
- The other party has no alternative or a weak alternative to a negotiated agreement; and
- The other party has a low walk-away threshold.

## WHAT IS NEGOTIATION

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# PRE-NEGOTIATION PREPARATION

# Identify the negotiation issues

Successful negotiators know that optimizing the outcome is dependent on the parties identifying, understanding and clarifying the relevant issues beforehand. Identifying the negotiation issues involves an analysis of the other party as explained in Section 2. In a typical business scenario where a seller approaches a potential customer with a proposition to buy certain products or services at a proposed price, the parties are likely to negotiate specific issues related to the proposition, e.g. the price, the delivery schedule, discounts and service arrangements. Were the seller fails to understand the pricing or delivery schedule, his/her ability to successfully negotiate a preferential, fair price is severely compromised.

Negotiation issues may be simple, such as the price for a service or product, or may be more complicated, such as the market value of a new business a person wishes to buy, or could even be somewhat fuzzy, such as the exact wording of an agreement.

Generally, a negotiation concerns one or more issues about which the parties hold differing views. Spending time identifying and ranking these issues as they pertain to the parties in the negotiation, could therefore provide an excellent basis for not only planning the negotiation, but also anticipating supportive arguments. As negotiation issues are very likely to have a different importance and ranking for each of the parties in a negotiation this could furthermore provide a sound basis for the development of an optimal concession strategy. A party that has done its homework in this regard could then ensure that what it concedes is of least important issues to it, but is presented in such a manner that the impression is created of substantial concessions being made, thereby justifying the ensuing requests for counter-concessions that are of far greater importance to it, but of lesser importance to the other party.

## PRE-NEGOTIATION PREPARATION

<b>YOUR PARTY'S ISSUES IN ORDER OF PRIORITY</b>	<b>THE OTHER PARTY'S ISSUES IN ORDER OF PRIORITY</b>
1. A regular offset point for produce	1. Constant, reliable supply of fresh, quality vegetables
2. Production cost recovery plus a 15% margin	2. Delivery to point of sale
3. Short payment terms – preferably on delivery	3. A market related price
	4. A 60 day payment period

Good negotiators ensure that they are clear on the issues they wish to introduce into the negotiation, and have spent time trying to anticipate the issues the other party is likely to raise. Analyzing own issues and anticipating those of the other party is one of the most important aspects of pre-negotiation preparation.

Researching the issues is also important in that it sheds light on the potential conflict that may exist between the parties or may arise during the negotiation.

Such conflict could relate to matters such as:

- Different expectations in terms of the outcome of the negotiation, which in turn could determine the degree of interdependence between the parties.
- The nature of the relationship between the parties.
- Insensitivity to the means whereby outcomes are produced.
- The negotiation procedures in respect of matters such as the venue, timing, etc.
- Intangible aspirations of the parties (winning by achieving exactly what was initially requested, obtaining a good settlement, not making concessions, beating the other party, faring as well or better than any other negotiator in previous similar negotiations or ensuring a fair and reasonable process).
- The history of the negotiation between the parties.

## **Obtaining information on the other party and the history / context of the negotiation**

Information is power in any negotiation. The more of it you have, the greater your negotiating power. In a negotiation, negotiators therefore do not give away information; they use it to advance the desired negotiation outcome.

The more you know about the other party before entering a negotiation, the better you are equipped to steer the negotiation towards a win more/win more outcome.

During your pre-negotiation preparation negotiators should ask the following questions and seek answers from any reliable source or make carefully calculated deductions based on available information. Some of the key questions they need to pose are:

- What is the person's position in his organization and does he have the authority to take binding decisions (if not you are wasting your time);
- Who in this person's organization or amongst his acquaintances could assist me in obtaining information about this person;
- What is this person's native language (you may need an interpreter) and are there cultural aspects that I need to be aware of;
- Have I previously negotiated with this person, and what was my experience;
- Is the person I am meeting an experienced negotiator with a negotiation track record that I can investigate to be able to anticipate his strategy and tactics;
- Are there agreements that the person I am meeting previously concluded that I could refer to as a precedent;
- What location would the other party prefer and would this be the fairest negotiation environment;
- Is the other party likely to use time and timing as a power play, time being strongly correlated to negotiation power (the more time you have, the greater your power and vice versa).

*Strengths and weaknesses*

The history of the relationship between the parties determines the climate for the current negotiations. Where one party feels that the other has 'won' or obtained an unfair advantage in the past, that party will, as the 'loser', be inclined to be extremely cautious or even angry to the point of seeking revenge. Where the last negotiation ended amicably, but the relationship between the parties has subsequently deteriorated, this is likely to cause the parties to be tense, cautious, and distrusting.

When the negotiating relationship had been strained in the past as the result of the other party feeling that it had previously been 'fleeced', that party consciously adopt a very defensive and even negative stance initially. That party may then focus on the negative aspects of the other party's behavior to justify its own negativity, thereby creating a 'self-fulfilling prophecy' in the sense that the other party may then very well act accordingly, feeling that it has prematurely been tried and pronounced guilty. Even when the accused party does not respond in the manner described, it may experience personal offence and therefore react angrily or defensively.

Knowing that the other party may enter the negotiation with a particular set of historical experiences, enables a negotiator to psychologically and factually anticipate and prepare for how the other party may approach the negotiation. This information is helpful as it enables the negotiator to develop the necessary strategy and tactics beforehand to address the effect this may have on the negotiation relationship.

*Identity & characteristics*

Although negotiators learn much about the other party at the negotiating table, it is essential for them to gather as much information as possible through research and investigation before the negotiation commences. This research should look into the other party's business history and include an analysis of previous negotiations in which this party was involved (successful or otherwise). Much can also be learned from visiting the other party and questioning friends, peers and its business associates.

*Reputation & style*

The other party's previous negotiating behavior is normally a good indication of

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how it will behave in future. Hence, when a negotiator has had no previous negotiating experience with the other party, it is of great value to speak to those persons who have had such experience.

Negotiators should never lose sight of the potential dangers when drawing conclusions from information about the other party. The assumptions about how the other party may behave in future should always be seen as mere assumptions that should be tested within the negotiation, as negotiators may act differently in different circumstances and at different times.

“Assumptions are potential hurdles that can move us in the wrong direction... The reality of negotiation is that we must and should make assumptions about the opposing party... The important thing to remember is that your assumptions are just that. They are no better than poorly educated guesses. Don’t fall in love with your assumptions. Check them out: they are neither right nor wrong until proven so.” Chester Karrass (1974).

Our assumptions concerning the other party may be based on:

- How the predecessors of that party negotiated with us in the past;
- How that party has negotiated with us in the past in the same or different contexts; and
- How the other party negotiated with others in the past.

Although information is of great value in preparing for a negotiation and in alerting negotiators to what may happen, it is extremely important that negotiators continuously remain open to new information that confirms or denies the validity of their assumptions. There is a constant danger that invalid assumptions could become ‘self-fulfilling prophecies’. Assumptions that the other party will be demanding and aggressive may result in that party adopting an attitude of “the best defense is a good offence”. This could in turn lead the negotiator who made the assumption, to respond to this attitude with aggressive demands and negative behavior. Although the other party may not respond in the way suggested, it may, despite initially entering the negotiation with the intention to co-operate, decide to

reciprocate and hit back. Such reciprocation may then prompt the negotiator to feel vindicated, thus triggering an escalating cycle of competitive mistrust and hostility.

### *Objectives*

Negotiators are inclined to think in stereotypes about the interests and goals of the other party, using their own goals, interests and values as guidelines. They also often assume that others are like them and want the same things that they desire. The manager who is only interested in promotion is surprised when other members of his staff prefer a meaningful increase in salary to a promotion that holds little or no financial benefit.

The best information about the goals and interests of the other party is available directly from that party. Given the importance of the goals and interests of the parties with regard to developing a negotiation strategy, skilled negotiators often exchange information about goals and interests before the commencement of the negotiation.

### *Needs*

Knowing and respecting the needs of the parties in a negotiation is crucial to the success of that negotiation.

Nierenberg (1973) is of the opinion that needs are the driving forces that underlie a negotiator's position on issues, and that an understanding of these needs provides insight into intangible objectives. Where a negotiator is motivated by the need for security, that negotiator is likely to desire an agreement that ensures safety and protection, whereas a negotiator motivated by a need for affiliation will seek a supportive relationship with others and will do nothing to endanger that relationship.

### *Authority*

It is extremely irritating when a negotiator has to negotiate with a party that does not have the authority to take decisions. It is therefore very important to ascertain decision-making authority prior to expending a large amount of time on a negotiation.

Prior to the commencement of any negotiation, it is crucially important that negotiators obtain as much background information as possible about the other

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party as well as their own situation. In negotiation, information is power. The party with the most and best information is very often in an extremely strong position. Unfortunately, most negotiators are inclined to shun prior preparation, believing they will be able to gather sufficient information on the fly during the negotiation.

Unfortunately, no negotiator ever has access to all the information he/she needs, and therefore has to make assumptions about issues, about his/her counterparts, the negotiators in the other party and their authority, and about possible stereotypes. Such assumptions must not be confused with facts, and should therefore be tested when appropriate opportunities arise.

<b>ENVIRONMENTAL SCAN TEMPLATE</b>	
<b>STRENGTHS</b>	<b>WEAKNESSES</b>
<ul style="list-style-type: none"><li>• Particular strengths the parties have in relation to the specific negotiation.</li><li>• Why have the parties opted to negotiate?</li></ul>	<ul style="list-style-type: none"><li>• Specific weaknesses the parties have in relation to the negotiation.</li></ul>
<b>OPPORTUNITIES</b>	<b>THREATS</b>
<ul style="list-style-type: none"><li>• What opportunities does the negotiation create for the parties that do not exist outside the negotiation?</li></ul>	<ul style="list-style-type: none"><li>• What specific threats could the negotiation hold for the parties involved?</li></ul>

# Establishing objective criteria and creating options

## **Establishing objective criteria**

Negotiators must, prior to a negotiation, consider which objective criteria to apply in the negotiation as a basis for agreement.

### *Fair standards*

Usually more than one objective criterion could serve as a basis for agreement. Depending on the issue, a negotiator may suggest criteria such as the following:

- Market value;
- A particular precedent;
- Professional standards;
- Efficiency;
- Costs;
- Scientific judgment
- Moral standards;
- Tradition;

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- Reciprocity;
- Equal treatment;
- The decision a court would hand down;
- Depreciation; and/or
- Replacement value.

Objective criteria should be:

- Independent of the will of each side;
- Legitimate and practical; and
- Applicable to all parties.

### *Fair procedure*

The age old story of how to divide a cake between two children provides an excellent example of fair procedure – one cuts and the other chooses. This precludes an unfair advancement of self-interest.

Negotiators effectively advance procedural fairness by:

- Letting the parties take turns to select items when something needs to be divided, and then at a later stage providing an opportunity to trade what they have accumulated;
- Agreeing to allow an independent outside person to assist in the decision-making process, as in the “last-best-offer” arbitration used in baseball salary disputes in the USA, where an independent arbitrator chooses between the last offer made by the one side and the last offer made by the other. The rationale being that pressure is brought to bear on both parties to put forward reasonable proposals.

*Using objective criteria*

In dealing with objective criteria in a negotiation, negotiators should adopt the following three basic points of departure:

- Framing every issue as a joint search for objective criteria;
- Retaining openness of mind as to the most appropriate standards and how to apply these standards; and
- Ensuring that principle not pressure is the determining factor.

At the outset of a purchasing negotiation, a negotiator could start by pointing out that, contrary to the seller's desires for a high price, the purchaser aspires to a low price. The follow-up could then be a suggestion that the parties together explore what a fair price would be when measured against objective criteria, e.g. the current market price. Irrespective of potentially conflicting interests, the parties would then focus on the common goal of establishing a fair price.

A common error in negotiation is for negotiators to seek agreement on terms before principles/standards have been established. Getting the other party to suggest and agree certain principles/standards creates very useful levers for moving the negotiation towards a mutually beneficial outcome. The other party will find it difficult to refute principles/standards that it played a role in establishing, and will experience very little resistance to conceding to its own principles/standards. In this case the other party feels that it is merely doing what it deems to be correct.

Smart negotiators are aware of the leverage factors intrinsic in a deal, such as necessity, time, desire, competition etc. They furthermore also appreciate that leverage is dynamic and ever-changing, and that it is therefore possible to enhance leverage through aspects such as:

- Preparation;
- Information gathering;

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- Number-crunching;
- Increasing their understanding of the other party;
- Exploring and developing options;
- Timing; and
- Patience.

It is important that negotiators not use precedents/principles/objective standards in a restrictive manner in order to justify their position. They should guard against declaring that their position is a “matter of principle”, thereby effectively closing out the other party’s case. Negotiators should aspire to remain open to the reasons why the other party is proposing a different precedent/principle/standard, or why it chooses to apply a particular standard differently, instead of insisting that an agreement be based only on what they regard as fair.

Principled negotiators are open to reason, but insist on objective criteria being the basis for agreements. They derive normative leverage from the principles and standards that the other party views as legitimate and relevant in seeking an agreement. They know that by placing their needs within the normative framework that the other party uses to make decisions, they show respect for the other party and consequently gain its attention and sympathy.

Yielding to the pressures exerted by positional bargainers – bribes, threats, manipulation, refusals to budge and appeals to trust – is a common failing in negotiation, as many negotiators do not know how to counter such pressures. The solution is comparatively simple, they should invite the other party to state its reasoning, suggest that the objective criteria it believes should apply, and refuse to move on any basis other than principles or standards. In most instances, such a response prevails, as the principled negotiator has the willpower, the legitimacy and the persuasiveness associated with being open to reason. Refusing to yield to anything but sound reasons is easier to defend publicly and privately than a bland refusal to yield, whilst refusing to provide sound reasons.

Principles, standards and norms are powerful in a negotiation because they possess the authority of the market, of experts and of society regarding what is fair and reasonable. Humans are inclined to defer to such authority.

“We would like to seek an agreement on the basis of principle, not self-interest and power.”

### **Creating options/alternatives**

“The haste of a fool is the slowest thing in the world.” Thomas Shadwell

#### *Creativity*

The most telling insights often emerge when negotiators step back from the problem and allow themselves the creative space needed for their mind to make the mental leaps required to create a truly innovative solution.

#### *Creative negotiators:*

- Carefully formulate the problem to be solved and then explore all possible solutions;
- Gather all information relevant to defining the problem and to clarifying conflicting approaches to its solution;
- Organize, study and unravel all available information in the context of the problem to be solved;
- Consciously put the problem aside, waiting for their subconscious to deal with the information and generate ideas or hunches;
- Act on the ideas or hunches from their subconscious; and
- Rigorously test the chosen solution.

### **Common impediments to developing options**

- Premature judgment

Premature judgment in negotiators is their biggest enemy when it comes to inventing

options, since it effectively prevents new ideas from coming to the fore. Premature judgment shuts out ideas that are not immediately identifiable as being practical.

- **Premature Thought-closure**

Closely akin to premature judgment is premature thought-closure. This tendency prevents negotiators from approaching negotiation as an innovative process. Premature thought-closure limits negotiation to the status of a mere tool for narrowing the gap between parties that have diverging positions. Encouraging a free flow of ideas is seen as wasteful by negotiators who are inhibited by premature thought-closure.

- **The single solution syndrome**

Seeing negotiation from the perspective of a single solution, excludes a wiser decision-making process involving a large number of possible options.

- **Assuming a fixed size pie**

True to our natural cognitive tendency, negotiators tend to see negotiation from a dichotomous or either/or perspective where the one party gaining more must inevitably result in the other party having less. Viewed from this perspective, it would be foolish to spend time developing options, as these would only be to the detriment of one or other of the parties.

- **Accepting that the negotiation is limited to solving the problem at hand**

The preoccupation of each party in a negotiation with its own interests is another major obstacle to developing options that will speak to the interests of both parties. In such cases negotiators become so emotionally enmeshed in their own interests that they are unable to separate themselves sufficiently to enable them to explore wise options for also meeting the interests of the other party. In addition, they experience a psychological resistance to legitimizing the views of the other party, as it appears somehow disloyal to be working for the other party.

### **Inventing options**

#### *Separating inventing from deciding*

Negotiators should consciously strive to first invent, and only thereafter to judge and decide. Becoming judgmental too early kills creativity.

*Broadening options*

It is futile to look for the one best answer. Negotiators should instead widen the scope of the negotiation by increasing the number of available options and thereby the range of choices.

Increasing options by moving between the specific & the general

Inventing options, according to Fisher & Ury, involves the following four types of thinking:

- Step 1:** Thinking about a particular problem – the factual situation concerning agricultural and industrial dilemmas related to the current quality of water;
- Step 2:** A descriptive analysis – a diagnosis of the existing situation in general terms, e.g. categorizing the problem as high salinity in the water and suggesting that this is due to the building of a new dam;
- Step 3:** Considering what ought to be done in general terms – on the basis of the diagnosis, prescribing additional environmental releases from the a dam; and
- Step 4:** Proposing a feasible suggestion for action – who needs to do what to put the proposed course of action into practice.

Examining the problem from the perspective of different professions and disciplines  
Negotiators need to consider how a banker, an industrialist, an environmentalist, a doctor, a trade unionist etc may see the problem, and what options may occur to persons in these professions/disciplines.

*Inventing agreements of different strength*

Increasing the number of options by inventing solutions of different strengths is another possibility. This ensures that weaker possibilities are available should it not be possible to achieve sought-after, first-order agreements, or when agreements based on substance become a sticking point, whilst agreements based on procedure are achievable. The following are examples of agreements of different strengths according to Fisher & Ury:

<b>DIFFERENT STRENGTH AGREEMENTS</b>	
STRONGER	WEAKER
Substantive	Procedural
Permanent	Provisional
Comprehensive	Partial
Final	In principle
Unconditional	Contingent
Binding	Non-binding
First-order	Second-order
Price	Terms
Ultimate volume	Trial consignment

*Changing the scope of a proposed agreement*

Changing not only the strength, but also the scope of a proposed agreement, by breaking the problem into smaller, more manageable pieces, often paves the way to achieving an agreement. The motor manufacturer wishing to secure a network of dealerships, may decide to not initially require of each new dealer to carry the full complement of prescribed stock, to decrease the contract period, to limit the models for which a dealer needs to establish servicing and repair facilities, and to initially settle for a smaller geographic footprint.

*Searching for mutual benefit*

Negotiation need not be a zero-sum game. Apart from the obvious shared interest in averting loss, there is also the possibility of jointly seeking gain by developing a mutually beneficial relationship or by satisfying each other's interests through a jointly developed creative solution.

When preparing for a negotiation, negotiators should consciously contemplate interests that will be beneficial to both parties because they satisfy their respective needs. The seller that cheats a buyer generally fails, as he/she is likely to lose this customer and suffer a loss of reputation. Ignoring the potential interests of the other party leaves that party so dissatisfied that it is not committed to upholding the agreement.

Shared interests relate to matters such as:

- Determining how to build and preserve the relationship;
- How to jointly explore opportunities for mutual gain;
- What the cost of a failed negotiation would be to both parties; Which common principles are respected by both parties;
- What opportunities may become available through a co-operative approach; and
- How to ensure a smooth and productive negotiation.

Although it may sound strange, parties that disagree often reach agreement for this very reason. For example, when a stockbroker sells stock to a buyer, the deal happens for the very reason that the buyer of the stock believes that the price will rise, whereas the seller believes that the price is destined to decrease, hence the reason for selling the stock.

- Making it easy for the other side to take a mutually beneficial decision
- Successful negotiators do not become fixated on the merits of their case, but are cautious to also remain sensitive to presenting their case in such a way that the other party is afforded a choice that is as painless as possible. When determining how to

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present an option and enhance the prospects of an agreement, they deliberately put themselves in the shoes of the person likely to be negotiating on behalf of the other party. This approach recognizes the multi-dimensional nature of the other party, as it seeks to ensure that the other negotiator will have the necessary confidence and compelling arguments to convince his/her principals.

- Contemplating the decision required of the other party

In a negotiation, parties are often not ready to take a decision, as they are uncertain about the outcome they desire. They consequently tend to resort to the following type of request, "Propose something and I will tell you if it is adequate." Negotiators should then be prepared to propose a draft agreement that includes terms and conditions that the other party could embrace, would be able to sell to its principals and could successfully implement.

Given that the notion of legitimacy strongly influences most negotiators, it is very important that options be presented to the other party in such a manner that they appear to be legitimate and the fair, legal, honorable etc. thing to do.

Precedents – statements or decisions made by the other party in a similar situation – provide an objective basis for a request and therefore make compliance considerably easier. Consistency is a powerful determinant of human behavior.

- Threats or offers?

Threats very seldom succeed in concluding an agreement, as they ignore the consequences of a particular decision for the other party. They fail to take into account what the other party fears or desires.

Offers invariably prove more effective, as they draw attention to what the other party can expect by agreeing to the offer, and leave room for the consequences such a decision may have for the other party to be improved.

The credibility and acceptability of an offer is enhanced by referring to the specific needs of the other party, couching the offer in ways that give the other party credit for the final proposal, and including needs of high value to the other party, but low in cost to the negotiator.

## PRE-NEGOTIATION PREPARATION

A very valuable approach involves contemplating the criticism the other party may receive for adopting an offer, and then developing a number of possible responses that party could use in its defense. This approach ensures that the negotiator considers the constraints that may apply to specific options.

Constructing an option in a way that would elicit “yes” as an adequate response is a very useful manner of ensuring that self-interest does not completely shroud the needs, desires, fears and concerns of the other party.

# Determine positions & interests

## *Positions*

The concept of a position in a negotiation refers to ground that the negotiator feels obliged to defend strongly in the face of an opposing party. On entering a negotiation parties normally have clearly defined, explicit negotiating positions, underpinned by tangible and non-tangible interests. Although these interests are often not articulated, and may at times be inconsistent, they are usually deemed sufficiently important to warrant a strong defense. One of the biggest dangers negotiators often face is of becoming so rigidly fixated on their positions that they fail to identify and respond to the interests that underpin these positions, thereby allowing the negotiation to rapidly degenerate into a win-lose battle that is unable to produce an agreement that all the parties will honor.

Negotiators should always keep in mind that it is not possible to build a successful value-enhancing negotiation around a positional, adversarial standoff in which negotiators trade offers and counter-offers in an effort to achieve a compromise solution. Although such an approach may produce an agreement, the result is seldom more than a lowest common denominator solution that fails to meet either party's interests and inevitably leaves potential value on the table. A positional approach significantly limits the ability of the parties to develop creative solutions that are able to integrate apparently conflicting needs and aims. By focusing on making and trying to gain concessions, parties invariably severely damage the relationship between them, thereby negatively influencing the sustainability of an agreement they may reach.

Positional bargaining has the added disadvantage that as the negotiation advances, the negotiators tend to become more and more committed to their positions,

continuously restating and defending these positions. This prevents attention from being focused on the underlying interests and therefore frequently results in a somewhat mechanical splitting of the difference between their final positions rather than a jointly created value-adding solution that meets the legitimate interests of both parties.

Positions are normally revealed in the opening statements made by negotiators.

### *Interests*

Contrary to popular assumptions, the basic challenge in a negotiation does not concern the conflicting positions of the parties. It concerns their interests – their basic needs (security, economic well-being, recognition, belonging, control, etc.) desires, concerns and fears. These interests constitute the silent motivators that underpin their positions. Whereas their positions are something the parties can decide to adopt, their interests are the reasons why they adopt particular positions. Behind the positions negotiators adopt when embarking on a negotiation, lie shared and conflicting interests that are potentially the building blocks for wise, value-enhancing agreements. Although both a clothing merchant and a customer have a liking for clothing and money, the clothing merchant prefers money, whereas the customer prefers clothing.

Identifying and acknowledging interests requires negotiators to stand in the shoes of the other party and to view the position that party takes from its perspective. This is best achieved by asking, “Why they want that?”, “Why they need that?”, “What their concerns, fears and hopes are?”, “Why they feel the way they do?”, “Why they are demanding what they demand?” Another way to Identifying and acknowledging interests is by trying to determine what requests/demands the other party expected during the negotiation, and then weighing the consequences such an outcome would have for that party – short-term/long-term consequences, economic implications, public support, precedents, exclusion of a better outcome, timing.

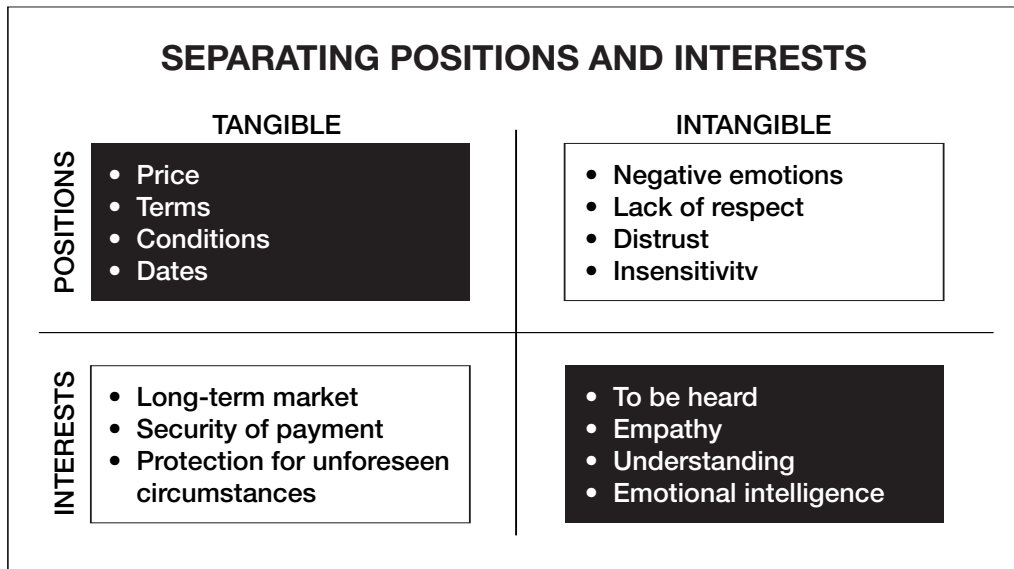
### *Interests vs. Positions*

When parties opt not to haggle about positions, but choose rather to work together to explore opportunities, they develop a relationship that encourages communication. Instead of fixating on positions, they then feel sufficiently secure

## CONTRACT NEGOTIATIONS

to discuss their interests and to brainstorm value-adding options. Only once they have together generated and explored all possible options, do they discuss and apply objective criteria to determine the most preferred, mutually beneficial option to which they are both willing to commit as it generates greater value than either of their positions should they pursue them independently. Not only does an interest-based approach produce better agreements and solutions, but it also creates a mutually beneficial partnership.

When the focus of a negotiation is not on past grievances, but on future concerns, interests rise above positions. Focusing on interests creates an open and empathic interaction where parties work together as problem-solvers for their common benefit.



# Establish the deal parameters: aspiration bases, real bases, the likely contracting zone and BATNAs

## **Aspiration bases**

In every negotiation, each party determines a target to which they aspire (aspiration bases). Their aspiration bases denote the point at which the outcome of a negotiation would optimally satisfy them.

Good negotiators generally set high targets (aspiration bases) to which they aspire, as research has repeatedly shown that negotiators with high aspirations (within reason) do better deals than those who set low targets. Good negotiators are not afraid to suggest options that reflect their own high aspirations for gain. They appreciate that low aspirations may suggest their dependence on the other party's willingness to meet their needs, and that they would then have no leeway if the negotiation did not proceed as they intended.

Low aspirations reduce a negotiator's power; and create the impression of his/her being at the mercy of the other party, thus decreasing the willingness and dedication of that party to work towards developing mutually beneficial options. Such aspirations invariably create the perception in the mind of the other party that a

negotiator is over a barrel, and is consequently compelled to accept any offer.

High aspirations leave ample room for concessions during a negotiation, thereby preventing a negotiator from having to fight excessively hard to prevent an unacceptable erosion of value. Such aspirations require the other party to do the hard work to move this anchor. A seller for example would need to work very hard to drive up the price and drive down the terms and conditions of an agreement, whereas a purchaser would need to work similarly hard to achieve the converse.

Although research results are conclusive on the economic benefits of high aspirations, the pursuit of such aspirations should not override the objective of proposing options that also fairly address the needs of the other side. The substantial economic gains generally achieved by negotiators with high aspirations need to be carefully weighed against the impact such gains have on the overall social interaction. The social outcome of a negotiation may have more far-reaching implications than the economic gain achieved in a single negotiation. When setting goals negotiators should therefore be sensitive to the social and economic implications, and not merely aspire to a once-off economic gain.

### **Real bases**

Given that the negotiators in a specific negotiation aspire to different targets (aspiration bases), they understand that it is not possible for both parties to achieve their aspiration bases. They accept that they will either pay more or receive less. The question is how much more or how much less will be acceptable to the parties? Beyond which points will the parties not go further (their real bases) before they walk away from the negotiation?

By setting a real base, negotiators prevent themselves from becoming so carried away in a negotiation that they continue negotiating way beyond the outer limit of their best interests. The Real Base is the point beyond which a negotiator will not continue negotiating, but at which he/she would rather choose to walk away. When the price, conditions or benefits required by the buyer extend beyond this critical point, it therefore becomes impossible for the seller:

- To adjust the price, the conditions or the benefits any further, or

## PRE-NEGOTIATION PREPARATION

- To redesign the offer in a way that will satisfy the buyer, and he/she therefore exits the negotiation to pursue his/her BATNA (see BATNA).

Prior to every negotiation, negotiators should conduct an objective analysis of the following:

- What they would wish to achieve through the process of negotiation;
- What their Real Base is;
- What the other party is likely to desire from the negotiation; and
- What the Real Base of the other party is likely to be.

A real base may concern a company's unwillingness to compromise on price, as it is confident that the benefits of its product or service outweigh the benefits of all other products or services available in the market, and that the higher price is therefore justified. Anticipating that the other party is likely to confront it with the lower prices of other producers or providers permits a negotiator to prepare to use a creative problem-solving strategy to justify the price of its product or service and thus secure the sale.

### **Contracting zone**

In a negotiation, the aspiration and real bases indicate the range of acceptable outcomes for the parties. Whereas the aspiration bases define success, the real bases are the outer limits of acceptability. The area between the real bases is the contracting zone where most of the negotiation takes place and an agreement is most likely to be found.

When a seller's real base is below the buyer's real base, a positive contracting zone exists, e.g. the lowest wage settlement the union is willing to accept is below the highest wage settlement management is willing to grant. Conversely, when the seller's real base is higher than the buyer's real base, a negative contracting zone exists that makes any agreement nigh impossible.

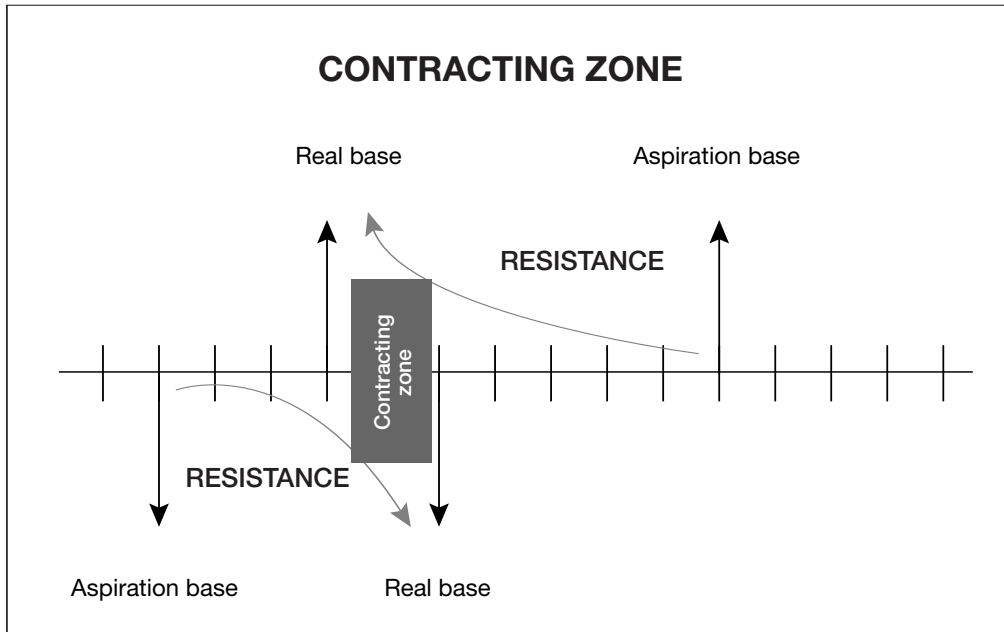
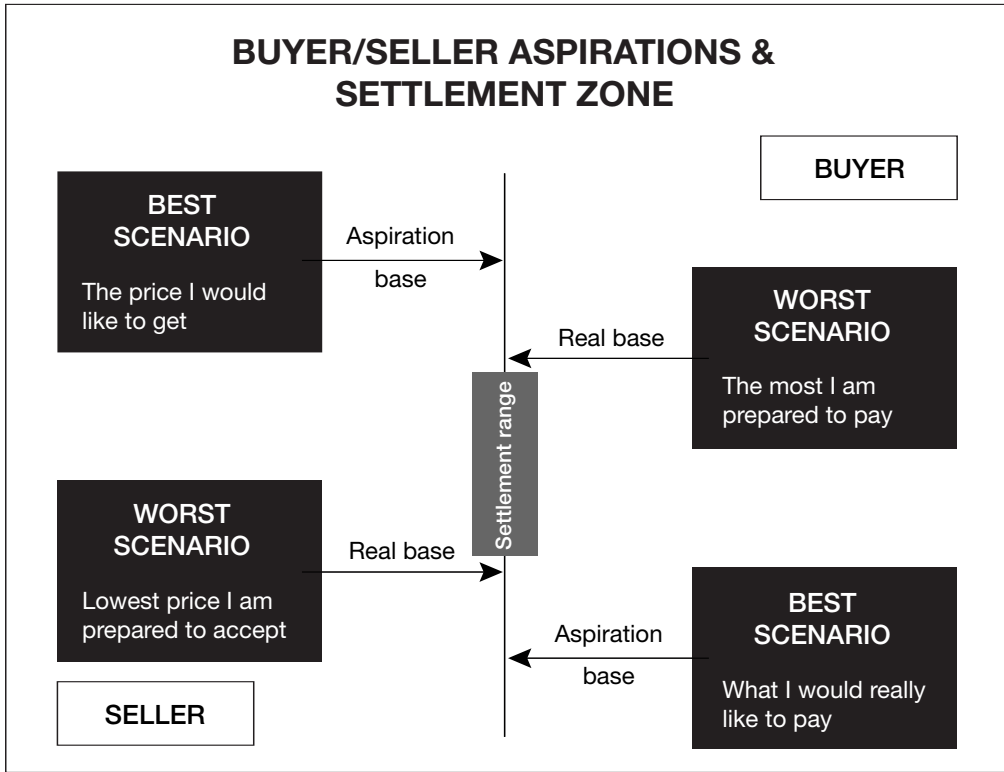
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In essence, negotiation is a process whereby negotiators establish an agreement somewhere on the continuum (positive contracting zone) between the real bases of the parties involved. Each negotiator attempts to reach an agreement as close as possible to the real base of the other party. Although this objective is obvious, it is for the following reasons unfortunately not always easy to achieve:

- Although parties are generally willing to disclose their aspiration bases, they usually do their best to hide their real bases.
- Parties usually work hard to convince each other that their real bases are very close to or identical to their aspiration bases.
- Although parties generally do not want to reveal their real bases, there are occasions where they see an advantage to be gained by revealing their real bases as a means of convincing the other party that they have very little room within which to move, as their real and aspiration bases practically coincide.

When both parties succeed in convincing each other that their real bases and aspiration bases are very close, a negative contracting zone is created, making the feasibility of further negotiation questionable.

In a negotiation the contracting zone – the outer limits within which an agreement/settlement is likely to be reached – lies between the real bases (bottom lines) of the parties (see Figure 13). During a negotiation, the parties aspire to convince each other to move from their aspiration bases in the direction of their real bases. As they approach their real bases, they become increasingly resistant to making further concessions.



## **BATNAs**

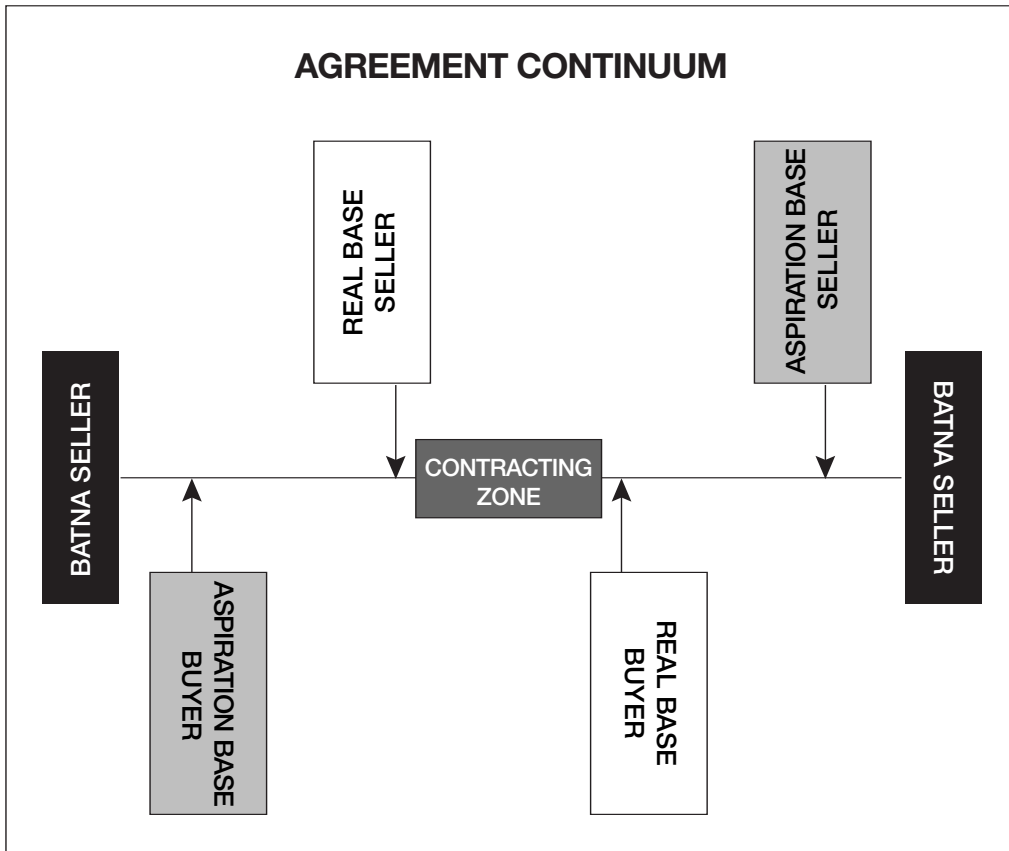
It is a prerequisite for successful negotiation that negotiators know what their Best Alternative To a Negotiated Agreement (BATNA) is, and that they also try to understand what the BATNA of the other party is likely to be.

### *What is a BATNA?*

A BATNA is not the so-called bottom line that negotiators conceptualize to protect themselves against concluding agreements that give too much or receive too little.

A bottom line denotes the worst possible acceptable outcome, and is therefore the barrier beyond which the negotiation may not extend. As such, it is a defense against the pressure and temptation often exerted on members of a party to agree to a deal that is self-defeating. Although a bottom line undoubtedly serves an important purpose, it unfortunately creates rigidity and inflexibility, inhibits creativity and innovation, and reduces the incentive to seek tailor-made solutions that reconcile differences.

By contrast, a BATNA (see fig. 15) does not concern what should be achieved, but rather what options are available to the negotiator outside the negotiation if no acceptable agreement is reached within a certain time. A BATNA is the standard against which an agreement is measured and prevents a negotiator from accepting an agreement that is not sufficiently favorable or is not in best interests of his party, since the negotiator is aware of a better option outside the negotiation. By virtue of the fact that a BATNA concerns what the alternative to a negotiated agreement would be, it allows far greater flexibility and room for innovation than a predetermined bottom line. The better a negotiator's BATNA is, the greater that negotiator's flexibility and power, given the attractiveness of the BATNA that the negotiator could resort to if an acceptable agreement is not achieved.



### *Developing a BATNA*

When contemplating a BATNA a negotiator should:

- Brainstorm a list of alternatives that could be considered if the negotiation fails to deliver a favorable agreement;
- Select the most promising alternatives and develop them into practical and attainable alternatives; and
- Identify the most beneficial alternative to be kept in reserve as a fallback during the negotiation.

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Although it would be foolish to enter a negotiation with a preconceived decision to not conclude an agreement, having a viable BATNA as a fallback is nonetheless an essential insurance policy. A well thought through, clearly defined BATNA has the advantage of making it possible for the negotiator to break off the negotiation if it becomes clear that a beneficial outcome is not achievable, as the negotiator has already contemplated the consequences of the negotiation possibly failing. This 'willingness' or 'preparedness' of a negotiator to break off a negotiation should it become necessary, permits the negotiator to adopt a firmer and more forceful stance when presenting ideas and interests as the basis for an agreement.

The question of whether to disclose a BATNA to the other party depends on the strength or attractiveness of the BATNA and the expected response. If a negotiator has a strong BATNA, which is better than the other side thinks, the negotiator may, at an opportune and beneficial moment in the negotiation reveal it, as this will prevent the other party from acting on the assumption that its counterpart does not have a good alternative should the negotiation break down. Where a party has a weak BATNA, however, non-disclosure is generally the preferred approach, as this weak BATNA may, especially where the other party shows signs of over-estimating its counterpart's BATNA, prove to be a bonus that should not lightly be squandered through disclosure.

The more a negotiator knows about the alternatives available to the other party, the better that negotiator is able to prepare for a negotiation. Should a negotiator have access to information prior to the negotiation that the other party is over-estimating its BATNA, such information could be used very effectively to lower the other party's expectation of the outcome of the negotiation. If, however, the information indicates a particularly strong BATNA, as that party has many alternatives outside the negotiation, there is a strong likelihood of that party exerting considerable pressure for concessions if it is to remain in the negotiation.

A negotiation is usually ripe for agreement when parties have similar ideas or congruent images about their BATNAs. They both share a similar view on how a dispute will end should they not come to an agreement and decide to pursue their own thinking. They are motivated to seek agreement, as they understand that this will be less costly to them than the available alternatives. This is the primary reason why an ever-increasing percentage of lawsuits are settled out of court.

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In cases where both parties have dissimilar views about the BATNAs that exist, this often leads to intractability, stalemate or a power contest. An agreement is only possible when they both come to the realization that conflict is more costly, and that their BATNAs are not as good as they had initially thought.

Where both parties have a strong BATNA, negotiation becomes rather meaningless, as there is then very little incentive to reach an agreement. In such cases, it is better for the parties to look for opportunities elsewhere to further their respective interests.

Where a community has for example unsuccessfully tried to negotiate with a developer aspiring to build a dam in an environmentally, socially and economically responsible manner, that community could resort to the following types of options, bearing in mind the affordability, feasibility, short-and long-term impacts etc:

- Sue the developer on the basis of the National Environmental Management Act and/or the Record of Decision;
- Petition the Department of Water Affairs and the Department of Environmental Affairs to discipline the developer;
- Lobby Parliament to pass stricter legislation and more stringent regulations; and
- Wage a public education campaign to inform the widest possible audience of the problem and thereby force slumbering politicians into action.

Interest organizations such as Unions, Commodity associations have important roles to play in helping farmers' negotiators come up with strong and accurate BATNAs. This can be done by providing negotiators with market information and market analysis, but also by contributing to giving negotiators the necessary skills to construct such BATNAs.

### *The consequences of not having a BATNA*

When a party fails to explore its BATNA, it invariably finds itself in a very insecure situation, as it is then exposed to:

## CONTRACT NEGOTIATIONS

- Strong inner pressure to reach an agreement, as it is unaware of what would happen if the negotiation failed;
- Over-optimism about proposed agreements, thus often not fully appreciating the associated costs involved;
- The danger of becoming totally committed to reaching an agreement, as it is not aware of alternatives outside the negotiation;
- Pessimism concerning its prospects should the negotiation fail; and
- The vagaries of the law of agreement, which holds that when persons agree to something, this is entirely dependent on the attractiveness of the available alternatives.

Without having the possibility for walking away from a negotiation, a negotiator's negotiating stance is spineless.

# Determine the objectives for the negotiation

## Optimistic, realistic, pessimistic targets

*In a negotiation, there are two key targets:*

- The first is the negotiator's aspirations base, derived from the most optimistic settlement that can be expected. Consequently, this objective is often the opening bid or asking price.
- The second is more pessimistic and relates to what the negotiator regards as an achievable settlement, namely the real base.

Negotiators who know that they are inclined to be too optimistic about what is achievable should preferably start with a 'wish list' and then systematically moderate these 'demands' by defining what is most realistic and what is minimally acceptable. Conversely, negotiators who know that they are inclined to be too pessimistic about negotiation outcomes, should preferably start out by identifying the minimum acceptable outcome and then widening the range by defining what is realistic, and brainstorming what might be optimally possible. Finally, negotiators with a track-record of being realistic should preferably start by defining realistic objectives and then, working from that point, determine the upper and lower boundaries.

### *Positive thinking about objectives*

When preparing for a negotiation, negotiators become aware of how the other party will behave, what the other party is likely to demand and how they feel about

dealing with that party. Unfortunately, this often leads to negotiators devoting too much attention to the objectives of the other party, and consequently neglecting to develop their own negotiation strategy. This often results in negotiators feeling threatened and defensive, and therefore becoming reactive, less flexible and creative.

*Anticipated packaging*

Negotiators need to consider whether the objectives they have developed should be negotiated individually to achieve an optimal settlement, or whether they should be packaged. In a produce sale, the negotiator may for example propose a firm, but high price, as he/she requires cash immediately, however, he/she may be willing to wash and package the produce for the buyer, as this could be done using own labor at a minimal cost.

When evaluating a negotiation mix that includes a number of different issues, most negotiators find it very helpful to explore different ways of combining these issues into packages. Experience has taught them that different packages have different outcomes.

*Understanding trade-offs and throwaways*

Negotiators often need to decide how to react when the other party proposes a package that contains proposals that omit certain potentially important issues. They may for example present a package containing:

1. Price, which falls within our optimistic range;
2. Quality, which falls in our realistic range; and
3. Terms and conditions that fall within our pessimistic range.

*They, however, omit to mention the warranty as part of the package.*

Should we accept that the warranty becomes a ‘throwaway’ and therefore ignore it? Is the warranty relatively unimportant and therefore worth giving up to secure an agreement where price falls into our optimal range?

For a negotiator to be able to evaluate the items or issues in a bargaining package,

she needs to have an idea of what each item or issue in the mix is worth in relation to the other items or issues. Such an evaluation provides the rationale for possible 'trade-offs'. Naturally, it is not an easy task, as different items or issues do not have the same value for the negotiator and the other party, as the parties may measure each items or issues in terms of different norms. When negotiating the rental of floor space in a new retail outlet, the negotiating mix would usually include items such as the monthly rental, the duration of the rental contract, options to renew the rental contract, cancellation penalties, restrictions on signage and many others. For the tenant a difference of \$25 or \$50 in the monthly rental may be relatively unimportant compared to permission to erect vital signage. Hence, the tenant may be amenable to trading a higher rental for larger or additional signage.

Many negotiators have found it convenient to position all issues on some common continuum to compare them, e.g. translating all issues into currency value. In the store rental example, the tenant would estimate the currency value of a large sign in terms of the additional customers as well as the associated increase in revenue, and compare this calculated value to the higher rental. Some negotiators prefer a utility scale as the basis for comparison, assigning utility points to each issue in accordance to its relative importance. If the tenant is uncertain about the success of the new outlet, fearing the possibility of having to close the outlet before the end of the rental contract, including a sub-lease as a clause in the rental agreement may be of extreme importance and therefore be awarded 80 utility points on a 100 point scale. Conversely, if the tenant is assured of long-term success, a sub-lease clause may not rate very highly and therefore only be awarded 15 points.

### *Setting objectives*

On entering a negotiation, negotiators usually have an idea of the outcome they wish to achieve. Unfortunately, many fail to appreciate that wishes do not necessarily constitute objectives.

When contemplating objectives, negotiators must take cognizance of the fact that:

- Wishes are not necessarily objectives;
- Objectives must be seen within the context of the objectives of the other party;

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- The interconnected objectives of the parties to a negotiation define the issues for negotiation;
- Objectives are limited by what the other party is capable of or willing to give, and should therefore be attainable; and
- Objectives should preferably be concrete, specific, and measurable. If not, the other party may fail to understand what the negotiator wants, and what needs are being expressed.

## PRE-NEGOTIATION PREPARATION

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# ENGAGEMENT PLANNING

# Develop the negotiation plan, strategy and tactics

Effective planning and preparation are the most critical elements in achieving negotiation objectives. Those negotiators that achieve their objectives invest many days and hours in planning for a negotiation. Results without proper planning occur by chance rather than by the efforts of the negotiator.

In order to plan and prepare effectively a negotiator must:

- Understand the nature of the conflict, given that conflicts vary in size, seriousness and characteristics, as well as the parties involved. Although most of the aspects of a conflict may be obvious, this is not always the case. What appears to be a serious conflict may turn out to be simply harmless.
- Identify the negotiation issues - the matters of substance for discussion with the other party. Some may be simple, such as the price for a product. Others may be more complex, such as the myriad of economic data to justify a union's wage demands. Some may be subtle, such as the exact wording of a clause in a contract that both parties essentially agree about, but which could easily result in conflict if not carefully handled.
- Prioritize the issues in terms of their importance and how critical it is that they should be achieved during the negotiation.
- Develop a most desired package of important issues, or several alternative

packages, since discussing each issue separately could easily lead to inferior results, could confuse the other party in terms of the importance of issues or could, due to a lack of understanding as to how issues interact and support each other, result in attractive opportunities for solutions being missed.

- Establish an agenda. A procedure is required that places important issues in the order in which they should be discussed.
- Understand the other party. It is essential to gather information on the other party's goals and the relative importance of those goals to that party.
- The following background information is very important:
  - Specify goals and objectives. This comprises clarifying all the goals of the negotiation, prioritizing them and considering possible trade-offs amongst them. Apart from tangible goals, there are also intangible goals, such as maintaining a certain precedent, achieving a fair outcome, or concluding a mutually acceptable agreement.
  - Clarify how to manage the negotiation process to attain the goals that have been set. This entails understanding the conflict, identifying possible areas of cooperation, determining ways to establish trust, and identifying the best ways to negotiate issues.

### **The importance of planning**

Preparation and planning are the most important elements of negotiation. Inexperienced negotiators often believe that success lies in persuasiveness, eloquence, clever ploys, and occasional emotional behavior, but although these behaviors are important, they do not constitute the foundations for sustainable agreements.

Unfortunately, systematic planning is something that most negotiators do not willingly undertake, often pleading time constraints and work pressure as reasons why they cannot pay it sufficient attention. In practice, however, they find planning somewhat boring and easily become over-anxious to 'get the show on the road'.

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In addition to the error of not investing sufficient time in planning, negotiators furthermore fail to pay sufficient attention to the planning process, which results in the following:

- Failure to determine clear goals and objectives. This places a negotiator in a position where he/she is unable to develop possibilities quickly and accurately, to respond to requests for concessions or to deal with proposals for rearranging the elements in an agreement. It could also result in a negotiator agreeing to a proposal that transpires to be disadvantageous or feeling so confused that he/she becomes defensive thus delaying the negotiation, to the frustration of the other party.
- An inability to formulate convincing arguments. When a negotiator does not devote enough time to planning this is often the result. In addition, he/she might consequently not understand the strengths and weaknesses of his/her own position and not recognize weaknesses in the other party's arguments.
- Failure to consider the other party's needs and negotiating history. This renders a negotiator unable to estimate what the other party really desires. Furthermore, he/she is also not able to understand the other party's strategy and tactics, and will not know when to stand firm and when to be flexible.
- An inability to defend positions convincingly during a negotiation. A negotiator cannot simply depend on reacting quickly and cleverly during the give-and-take of a negotiation, since simply being eloquent when presenting a position will be of no assistance when the other party contests the legality or economic feasibility of the position.

### **Different types of planning**

In a negotiation, there are three types of planning, namely strategic, tactical and administrative, however, although these three types are discernible, in practice they often overlap and are interwoven. Acknowledging and recognizing the three categories serves to remind a negotiator of the process for identifying goals and objectives. When negotiators rely on tactical planning alone, they may win in the short-term, but they ultimately lose because they are not clear on their final goals. However, should a negotiator keep his/her eye on the big picture alone, he/she may

trip up over immediate obstacles and therefore never achieve the ultimate goals.

Negotiators need to not only determine where they want to go and how they wish to get there (strategic and tactical), but also the means (administrative) they need to succeed.

### *Strategic planning*

Strategic planning is aimed at defining long-term goals and enabling a negotiator to position him-/herself so as to achieve such goals. By means of strategic planning a set of objectives that the parties wish to attain are determined, as well as the process for achieving these objectives.

For example, in a labor negotiation, management might want to define what its goals are for the next five years regarding wage compensation, job security etc, and what process is necessary to achieve these goals. In the case of a negotiation involving the sale of land for a shopping centre, the buyer would need to define what he wishes to pay, what terms he requires, and whether he wishes to be in a position to acquire land for future expansion. In addition, the buyer would need to establish a strategy for achieving these goals.

### *Tactical planning*

Tactical planning involves the development of short-term tactics and plans aimed at achieving long-term objectives.

In the aforementioned example of a labor negotiation, management might decide that part of their overall goal is avoiding strikes. In the first negotiation session, management would then propose the automatic extension of the current wage contract if negotiations for a new contract are not completed by the expiry date of the current contract. Although this is a tactical step, it is part of a long-term strategic goal of eliminating strikes and thus reducing ways in which the union could exert pressure on management during wage negotiations. In the case of the land for the shopping centre, the buyer might request a first right of refusal on adjacent land to support his long-term strategic objectives of expanding the shopping centre if it is successful.

### *Administrative planning*

Administrative planning focuses on the process of acquiring the necessary

information to ensure a smooth negotiation process. This type of planning includes organizing the negotiation and determining how to obtain information about the other party's goals, interests and negotiating history.

### **Negotiation preparation prompt template**

In Appendix A, a negotiation prompt template is included for use during the planning for a negotiation. It helps to structure and systematize the essential information and ensures that negotiators pay attention to all aspects of the negotiation when developing their negotiation strategy and deciding on the tactics they should use. Furthermore, it also ensures that they are prepared to deal with the negotiation strategy of the other party and counter the tactics that party may use.

Although populating a template such as this is very often seen as a tedious task, failure to do so more often than not results in either a failed or grossly sub-optimal negotiation. It is a relatively small investment for an extended gain.

In the section essential background reading, substantial information is provided on tactics and how to deploy or counter these tactics.

# Employ persuasion

The emphasis in many negotiation training courses falls strongly on the use of tactics, which is unfortunate as these are inclined to be highly manipulative and are easily spotted by experienced negotiators.

Tactics are actions, or inactions, that support the achievement of strategy-related goals, and promote or hinder actions or inactions undertaken by another party. A party involved in a negotiation may, for example, choose to slow-up or to expedite a certain process within its control, such as the transmission of a document, as this may have a strategic impact.

Prior to the 1980's, many companies concentrated largely on tactically orientated negotiation training, failing to appreciate that in order for negotiation to deliver enduring results, it cannot merely rely on tactics. Although tactics, when skillfully and sparingly used, do deliver results, such results are often of a short-term nature and fail to take into account that the quality of the relationship built within a negotiation is ultimately the determining factor as to whether the agreement will be honored or not. In addition there is the question of ethics, since many tactics are experienced as being highly manipulative and are therefore not conducive to a climate of mutually beneficial gain.

Once negotiators become familiar with a mutual gains approach to negotiation, their need for tactics, especially manipulative tactics which are designed to extract value from the other party without contributing reciprocal value, greatly decreases. Negotiation where both parties consciously endeavor to create mutually beneficial value has little need of tactics of the kind often espoused in popular literature on negotiation.

Regrettably, negotiators often have to engage in negotiations with parties that have a strong tactical approach. Knowledge of the tactics that could be employed is

therefore essential, as this enables a negotiator to counter whatever tactics are used by declaring his/her awareness of them to the other party and expressing his/her discomfort at an approach that is not aligned to seeking a sustainable, mutually beneficial outcome.

When countering tactics it is important that negotiators do not do it in a personal way. The approach should focus on the tactics and should not in any way attack the dignity of the other party. Tactics per se do not make of a negotiator a manipulator. Negotiators frequently use tactics as a result of the restrictive one-dimensional training that they have received, not appreciating the long-term consequences. There is also the danger that a perceived tactic may in practice be the way that a particular person has of acting or reacting.

A valid test for any approach that a negotiator may wish to adopt is to ask whether it would be acceptable to a friend or family member.

### **Persuasion**

The scientific study of the process of social influence stretches back over half a century, commencing in earnest with the propaganda, public information and persuasion programmes of World War II. Since then, many social scientists have investigated the ways in which one individual is able to influence another's attitudes and behavior.

For the past 30 years Robert Cialdini has investigated the primary factors that induce people to say 'Yes' to a request. He has discovered that six basic tendencies of human behavior underlie a positive response, namely;

- Reciprocation;
- Consistency;
- Social validation;
- Liking;

- Authority; and
- Scarcity.

According to Cialdini, these six tendencies play a very important part in governing our business dealings, societal involvements and personal relationships, and some knowledge of these six rules of persuasion is therefore crucial to negotiators.

### *Reciprocation*

Cialdini's research has revealed that reciprocity is one of the most powerful determinants of human behavior, and therefore also of negotiator behavior. According to the law of reciprocity, a negotiator making a concession to another party is not giving something away. Given that all cultures train their members in reciprocation; this concession registers an obligation to reciprocate with the other party.

To demonstrate the power and durability of this law, Cialdini quotes an occurrence involving Mexico and Ethiopia. In 1975, at the time of the Mexico City earthquake, despite famine, deprivation and great suffering, Ethiopia donated a relatively large amount to Mexico to assist in dealing with the consequences of this natural disaster. On investigating the reasons for this apparent absurdity, Cialdini discovered that Ethiopia made this contribution to reciprocate the assistance Mexico had provided to Ethiopia when that country had been invaded by Italy some fifty years before. Notwithstanding a gap of fifty years since Mexico has assisted Ethiopia, the law of reciprocity prevailed.

Unfortunately, many negotiators are oblivious to the moment of power in negotiation when, immediately after they have made a concession and the other party recognizes this concession with a 'Thank you', they respond to such a 'Thank you' (whatever form it may take) with an utterance such as "It's a pleasure"; "No big deal"; or "Forget it". This effectively removes the saddle of obligation from the other party and thereby the possibility of reciprocation. A far better response would be "I know you will do the same for me" which does not squander this powerful obligation.

Another application of this law involves situations where large requests made by negotiators meet with a bland 'No'. Their natural inclination at that point is to retreat from the negotiation, accepting that there is no way forward.

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Fortunately, this is not the case, as reciprocation is still possible if they do not retreat from the negotiation, but remain in the negotiation and offer the other party a concession with regard to the initial large request, thus registering an obligation with the other party that is often powerful enough to get that party to respond with a concession of its own by agreeing to the lesser request.

### *Consistency*

The second law of persuasion relates to the human desire to appear and act consistently. A negotiator can employ this law by getting the other party in a negotiation to agree to co-operate in defining the negotiation issues, developing options and setting the agenda. According to this law, the other party will, having co-operated in terms of the process, then experience a psychological urge to continue acting consistently in terms of the other phases of the negotiation.

To support this conclusion, Cialdini cites a real-life occurrence, in which Gordon Sinclair, a well-known Chicago restaurant owner, in 1998 used this law to largely solve the problem of restaurant patrons who frequently reserve a table but, without notice, fail to appear. Sinclair asked his receptionist to change two words in what she said to callers requesting reservations. Instead of using her usual request to patrons to “Please call if you have to change your plans”, she said, “Will you please call if you have to change your plans?” and then politely awaited a response. By waiting for a response, she induced patrons to fill the pause with a public commitment that, as the results prove, directed their future behavior.

Getting a party to agree to co-operate in seeking a mutually beneficial outcome to a negotiation, very often exerts a powerful influence on the rest of the negotiation, as that party will then have a strong urge towards behaving consistently.

### *Social validation*

A further important law relates to our tendency to look to what others do, or have done, when we decide what to do in a certain situation. Taking advantage of social validation, negotiators can stimulate compliance by demonstrating (or merely implying) that others, just like the other party, have previously supported the suggested option/solution.

The power of social validation was confirmed in a study involving fund-raisers, where some were asked to show homeowners a list of the neighbors who had donated to a local charity. This resulted in a significant increase in contributions. In addition, researchers found that the longer the list was, the greater the effect it had.

If used incorrectly, as in many health campaigns, this law can result in outcomes opposite to those intended. Were a negotiator to point out to the other party that most companies lose out by not applying the solutions it proposes, this could boomerang in that it could cause the other party to see the negative responses of these companies as social validation, thus strengthening its resolve not to co-operate.

### *Liking*

“Affinity,” “rapport” and “affection” are all described as feelings of connection between parties. However, the word “liking” most faithfully captures the concept and has become the standard designation in the social science literature. People prefer to say ‘Yes’ to those they like.

Negotiators can access the power of this law by ensuring that they establish a positive climate at the outset of the negotiation, and continue to maintain this climate throughout the negotiation. Liking is also promoted by ensuring that the negotiation team has a good balance between task and relationship negotiators, and that those aspects of similarity between the negotiator and the other party are emphasized.

Research has convincingly shown that liking is related to familiarity (as in Tupperware marketing), physical attractiveness, some form of connection between the parties (e.g. attending the same university, playing for the same sports team), compliments, praise, co-operation and a common dislike.

### *Authority*

Expert worship is alive and well, and negotiators would be foolish if they did not utilize the seeming blind willingness of parties to accept so-called expert opinion. Negotiators, who are able to back up options with factual evidence from relevant experts, often succeed in advancing a negotiation towards their preferred option.

The power of authority as a persuasion tool is borne out by an experiment

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conducted at the University of Texas in 1955 by Monroe Lefkowitz, Robert R Blake and Jane S Mouton, in which they found that a man could increase by 350% the number of pedestrians who would follow him across a street against a red traffic light by changing one simple thing. Instead of dressing casually, he chose signs of authority: a suit and tie.

### *Scarcity*

Perceived scarcity is a factor which also has a profound effect on human judgment. A great deal of evidence shows that items and opportunities become more desirable as they become less available. People want what they cannot have, or what they cannot have enough of, be it a product, service or even information.

By alluding to scarcity, negotiators can exert considerable influence on a party to, for example, purchase a product or service immediately and purchase a larger volume of a product than they had initially intended.

To accentuate the power of the scarcity principle, Cialdini quotes from the dissertation of a former student who owned a company that imported beef into the USA and then sold it to supermarkets. On examining the effects of scarcity and exclusivity on compliance, this student:

- Instructed his telesales people to call a randomly selected sample of customers and to make a standard request of them to purchase beef.
- Also instructed the telesales people to do the same with a second random sample of customers, but to add that a shortage of Australian beef was anticipated. By adding information that Australian beef was soon to be scarce, purchases more than doubled.
- Finally, requested his telesales people to call a third sample of customers, to tell them about the impending shortage of Australian beef and that this information came from his company's exclusive sources in the Australian National Weather Service. Orders received from these customers increased by more than 600%. They were hit by a double dose of scarcity, for not only was the beef scarce, but the information that the beef was scarce was itself scarce.

# First offers

## What are “first offers”?

Whether negotiators are busy negotiating the acquisition of a new business, a revised wage agreement, or the purchase of a property, one of the negotiators needs to make the first offer.

The million-dollar questions are:

- Who should make the first offer? and
- How will making, or not making the first offer influence the negotiation process and the outcome?

The decision as to who should make the opening move frequently causes great uncertainty and anxiety amongst negotiators. This is especially true when they lack reliable information about the other party, as they are then unsure about what offer that party will accept and what offer is likely to cause the other party to walk away from the negotiation. It is furthermore also possible that the other party could deliberately respond with misleading information to gain a negotiating advantage.

Given that most negotiations are initially somewhat vague, a school of thought believes that the first offer should therefore preferably come for the other party. The rationale being that an opening offer provides valuable information about a party's negotiating position and gives an indication of what type of agreement would be acceptable. Although this seems to be good advice, it unfortunately fails to take account of the critical effect first offers have on how negotiators think about the negotiation process. Reputable psychological research tends to strongly suggest that negotiators who make first offers often achieve better results.

### *First offers as ‘anchors’*

Research has established that the way negotiators perceive the value of any offer

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made in a negotiation, strongly correlates to any relevant number related to that offer. Given that numbers related to an offer tend to have a magnetic effect on the judgment of negotiators, these numbers are referred to as anchors.

First offers have a strong anchoring effect in situations of great fluidity and uncertainty, as in the case with many negotiations, as they maintain a strong influence throughout the negotiation. This influence is so strong that even negotiators who are aware of the magnetic effect of anchors in terms of their judgment are often unable to resist this influence. Therefore, their valuations of a first offer seldom break out of the field of influence of such anchors.

Negotiation related research has emphasized the importance of first offers as anchors in a negotiation. Where graders of farm produce are for example supplied with manipulated price lists for certain commodities (high and low anchors) and thereafter asked to inspect these commodities and determine their value, they tend to allow the list prices to influence their decisions. The list prices clearly influence them to grade the commodities in accordance with the price lists, irrespective of the true quality.

Research has conclusively shown that when customers suggest the value of used cars requiring numerous repairs to automotive mechanics (professionals knowledgeable about the true value of cars); these mechanics allowed the suggested value to meaningfully influence their judgment of the value of these cars. By contrast, the 50% of mechanics provided with a high anchor, "I think that the car should sell for about \$5 000", compared to the 50% of mechanics provided with a low anchor, "I think that the car should sell for about \$2 800", on average estimated the value of the cars \$1 000 above the estimate of the mechanics that were provided with a low anchor.

Even persons who profess that they are wise to anchors are invariably affected by them. This relates to the fact that high anchors selectively direct attention towards strong, positive attributes, whereas low anchors selectively direct attention towards weak, negative attributes.

In the case of the estate agents the high list price directed their attention towards the positive features of the properties (spaciousness, a pool etc.), while at the same time

moving the negative qualities (a small garden, one garage etc.) to the back of their minds. The mechanics confronted with a low anchor focused on the wear-and-tear the vehicles exhibited and did not pay attention to the positive aspects such as low mileage and the impeccable interiors.

*When to make/not to make first offers*

Research into the influence of anchoring strongly suggests that negotiators making a first offer usually enjoy a substantial negotiation advantage. In numerous studies sellers making a first offers have been found to achieve higher negotiated prices than buyers making first offers. Making the first offer anchored the negotiation in the favor of the sellers.

Furthermore, researchers have also found that the likelihood of a first offer being made strongly correlates to a negotiator's confidence and sense of control at the negotiation table. Those with a lack confidence and who feel disempowered by the structure of a negotiation, inadequate information or the availability of alternatives are less inclined to make a first offer.

There is also strong evidence that the size of the first offers influences the outcome of a negotiation. Higher or more aggressive first offers deliver better outcomes.

First offers predict final settlement prices better than subsequent concessionary offers.

Naturally, there are no hard and fast rules that apply in every negotiation situation. It would clearly not be advantageous for a negotiator to make a first offer when he/she has inadequate information regarding the other party, and is aware that the other party is better informed about the issues being negotiated and possess better market and industry data. Sellers or buyers of property, who make use of experienced real estate agents, have access to more and better information than buyers and sellers who act on their own behalf. The lesson to be learned is that negotiators should prepare well enough to be on par or ahead of the other party in terms of their knowledge of the issues at hand, and of market and industry trends. This affords them the necessary confidence to make first offers that will anchor the negotiation in their favor.

*How to make a first offer*

Although it is clear that first offers should be strong, negotiators should always guard against becoming so aggressive that they move outside the range of what would be acceptable to the other party. The fear that many negotiators have concerning the possibility that aggressive first offers may scare or annoy the other party to the extent that it would break off the negotiation is often highly exaggerated. It causes most negotiators to err on the side of over-caution and therefore to forgo optimal agreements.

Aggressive first offers work in the favor of negotiators for the following reasons:

- Such offers assist sellers to achieve higher final agreements;
- Higher list prices lead to higher final selling prices, as it focuses buyers on the positive aspects of a purchase; and
- Aggressive first offers create leeway for negotiators to make concessions without disregarding their BATNAs.

First offers that are meek generally place heavy limitations on the ability of a negotiator to grant concessions/counter-concessions and extract concessions/counter-concessions or not to go beyond their real base. Conversely, aggressive first offers afford the other party the scope to negotiate concessions, thereby increasing that party's sense of achievement and satisfaction, and consequently the possibility of a mutually beneficial outcome.

Given that first offers provide early insight into the contracting zone and the range of possible agreements, such offers could, if they are absurdly aggressive, create the impression that a mutually beneficial agreement is impossible, thus leading to a party invoking its BATNA.

*The aspiration base & first offers*

When negotiators contemplate aggressive first offers, they should make such offers within the context of the strength of their BATNA, their aspiration base (the target at which their hopes and desires would be fulfilled) and their real base (the bottom

line beyond which their BATNA kicks in).

Although a clearly defined real base is an extremely important aspect of any negotiation, it is crucial that negotiators focus their attention on their aspiration base when developing a first offer. Research findings reveal that negotiators who focus on their aspiration base when considering first offers tend to make more aggressive first offers and achieve more beneficial outcomes than negotiators who focus on their real base.

Another way of ensuring that first offers are not so aggressive as to cause the other party to walk away from the negotiation is by focusing on the other party's BATNA, real base, and on market trends. It has been found that the best first offers tend to be those that fall outside the contracting zone, but are not so far outside the real base of the other party that they cause an extreme reaction.

When negotiators become strongly fixated on their aspiration base, they are blinded to beneficial outcomes that exceed their BATNAs. Their challenge is to focus on their aspiration base and make an aggressive first offer, but to remain open to conceding, thereby preventing the possibility of rejecting beneficial agreements. This ensures a mutually beneficial agreement.

*Suggested alternative approaches*

When a negotiator does not have the opportunity to make the first offer, his/her protection against anchoring lies in making an aggressive counter-offer firmly based on the other party's BATNA, real base and aspiration base, and presenting this offer in such a way that it creates a positive climate and blunts the other party's first offer. The key to protection lies in a negotiator knowing his/her aspiration base and the limitations of the other party.

Where the other party makes a first offer that is close to the aspiration base of its counterpart, the immediate inclination is to accept that offer and conclude the negotiation. Research, however, indicates that immediate acceptance of a first offer is likely to leave the other party filled with regret and discontent about not having made a more extreme first offer. It is also likely that doubts may arise about the quality of the product or service purchased. A dissatisfied party is less likely to live

up to the terms of an agreement and may consequently immediately start plotting how to amend the agreement, extort concessions or gain revenge. Even highly acceptable first offers should therefore be met with a request for concessions. If nothing extra is forthcoming the other party would at least have the satisfaction that it has achieved a meaningful victory where both parties have benefited.

### **Tactics, gambits & ploys**

There are many tactics, gambits and ploys used by negotiators and a brief summary of those most commonly experienced is appended.

This summary seeks primarily to inform negotiators of the existence of such tactics, gambits and ploys in order to equip them to effectively deal with them when they are used by the other party. The intention is not for negotiators to turn their own approach to the negotiation into a succession of tactics, gambits and ploys, thereby harming the relationship and preventing a mutually beneficial agreement from being achieved.

# Determine common ground, power bases and frame the negotiation

## *The importance of common ground*

In many publications on negotiation, it is argued that collaboration, communication and all collective actions in negotiation rely heavily on the common ground that is initially established between the parties and thereafter gradually strengthened during the course of a negotiation. The process of updating such common ground on a moment-by-moment basis is referred to as grounding - the collective process by which parties together work towards reaching mutual understanding. Although such an understanding is never perfect, in the sense that the parties can never share beliefs that are identical, the mere fact that they together aspire to a common understanding establishes a valuable level of mutuality and belief.

Common ground, contrary to what is often taught, does not necessarily reflect common interests, it relates to complementary interests. Although parties may have differing interests they wish to satisfy through a negotiation, such as increased sales volumes, greater market visibility, social responsibility etc, these interests are not necessarily exclusive. In order that they be met, the parties need to find a mutually beneficial agreement, their complementary interest.

Conflicting, or seemingly conflicting, interests are best dealt with at the outset of a negotiation by not dwelling on them, but rather together trying to discover the

complementary interests that are normally not verbalized by the parties. Common ground provides a minimal starting point at which both parties are sufficiently comfortable to allow them to work creatively and constructively towards a mutually beneficial agreement. In a retail negotiation, buyers and sellers may (despite the buyer wanting to pay a price as low as possible and the seller wanting to receive a price as high as possible) discover that the common ground lies in their appreciation that they each desire the best possible price. Although there is not a common price interest, the common ground lies in their appreciation that they need each other to sell and procure a product or service.

Common ground represents a future focus, in that the parties to a negotiation choose to concentrate on what they can become by working together, rather than on what they could achieve independently of each other or by opposing one another. Instead of viewing the negotiation as a tool to resolve past differences, they see it as a creative tool to establish the future they both desire.

### *Establishing common ground through questioning*

Questions are very important tools to establish what the parties agree about, principles, objectives etc.

Questions have the following six functions:

1. They focus the attention of the other party on what is to be communicated –  
“Do you also see us working together for a mutually beneficial outcome?”
2. They assist in acquiring information:  
“How do you see us achieving our individual price goals?”
3. They provide information:  
“Were you aware that that there is a great degree of compatibility in what we individually desire?”
4. They encourage the thinking process:  
“What do you propose we do to get to the goals we have set?”

5. They bring the negotiation to a conclusion:  
“Do you not think we should now go ahead and implement our joint agreement?”
6. They make a statement:  
“Has your company ever defaulted on a deal?”

*Commonly used types of questions*

It is useful for negotiators to keep in mind the types of questions that they can frame in their endeavors to ascertain the common ground that might exist between the parties:

- Open-ended who, what, where, why, how and please explain questions that do not only invite a Yes or No response:  
“Please help us understand why you have chosen this particular approach?”
- Open questions that invite the other party to express an opinion:  
“Would you please explain to us what this situation looks like to you?”
- Leading questions that direct the reply:  
“Would it then not be best for you to inform your superior that it is essential to immediately create fire breaks?”
- Non-emotional questions:  
“What do you think the next step should be in calculating the future value of this asset?”
- Sequence questions:  
“Now that we have agreed phase one, what would your suggestion for phase two be?”
- Complimentary questions:  
“Could you make another of your excellent proposals to move the negotiation towards our common goal of a mutually beneficial outcome?”

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- Window questions that assist in gaining insight into the other party's emotional state:  
“Why do you feel as strongly about this issue as you do?”
- Directive questions that focus on a specific point:  
“How excessive do you think the impact on water salinity may be?”
- Gauging questions that provide information on the state of the other party:  
“How does this look to you?”
- Close out questions that compel the other party towards a preconceived point of view:  
“If you could see that this action would be detrimental and damaging to fellow farmers, would you go ahead with it?”
- Loaded questions that put the other party on the spot whatever the answer:  
“Do you wish to tell me that this is the only possible solution to this problem, and that this is a failsafe solution?”
- Heated questions that occur impulsively:  
“Seeing we have already spent a great deal of time on this issue, is it not time that we now move on?”
- Impulsive questions:  
“Just tell me, how would your boss feel about the way this problem should be dealt with?”
- Trick questions that seemingly require a straightforward answer, but are in fact intended to put the other party in a difficult position:  
“What are you going to do about the quality of your products – discontinue the production of this commodity, have someone else grow it for you or decrease the price?”
- Mirror questions that reflect the other party's view or own view:  
“This is how we see it, don't you agree?”

## ENGAGEMENT PLANNING

Possible questions to assist in establishing common ground

Asking those questions listed below, as well as others, can greatly assist in moving towards establishing the common ground between negotiating parties.

- Can we agree that we are in this negotiation to develop alternative ways of working together in future?
- Can we agree that we are not in this negotiation to compete with each other, but rather to co-operate with each other to find the most viable and profitable ways of working together in future?
- Can we agree that we need to focus on the future, on what we can become together, rather than on trying to recreate the past?
- Can we agree that co-operation and compromise are far more beneficial to both parties than a costly war in which both are destined to lose?
- Can we agree that flexibility on the part of both parties is a prerequisite for the success of the negotiation?
- Can we agree that we are in this negotiation to explore alternatives that neither party may have brought to the negotiation table?
- Can we agree that we are intent on exploring a negotiated agreement that will not create winners and losers, but will be mutually beneficial?
- Can we agree that we need to be sensitive to each other's feelings?
- Can we agree that we are in this negotiation to achieve the greatest profit for each other by working together?

Examples of questions that could be used to counter statements. The purpose of these questions is to move the negotiation towards the common ground that exists between parties.

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<b>QUESTIONS TO EXPLORE / CLARIFY DETAIL</b>	
<b>STATEMENT</b>	<b>COUNTER-QUESTION</b>
It's too expensive.	In what way is it too expensive?
Too many/much/little/few.	Where does this fall short of your expectation?
I want the best.	What would be best for you?
You can't do that around here	What would happen if we did?

<b>QUESTIONS TO EXPLORE OPTIONS</b>	
<b>STATEMENT</b>	<b>COUNTER-QUESTION</b>
He (she) would never...	How can we find ways for it to happen?
They always.....	Are there any times they don't?
We've tried that already.	What was the outcome?
This is the only way to do it.	Yes, that's an option. What else could we consider?

<b>QUESTIONS TO REDIRECT THE PARTY TOWARDS THE POSITIVE</b>	
<b>STATEMENT</b>	<b>COUNTER-QUESTION</b>
It will never work	What would it take to make it work?
I won't.	What would make you willing?
It's a failure.	How could it work?
It's disastrous.	What would make it better?
He's (she's) useless.	What is he (she) doing that is acceptable?
It's impossible.	What would it take to make it possible?
I can't.	You can't see a way to do it at the moment?
I don't want to.	What would you like?

*The importance of answering questions*

Answering questions in a positive, constructive manner is as important as asking questions.

**CONSTRUCTIVE ANSWERS**

- Declaring the effect a particular line of questioning has on a negotiation  
“If you ask the question in the way you have, it makes me feel that you are not as committed to a mutually beneficial outcome as you have said. Is this true, or would you care to rephrase the question?”
- Requesting suggestions as to how the parties can reach a mutually beneficial agreement  
“What do you think we should do, in the light of the question you have just asked, to reach our mutually agreed goal of a win more/win more outcome?”
- Reminding the other party that it is more beneficial to choose between alternatives than to set the parties up against each other  
“When we narrow the negotiation to a simple choice of one alternative, we create an adversarial climate that is not conducive to our goal of a mutually beneficial outcome.”
- To remain silent in a respectful way.

**DESTRUCTIVE ANSWERS**

- Answering questions in a way that creates the impression that a question has been answered  
“Why?” or “Who better would know the answer to that question than you?”

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- Answering a question in an incomplete manner that only addresses part of the question  
In response to “How did you like the presentation?”  
Answering, “The presenter certainly has a wonderful voice that was greatly complemented by the acoustics of the auditorium.”
- Answering a question inaccurately by starting out with,  
“As I interpret the question ...” and then proceeding to redefine it.
- Killing the desire of the other party to continue the line of question –  
“That is one of those impossible question to which only the future could provide the answer. To speculate about the future would be a meaningless exercise.”

# Framing

## *The significance of framing*

Over the past decade or two framing has enjoyed increasing attention and has become a key variable in the negotiation equation, primarily due to the research of Kahneman and Tversky. Nonetheless, many negotiators have a poor understanding of the concept of framing and its consequences in a negotiation, which is unfortunate.

The use of framing dates back to the time of Aristotle when he used it very effectively to portray murdering villains as laudable patriots, thus achieving their acquittal.

## *Definition of framing*

- A frame provides perspective by managing the alignment of the observer in relation to an issue.
- A frame directs the observer to focus on a feature of an issue within the frame and to disregard other features of the same issue that fall outside this frame.
- A frame influences subsequent judgment in that it organizes and tailors information to fit into it. It therefore not only contains, but also constrains.

Of the many examples of framing that come to mind, that of the O J Simpson trial is probably one of the best. After the opening frame provided by the judge,

After the opening frame provided by the judge,

- O J innocent or O J guilty;

the prosecution chose to reframe it in terms of gender

- O J the male wife-beater vs. the female victim;

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whereas the defense opted to reframe it in terms of race

- O J the ethnic minority victim vs. the racist police force.

The verdict handed down was determined by the frame ultimately adopted by the jury, who found the frame of the defense the most relevant, and therefore decided that O J was not guilty.

### *Employing framing in a negotiation*

Framing is often used in a negotiation to create a rationale as to why a party should adopt a particular approach or acquire certain products or services.

A person entering a tractor dealership, to decide whether he/she should purchase a small agricultural tractor to replace the oxen he has used to pull the plough (frame: tractor vs. no tractor) may end up buying an expensive tractor as a result of:

- The reframing of the initial decision, namely buy vs. not buy, to tractor vs. very low yield. Through skilful reframing the salesperson justifies the purchase of an expensive tractor:
  - “Buying a tractor will make it possible to achieve substantially higher yields, and therefore generate income that will more than compensate for the cost of the tractor. In fact, it will enable you to do many of the things that you have wanted to do on your farm for many years.”
- Allowing the salesperson to create a focus frame that justifies the purchase of an expensive tractor
  - “People who buy tractors save the cost of the tractor within one year by enjoying high yields and improving their farms.”
- Falling prey to a contrast frame, where the salesperson cleverly moves the focus away from what the person can afford to spend on tractor, to the importance of utilizing technological advances, and then reframing the purchase in the following way
  - “Although this investment may at face value seem rather large, this is definitely not the case. Our installment plan will only require you to spend the monthly equivalent of one case of beer. Surely your future is more important than the cost of one case of beer?”

*Prospect Theory*

In framing research a theory has been developed of why people take conservative or risky decisions. According to this theory, which is called prospect theory, people are more influenced in their decision-making by the prospect of a loss than by the prospect of an equivalent gain. Subsequent research has clearly demonstrated that humans do not weigh losses and gains objectively, but are inclined to choose options with the highest subjective value, irrespective of whether these options deliver the highest objective gain. Often the emotional value of an asset is seen to be more important than the economic value.

PROSPECT THEORY  
POTENTIAL LOSSES ALWAYS LOOM LARGER THAN POTENTIAL GAINS

- The first priority is not to lose – humans are loss averse.
- Gains are secondary to not losing.
- Framing a decision in terms of possible loss motivates a person more strongly than framing it in terms of possible gain.

*Framing in terms of Risk Aversion & Risk Taking*

Because losses appear larger than gains, humans tend to adopt conservative strategies when confronted with a positively framed problem, and risky strategies when confronted with a negatively framed problem.

Given our positive bias as humans, we overwhelmingly expect good things to occur. Negative information is more persuasive as it does not confirm these positive expectations and therefore tends to jolt us out of our comfort zones. Furthermore, we also tend to examine information that does not confirm to our expectations more intensely and are inclined to ascribe extra weight to such conflicting information during our decision-making processes. This tendency is best explained by asking ourselves whether we would send members of our family to a doctor who is known to be exceptionally competent, but recently botched a tonsillectomy

performed on a neighbor's child. Our answer clearly will be "No", as the negative information tends to overwhelm the positive information. We expect the doctor looking after our family to be fully competent and not to make mistakes.

### *Dealing with negative framing in negotiation*

Although most negotiators generally use frames for positive reasons, many unfortunately use frames for negative, manipulative reasons.

Countering negative, manipulative frames requires that:

- Issues be juxtaposed, with the negotiator asking whether these are the real issues and then reframing the negotiation;
- The negotiator ask what other frames could be appropriate when confronted with an open-and-shut decision, e.g. "Is this truly such a simple decision, or is it made to look this way by the current frame?";
- Negotiators never forget that they are in charge of the frames according to which they operate, and that they therefore should frequently ask themselves, "What is important?", and then acting accordingly;
- Negotiators try to understand what the agenda of the other party is when that party stands to benefit from their compliance, and then countering with an alternate frame; and
- Negotiators always remember that everything they see or hear on TV, the radio, the web or in print are subject to framing.

## **Power**

In a negotiation context, power represents the ability to influence the results of the negotiation.

Power is an inescapable aspect of all human relationships. It influences every human endeavor. Although we are the products of power, it remains one of the least understood and most important factors that influence our lives.

Whereas past generations relied heavily on muscle and money power, the emphasis has now irreversibly shifted towards knowledge power.

*Principles of power*

- Power is relative and seldom resides in one party;
- Power is only meaningful if the other party recognizes it;
- Power can be exercised without taking action;
- Power is limited by the situation, laws, ethics and present/future competition;
- Power exists to the degree that it is accepted by the other party;
- The goal to be achieved in a negotiation cannot be divorced from the means;
- Deploying power always involves costs and risks;
- Power is an inescapable aspect of all human relationships;
- Power influences every human endeavor;
- Power is one of the least understood and most important factors that influence our lives;
- Power is not static but changes over time;
- Power is always limited;
- Power can be either real or apparent;
- Power relates to the ability to punish or benefit;
- Power is enhanced by legal support, personal knowledge, skill, resources and hard work;

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- Power is increased by the ability to endure uncertainty and by commitment;
- Power is enhanced by a good negotiating relationship;
- Power depends on the perceived BATNAs; and
- In addition, the balance of power changes as the advantages and contributions of the parties' change.

### *Forms of power*

#### Situational power

- The power of expertise
  - Refers to the relative knowledge parties' have in relation to each other.
- The power of legitimacy
  - Refers to internalized values (culture, ethics, norms, values or ground rules) that predispose a negotiator to accept that the other party has a legitimate right to exert certain influences.
- Referral power
  - Refers to power derived from association with an authority or party highly regarded by the other negotiating party.
- Reward power
  - Relates to the tangible/non-tangible rewards that one party is able to offer the other. The power varies according to the importance of the reward and is most effective when concessions that are granted are to be discussed at a later stage.
- Coercive power
  - Refers to the ability of one party to secure a course of action by limiting the other party to negative options.
- Official power
  - This is power vested in the position or office of a party. It is most effective when a party is acting in an official capacity.

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- Coalition power
  - This form of power is achieved when persons or parties agree to work together to achieve a specific goal. It unlocks a variety of resources for use in the intervention.
- Team power
  - Carefully selected teams have more resources available than individuals. (See “Establish the lobbying climate”)
- Personal power
  - The individual’s desire to achieve (task orientation), need for power and ability/desire to establish strong relationships.

### *Other forms of power*

- The market
  - Parties with a monopoly in terms of supply and demand are better able to ensure the adoption of a particular strategy.
- Product image
  - Certain products (e.g. Hewlett-Packard) have greater power by virtue of their market image.
- Possession of strategic resources
  - When a resource is limited or too little of it is available, it gives the owner lots of power, e.g. oil, titanium etc.
- Control of alternatives
  - The more alternatives available to a party, the greater that party’s power. If a company is the only employer of a particular occupational category, that company controls all the alternatives and hence the power.
- Use of a third party
  - When a party does not have a strong power base, it may choose to use a third party to strengthen its power base, e.g. a trade union.

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- Venue
  - Where parties meet, be it on home or neutral turf, has a distinct power implication.

### *Perception of power*

For a party to possess power that party must think or know that it has power and the other party must believe and accept that it has power. A party is perceived to have power if it has access to valuable resources.

Questions to be asked in relation to power:

- How do I perceive my own power?
- How do I think the other party perceives my power?
- How would I like the other party to perceive my power?
- How do I perceive the other party's power?
- How does the other party perceive his/her power?
- How would the other party like me to see his/her power?

A negotiator's goals and his/her perception of power are interrelated.

### *Sources of power in negotiation*

Every time a negotiator feels comfort or discomfort, control or lack of control, intimidation or the ability to intimidate he/she either has or does not have power.

- Power is need related. High need = low power, and low need = high power. A negotiator's need and the perception of a negotiator's need by the other party affects that negotiator's power.
- Power is a perception of reality. If a negotiator thinks he/she has power, then he/she does have power and vice versa.

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- A negotiator's attitude determines his/her power. When a negotiator feels resourceful and can visualize a positive negotiation outcome he/she is more powerful than when he/she is tired, frustrated and negative.
- Power is neither good nor bad in itself. The way power is used in a negotiation determines its virtue.
- Persistent persons have more power because of their ability to say 'No' or 'You will have to improve on that' repetitively. They are able to hold the line when abused or threatened. Persistence eventually allowed ZANU PF to overcome Ian Smith in Zimbabwe.
- Negotiators with a strategy and plan to focus the negotiations on the process and not on personal feelings and prejudices have power.
- By focusing on intentions (why something is said) and not on behavior (what is said and how it is said) a negotiator prevents becoming engulfed in a confrontation and thus losing power.
- Validating a point of view confers legitimacy on that view, e.g. by presenting a printed price list or agreement. It also signals limited flexibility.
- The more information a negotiator has the more power he/she has. It is, however, important that negotiators beware of deliberately using misleading information and of assuming accuracy. They should ask: "What do you mean?", "Could you please explain?" etc.
- By revealing certain information or revealing information too soon, negotiators often erode their power.
- The availability of time or the lack thereof can influence a negotiator's power. It is very important that negotiators always remember that deadlines can be changed and that so-called final choices are seldom final. By exposing the other party to deadlines negotiators can increase their power, e.g. "If you do not sign before 12:00 today, I will definitely not be buying your home." It is extremely

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important that negotiators do not allow themselves to be placed in such situations, by asking “Who set this deadline? Why did they? Could it be changed if the right offer is made?” or “Given that this is just not enough time, I have no other choice but to seriously look at the many other options that I have.”

- Negotiators from other cultures (e.g. the Japanese) often cleverly create deadlines by deliberately getting to know itineraries and departure times and then delaying negotiations until the last minute. They know that high time pressure = low power and vice versa.
- The amount of time invested in a negotiation often translates into power in two ways. Negotiators who prepare well are likely to do better deals than those who are poorly prepared, whereas it is also equally true that the more time a party invests in a negotiation, the greater the likelihood will be that party will be more flexible, as some form of return becomes crucial. In practice this entails that a party willing to remain in the negotiation long enough to get the other party to make a disproportionate time investment has a very good possibility of achieving the outcome it desires.
- Power in a negotiation is related to the willingness to take risks. For example an employee willing to lose his job is more likely to achieve a good increase or minimizing the risk involved for the other party by giving written guarantees that serve to empower that party, increases its flexibility. It is important to check the authenticity of the willingness of a party to take risks, and to call his/her bluff if this is merely a ploy to enhance its power.
- The more alternatives a negotiator has, the more power he/she has. When a negotiator has a unique offer to make – something only he/she can offer – that negotiator’s power is substantially enhanced, as long as it is believable.
- The stronger the willingness of a negotiator to walk away from a negotiation, the stronger the perception of his/her power. Merely appearing to want to walk away is power. A so-called soft walk out (“Wish I could help, but unfortunately I cannot, so all that is left is to thank you for the opportunity.”) is preferable to a hard walk out (slamming the door, shouting abuse leaving for good).

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- By establishing rapport negotiators gain power. A person at a airline check-in counter who, knowing he has excess baggage, greets the airline official in a friendly way and refers to the great job he/she is doing before placing his/her baggage on the scale, makes it very difficult for the official to confront him/her with a baggage surcharge.
- By introducing the possibility of competitors, negotiators often increase their power (“If you refuse to sell to me under my conditions, there are others who will.”). Should a party, however, be aware that it has an advantage over its competitors or that fictitious competitors have been introduced into the negotiation, it could counter this ploy by asking the other party to again clarify its needs and thereafter resell the product or idea to that party.
- Although some people believe that titles confer power, titles more often than not create distance between negotiating parties. By not using titles, one party can discourage the other from so doing.
- The ability to reward or punish is power in a negotiation. Even the mere threat of punishment is often enough, e.g. when Margaret Thatcher threatened the Argentine government with two fictitious nuclear submarines in the Falkland war. By holding out the possibility of a reward that could empower the other party, e.g. asking a salesperson the price of an item if ten or twenty were purchased, thereby inferring the possibility of a substantial sale at the right price, as this often results in a lower price, even when only one trial item is eventually purchased.
- Charismatic persons (Nelson Mandela, JF Kennedy, Mahatma Ghandi, Ronald Reagan etc.) have the ability to get others to do what they want them to do, at times even against their best interests.
- Power resides in unique expertise, e.g. that of the doctor or the plumber.
- The environment (location, lighting, privacy, noise, seating, number of negotiators, dress etc.) can be a source of power or disempowerment. Home turf can be a confidence factor or intimidator. Ensuring a friendly and relaxed

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environment empowers the guest party and enhances rapport. Deliberately choosing a public environment, e.g. a restaurant, to negotiate with a loud and aggressive party could be a way of preventing the use of destructive power.

- Fatigue, hunger and thirst are well known factors that weaken negotiating power and lead to unwarranted flexibility or aggression.
- Power is often situational, e.g. the bank clerk who slaps down a 'Closed' sign as a client is approaching. The way a party responds to such an exhibition of power can either be empowering or disempowering. By accepting it, it is often removed as a source of power.
- Power is role-related. Persons within the ranks of a negotiation team that do not have a role, constitute one of the greatest risks to their own team in the sense that they could easily be misused by the other party should that party give them a role contrary to the interests of their own party, e.g. to support a specific proposal that their team is not comfortable with. The rationale being that we as humans strongly crave a role, as our sense of power and security is directly related to whether we have a role.
- Negotiators with consistent values (Nelson Mandela, Mahatma Ghandi) have referent power, whereas a questionable person such as Bill Clinton does not have such power. Referent power derives from the other party believing that its counterpart will not easily renege on negotiation commitments.
- Predictable negotiators are easy prey and targets to be out-negotiated.
- The ability of a negotiator to collapse his/her power when an escalation of power is anticipated or even justified (Nelson Mandela, Mahatma Ghandi).

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# CONDUCTING THE NEGOTIATION

# Establish the negotiation climate

## **Politeness**

Politeness is non-negotiable. It costs nothing, yet delivers substantial dividends, in that it ensures that a negotiator commands the moral high ground in a negotiation. Operating from the moral high ground confers an immediate power position, as it blunts any negative attack the other party may contemplate. Furthermore, the law of reciprocity also holds that such a positive disposition should be compensated by an equally positive approach.

Acquiring the moral high ground in a negotiation can also be achieved by adhering to one of the basic tenets of the Mutual Gains Approach, namely to admit mistakes when they occur, apologize to the other party for such mistakes and offer to mitigate/compensate the consequences.

## **Names**

Our names are our labels given to us by our parents at a time of great joy. As a result, we tend to be proud of our names and to respond positively when others use them. Important, however, is that they pronounce our names correctly. Nothing is more irritating than a name or surname pronounced incorrectly.

Knowing and using names in a negotiation has the following distinct advantages:

- It focuses the attention of a specific person in the other party;
- It recognizes the identity of a specific person in the other party;
- It dignifies members of the other party as individuals; and
- It encourages the involvement of a specific person in the other party.

Prior to a negotiation the lead negotiator should ensure that the preferred names of all the members of the other party are known and that all his/her team members are able to pronounce these names correctly. Furthermore, it should also be established whether first names, surnames and titles are required when addressing members of the other party.

When the other party arrives at the negotiation, it is good practice for the lead negotiator to introduce every member of his/her team to every member of the other team by repetitively using the names of each of these members, e.g. “John meet Sally. John, Sally is the head of IT at Future Consulting; Sally has been with them since the launch of the company. Sally, John is head of our IT; he joined us recently after an illustrious career with the Council for Industrial and Scientific Research.” This not only denotes respect, but is an excellent way of breaking the ice and conveying important information that establishes the credibility of the negotiators.

### **Taking Space**

The way negotiators take space in a negotiation tells the other party how secure or insecure they feel. If they only operate within a very small area (molecular space <45cm), they communicate insecurity and tend to rapidly lose the attention of the other party. Conversely, if they use a bigger space (molar space >45cm) they communicate confidence and hold the attention of the other party.

Our bodies, especially our hands, arms and eyes, are our most important assets in taking space. In a negotiation, we should therefore always ensure that we look up and use our eyes to involve all members of the other party. Furthermore, we should also keep our hands on the table, using them to indicate our dedication and sincerity, to involve all members of the other party, and to accentuate specific points.

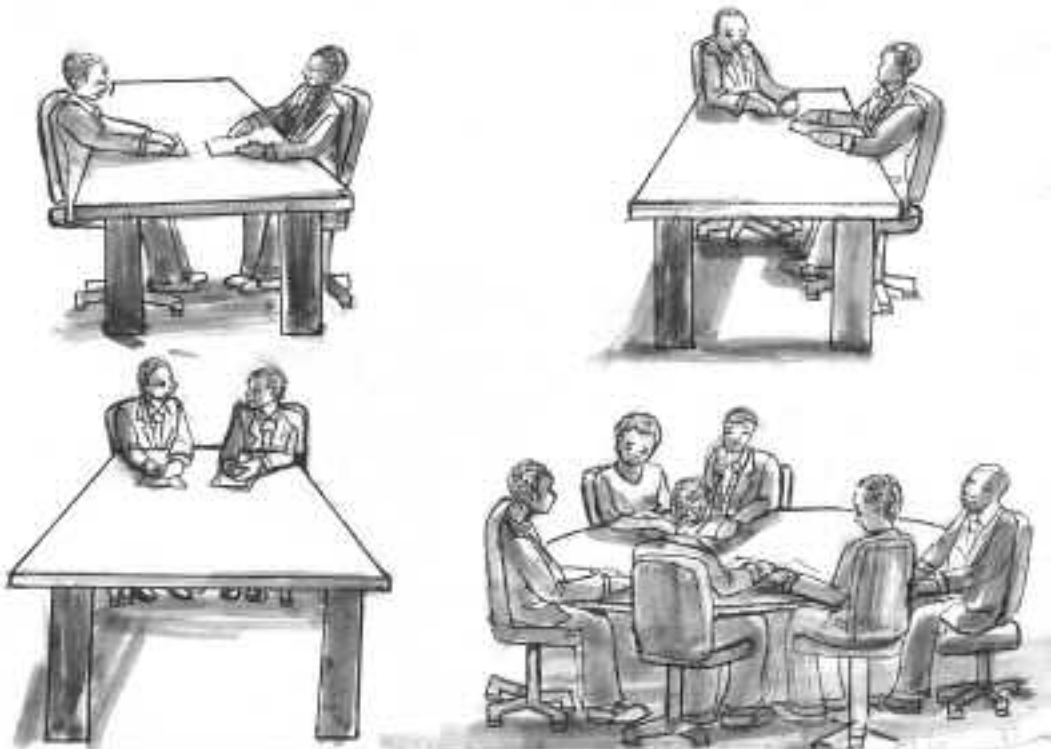
Negotiators should be aware of the negative use of eyes in a negotiation, and should never use manipulative tactics. Zapping (fixating on a particularly sensitive body part) a member of the other party by focusing on sensitive body areas - the lower abdominal triangle in men and the neck in women - disrupts their thinking and the involvement of that party in the negotiation. At most, this provides a temporary and highly questionable advantage that often has a serious detrimental effect on the long-term relationship. It is easily countered by a negotiator declaring to the other

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party his/her awareness thereof and the disruptive effect it has on exploring a mutually beneficial outcome.

When seating negotiators it is important to take cognizance of the climate created by different seating positions. It is highly preferable not to seat negotiators directly opposite each other, as this creates an oppositional frame that is not conducive to working together. Better alternatives are to seat the negotiators diagonally across the corner of the table, next to each other or around a round table. This creates the impression of togetherness and enables the sharing of documents. As an option, a round table should always be the preferred choice, as no position around such a table has a greater power perception than any other, and equalizing space poses no problem.

King Arthur of old knew what he was doing when he introduced the Round Table as a means of quelling the constant jockeying for power positions amongst his men, the Knights of the Round Table.



### **Voice**

Voice is a very important determinant (38%) of the impact made in a negotiation. Research has conclusively found that negotiators who speak in deeper, darker and softer voices are perceived to have greater credibility than those who speak in high-pitched, shrill voices. This goes for women as well as men.

Negotiators who raise their voices in a negotiation and even resort to screaming, merely cause the other party to reciprocate by also raising his/her voice and following suit when confronted by shouting. The net impact is that the negotiation moves from the rational to the emotional, seriously complicating the possibility of finding a mutually acceptable agreement. When confronted by raised voices or shouting, negotiators should remain calm and continue to speak in a soft, deep voice.

### **Roles**

In negotiation, there are only two roles of particular importance, namely a task role and a relationship role. In practice there are very few negotiators that are able to fulfill both these roles, the majority are either good task or good relationship negotiators. When a negotiator attempts to fill both roles in a negotiation, he/she comes across as somewhat schizophrenic and therefore struggles to achieve credibility. Negotiators should know which role suits them best and then prepare to fulfill that role within the negotiation team.

In life, our roles are inextricably linked to our perception of power and our sense of security. When we are therefore without a role, we experience a loss of power and a sense of insecurity. When negotiation teams are selected, the size of the team is often motivated by the erroneous assumption that there is power in numbers in a negotiation. Unfortunately, this assumption fails to take cognizance of the fact that those team members who are merely brought to a negotiation for numeric comfort, and therefore have no role, are vulnerable to being used by the other party. An experienced negotiator immediately becomes aware when a member of a team has no role, and then skillfully provides this member with a role by involving him/her in the negotiation to their advantage. Such wallflower team members are very happy to accept any role that compensates their sense of disempowerment and insecurity.

Unless compelling reasons exist, negotiation teams should never exceed two members, a task negotiator and a relationship negotiator. This excludes the possibility that a team member will be used by the other party, and has the distinct advantage that the team is more manageable, requires less attention to group dynamics and is generally better focused.

### **Questions**

75% of the utterances of good negotiators are in the form of questions, not statements. Questions invite participation, recognize that the other party has a view or opinion to convey, focus attention and elicit information. Statements often close out the other party by creating the impression that a fixed view exists or that a particular course of action has already been decided. Whereas questions are the keys to developing mutually beneficial agreements, statements are more akin to positional bargaining.

Of the many questions that could be used in a negotiation, the following three are of particular importance:

- Why are we here? This question if regularly asked during a negotiation helps to keep the negotiation focused on the reason for negotiating. It is often referred to as the common-ground question.
- What is missing? Unless negotiators enquire what it is that they are not seeing, they tend to focus only on what is on the table, forgetting that viable, sustainable agreements often require them to look beyond the table to what is not known.
- What can we become together? Negotiation is about where the parties will live tomorrow, it is not about repairing the past or merely shoring up the present. Negotiation is not about positional bargaining where parties claim value from each other, but is about parties working together in a partnership to jointly create mutually beneficial value.

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# Formalizing the agreement

The final step in a negotiation should always involve the parties together summarizing the agreements that were reached and the terms and conditions related to these agreements, as this information will be the basis of the contract to be drawn up after the negotiation is concluded. Both parties must understand the agreement in the same way to ensure that matters of interpretation do not arise soon after the signing of the contract.

From a legal perspective, closure occurs when all the agreed-upon details are committed to a legally binding, signed contract that is witnessed and verified by the parties.

Closure is often delayed unnecessarily by the following factors:

- Fear of taking a decision due to the potential risks it poses, despite having approached the negotiation in a structured, responsible way.
- Doubt as to whether more could be achieved if you were less compromising and extend the negotiation.

Fear and doubt are normal just before the conclusion of a negotiation, being very similar to the well-known buyer's remorse we often experience before we purchase an expensive product or service. Not dealing with fear and doubt constructively by trusting the insights gained during the pre-negotiation preparation and planning could cause a positive agreement to unravel, as the other party may sense this uncertainty and seek to exploit it.

Contracts are legally binding documents that serve to record the agreements parties

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make with each other and to set out the stipulations of those agreements. Good contracts protect the investments of the parties to an agreement.

Although parties may draw up their own contracts, this is not advisable other than in cases where the agreements are very simple and do not entail substantial value. Where possible, parties should rather together decide on a legal expert to draw up the contract emanating from the agreement they negotiated. If neither of these possibilities are feasible, standard contracts can sometimes be of value.

Contracts should include clear information on:

- The gains and benefits the party's have agreed;
- The terms and conditions that apply to these gains and benefits;
- Important deadlines, obligations and consequences of termination;
- How unpredictable circumstances will be dealt with; and
- Anything and everything pertinent agreed in the course of action.

Once the contract is drawn, the parties should carefully review the contract by:

- Checking all the documents referred to in the contract;
- Checking that all aspects of the agreement reached by the parties have been accurately recorded by the legal drafters of the contract;
- Reading and re-reading the fine print to ensure that they understand all the possible consequences thereof; and
- Checking all the numbers relating to dates, prices, discounts, fees and compensation.

After the contract has been drafted to the satisfaction of the parties, it is highly advisable that they meet, possibly together with the legal drafter, to ensure a

common understanding of the contract prior to the signing thereof. This builds trust.

Once the contract is signed and implementation commences, it is advisable to agree a process whereby the implementation is regularly monitored. This prevents serious conflict from arising and eventually posing a danger to the contract.

Negotiators need to remain aware throughout the negotiation that the successful implementation of a contract is not merely dependent on the contract, but also very largely relies on the quality of the relationship that has developed between the parties.

## **The contract**

### *Background to contractual law*

We enter into contracts as a regular part of life and generally we experience no difficulty in doing so. The general principles of the law of contract are derived from the common law (or judge-made law which are laws that have come about as a result of decisions passed down from the Courts of Law) and much of the regulatory legislation concerning contracts has been built upon the foundation of the common law principles.

Freedom of contract is the most important ideology relating to the law on contract. In other words parties should be as free as possible to make agreements on their own terms without the interference of the courts or any other third party and their agreements should be upheld and respected by the courts.

### *What to look out for when entering into a legally binding contract*

When entering into a legally binding contract and particularly where there is a difference in the bargaining powers of the parties (i.e. where an individual grower enters a supply contract with a large corporate entity) the weaker party must pay particular attention to the following fundamental aspects of the contract:

- (i) The duration of the contract (i.e. how long are the parties going to be bound by the contract - is the contract for one growing season or for several growing seasons);

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- (II) Who are the parties to the contract (is the farmer actually a party to that contract and legally bound by the terms therein). It is vital that the parties are clearly stated within the contract as under contract law you cannot be bound by the terms and conditions of a contract unless you are actually a party to the contract agreement itself. Normally the Buyer will be easy to identify as it will generally be a corporate entity. However the 'Farmer' may be a group of farmers, an association of farmers or a co-operative. In such cases those farmers falling under such a co-operative or association must be identified in order to be bound by the contract.
- (III) The price clause and any variations (i.e. can the agreed price be changed by either party during the contract as a result of external factors such as the world commodity prices or an increase in the cost of inputs);
- (IV) The description, quantity and specifications of what it is that the grower is being contracted to grow and the penalties for not complying with such specifications (i.e. is the grower expected to plant a particular variety of seed or use a particular chemical and what are the penalties if these specifications are not followed by the grower; is the buyer still expected to buy the crop);
- (V) The obligations of the grower (i.e. is the grower bound/legally obligated under the contract to purchase the seed and the chemicals from the buyer or is he free to purchase his inputs from other sources);
- (VI) The obligations of the buyer (i.e. is the buyer legally bound to purchase the entire crop from the grower or only part of the crop; what remedies does the grower have if the buyer refuses to buy his crop and vice versa);
- (VII) Which party is responsible for delivering/collecting the crop – the grower or the buyer;
- (VIII) Who bears the risk in relation to crop (i.e. does the grower bear the risk in the crop up until the point at which the crop is physically collected by the buyer; is the grower responsible for the safe storage of the crop even where the buyer is late in collecting the crop; and is the grower obliged to take out crop insurance over the crop);

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(IX) Remedies available where an event occurs that makes it impossible for the grower to grow the crop (i.e. drought / hail / fire etc); is the grower bound to supply the buyer with the crop despite the fact that his own crop has been destroyed by hail, fire, theft, disease or drought.

(X) Is the grower restricted from selling his crop to other buyers or is he free to sell his crop for the best price being offered on the open market as long as he pays back the cost of the inputs that may have been provided.

Some contracts may have an exclusivity clause which means that the Farmer can only sell his crop to one particular Buyer and to no one else. If this Buyer has provided financial and technical support to the Farmer to grow the crop in return for that Farmer selling his entire crop to the Buyer then the Farmer will have a legal obligation to supply his crop to the Buyer. If he fails to do this or chooses to sell his crop elsewhere he will be in breach of contract and the Buyer can commence an action in the courts to recover any losses he has suffered as a result of the fact that he did not receive that bargained for quantity to crop. For example a Cotton Buyer (Buyer A) supplies a Farmer with the seed and necessary inputs to grow his crop and contracts to buy his entire crop at a pre-determined price. At the time of harvest the Farmer finds another buying willing to pay more for that crop and he sells to Buyer B. Buyer A has already committed to sell the Farmers cotton to Buyer C and now finds he cannot find enough cotton to fulfill his orders. Buyer A can then sue the Farmer for any loss he has suffered or financial penalties he has incurred as a result of Buyer A breaching his supply contract with Buyer C because the Farmer decided to sell his crop elsewhere despite his legal obligations to sell to Buyer A.

However it is important to review the contract clearly as the Farmer should be looking at an arrangement whereby he supplies a part only of his crop to Buyer A to the value of the inputs provided by Buyer A and any amount over and above this he should be free to sell to the highest Buyer. This will provide security to the Farmer in the event that the pre-determined contract prices for the cotton increase significantly on the market at the time of selling.

(XI) Have other terms have been agreed which have not actually been incorporated into the written contract (i.e. the parties may have agreed on further conditions

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and obligations after the contract has been signed which conditions have not been added to the contract itself);

- (XII) Are there any clauses which are unclear and uncertain and which may result in a dispute arising between the parties at a later date;
- (XIII) Is there a termination clause permitting the grower or the buyer to terminate the contract (i.e. to bring it to an end and to end their obligations to each other) and if so, what period of notice is required, and what remedies are available to the other party; and
- (XIV) Is there a dispute resolution clause in the contract (i.e. a clause such as an Arbitration Clause which provides that in the event of a dispute occurring between the parties an independent arbitrator or mediator may be invited in to attempt to resolve the dispute). Or does the contract provide that any dispute between the parties must be resolved by the courts.

The Arbitration or dispute resolution clause is important as it provides the aggrieved party with a procedure to follow should there be a breach of contract. It may be better to resolve disputes through a pre-determined means i.e. an appointed arbitrator (who has the same powers as a Judge of the Courts of Law and whose decision is legally binding) or a mediator (which is less formal process and whose decision must be willingly accepted by the parties to be legally binding) as agreed by the parties.

If however government intervention makes the contract impossible to perform this may then be where force majeure may be raised where the parties claim that they can no longer perform their side of the contract due to events beyond their control i.e. a change in the law introduced by government forbidding private buyers from buying the crop. In such a case that party will not longer be bound to perform under the terms of the contract.

- (XV) Some contracts will provide that the Buyer will place an Agricultural Charge over the Farmers Crop particularly where the Buyer finances the growing of the crop. The purpose of such a Charge is to protect the Buyer, and it means that the Buyer has the legal right to take possession of, and sell the Sellers entire

crop if the Grower fails to pay the monies due and owing to the Buyer. The Farmer must be clear of the legal implications of an Agricultural charge and must understand that it does give the Buyer a legal right to that crop to recover all monies advances.

### **Fundamental aspects of a contract**

These aspects are described in greater detail below but it is important to note that every contract should cover each of these elements in order to be enforceable and binding and in order to avoid confusion and uncertainty at a later date should a dispute or disagreement break-out between the parties relating to the performance of the contract itself.

#### *Offer and acceptance*

In determining whether an agreement has actually been reached between the parties there must be a clear and certain offer, which is matched by an equally clear and certain acceptance. Where a party agrees to certain parts of the proposed contract but proposes changes to other parts of the contract, this will not be considered to be a true acceptance. Any changes to the original proposed contract are referred to as 'counter offers' which kill off the original offer and amounts to a new offer which can in turn may be accepted or rejected by the other party. Only when the proposed counter offer is accepted without further changes will a legally binding agreement actually have been reached.

#### *Certainty*

In order to create a legally binding contract the parties must express their agreement in a way, which is sufficiently certain for the courts to enforce it. In other words the parties must express themselves in such a way that their meaning and intention can be determined with a reasonable degree of certainty. Where an agreement is vague and uncertain it may not be enforceable as it will not be clear what the intentions of the parties really were. So where an agreement makes no mention of important facts such as the price to be paid for the crop or the type of crop to be grown, the courts may find that the contract is so vague and so uncertain that it cannot be legally binding upon the parties. However, the courts are reluctant to find that an agreement is so vague that its unenforceable and will look to the custom or trade in which the parties are contracting i.e. the court might take note of what the market

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price is for a particular crop and order that the market price be paid by the buyer if the contract does not mention pricing. The courts might also choose to do away with a meaningless clause in a contract or simply interpret the vague clause in light of what is reasonable. The courts are very keen not to interfere with contracts drawn up between the parties and will intervene only where a clause is so confusing as to be meaningless or where the contract is silent on a fundamental area such as pricing or risk.

### *Consideration*

In order to be enforceable there must be an element of consideration between the parties. In other words, each party should benefit in some way from the contractual relations. The traditional interpretation was that

someone who has been promised something (i.e. the promisee) should not be able to enforce that promise

*unless*

he has given or promised to give something in exchange for the promise

*or unless*

the promisor (the person who has made the promise) has obtained something in return

However, the value of the consideration will not be questioned so long as consideration passes between the parties and therefore even where a commodity is sold at an undervalue the courts will uphold the contract so long as some benefit was received by the seller and so long as neither party was forced into the contract.

### *Intention to create legal relations*

The fact that the parties have reached an agreement does not necessarily mean that they have concluded a legally enforceable contract. There must be an “*intention to create legally binding relations*” and this has been held to be an essential element in any contract. Thus each party must actually intend to be bound by the terms of the contract. However, where parties enter into commercial agreements (as opposed to personal agreements) the presumption is that those parties intend to create legal relations and it is difficult for either party to turn around at a later date and claim that they did not intend to be bound by the contract. When entering into

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commercial agreements it is presumed that both parties are clear on what it is they are entering into and have sought the necessary advice before signing. They are not expected to turn around at a later date and claim that they never meant to be bound by the terms of the contract. It is vital therefore to understand the entire contract, each and every clause, in order to be certain as to what it is you are being bound to do before signing any agreement.

### *Terms of the contract*

A contract consists of a number of terms or conditions. However it is important to know whether a statement made in a contract or during the negotiations for that contract is actually a contractual term of the contract, which will bind the parties, or whether the statement is merely a representation, which will not bind the parties. A statement is likely to be a term of the contract if the maker of the statement asks the other party to verify its truth. Thus if Party A is selling a car and claims that the car is only 2 years old and if Party B asks Party A to provide proof that the car is only 2 years old then that statement will become a term of the contract and if it is later found that the car is in fact 4 years old, this will result in Party A being in breach of a term of the contract. A statement is likely to be a term of the contract where it is of such importance to the person to whom it is made that, had it not been made, he would not have entered into the contract. A mere representation on the other hand, may be a statement made by one party which has not induced the other party to enter into a contractual relationship. Thus if Party A says to Party B that he thinks the car is silver but it turns out to be grey this is unlikely to result in a breach of a term of the contract.

The terms of the contract are the life-blood of the contract in that they define both the content and the scope of the parties' mutual rights and obligations. Thus the price, the date of delivery and the requisite standard of quality are all terms of a contract, which must be met.

### *Exclusion clauses*

An exclusion clause may be defined as a clause in a contract or a term in a notice which appears to exclude or restrict a liability or a legal duty which would otherwise arise. Exclusion clauses are a common feature of contracts today and may take a number of different forms. The most frequently encountered types of exclusion

## IMPLEMENT THE DEAL

clauses are those which seek to exclude liability for breach of contract or for negligence or which seek to limit liability to a specified sum. Another type of exclusion clause commonly encountered is an indemnity clause, under which one contracting party promises to indemnify the other for any liability incurred by him in the performance of the contract.

A party wishing to include an exclusion clause in a contract must overcome three hurdles before he can do so.

- First he must be shown that the exclusion clause is properly incorporated into the contract;
- Secondly it must be shown that, properly interpreted, the exclusion clause covers the loss which has arisen; and
- Thirdly, there must be no other rule of law which would invalidate the exclusion clause.

In relation to an attempt by a contracting party to exclude liability for his own negligence various rules have been applied but the more serious the breach or the consequence of the breach, the less likely it is that the court will interpret the exclusion clause as covering that breach. Any attempts by reference to a contract term or notice to exclude or restrict liability for negligence causing death or personal injury are void. In relation to other loss or damage caused by negligence, such attempts are only valid if they are held to be reasonable.

A party who signs a document containing an exclusion clause is normally bound by its terms irrespective of the degree of notice given and whether he has read it, but the exclusion clause must be drawn to the attention of the other party before or at the time the contract is entered into. However, there is clear authority for the notion that certain obligations in contracts are fundamental to the entire undertaking such that their non-performance amounts to a failure to perform the contract itself. Common law considered that such a fundamental breach could not be excluded or restricted in any circumstances as this would amount to giving with one hand and taking away with the other.

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It is therefore very important particularly for the Grower to review the contract carefully to ensure that if there are exclusion clauses within the contract, he understands exactly what is being excluded and what this will mean in the event of a breach of contract. For example a clause might state that the Buyer will accept no liability for any damage in the crop incurred as a result of the failure of the Buyer to collect the crop within a specified period of time – clauses such as this should be struck out and the Growers should seek to restrict as much as possible any exclusion clauses inserted by the Buyers.

### *Misrepresentation*

Misrepresentation is a false statement of fact, which is addressed to the party misled and which results in that party entering into the contract. Once misrepresentation has been established the misled party has the right to set the contract aside and to claim for damages.

### *Improper pressure*

As mentioned earlier the formation of a legally binding contract requires the acceptance of an offer, the intention to be bound by the contract and the passing of consideration. However, where there is a noticeable inequality of consideration (i.e. where one party has received a benefit and paid an amount which is so obviously below the value of the benefit received) this might imply that improper pressure had been applied to force one party to enter into a contract. The courts will focus on the relationship between the parties and look out for the possibility of an abuse by a dominant party and afford protection to the weaker party. Thus where the weaker party places confidence and trust in the dominant party and gives that dominant party authority over the decision-making powers of the weaker party, this may result in that stronger party having an opportunity to enhance his position unfairly in order to gain some personal advantage.

### *Frustration*

Frustration refers to an event or happening not reasonably expected or contemplated by the parties at the time of entering into the contract, which radically alters the foundation of the contract or makes it physically or legally impossible to perform. The event must have a fundamental impact on the performance of the contract; thus disappointed expectations, hardship or mere inconvenience do not in

themselves give rise to frustrated contracts. Frustration refers to events, which take place after the contract was made, whereas if the change of circumstances was pre-contractual (i.e. as a result of events which occurred before the contract was entered into) then recourse would be made to the law of mistake.

Generally the effects of frustration are that the parties are discharged from the performance of any future obligations i.e. they are no longer legally bound to perform under the contract.

### *Actions to take upon a breach of contract*

A failure to perform ones obligations under the terms of a legally binding contract “without lawful excuse” amounts to a breach of contract. Thus where a contract has been frustrated there is no liability for breach of contract because both parties have a lawful excuse for the non-performance. A breach of contract entitles the other party to the contract to an appropriate remedy.

Whether or not a particular contract has been breached depends on the terms of the contract itself and it is for the party alleging the existence of a breach to prove that the breach has occurred.

A breach does not automatically bring a contract to an end, but it gives various options to the party that is not in breach (the ‘innocent party’) and the extent of these options depends on the seriousness of the breach. Even the most serious breach does not necessarily terminate or discharge the contract. The consequences of a breach depend upon the facts of each individual case but three principal consequences of a breach of contract can be identified.

- (i) The innocent party is entitled to recover damages in respect of the loss which he has suffered as a result of the breach;
- (ii) The party in breach may be unable to compel the innocent party to perform his obligations under the contract; and
- (iii) The innocent party may be entitled to terminate the contract.

### *Damages*

The victim of a breach of contract has the right to recover damages in respect of the loss suffered as a result of the breach, unless liability for the breach has been

## CONTRACT NEGOTIATIONS

excluded by an exclusion clause within the contract (i.e. if the Buyer states in his contract that if he cannot collect the Growers maize due to the poor conditions of the roads and the Growers maize ultimate rots because the Buyers do not collect the maize on time, the Grower may not be able to recover damages for the loss of his crop because of the existence of this exclusion clause).

The purpose of awarding damages is to compensate the victim for the loss caused by the defendant's breach of contract, rather than to punish the wrongdoer. Compensation is the overriding principle and loss of bargain is the main yardstick for awarding damages. This principle however should be treated with a degree of caution as a court may adopt a different basis for awarding damages where appropriate. The victim of the breach must show that the damages were not too remote, that the damages were of a type recoverable under law and that the damages could not have been mitigated. Thus the victim is not expected to sit back and claim the full contract price; where reasonable he must make alternative arrangements in order to lessen his current loss.

For example where the Grower has contracted to grow 2 hectares of cotton at a pre-determined price and the Buyer purchases the entire crop but at a lesser price to that agreed upon under the terms of the contract, then a breach of contract has occurred. The Buyer has failed to pay the agreed purchase price and the Grower may recover damages in respect of the loss suffered as a result of the breach (i.e. the difference between the agreed purchase price and that actually paid by the Buyer). The Grower must insure however, that there is nothing in the contract which permits the Buyer to reduce the contract price under certain circumstances. If this is not the case the Grower will first write to the Buyer demanding payment of the balance due and thereafter he may either (i) proceed to appoint an arbitrator if the contract has an arbitration clause who if satisfied of the default on the party of the Buyer, will order payment; or (ii) commence an action in the Courts of Law for the recover of the balance due as well as the costs relating to the commencement of legal proceedings and any other loss he may have suffered as a result in the lesser payment.

### *Enforcement*

Where the obligations of the parties are dependent upon one and other then a contracting party must generally be ready and willing to perform his obligations under the contract before he can commence an action against the other party for

breach of contract (i.e. where the Buyer is obliged to provide seed to the Grower and the Grower is obliged to plant that seed, then if the Buyer fails to provide the seed the Grower is not compelled to grow the crop notwithstanding the existence of the contract). But, if for example one party's obligations are not dependent upon the other's obligations being performed, a failure to perform by one party will not mean that the other party can abandon his obligations.

The Contract may have an Arbitration Clause within which an independent arbitrator can be named who will be responsible for resolving disputes should they arise. Care should be taken that if an arbitrator is actually named, both the Buyer and the Grower are satisfied with that appointment. In the event of a dispute the aggrieved party will approach the arbitrator and advise him of the dispute and the parties will then be asked to meet with the arbitrator to give their own versions of the dispute and the arbitrator will make a final award. These awards are legally binding and hold the same weight as any final court decision and accordingly the successful party can enforce that decision in the same way as he could enforce a court decision i.e. if judgment was in the Grower's favor and the Grower still refused to pay, then the Farmer could arrange for the Bailiffs to collect goods from the Buyer's premises to be sold and the proceeds used to settle the debt.

### *Termination*

The innocent party may have the right to terminate performance of the contract and seek damages where the consequences of the breach are serious enough to justify such action. The innocent party must notify the other party of his intentions to terminate the contract. The innocent party may also decide to affirm the contract even though it has been fundamentally breached. In other words, he might choose to insist that the contract remains in place and the parties must continue to perform their obligations. If this is the case and the innocent party accepts further performance of the contract after the breach, he will have affirmed the contract and while he can still claim damages for any loss suffered as a result of the breach, he is still bound by the terms and obligations of the contract.

In conclusion then, a party who is in breach of contract by failing to perform an obligation cannot claim for payment from an innocent party; the innocent party may demand that the contract be immediately terminated as a result of the breach and must then calculate the loss he has suffered taking into consideration that he

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must take all reasonable measure to mitigate his loss (i.e. try to sell the crop to someone else if possible and then claim for the difference in the sale prices). If the wrong-doer fails to make good this loss, the innocent party will then have to proceed through the courts of law to have his rights upheld and an award of damages will be granted by the courts.

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# APPENDICES

# Negotiation preparation Prompt template

## The conflict relationship

<p>What is the nature and degree of the conflict/issues that exists between us and the other party, and therefore forms the basis of the negotiation?</p>	<p>Typical Examples:</p> <ul style="list-style-type: none"><li>- Disagreement on price.</li><li>- Disagreement on delivery schedule.</li></ul>
<p>What is the nature of the relationship we/our colleagues or others have had with the other party in the past?</p> <p>How could this affect the negotiation?</p>	<p>Typical Examples:</p> <ul style="list-style-type: none"><li>- Adversarial.</li><li>- Could result in a hostile negotiation climate.</li></ul>

**Deal parameters**

What are the real bases (bottom lines) for the parties in this specific negotiation?	Ours	The other party's
What are the aspiration bases (best possible outcomes) the parties desire for this specific negotiation?	Ours	The other party's
What BATNAs do the parties have for this specific negotiation?	Ours	The other party's

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**Objectives/goals**

What are our objectives/goals for this specific negotiation?		Tangible		Intangible	
	• Must have:				
	• Intend to have:				
	• Nice to have:				
What are the objectives/goals that we think the other party is likely to have for this specific negotiation?		Tangible		Intangible	
	• Must have:				
	• Intend to have:				
	• Nice to have:				
Which of our tangible and intangible objectives/goals are most important?	Tangible	Priority (rank)	Intangible	Priority (rank)	
How far apart are the objectives/goals of the parties?	<p>Typical Example: We require a price of 100 dollars per ton of maize, and the buyer is only willing to pay 70 dollars.</p>				
What are the key differences?					
Is there sufficient common ground between us and the other party to establish a “win more/win more” frame for the negotiation?	<p>Typical Example: I am the only farmer producing milk in the immediate vicinity of the shop. If the buyer were to buy milk elsewhere, it would involve far greater cost.</p>				

**Issues**

Have we defined and clarified the issues involved in this negotiation, prioritised these issues, and determined which issues are independent and which are interdependent?	Importance	Issues		
		Priority (rank)	In-dependent	Inter-dependent
	• Major	1		Price
		2		Terms
		3	Warranty	
		4		
	• Secondary	1		Conditions
		2		Delivery date
		3		
		4		
	Given our goals, assumptions and the information we have about the other party, what deal we can expect from this negotiation?	• Best deal:		
		I achieve my aspiration base in terms of price		
• Fair and reasonable deal:				
I compromise on price, but receive favorable terms and conditions				
• Minimally acceptable deal:				
The price I achieve is in accordance with my real base				

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### Analysis of the other party

What are the main characteristics of the other party?	Typical Examples: - Multinational aggressive giant. - Manipulative.			
What is the other party's reputation and style?	Typical Examples: - Insensitive to the needs of suppliers. - Very cooperative and understanding.			
What additional information on the other party do we need to make this specific negotiation succeed?	Typical Examples: - How they have negotiated in the past with other farmers. - Do they seek long term relationships with their suppliers?			
What tangible and intangible needs and wants do we assume the other party has in priority order?  Sample questions: <ul style="list-style-type: none"> <li>“Why are we here?”</li> <li>“How do you see the situation?”</li> <li>“How did this situation come about?”</li> <li>“Ideally, what would you like to gain from this negotiation?”</li> <li>“Why do you want to achieve this?”</li> <li>“Why is this important to you?”</li> <li>“What would this mean to you?”</li> </ul>	Tangible needs/wants	Rank	Intangible needs/wants	Rank
	Price	1	Trustworthy	1
	Delivery	2	Long-term commitment	2
	Delivery			
What request(s) do we expect the other party to make?	Typical Examples: - That we guarantee the price they wish to achieve, accepting a penalty if we fail to deliver the product on time.			

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**Competitive advantage**

What are the strongest points in our arguments and what advantage do they give us?	<b>Arguments</b>	<b>Rank</b>	<b>Advantage</b>
	Sole supplier	1	Monopoly power
	Best quality	2	Price premium
What are the strongest points in the other party's arguments and what advantage do they give the other party?	<b>Arguments</b>	<b>Rank</b>	<b>Advantage</b>
	Sole buyer	1	Monopoly power
	Reliable	2	Trustworthiness
What are the weakest points in our position?	<b>Weakest points</b>		<b>Rank</b>
	Drought sensitive		1
	High input costs		2
What are the weakest points in the other party's position?	<b>Weakest points</b>		<b>Rank</b>
	Delivery dependent		1
	No other (reliable) suppliers		2
Do we need to modify our objectives/goals in any way at this point?	If the information up to this point requires you to modify your objectives/goals, please revert back to the beginning of this template and revise.		
What precedents or standard practices can we invoke in the negotiation?			

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### The negotiation process

Mark the kind of strategy we wish to use for this negotiation, noting the effect it will have on climate and relationship.	<b>Strategy</b>		
	Distributive Bargaining	Win-Win	Win more- Win more
	<b>Climate</b>		
	Adversarial	Cooperative	Mutually beneficial
	<b>Relationship</b>		
	Short term	Long term	Long term
What tactics should we employ to get the other party to behave in a way that will make our strategy work?	Typical Examples: - Emphasizing reciprocity - Emphasizing scarcity		
What are the long and short-term advantages, and the legal and financial implications of our negotiation strategy?	<b>Long-term advantages</b>		
	Distributive Bargaining	Win-Win	Win more- Win more
	<b>Short-term advantages</b>		
	Possibly Maximizing short term gain	Limit potential loss and the danger of a walk-way	Limit potential loss, the danger of a walk-away and create future opportunities
	<b>Legal implications</b>		
	Probably none	Probably none	Possibly long term contract
	<b>Financial implications</b>		
	Possible loss	A deal with limited loss, if any	Optimized long term gains for both parties

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<p>What is our fall-back if our strategy does not work?</p>	<p>Typical Examples: - Revert to BATNA</p>	
<p>What are the most important items for inclusion on the agenda for the negotiation?</p>	<p>Typical Examples: - Price - Conditions - Terms</p>	
<p>When and in which venue will the negotiation take place? Why?</p>	<p>Typical Examples: - Next week, in our office. Gives us easy access to our documents and support staff.</p>	
<p>What timeframes and time pressures exist?</p> <p>How can the impact of these timeframes and time pressures be relieved/increased in relation to ourselves and the other party?</p>	<p><b>Us</b></p>	<p><b>The other party</b></p>
	<p>Typical Examples: - We have already harvested our perishable crop.</p>	<p>Typical Examples: - Have numerous other suppliers who have not yet harvested.</p>
		<p>Typical Examples: - Agree a combined approach with other producers.</p>
<p>What concessions and counter-concessions are we prepared to consider?</p>	<p><b>Our Concessions</b></p>	<p><b>Their Counter concessions</b></p>
	<p>- Price</p>	<p>- Terms</p>
	<p>- Delivery</p>	<p>- Conditions</p>
	<p>- Price</p>	<p>- Quality</p>
<p>Will we be making the first offer?</p> <p>What reasons do we have for making or not making the first offer?</p>		

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<p><b>What opening statement/offer do we intend making?</b></p>	<p>Typical Example:                      - We offer a package containing Price, Terms and Conditions to establish the link between these.</p>
<p><b>What do we expect the opening statement/offer/demand of the other party to be?</b></p>	<p>Typical Example:                      - That we deliver the product at their price and their terms and conditions.</p>
<p><b>What negotiation style and tactics do we envisage using?</b></p>	<p>Typical Example:                      - Mutual gains approach with non-adversarial, non-manipulative tactics.</p>
<p><b>What negotiation style and tactics do we expect the other party to employ?</b></p>	<p>Typical Example:                      - Aggressive style in which they try to manipulate us to accepting their price, terms and conditions.</p>
<p><b>On what basis have we selected the members of our negotiation team?</b></p>	<p>Typical Example:                      - We have deliberately selected one task, and one relationship negotiator, limiting our team to two.</p>
<p><b>Which negotiation role will each member play?</b></p>	<p>Typical Example:                      David: relationship negotiator.                      Lisa: task negotiator.</p>

# Examples of tactics, gambits and ploys

There are many tactics, gambits and ploys that are utilized in negotiation and included in this appendix is a comparatively brief summary of those which are most often experienced.

## THE NIBBLE OR ADD-ON

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### *Description*

A favorite technique used by sales persons immediately after they conclude a deal, is to add additional cost items to the deal.

Sales person: "With all the features the price is \$1 995."

Client: "Excellent! That is better than I thought."

Sales person: "Naturally \$50 for delivery and \$100 for installation needs to be added."

The sales person relies on the fact that once a deal is concluded the buyer will relax and therefore become highly susceptible to add-ons.

Some authors caution that this technique should be used sparingly, as it has the potential to be the straw that breaks the camels back.

In principled negotiation, all specific cost items should be placed on the table up front so that these can be dealt with openly. The nibble is not recommended when it adds significant additional cost.

Children are masters of the nibble.

The nibble is not the preserve of sales persons. Clients can also use it immediately after a deal is concluded by responding as follows:

Client: "Thank you. I'll take it, seeing this excellent price includes delivery and installation. "

Sales person: "Well it doesn't really, but I could probably arrange delivery and installation."

Client: "Brilliant!"

The client derives power from the fact that the sales person becomes highly vulnerable once the deal is concluded, as there is a reluctance to see all the hard work undone.

In the abovementioned example, the sales person could have countered by responding:

Sales person: "Come, you already have a great deal. Please be fair."

The client could then have countered:

Client: "Does this mean we start negotiating all over again?"

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*Suggested counter-tactics*

It often happens that just when the sales person thinks that full agreement has been reached and the client is ready to sign the contract, the client suddenly asks: "Transportation and insurance are included, are they not?"

At this point, the sales person naturally feels the urge to grant these final concessions for the sake of obtaining the final signature. Succumbing is, however, not the correct response. The sales person should rather choose the trading route by responding: "Where our contracts stipulate that we pay for transportation and insurance, there is an add-on of 3% to the price. The answer to your question is therefore yes, if you are willing to pay the extra 3%. We will then gladly cover the cost of these two items."

When a new request is suddenly raised, it is good practice to immediately enquire what the underlying interest/need is, as there may be a creative way of fulfilling it in a manner that does not unduly erode value for either of the parties.

Nibbling and other unpleasant surprises can be prevented by ensuring that what is included in a deal and what is excluded from a deal is explained as early as possible in the negotiation. This prevents a negotiator suddenly finding him-/herself in a position of psychological disadvantage.

## **FUNNY MONEY**

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### *Description*

After a buyer has, for example, negotiated a great deal on the purchase of a car the following could ensue:

Sales person: "You have made a truly outstanding purchase. Congratulations! All that now remains is for us to fill out the contract. Before we, however, do that I need to inform you that for a mere additional payment of \$50 per month you could be the proud owner of the classic model. For such a small increase in your installment, an increase you definitely will not even feel, it would be a real shame not to buy the top of the line. Don't you agree?"

Unless the buyer is very careful, he/she is likely to spend considerably more over the payment period than initially intended.

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### *Suggested counter-tactics*

The counter to the funny money approach is similar to that recommended in the case of the nibble.

## THE FLINCH

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### *Description*

Sales person: "So with all the abilities I demonstrated, your price is \$2 950?"

Client: "What! How much? \$2 900? That's a hell of a lot of money my friend."

Sales person: "Naturally that price includes a carry-in warranty and installation."

Client: "\$2 900 is still big money."

Sales person now makes a concession: "Naturally we will throw in some software for your new computer."

Failure to flinch in the case of a low offer, leads the party making the low offer to conclude that the other party has yet to reach its real base. This could then result in added pressure to lower the price even further.

By merely accepting an offer without flinching, an opportunity to achieve a better price is lost, leaving the other party feeling that it has not achieved an optimal outcome.

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### *Suggested counter-tactics*

Non-verbal reactions such as a sudden gasp for air and a facial expression of surprise and shock are commonly used as a means of flinching. Given that such reactions are often instantaneous, primarily visual and usually not immediately perceived as being flinching, makes them particularly dangerous. Such expressions of shock and disgust are often more believable than vocal utterances. Effectively combating flinching requires negotiators to constantly remain aware of the possibility of flinching, and to evaluate whether every expression or utterance conveys a genuine need or is a tactic designed to lower expectations. Identifying flinching is the best protection.

Since a flinch in essence is an expression of disappointment, a negotiator should use it as an opportunity to enquire what the cause for this reaction is, by asking: "I detect that you look surprised." "What is it you were expecting?" This reframes the interaction, placing the focus on the other party's unrealistic expectation, moving it away from your unrealistic price/terms.

## REFERRING TO HIGHER AUTHORITY

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### *Description*

Mandated authority presents itself in two main forms:

- The other party is only able to negotiate certain items, whilst others are fixed by a higher authority. Sometimes this is referred to as 'Limited Authority'.
- Final approval resides with a higher authority.

A good counter-strategy is to ask the other party, should you not know, who the decision-makers are and who has the authority to take final decisions. The time and energy invested in a negotiation could be wasted by not asking, as this would open a negotiator to the other party playing the higher authority card at a key point in the negotiation.

Although a negotiation may not start out with the final decision-maker present, it is not wasted time to first interact with a lower authority to build a relationship, as such persons often are able to exert considerable influence with higher level authorities. What is, however, essential, is that the lower level authority appreciates that at some point there will be the need to interact with those authorities that can conclude a final agreement.

In the example below the client should possibly have enquired who he/she would be required to speak to in the event of the repair bill not being acceptable, or have requested a signed quote upfront that he/she could compare with market trends.

Client: "I'm very unhappy with the repair bill for my car. It's absurdly high for the job you did! I refuse to pay."

Workshop manager: "What you must appreciate, Sir, is that I am only an employee. If you refuse to pay I am prevented from releasing your car. I have no authority to change the bill." (A very neat deferral.)

Client: "Who has the authority?"

Workshop manager: "The Service Director at our head office in Maputo"

*Suggested counter-tactics*

Negotiators can counter deferral as a ploy by probing for information relating to such decision-makers during the Negotiation Preparation Phase so as to be able to involve them in the negotiation if necessary.

**THE BOTTOM LINE**

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*Description*

Sales person: "Forgive me for taking this much of your time, but I am convinced this car is a real winner, is it not? It has all the bells and whistles!"

Client: "I sincerely appreciate the time you devoted, but this is not what I am after. I need something more practical and affordable." (Client gets up and starts moving away.) "Is this in all fairness, the best price for this car?"

Given that the sales person has invested much time and energy in securing this deal, it is understandable that he/she is concerned about translating this time investment into a deal. This concern could easily result in the sales person making a big concession as a last ditch effort to secure the deal.

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*Suggested counter-tactics*

A skilled buyer would respond as follows to such a bottom line concession: "I possibly reacted too hastily. Are you saying that the car is available for your latest price? "

## THE VICE

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### *Description*

Think of an art lover in an art gallery with the expectation of buying a painting for a good price.

Sales person: "Our very best price is £15 000."

Despite this price being lower than what the client expected, the client displays reluctance by responding with dismay and shock

Art Lover: "How much did you say? You will need to greatly improve on that!"

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### *Suggested counter-tactics*

No matter how good the response of the sales person is, the experienced buyer continues to apply the vice. A viable counter is for the sales person to reveal his/her bottom line immediately, or to respond with "Precisely how much better do you think I will need to do?" Responding in this manner not only compels the other party to spell out the expected concession, but also prevents the sales person from making an unnecessarily large concession

## GOOD GUY/BAD GUY

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### Description

Imagine a sales person and the owner of a property negotiating with the prospective buyer of this property.

Owner: "I apologies, but I am not prepared to spend more time on this negotiation. I am compelled to leave now, as I see no likelihood of a meaningful offer. Go well!" (Owner gets up and leaves, slamming the door on the way out.)

Sales person: "I apologies for my client's reaction. Although he's inclined to be a difficult person, it is still my wish that you will succeed in buying this property. I am going to see what I can do to ensure this."

Buyer: "Will you be able to change your client's mind?" (This poses a danger, as the buyer is in effect giving the sales person the right to take over the negotiation. This

could result in the buyer feeling committed to accept the deal the sales person is going to propose.)

The buyer's best counter response would be to inform the owner and the sales person that he/she is aware of the ploy being used, thereby nullifying the ploy.

*Suggested counter-tactics*

Despite extensive literature on this ploy, many negotiators still fail to detect it. Faced by two or more negotiators; one demanding concessions and the other showing compassion for the cause of the other party, negotiators are often, due to a natural inclination to reciprocate the kindness of the good guy, duped into doing something which is opposed to their best interests. Some negotiators have refined this ploy to the extent that not both the good and bad guys need to be present in the negotiation. They merely refer to this other guy and his/her demands for concessions, e.g. a boss.

What is crucially important is for negotiators to identify the use of this ploy immediately and to remember that good guy is a façade and is not honestly fighting their cause. The dynamics can often be changed by a negotiator pointing out this ploy in a friendly way and remarking "This reminds me of a wonderful interrogation scene from an old police movie where the good guy/ bad guy routine was brilliantly enacted. I know you guys would not intentionally be using this ploy, so should we not rather focus on the reason why are here today?"

An alternative approach would be to focus on the bad guy, ignoring the good guy, as the bad guy is the party whose interests need to be satisfied.

## THE SET-ASIDE RESPONSE TACTIC

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### *Description*

Picture a meeting where a procurement manager is negotiating with a representative from a printing firm.

Procurement manager: "We only do business with companies that give us a sixty-day payment period. I really do not understand why we are wasting our time when you cannot provide the same terms."

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### *Suggested counter-tactics*

The representative of the printing firm realizes that the negotiation is in danger of collapse even before it is possible to establish a relationship and get the issues into the open. In the case of an inexperienced negotiator, this could lead to an unwarranted concession or to the collapse of the negotiation.

An experienced negotiator would probably respond as follows: "Could we put this issue aside while we first try to establish whether there are other interests we both share?" (Using the put-aside suggestion strengthens the verbal request.)

## THE HOT POTATO

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### *Description*

The Hot Potato tactic relates to the childhood game in which a hot potato is passed from one child to another. Since a child cannot hold onto the potato for more than a moment, it is rapidly passed from one player to the next. The ownership of the responsibility for the hot potato is rapidly passed on to the next player. The underlying assumption is that no one wants to accept responsibility for wasting the food. The one who drops the hot potato is the loser.

In business literature, the "Potato" is referred to as the "Monkey", with the same principle applying.

Buyer: "I only have \$250 000 available." (The other party now owns the problem.)

## CONTRACT NEGOTIATIONS

To this, a skilled real estate professional would respond: "I fully grasp your situation. Were I therefore to find an excellent property that meets your needs, but is marginally beyond your budget, would you want to at least see the property, or should I only offer it to other buyers?"

A skilled real estate negotiator neatly passes ownership of the problem back to the buyer, thereby testing the validity of the buyer's statement about limited financial ability.

### *Suggested counter-tactics*

Very simple, pass it back to the other party!

## SPLITTING THE DIFFERENCE

### *Description*

Experienced negotiators know how to convince the other party to split the difference.

Buyer: "Your asking price is \$9 000 for this car, whereas I only have \$8 000. I am saddened by the fact that a mere \$1 000 prevents us from doing business. Would there be another way of ensuring that we are able to do business?"

Seller: "I definitely would like to sell my car to you. Could we split the difference?"

Buyer: "What do you mean? Are you proposing that we split the difference between your \$9 000 and my \$8 000, and that I therefore pay you \$8 500? Although this sounds perfectly fair to me, I first need to discuss this with my wife. Is it in order if I use your phone?"

Buyer after phone call to wife: "I did my best. It truly is a pity that we are unable to do business over a mere \$500." (The initial \$1 000 difference is now forgotten.)

Seller: "If we split the \$500, will that be acceptable?"

Buyer: "Do I understand you correctly that you are proposing we settle at \$8 250? Is that what you are saying?"

Seller: "Why not if that is acceptable to you?"

*Suggested counter-tactics*

A negotiator has two choices;

To allow the difference to be split a second time; or if \$8 500 is his/her Real Base to activate the BATNA!

**THE TRADE-OFF**

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*Description*

Printer: "We have a problem delivering the letterheads you requested by 30 July. I am afraid they will not be ready before 15 August. We regret this, but have done everything possible to meet your request. I trust this will be in order."

Skilled negotiator: (Sees this as an opportunity and understands the importance of stopping further erosion.) "I'm not at all sure. As you know we have very tight deadlines. I'll have to see what is possible. If I succeed I would need to know what you are going to do for me in return."

Printer: "I am not sure. What about the possibility of my providing you with an additional 1 000 copies at no cost?"

There are cases where it is appropriate to bank any 'debt' for use in future.

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*Suggested counter-tactics*

A printer who is a principled negotiation may have commenced this conversation by providing a sincere apology, thereby not incurring a penalty of the magnitude above.

## THE WALK-AWAY

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### *Description*

Once a negotiator becomes fixated in the sense that he/she must have something, there is a big erosion of power. To think along the lines of once-in-a-lifetime deals causes negotiators to become emotionally trapped and therefore unable to walk away if required.

The ability to walk away, although never lightly contemplated, constitutes real power in a negotiation.

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### *Suggested counter-tactics*

Should the Marketing Manager now reluctantly concede, the other party feels good at gaining what they "could not have".

A good counter to this ploy is to walk away as a test of the validity.

## WITHDRAWN OFFER

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### *Description*

This tactic is used at any time during a negotiation. The threat of withdrawing an agreement that has already been concluded is most often used when a party threatens to walk away from the negotiation.

Marketing Manager: "I regret to inform you that my sales manager has just informed me that I misquoted the price. What I quoted is far below the real price. I therefore have to withdraw the price I offered.

Buyer (frequent response): "I'm sorry; it's far too late now to retract! We accept your offer!"

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### *Suggested counter-tactics*

Similar to that suggested in the case of the Walk-Away above.

## WITHDRAWAL

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### *Description*

Withdrawal comes in two main forms:

Withdrawal of a previously agreed term or tentative agreement; or

Withdrawal from the negotiations altogether.

With the first, the other party will ask to draw back their side of an already agreed tentative agreement. Be careful to understand how circumstances have changed to justify their changed need. Consult your notes to see what you had promised in return, and remind them that you too will need to withdraw this item in return. Enquire as to what interests they are looking to satisfy, and look at together creating new options. Corporate negotiations are typically highly complex – requiring parties to sense when changes in circumstances and negotiating parties demand a re-visit.

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### *Suggested counter-tactics*

You will need to judge as to whether the second is a tactic or a real withdrawal. Listen very carefully to their wording to identify whether they are providing you with a conditional withdrawal. “We are going to have to break off discussions with your insistence on a 50% share in this venture!” Here you are given the 50% share condition/demand to overcome, without knowing their underlying interest. Start by pacing areas you know you are in agreement over. Your overarching reason for meeting, your sharing interests, and the areas agreed so far. Once you are both back in an agreement frame, enquire into why they don’t want you to have a 50% share. I may be that in China joint ventures are controlled by the government. Perhaps you can appoint the CEO whilst they appoint the Chairperson, and your decision making procedures allow you to veto any proposals despite their 51% share. They get the public perception of control, you get equal say.

## DELAYING & STALLING

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### *Description*

When one party deliberately employs delaying tactics, the other party should resist the temptation to focus on the behavior of that party, but should concentrate rather on the intention that underlies that behavior. Once a party understands that it is the underlying purpose of the other party to wear it down, force capitulation or achieve greater flexibility, this tactic is pretty easy to handle.

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### *Suggested counter-tactics*

The best counter to this ploy is to remain emotionally detached and resist deadlines whether self-imposed or imposed by the other party. Declaring to the other party that this tactic is known, and therefore will not succeed, is a highly effective response by the recipient party. Another very useful counter is for a negotiator to set the other party a deadline that is well within his/her own deadline.

## PRE-CONDITIONS

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### *Description*

Negotiators often acquire concessions by merely consenting to negotiate.

Manager: "If you give me the sole right to market your products we can talk, but only then."

The inexperienced negotiator easily falls prey to this tactic and then finds that his/her options are restricted even before the negotiations commence.

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### *Suggested counter-tactics*

Pre-conditions are best countered by simply ignoring them and putting aside the issues to which they relate.

## PERSONAL ATTACKS

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### *Description*

Personal attacks in a negotiation are often deliberate attempts to disrupt the other party and to cause that party to respond emotionally. Negotiators therefore constantly need to be careful not to be lured into emotional traps of this nature.

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### *Suggested counter-tactics*

Merely smiling when personal attacks are made is a very powerful way of stifling such attacks. They are often defused by also pointing out that such attacks are contrary to the mutual gains approach initially agreed.

## PRECEDENTS

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### *Description*

Employee: "Why must I? If John was not required to do it, why should I?" (Claims a precedent has been set in the past.)

Manager: "This is a new situation we have never experienced before. There are totally different circumstances." (The manager is not prepared to rationalize.)

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### *Suggested counter-tactics*

Valid precedents should be accepted.

Since prevention is better than cure, negotiators should avoid setting precedents.

## THE DECOY

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### *Description*

This ploy involves asking for something that you do not want and that you very well know the other party is unable to give, and then, when a negative response is received, following up with a request for a trade-off.

Manager: "I need these files within 30 days. (Knows that 90 days is the minimum time needed to fulfill this order.)

Sales person: "90 days is the minimum time we need."

Manager: "What! You are leaving me with a very costly problem. What must I do in the meantime? I cannot live with 90 days!"

Sales person: "I'll tell you-what we can do. I'm willing to give you a discount of 5c per file. What do you say?" (The sales person does not want to lose the deal.)

The 30 days was a mere decoy to secure a concession.

Two examples of how this can create a win-lose in their favor:

- First danger is of your making an exchange on an invalid interest of theirs, only later to have them drop this exchange from the deal – leaving you with an interest of yours that is not met, and them with a deal that satisfies all of their interests.
  - Second danger is for the other party to agree to 'forget' about their fictitious interests if you will forget about your real interests.
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### *Suggested counter-tactics*

There are various methods of handling this dishonest tactic. Your being thorough may be sufficient. So remember to get to their motivation for each interest by asking how each interest helps them. Then work together in ranking their interests. If you feel suspicious, trust your hunches and probe further, research more widely and withdraw to regroup.

## THE PUPPY DOG

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### *Description*

This description derives from the situation where the kids want a dog and the parents are very apprehensive.

Sales person in pet shop: "Take it home for the weekend and see if you like it." (The sales person knows that once the dog has been in the home for a weekend it will be nearly impossible to return it, as the other party will then be emotionally involved.)

Think of an estate agent that takes a photo of you, your wife and your children in front of a beautiful home and then gives it to you to take home.

Think of the photocopier the sales person places in your office with 'no obligation to buy'.

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### *Suggested counter-tactics*

The best counter is to not accept such offers or to avoid becoming emotionally ensnared and obligated.

## THE CALL GIRL

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### *Description*

The value of a service rendered diminishes very quickly after it has been delivered. When a concession is made it must therefore immediately be followed by a request for a counter-concession. To delay would mean allowing the value of the concession to diminish. This is the reason why fees are often negotiated up front.

### *Suggested counter-tactics*

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It is very important to remember that concessions prior to the commencement of a negotiation cannot be seen as part thereof.

## EXTREME OFFERS

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### *Description*

If you are the buyer, you will hear the seller ask for a lot more than you expected. If you are the seller, the buyer will offer you far less than you expected. The intention is to lower your expectations and thereby gain a concession without having to make one in return. The risk is that you will be offended and enraged, refusing to have any further dealings with the other party.

It's important to note that the other party's culture may dictate this tactic as standard practice. We are accustomed to extreme proposals. If the culture in which you must operate does not approve of extreme opening offers, then you are recommended to blend in and take advice on how to play by their rules.

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### *Suggested counter-tactics*

To generalize, in western countries, separate the person from their behavior or tactic. If you are surprised, show your surprise and allow yourself to laugh. This can diffuse the situation and facilitate a deal. An extreme counter-proposal is not generally recommended. Let the other side know that their expectations need to be adjusted, and use other deals as precedents to persuade them by how much.

## CHERRY PICKING

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### *Description*

Buyers can model their perfect deal through shopping around and getting many bids before coming to you. They may come to you with a proposal that fully satisfies their interests on price and discount structures, quality, service, timescales etc. Often they may tell you that "This is what the competition is offering us, so you'll need to at least match it!"

In reality they would have 'cherry picked' the most desirable offerings from each of your competition's proposals. This should be seen as an attempt at unethical framing.

*Suggested counter-tactics*

By asking exactly who you are being played off against, you are better able to satisfy your own interests. Enquire into who it was that offered them this dream deal, and whether this company indeed did offer them an identical deal to the one you have to beat. If it seems too good to be true you may be right! Take time out to do your market research and examine the named competitors standard conditions and current deals. If at all possible, talk with your competition.

Draw the other side's attention to the principle of trading and mutual concession making. Explain that in order to make the deal worthwhile you will need to gain something in return for varying your offer in favor of their cherry picked deal. Perhaps you will be the one with the challenging task of bringing this buyer's expectations back down to earth, and perhaps you will win the deal in so doing.

**COMPETITION**

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*Description*

The law of supply and demand comes to us in many guises. Similar to 'Cherry Picking' you may hear that your competitor offered the same deal for a lower price. You may be told that unless you meet their price the contract will have to go out for bids. More subtle, may be allusions to conversations or products of your competitors. Perhaps you will notice a competitor's product catalogue on their desk with post-it notes marking several pages.

Often you will be faced with a generalization of "Everyone else is providing this service as standard". Of course you will want to challenge this generalization immediately, lest it sticks and they start believing their own claim. Ask exactly whom they have spoken with, and then proceed to compare your offering to the other party in detail. Do not take their word for it; make your own enquiries if you do not already know what your competition is offering.

*Suggested counter-tactics*

First establish exactly how comparable your competitors' offering really is. Quality, volume, service, delivery, time-scales and payment terms need to match to make for a meaningful price comparison. Very rarely will your offering be totally undifferentiated from the competition. Ideally your due diligence preparation would have armed you with information on your competitors value proposition. Work in order to differentiate your offering so as not to be commoditized and beaten down on price.

**LIMITS**

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*Description*

Limits range from money, to time (deadlines as mentioned above), to capacity, to personnel and more. The most feared limit to a sales person is limited money.

Buyer: "We love you, your product and organization - we just can't afford to pay more than \$500."

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*Suggested counter-tactics*

1. If you can deliver within their stated limit, ensure that you apply the trading principle and get something back for making this concession.

Seller: "If I sell at \$500, then you will need to lower your expectation on quality and pay on delivery."

2. Another means of dealing with Limits is to attempt to reframe. The literature effectively shows that when the risk of losing a valuable product or service is fully understood, the effects of limits are better grasped.

Seller: "Yes we do need to work within your budget. But let us also remember that we are limiting the number of transactions, thereby saving your company considerable expenditure. So the real cost isn't \$500, it's \$500 less the saving that we are helping you to achieve! Take it or leave it!"

## THE BLUFF

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### *Description*

This tactic is confrontational and sometimes even hostile. Focus on the interest behind the demand, and then work together with the other party to create options that allow the interest to be met in another way.

“The workers won’t accept less than a 2% increase in salary, take it or leave it!” can be met with “I understand the workers need 2% more in salary, so please help me to understand what they will be doing with 2% more?”

It may be that this money would go towards their retirement plans. If so, the company could offer to increase the pension contributions to meet the desired security levels. Until you know why they want a 2% rise, you are not in any position to create alternatives.

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### *Suggested counter-tactics*

If you suspect a bluff, a good way to expose the bluff is to ask “If we were to agree to your demand, then would you be prepared to sign the contract here and now?” If you don’t ask this question, you run the risk of making a concession only to face another demand. Often you will flush out more of their interests through asking this question.

Similar is “You are going to have to do better than that!” Again, we recommend your asking: “How much better, and if we do, will you be willing to sign here and now?” You are not committing yourself, but merely exposing their intentions. Another response is to use the trading principle: “If we reduce your price, then we need you to increase your order.”

## POWER OF PRINT & POLICIES

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### *Description*

We tend to lend the written word and company policies more weight and credibility than the spoken word and requests. For this reason we recommend that you list your prices in writing rather than mentioning them verbally. Written words are viewed in the light of enhanced legitimacy, and are therefore less often challenged

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### *Suggested counter-tactics*

If you are presented with a price or company policy, ask who originally formulated the price or policy, and what interests it was intended to serve. They may not have thought about this policy before, and may realize that it is either defunct or does not apply.

If you are shown a list of client company names, choose a couple of companies and ask for details of what work they did, when, what the results were, whether they have testimonies to show.

## APPEAL TO EMOTIONS OR MORALS

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### Description

You will hear the other side framing their appeal as being the 'fair' or 'right' way. By so doing the result is that by disagreeing with their proposal, you run the risk of being branded 'unfair' or 'wrong'.

"If we agree to pay in 30 days, then it's only fair that you let us have our standard 5% discount."

"Let's be fair and share the costs on this."

"If I take this deal back to my boss, he will chew my ear off! Can you please help me out just a little?"

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### Suggested counter-tactics

Remind the other party that you earned your trusted position through trading in

negotiations. If you make this concession for them, you will need a concession in return. If there are interests of yours that are not fully met, now is the time to bring them up. “If I give you a discount of 5%, then I need you to add product group Y to this order.”

The moral appeal could mask an interest that has yet to be fully satisfied. In the third example you could enquire “So what interests would your boss want met, can you rank them?”

## APPEALING TO AUTHORITY

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### *Description*

This is also known as ‘Name Dropping’. The other party may mention having done business with a VIP or an esteemed company. Alternatively they may display in their office pictures of themselves shaking hands with great leaders, such as Nelson Mandela. The danger lies in the human tendency of wanting to do business with people who are well connected.

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### *Suggested counter-tactics*

Most important is to recognize what is happening and not to allow yourself to be influenced or swayed to treat this person any differently than you would have done without this information.

If you think they are stretching the truth, enquire into what they did with the person or company, be interested and ask for details. If they mention a company ask for the name and position of the person they dealt with. If they become vague or change the topic you can draw your own conclusions.

## DEFAULT

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### *Description*

The default tactic tests your thoroughness and diligence. You are given a benefit such as extra service or more of the product, along with a contractual term or note saying that they assume these terms are to your liking. The responsibility rests on you to get in touch with the other party and explain that you did not ask for these additional products or services. If you are lazy and do not read all communication, or do not take action, you will be setting a precedent of tacit agreement that is difficult to escape from at a later stage.

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### *Suggested counter-tactics*

It is best to be firm when responding to a default tactic. Let the other party know that you understand the intention behind the products, and that you would value them clearing all variations to the agreement personally.

## DELIBERATE MISTAKE

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### *Description*

This tactic plays on your ethics or lack thereof. You may be baited with a contract or offering that is clearly to your advantage – contrary to your discussions. The danger lies in your eagerly signing before the other party realizes their error or omission, only to have this matter brought to your attention and corrected later on. This tactic, as with the others, has a way of boomeranging to catch up with you in the medium- to longer-term.

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### *Suggested counter-tactics*

It is recommended that you point out the error or omission as soon as you notice it.

## PLANTED INFORMATION

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### *Description*

In general, it is human nature to trust what we have learned about the other party by coincidence, over what the other party is telling is about themselves. It is largely for this reason that (friendly) mergers and acquisitions (M&A) are often only announced shortly before being agreed between parties. The risk exists of the press publishing an unfounded and speculative article, thereby shooting holes in the trust that has steadily been building between companies and their shareholders. There are many case histories documenting how one side 'leaked' information to the press in order to tilt the M&A negotiation in their favor.

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### *Suggested counter-tactics*

As far as is practical, research the information at your disposal, and resist reacting on the spur of the moment. If you have a good relationship with the other party, you can save a lot of time by sharing the information with them face-to-face, and asking for the truth behind it. If they verify the rumor to be true, ask for their sources.

## RELYING ON AUTHORITIES

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### *Description*

Parties sometimes use authorities as a means of gaining an advantage in a negotiation, as this tactic often results in the other party then accepting their views as credible and valid. Even when the authority is questioned, this tactic still serves to create a compelling frame. The use of authorities is only appropriate when the issue in question requires specialized knowledge or skills that the ordinary person does not possess.

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### *Suggested counter-tactics*

If the issue is not a technical one, if it is a matter of common sense, or if it is a value judgment, a political view, or an observation about human nature, this should be openly declared to all parties, thereby exposing this manipulative tactic.

## FOOT-IN-THE-DOOR

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### *Description*

Negotiators encourage the other party to agree to a small, rather insignificant request, and then follow this up with a larger and more important request after agreement to the small request has been obtained. The rationale being that by agreeing to a small request, negotiators positively alter their self-perception. Because they start to see themselves as co-operative, they experience psychological pressure to agree to larger requests to maintain this positive self-image.

55% of farmers who had agreed to answer a question (a small request) later agreed to respond to a full questionnaire (large request) requiring two hours of their time. This finding strongly contrasts with the 17% level of agreement for farmers who had not been confronted with the small request prior to the bigger request.

A clever way of using this tactic is for negotiators to initially suggest, "Let us start by agreeing in principle", and then at a later stage substantially increasing the request. Alternatively, a negotiator could start out by proposing to a retailer that they test the market for the product or service at no promotional cost initially and that, depending on customer reaction, they thereafter discuss payment and a permanent relationship.

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### *Suggested counter-tactics*

Negotiators need to be consistently aware that small requests are often followed by larger requests, and that this is a tactic frequently employed in negotiations. Should they be subjected to this tactic, they should declare that they deal with each request on its own merit.

## DOOR-IN-THE-FACE/BANANA TECHNIQUE

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### *Description*

This is the reverse of the foot-in-the-door technique. In this case, the negotiator makes a large request and then follows it up with a smaller request that is still larger than the other party anticipated. The rationale is based on the negotiator being so taken aback by the first large offer, that the second smaller offer looks much more reasonable than it really is, and he/she is therefore inclined to accept the latter offer. It has been found that when persons are asked to contribute a considerable amount of time to a good cause, most refuse (75%), but when the same person is later confronted with a smaller request of the same kind after the larger request, some 50% agree to the smaller request.

Union negotiators often use this technique when they start out by asking for a salary increase of more than twice the inflation rate, and then settle for considerably less. Although the union negotiator knows that the initial request is very unlikely to succeed, this is a deliberate strategy to gain room for a concession that the other party will see as an acceptable compromise; the revised request being small in relation to the initial request.

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### *Suggested counter-tactics*

Negotiators need to be consistently aware that large requests are often followed by smaller requests, and that this is a tactic frequently employed in negotiations. Should they be subjected to this tactic, they should declare that they deal with each request on its own merit.

## LOW-BALLING

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### *Description*

This is a hooking technique. A first, “cheap” offer is made, which the negotiator has no intention of remaining with. As soon as the other party accepts this first offer, it is immediately followed up by incremental increases, which the “hooked” party is then likely to accept.

Motorcar sales persons often employ this tactic when they initially, unknown to the prospective buyer, quote the buyer the price for the most basic model, while showing the buyer a model with a full house of accessories. Only once the buyer is psychologically ‘hooked’, do they reveal that key items such as a radio, air conditioner, airbags, metallic paint, etc. are not included at the quoted price. They then skillfully shroud the effect that the cost of these items would have, by contrasting the ‘limited impact’ their individual cost would have in terms of the basic price and the monthly installment payable over 60 months.

Another example of this technique involves a ‘bland withdrawal’ where a computer salesperson for example convinces an organization that its information technology equipment needs replacing; stressing the many benefits new computers could have in terms of increased productivity and profitability. Initially the sales person intimates a ‘low ball’ price that is extremely favorable to the organization as a way of getting the responsible manager to evaluate the new computers and enter into a negotiation about a potential agreement. Once the manager agrees to a deal at the quoted price, the sales person informs the manager that there seems to be a misunderstanding about the price, as the so-called quoted price is either totally out of sync with list prices (then provided in hard copy to the manager), or that his management (external factor) has unfortunately just informed him/her of an increase in the price of the computers. The rationale is that, if the increase in the price of the computers is reasonable, the manager will go ahead with the deal, given the time and energy invested thus far in the negotiation. Furthermore, there is also the difficulty people have in rejecting something to which they have agreed.

A further permutation is known as the so-called Caesar’s declaration, where a union for example agrees to a wage agreement, but immediately requests the management to add a small something extra that they can take back to their members; the cherry on the top. In most cases management complies to ensure good future relations.

Suggested counter-tactics

Negotiators need to be consistently aware that small offers are often followed by incrementally bigger offers, and that this is a tactic frequently employed in negotiations. Should they be subjected to this tactic, they should declare that they deal with each offer on its own merit.

## MESSAGE STRUCTURE

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*Description*

Negotiators are not only influenced by what is said, but also by the way in which words and sentences are arranged.

Negotiators should therefore pay attention to the following principles:

- When a negotiation contains new information on an issue important to the other party, the negotiator should place the most persuasive information towards the end of the message.
- Where a negotiator is of the opinion that the other party will be positively inclined towards a message, the most important points should come first in the message.
- When a negotiator is unsure about the other party's interests or whether the other party is familiar with the certain arguments, strong points should be at both the beginning and the end of the message.
- Important points should be made early in a message when the topic is known, interesting and/or controversial to the other party, the rationale being that the first item to be mentioned in a long list of items is the most likely to be remembered.
- Conversely, when a topic is unfamiliar, uninteresting or unimportant to the other party, the most crucial points should be towards the end of the message to as the most recently mentioned item is then most likely to be remembered.

## ONE- & TWO-SIDED MESSAGES

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### *Description*

One sided messages cover only one party's perspective, whereas two-sided messages are specifically designed to also take into account the perspective of the other party, e.g. "Although we know that building this road will definitely be to the benefit of all motorists and the economy, we understand that the prospect of a new highway could be very disconcerting to you, as you chose this area for the peace and quiet it would provide. Our intention is to build this road in such a way that it will have the least environmental impact."

- Negotiators use two-sided messages in the case of an educated other party, mentioning and criticizing the competition.
- Two-sided messages are preferable when the other party disagrees with an option posed by a negotiator.
- Two-sided messages are more effective in convincing the other party when that exposing that party to arguments or points of view that differ from that which it advocates.
- One-sided messages are more effective when the other party already agrees with the negotiator.

When presenting two-sided messages the preferred arguments should be mentioned last

## REPETITIVE SUMMARIES

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### *Description*

Research stresses the importance of negotiators restating points of view to change opinions, but warns that overuse of this technique could rapidly diminish its effectiveness.

It has been found that when negotiators at regular intervals during a negotiation summarize the negotiation up to that point, and draw explicit conclusions on behalf of the other party, achieving an agreement is meaningfully enhanced.

## PARAPHRASING

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### *Description*

Paraphrasing is a very powerful tool in negotiation, as it helps to confirm that the parties understand each other accurately. It is therefore suggested that negotiators regularly use the following type of introductory sentence, "Let me see if I understand the point you have just made and where it takes us in this negotiation."

## COGNITIVE DISSONANCE APPROACH

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### *Description*

Any negotiator whose behavior is inconsistent with his values, experiences cognitive dissonance that creates psychological tension that a negotiator feels compelled to remove.

Two ways of removing such dissonance are:

- Adding a positive cognition
- Changing the dissonant cognition so that it is no longer inconsistent.

Where an ultra-left wing union representative negotiates with an ultra-right wing

## CONTRACT NEGOTIATIONS

manager about racism and equal treatment for staff, the conservative manager experiences dissonance and has the following choices to reduce this dissonance:

- Change his attitude about other races;
- Add new information to back up his view on other races;
- Disregard the union request as a ploy to antagonize management; or
- Remove himself from the negotiation.

If the facts supporting the union's demands were to prove that the management has acted illegally, and a strike or other industrial action could follow if matters are not rectified, the manager's opinion but also the interests of the company would be at stake.

The union representative should continue arguing his case until the manager agrees to change the system, thus providing for equal treatment of staff, as the only way the manager can reduce his dissonance is to justify such an agreement by changing his attitude towards other races.

Based on the insights gleaned from research regarding cognitive dissonance, negotiators should encourage the other party to indulge in actions that are contrary to its usual behavior as a way of inspiring attitudinal change by, for example:

- Encouraging the other party to agree to a further meeting;
- Inviting the other party to dinner;
- Getting the other party to agree to a small pilot agreement to pave the way to a full scale agreement;
- Inviting the other party to visit your headquarters;
- Issuing a joint media statement;
- Inviting the other party to a sporting occasion; and
- Encouraging a trial of the product or service.

## LABELLING

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### *Description*

Labeling implies that a person's self-image can be reinforced, eroded or changed by providing that person with a name or label, as this tends to encourage behavior that is consistent with such a name or label.

---

### *Suggested counter-tactics*

Because of the tendency for labels to become self-fulfilling prophecies, negotiators need to be very cautious about the labels they apply to the other party as well as those applied to them. Whereas positive labels can inspire or strengthen positive attitudes and behavior, negative attitudes can entrench negative behavior and prevent the other party from implementing its desire to act in a co-operative manner. Negative labels should therefore be rejected in a sensible way, explaining the effects that such labels can have.

## VIOLATION OF EXPECTATIONS

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### *Description*

Violation of expectations occurs when a party expects a particular style of negotiation from the other party and then encounters an entirely different style. When a negotiator expects an aggressive style, but is confronted by a softly spoken party, this could result in significant attitudinal change, e.g. Nelson Mandela's conciliatory approach when released from 25 years of incarceration. Contrary to the expectation that he would seek revenge, he preached a sermon of forgiveness for which white South Africa was totally unprepared. This so surprised them that he instantly became the role model to which all South Africans aspired. He single-handedly changed apprehension and fear to enthusiastic co-operation.

The aforementioned could be reversed where negotiators expect a quiet, rational negotiation and are then confronted by a passionate, emotional party, finding themselves totally unprepared to deal with such persuasive power.

CONTRACT NEGOTIATIONS

**STANDARD SUPPLY CONTRACT**

Dated at ..... this ..... day of ..... 2006

[insert name of party]

AND

[insert name of party]

**SUPPLY CONTRACT**

---

**THIS AGREEMENT** made the ..... day of ..... Two Thousand and ..... **BETWEEN** [name of party] of [address], (hereinafter referred to as the “Buyer”) of the one part and [name of party] of [address] (hereinafter referred to as the “Grower”) of the other part (all hereinafter jointly referred to as the “Parties”).

**WHEREAS:**

- A. The Parties are desirous of entering into an agreement whereby the Grower will grow [insert details of crop to be grown] and the Buyer shall purchase the said crop under the following terms and conditions.
- B. The Parties wish this transaction to be governed by this Agreement:

**NOW IT IS HEREBY AGREED** as follows:

**1. DEFINITIONS**

Unless the context otherwise requires, in this Agreement:

‘**Agreement**’ means this Agreement entered into between the Grower and the Buyer;

‘**Crop**’ means [specific details of crop to be grown].

‘**Dollars**’ or the sign ‘**US\$**’ means the lawful currency of the United States of America;

‘**Inputs**’ means the inputs to be provided by the Buyer to the Grower pursuant to the terms of this agreement;

‘**Parties**’ means the Grower and the Buyer;

**2. APPOINTMENT**

- 2.1 The Buyer shall contract the Grower to grow [specify hectareage to be grown] of [specify the crop to be grown].

**3. PERIOD**

- 3.1 This agreement shall be deemed to have commenced with effect from the [insert date of commencement] and shall continue thereafter for a period of [insert contract period] or otherwise pursuant to the termination clause in terms of Clause 10.

## CONTRACT NEGOTIATIONS

### **4. UNDERTAKINGS AND OBLIGATIONS OF THE BUYER**

- 4.1 The Buyer hereby makes the following undertakings:
  - 4.1.1 To supply seed and chemicals to the Grower and to furnish the Grower with invoices in respect of the same.
  - 4.1.2 To supply the Grower with the predetermined selling price of the Crop as provided by the market which price shall also vary from time to time as determined by the market and communicated to the Grower by the Buyer in writing;
  - 4.1.3 To provide agricultural officers on a regular basis to advise upon the growing of the Crop and the chemical requirements;
  - 4.1.4 To provide suitable package for the Crop upon the same being harvested; and
  - 4.1.5 To collect the Crop from the Grower upon the same being harvested and packed.

### **5. UNDERTAKINGS AND OBLIGATIONS OF THE GROWER**

- 5.1 The Grower hereby makes the following undertakings:
  - 5.1.1 To receive and use for the purposes of growing the Crop all the seed and chemicals as provided by the Buyers;
  - 5.1.2 To use only certified seed as provided by the Buyer;
  - 5.1.3 To keep pesticide records up to date;
  - 5.1.4 [insert all requirements and specifications necessary to grow and harvest the Crop];
  - 5.1.5 To supply the entire Crop to the Buyer.

### **6. OWNERSHIP OF THE CROP AND RISK**

- 6.1 The Parties hereby agree that ownership of the Crop shall pass to the Buyer upon the same being loaded onto the Buyers trucks for onward transportation.
- 6.2 Risk in the Crop shall pass from the Buyer to the Grower upon delivery of the seed to the Grower and shall remain with the Grower during the growing period of the Crop. Risk shall pass to the Grower upon collection by the Grower of the Crop.

### **7. CONTRACT PRICE**

- 7.1 The Grower shall be paid the purchase consideration in respect of the supply

## APPENDICES

of its entire Crop at such prices as agreed upon between the Parties and as specifically referred to hereinafter in Schedule One.

### **8. RE-PAYMENT BY THE GROWER OF COST OF INPUTS**

- 8.1 Upon collection of the Crop the Buyer shall issue the Grower with a final reconciled invoice for the inputs supplied to the Grower to assist in the production of the Crop, which shall reflect the Growers total indebtedness to the Buyer.
- 8.2 The amounts owing in respect of these invoices shall be deducted by the Grower from the total price owing to the Grower in respect of the delivery of the Crop.
- 8.3 Within 7 days of collecting the Crop the Buyer shall supply the Grower with a final reconciled account and shall effect payment of the amount due by way of check or cash payment.
- 8.4 In the event that the Grower is indebted to the Buyer after the final calculation is made, such indebtedness shall be reimbursed to the Buyer within 30 days after the delivery by the Buyer of the final reconciliation.

### **9. PRICE REVIEWS**

- 9.1 Price reviews will be subject to negotiation between the Parties subject to changes that may fundamentally affect the price structure.
- 9.2 Any agreement with regard to price variations shall be evidenced in writing, a copy of which shall be attached to this Agreement.

### **10. TERMINATION**

- 10.1 Notwithstanding any other provisions of this Agreement the Parties hereto may terminate this Agreement forthwith by mutual consent and either of the Parties hereto may terminate this Agreement forthwith by notice in writing served on the others at any time if:
  - 10.1.1 Either of the Parties is dissolved, placed into liquidation or placed under Receivership whether provisional, or final, voluntary or compulsory;
  - 10.1.2 Either of the Parties has committed a material breach of any provision of this Agreement and has failed or neglected to remedy such breach within thirty (30) days of receipt of a written notice informing of that breach;
  - 10.1.3 The Grower has failed to plant the Crop; or
  - 10.1.4 The Buyer has failed to supply seed and inputs to the Grower.

**11. RIGHTS OF TERMINATION**

11.1 No termination or discharge of this Agreement shall prejudice or affect the remedies of any of the Parties in respect of any antecedent breach of any provision of the Agreement.

**12. INDEMNIFICATION**

The Buyer shall keep the Grower indemnified against all damage, actions, claims, costs and proceedings arising out of anything done in good faith pursuant to this Agreement

**13. CESSION**

Neither of the Parties shall cede or assign any of their rights and obligations hereunder without the prior written consent of the other Parties.

**14. GOVERNING LAW**

This Agreement shall be governed and construed in accordance with the Laws of [insert name of Country].

**15. ARBITRATION**

15.1 Should any dispute or difference arise of any kind whatsoever between the Parties in connection with or arising out of this Agreement, or in respect of the breach thereof, it shall be first referred to an arbitrator to be agreed upon by the Parties hereto within 30 days from the date of the dispute and should the Parties be unable to agree on such an arbitrator, then the arbitrator shall be appointed by:

- (i) In the case of a financial dispute, the President of the Institute of Certified Accountants in [insert name of Country];
- (ii) In the case of a legal dispute, the Chairman of the Law Association of [insert name of Country]; and
- (iii) In the case of a technical dispute, the Chairman of the [insert name of Country] National Farmers Union.

Provided that any such arbitrator appointed in terms of the above mentioned provisions shall have at least 10 years professional experience.

15.2 The terms of the arbitration shall be governed by the Arbitration Act of the Laws of the Republic.

## APPENDICES

15.3 At all times during the Arbitration proceedings arising from a breach of this Agreement, both parties shall continue to perform their obligations under this Agreement.

### **16. FORCE MAJEURE**

16.1 Force Majeure shall mean any act of God, war and other hostilities, invasion, blockade, mobilization, rebellion, revolution, insurrection, military or usurped power, civil war, riot, commotion or disorder, strike or labor dispute or any other cause whether of the kind specifically enumerated above or otherwise which is not reasonably within the control of the Party claiming force majeure.

16.2 Neither of the Parties shall be considered to be in default or in breach of its obligations under this Agreement to the extent that performance of such obligations is prevented by any circumstances of Force Majeure, which may arise after the execution of this Agreement.

16.3 If any of the Parties considers that any circumstance of Force Majeure has occurred which may affect performance of its obligations, they shall immediately notify the other Parties.

16.4 Upon the occurrence of any circumstance of Force Majeure the Grower and/or the Buyer shall endeavor to perform its obligations under this Agreement so far as is reasonably possible. The Grower shall notify the Buyer and the Buyer shall notify the Grower and of the steps it proposes to take including reasonable alternative means of performance, which is not prevented by the Force Majeure.

### **17. NON-RESTRAINT**

17.1 [Where the Grower meets its contractual targets to supply the Crop to the Buyer, the Grower shall be at liberty consistent with its obligations hereunder to supply the balance of the Crop to other interested Parties.]

OR

17.1 [The Grower shall not supply any part of its Crop to any other person other than the Buyer herein]

### **18. NOTICES**

18.1 Any notices or other communication to be served under this Agreement must

CONTRACT NEGOTIATIONS

be in writing and may be delivered or sent by pre-paid post or facsimile transmission to the Party to be served at the Party's address or at such other address or number as that Party may from time to time notify in writing to the other Party to this Agreement.

18.2 Any notice or document shall be deemed served:

- (i) if delivered at the time of delivery provided that, if delivery takes place after 17.00 hours on a business day or on a Saturday, Sunday or statutory holiday, delivery shall be deemed to have taken place on the next business day;
- (ii) if posted, ninety-six hours after posting; and
- (iii) if sent by facsimile transmission, at the time of transmission if before 17.00 hours on Monday to Friday (other than statutory holidays) or otherwise on the next succeeding banking business day.

18.3 In proving service (without prejudice to any other means) it shall only be necessary to prove:

- (i) by post, that the notice or document was contained in an envelope properly stamped and posted as provided in Clause 18.1.
- (ii) by facsimile transmission, that the notice or document was duly received by production of a copy of the facsimile bearing the addressee's answerback code or automatic record of correct transmission.

**IN WITNESS WHEREOF** the Parties hereto have caused their respective Common Seals to be hereunto affixed the date and year first before written.

The Common Seal of

**[name of Buyer]**

Was hereunto affixed

In the presence of:

DIRECTOR:

SECRETARY:

Signed Sealed and Delivered

by the said **[name of Grower ]**

at this day of 2006

Witness:

Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Address: \_\_\_\_\_

APPENDICES

**STANDARD LOAN AGREEMENT**

Dated at ..... this ..... day of ..... 2006

[insert name of party]

AND

[insert name of party]

## CONTRACT NEGOTIATIONS

**This agreement** is made the ... day of ..... Two Thousand and [ ]

**Between:**

[Name] of [Address] (hereinafter referred to as the 'Lender'); and

[Name] of [Address] (hereinafter referred to as the 'Borrower').

**Whereas**

- A. The Borrower has requested the Lender to lend to him monies in united states dollars upon the undertaking, inter alia, to make repayment in united states dollars ; and
- B. The Lender has agreed to lend to the Borrower the monies requested on the terms and conditions herein contained.

**Now it is hereby agreed** as follows:

**1. Interpretation and definitions**

- 1.1 Unless the context otherwise requires, in this Agreement
  - 1.1.1 if figures are referred to in numerals and words, the words shall prevail in the event of any conflict between the two;
  - 1.1.2 where the day upon or by which any act is required to be performed is a Saturday, Sunday or public holiday in [insert country name], the Parties shall be deemed to have intended such act to be performed upon or by the first day thereafter which is not a Saturday, Sunday or public holiday;
  - 1.1.3 words and/or expressions defined in any particular clause in the body of this Agreement shall, unless the application of such word and/or expression is specifically limited to that clause, bear the meaning so assigned to it throughout this Agreement;
  - 1.1.4 the contra proferentem rule shall not apply and accordingly, none of the provisions hereof shall be construed against or interpreted to the disadvantage of the Party responsible for the drafting or preparation of such provision;
  - 1.1.5 **"Agreement"** mean this agreement and any variations or extensions;  
**"Business Day"** means a day on which commercial banks are generally open for business in [insert country name];  
**"Effective Date"** means the date of execution of this Agreement;

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“**Loan Amount**” means the principal amount provided for at clause 2.1;  
“**Party**” means any one of the Parties;  
“**Parties**” means the Lender and the Borrower;  
“**Repayment Date**” means such date within one (1) month from the Effective Date.

### **2. Loan commitment and interest**

- 2.1 Subject to the terms of this agreement, the lender shall lend and the Borrower shall the sum of [ insert sum] [insert currency in writing]([insert currency abbreviation, e.g. USD) (the “Loan Amount”).
- 2.2 Interest on the Loan Amount shall be payable at the rate of [insert interest in writing] Per Centum ( [insert interest in digits]%) per month on the Loan Amount which for the avoidance of doubt shall [ insert sum] [insert currency in writing]([insert currency abbreviation, e.g. USD).

### **‘3. Repayment**

The Loan Amount shall be repayable within or on the Repayment Date in full in United States Dollars.

The interest payable in terms of clause 2.2 shall be payable in United States Dollars free and clear of all taxes and payable at the end of each month for so long as the Loan Amount remains outstanding and shall be calculated on the full Loan Amount notwithstanding an repayment of part of the Loan Amount.

### **4. Default**

- 4.1 The Borrower shall be in default if he does not pay on the due date any amount payable by it under this Agreement and in the currency in which it is expressed to be payable unless the failure to pay such amount is due solely to administrative or technical delays in the transmission of funds which are not the fault of the Borrower and such amount is paid within three (3) Business Days after its due date for payment; or

### **5. Breach**

- 5.1 In the event of Borrower committing a breach of clause 4.1 or any of the provisions of this Agreement and failing to remedy such breach within a period of two (2) days after receipt of a written notice from Lender calling

## CONTRACT NEGOTIATIONS

upon the Borrower to so remedy then the Lender shall be entitled, at his sole discretion and without prejudice to any of its other rights in law, either to claim immediate payment and/or performance by the Borrower of all of the Borrowers obligations under this Agreement, whether or not the due date for payment and/or performance shall have arrived.

- 5.2 All costs, charges and expenses of whatsoever nature which may be incurred by the Lender in enforcing its rights in terms hereof including legal costs, irrespective of whether any action has been instituted shall be recoverable from the Lender against which such rights are successfully enforced.

### 6. **Domicilium citandi et executandi**

- 6.1 The Parties choose as their domicilia citandi et executandi for all purposes under this Agreement, whether in respect of payments, court process, notices or other documents or communications of whatsoever nature the following addresses:-

**THE LENDER** [Address]  
[E-mail:]  
[Fax No:]

**THE BORROWER** [Address]  
[E-mail:]  
[Fax No:]

- 6.2 Any notice or communication required or permitted to be given in terms of this Agreement shall be valid and effective only if given in writing but it shall be competent to give notice by e-mail or fax, provided receipt is received confirming due completion of transmission.
- 6.3 The Lender may by notice to the Borrower change the physical address chosen as its domicilium citandi et executandi to another physical address in [insert country], e-mail address or its fax number, provided that the change shall only become effective upon receipt of the notice by the addressee.
- 6.4 Any notice to the Borrower which is:-
- 6.4.1 sent by prepaid registered post in a correctly addressed envelope to it at its domicilium citandi et executandi shall be deemed to have been received on

## APPENDICES

- the 10th day after posting (unless the contrary is proved); or
- 6.4.2 delivered by hand to a responsible person during ordinary business hours at its domicilium citandi et executandi shall be deemed to have been received on the day of delivery; or
- 6.4.3 transmitted by e-mail or fax to its chosen fax number stipulated in 6.1 above, shall be deemed to have been received on the date of dispatch (unless the contrary is proved).
- 6.5 Notwithstanding anything to the contrary herein contained, a written notice or communication actually received by the Borrower shall be an adequate written notice or communication to it notwithstanding that it was not sent to or delivered at its chosen domicilium citandi et executandi.

### **7. Miscellaneous**

- 7.1 The Parties acknowledge and agree that:-
- 7.1a this Agreement constitutes the entire contract between them and that no provisions, terms, conditions, stipulations, warranties or representations of whatsoever nature, whether express or implied have been made by any of the Parties or on their behalf except as are recorded herein;
- 7.1b no relaxation, extension of time, latitude or indulgence which the Lender may show, grant or allow to the Borrower shall in any way constitute a waiver by the Lender of any of the Lender s rights in terms of this Agreement and the Lender shall not thereby be prejudiced or stopped from exercising any of its rights against the Borrower which may have then already arisen or which may arise thereafter;
- 7.1c no alteration, variation, amendment or purported consensual cancellation of this Agreement or this clause 7 or any deletion there from shall be of any force or effect unless reduced to writing and signed by or on behalf of the Parties hereto;
- 7.1d they have undertaken to each other to do all such things, take all such steps and to procure the doing of all such things and the taking of all such steps as may be necessary, incidental or conducive to the implementation of the provisions, terms, conditions and import of this Agreement;
- 7.1e No Party shall be entitled to cede, assign or otherwise transfer any of its rights, interests or obligations under and in terms of this Agreement without the prior written consent of all of the other Parties;

## CONTRACT NEGOTIATIONS

### **8. Force majeure**

- 8.1 Force Majeure shall mean any act of God, war and other hostilities, invasion, blockade, mobilization, rebellion, revolution, insurrection, military or usurped power, civil war, riot, commotion or disorder, strike, labor dispute or other industrial dispute except where solely restricted to the employees of the Contractor, or any other cause whether of the kind specifically enumerated above or otherwise which is not reasonably within the control of the Party claiming force majeure.
- 8.2 Neither of the Parties shall be considered to be in default or in breach of its obligations under this Agreement to the extent that performance of such obligations is prevented by any circumstances of Force Majeure, which may arise after the execution of this Agreement.
- 8.3 If any of the Parties considers that any circumstance of Force Majeure has occurred which may affect performance of its obligations, they shall immediately notify the other Parties.
- 8.4 Upon the occurrence of any circumstance of Force Majeure the Agent shall endeavor to perform its obligations under this Agreement so far as is reasonably possible. The Agent shall notify the Principal of the steps it proposes to take including reasonable alternative means of performance, which is not prevented by the Force Majeure.
- 8.5 Neither of the Parties to this Agreement shall, in order to avoid its obligation rely on the provisions as stated in Clause 8.1 if at the time of signing this Agreement, the Party which seeks to rely on this occurrence, knew, or ought reasonably to have known the existence of such a condition at the date of the signing of this Agreement.

### **9. No Assignment**

- 9.1 None of the Parties may assign all or any of its rights and/or obligations under this Agreement.

### **10. Waivers, Remedies and Amendments**

- 10.1 Except as otherwise expressly provided, no failure or delay by the Lender in exercising any right, power or privilege under this Agreement shall operate as a waiver thereof nor shall any single or partial exercise by the Lender of any right, power or privilege preclude any further exercise thereof or the exercise

## APPENDICES

of any other right, power or privilege.

- 10.2 The rights and remedies herein provided are cumulative and are not exclusive of any rights and remedies provided by law.
- 10.3 No provision of this Agreement may be amended, modified and/or waived, otherwise than by the express written agreement of the Parties nor may any breach of any provision of this Agreement be waived or discharged except with the express written content of the Parties not in breach.

### **11. Invalidity**

- 11.1 If any provision of this Agreement is or becomes ineffective for reasons beyond the control of the Parties:
  - 11.1.1 the effectiveness of the remaining provisions of this Agreement shall not, in any way, be impaired or affected thereby; and
  - 11.1.2 the Parties shall use reasonable efforts to agree upon a new provision that shall, as nearly as possible, have the same commercial effect as the ineffective provision.

### **12. Arbitration**

- 12.1 For the purpose of this clause “**Dispute**” means any dispute, difference of view, disagreement, controversy or claim arising out of or relating to this Agreement or the interpretation or performance of provisions of this Agreement or the breach, termination or validity thereof, which the parties are unable to resolve by mutual agreement within a reasonable time.
- 12.2 In the event of any Dispute either Party may give notice in writing to the other Party to require such Dispute to be referred to the arbitration of a single arbitrator in accordance with the provisions of the Arbitration Act.

### **13. Choice of law**

This Agreement shall be interpreted according to the laws of [insert country]

CONTRACT NEGOTIATIONS

As WITNESS the parties hereto or their duly authorized the agents have set their hands the day and year first before written

**SIGNED BY**

[NAME OF LENDER]

in the presence of

**WITNESS :**

**Name:**

**Address:**

**Occupation:**

**SIGNED BY**

[NAME OF BORROWER]

in the presence of

**WITNESS :**

**Name:**

**Address:**

**Occupation:**

## Case analysis template completion example

The following is an example of what an experienced negotiator will have to say about the cases, not a blueprint of what should be found.

### *The Old Cows*

Which factors contributed to making this negotiation so successful? It could be any event or behavior that you feel significantly influenced the outcome. List your observations below

---

The negotiators use questions and obtain important information

---

Politeness generates politeness

---

The parties together generated new alternatives

---

The negotiation is reframed (from a “one off purchase” event to a “rental long term contract” process)

---

The parties aim to create mutual value

---

The parties jointly develop the contract

### *The Old Tractor*

Which factors contributed to making this negotiation so successful? It could be any event or behavior that you feel significantly influenced the outcome. List your observations below

---

The negotiators did their researched well

---

The negotiators are well rehearsed, and have a plan

---

The negotiators have clear roles

---

The negotiators have a high aspiration base (they aim for a new tractor and a very high trade-in price)

## CONTRACT NEGOTIATIONS

The negotiators force the other party to make concessions by aiming high, and then make counter-concessions

The negotiators ask questions to get important information

The negotiators “rescope” the deal, introducing new elements into the package (warranty)

The negotiators knew their Best Alternative To A Negotiated Agreement

### *The Transporter*

Which factors contributed to making this negotiation so successful? It could be any event or behavior that you feel significantly influenced the outcome. List your observations below

The negotiators are well prepared with a plan and market information

The negotiators know their Best Alternative To A Negotiated Agreement

The negotiators use politeness to be treated politely

Information is provided

The negotiators use questions to obtain important information

The negotiators expand the deal to cover multiple issues (produce, inputs, point of collection, duration)

The negotiators reframe the negotiation from an event to a process (long term contract, guaranteed business)

The contract is drawn up by the parties together

*The Outgrower*

Which factors contributed to making this negotiation so successful? It could be any event or behavior that you feel significantly influenced the outcome. List your observations below

The parties have done their research well

The negotiators know their Best Alternative To A Negotiated Agreement

The negotiators are agreed on roles and assignments

The climate is polite, but strict and determined

The negotiators are looking to create mutual value

The negotiators are focused on a long term solution

The negotiators use questions to obtain important information

The parties expand the deal (inputs and loans)

The negotiators use progressive summarization

*The Cooperators*

Which factors contributed to making this negotiation so successful? It could be any event or behavior that you feel significantly influenced the outcome. List your observations below:

The negotiators use politeness in order to be treated politely

The parties aim at creating mutual value

The parties respect each other's need for recognition

The parties together explore alternatives

The negotiators ask questions to obtain important information

The negotiators use progressive summarization

CONTRACT NEGOTIATIONS

**Analysis**

Column 1	Column 2						
Factors contributing to a successful negotiation:	How well are the factors employed in each case?						
	Case 1	Case 2	Case 3	Case 4	Case 5	Case 6	Sum
The negotiators share information, ask questions and get answers	<b>1</b> 2 3	1 <b>2</b> 3	1 2 <b>3</b>	1 <b>2</b> 3	1 <b>2</b> 3	1 2 <b>3</b>	13
The negotiators create a good negotiation climate by being polite and showing respect. In return they receive politeness and respect. The negotiators are however <u>firm in their approach</u> .	<b>1</b> 2 3	1 2 <b>3</b>	1 2 <b>3</b>	1 2 <b>3</b>	1 <b>2</b> 3	1 2 <b>3</b>	15
New alternatives are generated and explored.	<b>1</b> 2 3	1 2 <b>3</b>	1 2 <b>3</b>	1 2 <b>3</b>	1 <b>2</b> 3	1 2 <b>3</b>	15
The negotiators focus on building a long term relationship, and reframe the negotiation from an event to a process.	<b>1</b> 2 3	1 2 <b>3</b>	1 2 3	1 2 <b>3</b>	1 2 <b>3</b>	1 <b>2</b> 3	14
Together, the parties aim to create mutual value.	<b>1</b> 2 3	1 2 <b>3</b>	1 2 3	1 2 <b>3</b>	1 <b>2</b> 3	1 2 <b>3</b>	14
The negotiators are well researched and prepared, having collected market information and developed a plan for the negotiations.	<b>1</b> 2 3	1 2 <b>3</b>	1 2 <b>3</b>	1 2 3	1 <b>2</b> <b>3</b>	1 2 3	14
The negotiators have clearly defined the roles the members of the negotiation teams play in the negotiation.	<b>1</b> 2 3	<b>1</b> 2 3	1 2 <b>3</b>	1 <b>2</b> 3	1 2 <b>3</b>	1 <b>2</b> 3	12
The negotiators have a high aspiration base, thus creating space for concessions, which are then met by counter-concessions.	<b>1</b> 2 3	1 <b>2</b> 3	1 2 <b>3</b>	1 <b>2</b> 3	1 <b>2</b> 3	1 <b>2</b> 3	12
The negotiators know their Best Alternative To A Negotiated Agreement (BATNA).	<b>1</b> 2 3	1 <b>2</b> 3	1 2 <b>3</b>	1 2 <b>3</b>	1 2 <b>3</b>	1 <b>2</b> 3	14
The negotiators gradually build towards an agreement, by immediately putting to paper each point they agree upon, thereby preventing such points to be opened up again at a later stage of the negotiation. They use progressive summarization to gradually build a climate of agreement that improves the possibility of finding an overall solution.	<b>1</b> 2 3	<b>1</b> 2 3	<b>1</b> 2 3	<b>1</b> 2 3	1 2 <b>3</b>	1 2 <b>3</b>	10

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## APPENDICES

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The Swedish Cooperative Centre (SCC) has a long history of supporting farmers' organizations around the world. We take pride in partnering with organizations representative of the farming societies, providing important services to what is often a majority of the population.

This material is one in a series of SCC publications aiming at contributing to enabling farmers and their organizations to engage more effectively in marketing activities. It focuses on the art of negotiating contracts, combining a training material with an introduction to the legal framework regulating contracts – all in a typical southern African setting.

*Lennart Hjalmarson*

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